

## Determination

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

Applicant	Mr Chris Picton MP
Agency	Department of the Premier and Cabinet
Ombudsman reference	2019/01271
Agency reference	DPC/18/3657
Determination	The determination of the agency is reversed.

## 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:

Documents (including emails, minutes, letters, notes, briefings and other documents) regarding discussions between DPC and the Adelaide Development Company (ADC) regarding ADC land at Moana.

### Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.
3. The agency identified 14 documents within the scope of the application and formed the view that 2 of the documents contained matter concerning the business affairs of the third party named in the application, the Adelaide Development Company (**ADC**). In accordance with its obligations under the FOI Act, the agency consulted ADC on 9 November 2018.
4. In response to my provisional determination, representatives for ADC advised that the correct name for the entity named in the application is Moana Sands Pty Ltd (**Moana Sands**). I shall refer to that party as such, except where I cite the submissions of the agency. I shall refer to the land referred to in the application as 'the land at Moana'.
5. On 16 November 2018, Moana Sands provided a response to the agency and submitted that the two documents were exempt.
6. On 21 November 2018, the agency issued a determination, refusing to release documents 11 and 12 on the basis that they are exempt by virtue of clause 7(1)(b) and 7(1)(c). The agency also released documents 6 and 9 to the applicant, but belatedly formed the view that these documents were also exempt by virtue of clause 7.
7. In its submissions to my Office, the agency provided an explanation of the events that followed:

On 7 December 2018... DPC wrote to Mr Picton advising him of the oversight and asking him to return, delete or destroy all copies of documents 6 and 9 (including copies provided to anyone else) until the third party's rights were exhausted.

On 7 December 2018, correspondence was also provided to ADC advising them of the oversight and inadvertent release of documents 6 and 9. A copy of the original determination and the documents in question were provided to ADC and they were advised that the company could seek an internal review of the original determination in respect of documents 6 and 9.

On 14 December 2018, Mr Picton applied for an internal review (IR) of the original determination and the decision to refuse access to document 12.

On 30 December 2018, ADC's lawyers provided correspondence seeking a review of the determination to release document 6 and 9, access to all documents produced to the applicant and the provision of the name and address of the applicant.

On 31 December 2018, as no response had been received from Mr Picton, further correspondence was sent to Mr Picton requesting a response to DPC's request to return, delete or destroy the documents in question.

On 3 January 2019, Mr Picton queried the 'return, delete or destroy' of the documents. ... DPC responded to Mr Picton's query on 10 January 2019 advising him that pursuant to section 27(3)(d) of the FOI Act, DPC was required to defer the provision of the documents to him and he had no right to receive the documents under the FOI Act as the documents should not have been included in the materials provided to him. Mr Picton was also advised that as ADC had lodged an application for IR of the decision to release the documents in question, any right of access under the Act was deferred until that application was determined. At the time of writing, DPC has not received any response from Mr Picton to indicate that he has complied with the request to return, delete or destroy the [sic] documents 6 and 9.<sup>1</sup>

8. At the request of the agency, the applicant agreed to allow the agency an extension until 7 January 2019 to issue an internal review determination.
9. The agency did not determine either the applicant's or Moana Sands' internal review applications within the statutory time frame, and is taken to have confirmed the original determination.<sup>2</sup>

### Jurisdiction

10. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.
11. I have exercised my discretion under section 39(4) of the FOI Act to extend the time for making an application for external review, having regard to the history of the matter, as detailed above, and the applicant's agreement to the agency's extension of time for the internal review determination. I have not received any objections from the parties in this regard.
12. I do not consider that it is within my jurisdiction as an external review authority to compel or require the applicant to return or destroy documents that were accidentally released to him in the course of the agency's determination. I am of the view that this is a matter that would need to be addressed by the agency, the applicant and Moana Sands.

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<sup>1</sup> Letter from the agency to this Office, 26 March 2019.

<sup>2</sup> *Freedom of Information Act 1991*, section 29(5).

## Provisional determination

13. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 18 November 2019. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
14. The agency responded to my provisional determination but advised that it had no further submissions. The applicant did not provide a response.
15. Representatives for Moana Sands provided submissions in response to my provisional determination as follows:

### Document 12

Document 12, is a summary of events apparently produced by the Agency. The document is not a complete record nor is it accurate in every respect. Nonetheless, it does contain material concerning the business affairs and of commercial value to Moana Sands. According, Moana Sands maintains that the disclosure of this document should not be permitted as it constitutes an exempt document for the reasons set out in our earlier submissions to the Agency...

We note the reference to "*the age of the information*" as being a reason that release of the information would not reasonably have an adverse effect on Moana Sands' business affairs.

Residential development is a long-term business. It involves long-term landholdings or development projects that span multiple decades. Document 12 purports to relate to events regarding rezoning of a site owned by Moana Sands for residential purposes. Such rezoning has not yet occurred. The information has not yet been superseded by events (ie any actual rezoning), so the age of the information is irrelevant. In addition, the release of misinformation could cause nuisance or harm to the business affairs of Moana Sands.

We repeat our submissions in our letters to the Agency dated 16 November 2018 and 30 December 2018 that the document should not be released as it is an exempt document for the purposes of schedule 1, clauses 7(1)(b) and (c) thus access should be refused under section 20(1)(a) of the Freedom of Information Act 1991.

### Redactions of portions of document

If you are despite these submissions minded to release the document, then, in light of the tentative findings (at [29] of the Provisional Determination), at least the third and seventh dot point items in the document should be redacted.

In like fashion, the eighth and final dot points should also be redacted.

### Summary

Moana Sands is aggrieved at the manner in which the Agency have [sic] managed this FOI process. The behaviour to date and any determination to release Document 12 will prejudice the provision of future information to the Government.

16. In its submissions to the agency on 16 November 2018, Moana Sands, by way of its representatives, argued that document 12 is exempt by virtue of clause 7(1)(b) as:
  - it reveals
    - the history of Moana Sands<sup>3</sup>
    - the proposed development of the land at Moana

<sup>3</sup> Having regard to the information in document 12, it appears that this refers to the history of the land, and not the company.

- commercial transactions involving Moana Sands in regards to the land at Moana
- negotiations with the government concerning proposals to rezone the land at Moana
- the information is central to its business operations, particular in regards to the land at Moana
- the information is commercially sensitive and has value to Moana Sands
- that value would be diminished if the information were to be released
- disclosure would be contrary to the public interest as:

There is a real possibility that the documents,<sup>4</sup> if released, will be used unfairly against our client, including by commercial competitors or opponents of our client, which is adverse to the public interest.

17. In regards to clause 7(1)(c), Moana Sands' representatives argued that document 12 contains information concerning its business, professional and commercial affairs and that:

It can be reasonably expected that the material may, if released, be used inappropriately or otherwise adversely to our client's commercial affairs, including being used by commercial competitors or persons opposed to our client's operations and proposal for Moana Sands land.

Our client ought to enjoy a relative degree of certainty that information about its business affairs will not be released to the public at large or to unknown applicants who may intend to act unfairly and adversely to its interests.

The release of the documents will reduce this certainty and will thereby prejudice the future supply of relevant information affecting business affairs by entities in my client's position, in their future dealings with the State Government.

18. Moana Sands' submissions to the agency by letter dated 30 December 2018 concern documents that have not been considered in the course of this external review. However, the submissions reiterate their concerns for the release of information regarding the history and rezoning of land at Moana.

### Relevant law

19. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>5</sup>
20. 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.
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.

<sup>4</sup> In reference to document 11 and 12.

<sup>5</sup> *Freedom of Information Act 1991*, section 12.

*Agency submissions and section 19(2a)*

23. Prior to my provisional determination, the agency proposed to release document 12 to the applicant, withdrawing its claim that the document is exempt by virtue of clause 7(1)(b) and 7(1)(c) on the basis that:
- any information of commercial value in the document would not be diminished if released
  - while it is arguable that the document concerns ADC's business affairs, release of that information was not likely to prejudice the supply of information to the Government or adversely affect ADC's business affairs
  - in any event, release of the document would not be contrary to the public interest.
24. The agency first considered whether to release document 12 by issuing a determination under section 19(2a) of the FOI Act. Sections 19(2) and 19(2a) provide:

(2) If—

(a) —

(i) the principal officer of an agency has, under section 14A, extended the period within which an application must be dealt with by the agency; and

(ii) the agency fails to determine the application within the period as so extended

(b) in any other case—an agency fails to determine an application within 30 days after receiving the application

The agency is taken to have determined the application by refusing access to the document to which it relates for the purposes of Division 3 and Part 5.

(2a) However, nothing prevents an agency from making a determination to give access to a document on an application after the period within which it was required to deal with the application (and any such determination is to be taken to have been made under this Act).

25. However, it is my view that a decision to release documents, purportedly under section 19(2a), is not a determination within the meaning of the FOI Act if an agency has already made an express determination to refuse access. I consider that the wording of section 19(2a) means that its operation follows a failure to make a determination, detailed in the preceding section 19(2). If an agency chooses to release documents that it had previously determined to be exempt, I consider that it would do so without the protections provided by the FOI Act.
26. I advised that agency of this view when I sought to confirm whether a purported section 19(2a) determination had been issued to the parties.<sup>6</sup> At the time of my enquiry, the agency had not issued its purported determination.
27. In conducting external reviews under the FOI Act, I may try to effect a settlement between the participants to a review.<sup>7</sup> In light of the agency's revised view, I considered whether settlement was appropriate before preparing my provisional determination. However, given the presence of an interested party who, in my understanding, may have been aggrieved by this matter, I considered it appropriate to proceed and consider the exemption clauses originally claimed by the agency and argued by Moana Sands.<sup>8</sup>

<sup>6</sup> Letter to the agency, 8 April 2019.

<sup>7</sup> Section 39(5)(c), *Freedom of Information Act 1991*.

<sup>8</sup> The agency's original determination repeated, almost identically, the submissions it had received from Moana Sands by letter dated 16 November 2018.

## Documents in issue

28. The agency identified 14 documents within the scope of the application.
29. In response to an enquiry by my Officer, the applicant confined the scope of this external review to the agency's refusal to release document 12.<sup>9</sup>
30. Document 12 is titled 'Summary of History of Moana Sands', and has a date range between 1947 and May 2016.

## Issues in this review

31. The issue to be determined is whether the agency has justified its determination to refuse access to document 12 on the basis that it is exempt by virtue of clause 7(1)(b) and 7(1)(c).

## Consideration

### *Commercially valuable information - clause 7(1)(b)*

32. For a document to be properly exempt by virtue of clause 7(1)(b), it must contain information (other than trade secrets) that has commercial value to any agency or any other person, and the disclosure of that information must reasonably be expected to destroy or diminish the value of the information. Moreover, disclosure must, on balance, be contrary to the public interest.
33. Whether or not the information has commercial value is a question of fact. In *Re Cannon and Australian Quality Egg Farms Limited*, the Queensland Information Commissioner considered the phrase and noted that there are two possible interpretations:

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 the agency or another 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 a 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...<sup>10</sup>

34. I generally agree with this view and consider it applicable to clause 7(1)(b).
35. While I recognise that document 12 provides a summary history of the land at Moana and I accept that certain parts of that summary concern the business affairs of Moana Sands, I am not satisfied that the information itself is commercially valuable in the sense that it is essential to the profitability of Moana Sands' continuing business operation or that a genuine arms-length buyer would be prepared to pay to obtain that information. I accept that the information may affect the viability and profitability of the land at Moana, but I am not persuaded by the submissions that the information itself is central to its business operations.

<sup>9</sup> Email between the applicant's office and my Officer, 17 September 2019.

<sup>10</sup> *Re Cannon and Australian Quality Egg Farms Limited* [1994] QICmr 9 at [54]-[55].

36. In any event, I am not satisfied that the value of *the information* would be diminished or destroyed if released. The release of information about authorisations or rezoning, for example, may affect the business to which that information relates, but as information which records an administrative act, it is unclear to me how any possible value *in the information* may be affected, or indeed diminished or destroyed by disclosure.
37. As such, I consider that document 12 is not properly exempt by virtue of clause 7(1)(b).

*Business affairs - clause 7(1)(c)*

38. For a document to be exempt pursuant to clause 7(1)(c), it must contain information concerning the business, professional, commercial or financial affairs of any agency or any other person and the disclosure of that information:
- could reasonably be expected to have an adverse effect on those affairs or prejudice the future supply of such information to the Government or to an agency and
  - would, on balance, be contrary to the public interest.

*Business affairs*

39. In *Re Cannon and Australian Quality Egg Farms Limited*, the Queensland Information Commissioner stated:

The words 'business, professional, commercial or financial' are hardly apt to establish distinct and exclusive categories; there must in fact be substantial overlap between the kinds of affairs that would fall within the ambit of the ordinary meanings of the words 'business', 'commercial' and 'financial', in particular. The common link is to activities carried on for the purpose of generating income or profits.<sup>11</sup>

40. I consider that the 3<sup>rd</sup> dot point, and the final 3 lines of the 7<sup>th</sup> dot point of document 12 may contain information concerning the business affairs of Moana Sands.
41. In its submissions to my Office, Moana Sands' argued that the 8<sup>th</sup> and 11<sup>th</sup> dot points also concern its business affairs. I do not consider that information describing ministerial action under the *Aboriginal Heritage Act 1988* or local government council meetings constitute information concerning the generation of income or profits. While this information relates to Moana Sands and its property, my view remains that the information does not concern the income or profit generation activities of that party.
42. I do not consider that the remainder of the information concerns Moana Sands' business affairs, but rather details:
- the enactment of the Aboriginal Heritage Act and the operation of that Act to the land at Moana
  - actions by former South Australian and Commonwealth ministers, and third parties other than Moana Sands
  - internal government records.
43. I also note Moana Sands' submissions that the information in the document is not accurate in every respect'.<sup>12</sup>
44. It may be the case, in some circumstances, that misinformation about a business could constitute its business affairs, and that release of that information could be reasonably expected to have an adverse effect on those affairs. Moana Sands offered no clarification as to which parts of the document are inaccurate, or in what manner. As such, I am not satisfied, in this instance, that any inaccurate information in document

<sup>11</sup> *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, [81].

<sup>12</sup> Letter from representatives of Moana Sands to my officer, 9 December 2019.

12, if it is present, constitutes the business affairs of Moana Sands and that release could reasonably be expected to have an adverse effect on those affairs.

*Adverse effect or prejudice to the supply of information*

45. I turn to consider whether release of dot point three and the final three lines of dot point seven could reasonably be expected to have an adverse effect on the affairs of Moana Sands, or prejudice the supply of such information to the Government or an agency. For the sake of completeness, I shall also consider whether the release of dot points 8 and 11 could reasonably be expected to have the same effects.
46. The phrase ‘could reasonably be expected’ requires that I make an objective judgement of whether it is reasonable, as distinct from irrational, absurd or ridiculous, to expect that disclosure could result in the effects envisioned by clause 7(1)(c). That is, the expectation must be based on reason and not be ‘fanciful, far-fetched or speculative’.<sup>13</sup>
47. It will be sufficient:
- 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 properly be 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.<sup>14</sup>
48. In its submissions to the agency, Moana Sands argued that the information in document 12 could be ‘used by commercial competitors or persons opposed to [our] operations and proposals’.<sup>15</sup> Moreover, although the document largely details historical information, Moana Sands objected to my provisional view that this would not diminish the adverse effect that it anticipates.<sup>16</sup>
49. In light of Moana Sands’ submissions, I accept that some of the information in document 12 remains relevant to that party and its ongoing affairs. However, in light of publicly available information in the media<sup>17</sup> and in council meeting documents of the City of Onkaparinga,<sup>18</sup> I am not satisfied that disclosure of *this* information, relating to Moana Sands’ intentions, could be reasonably expected to have an adverse effect on its business affairs. It is unclear what use could be made of *this* information to have such an effect. As such, I am not satisfied that dot points 3 and 11 are properly exempt by virtue of clause 7(1)(c).
50. Dot point 8 concerns ministerial action under the Aboriginal Heritage Act. The final three lines of dot point 7 concern the transfer of land to the Government in the 1990s. I have not been provided submissions to support the claim that this information, if released, could have an adverse effect. In any event, I do not consider that disclosure of that information could reasonably be expected to have an adverse effect on the business affairs of Moana Sands. Again, it is unclear how use by competitors or opposed persons could have such an effect, as Moana Sands have argued.

<sup>13</sup> *Konieczka v South Australian Police* [2006] SADC 134, [14].

<sup>14</sup> *Iplex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54, applying *Re Actors Equity Association of Australia (No 2)* (1985) 7 ALD 584, 590.

<sup>15</sup> Letter from representatives of Moana Sands to the agency, 16 November 2018.

<sup>16</sup> Letter from representatives of Moana Sands to my officer, 9 December 2019.

<sup>17</sup> Michael Milnes. ‘Adelaide Development Company wants to speed up proposals for 236 new houses in Moana’, *The Daily Telegraph*, 23 August 2013, accessed online at <https://www.dailytelegraph.com.au/news/adelaide-development-company-wants-to-speed-up-proposal-for-236-new-houses-in-moana/news-story/d351c9bb8c5afbee8e7a9811fa065abf?sv=98244b7e9bee678a82c63547490e9362> on 5 February 2020.

<sup>18</sup> Council meeting documents record consideration of this matter as early as 2013, accessed at <https://www.onkaparingacity.com/Council/Council-and-Committees/Agendas-and-Minutes/Search-all-agendas-and-minutes> on 5 February 2020.

51. Finally, I turn to consider whether release of the information could reasonably be expected to prejudice the supply of future information to the Government or to the agency. As the document appears to have been generated by the agency, and provides its account of the history of land at Moana (largely in relation to its own actions), I am not satisfied that release could reasonably be expected to prejudice the future supply of such information to the Government or the agency.

52. I conclude that document 12 is not properly exempt by virtue of clause 7(1)(c).

*Comment on the public interest*

53. In light of my views above, I do not intend to consider whether release of document 12 would, on balance, be contrary to the public interest. Nevertheless, I consider it appropriate to make the following comment.

54. In its submissions to the agency, Moana Sands argued that

There is a real possibility that the documents, if released, will be used unfairly against our client, including by commercial competitors or opponents of our client, which is adverse to the public interest.

55. I do not agree with this submission, and have regard to the Guidelines issued by the Australian Information Commissioner under *Freedom of Information Act 1982* (Cth),<sup>19</sup> which provides that the public interest test is considered to be, among other things:

- something that is of serious concern or benefit to the public, not merely of individual interest<sup>20</sup>
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public.<sup>21</sup>

### Determination

56. In light of my views above, I reverse the agency's determination such that document 12 is released to the applicant in full.



Wayne Lines  
SA OMBUDSMAN

12 February 2020

<sup>19</sup> Office of the Australian Information Commissioner, *FOI Guidelines: Guidelines issued by the Australian Information Commissioner under s93A of the Freedom of Information Act 1982*, version 1.4, part 6.5.

<sup>20</sup> *British Steel Corporation v Granada Television Ltd* [1981] AC 1096.

<sup>21</sup> *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at 480 (Barwick CJ).

## APPENDIX 1

### Procedural steps

Date	Event
21 September 2018	The agency received the FOI application.
21 October 2018	The agency failed to determine the application within the 30 day period required by the FOI Act, <sup>1</sup> and is deemed to have refused access to the documents. <sup>2</sup>
9 November 2018	The agency consulted Moana Sands Pty Ltd, seeking its views on the disclosure of document 11 and 12.
16 November 2018	Moana Sands provided a response to the agency, claiming that the documents were exempt by virtue of clause 7(1)(b) and 7(1)(c).
21 November 2018	The agency belatedly determined the application.
7 December 2019	The agency advised the parties of the inadvertent release of documents 6 and 9.
14 December 2018	The agency received the applicant's internal review application in regard to the refusal to release document 12.
24 December 2018	The agency sought an extension until 7 January 2019 to issue an internal review determination.
28 December 2018	The applicant agreed to the agency's request for an extension.
30 December 2018	The agency received Moana Sands' application for internal review.
8 January 2019	The agency failed to determine the applicant's application for internal review by the agreed deadline, and is taken to have confirmed the original determination.
14 January 2019	The agency failed to determine Moana Sands' application within the statutory time frame, and is taken to have confirmed the original determination. <sup>3</sup>
5 February 2019	The Ombudsman received the applicant's request for external review dated 3 February 2019.
7 February 2019	The Ombudsman advised the agency of the external review and requested submissions and documentation.

<sup>1</sup> *Freedom of Information Act 1991*, section 14(2).

<sup>2</sup> *Freedom of Information Act 1991*, section 19(2).

<sup>3</sup> *Freedom of Information Act 1991*, section 29(5).

<b>Date</b>	<b>Event</b>
28 March 2019	The agency provided the Ombudsman with its submissions and documentation.
18 November 2019	The Ombudsman issued his provisional determination and invited submissions from the parties.
25 November 2019	The agency advised that it had no further submissions in response to the Ombudsman's provisional determination.
9 December 2019	Representatives for Moana Sands provided submissions in response to the Ombudsman's provisional determination.