

Determination

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

Applicant	Mr Bill Cumpston
Agency	Department of Planning, Transport and Infrastructure
Ombudsman reference	2018/02781
Agency reference	2017/21864/01
Provisional 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 made the following request for access to information held by the agency:

In July 2017 the Department of Planning, Transport and Infrastructure issued the request to quote 17C448 Digital Journey Management System - Proof of Concept.

Ebor Computing Pty Ltd submitted a proposal in August 2017. This FOI request is for all documents relating to the evaluation of that proposal prepared by or for the Department.

Background

2. For ease of reference, the procedural steps relating to the application 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 4 July 2018. 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 applicant responded to my provisional determination, commenting that he has made several FOI applications of a similar nature in the past without encountering any refusals. I have noted this comment, however, FOI determinations should be distinct and unique depending on the exact contents of requested documents, and I cannot

confirm whether information previously provided is identical to the information that is subject to my current review. That said, in light of my comments in my report below, I agree that it is unfortunate the applicant has been required to seek an external review by my Office.

6. The applicant also commented that providing feedback to tenderers is not only beneficial to applicants, it also provides greater transparency in the decision making process. As I expressed views of a similar nature in my provisional report, I have not considered the applicant's comment further in this report.
7. The agency also responded to my provisional report, indicating that it agreed with my variation to its determination. It also provided a draft version of my proposed redactions in order to confirm that it understood the information I had proposed to release. I confirm the agency's understanding is correct.

Relevant law

8. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
9. 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. The exemption clauses relied upon by the agency include clauses 6(1), 7(1)(b), 7(1)(c) and 9(1), which I have set out below:

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).

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
 - (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

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

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

- (2) A document is not an exempt document by virtue of this clause merely because it contains matter concerning the business, professional, commercial or financial affairs of the agency or other person by or on whose behalf an application for access to the document is made.
- (3) A document is not an exempt document by virtue of this clause if it is a contract entered into by the Crown or an agency after the commencement of this subclause.

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.

10. Under section 48, the onus is on the agency to justify its determination ‘in any proceedings’. This includes the external review process.
11. 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

12. The agency identified three documents within the scope of the application:
 - Document 001 - Simple Purchase Recommendation (access refused in full)
 - Document 002 - Request for Quote (released in full)
 - Document 003 - Tender Evaluations Weighted Attribute Analysis (access refused in full).

Issues in this review

13. I must consider whether the agency has justified its determination to refuse access to Documents 001 and 003.

Consideration

14. The applicant’s initiating FOI application was received by the agency on 4 October 2017
15. The agency did not determine the application within the 30 days required by the FOI Act, and was therefore deemed to have refused access to the requested documents.²
16. The applicant then made an application for an internal review of the deemed refusal, which was received by the agency on 18 January 2018.

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

17. The agency again failed to determine that application within the required timeframe under the FOI Act, and was therefore deemed to have confirmed the initial refusal,³ prompting the applicant to apply for an external review by my Office on 8 March 2018.
18. Shortly after notifying the agency of the applicant's application for external review, the agency made a determination dated 26 March 2018, and invited the applicant to withdraw the application for external review. The applicant indicated by telephone on 29 March 2018 that he wished to proceed with the external review.

Determination dated 26 March 2018

19. The agency explained that Document 001 is:

...a purchase recommendation report which contains the names of tenderers, pricing of tender proposals and subsequent weighted scores. It also contains the opinions of the panel regarding the evaluation of the tender submissions and the final recommendation from the panel.

20. The agency also explained that Document 003 is:

...a weighted analysis of all tenders by the panel and contains commercial and financial affairs of the tenderers. The document also contains scores which resulted from deliberations on the tender submissions by the panel.

21. The agency provided the following submissions in support of its determination that Document 001 is exempt under clauses '6(1), 7(1)(b)(c) and 9(1)(a)(b)'⁴:

Document 001 contains information relating to deliberations undertaken for the purpose of the decision-making functions of the agency and contains personal affairs, which includes the members of the evaluation panel and signature of the approver. The document also contains the business affairs of multiple tenderers, namely tender prices and commentary on each tenderer's submission which has commercial value to the agency and to competitors in the industry. Release of this information would reveal financial information plus technological and operational capabilities of tenderers. Release could reasonably be expected to destroy or diminish the commercial value of the information if a business was privy to operational and financial strengths and weaknesses of competitors in their field. Furthermore release of this document could reasonably be expected to have an adverse effect on the tenderer's business affairs particularly if a competitor was able to use the information to create an advantage for themselves. Release of this document could also prejudice the future supply of such information to the agency if tenderers are concerned their tender proposals and business affairs will not remain confidential throughout the tender process.

22. The agency also provided the following submissions as to why it considered Document 003 is exempt under clauses '7(1)(c) and 9(1)(a)(b)' of the FOI Act:

...Release of this document could reasonably be expected to prejudice the future supply of such information to the agency if tenderers believe their tender proposals and business affairs will not remain confidential throughout the tender process.

23. The agency submitted that it had given weight to the following public interest considerations when considering whether Documents 001 and 003 were exempt under clauses '7(1)(c) and 9(1)(a)(b)' of the FOI Act:

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

⁴ I have referred to the exemption clauses as set out by the agency. As noted below it appears the agency cited the exemption clauses it was relying on incorrectly, not distinguishing its submissions in relation to separate exemption clauses. The agency clarified its determination in an email dated 5 May 2018.

...I consider the following factors are in favour of disclosure: furthering the objects of the Act; promoting openness and accountability of agencies; and enabling effective oversight of government expenditure. The factors against disclosure are: ensuring agencies are able to achieve best value for money when engaging third parties; ensuring effective conduct of government functions; and release could reasonably be expected to prejudice future tender processes, particularly if tenderers aren't assured of confidentiality. In this case I consider the factors against disclosure outweigh those in favour and therefore consider that on balance, it would be contrary to the public interest to release these documents.

24. The following comment was also provided by the agency, suggesting that it considered that release of the documents was not necessary, as the applicant had already been provided with an oral representation of what was contained within the documents:

...the agency provides feedback to tenderers via a formal debrief, which is the appropriate forum for tenderers to seek and be provided with specific feedback about their tender and get advice on how to improve chances in the future.

Response to external review

25. Following the applicant's email dated 29 March 2018, in which he indicated he wished to proceed with the application for external review, the agency provided further submissions in support of its determination by letter dated 19 April 2018:

Exemptions under Schedule 1, Clause 7(1) apply to documents 001 and 003 as they contain the business affairs of third parties (see determination for details). The agency notes Clause 7(2) likely excludes the specific information relating to Ebor Computing Pty Ltd in these documents from being exempt under Clause 7(1) however they are also internal working documents and satisfy the exemptions in Clause 9(1).

Documents 001 and 003 contain opinions, recommendations and deliberations of the tender evaluation panel and the information is summarised in high level form. The public interest factors have been articulated in the determination however there are additional factors the agency would like considered.

A factor against the public interest to release this information is the maintenance of effective conduct of public affairs through free and frank expression of opinions. A tender evaluation panel should be free to openly discuss and deliberate on tender submissions and provide open, frank advice for the final recommendation. The information is used for internal business purposes to ensure value for money outcomes in a competitive environment, not designed to be a feedback mechanism for tenderers.

In addition, it is against the public interest if a precedent were to be set for tenderers to be provided with information relating to their own submission from internal working documents created during the evaluation process. With the high volume of tenders the agency manages, the agency's resources would be unreasonably diverted in the exercise of its functions.

It is acknowledged that a public interest factor in favour of release is providing an individual with information that is of special interest to them. It is considered that the most appropriate and optimum process for providing feedback to unsuccessful tenderers is via a verbal or face to face debrief. This ensures the feedback is targeted and helpful plus gives the tenderers opportunities for clarification. This leads to improved opportunities for third parties in future tender processes and increases competition in the market for the agency. The agency currently has over \$7.2 billion worth of goods and services across 3,300 contracts. This is a significant financial cost where confidence in the agency's tender process and increased market competition is vital to ensure value for money and the best outcomes for public funds.

In the current case, a representative from the applicant's company, Ebor Computing, partook in a phone call debrief with the tender evaluation panel chairperson on 27 September 2017. The chairperson explained the positives and negatives of their proposal

and advised the main concern with their bid was the Intellectual Property was to be owned by Ebor Computing.

On balance, it is still considered against public interest to release documents 001 and 003. Ebor Computing have been verbally debriefed on the information that is of special interest to them and the agency considers the factors against disclosure, particularly free and frank expressions of opinions during a tender evaluation process, to be most persuasive in this case.

26. The agency's determination dated 26 March 2018 and its letter dated 29 March 2018 made references to 'clause 7(1)(b)(a)', 'clause 7(c)', 'clause 7(1)', and 'clause 7(2)', in a seemingly interchangeable manner in its submissions.
27. My legal officer requested that the agency clarify its submissions and provide a succinct summary of the clauses it was relying on in relation to each document, which it provided by email dated 3 May 2018:

Document 001

Refused under Clause 7(1)(b)

The document contains information from multiple tenderers, namely tender prices and commentary on each tenderer's submission which has commercial value to the agency and to competitors in the industry. Release of this information would reveal financial, technological and operational capabilities of tenderers. Release could reasonably be expected to destroy or diminish the commercial value of the information if a business was privy to operational and financial strengths and weaknesses of competitors in their field. Public Interest will be considered at the end as applies to both clauses being used

Refused under Clause 7(1)(c)

The document contains commercial affairs of multiple tenderers, namely tender prices and commentary on each tenderer's submission. Release of this document could reasonably be expected to have an adverse effect on the tenderers' business affairs particularly if a competitor was able to use the information to create an advantage for themselves. Release of this document could also reasonably be expected to prejudice the future supply of such information to the agency if tenderers are concerned their tender proposals and commercial affairs will not remain confidential throughout the tender process.

Public Interest - clauses 7(1)(b)(ii)(B) & 7(1)(c)(ii)(B)

The following factors are in favour of disclosure:

- furthering the objects of the Act;
- promoting openness and accountability of agencies; and
- enabling effective oversight of government expenditure.

The following factors are against disclosure:

- ensuring agencies are able to achieve best value for money when engaging third party service providers;
- protecting commercial and financial interests of third parties;
- ensuring effective conduct of government functions; and
- release could reasonably be expected to prejudice future tender processes, particularly if tenderers aren't assured of confidentiality.

In this case we consider the factors against disclosure outweigh those in favour and therefore consider that on balance, it would be contrary to the public interest to release these documents.

Refused under Clause 9(1)(a)(i)(b)

The document contains a procurement recommendation that has been prepared and recorded by the evaluation panel.

Public Interest - clause 9(1)(b)

The following factors are in favour of disclosure:

- furthering the objects of the Act;
- promoting openness and accountability of agencies;
- enabling effective oversight of government expenditure; and
- providing an individual with information that is of special interest to them.

The following factors are against disclosure:

- ensuring agencies are able to achieve best value for money when engaging third party service providers;
- protecting commercial and financial interests of third parties is important to the community as a whole;
- ensuring effective conduct of government functions as disclosure of tender evaluations and assessments may provide unfair advantages to some business in future tender processes;
- release could reasonably be expected to prejudice future tender processes, particularly if tenderers aren't assured of confidentiality; and
- the maintenance of effective conduct of public affairs through free and frank expression of opinions during a tender evaluation process.

In this case we consider the factors against disclosure outweigh those in favour, particularly the maintenance of effective conduct of public affairs through free and frank expression of opinions during a tender evaluation process, and therefore consider that on balance, it would be contrary to the public interest to release this document.

Document 003

Refused under Clause 7(1)(c)

The document contains commercial and financial affairs of the tenderers as evaluated by the panel. Release of this document could reasonably be expected to prejudice the future supply of tenders or information to the agency if tenderers believe their tender proposals and business affairs will not remain confidential throughout the tender process.

Public Interest - clause 7(1)(c)(ii)(B)

The following factors are in favour of disclosure:

- furthering the objects of the Act
- promoting openness and accountability of agencies; and
- enabling effective oversight of government expenditure.

The following factors are against disclosure:

- ensuring agencies are able to achieve best value for money when engaging third party service providers;
- protecting commercial and financial interests of third parties;
- ensuring effective conduct of government functions; and
- release could reasonably be expected to prejudice future tender processes, particularly if tenderers aren't assured of confidentiality.

In this case we consider the factors against disclosure outweigh those in favour and therefore consider that on balance, it would be contrary to the public interest to release these documents.

Refused under Clause 9(1)(a)(ii)(b)

The document contains scores which resulted from deliberations on the tender submissions by the evaluation panel.

Public Interest - clause 9(1)(b)

The following factors are in favour of disclosure:

- furthering the objects of the Act;
- promoting openness and accountability of agencies;
- enabling effective oversight of government expenditure; and
- providing an individual with information that is of special interest to them.

The following factors are against disclosure:

- ensuring agencies are able to achieve best value for money when engaging third party service providers;
- protecting commercial and financial interests of third parties is important to the community as a whole;
- ensuring effective conduct of government functions as disclosure of tender evaluations and assessments may provide unfair advantages to some business in future tender processes;
- release could reasonably be expected to prejudice future tender processes, particularly if tenderers aren't assured of confidentiality; and
- the maintenance of effective conduct of public affairs through free and frank expression of opinions during a tender evaluation process.

In this case we consider the factors against disclosure outweigh those in favour, particularly the maintenance of effective conduct of public affairs through free and frank expression of opinions during a tender evaluation process, and therefore consider that on balance, it would be contrary to the public interest to release this document.

The reference to clause 7(2) in our submission of 19 April 2018 is our acknowledgement that exemptions under Clauses 7(1)(b) and 7(1)(c) only apply to third party's business affairs within documents 001 and 003 and not the business affairs of Ebor Computing. However, the agency maintains the documents are still exempt under Clause 9(1) and have included the information above to help clarify our determination.

28. On 29 June 2018, my legal officer contacted the applicant to clarify what specific information he was seeking from the agency, as it appeared from the wording of his application that he was only seeking information relating to the agency's assessment of Ebor Computing's proposal.
29. The applicant advised that he did not seek access to information in relation to other bidders' proposals, and stated that he had previously received similar information in a redacted format, and that this would be sufficient in the present circumstances.
30. As the applicant only sought access to Ebor Computing's proposal, I have excluded information concerning all other proposals from my determination.
31. It is necessary to note that the agency's determination process could have been simplified had it taken steps to clarify with the applicant at first instance the exact nature of the information he was seeking.

Clause 6(1) - Personal Affairs

32. The agency submitted that the names of panel members and the signature of the 'approver' in Document 001 are exempt on the ground that they constitute personal affairs.
33. As the applicant has identified he does not wish to access this information, I have not considered whether it is exempt under clause 6(1) of the FOI Act.

Clauses 7(1)(b) and 7(1)(c)

34. I have noted the agency's submission that it does not consider that information relating to Ebor Computing is exempt under clauses 7(1)(b) or 7(1)(c).
35. As this is the only information the applicant is seeking access to, it is not necessary for me to consider whether any other information in the documents is exempt under either of these clauses.

36. That said, it is necessary to note that in assessing Document 001 and Document 003, it has become apparent that the agency has not turned their mind to their obligation to give partial access to a document where it is appropriate to do so, noting that page one of Document 001 largely contains information that was determined not to be exempt where it appears in Document 002.⁵

Clause 9(1)

Document 001

37. For a document to be exempt pursuant to clause 9(1), I must be satisfied that:
- the document contains matter that relates to an opinion, advice or recommendation that has been obtained, prepared or recorded *or* consultation or deliberation that has taken place
 - in the course of, or for the purposes of, the decision-making functions of the agency
 - disclosure of the document would, on balance, be contrary to the public interest.

Does the document contain matter that relates to an opinion, advice or recommendation that has been obtained, prepared or recorded or consultation or deliberation that has taken place?

38. The agency submitted that Document 001 contains a recommendation that has been prepared by a selection panel.
39. I am persuaded that page six of Document 001 contains a recommendation, however, that information does not relate to Ebor Computing.
40. That said, information on page two of Document 001 does concern Ebor Computing, and I am of the view that it relates to an opinion that has been obtained.

Was that opinion, advice or recommendation provided in the course of, or for the purposes of, the decision-making function of the agency?

41. I am satisfied that the opinion was obtained for the purposes of the decision-making functions of the agency, as it was prepared in order to inform the agency of the preferred supplier.

Would disclosure of the information be contrary to the public interest?

42. The agency referred to the objects of the FOI Act, and the significance of promoting transparency and accountability for government expenditure as public interest considerations in favour of disclosure. The agency also highlighted that it is in the public interest to allow individuals to have access to information that is of special interest to them.
43. The agency determined, however, that there were more compelling public interest considerations against disclosure, but I note that those considerations only appear relevant to information that does not concern Ebor Computing. I have identified those public interest considerations against disclosure as:
- ensuring best value for money for future tenders
 - protecting commercial/financial interests of third parties
 - prejudice to future tender processes if confidentiality cannot be assured.

⁵ *Freedom of Information Act 1991*, section 20(4).

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44. As these public interest factors are only relevant to information concerning third parties, and this information is not sought by the applicant, I have excluded them from my consideration.
45. The remaining public interest considerations against disclosure were described by the agency as:
- ensuring effective conduct of government functions as disclosure of tender evaluations and assessments may provide unfair advantages to some businesses in future tender processes
 - the maintenance of effective conduct of public affairs through free and frank expression of opinions during a tender evaluation process.

Ensuring effective conduct of government functions

46. I am not persuaded this consideration bears much weight, if any, in balancing whether disclosure is in the public interest.
47. As the agency has noted, it has already provided verbal feedback to the applicant in relation to Ebor Computing's proposal. Although I do not have details of what that verbal feedback consisted of, I consider it is unlikely that the feedback contained in the document would provide significantly more insight given the lack of detail in those written comments.
48. Further, although I do not consider the feedback is likely to provide the applicant with much of a benefit or insight into Ebor Computing's performance, I am of the view that providing bidders with feedback on their proposals is ultimately in the public interest as it could assist them in offering better and more competitive services for the state in the future.
49. It is also necessary to note that other applicants are not prevented from seeking similar written feedback on their proposals.

Free and frank expression of opinions

50. The agency also submitted that disclosure of Document 001 would be contrary to the public interest as it would inhibit free and frank expression of opinions when evaluating future tender submissions.
51. Firstly, it is necessary to note that in *Treglown v SA Police* the District Court said that 'it may be presumed that the prospect of disclosure will not ordinarily inhibit candour such as to be contrary to the public interest'.⁶
52. I am also not persuaded by the agency's submission, as I consider it is unlikely that public officers would not fulfil their duties merely out of concern that their professional opinions could be publicly disclosed.
53. In light of the above, I do not consider that the submissions put forward by the agency outweigh the public interest considerations in favour of disclosure, including:
- the promotion of transparency and accountability of decisions made by government agencies, noting that disclosure would allow the public to determine whether the successful bidder was selected on merit
 - providing individuals with access to information that is of particular interest or relevance to them
 - the potential that providing unsuccessful bidders with more detailed feedback on their proposal may allow them to address and improve on future proposals,

⁶ *Treglown v SA Police* [2011] SADC 139 [159].

potentially resulting in those bidders offering better value services that meet the needs of the agency, and therefore the public, in future.

54. Accordingly, I do not consider that the information concerning Ebor Computing in Document 001 is exempt under clause 9(1) of the FOI Act.

Document 003

Does the document contain matter that relates to an opinion, advice or recommendation that has been obtained, prepared or recorded or consultation or deliberation that has taken place?

55. I am satisfied that the information concerning Ebor Computing in Document 003 relates to a deliberation of an evaluation panel.

Was that opinion, advice or recommendation provided in the course of, or for the purposes of, the decision-making function of the agency?

56. I am also satisfied that the deliberation took place for the purposes of the decision-making functions of the agency, as it was prepared in order to inform the agency of the preferred supplier.

Would disclosure of the information be contrary to the public interest?

57. I do not consider that disclosure of Document 003 would be contrary to the public interest for the same reasons set out above in relation to Document 003.

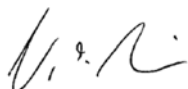
58. Therefore, I do not consider that Document 003 is exempt under clause 9(1) of the FOI Act

Comment

59. The agency generally submitted that it does not wish to release the documents as doing so would encourage other bidders to seek such information in the future.
60. This is not a relevant consideration when determining an application for access to information, and is contrary to the objects of the FOI Act which aim to 'facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies.'
61. Members of the public are entitled to seek access to information held by government agencies, and discouraging them from doing so should not be a relevant consideration when determining FOI applications.

Determination

62. In light of my views above, I vary the agency's determination.
63. My view is that information relating to Ebor Computing in Document 001 and 003, including information describing the assessment criteria, is not exempt and should be released.
64. It is also my view that as the applicant has not sought access to information relating to competitors' proposals, that information should be redacted.



Wayne Lines
SA OMBUDSMAN

19 July 2018

APPENDIX

Procedural steps

Date	Event
27 September 2017	The agency received the FOI application dated 27 September 2018.
27 October 2017	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
18 January 2018	The agency received the internal review application dated 16 January 2018.
18 February 2018	The agency failed to determine the application within the statutory time frame, and is taken to have confirmed the original determination. ³
8 March 2018	The Ombudsman received the applicant's request for external review dated 8 March 2018.
9 March 2018	The Ombudsman advised the agency of the external review and requested submissions and documentation.
23 April 2018	The agency provided the Ombudsman with its submissions and documentation.
4 July 2018	The Ombudsman made a provisional determination.
6 July 2018	The Ombudsman received a response from the applicant to his provisional determination
18 July 2018	The Ombudsman received a response from the agency to his provisional 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).