



## DETERMINATION

### External review pursuant to *Freedom of Information Act 1991 (SA)*

<b>Applicant:</b>	<b>Mr Nathan Paine</b>
<b>Agency:</b>	<b>Adelaide City Council</b>
<b>Ombudsman reference:</b>	<b>79343D01</b>
<b>Agency reference:</b>	<b>ADEL 46067; 2009/175965</b>
<b>Determination subject to review:</b>	<b>Internal review determination dated 16 July 2009</b>
<b>Determination:</b>	<b>The determination of the council is reversed.</b>

## REASONS FOR DETERMINATION

### Background

1. The Adelaide City Council (**the council**) resolved on 20 December 2007 to prepare Heritage Development Plan Amendments for the Residential/Mainstreet (Hutt) Zones and the Central Business Area/Mixed Use Zones under the *Development Act 1993 (SA)*.
2. Following this and after a tender process, the council engaged independent consultants, Donovan and Associates (**the consultants**), and entered into a contract dated 19 March 2008 for 'City Heritage Survey' T2008/0035. The consultants were required to undertake an independent survey of the city and make recommendations to the council on potential heritage places.
3. Councillor Wilkinson of the council is a director of an Adelaide design, planning and heritage consultancy practice, Alexander Wilkinson Design Pty Ltd and specialises *inter alia* in heritage restoration. At some time, Councillor Wilkinson placed his own list of possible heritage places and archival and current photographs of properties on a Compact Disc, entitled 'Councillor Wilkinson City Heritage Research 2008' (**the CD**). He placed a motion on notice for the council meeting of 12 May 2008 in relation to the CD.
4. During the 12 May 2008 council meeting, the council resolved:

That with respect to the Heritage Survey & Assessment being undertaken for City Heritage by the selected consultants, Donovan & Associates:

- o The administration provide to the consultants a copy of the research information compiled by Councillor Wilkinson in CD ROM format labelled "Councillor Wilkinson City Heritage Research 2008" [the CD] lodged to the CEO for information. In

making this information available to the consultant, Council does not express an opinion of the merit or otherwise of the properties contained there-in.

- The brief to the consultants be varied to call for the insertion of archival photographs, whenever they exist, on the assessment sheets, for each of the properties assessed showing the building in its original appearance and any significant alterations.
  - The administration be authorised to deal with any additional professional fees on a pro rata basis with the consultants.
5. The contents of the CD were not tabled or reviewed at the council meeting of 12 May 2008. The council did not formally consider the contents of the CD. The properties listed and the photographs depicted on the CD reflect the views of Councillor Wilkinson and their potential heritage significance, not those of the council.
  6. On 13 May 2008 the following day, Councillor Wilkinson provided copies of the CD to the then Chief Executive Officer of council, for distribution upon request to councillors, and to the consultants to assist in their research. Council then requested the consultants to provide the council with a written fee proposal for their consideration of the CD.
  7. In providing the CD to the consultants, council did not express an opinion in relation to the heritage merit or otherwise of the properties which appeared on the CD.

### **The FOI application**

8. By application dated 24 April 2009, Mr Nathan Paine, Executive Director of the Property Council of Australia (SA Division) (**the applicant**) applied to the council under the *Freedom of Information Act 1991* (**the FOI Act**) for access to the CD and related documents, namely:

Documents concerning specifically a CD titled 'Councillor Wilkinson City Heritage research 2008' which was the subject of a resolution of the Adelaide City Council on 12 May 2008 (Agenda item 8.4 Motion on Notice/minutes page 4327-8) and any subsequent memos, briefing papers or documents transmitting the contents of the CD, or parts thereof, to elected members, staff members or other parties. (**the application**)

9. By notice dated 10 June 2009, Ms Tamara Wagner as Accredited Freedom of Information Officer of the council made a determination that seven documents fell within the scope of the application. Ms Wagner determined that the majority of the documents could be released to the applicant, with the exception of documents numbered as document 6.2 and parts of document 7.
10. Document 6.2 is a hard copy of some of the information on the CD entitled 'CBA/Mixed Use Zones-Previously Not Identified Potential Heritage Local Heritage Listings'. The CD itself could not be located at the time of Ms Wagner's determination.
11. Ms Wagner claimed clause 9(1) of Schedule 1 to the FOI Act (**clause 9(1)**) as a basis for refusing access to document 6.2 in her determination.

Clause 9(1) of Schedule 1 to the FOI Act provides:

#### **Internal working documents**

**9.** (1) A document is an exempt document if it contains matter—

(a) that relates to—

- (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
- (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision-making functions of the Government, a Minister or an agency; and

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

### **The applicant's submissions in his application for internal review**

12. By application dated 2 July 2009 under the FOI Act, the applicant requested an internal review of Ms Wagner's determination in relation to document 6.2 only (and not document 7). The applicant drew the council's attention to the objects of the FOI Act. He argued that the CD was received by the council in the course of an open meeting on 12 May 2008. He submitted:

The CD forms part of the public record of that meeting. There was no suggestion or motion that any part of the CD should be received in confidence nor could there be such a suggestion or motion. The CD was plainly a document which was intended to and did form part of the public record. By its nature and the circumstances in which it came before Council, it could not have validly been received in confidence. The CD was discussed in public and formed the basis for a public resolution by Council. It is [sic] fundamental principle of open government that the activities and processes of the Council are conducted in public except in the most exceptional circumstances. An understanding of the basis for the resolutions made by council and public confidence in local government is dependent on the public having access to the document referred to and relied upon by the Council in making its decisions. ... The FOI Act should not be used to prevent the public from accessing documents which have been received and publicly discussed by Council and which have formed the basis for public resolutions.

13. The applicant disputed that the CD was exempt from access under clause 9(1):

The document is not an internal working document of council. It is a document prepared by an individual and which has been submitted to and placed before Council. Council did not commission the document nor was it prepared at the request of council. The document is in the nature of a private submission. The fact that a Councillor is associated with the document does not given the document any special status.

The document was publicly received by Council. After public discussion, there was a public resolution that the document be passed on to the Council's consultants. The document was passed on in its existing form and status 'for information purposes'. It was not adopted or endorsed by Council. Indeed an amendment was made to the resolution disclaiming any involvement by the Council with the document - Council wished to make it clear that no opinion was expressed by council regarding the merit or otherwise of the properties mentioned.

...

Even if the document could be characterised as an internal working document ... the public interest plainly supports public access to this document. To prevent access to a document which was received and publicly discussed by the Council and which formed the basis for a resolution by Council would contradict every fundamental principle of open government and fly in the face of the working and spirit of the legislation governing the meetings of Council.

The document was in the nature of a private submission by an individual which Council had been requested to make available to Council consultants. It is entirely proper and appropriate that that document would be dealt with publicly by Council and would be

available for inspection by the public. Release of this document is essential so that the public is aware of the material being taken into account by the consultants. As the document has no formal status and the Council expressly disavowed any opinion on the merit or otherwise of the properties mentioned, the concern regarding the effect on third parties is, with respect, entirely misplaced. To the contrary, parties whose properties are mentioned in the document should be entitled to ascertain that their properties have been the subject of a document publicly received by Council.

The concerns raised in the determination do not and could not outweigh the over-riding public interest in preserving proper access to public documents.

### **Council's determination following internal review**

14. By notice dated 16 July 2009, Mr Michael Sedgman, General Manager - Corporate Strategy and Finance of the council confirmed Ms Wagner's determination on internal review. Mr Sedgman had located the CD. He confirmed that the CD comprised an electronic version of a table entitled 'CBA/Mixed Use Zones - Previously Not Identified potential Local Heritage Listings' identified as document 6.2 in Ms Wagner's determination, as well as current and archival photographs of relevant buildings in Mixed Use and Residential Zones.
15. In effect, Mr Sedgman determined that under clause 9(1)(a), the CD's contents (that is, document 6.2 and the photographs which identified the properties) relate to part of a consultation process that has taken place and to enable an opinion, advice and recommendation be provided to the council for the purpose of council's decision-making function regarding amendment of its Development Plan.
16. Mr Sedgman's public interest arguments supporting withholding the CD under clause 9(1) were couched in the following terms:

...the disclosure of this document would be contrary to the public interest because the council has not yet finalised its deliberations on the Development Plan Amendments.

This document constitutes a list of specific properties to be considered by Council's heritage consultants. In making this information available to the consultant Council did not express an opinion of the merit or otherwise of the properties listed. If these details are released, the market values of these properties may be unnecessarily affected, particularly if they are not proposed for the heritage listing in the final DPA, which will be released for public consultation. This is, in my view, contrary to the public interest when balanced against the need for these documents to be disclosed.

Furthermore, revealing the specific property that are being considered for heritage listing, and even the areas themselves may cause land-owners or developers to unnecessarily demolish buildings which are specifically mentioned in these documents, or buildings in the areas mentioned in the documents, in the event that they may receive a heritage listing. This again, when balanced against the disclosure of this information, is contrary to the public interest.

The same exemption applies to the photographs contained on the CD, in that they form part of the consultation and deliberation for the purpose of a decision-making function of the Council. As the photographs enable properties to be identified, the public interest arguments outlined above would also apply to the photographs.

While the CD was identified at the council meeting of 12 May 2008, it is not publicly available as it was never tabled or received at that Council meeting and never formed part of its

agenda. The CD was hand delivered to the Chief Executive Officer on 13 May 2008 and was subsequently made available to elected members.

### External review by the Ombudsman

17. The applicant requested an external review by my office of Mr Sedgman's determination (**the determination**), by letter dated 7 August 2009. The applicant reiterated his reasons outlined in his application for internal review in support of his request.
18. During my review, my office communicated with the council and the applicant; received further submissions from both parties; and conducted independent research. Council also provided a copy of its legal advice to my office.

### My preliminary view of the determination

19. I advised council on 22 October 2009 of my preliminary view of the determination, and I invited final submissions from council in response to my preliminary view.
20. I advised that I agreed that that the contents of the CD satisfy paragraph (a) of clause 9(1), in that they *relate to* a consultation that has taken place in the course of the decision-making functions of council. I construe the term 'relates to' in paragraph(a) broadly; and I consider that the CD 'relates to' the consultation between the council and the consultants in the council's decision making functions about whether or not to amend its Development Plan. The CD may also *relate to* an opinion obtained by council in the course of this decision making function within the meaning of the clause.
21. However, I advised that I was not persuaded that release of the CD would, on balance, be contrary to the public interest under clause 9(1)(b). I quote from my preliminary view in the following:
  - There is a public interest in the achievement of the objects of the FOI Act, namely to 'promote openness in ... government agencies' such as the council, and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'...<sup>1</sup>
  - The principles of administration of the FOI Act in section 3A reveal Parliament's clear intent that the FOI Act should be 'interpreted and applied so as to further the objects of this Act'.
  - Section 3A suggests that the council's discretion to refuse access to the CD as an 'exempt document',<sup>2</sup> should be exercised 'as far as possible in a way that favours disclosure'.
  - Although the CD was not tabled in the council meeting of 12 May 2008 so as to form part of the public record and thus available for inspection under the *Local Government Act 1999*, I agree with the applicant that the fact that the CD was publicly discussed by the council and formed the basis for a public resolution by council supports the public interest in its disclosure.
  - The fact that the council resolved to provide the CD to its consultants and authorise expenditure of additional public monies and professional fees incurred by the consultants in their assessment of the CD, are public interest reasons for the CD's disclosure.

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<sup>1</sup> Section 3 FOI Act

<sup>2</sup> Section 20(1)(a) FOI Act

- It could be perceived that as a consultant specialising in heritage restoration in private practice, Cr Wilkinson stands to benefit (albeit indirectly) from providing his CD through council to the consultants. I understand that no other parties were invited by the council to provide their views to the consultants. In my view, this suggests that a greater degree of openness is required, and the public interest in the CD's release is further enhanced.
- In light of my comments above, the fact that the properties proposed to be heritage listed by the council may be released in the future in a public consultation process, does not lessen the public interest in disclosure of the CD.
- Even though the council has not yet finalised its deliberations on the Development Plan Amendments, this does not mean that disclosure of the CD would be contrary to the public interest. Clause 9(1) anticipates disclosure of pre-decisional documents such as the CD, and does not view that disclosure of pre-decisional documents is necessarily contrary to the public interest.<sup>3</sup>
- The public interest factors in favour of disclosure of the CD which I have listed above outweigh the argued public interest factors against disclosure submitted by the council, namely possible falling market values of the properties identified on the CD or the unnecessary demolition of buildings. I would have thought that property owners in these areas would have some idea that their properties may be subject to heritage listing in any event, and that demolition may occur despite the CD and in the mere knowledge that the council is compiling a list of properties for possible heritage listing and amendments to its Development Plan.

### **Council's final submissions**

22. The Chief Executive of the council responded to my preliminary view by letter dated 29 October 2009. Below, and to assisting in illustrating my reasons for my determination which follow, I quote excerpts and summarise from the Chief Executive's submissions. I have numbered the excerpts for ease of reference:
- 22.1 'Under the ... *Development Act 1993*, Council is required to amend its zoning policies to meet the aspirations of the State Government's Planning Strategy for the City. ... Amongst a number of outcomes, the Planning Strategy seeks that buildings of identified heritage value are protected, whilst ensuring the City has sufficient zoning potential to meet future employment and housing targets.'
- 22.2 'Council is progressing the necessary statutory measures to designate within the Development Plan, and thus protect from demolition for the community into the future, buildings that do not currently enjoy protection from demolition.'
- 22.3 The steps undertaken by council thus far to progress the Development Plan amendments include:
- engaging independent heritage consultants to undertake a survey of Adelaide in order to identify buildings that meet the statutory local heritage criteria contained in the Development Act
  - conducting a peer review of the findings of the consultants
  - engaging independent consultants to advise on the implications of the proposed heritage listings in relation to employment and housing needs and the implications for businesses
  - consulting various government agencies in relation to the proposed amendments
  - briefing various stakeholders, including the Property Council of Australia (SA Division) regarding the overall aims of the amendments

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<sup>3</sup> See Mr Sedgman's arguments on internal review, first paragraph, para 16 above

- lodging the proposed amendments with the Minister for Urban Development and Planning seeking his approval to release the amendments for community consultation under the Development Act. The amendments are currently being reviewed by the relevant department to prepare advice for the Minister.
- 22.4 The criteria for heritage listing are articulated in section 23(4)(a)-(g) of the Development Act. Further:
- Heritage values exists if a building is important to the local area for historical reasons, if it represents characteristic customs, it has played an important part in the lives of local residents, it has design significance to the local area, it is associated with a notable personality, or it is a notable landmark.  
All of these local heritage outcomes are at are in the broader public/community interest. These outcomes are at risk by the release of the CD.
- 22.5 Council has resolved to keep the two Development Plan Amendments confidential at this stage.
- 22.6 ‘Maintaining confidentiality of the proposed list of buildings prior to the public consultation process and council seeking interim development control from the Minister to coincide with the start of community consultation is necessary so that the merits of each buildings heritage value can be professionally assessed, consulted about and further reviewed without the risk of buildings of heritage value to the broader public being demolished.’
- 22.7 ‘... The list of proposed buildings that have been assessed as being of heritage value is confidential at this stage. To maintain integrity in the process described above, the contents of the CD should remain exempt from disclosure and the owners of City buildings be advised that:
- The CD was referred to independent heritage consultants who along with undertaking their own heritage survey of the City, have identified buildings that in their view meet the statutory local heritage criteria.
  - If an owner’s building is on the proposed list, Council will write to them at the commencement of consultation to seek their comments, and their comments will be reviewed following processes established in the *Development Act 1993* by both Council and the State Government prior to the Minister finalising the DPA.’
- 22.8 ‘It is premature to provide a response to any owner of City buildings as to whether their building is on the proposed list or not. To do so would place owners in a situation of knowing their building was identified to be reviewed for potential heritage value, but not being able to confirm it was assessed as being of actual heritage value. This will cause unnecessary uncertainty and may have a detrimental impact on the public value of built heritage.’
- 22.9 ‘...such uncertainty could lead to owners lodging development applications seeking to demolish their building under the current Development Plan’ (which does not provide for refusal on the grounds of loss of heritage value).
- 22.10 ‘If the building over which a demolition approval exists has been identified by the independent heritage consultant as being of heritage value regarding statutory criteria, this scenario puts at risk these buildings of identified heritage value.

As an example of our concern, when the former Council was considering a similar heritage survey in North Adelaide, it considered in public the independent heritage consultants recommendations. Between the time of the former Council's public consideration of some 240 proposed local heritage buildings, and the final gazettal by the Minister for Urban Development and Planning, some eight development applications involving demolition were granted planning consent.'

22.11 'If the building over which a demolition approval exists has NOT been identified by the independent heritage consultant as being of heritage value, this scenario creates an unnecessary allocation of owners' resources as well as public resources and may lead to undue angst and uncertainty for owners.'

22.12 'Council recognises there is a balance to be achieved between public transparency and holding information confidentially. However, in this instance, the release of the information contained on the CD unduly places at risk buildings of heritage value to the public. It is in the public interest that the heritage value be maintained and that such a process not be undermined by the premature release of information.

If the CD is released, and it prompts owners to lodge development applications which result in buildings of heritage value to the public being demolished, is this, on balance, in the public interest?'

22.13 'The contents of the CD are the views of only one Council member and as you recognise, were forwarded to the independent consultants for information.

22.14 'The brief for the heritage consultants obliges those consultants to form their own professional opinion on the heritage value or otherwise of buildings that are not currently heritage listed...' The consultants initiated their own historical research, conducted their own inspections of buildings and undertook the necessary research that they considered – in their professional opinion – was necessary to substantiate how, or how not, each building met the statutory criteria for local heritage value. The CD was only one input into the heritage consultants investigations.'

22.15 '...all investigations - including the extensive investigations undertaken by the independent heritage consultant - forms part of each of the Development Plan Amendments. When approved by the Minister for consultation, these investigations will be fully available for the wider public - as well as affected owners - to review and to comment to Council on.'

22.16 The Development Act obliges Council to write to owners of buildings proposed for local heritage designation advising of the proposed designation and providing comments. All comments received as part of community consultation are reviewed by Council. Council's response is forwarded to the State Government for review by the Local Heritage Advisory Committee, who then provide advice to the Minister. The Minister then determines whether the buildings should, or should not be designated as local heritage places in the Development Plan. '... There are numerous checks and balances of the respective heritage value of buildings proposed by Council to be recognised for their local heritage value.'

*Specific arguments against the public interest*

22.17 'Council maintains the position that case law authorities support the view that the release of the documents contained on the CD is, as a general principle, contrary to

the public interest. In the case of *John Howard and the Treasurer of the Commonwealth of Australia*,<sup>4</sup> the Commonwealth Administrative Appeals Tribunal was required to consider the public interest test contained in a similar provision in the Commonwealth FOI Act to clause 9(1) of Schedule 1 to the South Australian FOI Act. The Tribunal in that case acknowledged that although the public interest in the release of individual documents was not to be circumscribed, that as a general principle:

- Disclosure of communications made in the course of the development and subsequent promulgation of policy tends not to be in the public interest;
- Disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not to be in the public interest; and
- Disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision maker and may prejudice the integrity of the decision making process

22.18 'In the present situation, the Council is concerned that the release of the contents of the CD is not in the public interest in that:

1. it amounts to a disclosure of communications made in the course of the development of a policy, being a Development Plan Amendment;
2. the disclosure of the contents of the CD will lead to confusion and unnecessary debate resulting from the disclosure of possibilities considered;
  - a. as stated above, the Council is awaiting the Minister's feedback on the DPA so that it may be released for public consultation;
  - b. it may be that this feedback requires the Council to amend the DPA, before it can be released for public consultation;
  - c. it is therefore in the greater public interest for the contents of the CD not to be released to the public **before** the finalised DPA is placed on public consultation;
  - d. the Council is also concerned that the release of the contents of the CD, especially given the risk that they may not reflect the contents of the final DPA may lead to members of the public becoming confused as to the contents of the finalised DPA and therefore lodging submissions based on incorrect and irrelevant information;
3. the disclosure of the contents of the CD may not fairly disclose the reasons for a decision made as to the finalised DPA:
  - a. this may cause unnecessary public criticism of the Council, and unnecessary criticism of the DPA, particularly if a number of properties contained in the list and the photographs on the CD are not actually recommended for heritage listing in the finalised DPA.'

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<sup>4</sup> [1985] AATA 100

## Provisions of the FOI Act relating to the external review

23. Section 48 of the FOI Act provides that in 'proceedings' concerning a determination under the Act, the onus is on an agency (such as the council) to justify its determination. The term 'proceedings' includes the external review process by the Ombudsman.
24. At the conclusion of an external review, I may confirm, vary or reverse the determination of the agency, based on the circumstances existing at the time of review (section 39(11)).

## Consideration of the operation of clause 9(1)

25. To justify claiming clause 9(1) of Schedule 1 to the FOI Act as a basis for withholding access to a document such as the CD, council is required to show that the contents of the CD are captured by clause 9(1)(a) and clause 9(1)(b). This is a dual requirement.
26. Parliament's articulation of the dual requirement in clause 9(1) shows that disclosure of a 'pre-decisional' document of the type described in paragraph 9(1)(a) will not of itself be contrary to the public interest.
27. The term 'public interest' is not defined in the FOI Act. Australian FOI case law generally accepts that '[t]he public interest is not to be circumscribed'.<sup>5</sup>
28. The District Court of South Australia in *Everingham v Director-General of Education* stated that in assessing the applicability of clause 9(1)(b):

In each case the documents must be viewed in the light of all relevant circumstances, their contents and purposes assessed, and that done, the question of balance decided.<sup>6</sup>

29. The Court has commented on the requirement under clause 9(1)(b) to engage in a 'public interest balancing process':

This does not mean merely showing that there is something adverse to the public interest likely to flow from disclosure of the document, but that on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure.<sup>7</sup>

30. Clause 9(1)(b) should be interpreted in accordance with the objects and intent of the FOI Act. In *Everingham*, the court commented:

Clearly the achievement of the objectives of the [FOI] Act is conducive to the public interest. It is a factor - and, I think, a fairly weighty factor - to be taken into account when determining where the balance lies.<sup>8</sup>

## My determination and reasons

31. My determination relates to the contents of the CD, which include document 6.2. I have considered the contents of the CD; the applicant's arguments; and the council's reasoning

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<sup>5</sup> *Re Murtagh and Commissioner of Taxation* (1983) 6 ALD 112 at 121. This case dealt with the provisions of the Commonwealth *Freedom of Information Act 1982*; however, the principles of what constitutes the public interest, and the process of considering the documents are applicable to the FOI Act in South Australia.

<sup>6</sup> Per Judge Bowering *Everingham v Director -General of Education* D2959 13 November 1992

<sup>7</sup> Per Judge Lunn *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54 at p70 (**Ipex**).

<sup>8</sup> *ibid*

in the determination and also in its final submissions. I thank both the applicant and the council for providing helpful submissions.

32. I have not been persuaded to resile from my preliminary view that the CD is not an exempt document under clause 9(1). I provide my reasons below, some of which are a repeat of my comments in my preliminary view.
33. I am satisfied that the contents of the CD fall within paragraph (a) of clause 9(1), in that they *relate to* a consultation that has taken place in the course of the decision-making functions of council. As I stated in my preliminary view, I construe the term 'relates to' in paragraph (a) broadly. The CD 'relates to' the consultation between the council and the consultants in the council's decision making functions in Development Plan Amendment process. The CD may also *relate to* an opinion obtained by council in the course of this decision making function within the meaning of paragraph (a).
34. However, I am not satisfied that disclosure of the CD would, on balance, be injurious to the public interest as required under paragraph (b) of clause 9(1).
35. There is a significant public interest in the achievement of the objects of the FOI Act, namely to 'promote openness in ... government agencies' such as the council, and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'... . The principles of administration of the FOI Act<sup>9</sup> demonstrate the SA Parliament's clear and express intent that the Act should be interpreted and applied so as to further the Act's objects; and that the discretion to refuse access to an 'exempt document',<sup>10</sup> should be exercised 'as far as possible in a way that favours disclosure'.
36. Although the CD was not tabled in the council meeting of 12 May 2008 and does not comprise the public record (making it available for public inspection under the *Local Government Act 1999*), the fact that the CD was publicly discussed by the council and formed the basis for a public resolution by council supports the public interest in its disclosure.
37. The fact that the council resolved to provide the CD to its consultants and authorise expenditure of additional public monies and professional fees incurred by the consultants in their assessment of the CD, are forceful public interest reasons which support the CD's disclosure.

I refer to section 8 of the *Local Government Act 1999* and the obligations of a council to provide open and accountable government.

38. While I make no suggestion about the conduct of Councillor Wilkinson, it could be perceived that as a consultant specialising in heritage restoration in private practice, he may stand to benefit (albeit indirectly) from providing his CD through council to the consultants. I understand that no other parties were invited by the council to provide their views to the consultants. In my opinion, this suggests that a greater degree of openness and accountability is required by council, and the public interest in the CD's release is amplified.

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<sup>9</sup> Section 3A

<sup>10</sup> Section 20(1)(a) FOI Act

39. Even though the Development Plan Amendment process has not been finalised, in my view, this does not mean that disclosure of the CD would on balance, be contrary to the public interest, as contended by council. Clause 9(1) anticipates disclosure of pre-decisional documents, such as the CD. Contrary to Mr Sedgman's argument, clause 9(1) in paragraph (b) suggests that disclosure of pre-decisional documents in itself is not harmful to the public interest within the meaning of the clause.<sup>11</sup>
40. The fact that the properties proposed to be heritage listed by the council may be released in the future in a public consultation process, does not diminish the public interest factors in paragraphs 36 - 38 above in favour of disclosure of the contents of the CD.
41. Some of the submissions of the council recognise that the CD is *not* the confidential 'proposed list' which has been put to the government for consideration in the DPA process. As council submits, 'The contents of the CD are the views of *only one Council member ...*' and '*... were forwarded to the independent consultants for information*' (para 22.13 above) who '*along with undertaking their own heritage survey of the City, have identified buildings that in their view meet the statutory local heritage criteria.*' (para 22.7). Further, '*The CD was only one input into the heritage consultants investigations.*' (para 22.14) (my emphasis)
42. However, in other submissions (paras 22.6-22.8), council does not distinguish between the CD and the later confidential 'proposed list of buildings' that have been assessed as being of heritage value and which has been put to the government in the DPA process for the Minister's consideration. Council's suggestion in para 22.7 that the integrity of the DPA process will be jeopardised if the contents of the CD are released, does not recognise the 'pre-proposed list' status of the CD.
43. I accept that there is an argument that there is a public interest in maintaining confidentiality of the council's 'proposed list' of buildings prior to the DPA public consultation process and council seeking interim development control from the Minister. But the CD is not the 'proposed list'; and council's arguments about 'confidentiality' and 'premature' release of the 'proposed list' cannot relate to the CD. (paras 22.6-22.8) Further, the CD's contents are not the views of the independent consultants, but those of Councillor Wilkinson. Thus, council's arguments about possible risk to buildings which have been identified by the consultants as being of heritage value, do not concern the CD. (see, for example, paras 22.10, 22.11).

This is not to say that the consultants' and/or council's views may not coincide with those of Councillor Wilkinson about the heritage worth of the properties identified on the CD. But this does not alter the fact that council's submissions which address the detrimental impact of release of the 'proposed list' or the consultants' views, fail to properly target the contents of the CD and consequences of its release.

44. I also accept that it is in the public interest that the heritage value of properties be maintained. However, the heritage status of the properties is yet to be finally determined. In my opinion, the public is able to differentiate between the contents of the CD which represents one person's view about the heritage status of identified properties, and the consultant's and council's 'proposed list' which has been submitted for the government's consideration.

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<sup>11</sup> I refer to Mr Sedgman's arguments on internal review, cited above in paragraph 16.

In addition, the council's current DPA heritage listing process is public knowledge. I consider that city property owners who are concerned about such matters would make it their business to inform themselves about the possibility of their property being heritage listed, and that development applications seeking demolition may occur whether or not the CD is released.

45. Council's final submissions address some of the public interest factors recited by Justice Davies in the case of *Re Howard and the Treasurer of the Commonwealth of Australia (Re Howard)*.<sup>12</sup> This decision has been frequently criticised in subsequent decisions<sup>13</sup> and in academic circles;<sup>14</sup> and was considered by Judge Lunn in *Ipex*.<sup>15</sup> At page 70 he states:

The statements in Howard's case are merely general indicators of where the public interest might lie, but they are neither necessarily definitive nor exhaustive.

*Re Howard* was decided in 1985, early in the operation of the Commonwealth *Freedom of Information Act 1982*. Justice Davies was aware of this when he commented after articulating the 'Howard factors' cited in part by council, at p 635:

As time goes by, experience will be gained of the operation of the Act. The extent to which disclosure of internal working documents is in the public interest will more clearly emerge. Presently, there must often be an element of conjecture in a decision as to the public interest. *Weight must be given to the object of the FOI Act.*" (my emphasis)

In the case of *Re Chapman & Minister for Aboriginal & Torres Strait Islander Affairs (Re Chapman)*, Deputy President McDonald noted Justice Davies' comments and added:

27. The difficulties associated with giving substance to the otherwise amorphous concept of public interest were highlighted in the Australian Law Reform Commission publication, Report No. 70, Administrative Review Council, Report No. 40, 'Open Government: a review of the Federal Freedom of Information Act 1982', at 96, in which the following factors were nominated as being of possible relevance in determining the public interest, namely:

- ' the general public interest in government information being accessible
- . whether the document would disclose the reasons for a decision
- . whether disclosure would contribute to debate on a matter of public interest
- . whether disclosure would enhance scrutiny of government decision making processes and thereby improve accountability and participation.'

and the following as possibly not being relevant:

- ' the seniority of the person who is involved in preparing the document or who is the subject of the document
- . that disclosure would confuse the public or that there is a possibility that the public might not readily understand any tentative quality of the information

<sup>12</sup> (1985) 7 ALD 626. Para 22.17 above.

<sup>13</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* [1993] QICmr 2 (30 June 1993); (1993) 1 QAR 60; *Re Rae and Dept of Prime Minister and Cabinet* (1986) 12 ALD 589. The Howard factors were also criticised in the Senate Standing Committee 1987 Report para 11.7-13.

<sup>14</sup> 'Reclaim the public interest high ground', Rick Snell, *The Australian*, 22 July 2004

[http://www.theaustralian.news.com.au/common/story\\_page/0,5744,10204902%255E36055,00.html](http://www.theaustralian.news.com.au/common/story_page/0,5744,10204902%255E36055,00.html).

<sup>15</sup> See fn 7

- . that disclosure would cause a loss of confidence in the government
- . that disclosure may cause the applicant to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.'

As will be seen from the above, a number of the principles listed by Davies J in *Re Howard* stand, as time has passed and experience in the administration of the FOI Act has grown, to be considered differently than was the case when they were first pronounced - a fact readily recognised by the learned judge at the time the decision was given.<sup>16</sup>

46. In a more recent decision, the NSW Court of Appeal held that the operation of the equivalent of clause 9(1)(b) in the *New South Wales Freedom of Information Act 1989* should not be constrained by rigid rules:

As one commentator has observed, the formulation of determinative guidelines 'runs contrary to the rationale for including a flexible, open-ended test': *Freedom of Information and Privacy in Australia: government and information access in the modern state*, Moira Paterson, 2005, LexisNexis Butterworths at [7.12]. That does not mean that guidelines such as the Howard factors are to be discarded, although it would be wise to have regard to the historical context in which they were formulated. They may be regarded as 'empiric conclusions ... not ... determinative guidelines': *Re Rae and Department of Prime Minister and Cabinet* (1986)12 ALD 589 at 597.<sup>17</sup>

47. I agree with the views expressed above; and I provide these comments in response to council's submissions in points 1-3 recited in para 22.18 above:

1. Without further submissions, I do not accept that mere disclosure of communications made in the course of the development of a policy is not in the public interest. This is generalised speculation, and fails to consider the contents of the particular documents, and in this case, the contents of the CD. The CD is the expression of one councillor's view about the heritage status or otherwise of properties under the Development Act.
2. I do not consider that the general public is as lacking in sophistication regarding knowledge of the DPA processes as to be unable to understand the status of the CD, namely that it is only one view of an individual who contributed to the consultants' investigations and the list of possible heritage sites ultimately proposed by council. To the extent that there may be confusion, the council is at liberty to clarify the 'status' of the CD to the public. I refer also to my reasons in paras 36-39, about the public interest in disclosure of the CD.
3. Again, I consider that the public is able to understand that the CD may not contain reasons for a decision made as to the proposed list or the finalised DPA, because of its very nature as a 'pre-decisional' document. It is the view of one person only, and not that of council.

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<sup>16</sup> (1996) 43 ALD 139 at 152

<sup>17</sup> *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWCA 84 at [157]

48. Council has drawn my attention to the Property Council of Australia (SA)'s recently articulated public position in its document *Adelaide 2036 – Building on Light's Vision* where the Property Council's recommendation is to 'Terminate the current proposal to apply heritage restrictions to more than 250 additional central city buildings ...' and with accompanying discussion on Page 26. I have considered this document, but do not consider that it impacts on the main arguments in my review.
49. Balancing my views and reasons above, I consider that the public interest arguments in favour of disclosure of the CD outweigh those against disclosure as submitted by the council under clause 9(1)(b).
50. The determination of the council to refuse access to the CD has not been justified; and pursuant to section 39(1) of the FOI Act, I reverse the determination of the council.

### **Right of Appeal**

51. The council or any person aggrieved by this determination may appeal against the determination to the Administrative and Disciplinary Division of the District Court pursuant to section 40(1) or 40(2) of the FOI Act.

Any appeal against this determination must be commenced within 30 days after notice of this determination is given to the applicant or the council; or in the case of a person who is not given notice of the determination, within 30 days after the date of this determination.

Richard Bingham  
**OMBUDSMAN**

... November 2009