

Determination

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

| | |
|---------------------|--|
| Applicant | Mr David Pisoni MP |
| Agency | Department of Planning, Transport and Infrastructure |
| Ombudsman reference | 2016/08734 |
| Agency reference | 2016/14060/01 |
| 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 documents, contracts or agreements related to the specifications, supplier(s) and tender process for the supply of security cameras in taxis from 2013 to the present.

Background

2. The agency failed to make a determination within the 30 day statutory timeframe, and was therefore deemed to have refused access to the requested documents.¹
3. The applicant applied for internal review of this 'deemed refusal' on 4 October 2016.
4. The agency failed to make a determination on internal review within the 14 day statutory timeframe, and so was taken to have confirmed its 'deemed refusal'.²
5. For ease of reference, the procedural steps relating to the application are set out in the Appendix.

Jurisdiction

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

Provisional determination

7. I provided my tentative view about the agency's determination to the parties by my provisional determination dated 17 March 2017 (**first provisional determination**).

¹ *Freedom of Information Act 1991*, section 19(2).

² *Freedom of Information Act 1991*, section 29(5).

8. I proposed to vary the agency's determination subject to my receipt and consideration of submissions from the parties.
9. The agency consulted with relevant interested parties and provided submissions in response to my first provisional determination which included the views expressed by those parties.
10. The applicant did not provide any submissions in response.
11. On re-examination of the documents, and after consideration of the submissions, I altered my view in regards to the documents. For this reason, I opted to provide a revised provisional determination to the parties, including 13 interested parties, to afford them all an opportunity to respond.

Revised Provisional determination

12. On 26 September 2017 I provided my revised provisional determination to the parties (**revised provisional determination**). I again proposed to vary the agency's determination subject to my receipt and consideration of submissions but my determination was more liberal in terms of releasing material.
13. On 19 October 2017 one interested party provided submissions in response to my revised provisional determination. These submissions were apparently made on behalf of two interested parties.
14. On 19 October 2017 a separate interested party advised it did not wish to make submissions in response to my revised provisional determination.
15. On 8 November 2017 the agency provided submissions in response to my revised provisional determination.
16. To date, I have not received a response from the applicant or the remaining interested parties that were consulted.
17. I have addressed all submissions received to date in this determination.

Relevant law

18. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.³
19. 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 of the FOI Act lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
20. Clauses 4(2), 6(1), 7(1), 9(1) and 13(1)(a) of Schedule 1 were claimed by the agency and are relevant to my external review.
21. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
22. 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.

³ *Freedom of Information Act 1991*, section 12.

Documents in issue

23. By letter dated 10 November 2016, I notified the agency of my review and requested all relevant documents as well as any submissions they wished to have considered.
24. In a responding letter dated 14 December 2016, the agency provided its submissions, as well as 32 documents it had located in response to the access request. The agency also provided a schedule listing the documents and exemption clauses it claimed were applicable to each.
25. Two documents in this schedule were mistakenly numbered 29, and so, for clarity, I have labelled these documents 29A and 29B.
26. In its submissions the agency indicated that, in its view, one document (**document 24**) could be released in full while five documents (**documents 10, 11, 12, 18, and 22**) appeared suitable for full release but would require consultation with interested parties in accordance with Division 2 of Part 3 of the FOI Act.
27. The remaining documents were listed as being entirely exempt, and thus refused, pursuant to clause 7(1), or a combination of clauses 4(2), 7(1), and 13(1)(a). The agency made submissions with respect to clause 6(1); however, the attached schedule did not indicate which documents were considered to be exempt on this basis.
28. In response to my revised provisional determination, the agency formed the view that clause 9(1)(a)(i) and 9(1)(b) were applicable to documents **14** and **30**. The agency also altered its view with regards to document 24, which it now considers is partially outside the scope of the original FOI request.

Issues in this review

29. The applicant applied for external review on the basis that the agency is deemed to have refused him access to all documents. It is therefore for me to determine whether the agency may properly withhold access to any of the documents located in response to the original FOI request.

Consideration

30. I will address the applicability of each exemption clause in turn, as well as any submissions provided by the parties.

Clause 4(2)(a)(iii), (iv), (v), (vi) and 4(2)(b) - law enforcement and public safety

31. Clause 4(2)(a)(iii), (iv), (v), (vi) and 4(2)(b) provide:

4-Documents affecting law enforcement and public safety

- (2) A document is an exempt document if it contains matter the disclosure of which –
 - (a) could reasonably be expected –
 - ...
 - (iii) to prejudice the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law (including any revenue of law); or
 - (iv) to prejudice the maintenance or enforcement of any lawful method or procedure for protecting public safety; or

- (v) to endanger the security of any building, structure or vehicle; or
- (vi) to prejudice any system or procedure for the protection of persons or property; and

(b) would, on balance, be contrary to the public interest.

32. The use of the phrase 'could reasonably be expected' in 4(2)(a) acts as a moderating preamble to the consequential effects set out in the ensuing subclauses.
33. The phrase requires that I make an objective judgment as to whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect that disclosure could result in one of the listed effects.⁴ That is, the expectation must be based on reason and not be 'fanciful, far-fetched or speculative'.⁵
34. The agency initially relied upon clauses 4(2)(a)(iii), (iv), (v), (vi) and (b) as a basis for refusing access to the following documents:

| Table 1 | | | | | | | |
|---------|-----|-----|----|----|----|----|----|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 13 |
| 14 | 15 | 16 | 17 | 19 | 20 | 26 | 27 |
| 28 | 29A | 29B | 30 | - | - | - | - |

35. The agency submitted that if system operating limits of surveillance cameras were available to the general public they could be exploited and evidence could be compromised.
36. By way of example, the agency postulated:
- ...a driver that understands how to access the encrypted images may be able to access images of vulnerable people. A person may be able to destroy or corrupt the images if they understand the humidity, waterproofing or fireproofing limitations therefore affecting the chain of evidence.
37. Accordingly, information such as industry standards, installation specifications, technical camera specifications, performance capabilities and operational procedures were considered to be exempt.
38. In my first provisional determination, I indicated that very few of the documents in issue contained information that could be used in the way feared. However, I acknowledged that information concerning minimum specification requirements of taxi security cameras, within documents 4, 16, 19 and 29B, were exempt pursuant to clause 4(2).
39. After re-examining the material, I conducted online searches to establish the availability of information concerning security camera specification requirements and technical specifications of particular camera models.
40. When comparing the documents in issue against publicly available material, it was apparent that disclosure of the documents would not provide the general public with any greater access to information than that which is already available.⁶ Whilst the information online was not the South Australian Taxi Security Camera Specifications (TSCS), it was nevertheless often analogous.

⁴ *Ipex Information Technology Pty Ltd v Department of Information Technology Services* [1997] SADC 3618; citing *Attorney-General's Department v Cockcroft* [1986] FCA 35.

⁵ *Konieczka v South Australia Police* [2006] SADC 134 [14].

⁶ Under section 39(15) of the FOI Act, I should avoid disclosing matter that the agency claims is exempt. Accordingly, I have omitted reference to the sources of information in question.

41. In light of this, I formed the revised view that the existing availability of equivalent information diminished the reasonableness of expecting that disclosure of the documents in issue could have an adverse effect on law enforcement and public safety. Therefore, clause 4(2) could not apply.
42. In response to my revised provisional determination, the agency refined its submissions, but maintained that clause 4(2)(a)(iii), (iv) and 4(2)(b) were applicable to documents 2, 4, 19 and 29B which contained 'minimum standards for retention of images and audio and the operating ranges of the security system'.
43. The agency reiterated its earlier submissions to justify this view and provided copies of documents 2, 4, 19 and 29B with proposed redactions marked.
44. I considered the specific information identified by the agency and compared it to what I had located online. When doing so I considered, in practical terms, how the information could be exploited, and whether this risk already exists by virtue of the availability of equivalent information.
45. Despite the agency's submissions, I remain of the view that the consequences of disclosure as suggested by the agency are merely speculative or theoretically possible. It is not reasonable to expect that disclosure of the information identified by the agency could prejudice law enforcement or public safety given what is already in the public domain.
46. Section 39(15) of the FOI Act prevents me from providing a more detailed explanation of my reasoning in this regard; however, the following considerations may assist the parties to understand:
 - a reasonably well-informed person could safely presume that security cameras have limitations such as those revealed by the documents
 - the hypothetical person who could exploit South Australia's minimum specification requirements when attempting to destroy evidence already has access to a variety of sources that will assist in ascertaining security camera operating limits and audio/visual retention periods. Therefore, disclosure of these documents does not create a risk that is not already present
 - the documents in issue only provide minimum specification requirements, rather than actual limitations of specific camera models. Nothing prevents security cameras from exceeding these requirements. Therefore, those wishing to destroy evidence would be required to make an informed 'guess' with respect to operating limits and footage retention periods regardless of disclosure
 - a separate document reveals sources upon which the South Australian specifications have been based. The agency has made no comment in relation to this document. In fact, the agency concurred with my proposal to partially release this document which would reveal the sources
 - if it were a legitimate concern that such information could reasonably be expected to prejudice law enforcement or public safety, access to this information would be restricted. This is not the case as the information is readily available and at times has been published by other Government departments.
47. Separately in my first provisional determination I expressed the view that disclosure of document 8 might pose a risk to the security of a building and should be redacted pursuant to clause 4(2)(a)(v).
48. Again, after re-examining this document it appeared that the notes and photos referred to a business that no longer operated from that location. Accordingly, in my revised provisional determination I altered my view in regards to this document also.

49. The agency's submissions in response to my revised provisional determination concurred with my altered view in this regard.
50. In light of the above, it is my determination that none of the documents in issue contain information which, if disclosed, could reasonably be expected to prejudice law enforcement or public safety. The documents are not exempt under clause 4(2).

Clause 6(1) - documents affecting personal affairs

51. Clause 6(1) provides:

6-Documents affecting personal affairs

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).
52. The term 'personal affairs' is defined in section 4(1) of the FOI Act to include a person's financial affairs, criminal records, marital or other personal relationships, employment records, and personal qualities or attributes. However, the definition is not exhaustive. The term has been held to involve 'matters of private concern to an individual'⁷ and the 'composite collection of activities personal to the individual concerned'.⁸
 53. Given the wording of the access request, it appeared to me that information concerning personal affairs was inconsequential to the applicant. Accordingly, on 20 July 2017, my legal officer contacted the applicant's office to ascertain whether he required this information. I was advised that the applicant did not wish to pursue access to information concerning personal affairs such as employee names, personal addresses, email addresses, mobile telephone numbers or other information concerning personal affairs.
 54. It was my revised provisional determination that information concerning purely personal information, such as names, home addresses, mobile telephone numbers, email addresses and other information concerning personal contact details, is outside the scope of the applicant's request and should be redacted.
 55. The agency did not make further submissions in response to my revised provisional determination; however, one interested party provided submissions in relation to documents 8, 9 and 25.
 56. The interested party submitted that documents 8, 9, and 25 contained information concerning personal affairs and that these documents should be refused entirely given the applicant did not wish to pursue access to such information.
 57. It was submitted that documents 8 and 25 comprised notes pertaining to personal conversations between the interested party and the agency which were of private concern. It was submitted that document 9 also contained matters of private concern and that it was not relevant to the agency's determination of the application.
 58. I am not satisfied that these documents contain information concerning the personal affairs of the interested party to the extent that they should be refused entirely. The content of these documents plainly concern the interested party's business affairs rather than personal affairs and, therefore, are within the scope of the applicant's request.

⁷ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1986) 13 FCR 85 at 88 - 89.

⁸ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625.

59. Conversely, information such as names, personal addresses, mobile telephone numbers, email addresses, signatures and other personal information is outside the scope of the applicant's request and should be redacted.
60. To clarify, material I consider to fall within the category of 'other personal information' refers to a person's National Police Certificate, relocation of residence or health related matters.

Clause 7(1)(a), (b) and (c) - business affairs

61. The agency relied on clauses 7(1)(a), (b) and (c) to refuse access to the following documents:

| Table 2 | | | | | | | |
|---------|----|----|----|----|----|-----|-----|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| 9 | 13 | 14 | 15 | 16 | 17 | 19 | 20 |
| 21 | 23 | 25 | 26 | 27 | 28 | 29A | 29B |
| 30 | 31 | - | - | - | - | - | - |

62. In its letter dated 14 December 2016, the agency submitted that:

The documents which have been marked as refused hold information relating to the business affairs of third parties. These documents discuss, in detail, the specific business arrangements including details surrounding business ownership, images of business facilities and details about third party financial affairs... All discussion around camera brands, specifications, testing and attributes and the release of this information may impact on the commercial value of the third parties. Therefore, the release of private financial and sensitive intellectual property information surrounding the business affairs would put the third parties at risk as this information is a valuable asset to their operation and position in the private market and for these reasons it would not be in the public interest for this information to be released.

63. Following my first provisional determination the agency expanded on its submissions and provided a summary of the submissions it had received from interested parties. I have taken these into account when assessing the applicability of clause 7.
64. Where detailed submissions were provided they have been summarised and discussed below.
65. Additionally, one interested party provided further submissions in response to my revised provisional determination regarding the applicability of clause 7(1)(b) and (c) to documents 9, 11, 14, 15, 16, 17, 20 and 29A. These too have been discussed below.

Clause 7(1)(a) - trade secrets

66. Clause 7(1)(a) 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 an agency or any other person;

67. The term 'trade secrets' is not defined in the FOI Act. However, when considering whether information amounts to a trade secret the following test was referred to by the Full Federal Court in *Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health*:⁹

⁹ (1992) 108 ALR 163; Quoting *Lansing Linde Ltd v. Kerr* (1990) 21 IPR 529, Staughton L.J. at 536.

- the information is used in a trade or business; and
- the owner must limit the dissemination of it or at least not encourage or permit widespread publication; and
- if disclosed to a competitor, the information would be liable to cause real or significant harm to the owner of the secret.¹⁰

68. *Re Organon (Australia) Pty Ltd v Department of Community Services and Health*¹¹ considered additional criteria that may assist in determining whether information amounts to a trade secret. However, I note that the Full Federal Court has determined that the criteria are ‘merely guides’ and in particular, that the information does not need to be of a technical character in order to be considered a trade secret.¹²

69. Accordingly, the following criteria, although not exhaustive, may provide a useful guide:

- the extent to which the information is known outside the business of the owner of that information
- the extent to which the information is known by persons engaged in the owner’s business
- measures taken by the owner to guard the secrecy of the information
- the value of the information to the owner and to his or her competitor
- the effort and money spent by the owner in developing the information
- the ease or difficulty with which others might acquire or duplicate the secret.¹³

70. Relevantly, in the same judgement their Honours also concluded:

...trade secrets of such a manufacturer may include formulae for the products as well as information concerning customers provided, in each case, that the information is in fact kept secret and would be to the advantage of trade rivals to obtain.

The necessity for secrecy means that such matters as the dimensions of products, and of parts of products, already on the market are unlikely to be trade secrets; the products being inspectable, such matters usually will not be secret. Similarly, the composition of a product, though secret in the first instance, may cease to be secret because it has become known through testing, reporting in trade journals, or discussions at seminars or conferences.

....

The determination in any particular case of the question whether information is a trade secret is a determination of fact.

71. In response to my first provisional determination, the agency and interested parties submitted that a number of documents should not be disclosed on the basis they contained trade secrets. This was often asserted without specificity or explanation.

72. However, it was submitted that disclosure of the interested party’s customer list contained in document 3 would reveal trade secrets and may make the interested party reticent to provide such information to the agency in the future for risk of it being disclosed to a competitor.

73. It was also submitted that the camera specifications and performance capabilities contained in documents 2, 4, 14, 15, 17, 20 and 29B were trade secrets and were not matters in the public domain. Additionally, two of these documents indicate that the interested party is the sole distributor of a particular system within South Australia. This was also considered to be a trade secret.

¹⁰ *Lansing Linde Ltd v Kerr* (1990) 21 IPR 529 per Straughton LJ[536].

¹¹ (1987) 13 ALD 588.

¹² *Re Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163, [37].

¹³ *Re Organon* (1987) 13 ALD 588.

74. In regards to the 'customer list' contained in document 3, I note that the information is over four years old and is clearly known by others outside of the interested party's business. In my view, it does not appear to be particularly valuable to competitors, does not appear to be liable to cause real or significant harm to the owner of the information if disclosed, and was duplicated without any notice of confidentiality or other obvious measure aimed at limiting further dissemination. For these reasons I am not satisfied that the customer list meets the requisite criteria to be regarded as a trade secret.
75. In regards to the camera specifications and performance capabilities contained in documents 2, 4, 14, 15, 20 and 29B, I am not satisfied that these documents contain sufficient detail to be regarded as trade secrets.
76. Similarly, although document 17 contains a substantial amount of detailed technical information, I am not convinced that it is so unique or inimitable that it provides the manufacturer with any competitive advantage over others. In reaching this conclusion I have considered the availability of similar information on the manufacturer's website. I also consider it relevant that the information is now three years old. Consequently, I am not satisfied that this information could properly be regarded as revealing trade secrets.
77. In my view, this type of information would be better dealt with under clause 7(1)(b).
78. Accordingly, it is my determination that none of the documents in issue contain information which, if disclosed, would reveal trade secrets. The documents are not exempt under clause 7(1)(a).

Clause 7(1)(b) - Commercially valuable information

79. Clauses 7(1)(b) provides:

7-Documents affecting business affairs

- (1) A document is an exempt document –
...
(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
 - (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

80. The term 'commercial value' is not defined in the FOI Act.
81. The Queensland Information Commissioner has noted that there are two possible interpretations of the phrase:

The first (and what I think is the meaning that was primarily intended) is that information has commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending, "one-off" commercial transaction...

The second interpretation of "commercial value" which is reasonably open is that information has commercial value to an agency or another person if a genuine, arms-length buyer is prepared to pay to obtain that information from that agency or person. It would follow that the market value of that information would be destroyed or diminished if it could

be obtained from a government agency that has come into possession of it, through disclosure under the FOI Act. ...¹⁴

82. In *Media Research Group Pty Ltd v Department of Premier and Cabinet (GD)* the New South Wales Administrative Decisions Tribunal Appeal Panel commented that:
- ...information of a 'commercial value' would ordinarily be information with a proprietary character, information of an internal character (such as specialised statistics) or information the product of some unique or special intellectual processes of a high order that might fall below the level of 'trade secret'. There should, as we see it, be some uniqueness attaching to the information that justifies treating it as exclusive, secret or confidential.¹⁵ (my emphasis)
83. The phrase 'could reasonably be expected' has been dealt with above and will be applied here in the same manner.
84. In response to my first provisional determination, the agency and interested parties submitted that a number of documents contain commercially valuable information and that disclosure would diminish the commercial value of that information. Again, this was often asserted without specificity or explanation, and without addressing how disclosure would be contrary to the public interest.
85. However, it was submitted that the camera specification and performance capabilities contained in documents 2, 4, 14, 15, 17, 20, and 29B is commercially valuable information and that disclosure would enable competitors to copy and recreate similar products.
86. It was also submitted that documents 9, 10, 11, 12, 14, 15 and 16 contain details of an interested party's suppliers and manufacturers and that disclosure of this would diminish its commercial value if obtained by a competitor. Additionally, documents 14 and 15 were said to contain details of contractual relationships with suppliers that were also commercially valuable.
87. To assist in my assessment of the documents in issue and the submissions of the parties, I again conducted research into the availability of information online.
88. In regards to supplier or manufacturer details, I am not satisfied that details of suppliers or manufacturers, or their association with a particular installer, is necessarily information which could reasonably be expected to reduce in value as a result of disclosure, particularly where this information is already in the public domain.
89. In forming this view, I considered the agency's website which contains a list of approved manufacturers and installers of taxi meters and audio video equipment. I also located a fact sheet headed 'Authorised Taxi Meter Installers - Sealers' produced by the agency. Elsewhere I located a list produced by the Tasmanian Government which identified Taxi Security Camera Systems approved for use in Tasmania which included manufacturers and the approved cameras they manufacture.¹⁶
90. In response to my revised provisional determination, one interested party submitted that his association with particular manufacturers, and details of cameras he was authorised to install, was commercially valuable information. It was submitted that disclosure of this information could result in competitors negotiating their own

¹⁴ *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, at paragraphs 54 -55, interpreting section 45(1)(b)(i) of the *Freedom of Information Act 1992* which is similar to section 7(1)(b).

¹⁵ *Media Research Group Pty Ltd v Department of Premier and Cabinet (GD)* [2011] NSWADTAP 7 (4 March 2011), [48].

¹⁶ Department of Planning Transport and Infrastructure, Government of South Australia, *Authorised taxi meter manufacturers*, <www.sa.gov.au/topics/driving-and-transport/transport-industry-services/taxi-and-passenger-transport/authorised-taxi-meter-manufacturers>; Department of Planning Transport and Infrastructure, Government of South Australia, *Authorised taxi meter installers - sealers* <www.sa.gov.au/_data/assets/pdf_file/0018/21681/MR603-0115.pdf> accessed 17 August 2017; Department of State Growth, Government of Transport, *Approved Security Camera Systems* www.transport.tas.gov.au/passenger/operators.

contractual arrangements with those manufacturers and that this would destroy the commercial value of the information or otherwise adversely affect his business.

91. The interested party indicated that it did not publicise this information and it was only disclosed to the agency for the purpose of gaining regulatory approval as an installer of particular security systems.
92. It appeared to me that where a particular manufacturer, or a specific camera model, can be located online, due to their involvement in the industry, it is not reasonable to expect that disclosure of these documents could prompt competitors to negotiate their own deals.
93. In my view, competitors wishing to negotiate deals with manufacturers or in relation to specific cameras could do so regardless of disclosure. It does not appear that disclosure of these documents would increase that existing possibility.
94. Furthermore, in instances where an interested party itself promotes its association with manufacturers, for example by including them in an email signature block, this too leads me to conclude that it is not reasonable to expect that the commercial value of that information would be destroyed or diminished by disclosure.
95. On 21 November 2017 my legal officer contacted the interested party to discuss this reasoning. During the discussion the interested party expressed that his primary concern was disclosure of the specifications of cameras and other technology produced by those manufacturers.
96. However, the interested party identified one manufacturer in particular who developed their technology in consultation with him. That technology is supplied to the interested party exclusively in Australia. The interested party then explained an instance in which details of the manufacturer were disclosed and resulted in products being purchased directly from them. This apparently enabled the purchasers to 'play with' the product, in order to test its limits, which put the integrity of the technology at risk.
97. The interested party reasoned that disclosure of the particular manufacturer's name could further enable others to purchase directly from the manufacturer rather than him, and additionally would reduce the value of technology by identifying its limitations. The commercial value of his association with this particular manufacturer, and thus the integrity of the products which he supplies, could therefore be destroyed or diminished.
98. I note, this particular manufacturer was not one that could be located online via searches focusing on the security camera and taxi industries. It was also not revealed in the interested party's signature block. In light of this, I am satisfied that the details of this particular manufacturer, referred to in documents 14 and 15, is commercially valuable and that disclosure could reasonably be expected to destroy or diminish the value of this information.
99. I remain of the view that the commercial value of information regarding all other suppliers and manufacturers could not reasonably be expected to reduce in value as a result of disclosure given the information is already in the public domain.
100. In regards to specification and performance capabilities, I remain of the view that very few of the documents contain information with sufficient detail or uniqueness to be capable of being replicated by a competitor.
101. In my revised provisional determination I accepted that pages 3, 4, 5, 11 and 13 of document 17 contained detailed technical information that was likely to be commercially valuable and was sufficiently detailed to be capable of duplication by a competitor.

-
102. During my legal officer's discussion with the interested party, he elaborated on the variances in technology and software developed by manufacturers and explained that while all systems must reach the same specification requirements, the systems differ in the ways they achieve these. Examples were provided of instances where money had been spent to further develop technology and how competitors who did not invest in similar research could utilise the information to improve their own systems.
103. Having considered these most recent submissions of the interested party, I am willing to accept that page 6 of document 17 also contains information which is commercially valuable and is capable of being replicated by competitors.
104. However, I am not convinced that the remaining pages contain information that is particularly unique, nor does it reveal software or hardware specifications that make it capable of being replicated by competitors.
105. Document 29B also contains detailed information about a particular camera model's compliance with the TSCS. In my view, this information is commercially valuable to the relevant interested party and, if disclosed, could result in competitors utilising the information to produce competitive products, or as a comparison point for negotiation purposes.
106. It is worth noting that, due to the broader application of subclause 7(1)(b), I again considered the confidential customer list contained in document 3 and accept that this is likely to be commercially valuable information. However, given the list is four years old, I am not satisfied that it retains any commercial value capable of being destroyed or diminished by disclosure.
107. I am not convinced that the remaining documents contain commercially valuable information which could reasonably be expected to lose value as a result of disclosure.
108. I now turn to consider the public interest factors for and against disclosure in relation to documents 14, 15, 17 and 29B.
109. I consider the following factors to weigh in favour of disclosure:
- the public interest in fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability within government
 - the public interest in scrutiny of government decision-making, achieved in part through the public having access to and being able to compare regulatory processes applied to regulated businesses.
110. I consider the following factors to weigh against disclosure:
- the public interest in ensuring the effective conduct of the agency's functions
 - the public interest in protecting the commercial interests of third parties
 - the public interest in ensuring regulated businesses are not dissuaded from working within the industry
 - the fact that the documents in issue have come to be held by the agency as a result of the industry being heavily regulated
 - the fact that interested parties have objected to the release of the information.
111. I consider the factors weighing against disclosure to be most persuasive in the present circumstances.
112. Accordingly, it is my determination that documents 14, 15, 17 and 29B contain commercially valuable information which could reasonably be expected to reduce in value as a result of disclosure. Additionally, the disclosure of this information would be

contrary to the public interest. Therefore, the information is exempt under clause 7(1)(b).

113. In my view, it is reasonably practicable to release these documents once the exempt material is redacted.¹⁷

Clause 7(1)(c) - Other information concerning business, professional, commercial or financial affairs

114. Clauses 7(1)(c) provides:

7-Documents affecting business affairs

- (1) A document is an exempt document –
...
(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.

115. The phrase ‘business, professional, commercial or financial affairs’ is not defined in the FOI Act, however, the Administrative Appeals Tribunal has commented that:

...they are words of very wide application, and cover all the aspects, both fiscal and administrative, of an organisation or undertaking; I do not think that they should be narrowly construed.¹⁸

116. The Queensland Information Commissioner in *Stewart and Department of Transport* also relevantly observed:

For a matter to relate to "business affairs" in the requisite sense, it should ordinarily, in my opinion, relate to the affairs of a business undertaking which is carried on in an organised way (whether it be full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained).¹⁹

117. The term ‘could reasonably be expected’ has been dealt with above and will be applied here in the same manner.

118. In regards to the ‘adverse effect’ the District Court has commented that:

It is sufficient for s7(1)(c)(ii) if any adverse effect is established... However, it must be something which can be properly categorised as an adverse effect and not something so de minimus [sic] that it would be properly regarded as inconsequential... It will be sufficient if the adverse effect is produced by that document in combination with other evidence which is before the Court on the appeal.²⁰

¹⁷ *Freedom of Information Act 1991*, section 20(4)

¹⁸ *Martin Saxon v Australian Maritime Authority* [1995] AAT 165, [99].

¹⁹ *Stewart and Department of Transport* [1993] QICmr 6 [103].

²⁰ *Ipex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, 65.

119. The submissions provided by the agency and interested parties asserted that a number of documents contain material concerning business affairs and that disclosure could have an adverse effect on those affairs or prejudice the future supply of such information to the agency.
120. Given the broad nature of this subclause and the content of the documents, I accept that a number of documents contain material concerning business, professional, commercial or financial affairs.
121. However, oftentimes I have not been satisfied that disclosure of the information could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of information to the Government, particularly where submissions in this regard have not been specific.
122. It was submitted that the disclosure of a portion of information in document 4 could have an adverse effect on the interested party's affairs or prejudice the future supply of such information to the agency.
123. It was submitted that the disclosure of document 16 could have an adverse effect on the interested party's ability to comply with certain practical requirements.
124. It was submitted that a portion of information within document 25 could have an adverse effect on the interested party's business affairs.
125. I have refrained from detailing these submissions further in accordance with section 39(15).
126. In regards to document 4, I do not consider there to be sufficient evidence before me to conclude that disclosure of the information identified by the interested party could reasonably be expected to have an adverse effect on their business affairs, or prejudice the future supply of such information to the agency. This is particularly so given the passage of time since its creation which, in my view, diminishes the relevance of the information four years later.
127. In regards to document 16 I do not consider there to be sufficient evidence before me to conclude that disclosure of the information could reasonably be expected to have any adverse effect on the interested party's ability to comply with the practical requirements of approval. This is particularly so given the period within which the interested party had to comply with these requirements has since expired.²¹
128. In regards to document 25, I accept that the 'ASIC key' is material concerning the business affairs of an interested party. Disclosure of this ASIC key would enable unauthorised people to access and alter details relating to the associated business' name. In light of this, I accept that disclosure could reasonably be expected to have an adverse effect on the interested party's business affairs.
129. I have again considered the confidential customer list contained in document 3 and accept that this concerns the interested party's business affairs. I note the interested party expressed concern that this list may become available to a competitor and indicated that disclosure would make them 'reticent to provide such information...in the future for risk of it being exposed to disclosure'. Given the customer list was not provided to the agency for regulatory purposes, I am willing to accept that disclosure may prejudice future supply of this information to the agency.
130. I now turn to consider the public interest factors for and against disclosure in relation to document 3 and 25.

²¹ The letter grants the interested party temporary approval, as a manufacturer, supplier and installer, for 12 months commencing 8 July 2014.

131. I consider the following factors to weigh in favour of disclosure:

- the public interest in fulfilling the objects of the FOI Act; particularly the public interest in promoting openness and accountability within government
- the public interest in scrutiny of government decision-making, achieved in part through the public having access to and being able to compare regulatory processes applied to regulated businesses.

132. I consider the following factors to weigh against disclosure:

- the public interest in ensuring the effective conduct of the agency's functions
- the public interest in protecting the sensitive business affairs of third parties
- the public interest in ensuring regulated businesses are not dissuaded from working within the industry
- the fact that document 25 came to be held by the agency as a result of the industry being heavily regulated
- the fact that interested parties have objected to the release of the information.

133. I consider the factors weighing against disclosure to be most persuasive in the present circumstances.

134. Accordingly, it is my determination that documents 3 and 25 contain material concerning the business affairs of third parties, and that disclosure could have an adverse effect on those affairs or prejudice the supply of such information to the agency. Additionally, the disclosure of this information would be contrary to the public interest. Therefore, the information is exempt under clause 7(1)(c).

135. In my view it is reasonably practicable to release these documents once the exempt information is redacted.²²

Clause 9 - Internal working documents

136. Clause 9(1)(a) and (b) 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;

...

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

137. The use of the words 'that relates to' in 9(1)(a) make this clause quite broad in terms of the information it captures. However, this breadth is narrowed by the inclusion of the public interest consideration in 9(1)(b).

138. The agency submits that clause 9(1) applies to documents 14 and 30.

²² *Freedom of Information Act 1991*, section 20(4).

139. These documents are draft versions of recommendations made to the Chief Executive of the agency. The final version of each document was also located in response to the original FOI request and has accordingly been considered elsewhere in this review. Importantly, the agency concurred with my revised provisional determination to partially release the final versions subject to redactions of information concerning third parties.
140. Despite this, the agency submits that disclosure of documents 14 and 30 is not in the public interest because they contain formatting, styling and numbering errors. The agency also reasoned that the information contained in these documents would be partially released via their respective final versions; therefore, there was no value in releasing two earlier versions of the documents containing errors.
141. I accept that portions of information within these documents relate to opinions, advice, and recommendations prepared or recorded for the purpose of the decision-making functions of the agency.
142. However, I am not satisfied that disclosure would be contrary to the public interest.
143. I remind the agency that it must engage in a 'public interest balancing process' in applying the public interest test.²³ A document may only be regarded as exempt if disclosure would, on balance, be *contrary to the public interest*. Note, this is different from regarding disclosure as '*not in the public interest*'. While this distinction is perhaps nuanced it is significant.
144. Given the final, substantially similar, versions of these documents are being released, I am not satisfied that disclosure of these documents could be contrary to the public interest purely due to errors contained therein. The errors do not alter the content of the information and the fact that errors exist does not outweigh the public interest factors in favour of release.
145. I concede that there is little value in releasing these documents given they are essentially duplicates; however, this is an irrelevant consideration when assessing disclosure under the FOI Act.
146. I determine that clause 9(1) is not applicable to document 14 or 30.

Clause 13(1)(a) - confidentiality

147. Clauses 13(1)(a) provides:

13-Documents containing confidential material

- (1) A document is an exempt document –
- (a) if it contains matter the disclosure of which would found an action for breach of confidence;

148. The term 'would' should be read as 'could'.²⁴
149. The Administrative Appeals Tribunal (AAT) has had cause to consider section 45 of the *Freedom of Information Act 1982* (Cth),²⁵ which is in substantially the same terms as clause 13(1)(a) of the FOI Act (SA). After consideration of the authorities, Deputy President Forgie of the AAT determined that an action for breach of confidence can

²³ *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.

²⁴ *Bray and Smith v WorkCover* (1994) 62 SASR 218, 226 to 227.

²⁵ *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244.

only mean an action for equitable breach of confidence.²⁶ In my view, the AAT decision has persuasive value.

150. An equitable obligation of confidence is a duty not to disclose information because the information was given and received in circumstances which would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised. A number of criteria must be satisfied:²⁷

- the information must be capable of being identified with specificity
- the information must have the necessary quality of confidence
- the information must have been received in circumstances which import an obligation of confidence
- there must be actual or threatened misuse of the information.

151. The agency relied on clause 13(1)(a) to refuse access to the following documents:

| Table 2 | | | | | | | |
|---------|-----|-----|----|----|----|----|----|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 13 |
| 14 | 15 | 16 | 17 | 19 | 20 | 26 | 27 |
| 28 | 29A | 29B | 30 | - | - | - | - |

152. The agency has submitted that before camera installers and technicians are able to access camera specifications and associated details, they are required to sign a confidentiality form agreeing not to release the information to any other parties. This is the basis for its claim that the above documents should be exempt pursuant to clause 13(1)(a).

153. Given the onus is on the agency to justify its determination, in my revised provisional determination I commented that I had not been provided with a copy of the confidentiality agreement. In light of this, I was not convinced that the information had been received in circumstances importing an obligation of confidence or that there was an actual or threatened misuse of the information.

154. The agency did not provide submissions in relation to clause 13(1) in their response to my revised provisional determination, nor did they provide the confidentiality agreement.

155. In view of this, it is my determination that clause 13(1)(a) is not applicable to the documents in issue.

Outside of Scope

Document 24

156. In response to my revised provisional determination the agency altered its view in relation to document 24 and submitted that most of the information contained in the 'Determinations and other Authorisations' and 'Policy for Approvals' documents is outside the scope of the original FOI request.

157. I have reviewed document 24 and consider that the information in this document is outside the scope of the original FOI request as it contains information which does not relate to security cameras in taxis.

²⁶ *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [163].

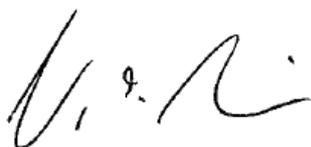
²⁷ *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010), [38], affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs* (Vic) (1987) 14 FCR 434, 443. The test was also endorsed in *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [165].

Document 27

158. In the schedule attached to the agency's letter dated 14 December 2016, the agency indicates that document 27 is outside the scope of the original FOI request, as well as being exempt pursuant to clauses 4(2), 7(1) and 13(1)(a).
159. I have reviewed document 27 and consider that the information in this document is within the scope of the original FOI request as it contains information related to specifications and suppliers of security cameras for taxis.

Determination

160. In light of my views above, I vary the agency's determination, such that:
- **Documents 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29A, 30 and 31** are to be partially released to the applicant following redactions of personal affairs information of third parties (including the entirety of page 13 of document 7)
 - **Document 3** is to be partially released to the applicant following redactions of the names and email addresses of third parties and the customer list on page 3
 - **Document 14** is to be partially released to the applicant following redactions to personal affairs information of third parties and the company that appears in paragraphs 1.9 and 2.9.
 - **Document 15** is to be partially released to the applicant following redactions to personal affairs information of third parties and the company that appears in paragraphs 1.10 and 2.7.
 - **Document 17** is to be partially released to the applicant following redactions of the names of third parties and pages 3, 4, 5, 6, 11 and 13 in their entirety
 - **Document 24** is to be released to the applicant following redactions to out of scope material
 - **Document 25** is to be partially released to the applicant following redactions of the names of third parties and the 'ASIC key'
 - **Document 29B** is to be partially released to the applicant following redactions of the names, email addresses and signature of third parties, and the far right column headed "Comments/Details of Non-Compliance".
161. I have provided the agency with a copy of the documents, with parts I consider to be exempt, or out of scope, highlighted in yellow or blue. The remainder of the information within the documents should be released to the applicant.



Wayne Lines
SA OMBUDSMAN

8 December 2017

APPENDIX

Procedural steps

| Date | Event |
|-------------------|---|
| 12 August 2016 | The agency received the FOI application dated 12 August 2016. |
| 12 September 2016 | The agency failed to determine the application within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ² |
| 4 October 2016 | The agency received the internal review application dated 4 October 2016. |
| 18 October 2016 | The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³ |
| 3 November 2016 | The Ombudsman received the applicant's request for external review dated 31 October 2016. |
| 10 November 2016 | The Ombudsman advised the agency of the external review and requested submissions and documentation. |
| 14 December 2016 | The agency provided the Ombudsman with its submissions and documentation. |
| 17 March 2017 | The Ombudsman provided his first provisional determination to the agency and the applicant. |
| 6 April 2017 | The agency sought an extension of time to 16 April 2017 to respond to the first provisional determination. |
| 20 April 2017 | The agency sought an additional extension of time to 28 April 2017 to respond to the first provisional determination. |
| 4 May 2017 | The agency provided submissions in response to the Ombudsman's first provisional determination. |
| 26 September 2017 | The Ombudsman provided his revised provisional determination to the agency and the applicant. |
| 19 October 2017 | One interested party provided submissions in response to the Ombudsman's revised provisional determination |
| 8 November 2017 | The agency provided submissions in response to the Ombudsman's revised provisional determination |
| 8 December 2017 | The Ombudsman provided his final determination. |

¹ *Freedom of Information Act 1991*, section 14(2).

² *Freedom of Information Act 1991*, section 19(2).

³ *Freedom of Information Act 1991*, section 29(5).