

Determination

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

Applicant	The Hon Stephen Mullighan MP
Agency	Premier
Ombudsman reference	2019/01163; 2019/01165; 2019/01206; 2019/01207
Agency reference	18/3997; 18/4000; 18/4003; 18/3982
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 applied to the agency:
 1. For all minutes, briefings, notes, emails and correspondence held by the Office of the Premier, the Hon Steven Marshall MP, regarding the proposed hotel development at Adelaide Oval.¹
 2. For all minutes, briefings, notes, emails and correspondence held by James Stevens, in the Office of the Premier, regarding the proposed hotel development at Adelaide Oval.²
 3. For all minutes, briefings, notes, emails and correspondence held by Paul Armanas, in the Office of the Premier, regarding the proposed hotel development at Adelaide Oval.³
 4. For all correspondence and emails from the Stadium Management Authority to the Premier, the Hon Steven Marshall MP and the Premier's Office.⁴
2. Each of the applications concern the hotel development at Adelaide Oval (**the Adelaide Oval hotel**) and there is significant overlap in the documents identified by the agency. As such, I formed the view that it would be efficient to consider each of the applications in the same external review. I advised the parties of my intention in my provisional determination and did not receive a response to suggest a different approach.

Background

3. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

¹ Ombudsman SA reference: 2019/01163, DPC reference: 18/3997

² Ombudsman SA reference: 2019/01165, DPC reference: 18/4000

³ Ombudsman SA reference: 2019/01206, DPC reference: 18/4003

⁴ Ombudsman SA reference: 2019/01207, DPC reference: 18/3982

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4. On 4 February 2019, the applicant applied for external reviews of 11 related determinations by the agency. The agency had not issued determinations in response to the original or internal review applications and was deemed by the FOI Act to have refused access to the documents in issue.
 5. On 14 March 2019, my Officers met with the applicant and an Accredited FOI Officer of the agency. At that meeting, the Accredited FOI Officer advised that the agency had not issued its determinations due to consultation with interested parties. It appeared that the agency adopted the following process for consultation with interested parties:
 - the agency identified documents within the scope of the applications
 - the agency concluded that consultation was required
 - the agency provided its views to the interested parties only and sought their response
 - the agency intended to issue a determination to the applicant, following receipt of submissions from the interested parties.
 6. According to the Accredited FOI Officer, the agency adopted this approach to exhaust the review rights of the interested parties before issuing determinations to the applicant. The Accredited FOI Officer advised that it was the agency's view that it could not issue a determination to an applicant and interested parties at the same time as to do so would release the documents to an applicant before the review rights of an interested party had expired.
 7. While this approach is well intentioned, I do not consider that it was in accordance with the FOI Act. Agencies and external review authorities such as myself are required to consult with interested parties if the documents appear to contain information covered by Division 2 of the FOI Act. However, this consultation does not operate to exhaust the review rights of those parties. Rather, an interested party may seek review of the agency's determination *after* it has been issued to the parties, including the applicant. An agency should advise all parties of the determination at the same time but delay the provision of the documents for the duration of the relevant review period, allowing any interested parties to seek internal or external review, depending on the stage or status of the matter.
 8. In my view, issuing a determination to the interested parties alone may prioritise their views over that of the applicant, and may allow the submissions of those parties to sway the views of the agency before the applicant is aware of the agency's determination.
 9. At the meeting on 14 March 2019, the Accredited FOI Officer offered to issue partial determinations to the applicant by 4 April 2019. The applicant agreed to this proposed course of action.
 10. On 9 April 2019, the agency issued its belated partial determinations over documents that had not required consultation with interested parties.
 11. On 7 May 2019, the applicant advised that he wished to proceed with the external reviews of seven applications, as the agency's final determinations had yet to be provided. On 13 May 2019, my Officer advised the agency of this and requested the documents and the agency's submissions.
 12. The agency released further documents to the applicant on 29 May 2019. On 6 June 2019, the applicant confirmed his intention to proceed with the applications that are the subject of this external review.

Jurisdiction

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

Provisional determination

14. I provided my tentative view of the agency's determinations to the agency and the applicant, as well as six interested parties,⁵ by my provisional determination dated 6 December 2019. I informed the parties that subject to my receipt and consideration of their submissions, I proposed to vary the agency's determinations.
15. Five interested parties⁶ provided submissions in response. I have considered these submissions in this determination. The agency and interested party nine responded to my provisional determination and made no further submissions. The applicant and interested party three did not respond to my provisional determination.
16. Interested party one provided submissions in response to my provisional determination and stated:

[We] agree with the Ombudsman's consideration of all documents considered properly exempt. [We] do not oppose the Ombudsman's consideration of document marked as "not properly exempt", apart from the following:

- Doc 1 – The contents of the letter to the Minister dated 2 August 2018
- Doc 5 – The contents of the Board Memorandum dated 4 October 2018
- Doc 6 – The contents of the slide headed "Key Timings"

In our view, the disclosure of this information would be contrary to the public interest. The release of confidential information by Government would not only result in damage to [our business], it would have the effect of deterring commercial entities from negotiating proposals which require the provision of commercially sensitive information to the Government, that would be disclosed through an application under the Act. This may have a dampening effect of [sic] the ability of the Government to create and develop commercial opportunities in this State.

As a result of the above, we consider the documents to be exempt in accordance with clauses 7 and 13 of Schedule 1 to the Act.⁷

17. Interested party one did not specify which part of clause 13 they considered applied to document 1, 5 and 6 and did not provide information in support of the claimed application of either clause 13(a) or 13(b) other than the submissions set out above.
18. In *Pope and Queensland Health*, the Queensland Information Commissioner at the time considered that while an applicant bore no formal legal onus, they must nevertheless ensure that they present sufficient evidence to the appropriate review body to substantiate their submissions.⁸ I have the same expectation of interested parties seeking to claim exemption over information.
19. Nevertheless, I consider the applicability of clause 13(a) and 13(b) below.

⁵ Interested parties one, three, six, seven, eight, nine. I did not consider that my provisional view required consultation with interested parties two, four or five as the documents either do not concern their business affairs (interested party two), or I did not propose release of information concerning their business affairs (interested parties four and five).

⁶ Interested party one, six, seven and eight.

⁷ Letter from interested party one to my Officer, 2 January 2020.

⁸ *Pope and Queensland Health* (1994) 1 QAR 616, [17].

Relevant law

20. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.⁹
21. 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.
22. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
23. 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

24. The following documents are in issue in this review. As there is overlap in the documents identified in each of the applicant's original applications, they have been renumbered for ease of reference:

Doc	Description	Agency identification	Claimed exemption
1	Letter from an interested party (interested party one) to Minister Stephan Knoll MP dated 2 August 2019	Document 12 in DPC 18/3982 Document 2 in DPC 18/3997 Document 2 in DPC 18/4000	Clause 7(1)(c)
2	Emails between agency staff and another interested party (interested party two)	Document 25 in DPC 18/3982	Clause 6(1)
3	Released in full to the applicant. In my provisional determination, I explained that I did not intend to consider the document in this external review and did not receive any submissions in response		
4	Architectural renditions and designs	Document 4 in DPC 18/3997 Document 4 in DPC 18/4000	Clause 7(1)(b)
5	Confidential memorandum authored by interested party one	Document 5 in DPC 18/3997	Clause 7(1)(c)
6	Preliminary proposal presentation	Document 6 in DPC 18/3997	Clause 7(1)(b) and 7(1)(c)
7	Internal agency emails	Document 7 in DPC 18/3997	Clause 1(1)(e)
8	Budget Cabinet Committee agenda	Document 8 in DPC 18/3997 Document 10 in DPC 18/3997	Clause 1(1)(e)
9	Internal agency emails	Document 9 in DPC 18/3997	Clause 1(1)(e)
10	Interagency email	Document 11 in DPC 18/3997	Clause 1(1)(c) and 6(1)
11	Cabinet submission	Document 12 in DPC 18/3997	Clause 1(1)(a)
12	Draft minute	Document 26 in DPC 18/3997	Clause 7(1)(b) and 6(1)
13	Minute	Document 32 in DPC 18/3997 Document 15 in DPC 18/4003	Clause 7(1)(b) and 9(1)

⁹ Freedom of Information Act 1991, section 12.

Doc	Description	Agency identification	Claimed exemption
14	Draft letter from Minister Stephan Knoll MP to interested party one	Document 33 in DPC 18/3997 Document 16 in DPC 18/4003	Clause 7(1)(b)
15	Attachment to the minute and draft letter	Document 34 in DPC 18/3997 Document 17 in DPC 18/4003	Clause 7(1)(b) and 1(1)(e)
16	Interagency email	Document 47 in DPC 18/3997	Clause 10
17	Email between agency staff and interested party two	Document 9 in DPC 18/4003	Clause 6(1) and 7(1)(b)

25. The agency redacted two paragraphs from the first page of document seven. The remainder of the document was considered to be outside of the scope of the application. My jurisdiction under the FOI Act does not extend to interpretation of the scope of an application, or whether the agency has correctly identified a document as being within scope. These are not 'determinations' within the meaning of the FOI Act that may be the subject of my review.¹⁰ As such, my consideration of document seven has been confined to those parts which the agency determined to be within scope.

Issues in this review

26. The issue to be determined is whether the agency has justified its determination to refuse or partially refuse access to the documents in issue on the basis that they are exempt by virtue of clauses 1(1)(a), 1(1)(c), 1(1)(e), 6(1), 7(1)(b), 7(1)(c) and 10(1). I shall also consider whether documents 1, 5 and 6 are properly exempt by virtue of clause 13, as claimed by interested party one.

Consideration

Clause 1(1)(a) - Documents specifically prepared for submission to Cabinet

27. In its submissions to my Office, the agency stated that document 11 contains information that was specifically prepared for submission to Cabinet and is therefore exempt by virtue of clause 1(1)(a), which provides:
- (1) A document is an exempt document –
- (a) if it is a document that has been specifically prepared for submission to Cabinet (whether or not it has been so submitted)...
28. I consider that, in the context of clause 1(1)(a), the word 'specifically' means 'specially' prepared for submission to Cabinet. Furthermore, a reference to Cabinet includes committees and subcommittees of Cabinet.¹¹ Whether a document has been prepared for submission to Cabinet is to be ascertained by reference to the events at the time the document was created.¹²
29. Having regard to the markings and content of document 11, I am satisfied that it was specially prepared for submission to Cabinet and is therefore properly exempt by virtue of clause 1(1)(a).
30. The agency did not claim that document 8 is exempt by virtue of clause 1(1)(a). Document 8 is an agenda for the Budget Cabinet Committee. I am satisfied that it was specially prepared for submission to that Committee and is therefore properly exempt by virtue of clause 1(1)(a). I do not intend to consider whether that document is also exempt by virtue of clause 1(1)(e), as the agency claimed. I advised the parties of this

¹⁰ *El Shafei v Central Adelaide Local Health Network* [2017] SACAT 5.

¹¹ *Freedom of Information 1997*, clause 1(3).

¹² *Re Fisse and Department of Treasury* (2008) 101 ALD 424, 434.

intention in my provisional determination. I did not receive any submissions to suggest a different approach.

Clause 1(1)(c) - Copies, parts or extracts of a document submitted to Cabinet

31. In its submissions to my Office, the agency stated that document 10 contains an extract of a document that was submitted to Cabinet, and is therefore exempt by virtue of clause 1(1)(c). The agency claimed that three words in document 10 constitute an extract of a document that was submitted to Cabinet.
32. Clause 1(1)(c) provides that a document is exempt if it:
 - is a copy or a part of, or
 - contains an extract from
 a document specifically prepared for submission to Cabinet, or a draft of a document specifically prepared for submission to Cabinet.
33. I consider that the redacted words in document 10 merely consist of factual material that does not disclose information concerning any deliberation or decision of Cabinet, or relate directly to a contract or other commercial transaction that is still being negotiated. As such, by virtue of the exception provided by clause 2(a), I am satisfied that document 10 is not properly exempt by virtue of clause 1(1)(c).

Clause 1(1)(e) - Information concerning a deliberation or decision of Cabinet

34. In its submissions to my Office, the agency stated that documents 7-9 and 15 contain information which, if released, would disclose details concerning a deliberation or decision of Cabinet, and are therefore exempt by virtue of clause 1(1)(e), which provides:
 - (1) A document is an exempt document –
 - (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet
35. As noted at paragraph 30, I do not intend to consider whether document 8 is exempt by virtue of clause 1(1)(e) as I am satisfied that it is properly exempt by virtue of clause 1(1)(a).
36. ‘The District Court of South Australia in *Department of State Development v Pisoni (Pisoni)*¹³ and, more recently, the South Australian Civil and Administrative Tribunal in *Department of the Premier and Cabinet v Dan van Holst Pellekaan (van Holst Pellekaan)*¹⁴ considered the test to be applied when considering whether a document is exempt by virtue of clause 1(1)(e).
37. In *Pisoni*, Justice Tilmouth observed:

There is highly persuasive, if not binding authority, to the effect that a document merely revealing a description of an event placed before Cabinet is not protected. Thus in *Secretary to the Department of Infrastructure v Louise Asher MP*, Buchanan JA wrote:

That is not to say that a document supplied to Cabinet for its consideration could never be exempt as disclosing a deliberation of Cabinet. It all depends upon the terms of the document. At one end of the spectrum, a document may reveal no more than that a statistic or description of an event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of

¹³ *Department of State Development v Pisoni* [2017] SADC 34.

¹⁴ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56.

a particular point of view. The former would say nothing as to Cabinet's deliberations; the latter might say a great deal...

Vincent JA considered the question is 'what the document itself would convey in the circumstances, and providing that there is nothing in the document enabling one to draw any inferences as to what may or may not have been the subject of deliberation or decision', the document is unprotected. Redlich JA was of a similar view in *Secretary to the Department of Infrastructure v Asher*. His Honour considered that there was nothing on the face of the subject documents permitting the conclusion that their disclosure would involve disclosure of any "deliberation" or "decision" of the Cabinet.¹⁵

38. In *van Holst Pellekaan*, Executive Member Stevens adopted the meaning attributed to 'deliberation' by Tilmouth J in *Pisoni*.¹⁶ Member Stevens considered that clause 1(1)(e) 'is broader than the equivalent provisions currently existing in other Australian jurisdictions' as a consequence of the inclusion of the words "information concerning any" which do not appear in other jurisdictions' legislation;¹⁷

In other jurisdictions, the test is whether disclosure will "disclose the deliberations or decisions" (of Cabinet). Case law in those jurisdictions must be understood accordingly. Clause 1(1)(e) poses a broader test. It is whether disclosure will disclose "information concerning any deliberation or decision of Cabinet".

In *O'Connor v Leaw Pty Ltd* (1993) 42 NSWLR 285 at page 303, Rolfe JH stated:

'Concerning' has been defined as 'regarding', 'touching', 'in reference or relation to' and 'about'. It is, accordingly, a word of wide import...¹⁸

39. In *van Holst Pellekaan*, Executive Member Stevens considered that there were two questions to be addressed in the application of clause 1(1)(e):

1. Has there been a relevant deliberation or decision of Cabinet?
2. If so, do the documents contain matter the disclosure of which would disclose information concerning that deliberation or decision?¹⁹

40. Having regard to these two questions, I consider that while there has been a relevant decision of Cabinet or a Cabinet Committee, disclosure of document 15, and the relevant parts of documents 7 and 9, would not disclose information concerning a deliberation or decision. Rather, the information in those documents appears to be procedural and does not, in my view, disclose information concerning the deliberations of Cabinet or a Cabinet Committee. As such, I am satisfied that documents 7, 9 and 15 are not properly exempt by virtue of clause 1(1)(e).

Clause 6(1) - Personal affairs

41. In its submissions to my Office, the agency stated that documents 2, 7, 10 and 17 contain information 'relating to the personal affairs of third parties'²⁰ the disclosure of which would be unreasonable, and are therefore exempt by virtue of clause 6(1). Clause 6(1) provides:

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).

¹⁵ *Department of State Development v Pisoni* [2017] SADC 34, [20], citations omitted.

¹⁶ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [70].

¹⁷ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [66].

¹⁸ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [67-68].

¹⁹ *Department of the Premier and Cabinet v Dan van Holst Pellekaan* [2018] SACAT 56, [81].

²⁰ Letter from the agency to my Office, 27 June 2019.

42. Each of the documents are emails, or chains of emails, largely between agency staff and staff from other government departments. Document 2 and 17 also contain emails from the managing director of interested party two. The agency claimed that the mobile phone numbers appearing in the signature blocks of the emails, and the email addresses in document 10, are exempt by virtue of clause 6(1).
43. As the email addresses in document 10 are tied to the employment of the individuals concerned, I am not satisfied that the details constitute their personal affairs, and are not properly exempt by virtue of clause 6(1). I also note that the agency did not consistently claim that such details are exempt.
44. While the mobile phone numbers appear in the signature blocks of the relevant individuals' emails, it is unclear whether the details are solely for use in employment, or mixed employment and personal use. Nevertheless, the ability to be contacted on a mobile telephone number outside of working hours, in circumstances where that person would not ordinarily be performing their employment duties, indicates that the information involves matters of private concern.²¹ Out of an abundance of caution, I consider that the details may constitute the personal affairs of the individuals concerned and turn to consider whether release would be unreasonable.
45. One of the mobile phone numbers in document two appears to have been disconnected.²² I am satisfied that the information no longer concerns the personal affairs of the relevant individual and is therefore not properly exempt by virtue of clause 6(1). As the document also contains the mobile phone number of another person, I shall continue to consider whether release of that information would be unreasonable.
46. In *Treglown v SA Police*, the South Australian District Court stated that, when interpreting 'unreasonable' in clause 6, a decision maker needs:
- ...to consider not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.²³
47. In addition, unreasonableness has, 'at its core, public interest considerations'²⁴ such as the preservation of personal privacy.²⁵
48. In each document, the mobile phone numbers appear to be automatically included in the email signature blocks of the emails, or, in one instance, repeated elsewhere in the body of the email.
49. I consulted with the managing director of interested party two (**interested party seven**), whose mobile phone number appears in documents 2 and 17. In doing so, I noted that the information is publicly available online and that this informed my provisional view that disclosure would not be unreasonable. Interested party seven advised, in a telephone call with my Officer, that they were not concerned with the release of their mobile phone number given that it could be obtained via a simple internet search.²⁶

²¹ *S72 and Department of Justice and Attorney General* [2019] QICmr 49, [100].

²² Attempted phone call by my Officer for the purposes of consultation, 5 December 2019; second attempted phone call by my Officer, 21 January 2020.

²³ *Treglown v SA Police* (2011) SADC 139 at [133] considering *Re Chandra and Minister for Immigration and Ethnic Affairs* (1984) 6 ALD N257, 259 and *Victoria Police v Marke* (2008) 23 VR 223.

²⁴ *Colakovski v Australian Telecommunications Corporation* (1991) 29 CR 429.

²⁵ *Freedom of Information Act 1991*, section 3(2)(b).

²⁶ Phone call between interested party seven and my Officer, 11 December 2019.

50. I consulted with the staff member from another government department (**interested party eight**) whose mobile phone number appears in document 10, and advised that my provisional view was release of that information would not be unreasonable. In response, they advised that while they would prefer for the information not to be released, they understood my reasoning, and made no submissions as to why the information was exempt.²⁷
51. I consulted with the agency staff member whose mobile phone number appears in document seven (**interested party nine**) and advised them of my provisional view. They advised that they had no comment or submissions in response to my provisional determination.²⁸
52. I do not consider that release of the information in issue would be unreasonable given that it appears in the email signature block routinely used by the individuals concerned in the course of their employment. As such, I am satisfied that documents 2, 7, 10 and 17 are not properly exempt by virtue of clause 6(1).

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

53. In its submissions to my Office, the agency claimed that documents 4, 6, 12-15 and 17 are exempt by virtue of clause 7(1)(b) and stated:

The information in these documents outlines information that has a commercial value to the parties involved and the disclosure of this information could be detrimental to the government and any of the business parties involved in the future construction, management and administration of the proposed hotel, and would reveal the commercially valuable affairs of both the government and these partners.

In applying the public interest test, I have considered the object [sic] of the Act, which favour release. I acknowledge there is a strong public interest in the public being made aware of all factors. However, I have determined this is outweighed by the need to ensure the South Australian Government and its business partners are not disadvantaged by the release of information. If disclosed, this information could have negative financial consequences and impact viability of the hotel, which in turn diminishes the economic and cultural benefits to the State. As such, I have determined to refuse release of this information pursuant to clause 7(1)(b).

54. For a document to be properly exempt by virtue of clause 7(1)(b), it must contain information (other than trade secrets) that has a commercial value to any agency or any other person, and the disclosure of that information must reasonably be expected to destroy or diminish its value. Finally, disclosure must, on balance, be contrary to the public interest.
55. 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 any other 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...

²⁷ Email from interested party eight to my Officer, 10 December 2019.

²⁸ Email from interested party nine to my Officer, 27 December 2019.

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...²⁹

56. I generally agree with this view and consider it applicable to clause 7(1)(b).
57. 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)(b). That is, the expectation must be based on reason and not be 'fanciful, far-fetched or speculative'.³⁰
58. Parts of document six that the agency claimed are exempt by virtue of clause 7(1)(b) contain the same information as document four, which the agency claimed is exempt by virtue of clause 7(1)(c). As such, I shall consider the applicability of both clauses over the same information.
59. Document four and six contain architectural renditions and designs of the Adelaide Oval hotel. I am satisfied that the images are commercially valuable to interested party one, and to the party responsible for their creation (**interested party three**), save for one image that appears to be of the existing Adelaide Oval. I am not satisfied that this image is of commercial value to any party.
60. Nearly identical renditions of the proposed hotel development are publicly available³¹ or released elsewhere in the documents.³² The images are from different angles to those contained in documents four and six. In its original submissions, the agency expressed the view that while some concepts and plans have been disclosed, the particular designs contained in the documents have not, and remain exempt by virtue of clause 7(1)(b). However, I also note that one of the redacted images was released to the applicant in other parts of the documents.
61. I am not satisfied that there is a meaningful distinction between publicly available images and those contained in the documents, or of the agency's submissions that the commercial value of the latter would still be diminished by release. I am not satisfied that the release of architectural renditions, where they appear in documents four and six, could reasonably be expected to destroy or diminish their commercial value, given that substantially similar images are already in publicly available. The agency, interested party one and interested party three did not provide submissions in regards to this view following my provisional determination.
62. However, I am satisfied that, if released, the architectural designs contained in documents four and six could reasonably be expected to diminish their commercial value.
63. Document 12 is an unsigned minute. Document 13 is a signed copy of the same minute. Document 14 is an unsigned letter, providing the same information as that in documents 12 and 13. Document 15 is an attachment to documents 12 and 13.
64. Having regard to the status of the Adelaide Oval hotel, I am not satisfied that documents 12-15 contain information that is commercially valuable in the sense that it is essential to the viability of an ongoing or pending 'one-off' commercial transaction.

²⁹ *Re Cannon and Australian Quality Egg Farms Limited* [1994] QICmr 9, [54-55].

³⁰ *Konieczka v South Australian Police* [2006] SADC 134, [13].

³¹ For example, Paula Thompson, 'Work Kicks Off on Oval Hotel', *The Advertiser*, 29 June 2019, Images may also be found by way of an online search using the terms 'Adelaide oval hotel' as of 14 November 2019.

³² Document 6, page 14.

65. However, I am satisfied that the documents contain information concerning the business affairs of interested party one, and will consider the applicability of clause 7(1)(c) below.
66. Document 17 is an email between the agency and interested party two. The agency claimed that one half of one sentence in the email contains commercially valuable information. Given the brevity of the information and adopting the reasoning in *Re Cannon*, its commercial value is unclear. In any event, the information is now publicly available, so I do not consider that release could reasonably be expected to destroy or diminish any commercial value that the information is claimed to hold.
67. I consider that the redacted sentence in document 17 concerns the business affairs of another interested party (**interested party six**). I advised that party of my provisional view in regards to document 17. In response, interested party six submitted that it did not consider the document to be exempt under the FOI Act, and made no objection to its release.³³
68. I turn to consider whether the release of the architectural designs in documents four and six would be contrary to the public interest, and in doing so, I have had regard to the following factors:

In favour of disclosure

- fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability of government agencies in
 - the expenditure of public money
 - the development of important South Australian assets.

Contrary to disclosure

- protecting the privacy and viability of private businesses from unreasonable disclosure
- the ongoing relevance to interested party one and interested party three.

69. Having regard to the ongoing relevance to interested party three in particular, and the public interest in protecting the privacy of private businesses, I am satisfied that release of the architectural designs would be contrary to the public interest, and those parts of documents four and six are properly exempt by virtue of clause 7(1)(b). I do not intend to consider whether the architectural designs are also exempt by virtue of clause 7(1)(c).
70. In summary, my view in regard to the applicability of clause 7(1)(b) is as follows:
- the image of the existing Adelaide Oval is not properly exempt
 - the architectural renditions in documents four and six are not properly exempt
 - the architectural designs in documents four and six are properly exempt
 - documents 12-15 and 17 are not properly exempt.

Clause 7(1)(c) - Adverse effect on business affairs

71. In its original submissions to my Office, the agency stated that documents 1, 5 and 6 are exempt by virtue of clause 7(1)(c) and that:

These documents may contain information regarding commercially sensitive business affairs of a third party. The disclosure of this information could reasonably be expected to have an adverse effect on these affairs. These documents contain information confidentially provided to the government in support of an application. I acknowledge that there is a strong public interest in the public being able to scrutinise the government's

³³ Email from interested party six to my Officer, 12 December 2019.

financial processes with regards to funding approvals. In my view, however, this is outweighed by the need to ensure that companies submitting approval applications are not disadvantaged by the release of sensitive commercial and financial information relating to the operations of their businesses. While the final amount of the loan and interest rates provided by the government have been disclosed publically, it is my view that much of the detailed information submitted as background information supporting this application is exempt pursuant to clause 7(1)(c).³⁴

72. I shall also consider whether the following are properly exempt by virtue of clause 7(1)(c):
- documents 12-15 and 17
 - the architectural renditions in documents 4 and 6.
73. For a document to be properly exempt by virtue of 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.
74. 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 be in fact a 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.³⁵
75. I am satisfied that the following concerns the business affairs of interested party one:
- the redacted parts of document one
 - document five
 - the architectural renditions in documents four and six
 - the remaining redacted parts of document six
 - documents 12-15.
76. I am satisfied that:
- the architectural renditions in documents four and six also concern the business affairs of interested party two
 - the redactions on page 13 of document six also concern the business affairs of two other interested parties (**interested party four** and **interested party five**)
 - documents 12-14 and 17 concern the business affairs of interested party six.
77. I do not consider that the redacted information in document 17 concerns the business affairs of interested party two (in the sense that it concerns the generation of income or profit), but rather is an exchange arising from its business relationship with the agency. However, in my view, the information does concern the business affairs of interested party six, who advised that they do not consider the information to be exempt and made no objection to its release.
78. I turn to consider whether release of the documents could reasonably be expected to have an adverse effect on the business affairs of the parties concerned. Again, in order to do so, I must consider whether that expectation is reasonable, or could be characterised as ‘fanciful, far-fetched or speculative’.³⁶

³⁴ Letter from the agency to my Office, 27 June 2019.

³⁵ *Re Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491, [81].

³⁶ *Konieczka v South Australian Police* [2006] SADC 134, [14].

79. I do not consider that release of the following could be reasonably expected to have an adverse effect on the business affairs of interested party one, interested party three or interested party six (where relevant):
- the redacted parts of document one, given the status of the subject matter
 - the architectural renditions in documents 4 and 6, for the reasons outlined at paragraphs 60 and 61
 - the first and second sections of document five, having regard to publicly available information about the Adelaide Oval hotel
 - the section of document six under the headings 'developments to date' and 'key timings'
 - the redacted part of document 17, as that information has been publicly known for some time.
80. I have had regard to the submissions of interested party one in forming my final view in this regard, provided above at paragraph 16. However, without any supporting submissions, I have not been persuaded by the statement that release of the information in documents one, five and six would have an adverse effect on their business affairs.
81. In contrast, I am satisfied that the release of the following could reasonably be expected to have an adverse effect on the business affairs of interested party one, interested party four and interested party five (where relevant):
- the third section of document 5, under the heading 'issues'
 - the redactions on page 13 of document 6, under the heading 'construction and equity funding requirements' and the redaction on the lower part of the same page
 - documents 12-15.
82. I turn to consider whether release of documents 12-15 and parts of documents 5 and 6, as outlined above, would be contrary to the public interest. In doing so, I have had regard to the following factors:
- In favour of disclosure*
- fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability in
 - the decisions of government agencies in the expenditure of public money
 - the development of important South Australian assets
 - whether the information is publicly available and the age of that information.
- Contrary to disclosure*
- the public interest in protecting the privacy and viability of private businesses from unreasonable disclosure
 - the public interest in protecting the financial viability of important South Australian assets and their ongoing development.
83. While I do not consider that significant public awareness in a matter is a public interest factor in itself, I have taken this into account in relation to the first factor in favour of disclosure.
84. I am satisfied that release of document 12-15 and the third section of document 5 would be contrary to the public interest. In forming this conclusion, I am persuaded by the public interest in protecting the privacy and viability of private commercial entities having regard to:
- the status of negotiations between the agency and interested party one at the time when documents 12-15 were created and in use

- the ongoing relevance and sensitivity of the information in the third section of document 5 to interested party one's business.

85. As such, I am satisfied that documents 12-15 and the third section of document 5, under the heading 'issues' are properly exempt by virtue of clause 7(1)(c).
86. In its original submissions, the agency also referred to the potential applicability of clause 9 to documents 12 and 13. In light of my views above, I do not intend to consider that clause. I advised the parties of this intention in my provisional determination and did not receive any submissions in this regard.

Submissions regarding the public interest

87. In its submissions to my Office, interested party one argued that release of documents 1, 5 and page 14 of document 6 in particular would be contrary to the public interest as

... it would have the effect of deterring commercial entities from negotiating proposals which require the provision of commercially sensitive information to Government, that would be disclosed through an application under the Act. This would have a dampening effect of [sic] the ability of Government to create and develop commercial opportunities in this state.

88. As provided above, I do not consider that release of the redacted parts of document 1, the first two sections of document 5, or page 14 of document 6, could be reasonably expected to have an adverse effect on the business affairs of interested party one.
89. In any event, I do not accept that commercial entities who wish to engage with the government, at times to significant benefit, would be deterred by potential disclosure under the FOI Act to such an extent that it would dampen the commercial prospects of South Australia. The FOI Act and the principles of openness and accountability in government decision making and the expenditure of public money are not new, or unique to South Australia. While public access to information is balanced against consideration for privacy and financial viability, private organisations that seek to gain from the public purse must do so with an understanding of the purpose and function of accountability mechanisms such as the FOI Act. Indeed, as the agency's original submissions note:

DPC determined that the full exemption of these documents was not appropriate, both due to the public profile of this project and the fact that a significant amount of information had been publicly released. Additionally, there is an expectation that transparency relating to engagements involving financial assistance given to third-parties by the Government is very much in the public interest.³⁷

90. As such, I do not agree with interested party one's submissions in regards to the public interest.

Clause 10

91. In regards to document 16, the agency claimed that

Under clause 10(1)... information is exempt from disclosure if it would be privileged from production on the ground of legal professional privilege. A section of this document contains legal advice provided to the government by its legal advisor - information which is subject to legal professional privilege. I have therefore determined to remove this section pursuant to clause 10(1).

³⁷ Letter from the agency to my Office, 27 June 2019.

92. Clause 10 provides:
- (1) A document is an exempt document if it contains matter that would be privileged from production in legal proceedings on the ground of legal professional privilege.
93. I am satisfied that document 16 contains a summary of legal advice provided to the government and is properly exempt by virtue of clause 10.

Clause 13

94. Interested party one also claimed that:
- document one
 - document five
 - and the section of document six titled 'key timings'
- are also exempt by virtue of clause 13, but did not specify which subclause they considered relevant.
95. Clause 13(1)(a) provides that a document is exempt if it contains matter the disclosure of which would found an action for a breach of confidence. There is no evidence before me to indicate that disclosure of documents one, five or six would found for a breach of confidence. I am not satisfied that the documents are exempt by virtue of clause 13(a).
96. Clause 13(1)(b) provides that a document is an exempt document if it contains matter obtained in confidence the disclosure of which:
- might reasonably be expected to prejudice the future supply of such information to the government or to an agency
 - and would, on balance, be contrary to the public interest.
97. Document five bears the heading 'Confidential Summary Memorandum'. I am satisfied that the document was obtained in confidence. However, I note that the remaining information³⁸ is almost entirely publicly known. While this may not alter whether or not the information was originally obtained in confidence, I consider that it is relevant to whether disclosure would be contrary to the public interest.
98. On their face, it is not clear that document one or document six were obtained in confidence. I also note that the agency did not seek to rely on clause 13. However, both the agency and interested party one have characterised the documents as being confidential³⁹ or as containing information that was confidentially provided to the government.⁴⁰ Given the purpose of the documents in the context of the Adelaide Oval hotel, the documents may have been obtained in confidence. However, at this late stage and on the information available, I am not satisfied that the documents were indeed obtained in confidence, but for the sake of completeness, I shall continue to consider clause 13(1)(b).
99. I turn to consider whether disclosure might reasonably be expected to prejudice the future supply of such information to the government or to an agency. As noted at paragraph 57, the phrase requires an objective judgement of whether that expectation is reasonable or whether it is 'fanciful, far-fetched or speculative'.⁴¹
100. I am not satisfied that disclosure of document one, document five and the section of document six titled 'key timings' might reasonably be expected to deter commercial entities from negotiating proposals with the government, as interested party one has

³⁸ Excluding the information that I consider is properly exempt by virtue of clause 7(1)(c).

³⁹ Letter from interested party one to my Officer, 2 January 2020.

⁴⁰ Letter from the agency to my Office, 27 June 2019. I have taken this to refer specifically to the information that the agency considered exempt and not to the document as a whole, given the wording of the agency's submissions.

⁴¹ *Konieczka v South Australian Police* [2006] SADC 134, [14].

claimed. As I explained at paragraph 89, commercial entities that seek to gain from engaging with the government must do so with the understanding that the government is subject to the provisions of the FOI Act. Indeed, given the age of the FOI Act, and freedom of information legislative concepts more generally, it would be naïve to expect otherwise.

101. In any event, if I did consider that disclosure might reasonably have the effect envisioned by clause 13(1)(b), I am not satisfied that disclosure would, on balance, be contrary to the public interest. In forming this conclusion, I have had regard to the following:

In favour of disclosure

- fulfilling the objects of the FOI Act, particularly the public interest in promoting openness and accountability in
 - the decisions of government agencies in the expenditure of public money
 - the development of important South Australian assets
- whether the information is publicly available and the age of that information
- that expectations of confidentiality are 'always subject to the provisions of the FOIA and cannot be affected by any representation ... that greater confidentiality might be accorded to material than properly reflects the effect of the FOIA.'⁴²

Contrary to disclosure

- the objections of interested party one
- the public interest in protecting the privacy and viability of private businesses from unreasonable disclosure
- the public interest in protecting the financial viability of important South Australian assets and their ongoing development.

102. I consider that the first and third points in favour of disclosure are particularly persuasive in this instance. As such, I am not satisfied that documents one, five or six are properly exempt by virtue of clause 13(1)(b).

Determination

103. In light of my views above, I vary the agency's determination in the manner set out in Appendix 2.



Wayne Lines
SA OMBUDSMAN

31 January 2020

⁴² *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997)192 LSJS 54, 80.

APPENDIX 1

Procedural steps

Date	Event
3 December 2018	The agency received the FOI applications.
3 January 2019	The agency failed to determine the applications within the 30 day period required by the FOI Act, ¹ and is deemed to have refused access to the documents. ²
17 January 2019	The agency received the internal review applications.
31 January 2019	The agency failed to determine the applications within the statutory time frame, and is taken to have confirmed the original determination. ³
4 February 2019	The Ombudsman received the applicant's requests for external review.
14 March 2019	The parties and Ombudsman SA Officers attended a settlement conference to consider the applications. The agency proposed to provide partial determinations to the applicant by 4 April 2019. The applicant agreed with this course of action.
9 April 2019	The agency issued belated partial determinations to the applicant.
7 May 2019	The applicant advised the Ombudsman that he wished to proceed with the external review.
13 May 2019	The Ombudsman advised the agency of the external review and requested its submissions and documentation.
29 May 2019	The agency released further documents to the applicant.
6 June 2019	The applicant confirmed his request to proceed with the external review.
28 June 2019	The agency provided the Ombudsman with its submissions and documentation.
6 December 2019	The Ombudsman issued his provisional determination and invited submissions from the parties.
10 December 2019	Interested party eight provided submissions in response to the Ombudsman's provisional determination.
10 December 2019	Interested party seven provided submissions in response to the Ombudsman's provisional determination via a telephone call with an Ombudsman SA Officer

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).

Date	Event
12 December 2019	Interested party six responded to the Ombudsman's provisional determination.
27 December 2019	Interested party nine responded to the Ombudsman's provisional determination.
7 January 2019	Interested party one provided submissions in response to the Ombudsman's provisional determination.
10 January 2019	The agency responded to the Ombudsman's provisional determination.

APPENDIX 2

Doc	Description	Agency's determination	Ombudsman's determination	Information to be released
1	Letter from interested party one to Minister Stephan Knoll MP dated 2 August 2019	Partially exempt by virtue of clause 7(1)(c)	Not properly exempt by virtue of clause 7(1)(c) Not properly exempt by virtue of clause 13(a) or 13(b)	Release in full
2	Emails between agency staff and interested party two	Partially exempt by virtue of clause 6(1)	Not properly exempt by virtue of clause 6(1)	Release in full
3	Released in full to the applicant. Not considered further			
4	Architectural renditions and designs	Exempt by virtue of clause 7(1)(b)	Architectural renditions and the image of the existing stadium are not properly exempt by virtue of clause 7(1)(b) or 7(1)(c) Architectural designs are properly exempt by virtue of clause 7(1)(b)	Pages 1-5 & 16 to be released to the applicant Pages 6-15 not to be released
5	Confidential memorandum authored by interested party one	Exempt by virtue of clause 7(1)(c)	First two sections of the document are not properly exempt by virtue of clause 7(1)(c) The third section is properly exempt by virtue of clause 7(1)(c) Not properly exempt by virtue of clause 13(a) or 13(b)	First two sections to be released to the applicant The third section, titled 'Issues', not to be released
6	Preliminary proposal presentation	Partially exempt by virtue of clause 7(1)(b) and 7(1)(c)	Architectural renditions and the image of the existing stadium are not properly exempt by virtue of clause 7(1)(b) or 7(1)(c) Architectural designs are properly exempt by virtue of clause 7(1)(b) Information on page 13 is properly exempt by virtue of clause 7(1)(c) Information on page 14 is not properly exempt by virtue of clause 7(1)(c), 13(a) or 13(b)	Pages 2, 6, 7, 8 & 14 to be released to the applicant Redacted information on page 9-13 not to be released

Doc	Description	Agency's determination	Ombudsman's determination	Information to be released
7	Internal agency emails	Partially exempt by virtue of clause 1(1)(e) and 6(1) Considered partially out of scope	Not properly exempt by virtue of clause 1(1)(e) or 6(1) Out of scope sections not considered	Release in full, except for those parts of the document which the agency considered out of scope
8	Budget Cabinet Committee agenda	Exempt by virtue of clause 1(1)(e)	Exempt in full by virtue of clause 1(1)(a)	No further release
9	Internal agency emails	Partially exempt by virtue of clause 1(1)(e)	Not properly exempt by virtue of clause 1(1)(e)	Release in full
10	Interagency email	Partially exempt by virtue of clause 1(1)(c) and 6(1)	Not properly exempt by virtue of clause 1(1)(c) or 6(1)	Release in full
11	Cabinet submission	Exempt by virtue of clause 1(1)(a)	Exempt in full by virtue of clause 1(1)(a)	No further release
12	Draft minute	Exempt by virtue of clause 7(1)(b) and 6(1)	Properly exempt by virtue of clause 7(1)(c)	No further release
13	Minute	Exempt by virtue of clause 7(1)(b)	Properly exempt by virtue of clause 7(1)(c)	No further release
14	Draft letter from Minister Stephan Knoll MP to interested party one	Exempt by virtue of clause 7(1)(b)	Properly exempt by virtue of clause 7(1)(c)	No further release
15	Attachment to the minute and draft letter	Exempt by virtue of clause 7(1)(b) and 1(1)(e)	Not properly exempt by virtue of clause 1(1)(e) Properly exempt by virtue of clause 7(1)(c)	No further release
16	Interagency email	Partially exempt by virtue of clause 10	Redaction portion properly exempt by virtue of clause 10(1)	No further release
17	Email between agency staff and interested party two	Partially exempt by virtue of clause 6(1) and 7(1)(b)	Not properly exempt by virtue of clause 6(1), 7(1)(b) or 7(1)(c).	Release in full