

Determination

External review – section 39 *Freedom of Information Act 1991*

Applicant	Mr John Houlahan
Agency	Department for Health & Ageing
Ombudsman reference	2015/02469
Agency reference	FOI2014-00050
Determination	The determination of the agency is varied

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the **FOI Act**) the applicant requested access from the agency to:

All correspondence, including electronic, records of meetings and telephone conversations between DOH and City of Onkaparinga between DOH and Consultants, between DOH and developers regarding Bluewater Development, Sellicks Beach, sewage system and treated effluent/reclaimed water and the Sellicks Beach Waste Water Treatment Plant (formerly Prodec).

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in the appendix.

Jurisdiction

3. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

Provisional determination

4. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 10 November 2016. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
5. The agency notified my Office that it did not wish to make submissions in response to my provisional determination.

6. The applicant notified my Office that he was satisfied with my provisional determination. The applicant otherwise sought to clarify one aspect of his interest in the documents at issue. I have amended my determination accordingly.
7. The council notified my Office that it disagreed with the conclusions reached in my provisional determination. In particular, the council disagreed with my observations with respect to the likelihood of disclosure impacting upon intergovernmental relations and the potential severity of any such impact. I have addressed these submissions below.
8. The other interested parties did not provide submissions in response to my provisional determination.

Relevant law

9. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
10. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
11. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
12. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Documents in issue

13. At internal review, the agency identified 72 documents within the scope of the application. Of these, the agency determined:
 - 14 documents were to be released in full to the applicant
 - 51 documents were to be released in part to the applicant
 - seven documents were to be refused to the applicant pursuant to exemption clause 6(1) (documents affecting personal affairs) and exemption clause 7(1)(b)(i) (documents affecting business affairs).
14. At external review, the agency has reviewed its position such that it no longer objects to the release of any of the documents in full to the applicant.²
15. The agency has provided my Office with evidence of consultation that it has undertaken with interested parties as required by the FOI Act. There are two interested parties who object to the release of documents. It is these contentious documents that form the subject of my external review.

The council documents

16. The City of Onkaparinga (**the council**) as an 'interested person'³ in this matter indicated during the consultation process that it considered 23 documents (including

¹ *Freedom of Information Act 1991*, section 12.

² Email dated 10 August 2016.

attachments) to be exempt under the FOI Act (**the council documents**).⁴ The council claimed a range of exemption clauses to apply to these documents, namely clause 4 (law enforcement and public safety), clause 5 (intergovernmental or local government relations) clause 6 (personal affairs), clause 7 (business affairs), clause 13 (confidential material) and clause 16 (operations of agencies).

17. The agency determined on internal review to release in full or in part all 23 of the council documents. The council has not applied to my Office for external review, or indeed to the agency for an internal review of this determination.
18. The council subsequently revised its position such that it additionally claimed exemption clause 9 (internal working documents) to apply to documents 11 and 51 and exemption clause 17 (contempt) to apply to all 23 documents.⁵
19. The council's position (as it then was) is summarised in the table below:

Document No.	Description	Exemption clause
11	Email	5,6,7,9,17
12	Email	5,6,7,13,17
14	Email	5,6,7,13,17
15	Email	5,6,17
16	Email	5,6,7,13,17
17	Email	5,6,7,13,17
18	Email	5,6,7,13,17
20	Email	5,6,7,13,17
23	Letter	4,5,7,13,16,17
24	Email	5,6,7,13,17
25	Email	5,6,7,13,17
29	Email	5,6,7,13,16,17
32	Email	5,6,7,13,17
33	Email	5,6,7,13,17
34	Email	5,6,7,13,17
36	Email	4,5,6,7,13,16,17
37	Email	4,5,6,7,13,16,17
38	Email	4,5,6,7,13,16,17
39	Email	5,6,7,13,17
40	Email	5,6,7,13,17
51	Letter	5,6,7,9,13,17
52	Fax	5,6,7,13,17
70	Letter	5,6,7,13,17

20. In the course of my external review I explored the possibility of achieving a settlement between the parties such that the applicant could be granted access to the council documents in a form that satisfied both the applicant and the council's concerns. In its 16 September 2016 letter to my Office, the council advised that it would not oppose release of the council documents if the applicant was prepared to revise the scope of his application so as not to encompass:
 - information tending to identify individual council officers, namely 'names, position titles, email addresses, phone numbers and other contact details in the body of the

³ As defined in section 39(1) of the FOI Act.

⁴ Letter dated 15 October 2014.

⁵ Most recently stated in the council's letter to the Ombudsman dated 16 September 2016.

communication, any greetings, signature lines, and the sent/received data which appears throughout email trails and on letters⁶

- two specific passages, one within document 11 and the other within document 51, that the council considers must not be disclosed to the applicant under any circumstances.
21. In response, the applicant indicated that he was prepared to revise his application to exclude the 'identifying material' as expressed in the first limb of the council's proposal. However, the applicant advised that he was not prepared to revise his application to exclude the two passages otherwise at dispute. The applicant has not been made aware of the contents of these two passages or, more broadly, what context the passages appear in within the council documents.
22. On 21 September 2016 my Officer wrote to the council to advise of the applicant's position and to inform the council that, absent any change in the council's position, I proposed to proceed to a provisional determination on the understanding that, in light of the applicant's revision of his application to exclude information tending to identify individual council officers, the council no longer opposed the release of the council documents save for the two passages at issue within documents 11 and 51.
23. My Officer sought to clarify the council's position insofar as it related to these passages. The council, by letter dated 6 October 2016, advised that it considered exemption clauses 5(1) and 9(1) to apply to these passages and to a certain degree clarified its submissions in this regard.

The second interested party

24. A second interested party (**the second interested party**) provided submissions to the agency in October 2014 that objected to the release of documents 5 and 7.⁷ These submissions appeared to claim exemption clauses 7(1)(a) (trade secrets), 7(1)(b) (information of a commercial value) and 7(1)(c) (business, professional, commercial or financial affairs) to apply to these documents.
25. The agency determined to release in part documents 5 and 7 to the applicant. On external review the agency advised my office that it no longer objected to the release of these two documents in full to the applicant.⁸

The other interested parties

26. A third interested party provided submissions to the agency in October 2014 to the effect that it did not oppose the release of documents 28, 31, 42, 43, 44 and 45 to the applicant.
27. The agency identified a fourth interested party and sought to consult with this party in regard to the release of documents 84 and 85. It appears the agency did not receive submissions from this party.
28. On 24 October 2016, pursuant to section 39(10) of the FOI Act I sought updated submissions from the second interested party and the other interested parties in light of

⁶ Although the construction of this clause is somewhat ambiguous, the council's earlier letter dated 6 May 2016 makes it clear that the council opposes the release of 'identifying information' relating to council employees (which it considers to include names, position titles, email addresses, phone numbers and other contact details) from the body, signature line and sent/received data of all communications.

⁷ Email dated 10 October 2014.

⁸ Email dated 10 August 2016.

the passage of time since the original consultations by the agency. I did not receive a response from these parties.

29. The documents at issue are therefore identified as follows: **5**, **7**, **11** and **51**.

Issues in this review

30. At external review I am ordinarily required to determine whether or not an agency has been justified in its determination to release or refuse access to documents.
31. The circumstances of the present external review are therefore somewhat unusual. The agency at internal review determined that all four documents now the subject of this external review be released to the applicant in part. The agency has since revised its position such that it no longer opposes the release in full of any of the documents within scope of the original application.
32. Moreover, one of the exemptions claimed by the council in regard to documents **11** and **51** (namely, clause 9 – internal working documents) is not an exemption which would ordinarily require an agency to consult with an interested party such as the council under the FOI Act.
33. Notwithstanding these issues and the agency's present position, I consider it appropriate in my external review to consider the full range of the council's submissions insofar as they relate to documents **11** and **51**. I similarly consider it appropriate to consider the second interested party's submissions in regard to documents **5** and **7**.

Submissions of the parties

The applicant

34. The applicant has submitted that there is a strong public interest in release of the documents in full. In this regard, the applicant points to the significant cost to ratepayers arising out of an incident involving the Sellicks Beach Community Wastewater Management Scheme and the need to determine the degree of culpability on the part of the council and other parties in regard to this incident.
35. The applicant has advised that, as a resident within the council area, he has been further impacted by the Sellicks Beach incident insofar as it resulted in burden-sharing amongst the various Septic Tank Effluent Disposal Schemes within the region.
36. The applicant has further advised that he is in the process of preparing an in-depth report on the Sellicks Beach incident and associated response efforts. He has submitted that the documents at issue are likely to be of utility in preparing this report.

The council

37. The council has submitted that documents **11** and **51** are exempt owing to information contained within a single passage in each document. These two passages are not identical and deal with different subject matter. The passage within document **11** constitutes five sentences in total. The passage in document **51** constitutes a single sentence.

38. The council has submitted that information within these passages is exempt pursuant to exemption clauses 5(1) and 9(1). In this regard, the council has provided general submissions as to how it sees these exemption clauses to apply to information within the passages. The council has not separated these submissions insofar as they may relate to only one of the two passages or otherwise addressed each passage individually.

39. Clause 5 provides:

5—Documents affecting inter-governmental or local governmental relations

- (1) A document is an exempt document if it contains matter—
- (a) the disclosure of which—
 - (i) could reasonably be expected to cause damage to intergovernmental relations; or
 - (ii) would divulge information from a confidential intergovernmental communication; and
 - (b) the disclosure of which would, on balance, be contrary to the public interest.

40. Clause 9 provides:

9—Internal working documents

- (1) A document is an exempt document if it contains matter—
- (a) that relates to—
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - (ii) any consultation or deliberation that has taken place

in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and
 - (b) the disclosure of which would, on balance, be contrary to the public interest.
- (2) A document is not an exempt document by virtue of this clause if it merely consists of—
- (a) matter that appears in an agency's policy document; or
 - (b) factual or statistical material.

41. With regard to clause 5(1), the council has submitted that:

- the documents contain information disclosed in confidence between government authorities and/or disclosure of the documents could reasonably be expected to cause damage to intergovernmental relations
- disclosure of the documents could 'negatively impact upon frank dealings between Local Government and State Government on matters of public health, to the detriment of the public interest.'

42. In support of its position the council has sought to rely upon the decisions in *Arnold (on behalf of Australians for Animals) v Queensland & Anor* (1987) 73 ALR 607 (**Arnold**); *Guy v the Department of Transport* (1987) 12 ALD 358 (**Guy**); *Re Shopping Centre*

Council of Australia and Australian Competition & Consumer Commission (2004) 78 ALD 494; and *Ravlich v Department of Productivity and Labour Relations* [2000] WAICmr 58 (*Ravlich*).⁹

43. In this regard, the council has submitted:
- *Arnold*, insofar as it considers the operation of a similar provision within the *Freedom of Information Act 1982* (Cth), establishes that documents are ‘excluded’ (which I take to mean exempt) in circumstances where they have been provided in confidence
 - *Guy* and *Ravlich*, considering the Commonwealth Act and the *Freedom of Information Act 1992* (WA) respectively, establish that documents in the normal course are to be ‘excluded’ where one of the parties to the correspondence ‘strongly opposes their release’. That is, in the absence of an ‘overwhelming’ public interest in favour of disclosure, release in the face of strong opposition on the part of the council would damage intergovernmental relations.
 - *Guy* and *Ravlich* establish that, where the release of documents is opposed by an interested person, the documents ‘can only be released if it is in the public interest to do so’, which is ‘not a discretionary decision, but is an assessment of fact.’
44. The council has submitted that in the present case it opposes release of the documents ‘to the threshold required’ by *Guy* and *Ravlich*.
45. With regard to clause 9(1), the council has submitted that the documents relate to ‘an opinion or advice that has been obtained and consultation or deliberation that has taken place in the course of or for the purposes of the decision-making functions of the Council and the Department for Health and Ageing.’
46. With regard to this exemption clause, the council has submitted that release of documents 11 and 51 would be contrary to the public interest. In this regard, the council makes reference to a specific passage of the judgment of His Honour Slattery DCJ in *City of Onkaparinga v Houlahan* [2015] SADC 91 (*Houlahan*). The council has made it clear that it opposes my disclosure of the specific nature of its argument to the applicant.¹⁰ I consider that this similarly prevents me from identifying which passage of *Houlahan* the council purports to rely upon in support of its argument.

The second interested party

47. The second interested party has submitted that documents 5 and 7 are exempt from release pursuant to exemption clause 7(1).
48. Clause 7 provides:

7—Documents affecting business affairs

- (1) A document is an exempt document—
- (a) if it contains matter the disclosure of which would disclose trade secrets of any agency or any other person; or
 - (b) if it contains matter—
 - (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and

⁹ Letter dated 15 October 2014.

¹⁰ Email from the council dated 22 July 2016.

- (ii) the disclosure of which–
 - (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
 - (B) would, on balance, be contrary to the public interest; or
 - (c) if it contains matter–
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which–
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) would, on balance, be contrary to the public interest.
49. The second interested party's submissions are of a general nature in that they do not identify which particular sub-clauses within clause 7(1) are said to apply. The second interested party has submitted, generally:
- the documents were always 'commercial in confidence' and 'privileged' to the agency
 - the documents form part of his intellectual property and are not available to third parties without his permission
 - the documents were never intended to be subject to the FOI Act.

Consideration

50. I am mindful of my obligation under section 39(15) of the FOI Act such that I should 'avoid disclosing in [my] reasons for a determination any matter that the agency claims is exempt matter'. Although the agency has advised that it no longer considers any information within the documents to be exempt, in my determination I intend to observe this obligation as if it applied to the objections of the interested parties. That said, in order to provide proper reasons to the applicant I consider it appropriate to provide some general information establishing the nature of each document at issue.

Document 11

51. Document 11 comprises a chain of emails between an officer of the agency and a council employee. I am satisfied that the document falls within the scope of the applicant's request to the agency.

Clause 5(1)

52. I must consider whether document 11 is exempt under clause 5(1).
53. For clause 5(1) to constitute a basis for refusing access to a document, I must firstly be satisfied that the document contains matter, the disclosure of which:
- could reasonably be expected to cause damage to intergovernmental relations; or
 - would divulge information from a confidential intergovernmental communication.

54. I have examined document 11 and observe that it appears to have been produced in the course of open and somewhat informal dialogue between officers of two public authorities.
55. I note that the majority judgment in *Attorney-General's Department v Cockcroft* [1986] FCA 35 observed that the words 'could reasonably be expected to' are to be given their ordinary meaning. That is, 'they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous.'¹¹ Sheppard J, in a separate concurring opinion, observed:

I do not myself feel able to derive from the presence of the word "reasonably" in the relevant expression a great deal of assistance. The difficulty is to give full weight to the meaning of the word "expected". It is only then that one can turn one's mind to the question of the significance of the qualification of it by the word "reasonably". The words are expressed in the passive voice - "could reasonably be expected". What is required is that the decision-maker act reasonably. For the document to be exempt his conduct must be taken to be that of the reasonable man. But then comes the difficulty. So acting, the decision-maker must expect that disclosure of the document could prejudice the future supply of information. In my opinion he will not be justified in claiming exemption unless, at the time the decision is made, he has real and substantial grounds for thinking that the production of the document could prejudice that supply. But, stringent though that test may be, it does not go so far as to require the decision-maker to be satisfied upon a balance of probabilities that the production of the document will in fact prejudice the future supply of information.¹²

56. The council has submitted that, per *Guy* and *Ravlich*, I can be satisfied that disclosure of document 11 could reasonably be expected to cause damage to intergovernmental relations by virtue of the council's strong objections to the release of the passage at issue in this document.
57. In *Guy*, the Administrative Appeals Tribunal (AAT) considered the decision of an agency under the Commonwealth Act to refuse access to a document that had been provided by a State agency to an agency of the Commonwealth. At [14], the Deputy President of the AAT observed:

It would not, in my view, be an exaggeration to say that the relationship between the units of a Federation can be quite as complex and difficult as that between nation states, and that trust and confidence are vital to the nourishment of bodies like the [Australian Motor Vehicle Certification Board] which are examples of Federal/State relationships based on mutual co-operation and not merely on the assertion of legislative power.

It follows that I consider that a disclosure of the [document] against the wishes of the Government of Queensland could reasonably be expected to cause damage to relations between the Commonwealth and the State of Queensland.

58. I observe that in reaching this conclusion the AAT was informed by evidence adduced by the State agency that disclosure would lead to a reluctance on that agency's part to provide information of a similar nature to its Federal counterpart in the future.
59. In *Ravlich*, the Office of the Information Commissioner (WA), considering the application of the Western Australian Act, concurred with the conclusion of the AAT in *Guy*. The Commissioner observed, referring in part to submissions from one agency as to the effect disclosure would likely have on future communications between the agencies, that the reasonableness of the objections to disclosure expressed by that party was not relevant in assessing the likely impact of disclosure.¹³ That is, an agency's strong objections to disclosure, however irrational the views underpinning

¹¹ *Attorney-General's Department v Cockcroft* [1986] FCA 35 at [29] (per the majority).

¹² *Attorney-General's Department v Cockcroft* [1986] FCA 35 at [12] (per Sheppard J).

¹³ *Ravlich* at [22].

those objections may be, must be considered in assessing whether disclosure could reasonably be expected to damage intergovernmental relations.

60. In my view, the council's objections to disclosure are somewhat perplexing. The passage to which the objections relate has not been prepared by the council, but rather constitutes a communication from an officer of the agency to the council. The passage does not purport to repeat any information the council may have previously provided to the agency in confidence or otherwise purport to disclose the council's views or position on a given topic. Indeed, it appears to chronicle a series of steps taken by an officer of the agency in furtherance of the agency's administration of the *South Australian Public Health Act 2011 (the Public Health Act)*.
61. I find the council's suggestion that disclosure of the information contained in this passage would 'negatively impact upon frank dealings between Local Government and State Government on matters of public health' (albeit expressed in terms of the public interest test) to be somewhat unconvincing. The council is in fact required to cooperate with the agency on matters of public health pursuant to section 37(2)(b) of the Public Health Act.
62. Nevertheless, I accept that the council staunchly opposes the release of the information to the applicant and, for reasons that presently elude me, the council has formed the view that disclosure of that information will necessarily impact upon the nature and content of the council's future dealings with this and other agencies.
63. I have considered the decisions in *Guy* and *Ravlich* insofar as they may be of persuasive value in my interpretation of the standard applicable in this jurisdiction. I have also considered the decision in *Arnold*, where Burchett J observed of the Commonwealth legislation:
- A feature of the drafting of para. (a) of s.33A(1) is that it does not require a finding that disclosure would cause damage to relations between the Commonwealth and a State. It provides the alternative: "or could reasonably be expected to cause (such) damage". It is now established that this does not require a probability, though a possibility which fails to reach the level of probability must be sufficiently tangible to answer to the notion of a reasonable capacity to be expected.¹⁴
64. In my view, the objection of an interested party to disclosure cannot be determinative, in and of itself, of whether disclosure could reasonably be expected to damage relations between that party and an agency. That is, per *Arnold*, that there must at least be some tangible possibility of the damage advanced.¹⁵
65. Taking into account the council's opposition to disclosure of the passage at issue, a position it has resolutely expressed and maintained over the course of several years, I am ultimately satisfied that there is a possibility in the present case (albeit somewhat remote) that disclosure of the passage at issue could damage the relationship between the council and the agency. I am accordingly satisfied that disclosure of document 11 could reasonably be expected to cause damage to intergovernmental relations within the meaning of clause 5(1)(a)(i).
66. Although unnecessary in light of my finding above, I have considered whether disclosure of the document would also 'divulge information from a confidential intergovernmental communication'.

¹⁴ *Arnold* at [18] (per Burchett J).

¹⁵ See also *Shopping Centre Council of Australia and Australian Competition and Consumer Commission* [2004] AATA 119 at [60]: ('The Tribunal is satisfied that the apprehension or expectation of damage to relations is one that is reasonable in the circumstances of this case.').

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67. As I have already observed, the passage in question forms part of a communication from the agency to the council. The agency has already indicated that it no longer considers the document to be exempt by virtue of this or any other exemption clauses.
68. In my view, in circumstances where the author of a document does not consider (or no longer considers) that document to be confidential, and to the extent that that document does not otherwise disclose information obtained in confidence from the recipient, the recipient's views should not determine whether information within the document is 'confidential' within the meaning of clause 5(1)(a)(ii). Indeed, I am satisfied that the passage in question for the most part merely describes information gathered by the agency which was reasonably available (or which was reasonably available at the time) to members of the public.
69. Accordingly, I am not satisfied that disclosure of the document would divulge information from a confidential governmental communication.
70. Having found that disclosure of the document could reasonably be expected to cause damage to intergovernmental relations; it next falls upon me to consider whether disclosure of the document would, on balance, be contrary to the public interest.
71. In this regard, the council has submitted that *Guy* and *Ravlich* establish that, where disclosure of a document relating to intergovernmental communications is opposed by the agency or an interested party, 'the documents can only be released if it is in the public interest to do so.'
72. With all respect to the council, insofar as these decisions might be of persuasive value within this jurisdiction, *Guy* and *Ravlich* establish no such thing. The Commonwealth Act as it existed at the time of *Guy*, and the Western Australian Act as it existed at the time of *Ravlich*¹⁶ both required a decision maker to determine whether release of a document 'would, on balance, be in the public interest'.
73. This is not the standard applicable in this jurisdiction. Instead, as I have already observed, I am required to determine whether disclosure would, on balance be *contrary* to the public interest. This is so even where I am already satisfied (as in the present case) that disclosure of the document could reasonably be expected to cause damage to intergovernmental relations.
74. As the District Court of South Australia observed in *Ipex Info Tech v Department of Info Tech Services* [1997] SADC 3618:
- [I]t is for the respondent to show on the balance of probabilities that the disclosure in question would be contrary to the public interest. This does not mean merely showing that there is something adverse to the public interest likely to flow from disclosure of the document, but that on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure.
75. The council has submitted that disclosure of the passage in question would be contrary to the public interest in that it 'could negatively impact upon frank dealings between Local Government and State Government on matters of public health'. The council, in its earlier submissions concerning the public interest factors relevant to clause 5(1), also made reference to the fact that the documents were provided 'in confidence for commentary', the age of the documents, and the applicant's failure to articulate any 'legal rights or interests affected by the information' as additional factors said to demonstrate the public interest favouring non-disclosure.¹⁷

¹⁶ With regard to the Western Australian Act, this continues to the present day.

¹⁷ Letter dated 15 October 2014. At this stage, the council made additional arguments regarding the public interest test which I do not consider to apply to the documents at issue in this external review.

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76. The council has not articulated its basis for suggesting that disclosure would impact upon its future dealings with State agencies on matters of public health, or explained just how this consideration is said to relate to the passage in question.
77. I take the council to be suggesting that, generally, in the event of disclosure it may be less likely to engage in full and frank communications with this or other public agencies.
78. I accept that there is a public interest in full and frank communications between public authorities on matters of public health.
79. Although I accept that, to the extent that I have already determined that disclosure of the document could reasonably be expected to cause damage to intergovernmental relations, this will in turn inform my consideration of the public interest, I do not consider the likelihood of any impact of disclosure on intergovernmental relations to be particularly high in the circumstances, nor do I consider that any such impact would be particularly severe.
80. The council is, of course, an agency that is itself subject to the FOI Act. It is axiomatic that council officers will be aware, generally speaking, of the council's obligations under the FOI Act and the possibility that communications made in the course of their official duties may ultimately be released to members of the public.
81. Moreover, as I have already observed, the council is in any case required to cooperate with the agency on matters of public health pursuant to section 37(2)(b) of the Public Health Act.
82. Although raised by the council with regard to clause 9(1), I have also considered the council's submissions with regard to *Houlahan*. With all respect to the council, I cannot see the point in it seeking to withhold the precise nature of this argument to the applicant. In this regard, I make it clear that the nature of the argument in no way reveals the information within the two passages at issue.
83. Although out of respect for the council's request I am severely limited in what I may say in this determination, I observe that I do not believe the judgment in *Houlahan* to support the council's submissions in the manner proffered. Rather, it appears to me that the council has incorrectly transposed Slattery DCJ's observations regarding the issue of procedural fairness afforded to council staff in the unique circumstances of that matter to the separate and discrete issue of determining the public interest for (or against) disclosure.
84. In its response to my provisional determination, the council has again sought to direct my attention to the judgment in *Houlahan*, and in particular paragraph 82 of this judgment, insofar as the council submits that I have erred in my assessment of both the likelihood of disclosure impacting upon intergovernmental relations and the severity of any such impact.
85. In paragraph 82 of *Houlahan*, Slattery DCJ opined (citation omitted):

The time has long passed when a Court would ignore the existence and nature of the exchange of information in the modern form of electronic media. The transmission of any forms of information about a topic, persons or events now occurs unhindered by rules requiring accuracy, completeness, fairness or proper expression when such media is used. The users of such media, however they be described, are very often faceless individuals who for any number of reasons see fit to comment on, speculate about, pass personal judgement or prognosticate upon matters and things which pique their interest. They sometimes rely upon the cloak of anonymity to disguise the footprint of their own identity and, hence, their responsibility. The potential and actual damage wreaked by

such persons is unmeasurable both in amount and longevity. In cases such as this the court must have these matters at the forefront of its mind in its decision making. Speculation will create two problems and begets two victims: the first those employees who were involved who have no opportunity to be heard; the second, those who had no connection to these matters in any way. The relevant level of unfairness applies to both categories of employees.

86. Again, I consider the council to have incorrectly conflated His Honour's observations with regard to the degree of procedural fairness afforded to council employees in that matter with the separate issue of determining the public interest for (or against) disclosure. That said, I agree with the council that Slattery DCJ's observations as to the manner in which information may be used (or misused) in the information age may inform my consideration of the public interest test.
87. I make it clear that I have considered the ways in which the information within the document may be used by the applicant and other members of the public. In all the circumstances I do not consider this to be a factor weighing against disclosure.
88. To the extent that the council's submissions regarding the age of the documents were intended to apply to the document at issue, I am not satisfied that this is a consideration affecting the public interest in the present circumstances. In this regard, I observe that the document was drafted in 2013 and that the Sellicks Beach Community Wastewater Management Scheme incident, which occurred in 2011, can hardly be said to be 'historical'.
89. With regard to the council's submissions regarding the applicant's lack of 'any legal rights or interests affected by the information' within the document, I observe that the applicant is a ratepayer to the council with a clear and enduring interest in the circumstances surrounding the Sellicks Beach Community Wastewater Management Scheme incident. The applicant, most recently on 18 November 2016, has repeatedly affirmed his interest in determining culpability for this incident.
90. I consider there to be a strong public interest in individuals having access to information relating to serious public health incidents such as that involving the Sellicks Beach Community Wastewater Management Scheme. In my view, this would extend to communications arising out of and in response to such an incident, such as those comprising the document at issue. There is also a clear public interest in scrutiny of the response of public authorities to these incidents, as well as in apportioning responsibility between the various agencies involved in order to better avoid future incidents.
91. I have also considered the public interest in fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability within government.
92. These factors in favour of disclosure are to be weighed against the other considerations outlined above, namely:
 - the public interest in full and frank dealings between public authorities on matters relating to public health
 - that the council considers the communications comprising the document to have been confidential
93. In my view, the public interest in openness and accountability within government and in the public being able to determine and apportion responsibility for serious public health incidents (including matters arising out of the response to such incidents) outweigh the factors against disclosure.

94. Accordingly, I am not satisfied that disclosure of document **11** would, on balance, be contrary to the public interest. I do not consider document **11** to be exempt under clause 5(1).

Clause 9(1)

95. I must consider whether document **11** is exempt under clause 9(1).
96. For clause 9(1) to constitute a basis for refusing access to a document, I must firstly be satisfied that the document contains matter that relates to (1) any opinion, advice or recommendation that has been obtained, prepared or recorded; or (2) any consultation or deliberation that has taken place; in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency.
97. The council's submissions on this issue state:
- The documents relate to an opinion or advice that has been obtained and consultation or deliberation that has taken place in the course of or for the purposes of the decision making functions of the Council and the Department for Health and Ageing.
98. In my view, these submissions are profoundly unhelpful. Other than eliminating the words 'recommendation', 'prepared' and 'recorded' from the legislative provision, the council's submissions have not assisted me to identify:
- which information in the passage is said to relate to an opinion or advice
 - what that opinion or advice is said to have been
 - which information in the passage relates to a consultation or deliberation
 - what that consultation or deliberation is said to have been
 - which decision-making functions of the council or the agency the opinion or advice was obtained in the course of (or for the purpose of)
 - which decision-making functions of the council or the agency the consultation or deliberation took place in the course of (or for the purpose of).
99. Having reviewed the document in its entirety and the passage at issue, I am unable to infer how the passage might fall within clause 9(1).
100. In my provisional determination I invited further submissions from the council on this issue. The council has not elected to provide these submissions.
101. Accordingly, I am not satisfied that the document is exempt by virtue of clause 9(1).

Document 51

102. Document **51** comprises a letter from an officer of the council to the agency and one attachment. I am satisfied that the document falls within the scope of the applicant's request to the agency.

Clause 5(1)

103. For the same reasons I have provided above in relation to document **11**, I am satisfied that the disclosure of document **51** could reasonably be expected to cause damage to intergovernmental relations.

104. Although unnecessary at this point, having reviewed the document, I am also satisfied that disclosure of the document would divulge information from a confidential intergovernmental communication.
105. In considering whether the disclosure of document **51** would, on balance, be contrary to the public interest, I have considered the same competing factors outlined above in my consideration of document **11**.
106. I observe that this document was created substantially earlier than document **11** and in this respect the age of the subject matter may be of more relevance. That said, having reviewed the passage at issue I am satisfied that it bears some relation to the Sellicks Beach Community Wastewater Management Scheme incident which occurred in 2012 and may better inform the public as to the circumstances surrounding this incident.
107. I consider that document **51** can also be distinguished from document **11** insofar as the passage at issue in this document includes matters disclosed by the council to the agency (and not *vice versa*). In my view, the council's submissions regarding the potential damage to its communications with this and other agencies on matters of public health are to be afforded more weight in my balancing the public interest for and against disclosure.
108. That said, I observe that the communication by the council appears to have been mandated by the conditions of the agency's approval of the Sellicks Beach Wastewater Treatment Plant. In the circumstances it is difficult to see how the council could reasonably or lawfully withhold such information from this or other agencies going forward.
109. Ultimately, I consider the strong public interest in individuals having access to information relating to serious public health incidents such as that involving the Sellicks Beach Community Wastewater Management Scheme (including information predating but relevant to such incidents), as well as the public interest in determining responsibility for these incidents outweigh the factors against disclosure.
110. Accordingly, I am not satisfied that disclosure of document **51** would, on balance, be contrary to the public interest. I do not consider document **51** to be exempt under clause 5(1).

Clause 9(1)

111. Having reviewed the contents of document **51** and the passage at issue, I am satisfied that this document, including the passage at issue, contains an opinion that has been provided by the council in the course of a decision-making function of the agency.
112. I have again considered whether disclosure of the document would be, on balance, contrary to the public interest. In doing so, I have weighed the various factors identified above in favour of disclosure against the public interest in maintaining the flow of opinions of this type between government agencies.
113. Ultimately, I consider the strong public interest in individuals having access to information relating to serious public health incidents such as that involving the Sellicks Beach Community Wastewater Management Scheme (including information predating but relevant to such incidents), as well as the public interest in determining responsibility for these incidents outweighs this and other factors against disclosure.

114. Accordingly, I am not satisfied that disclosure of document **51** would, on balance, be contrary to the public interest. I do not consider document **51** to be exempt under clause 9(1).

Documents 5 and 7

115. Document **5** constitutes a chain of emails between an officer of the agency and the second interested party, a former director of Bluewater Developments (SA) Pty Ltd (**Bluewater Developments**). Document **7** appears to be an email forwarding part of this correspondence to other officers within the agency.

116. Bluewater Developments was deregistered on 3 February 2014. Documents **5** and **7** predate this deregistration.

117. During consultation with the agency, the second interested party submitted:

The emails to the department were always commercial in confidence and privileged to the Department. They form part of my personal Intellectual Property and are not available to any third party to review without my permission.

The emails contents were never intended to form part of any request to the Department via the Freedom of Information Act. I had little if no knowledge this would be the situation.

I do not know who or whom has requested the information and for what purpose. I am concerned, without knowing, the information may, without limitation, cause some prejudice in the future.

[...]

I do not give permission for any of my emails and/or together written correspondence with the inclusion of notes from verbal communication. [sic] to be passed on to a third party by the Department.¹⁸

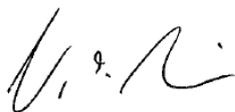
118. According to the second interested party, documents **5** and **7** are exempt pursuant to clause 7(1)(a), 7(1)(b) and 7(1)(c). I do not consider the second interested party to have properly addressed the elements of these clauses, including in particular the public interest test.
119. The emails which comprise documents **5** and **7** are not marked as being 'commercial-in confidence' or otherwise privileged or confidential. I am mindful that the agency has no objection to the release of the documents, and that close to three years have passed since the creation of the emails.
120. To the extent that the documents may be said to contain information concerning the business affairs of Bluewater Developments, I am not satisfied that these are the business affairs of the second interested party.
121. I consider that I have insufficient evidence before me to make a finding that clause 7(1) applies to prevent the release of documents **5** and **7**.
122. Although not specifically raised by the second interested party, I have considered whether, insofar as the second interested party has indicated that the documents were provided in confidence to the agency, exemption clause 13(1) applies to the documents. I am not satisfied that this exemption clause applies to the documents. Specifically, I am not satisfied that the information was obtained in confidence or that, in

¹⁸ Email dated 10 October 2014.

the circumstances, the disclosure of this information might reasonably be expected to prejudice the future supply of such information to the Government or to an agency.

Determination

123. In light of my views above I vary the agency's determination to enable the release of all documents within scope of the applicant's request¹⁹ after redacting all information tending to identify individual council officers (namely, names, position titles, email addresses, phone numbers and other contact details wherever they may appear).



Wayne Lines
SA OMBUDSMAN

5 December 2016

¹⁹ Documents 1, 3, 4, 9, 10, 26, 27, 49, 55, 57, 58, 59, 60, 68, 69, 76, 82, 88, 89, 90, 91, 92, 93, 94, 96 and 97 were deemed out of scope by the agency.

APPENDIX

Procedural steps

Date	Event
11 June 2014	The agency received the FOI application dated 30 October 2014.
12 January 2015	The agency determined the application.
19 January 2015	The agency received the internal review application dated 19 January 2015.
January 2015 ¹	The agency varied the determination.
2 April 2015	The Ombudsman received the applicant's request for external review dated 2 April 2015.
13 April 2015	The Ombudsman advised the agency of the external review and requested submissions and documentation.
26 August 2015	The agency provided the Ombudsman with its submissions and documentation.
15 March 2015	The Ombudsman requested submissions from the council.
6 May 2016	The council provided the Ombudsman with its submissions.
6 July 2016	The Ombudsman sought to narrow the issues in contention with the council.
22 July 2016	The council clarified its position to the Ombudsman.
10 August 2016	The agency reviewed its position such that it did not object to the release of any of the documents.
25 August 2016	At a meeting with Ombudsman SA, representatives of the council undertook to further clarify its position to the Ombudsman.
16 September 2016	The council further clarified its position to the Ombudsman.
20 September 2016	The applicant provided his views on proposed terms of settlement offered by the council.
21 September 2016	The Ombudsman sought the council's views on revising its position on documents 11 and 51 so as to achieve a settlement and sought further clarification regarding the council's position on documents 11 and 51.
6 October 2016	The council declined to revise its position and further clarified its submissions regarding documents 11 and 51.
24 October 2016	The Ombudsman conducted further consultation with the other interested parties.
10 November 2016	The Ombudsman provided his provisional determination to the parties

¹ The agency's determination on internal review is otherwise undated.

27 November 2016	The applicant provided his response to the Ombudsman's provisional determination.
1 December 2016	The council provided its response to the Ombudsman's provisional determination.
2 December 2016	The agency advised the Ombudsman that it did not wish to provide submissions in response to the Ombudsman's provisional determination.