

Determination

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

Applicant	The Hon Tony Piccolo MP
Agency	Town of Gawler
Ombudsman reference	2018/03576
Agency reference	CC18/362
Determination	The determination of the agency varied.

REASONS

Application for access

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

the report commissioned by the Town of Gawler regarding the rural areas of Gawler an[d] commonly referred to as the 'Jensen Number 2' Report...

any correspondence or communication either sent to or received from Jensen Planning & Design regarding ... [Jensen Reports Number 1¹ and Number 2].²

2. According to the overview contained in the *Jensen Report Number 1*:

This *Report No 1 Background Paper* provides a summary of all of the background information that will influence the future policy of the land relating to the "Buffer Area" located primarily within the Rural Zone in the Town of Gawler. The next *Report # 2 Draft Recommended Policy Approach* will provide recommended policies for further community and council review and feedback.³

Background

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

Jurisdiction

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

¹ The applicant acknowledged that the Jensen Report Number 1 has been released publicly: <https://s3-ap-southeast-2.amazonaws.com/tog-public-assets/agendas-minutes/Council/4.pdf> (accessed 11 September 2018). The agency numbered it document 8.

² The applicant subsequently narrowed the scope of the access application to exclude the actual tender: email from the applicant to the agency dated 19 January 2018. At the same time the applicant confirmed his interest in the tender agreements, including costs.

³ Jensen Planning and Design, Wallbridge & Gilbert and Econsearch, *Gawler Rural Land Use and Infrastructure Investigation, Report No 1 Background Briefing Paper*, March 2015, 5: <https://s3-ap-southeast-2.amazonaws.com/tog-public-assets/agendas-minutes/Council/4.pdf> (accessed 11 September 2018).

Provisional determination

5. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 25 September 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.
6. In response, the agency advised that it took no issue with my provisional determination. In addition, as the agency's understanding is that the applicant is not interested in the banking details in document 14b, it proposed to redact these from any copy released to the applicant. To date, the applicant and the interested parties have not provided submissions in response to my provisional determination. Accordingly, this (my final) determination is in similar terms to my provisional determination.

Relevant law

7. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.⁴
8. 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.
9. In this matter, the agency claims that the documents in issue are exempt, in full or part, as documents affecting business affairs (clause 7(1)(c)), internal working documents (clause 9(1)), and documents containing confidential material (clause 13(1)(a)).⁵ Although not relied on by the agency, I also intend to consider clause 12(1), in conjunction with section 110A of the *Local Government Act 1999*, and with reference to sections 90(2), 90(3)(m) and 91(7) of the *Local Government Act 1999*.⁶
10. The following provisions are relevant to my review:

Clauses 7(1)(c) and 7(3)⁷

- (1) A document is an exempt document—
 - ...
 - (c) if it contains matter—
 - (i) consisting of information (other than trade secrets or information referred to in paragraph (b)) concerning the business, professional, commercial or financial affairs of any agency or any other person; and
 - (ii) the disclosure of which—
 - (A) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to the Government or to an agency; and
 - (B) would, on balance, be contrary to the public interest.
- (2) ...

⁴ *Freedom of Information Act 1991*, section 12.

⁵ In its original determination and following internal review, the agency also claimed that three documents (numbered 21, 38 and 44) were exempt as documents affecting personal affairs. The applicant does not seek access to the redacted information in these documents and they are therefore not in issue in my external review.

⁶ I have a discretion to consider exemptions not relied upon by the agency: *Department of the Premier & Cabinet v Redford* (2005) 240 LSJS 171 [29].

⁷ Clause 7(3) of Schedule 1 to the *Freedom of Information Act 1991* commenced on 1 January 2005.

- (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.

Clause 9(1)

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

Clause 12(1)

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act..

In conjunction with:

Section 110A

- (1) An employee or former employee of a council must not disclose information or a document in relation to which there is an order of a council or council committee in effect under section 90 requiring the information or document to be treated confidentially.
Maximum penalty: \$10 000 or 2 years imprisonment.
- (2) Nothing in subsection (1) prohibits the disclosure of information or a document where the disclosure is required or authorised by law.

With reference to:

Sections 90(2) and 90(3)(m)

- (2) A council or council committee may order that the public be excluded from attendance at a meeting to the extent (and only to the extent) that the council or council committee considers it to be necessary and appropriate to act in a meeting closed to the public in order to receive, discuss or consider in confidence any information or matter listed in subsection (3) (after taking into account any relevant consideration under that subsection).
- (3) The following information and matters are listed for the purposes of subsection (2):
- ...
- (m) information relating to a proposed amendment to a Development Plan under the *Development Act 1993* before a Development Plan Amendment proposal relating to the amendment is released for public consultation under that Act;

Section 91(7)

- (7) However, subsections (4), (5) and (6) [providing for public display, inspection, and purchase of a copy of specified documents. Section 91(5)(b) refers to 'reports to the council or a council committee received at a meeting of the council or committee'] do not apply to a document or part of a document if—
- (a) the document or part relates to a matter dealt with by the council or council committee on a confidential basis under Part 3 [section 90]; and
 - (b) the council or council committee orders that the document or part be kept confidential...

Clauses 13(1)(a) and 13(2)⁸

- (1) A document is an exempt document—
 - (a) if it contains matter the disclosure of which would found an action for breach of confidence ...
- (2) A document that is a contract entered into by the Crown or an agency after the commencement of this subclause is not an exempt document by virtue of subclause (1) unless—
 - (a) it contains matter the disclosure of which would, under a term of the contract, constitute a breach of the contract or found an action for breach of contract; and
 - (b) that term of the contract has been approved by—
 - ...
 - (iii) in the case of a contract entered into by an agency that is not a State Government agency—the agency.

11. Section 20(4) of the FOI Act provides that if it is practicable to give access to a copy of a document from which the exempt matter has been deleted, and it appears that the applicant would wish to be given access to such a copy, the agency must give the applicant access to a copy of the document to this limited extent.
12. Section 39(12) provides that if I am satisfied that a document is an exempt document, I do 'not have power to make a determination to the effect that access is to be given to the document'.
13. Section 39(15) provides that I must avoid disclosing in my reasons 'any matter that the agency claims is exempt matter'.
14. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
15. 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

16. The agency originally identified 56 documents within the scope of the application.⁹
17. The agency originally determined:
 - to release 28 documents in full (documents 3b, 4a, 9a, 9b, 10a, 10b, 11a, 11b, 13a, 14a, 20a, 20b, 23, 24, 25, 26, 28, 32, 33, 34, 35, 36, 37, 40, 41, 42, 43 and 46)
 - to partially release 22 documents (documents 1, 2, 3a, 3aa, 5, 6a, 12a, 12b, 13b, 17, 18, 19, 21, 22, 27, 29, 30, 31, 38, 44, 45 and 47)
 - to refuse access to six documents (documents 3c, 3d, 7, 14b, 39a and 39b).
18. Following internal review, the agency varied the original determination to enable documents 5, 12a, 29, 30 and 45 to be released in full and documents 39a and 39b to

⁸ Clause 13(2) of Schedule 1 to the *Freedom of Information Act 1991* commenced on 1 January 2005.

⁹ The documents are numbered 1, 2, 3a, 3aa, 3b, 3c, 3d, 4a, 5, 6a, 7, 9a, 9b, 10a, 10b, 11a, 11b, 12a, 12b, 13a, 13b, 14a, 14b, 17 to 19, 20a, 20b, 21 to 38, 39a, 39b and 40 to 47. The agency concluded that three additional documents, numbered 8, 15a and 15b, were outside the scope of the access application. No document appears to have been numbered 16. I note that the agency sought confirmation from the applicant that he did not seek access to document 8, the Jensen Report Number 1. The agency's decision to exclude documents on the basis that they are outside the scope of the access application is not a determination for the purposes of the FOI Act, and is not subject to external review: *El Shafei and Central Adelaide Local Health Network* [2017] SACAT 5 (13 April 2017), available at <http://www5.austlii.edu.au/au/cases/sa/SACAT/toc-E.html>. I have therefore excluded these documents 8, 15a and 15b from my review.

be partially released. It confirmed the original determination in all other respects. Documentation provided by the agency reveals that documents 5, 12a, 29 and 30 were released to the applicant. It is unclear whether or not document 45 was released to the applicant in accordance with this determination. It is apparent, however, that the agency's purported determination with respect to documents 39a and 39b was made before the agency had fulfilled its consultation obligations.¹⁰ The agency has not released these documents to the applicant. In my view, documents 39a and 39b are within the scope of my external review.

19. During the course of my external review, the applicant further narrowed the scope of his application to exclude documents 2, 13b, 17 to 19, 21, 38 and 44.¹¹
20. Accordingly, documents numbered 1, 3a, 3aa, 3c, 3d, 6a, 7, 12b, 14b, 22, 27, 31, 39a, 39b and 47 are in issue in my review (**the documents in issue**).

Issues in this review

21. It is for me to determine whether the agency has justified its determination to refuse access to the documents in issue, or parts thereof, or whether there is sufficient evidence before me from which I am able to be satisfied that all elements of the clauses relied on by the interested parties are established.¹²

Summary of evidence and submissions

The agency

22. In its original determination, the agency provided the following reasons in support of its determination to refuse access, in full or in part, to the documents in issue:¹³

Clause 7(1)(c) - Documents affecting Business Affairs *Document[s] 2, 13b,¹⁴ 14b, 22, 39a, 39b*

These documents contain Bank, Employment & Contact details, a Draft Engagement Plan/Service Agreement which contains contact details of the Contractor & other Stakeholders and invoice details from Jensen Planning. This information concerns the business, professional, commercial or financial affairs of Jensen Planning and other persons, the disclosure of which could reasonably have an adverse effect on those affairs and, on balance would be contrary to the public interest.

Clause 9[(1)](a)(b) - Internal Working Documents *Document[s] 1, 3a, 3aa, 3c, 3d, 5,¹⁵ 6a, 7, 12a,¹⁶ 12b, 13b,¹⁷ 27, 29,¹⁸ 30,¹⁹ 31, 47*

These documents relate to the preparation and updating of the Gawler Rural Land Use & Infrastructure Investigation Report No 2 Policy Recommendations - May 2015 by Jensen Planning & Design which is still in Draft format. They include opinions, advice and recommendations that have been obtained, prepared and include consultation and

¹⁰ The consultation obligations are set out in sections 25 to 28 of the *Freedom of Information Act 1991*.

¹¹ Emails from the applicant dated 4 September and 11 September 2018.

¹² *Re Pope and Queensland Health* (1994) 1 QAR 616, [17].

¹³ Given that the applicant does not seek access to documents 21, 38 and 44 I have omitted the reasons in support of the agency's clause 6(1) claim. The agency has not released documents 17 to 19 to the applicant in full. It did not claim that these documents were exempt, but rather expressed concern that although the redacted links in the documents were no longer valid they posed a risk of being hacked. Nevertheless, as the applicant subsequently confirmed that he no longer seeks access to documents 17 to 19 they are therefore no longer relevant to my review; emails between Ombudsman SA and the agency dated 31 July 2018, 7 August 2018 and 22 August 2018, and Ombudsman SA and the applicant dated 11 September 2018.

¹⁴ The applicant no longer seeks access to documents 2 and 13b; they are no longer relevant to my external review.

¹⁵ Following internal review, the agency abandoned its claim of exemption over document 5.

¹⁶ Following internal review, the agency abandoned its claim of exemption over document 12a.

¹⁷ The applicant no longer seeks access to document 13b; it is no longer relevant to my external review.

¹⁸ Following internal review, the agency abandoned its claim of exemption over document 29.

¹⁹ Following internal review, the agency abandoned its claim of exemption over document 30.

deliberations that have taken place in the course of, or for the purpose of the decision-making functions of the Council and the disclosure of which would, on balance be contrary to the public interest.

Clause 13(1)(a) - Documents containing confidential material

Documents 1, 3a, 3aa, 3c, 3d, 5,²⁰ 6a, 7, 12a,²¹ 12b, 13b,²² 27, 29,²³ 30,²⁴ 31, 45,²⁵ 47

These documents contain opinions, feedback, directives, Council confidential motion and the Gawler Rural Land Use & Infrastructure Investigation Report No 2 Policy Recommendations - May 2015 by Jensen Planning & Design which [sic] still Draft format and held in Confidence by Council review in April 2018. Their disclosure of which [sic] would found an action for breach of confidence.

23. The agency proffered no further reasons in its internal review determination.

24. During my external review the agency advised that:

The review of Confidential Items was presented to the 22 May 2018 Council Meeting. At this meeting Council determined that the Rural Land Use and Infrastructure Investigation report and Attachments would remain in confidence until the matter is resolved. A copy of the Minutes (item 15.4) can be found on Council[']s website <https://s3-ap-southeast-2.amazonaws.com/tog-public-assets/agendas-minutes/Council/22-05-2018-Council-Minutes.pdf>²⁶

25. At my Office's request, the agency provided a copy of the executed contract between it and Jensen Planning and Design, along with links or copies of agency agenda and minutes evidencing resolutions to hold documents in confidence:

- confidential meeting agenda dated 23 June 2015 (item 15.1)
- confidential meeting agenda attachments dated 23 June 2015 (item 15.1)
- minutes dated 23 June 2015 (original order)
- minutes dated 26 April 2016
- minutes dated 26 April 2017
- minutes dated 22 May 2018.

26. The original order dated 23 June 2015 resolved:

1. Pursuant to Section 91(7) of the Local Government Act 1999, the Council orders that the following document(s) (or part) shall be kept confidential, being document(s) (or part) relating to a matter dealt with by the Council on a confidential basis under Sections 90(2) and 90(3)(m) of the Act:
 - The written report - Item 15.1 - Rural Land Use and Infrastructure Investigation Report
 - The feedback from Cr A Shackley tabled at the meeting^[27] on the grounds that the document(s) (or part) is: (m) information relating to a proposed amendment to a Development Plan under the Development Act 1993 before a Plan Amendment Report relating to the amendment is released for public consultation under that Act;
2. This order shall operate for a period of 12 months and will be reviewed at least annually in accordance with the Act.

²⁰ Following internal review, the agency abandoned its claim of exemption over document 5.

²¹ Following internal review, the agency abandoned its claim of exemption over document 12a.

²² The applicant no longer seeks access to document 13b; it is no longer relevant to my external review.

²³ Following internal review, the agency abandoned its claim of exemption over document 29.

²⁴ Following internal review, the agency abandoned its claim of exemption over document 30.

²⁵ Following internal review, the agency abandoned its claim of exemption over document 45.

²⁶ Email from the agency to Ombudsman SA dated 31 July 2018.

²⁷ By email dated 19 September 2018 the agency advised that this feedback is the same as document 3b. I note, however, that the agency released document 3b to the applicant as part of its original determination.

27. The reviews of this order resolved to keep the 'report and tabled document'²⁸ or the 'report, attachments and tabled document'²⁹ confidential 'until the matter is resolved and to the satisfaction of the CEO'.
28. Despite multiple requests for further submissions in support of the agency's clause 9(1) and 13(1)(a) claims of exemption,³⁰ to date these have not been forthcoming.

The applicant

29. When applying for external review, the applicant submitted that the agency's determination is incorrect because:
1. Clause 13(1)(a) does not apply in this case; and
 2. Disclosure of Jensen No 2 Report would not, on balance, be contrary to the public interest.

Clause 13(1)(a)

... [interpretation of clause 13(1)(a) omitted]

The agency ordered that Jensen No 2 Report be kept confidential under section 91(7) of the *Local Government Act 1999* (SA) ("LGA Act") as a document that related to a matter dealt with by the agency on a confidential basis under Part 3 of that Act, namely section 90(3)(m).

This does not create an equitable obligation between a confidant and a confider. This is the agency declaring information confidential, in itself; creating a statutory duty. The disclosure of which, by the agency, where not otherwise required by law, would be a breach of that statutory duty; not an equitable breach of confidence.

If clause 13 applies at all, it would require public interest considerations which I have set out below.

Public Interest

Clause 9

The Administrative Appeals Tribunal in *Re Murtagh and Commissioner of Taxation* [1984] AATA 249 considered section 36, now 47C, of the *Freedom of Information Act 1982* (Cth), which is substantially similar to clause 9(1)(a) of the FOI Act (SA) (*Grant, District Council of 2017/6562* [2018] SAOmbFOI 4 at [128]). The Tribunal stated: "Broadly speaking, s.36 can be seen as an attempt by the legislature to protect the integrity and viability of the [governmental] decision-making process. If the release of documents would impair this process to a significant or substantial degree and there is no countervailing benefit to the public which outweighs that impairment then it would be contrary to the public interest to grant access."

The disclosure of Jensen No 2 Report would not impair the decision making process in any significant or substantial way and there are strong public interest factors in favour of disclosure.

Under the new *Development, Planning and Infrastructure Act 2016* (SA) ("PDI Act") a Community Engagement Charter is being developed with principles that "the community should have reasonable, timely, meaningful and ongoing opportunities to gain access to information about proposals" for planning policies and relevant planning processes and to give the community opportunities to participate at an early stage. (section 44(3) PDI Act)

South Australia's Expert Panel on Planning Reform, who made recommendations

²⁸ Agency minutes dated 26 April 2016 and 26 April 2017.

²⁹ Agency minutes dated 22 May 2018.

³⁰ Emails from my Office to the agency dated 27 July, 6 August, 21 August, 31 August and 4 September 2018.

consequently enacted in the PDI Act, suggested the Community Engagement Charter be based on “on leading engagement practices, such as IAP2 guidelines, and will set out principles, benchmarks and suggested approaches.” (Expert Panel’s Final Report, “*The Planning System We Want*”)

The IAP2’s core values for the practice of public participation are as follows (International Association of Public Participation, “*Public Participation Spectrum*”):

1. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
2. Public participation includes the promise that the public’s contribution will influence the decision.
3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
5. Public participation seeks input from participants in designing how they participate.
6. Public participation provides participants with the information they need to participate in a meaningful way.
7. Public participation communicates to participants how their input affected the decision.

The new PDI Act and the IAP2 guidelines show a public interest in early engagement in such a decision-making process and the information needed to participate in a meaningful way.

There is also the public interest in the fulfilment of the objects and principles of the LGA Act and the FOI Act, namely to provide and ensure an open, responsive and accountable government.

*Clause 13(1)(b)*³¹

... [interpretation of clause 13(1)(b) omitted]

The document, Jensen No 2 Report, was not received by the agency under any apparent agreement or understanding, whether express or inferred, that it would be kept confidential.

However, if it is that the first element of clause 13(1)(b) is satisfied by the document having been received in a meeting that was moved into confidence because the agency was to discuss matters under s 90(3)(m) of the LGA Act, the disclosure of the document would not reasonably be expected to prejudice the future supply of such information.

The document was supplied knowing that it would likely be released as part of the due process that goes with development plan amendments, therefore the supply of *such* information was not predicated on an expectation of confidentiality and the disclosure would not prejudice future supply.

In any case, on balance, the disclosure of Jensen No 2 Report would not be contrary to the public interest.

I concede that if disclosure is part of a statutory process, that is a public interest factor against disclosure, but it is in no way determinative. (*Grant, District Council of 2017/6562* [2018] SAOmbFOI 4 at [88]-[89])

Section 90(3)(m) of the LGA appears to be intended to prevent the release of information relating to development plan amendments that would effectively release, at least in part, a development plan amendment to the public before it has been approved to be released for public consultation in accordance with the provisions of the *Development Act 1993* (SA) (section 25 *Development Act 1993* (SA)).

³¹ The agency has not raised clause 13(1)(b), however.

It is very early in this process and the document is unlikely to contain anything resembling a development plan amendment. It should be also be noted that the agency is yet to approve a statement of intent. It has not endorsed Jensen No 2 Report and will only be using it to assist in the formulation of policy for a development plan amendment. (Special Infrastructure & Environmental Services Agenda, 25 May 2017)

I repeat the public interest in promoting openness and accountability within government and would add that if the document is only to assist in the formulation of policy, that it be better suited to the public domain where it would empower the community to participate early and in a meaningful way in accordance with the principles outlined in the DPI Act.

The interested parties

30. The agency consulted eight interested parties about some of the documents under review. Of these, four consented to the full release of the documents about which they were consulted, three claimed that some documents/ parts of documents were exempt, and one claimed that the document about which they were consulted was exempt in full.
31. Interested party 1 was consulted about part of document 22 and consented to its release.
32. Interested party 2 was consulted about document 3d and objected to the release of page 1 of the document.
33. Interested party 3 was consulted about documents 3a and 3aa and objected to the release of some of the information contained therein.
34. Interested party 7 was consulted about document 3c and objected to its release.
35. Interested party 8, Jensen Planning and Design, was consulted about documents 1, 2, 4a, 5, 6a, 9a, 9b, 10a, 10b, 11a, 12a, 12b, 13a, 13b, 14a, 14b, 22, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39a, 39b, 40 and 41. Interested party 8 claimed that bank details and employer numbers were exempt in document 2,³² and that documents 14b, 39a and 39b were exempt in their entirety. In so doing, interested party 8 noted that:

Peter Jensen Pty Ltd sold the business trading as Jensen Planning and Design to MMCK Pty Ltd on 1 September 2015 and most of the documentation ... relates to the period prior to the purchase of the business by MMCK Pty Ltd.
36. Interested parties 2, 4, 5 and 6 consented to the release of documents 3b, 23, 40 and 11b, respectively. The agency has released these documents to the applicant; they are not in issue in my review.

Consideration

Clause 12(1)

37. Although not claimed by the agency, prompted by information provided by it, I have considered whether or not document 7 is exempt under clause 12(1) of Schedule 1 to the FOI Act, in conjunction with section 110A of the *Local Government Act 1999*, and with reference to sections 90(2) and 90(3)(m) of the *Local Government Act 1999*.
38. Document 7 is Jensen Report Number 2.

³² The applicant no longer seeks access to document 2; it is not relevant to my external review.

39. I am satisfied that there are current orders requiring that the Jensen Report Number 2 (document 7) be held by the agency in confidence pursuant to section 90(3)(m) of the Local Government Act.
40. Whilst I note the applicant's apparent concerns about the legitimacy of the order,³³ for the purpose of these reasons, I have proceeded on the basis that the confidentiality order is current, and without assessing the bases underpinning it.
41. Given the currency of the confidentiality order, and with reference to sections 90(2), 90(3)(m) and 91(7) of the *Local Government Act 1999*, my view is that disclosure of document 7 would constitute an offence under section 110A of the *Local Government Act 1999*.
42. Accordingly, I am satisfied that document 7 is exempt under clause 12(1).³⁴

Clause 7(1)(c)

43. The agency claims that the documents in issue numbered 14b, 22, 39a and 39b are exempt in full or in part under clause 7(1)(c). Of these, the agency has partially released document 22.
44. The phrase 'business, professional, commercial or financial affairs' is not defined in the FOI Act, however, the Administrative Appeals Tribunal has commented that:
- ...they are words of very wide application, and cover all the aspects, both fiscal and administrative, of an organisation or undertaking; I do not think that they should be narrowly construed.³⁵
45. The Queensland Information Commissioner in *Stewart and Department of Transport* also relevantly observed:
- For a matter to relate to "business affairs" in the requisite sense, it should ordinarily, in my opinion, relate to the affairs of a business undertaking which is carried on in an organised way (whether it be full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained).³⁶
46. Regarding the phrase 'could reasonably be expected to have an adverse effect', the District Court has commented that:
- We are in the field of predictive opinion. The question is whether there is a reasonable expectation of adverse effects... that is not fanciful, imaginary or contrived, but rather is reasonable, that is to say based on reason, namely 'agreeable to reason: not irrational, absurd or ridiculous'...³⁷
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 be properly regarded as inconsequential... It will be sufficient if the adverse effect is produced by that document in combination with other evidence which is before the Court on the appeal.³⁸

³³ For example, see the applicant's submissions that '[i]t is very early in this process and the document is unlikely to contain anything resembling a development plan amendment' and the agency is only using document 7 'to assist in the formulation of policy for a development plan amendment'.

³⁴ Given this, I see no reason to consider the agency's claims of exemption with respect to document 7.

³⁵ *Martin Saxon v Australian Maritime Authority [1995] AAT 165*, [99].

³⁶ *Stewart and Department of Transport [1993] QICmr 6* [103].

³⁷ *Ipex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, applying *Re Actors Equity Association of Australia* (1985) (No 2) 7 ALD 584 at 590.

³⁸ *Ipex Info Tech v Dept of Info Tech Services* (1997) 192 LSJS 54, 65.

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48. Documents 14b, 39a and 39b, and the claimed exempt information in document 22 detail financial and other information relevant to Jensen Planning and Design. I am satisfied that these documents contain information concerning the business affairs of Jensen Planning and Design, as required by clause 7(1)(c)(i).
49. Document 39b is an unexecuted version of the contract between the agency and Jensen Planning and Design. It includes a confidentiality provision (clause 13) and definitions for the terms 'Confidential Information' and 'Confidential Sections' (clause 1.1). Both the confidentiality provision and the corresponding meaning of 'Confidential Information' are expressed very broadly. The meaning of 'Confidential Sections' is very specific and does not appear relevant in this instance.³⁹
50. Clause 7(3) of the FOI Act clearly provides that a contract cannot be exempt under clause 7 if it was entered into after the commencement of clause 7(3) (that is, 1 January 2005). At my Office's request, the agency provided a copy of the executed contract between it and Jensen Planning and Design dated 20 May 2014. Accordingly, document 39b cannot, in my view, be exempt under clause 7(1)(c) by reason of clause 7(3).
51. I will now consider whether disclosure of documents 14b, 22 and 39a 'could reasonably be expected to have an adverse effect' on Jensen Planning and Design's affairs or 'prejudice the future supply of such information to the Government or to an agency'.
52. Document 14b is an invoice from Jensen Planning and Design dated 30 July 2014. The claimed exempt information in document 22 consists of a financial amount of an invoice referred to in an email from Jensen Planning and Design to the agency dated 8 December 2014. Document 39a is an email chain between the agency and Jensen Planning and Design dated 1 May to 7 May 2014.
53. I am not satisfied that disclosure of these documents could reasonably be expected to have an adverse effect on Jensen Planning and Design's affairs for the following reasons:
- the documents are now more than four years old
 - the documents were created for the purpose of a specific project at that point in time
 - much of document 39a appears to be routine or administrative in nature
 - the documents (including with reference to annexure A to document 39b, and item 7 in particular) contain limited information about the nature of the contracted services and the basis for the contract price
54. I am not satisfied that disclosure of the claimed exempt information in these documents could reasonably be expected to prejudice the future supply of *such* information to the Government or an agency. In saying this, I note that documents 14b, 22 and 39a contain a minimal amount of information for the purposes of finalising the contract (document 39a) and invoicing the agency for payment (document 14b and the redacted information in document 22). Businesses that have a financial interest in dealing with the government and agencies are, in my view, unlikely to be deterred from contracting with the South Australian government or agencies in the future as a result of disclosure of documents 14b and 39a and the redacted information in document 22. I say this notwithstanding the confidentiality provision in document 39b.
55. I am not satisfied that documents 14b, 22, 39a or 39b are exempt under clause 7(1)(c). That said, I indicated in my provisional determination that the banking details could be redacted from document 14b if the applicant did not express an interest in them in

³⁹ I must avoid disclosing in my reasons 'any matter that the agency claims is exempt matter': section 39(15) of the *Freedom of Information Act 1991*.

response. I did so noting that the applicant had not sought access to the claimed exempt information in document 2, which included banking details. To date, the applicant has not expressed an interest in the banking details in document 14b. Accordingly, in my view, they may be redacted from any copy released to the applicant.

Clause 9(1)

56. The agency claims that documents in issue numbered 1, 3a, 3aa, 3c, 3d, 6a, 12b, 27, 31 and 47 are exempt under clause 9(1).⁴⁰
57. The scope of clause 9(1)(a) is wide, particularly given the words ‘that relates to’.
58. The ‘opinion, advice or recommendation’ must nevertheless have been obtained, prepared or recorded, or the ‘consultation or deliberation’ must have taken place, ‘in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency’.
59. Having considered the contents of documents 1, 3a, 3aa, 3c, 3d, 6a, 12b, 27, 31 and 47, I am satisfied that they contain matter that relates to:
 - opinions, advice and recommendations obtained; and/or
 - consultations or deliberations that took place, in the course of, or for the purposes of, the agency’s decision-making functions.
60. Accordingly, my view is that the agency has satisfied clause 9(1)(a).

The public interest test

61. I have therefore considered whether or not the public interest test set out in clause 9(1)(b) has been met.
62. The agency merely claims that it would, on balance, be contrary to the public interest to disclose some of the documents in issue.
63. Document 1 is an email chain between the agency and Jensen Planning and Design dated 23 April to 27 April 2015. Document 47 is an email between the agency and Jensen Planning and Design dated 23 April 2015. It is duplicated in document 1. The claimed exempt information is the same in documents 1 and 47.
64. Document 3a is an email from the agency to Jensen Planning and Design dated 5 August 2015. Document 3aa is an email from Councillor Gidman dated 7 July 2015 along with another internal agency email dated 14 December 2015. Document 27 is an email chain between the agency and Jensen Planning and Design dated 5 August 2015 to 6 August 2015 (it duplicates part of document 3a). The claimed exempt information is the same in documents 3a, 3aa and 27.
65. Document 3c reflects comments made by Councillor Hughes. It appears to be a summary of publicly accessible information.
66. Document 3d is Councillor Shackley’s feedback.
67. Document 6a is an email from Jensen Planning and Design to the agency dated 13 March 2015. The agency has partially released it.

⁴⁰ The agency also claims that document 7 is exempt under clause 9(1). Given my findings above in relation to clause 12(1), I do not intend to consider this claim.

68. Document 12b is a report outline entitled 'Gawler Rural Land Use and Infrastructure Investigation - Draft Background + Options Paper'. The agency released it after redacting item 7 of the contents.
69. Document 31 is an email chain between the agency and Jensen Planning and Design dated 11 February 2015. The agency has partially released it.
70. In considering the public interest, I have had regard to the factors and submissions referred to above. Public interest considerations relevant to this matter are:

In favour of disclosure:

- fulfilling the objects of the FOI Act, particularly the public interest in:
 - promoting openness and accountability of the agency and its staff
 - facilitating public participation in the processes involved in the making and administration of the agency's policies with respect to rural land use
- the ongoing relevance of the claimed exempt information to the applicant as a representative of the community, and the members of the community
- the time that has elapsed, and events that have occurred, since the documents were created, including the publication of Jensen Report Number 1
- with respect to documents 1 (and by extension document 47), 6a, 12b, 27 and 31, the views of interested party 8
- with respect to documents 3c, 3d, 6a, 12b and 31, information in the public domain or previously released by the agency⁴¹

Contrary to disclosure:

- objections to disclosure raised by the agency
 - objections to disclosure raised by interested party 3 with respect to documents 3a and 3aa (and by extension document 27)
 - objections to disclosure raised by interested party 7 with respect to document 3c
 - objections to disclosure of page 1 of document 3d raised by interested party 2
 - with respect to document 3d, references to some of document 7's contents or the effects of its recommendations
 - with respect to document 6a, the agency's ongoing confidentiality order over document 7.
71. In my view, the third paragraph and the second to the final sentence of the fourth paragraph on page 1 of document 3d reference some of document 7's contents or the effects of its recommendations. As indicated above, I am satisfied that disclosure of document 7 would constitute an offence under section 110A of the *Local Government Act 1999*. This is a persuasive factor in relation to document 3d, which in my view takes precedence over the factors in favour of release. Accordingly, to the extent that document 3d would disclose document 7's contents or the effect of any of its recommendations, I am satisfied that it would, on balance, be contrary to the public interest to release such information. Accordingly, I am satisfied that document 3d is exempt under clause 9(1). I consider below whether disclosure of the residual parts of document 3d (that is, after redacting the third paragraph and the second to the final sentence of the fourth paragraph on page 1) (**the residual parts of document 3d**) would, on balance, be contrary to the public interest.
72. I am not satisfied that disclosure of the claimed exempt information in documents 1, 3a, 3aa, 3c, 6a, 12b, 27, 31 or 47 or the residual parts of document 3d would, on balance, be contrary to the public interest. My view is that the public interest in openness and accountability and facilitating more effective participation, and the ongoing relevance of

⁴¹ Document 3c is itself a summary of publicly accessible information. Documents 6a, 12b and 31 refer to information identified in, or related to, the Jensen Report Number 1. Document 3d includes references to the Jensen Report Number 1, other publicly accessible information, or information the agency has released in response to the FOI access application.

the information to the applicant and the community more generally are persuasive factors in this matter, and outweigh the factor or factors against disclosure. In addition, with the exception of document 6a, I note that the claimed exempt information in these documents and the residual information in document 3d does not appear to be contained in document 7 (Jensen Report Number 2), or that its disclosure would reveal the contents of document 7. Although document 6a refers to proposed topics for discussion in relation to Jensen Report Number 2, these topics are identified in the publicly available Jensen Report Number 1. The claimed exempt information in document 6a is minimal in any event. I comment also that documents 12b and 31 appear to be more closely aligned with the publicly available Jensen Report Number 1, rather than Jensen Report Number 2. In saying this, I have borne in mind the title and contents of document 12b (and compared these to the contents of the Jensen Report Number 1), and the substance of document 31, which specifically refers to the 'background report', which is also known as Jensen Report Number 1. The residual parts of document 3d appear to reference the Jensen Report Number 1 or other publicly accessible information, or duplicate information the agency has released in response to the FOI access application.

73. I am not satisfied that documents 1, 3a, 3aa, 3c, 6a, 12b, 27, 31 or 47 or the residual parts of document 3d are exempt under clause 9(1). Although satisfied that document 3d is exempt under clause 9(1), I consider that it would be practicable to release it after redacting the third paragraph and the second to the final sentence of the fourth paragraph (on page 1), as envisaged by section 20(4) of the FOI Act.

Clause 13(1)(a)

74. The agency claims that documents in issue numbered 1, 3a, 3aa, 3c, 3d, 6a, 12b, 27, 31 and 47 are exempt under clause 13(1)(a).⁴²
75. To succeed in claiming clause 13(1)(a) as the basis for refusing access to a document it is necessary to demonstrate that the relevant document contains matter 'the disclosure of which would found an action for breach of confidence'. The term 'would' should be read as 'could'.⁴³
76. The Administrative Appeals Tribunal (AAT) has had cause to consider section 45 of the *Freedom of Information Act 1982* (Cth),⁴⁴ which is in substantially the same terms as clause 13(1)(a) of the FOI Act (SA). After consideration of the authorities, Deputy President Forgie of the AAT determined that an action for breach of confidence can only mean an action for equitable breach of confidence.⁴⁵ In my view, the AAT decision has persuasive value.
77. An equitable obligation of confidence is a duty not to disclose information because the information was given and received in circumstances which would make it unconscionable for the confidant to disclose the information in a way the confider has not authorised. A number of criteria must be satisfied:⁴⁶
- the information must be capable of being identified with specificity
 - the information must have the necessary quality of confidence
 - the information must have been received in circumstances which import an obligation of confidence

⁴² The agency also claims that document 7 is exempt under clause 13(1)(a). Given my findings above in relation to clauses 12(1) and clause 9(1), I do not intend to consider this claim with respect to document 7 or the third paragraph and the second to the final sentence of the fourth paragraph (on page 1) of document 3d.

⁴³ *Bray and Smith v WorkCover* (1994) 62 SASR 218, 226 to 227.

⁴⁴ *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244.

⁴⁵ *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [163].

⁴⁶ *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010), [38], affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs* (Vic) (1987) 14 FCR 434, 443. The test was also endorsed in *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [165].

- there must be actual or threatened misuse of the information.
78. I will therefore consider whether the criteria for founding an equitable breach of confidence can be established.
79. Based on the submissions and documentation provided by the agency to date and information that is in the public domain, I am not satisfied that:
- the claimed exempt information in documents 3c, 6a, 12b and 31 has, and the residual parts of document 3d have, the necessary quality of confidence
 - the claimed exempt information in documents 1, 3a, 3aa, 3c, 6a, 12b, 27, 31 and 47 was, and the residual parts of document 3d were, received in circumstances which imported an obligation of confidence. Indeed, the agency has provided no evidence to support such a claim.
80. I accept that if the other criteria for founding an action for breach of confidence were satisfied, release of the documents under the FOI Act would constitute their misuse.
81. For clause 13(1)(a) to apply, it may also be necessary for the confider to show '(at least for confidences reposed within government), that unauthorised use would be to the detriment of the' confider.⁴⁷
82. If detriment is an essential element, my view is that it is easily established. It would be sufficient, for example, to show that disclosure would cause the confider difficulty. I note also that Deputy President Forgie of the AAT commented that detriment:
- ... may be that disclosure of information relating to his affairs will expose his actions to public discussion and criticism ... [or] the disclosure itself in circumstances in which the disclosure is neither consented to nor otherwise justified.⁴⁸
83. I am not satisfied that documents 1, 3a, 3aa, 3c, 6a, 12b, 27, 31 or 47 or the residual parts of document 3d are exempt under clause 13(1)(a).

Comments

84. I remind the agency that it must engage in a 'public interest balancing process' in applying the public interest test.⁴⁹ Merely satisfying the initial criteria in an exemption clause with a public interest test under the FOI Act, is not enough to satisfy the test that disclosure would, on balance, be contrary to the public interest. Agencies should always turn their mind to the objects of the FOI Act, to extend as far as possible, the rights of the public to obtain access to information held by the government. This issue was discussed in the Ombudsman's 2014 FOI audit.⁵⁰
85. If the agency has not released document 45 in accordance with its internal review determination, it should do so forthwith.⁵¹

⁴⁷ *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443. See, however, *Trevorrow v State of South Australia* (2005) 94 SASR 44; *N P Generations Pty Ltd v Feneley* [2001] SASC 185, [21]; and *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services & Health* (1990) 22 FCR 73.

⁴⁸ *Re Callejo v Department of Immigration and Citizenship* [2010] AATA 244, [174].

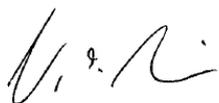
⁴⁹ *Iplex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.

⁵⁰ See 'An audit of state government departments' implementation of the *Freedom of Information Act 1991* (SA), May 2014, Part 7B, available at <http://www.ombudsman.sa.gov.au/wp-content/uploads/An-audit-of-state-government-departments-implementation-of-the-Freedom-of-Information-Act-1991-SA1.pdf>.

⁵¹ The copy of the agency's internal review determination dated 5 March 2018 provided to my Office includes documents 5, 12a, 29 and 30. Document 45 has been omitted, however.

Determination

86. In light of my views above, I vary the agency's determination to enable documents 1, 3a, 3aa, 3c, 6a, 12b, 22, 27, 31, 39a, 39b and 47 to be released in full, document 3d to be released after redacting the third paragraph and the second to the final sentence of the fourth paragraph (on page 1), and document 14b to be released after redacting the banking details.⁵²



Wayne Lines
SA OMBUDSMAN

16 October 2018

⁵² In my provisional determination I indicated that the banking details could be redacted from document 14b if the applicant did not express an interest in them in response. To date, the applicant has not expressed an interest in obtaining access to the banking details.



APPENDIX - 2018/03576

Procedural steps

Date	Event
12 January 2018	The agency received the FOI access application by email.
19 January 2018	The applicant narrowed the scope of the FOI access application by email.
24 January to 14 February 2018	The agency consulted interested parties.
16 February 2018	The agency determined the application.
19 February 2018	The agency received the internal review application dated 19 February 2018.
5 March 2018	The agency varied the determination.
28 March 2018	The Ombudsman received the applicant's online request for external review.
3 April 2018	The Ombudsman advised the agency of the external review and requested submissions and documentation.
17 April to 24 April 2018	The agency provided the Ombudsman with its submissions and documentation.
23 July 2018	By email, the agency provided additional information requested by Ombudsman SA.
26 July and 27 July 2018	Ombudsman requested additional documentation and submissions from the agency.
31 July 2018	The agency provided some of the requested documentation by emails.
6 August 2018	Ombudsman SA followed up the outstanding documentation and submissions requested from the agency.
7 August 2018	The agency provided a preliminary response to the follow up request.
21 August 2018	Ombudsman SA again followed up the outstanding documentation and submissions requested from the agency.

22 August 2018	The agency provided a partial response to the follow up request by email.
31 August 2018	Ombudsman SA reiterated the request for further submissions.
4 September 2018	Ombudsman SA sought further information from the agency and applicant, by separate emails.
5 September 2018	The applicant agreed to narrow the scope of the application.
13 September and 17 September 2018	By email, Ombudsman SA sought further information from the agency.
18 September 2018	Ombudsman SA received additional information from the agency, by emails.
19 September 2018	By email, Ombudsman SA received additional information from the agency.
25 September 2018	The Ombudsman made his provisional determination.
26 September 2018	Ombudsman SA emailed the Ombudsman's provisional determination to the parties.
12 October 2018	By emails, the agency responded to the Ombudsman's provisional determination.