

## DETERMINATION

### External review pursuant to *Freedom of Information Act 1991*

<b>Applicant:</b>	<b>Save the Chelsea Action Group</b>
<b>Agency:</b>	<b>City of Burnside</b>
<b>Ombudsman reference:</b>	<b>2010/00886</b>
<b>Agency reference:</b>	<b>FOIMS BU 57514</b>
<b>Determination:</b>	<b>The determination of the agency is varied</b>

## REASONS FOR DETERMINATION

### Background

1. By application dated 19 February 2010 the Save the Chelsea Action Group (**the applicant; STCAG**) applied to the City of Burnside (**the agency; the council**) under the *Freedom of Information Act 1991* (**the FOI Act; the Act**) for access to:

1. That part of the Council Minutes 15 December 2009 covering resolutions C7739 to C7744 including the text of all parts noted 'confidential' in the published version of these minutes and including any report that was received.
2. That part of the Council Minutes 28 July 2009 covering "Chelsea Complaints" resolutions C7548 to C7549 including the text of all parts noted 'confidential' in the published version of these minutes and including any report that was received.
3. That part of the Council Minutes 31 August 2009 covering "Chelsea Cinema" resolutions C7582 to C7584 including the text of all parts noted 'confidential' in the published version of these minutes and including any report that was received.

The applicant requested a hard and electronic copy of the documents, and to inspect the documents.

2. On 26 February 2010, Ms Sue Bayly, an accredited FOI officer of the agency refused access to the documents within the scope of the application. Ms Bayly offered the following reasons for her determination:
  - Clause 7(1)(b), documents affecting business affairs (commercial in confidence), applies to the material from 28 July and 15 December 2009;
  - Clause 10, Documents subject to legal professional privilege, applies to the material from 31 August 2009.
  - Clause 13(1)(a) applies to all of the above as the documents are confidential under council resolutions made under Section 90(3) of the Local Government Act 1999.
3. The applicant requested internal review on 3 March 2010 and summarised the bases on which it was aggrieved:
  1. Access has been denied to all documents
  2. The notice of determination does not comply with the S23 of the act ...

3. The broad application of the exemptions quoted without any reasoning or identification of documents is not in keeping with the objects of the Act to favour maximum disclosure of information.
4. It appears that no consideration has been given to granting partial access

As we do not have the reasoning referred to above it is difficult to explain why the exemptions should not apply, however we submitted that

- in order for exception 7(1)(b) to apply the loss of commercial value and public interest tests are not satisfied for all documents in the 28 July and 15 December 2009 group
- legal professional privilege does not necessarily apply to all documents or all parts of a document simply because one document or part of a document may be privileged so exception 10 would not apply to all documents in the 31 August 2009 group
- the fact that the minutes show a resolution was passed under S90(3) does not of itself mean that exemption 13(1)(a) applies

At the same time, the applicant requested a sequentially numbered list of documents.

4. The agency failed to make an 'active' determination within 14 days after receiving the application for internal review, and was therefore deemed to have confirmed its original determination refusing access to the documents.<sup>1</sup>

#### **External review process and parties' submissions**

5. On 29 March 2010, Mr Rob Williams sought external review by my office on behalf of the applicant.
6. By letter dated 15 April 2010 I requested preliminary information from the agency, including the documents within the scope of the application, by 29 April 2010.
7. My office received the agency's response on 13 May 2010 after a number of follow-up requests.
8. By letter dated 19 May 2010 the agency advised the applicant of its intention to make a belated 'determination' early in the week commencing 24 May 2010.
9. This did not transpire, and faced with the prospect of further delays, I wrote to the agency on 2 June 2010 asking it to provide:
 

detailed reasons in justification of any claims of exemption over documents or parts of documents within the scope of the application [not released to the applicant by 22 June 2010; and] ... a copy of any belated determination made by the Council, along with a copy of any documents or parts of documents released.
10. By letter dated 17 June 2010 the agency provided a report marked 'confidential', that had been tabled at the 15 June 2010 meeting, disclosing the agency's position at the time and additional reasons for maintaining its claim of exemption over some information.
11. On 24 June 2010, consistently with section 19(2a) of the FOI Act and in accordance with a resolution of the agency, the agency determined to release some documents to the applicant (in whole or in part). The agency also provided an excerpt from the

<sup>1</sup> According to a letter from the agency to the applicant, as at 24 March 2010 Mr Simon Bradley of the agency was conducting an internal review and anticipated an outcome by mid-April 2010. The applicant advised that receipt of this letter post-dated the application for external review.

minutes of its 15 June 2010 meeting, which included the following reasons under section 90 of the *Local Government Act 1999*, rather than under the FOI Act, for not releasing some documents:<sup>2</sup>

- 3.1 the report, minutes and attachments are to remain confidential on the basis that they contain information which could reasonably be expected to confer a commercial advantage on a person with whom the Council is conducting or proposing to conduct business or to prejudice the commercial position of the Council; and would be on balance contrary to the public interest, pursuant to Section 90(3)(b) of the Act; and
  - 3.2 the minutes, documents or information remain confidential on the basis that they contain commercial information of a confidential nature (not being a trade secret) the disclosure of which could reasonably be expected to prejudice the commercial position of the person which supplied the information **OR** to confer a commercial advantage on a third party, and to do so would be contrary to the public interest, pursuant to Section 90(3)(d) of the Act;
  - 3.3 the minutes, documents or information, are to remain confidential on the basis that it concerns legal advice pursuant to Section 90(3)(h) of the Act; and
  - 3.4 the minutes, document or information will not be available for public inspection for the period of does [sic] not exceed five years in either case at which time this order will be revoked/reviewed by the Council/Chief Executive Officer.
12. Shortly thereafter, the applicant reiterated its view that the agency had not complied with section 23 of the FOI Act. The applicant also submitted that it was not apparent from the documents what had not been released, which made it difficult to assess whether the agency's searches were sufficient, and again requested a list of documents.
  13. On 7 July 2010, with the agency's consent, I provided a schedule to the applicant after masking the names of third parties claimed exempt by the agency. At the same time, I asked for details of any documents the applicant thought the agency had failed to 'actively' deal within the scope of the application for access.
  14. By letter dated 20 July 2010, the applicant asked for a list identifying attachments and more information about 'the individual parts of documents and the entire documents which have been refused access', and anticipated receiving further reasons for the refusal of access in due course. The applicant also queried where the following documents were listed:
    - ... where are the reports listed that are referred to in C7584, C7549 and C7743?
    - ... Could you also advise where the following documents are listed:
      - Correspondence from interpreted [sic] parties and the outcome of legal audit of prior motions referred to in item 1.2 page 2
      - Wallmans La[w]yers advice at point 14 on the following page
      - The attachments referred to in document 3.4 page 2 at 2.3

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<sup>2</sup> I make the following comments with reference to the agency's submissions following my provisional determination (at paragraph 25(c) below). Although Attachment F to the agenda dated 15 June 2010 makes reference to the FOI Act, and specifies which documents the agency is and is not prepared to release, it does not include any reasons for refusing access. The minutes provided to me on 25 June 2010 do not provide reasons for refusing access either.

- Resolution C7491 referred to in document 1.2 and other places

15. On 9 August 2010 Ms Tonia Nielsen of my office met with Mr Simon Bradley of the agency, and Mr Anthony Kelly of Mellor Olsson Lawyers, acting for the agency. Ms Nielsen summarised the outcomes of the meeting in an email to the applicant and copied to the agency:

1. the council will consider whether the following documents are within the scope of the application:
  - a. Correspondence from the Save the Chelsea Action Group (**STCAG**) (referred to in document 2.2)
  - b. Another document (referred to in document 2.2)
  - c. Council agenda dated 25 August 2009 (this appears to be essentially the same as the council agenda dated 18 August 2010).

The council advised me that where the minutes note 'that the report be received' it does not mean that a separate document exists. The text that follows is the report. Likewise, documents that were 'to be attached' did not form part of the documents themselves. The references were to show the form the documents would take in the future.

2. the council will consider what further information from the documents within the scope of the application may be released to STCAG [bearing in mind information in the public domain<sup>3</sup>], as envisaged by section 20(4) of the *Freedom of Information Act 1991 (the FOI Act)*. This may answer some of the queries raised in your letter dated 20 July 2010.
3. for any information the council maintains is exempt following this process, the council will provide reasons for its claims under the FOI Act to STCAG.
4. the council will consider what further descriptions of documents 1.3, 1.4, 1.5, 1.6, 3.2 and 3.3 may be provided to STCAG. I have provided some suggestions that include the number of pages for each of the documents and further information to describe them.

16. On 22 September 2010, after a number of follow-up requests, I received the agency's response, which included a letter to the applicant dated 20 September 2010. The agency determined that it was practicable to release further information to the applicant. In addition, the agency offered reasons for its claims of exemption in the letter and Annexure A to the letter, and described the information claimed exempt in each document in greater detail.

17. The agency's letter dated 20 September 2010 included the following reasons in support of its claims of exemption:

the majority of documents that have not been provided in their entirety fall within Schedule 1, Clause 7(1)(b) as being documents containing matter consisting of information (other than trade secrets) that has a commercial value to any agency of any other person and the disclosure of which could reasonably be expected to destroy or diminish the commercial value of the information and would, on balance, be contrary to the public interest. These documents, particularly the correspondence from prospective tenderers, is also exempt by virtue of Clause 13 of Schedule 1, as disclosing the identity of such persons would be the disclosure of information sent to Council in confidence.

18. The agency addressed particular documents in Annexure A to its letter dated 20 September 2010. I will briefly summarise the agency's reasons with reference to the documents:

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<sup>3</sup> Ms Nielsen referred the agency to specific websites in a separate email.

***Documents 1.1 to 1.6***

[These documents contain information which is] exempt pursuant to clause 7(1)(b) and 13(1) of Schedule 1 of the Act... [The documents] contain information regarding businesses with a possible interest in the Cinema... [and] the provision of this information could prejudice future supply of such information, would diminish the value of the commercial information and would be contrary to the public interest.

***Documents 2.2 and 2.3***

[These documents contain] a number of items which would be classed as exempt documents ... pursuant to Clauses 7... and 13.

***Document 3.1***

There are a number of elements of these documents which are exempt ... as they contain information that has a commercial value and is confidential. It is not in the public interest to have information regarding sale and lease prices, as well as the process to be undertaken, in the public domain, as this will not ensure the Council receives the optimum deal it can (whether sale or lease). This is in accordance with Clauses 7 and 13.

***Document 3.2***

The Council consider[s] that [the remainder of] this ... document should remain confidential as it contains the processes which the Council is considering and the issues being addressed... This is in accordance with Clause 7.

***Document 3.3***

This document is confidential and contains information that is of a commercial value to the Council, in that it provides a value for the land and any lease, as well as a valuation methodology used by the valuer in making certain conclusions.

19. On 15 October 2010 Ms Nielsen provided a schedule of documents to the applicant, with the agency's consent. I have annexed a copy of the schedule to this determination, with an additional column containing my determination with respect to each document.
20. On 6 October, 15 October and 9 November 2010 the applicant was invited to provide reasons if it remained aggrieved, including if the sufficiency of the agency's searches was still in issue.
21. The applicant provided two responses to these invitations. On 7 October 2010, Mr Williams provided a preliminary response by telephone and sought an extension to discuss the matters with the applicant's other members. However, he indicated that the applicant remained aggrieved by the protracted process. In addition, he stated that he was not completely convinced that information claimed exempt ought to be, or that all documents had been provided. In support of the latter, he pointed to criticisms of the agency's processes by State Records and his past experiences. He referred to the independent report criticising the council's processes; and considered there was some onus on the council given the independent report and their proven history of not doing things properly. In his view, it was arguable that documents that may be necessary to understand the documents accessed were within scope.
22. On 17 November 2010, Mr Andrew Phillips confirmed in writing that the applicant remained aggrieved. The substance of the letter provided as follows:

**Document 1.2**

- The name of interested party (IP) 3 from 'Prev Resolution: 16/6/09 C7491' is claimed as exempt and yet was published by the Council in the public minutes of the 16 June 2009 Council meeting. That part of the meeting was held in public; the motion was drafted in public and witnessed by an overflowing gallery! As a result we are well aware that the missing extract includes the words "...*Wallis Group (if they are prepared to meet)*".<sup>4</sup>
- It is not clear whether the Officer's Recommendation in item 4 includes the names of two recommended Councillors or whether they have been deliberately left blank and for future nomination at the discretion of the elected members. We assume the latter as there is no reference to this item in your schedule of matters claimed exempt.

**Document 2.2**

- ... [the applicant's submissions are identical to the first dot-point for document 1.2.]

**Document 2.3**

- This document was not supplied with the 20 September 2010 correspondence from Mr Paul Deb. The implication from your schedule is that document 2.2 and 2.3 are identical apart from the header.

**Document 3.1**

- The STCAG questions the validity and merit of citing clauses 7(1)(b) and 13(1) of the *FOI Act (1991)* in exempting the reserve sale price in item 3 of C7739, C7742 and C7743. We would argue that such disclosure would NOT be contrary to the public interest given that the City of Burnside resolved on 2 September 2010 to abandon the sale of these properties.
- We maintain that the community has a right to know what current market value the Council ascribes to community owned property assets.

**Document 3.2**

- STCAG seeks access to the report cited as part of previous resolution C7674 and delivered to the Council on 17 November 2009 and requests that you make a determination as to whether this report can be considered to be within the scope of the original STCAG FOI application. We suspect that this report and the release of its contents may well be in the public interest and seek further information about the nature and content of that report.
- It is not clear to STCAG why Item 16 is exempted under clause 7(1)(b) of the *FOI Act (1991)* and its release claimed not to be in the public interest, based on the information provided.

**Document 3.3**

- It is not clear to the STCAG as to the precise nature of the material that has been excluded in pages 1 to 3 of this document. This has not been identified in the documentation supplied. We are therefore unable to test or question the validity of the claimed grounds for exemption. We seek further clarification of the nature of this exempted material.
- The STCAG questions the validity and merit of citing clause 7(1)(b) of the *FOI Act (1991)* in exempting the reserve sale price information on pages 3 and 4. We would argue that such disclosure would NOT be contrary to the public interest given that the

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<sup>4</sup> I have accessed the minutes via the agency's website, and am satisfied that words in italics are publicly accessible.

City of Burnside resolved on 2 September 2010 to abandon the sale of these properties.

- We maintain that the community has a right to know what current market value the Council ascribes to community owned property assets.
- The STCAG questions the validity and merit of citing clause 7(1)(b) of the *FOI Act (1991)* in exempting the shop rental price information on page 5. We would argue that such disclosure would NOT be contrary to the public interest given that the City of Burnside resolved on 2 September 2010 to abandon the sale of these properties.
- We maintain that the community has a right to know what current market rental value the Council ascribes to community owned property assets.

We ask that you give due consideration to these comments and requests concerning our scoping request, the lack of justification for the omissions and our questioning as to whether the omissions meet the criteria in the exemption clauses upon which the City of Burnside is reliant. In a number of cited cases we do not believe that the Council has provided sufficient argument to justify the exemptions and in particular why disclosure would be contrary to the public interest.

Regardless of your views in relation to our response above, we request that the Ombudsman make an official determination on external review concerning this FOI review rather than simply closing the file as you have indicated that you intended to do in the absence of any further communication from the STCAG. We seek formal acknowledgement from the City of Burnside that the application was poorly handled by them and that they did not follow the requisite timelines nor did they respond adequately and with sufficient regard to the specific requirements and obligations of an agency of which an FOI application is made as clearly laid out in the *FOI Act (1991)* and incumbent upon them to do so.

23. On 8 February 2011 I provided my provisional determination and reasons to the agency, the applicant, and the three interested parties, and invited their responses. I received written responses from the agency and the applicant, both dated 22 February 2011. I will discuss their contents in further detail below. Ms Nielsen also spoke to interested parties 1 and 2. On 15 February 2011, interested party 1 consented to information about them in the relevant documents being released. On 22 February 2011 interested party 2 indicated that they would consent to release of the information about them contained in the relevant documents subject to it not being used for a political purpose. Ms Nielsen advised interested party 2 that it was not possible to impose conditions on the use of information released under the FOI Act, and to enable them to seek legal advice, extended the time for them to respond until 23 February 2011. To date, no further responses have been received.
24. The applicant's response to my provisional determination and reasons, included the following:

... We accept your provisional determination in all respects with the exception of your ruling concerning our request for access to documents as set out in points 61 and 62 of your provisional determination letter of 8 February 2011 ['Sufficiency of agency's searches']. We request that you reconsider your decision to refuse to allow those documents to be considered to be within the scope of the original application.

The applicant concedes that the 'report and attachments' referred to in the confidentiality order in point 5 of the resolution C7675 of the 17 November 2009 minutes (and incorrectly identified in document 3.2 as C7674) ('**the report and attachments**') were 'not specifically requested as part of the original 19 February 2010 FOI application'. Nevertheless, the applicant has asked me to consider 'report and attachments' for the following reasons:

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- (a) they are referred to in document 3.2.
  - (b) they are 'closely and directly related to the subject matter of the other requested FOI documents and indeed is the immediate precursor to the 15 December 2009 agenda item 18.2 Chelsea report as identified in the previous resolution preamble to that report [document 3.2].'
  - (c) to avoid 'another separate and costly FOI application with the seemingly inevitable and protracted delays that will ensue', given the applicant's view that the agency is likely to refuse access to the report and attachments.
  - (d) the likely public interest in the report and attachments 'in the context of the ongoing debate ... and the likelihood or possibility that a prospective future cinema operator or purchaser may wish to partition the Chelsea auditorium into separate cinemas', and as 'a useful test as to the honesty and integrity of public comments by some former elected members'.
25. The agency has also made a number of submissions in response to my provisional determination and reasons. I will briefly refer to the salient points:
- (a) The agency concurs with my proposal to release additional information, 'given the circumstances have changed somewhat since the original determination ... [and t]he passage of time has meant that the material proposed to be released has lost its element of confidentiality.' Nevertheless, the agency has submitted that its original determination was correct at the time it was made, and my determination should be based on those circumstances.
  - (b) The agency 'acknowledges that there were some delays in providing responses' but has submitted that:

[a]t the time, there were numerous inquiries being undertaken in response of Council's activities, together with various officers acting in new roles as a consequence of the former Chief Executive Officer resigning. It was also necessary to obtain detailed legal advice on the issues that had been raised, as Council had to ensure it was not breaching any confidentiality requirements in respect of the information requested.'
  - (c) With reference to paragraph 11 of my provisional determination:

[t]he minutes of the 15 June 2010 Council meeting do in fact reflect that documents were released pursuant to the FOI Act, as the second motion refers to the documents being provided in accordance with Attachment F of the Report, and this report contained references to the FOI Act. The references to Section 91 in the third motion relates to additional matters in respect of the confidentiality of the documents.
  - (d) 'The tenders were submitted on the basis that all details of the tender would be kept confidential (and Council does not just rely on the document being stamped 'confidential').' At the time the agency initially assessed the FOI application, information about parties interested in the property was not in the public domain. Further and in any event, information in the public domain, such as unconfirmed media reports, does not 'excuse Council from any confidentiality obligations.'
  - (e) The agency denies that its reasons for refusing access to the documents were inadequate.
  - (f) The agency notes 'that the aims of the *Local Government Act 1999* and the FOI Act are sometimes in conflict when confidential matters are involved', and that it is

required to balance these aims and not prejudice future tendering and contracting processes.

- (g) When the application for access was made, the applicant had publicly indicated its interest in the Chelsea Cinema.

26. I have noted the information that the agency has released to the applicant, and the concessions made by the agency and the applicant in response to my provisional determination. For the purposes of my determination I therefore intend to focus on the information that the agency has not released to the applicant, and the applicant's request that my determination encompass additional documents. Although the applicant appears to agree with my provisional determination that the pricing information contained in some documents is exempt, my determination will consider such information.

### Exemption clauses

#### *Clause 7(1)(b)*

27. Clause 7(1)(b) of Schedule 1 to the FOI Act provides as follows:

- (1) A document is an exempt document—
- (b) if it contains matter—
- (i) consisting of information (other than trade secrets) that has a commercial value to any agency or any other person; and
- (ii) the disclosure of which—
- (A) could reasonably be expected to destroy or diminish the commercial value of the information; and
- (B) would, on balance, be contrary to the public interest; or

28. To justify a claim that a document is exempt pursuant to clause 7(1)(b), each of the following criteria must be satisfied:

- (a) The document contains information (other than trade secrets) that has a commercial value to any agency or person.

The terms 'commercial' and 'value' are not defined in the FOI Act, and should be accorded their ordinary meaning.

- (b) Disclosure of that information could reasonably be expected to destroy or diminish the commercial value *of the information* [my emphasis].
- (c) The disclosure of the matter would, *on balance*, be contrary to the public interest.

This means showing that there is something adverse to the public interest likely to flow from disclosure of the document, and that 'on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure'.<sup>5</sup>

The public interest has many facets. For example, there is clearly a public interest in the effective and efficient workings of representative government and its

<sup>5</sup> *Iplex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54 at 70 per Judge Lunn. These comments were made in relation to clause 9(1)(b) of Schedule 1 of the FOI Act, but are relevant to clause 7(1)(b).

agencies, as well as in ensuring just administration and accountability within representative government and the ability to scrutinise public administration.

***Clause 7(1)(c)***

29. In my view clause 7(1)(c) of Schedule 1 to the FOI Act is also relevant.<sup>6</sup>
30. Clause 7(1)(c) provides:
- (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) ['information (other than trade secrets) that has a commercial value to any agency or any other person'] 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.
31. To justify a claim that a document is exempt pursuant to clause 7(1)(c), it is necessary to demonstrate that:
- (a) Information in the document consists of information (other than trade secrets or information that has a commercial value to any agency or any other person) concerning the business, professional, commercial or financial affairs of an agency or person.
  - (b) Disclosure of that information could reasonably be expected to either:
    - (i) have an adverse effect on those affairs.

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.<sup>7</sup>

    - (ii) prejudice the future supply of such information to the Government or to an agency.
  - (c) disclosure of the information would, on balance, be contrary to the public interest.

***Clause 13(1)***

32. Clauses 13(1)(a) and 13(1)(b) of Schedule 1 to the FOI Act provide that:

<sup>6</sup> I have a discretion to consider clauses not relied on by the agency: *Department of Premier and Cabinet v Redford* (2005) 240 LSJS 171 at [29].

<sup>7</sup> *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) 192 LSJS 54 at 65.

- (1) A document is an exempt document—
  - (a) if it contains matter the disclosure of which would found an action for breach of confidence; or
  - (b) if it contains matter obtained in confidence the disclosure of which—
    - (i) might reasonably be expected to prejudice the future supply of such information to the Government or to an agency; and
    - (ii) would, on balance, be contrary to the public interest.

33. To succeed in claiming clause 13(1)(a) it is necessary to demonstrate that the relevant document contains matter 'the disclosure of which would found an action for breach of confidence'. The obligation of confidence may be contractual or equitable, and 'would' should be read as 'could'.<sup>8</sup>

34. 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.<sup>9</sup>

- (a) The information must be capable of being identified with specificity.
- (b) The information must have the necessary quality of confidence.
- (c) The information must have been received in circumstances which import an obligation of confidence.
- (d) There must be actual or threatened misuse of the information.

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.<sup>10</sup> If detriment is an essential element, my view is that it is easily established.

35. To succeed in claiming clause 13(1)(b) as a basis for refusing access to a document, each of the following criteria must be satisfied:

- (a) The information in the document was obtained on a confidential basis<sup>11</sup>
- (b) Disclosure of the information might reasonably be expected to prejudice the future supply of such information to the Government or an agency
- (c) Disclosure must, *on balance*, be contrary to the public interest.

### Other relevant provisions

36. Section 12 of the FOI Act provides that 'a person has a legally enforceable right to be given access to an agency's documents in accordance with this Act'.

<sup>8</sup> *Bray and Smith v WorkCover* (1994) 62 SASR 218 at 226 to 227.

<sup>9</sup> *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 (Unreported, Judge Brebner, 9 December 2010) at [38] affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs* (Vic) (1987) 14 FCR 434 at 443.

<sup>10</sup> See, however, *Trevorrow v State of South Australia* (2005) 94 SASR 44.

<sup>11</sup> *Re Maher and Attorney General's Department* (1985) 7 ALD 731 at 737.

37. Under section 20(1)(a) of the FOI Act, 'an agency may refuse access to a document if it is an exempt document'.
38. Section 48 of the FOI Act places the onus on the agency to justify its determination in my external review.
39. One of the 'principles of administration' in the FOI Act is that the Act 'should be interpreted and applied' so as to further its objects.<sup>12</sup> Section 3 of the FOI Act provides:

### **3 Objects**

- (1) The objects of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament-
- (a) to promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State; and
  - (b) to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies.
- (2) The means by which it is intended to achieve these objects are as follows:
- (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and
  - (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; ...
40. In addition, section 20(4) of the FOI Act provides that:
- If-
- (a) it is practicable to give access to a copy of a document from which the exempt matter has been deleted; and
  - (b) it appears to the relevant agency (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to such a copy,
- the agency must not refuse to give access to the document to that limited extent.

41. Section 39(11) of the FOI Act provides that in my external review, and 'based on the circumstances existing at the time of the [my] review', I may confirm, vary or reverse the agency's determination. Given section 39(11), I cannot accede to the agency's request to make my determination 'based on the "state of play" at the time the Council made its determination.' For the same reason, I do not intend to consider whether the agency's determination was correct at the time it was made.

### **Consideration of submissions and conclusion**

42. I have had regard to the submissions received from the parties to the review and two of the interested parties; the relevant documents; information in the public domain and information that has been released pursuant to the FOI Act; the applicable law; and the present circumstances.

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<sup>12</sup> Section 3A(1)(a) of the FOI Act.

43. Circumstances have changed significantly since the agency made its determination. Searches conducted by Ms Nielsen have revealed a considerable amount of information in the public domain about both the agency's intentions regarding the sale of the Chelsea Cinema and parties who may have expressed an interest in the Cinema.<sup>13</sup> I accept that much of this information was not in the public domain when the application for access was made.

*Documents claimed exempt*

*Documents 1.1 to 1.6, 2.2 and 2.3*

44. The agency claims that information in these documents is exempt under clause 7(1)(b), 13(1)(a) and 13(1)(b) of Schedule 1 to the FOI Act.
45. The majority of the information claimed exempt in documents 1.1 to 1.6, 2.2 and 2.3 is information that the agency considers would identify the interested parties, and includes their names and the names of their representatives. Document 1.2 contains some additional information that details the reasons for discussing two of the interested parties and the agency's intended response. Other than the first email in the email chain that constitutes document 1.3, the documents are all marked 'confidential', in the header, above the recipient's address, or in the subject and/or sensitivity lines of emails. The number of interested parties is also claimed exempt in documents 2.2 and 2.3.
46. I am not satisfied that identifying information about parties who may be or may have been interested in purchasing or leasing the property, or the number of interested parties, has a commercial value to the agency or to the interested parties as required by clause 7(1)(b). Disclosure of the information will not affect the agency's ability to negotiate or contract with any of the interested parties, or indeed other parties who have not previously expressed an interest. Further and in any event, even if I am wrong, and the information is commercially valuable, I have not been persuaded that its value would be destroyed or diminished by disclosure, bearing in mind information that is in the public domain and information that has been released to the applicant. This, in my view, further undermines any claim under clause 7(1)(b).
47. I have proceeded on the basis that the agency claims it is under an equitable obligation of confidence not to disclose the information for the purpose of clause 13(1)(a), as it has not submitted a contractual obligation exists. In response to my provisional determination, the agency explained that '[t]he tenders were submitted on the basis that all details of the tender would be kept confidential ... and at the time of the assessment this information was not in the public domain.' As previously indicated, I am obliged to make my determination based on the circumstances that exist at the time of my review. I am not satisfied that the information has the necessary quality of confidentiality required in the test for breach of confidence (see paragraph 34 above) to satisfy clause 13(1)(a) given the publicly accessible information and information that has been released to the applicant under the FOI Act.
48. Given this, the agency has not persuaded me that disclosure of these documents could reasonably be expected to prejudice the future supply of information for the purposes of clause 13(1)(b). In my view, this would also prove fatal to a claim of exemption under clause 7(1)(c), although I note that the agency has not relied on this clause.

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<sup>13</sup> Consistent with section 39(15) I have not included a list of the documents and websites I have considered in these reasons. In an email dated 10 August 2010 Ms Nielsen of Ombudsman SA provided relevant links to the agency and its solicitors. In addition, I provided relevant references to the interested parties for the purposes of consulting them about my provisional determination.

49. In these circumstances it is not necessary for me to consider the other criteria identified above. Nevertheless, by way of comment, simply marking documents as 'confidential' is not, in my view, sufficient in and of itself to prove that the documents were communicated in confidence as required by clauses 13(1)(a) and 13(1)(b). I accept that the agency was not relying solely on the fact that most of the documents were marked 'confidential'.
50. Regarding document 1.2, the applicant has queried whether names of two councillors have been excluded from item 4 of the 'Officer's Recommendation'. The copy of document 1.2 the agency has provided to me shows two underlined spaces where the councillors' names would otherwise appear. It appears to me that the councillors' names did not form part of document 1.2.
51. It is my understanding that to date document 2.3 has not been provided to the applicant. Although substantially similar to document 2.2, it should be treated as a document in its own right.

*Document 3.1*

52. The agency claims that reserve sale and lease prices in this document are exempt under clause 7(1)(b), 13(1)(a) and 13(1)(b) of Schedule 1 to the FOI Act.
53. Searches conducted by Ms Nielsen have revealed only minimal information about reported reserve sale prices.<sup>14</sup> To my knowledge, there is no publicly available information to corroborate or contradict the figures cited, however. This is in contrast to the position regarding the reported identities of the interested parties, some of whom appear to have confirmed their interest.
54. I note that plans to sell or lease the property were deferred shortly before the November 2010 council elections, and that the future of the Chelsea Cinema is in a state of flux.<sup>15</sup>
55. I am not satisfied that the reserve sale and lease prices considered by the agency are themselves commercially valuable, or if the prices were commercially valuable that disclosure would destroy or diminish their value, as required by clause 7(1)(b). I accept, however, that disclosure of the prices may diminish the value of the assets to which the prices relate.
56. In my view, the prices concern the agency's business or financial affairs. In addition, I consider that disclosure of the prices may adversely effect the agency's affairs by limiting the amount that the council would likely achieve in the event that it decides to sell the freehold or leasehold of the property. That is, prospective purchasers, in my view, may well be disinclined to pay more than a published reserve price, and their offers would be influenced by prices that the agency rejected. The applicant previously argued that the 'community has a right to know' the value of community owned assets. In addition, public knowledge of the reserve prices considered by the agency may facilitate debate about the future of the asset. There is also a public interest in the agency being accountable to residents and ratepayers. That said, I consider that there is a public interest in the agency maximising its ability to obtain the best result in the event that it decides to sell the freehold or leasehold. I am of the view that the agency's ability to do so would be compromised in the event that the prices were disclosed. On balance, I am of the view that it would be contrary to the public interest to release the prices. In my view, the prices are therefore exempt under clause 7(1)(c) of Schedule 1

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<sup>14</sup> Adam Todd, *East Torrens Messenger*, Australia, 'Chelsea Cinema D-Day looming', <http://east-torrens-messenger.wherelive.com.au/news/story/chelsea-cinema-d-day-looming/> at 25 August 2010.

<sup>15</sup> See item 10.2 of *Council Meeting Minutes* dated 18 January 2011; Heather Kennett, *Eastern Courier Messenger*, Australia, 'Chelsea Cinema plan lost - for now', <http://eastern-courier-messenger.wherelive.com.au/news/story/new-plan-for-the-chelsea/at> 18 January 2011.

to the FOI Act. Some time has elapsed since the resolutions were made, and the council is constituted differently now. In my view, however, given the uniqueness of the property, the figures are still likely to be relevant.

57. Given my findings above, it is not necessary for me to address the agency's claims regarding clauses 13(1)(a) and 13(1)(b) of Schedule 1 to the FOI Act.

*Document 3.2*

58. The agency claims that 'information relevant to the valuation/valuation methodology' in document 3.2 is exempt under clause 7(1)(b) of Schedule 1 to the FOI Act.
59. In my view the information claimed exempt in document 3.2 does not have a commercial value for the purposes of clause 7(1)(b), nor does it concern anyone's 'business, professional, commercial or financial affairs' within the meaning of clause 7(1)(c). Having regard to information that the agency has disclosed to the applicant in documents 3.6 and 3.7, disclosure of such information is unlikely to have an adverse effect in any event.

*Document 3.3*

60. The agency claims that valuation amounts, lease terms and observations are exempt under clause 7(1)(b) of Schedule 1 to the FOI Act.
61. In my view, the market values are exempt under clause 7(1)(c) for the same reasons as the prices in document 3.1. Document 3.3 contains seven market values, expressed in words and numbers, on pages 3, 4 and 5, and a price range expressed in numbers in the penultimate paragraph on page 5.
62. In my view, the residual information on pages 1 to 5 of document 3.3, being what I would describe as observations, assumptions and qualifications relevant to the ascribed market values, is not exempt. The agency has not persuaded me that the information is commercially valuable as required by clause 7(1)(b) of Schedule 1 to the FOI Act. In my view, it does not concern anyone's 'business, professional, commercial or financial affairs' within the meaning of clause 7(1)(c) either.
63. My view is that it would be practicable to release document 3.3 after excluding the market values and price range, in accordance with section 20(4) of the FOI Act.

***Sufficiency of agency's searches***

64. The applicant 'seeks access to the report cited as part of previous resolution C7674 [of document 3.2] and delivered to the Council on 17 November 2009 [the date of the previous resolution]'. I note that item 1 of the previous resolution is 'that the report be received'. I am satisfied that the text that follows is the report, and no separate document exists. Resolution 5 of the previous resolution simply refers to a 'confidential order'. I have therefore referred to the minutes of the agency for 17 November 2009. I am satisfied that the reference in document 3.2 is a typographical error and should read C7675, having regard to the substance of the resolution and submissions from the applicant in response to my provisional determination. This being so, the substance of the 'confidential order' identified at item 5 of the 17 November 2009 minutes is publicly accessible:

5. That further, pursuant to section 91(7) and (9) the Council orders that:

5.1 the report and attachments are to remain confidential on the basis that they contain information which could reasonably be expected to confer a

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commercial advantage on a person with whom the Council is conducting or proposing to conduct business or to prejudice the commercial position of the Council; and would be on balance contrary to the public interest, pursuant to Section 90(3)(b) of the Act; and

- 5.2 the report and attachments will not be available for public inspection for the period of 12 months for which the confidentiality order is to apply or reviewed, so long as it does not exceed 12 months in either case at which time this order will be revoked/reviewed by the Council/Chief Executive Officer.<sup>16</sup>

65. I appreciate the applicant's motives for wanting me to include the 'report and attachments'. Nevertheless, having regard to the terms of the application for access that underpins this external review, I am not satisfied that the 'report and attachments' are within scope. Given this, I am compelled to exclude them from further consideration.
66. Documents 2.1, 2.2 and 2.3 refer to legal advice. Information about the advice has been disclosed to the applicant at item 11 of document 2.2. In correspondence dated 20 September 2010 the agency claimed that the advice itself is exempt under clause 10(1) of Schedule 1 to the FOI Act. In response to a question from Ms Nielsen, Mr Bradley of the agency recently confirmed that the advice did not form part of the documents, however. Rather, the advice was circulated to elected members as part of an 'Elected Members Information Document' on 6 August 2009. In my view, the legal advice is therefore out of scope of the application.

### Determination

67. I am satisfied that documents 3.1 and 3.3 are exempt under clause 7(1)(c) of Schedule 1 to the FOI Act. In light of my reasoning above, however, I **vary** the agency's determination, pursuant to section 39(11) of the FOI Act, to enable documents 1.1; 1.2; 1.3; 1.4; 1.5; 1.6; 2.2; 2.3 and 3.2 to be released in their entirety. In addition, I consider it would be practicable to release some additional information from document 3.3, in accordance with section 20(4) of the FOI Act.

### Right of appeal

68. Any person aggrieved by my determination may appeal to the District Court of South Australia under section 40(2) of the FOI Act.
69. The agency may also appeal against my determination, but only on a question of law and only with the permission of the court, under section 40(1) of the FOI Act.
70. Under section 40(3) of the FOI Act, any such appeals should be commenced within 30 days after receiving notice of my determination; or in the case of a person who is not given notice of my determination, within 30 days after the date of my determination.
71. The agency should defer giving effect to my determination insofar as it relates to interested parties 2 and 3 until after the expiration of the appeal period, and until any appeals have been finally disposed of.

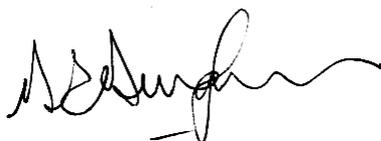
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<sup>16</sup> I note that more than 12 months have elapsed since the order was made. I do not know whether the confidentiality order has been revoked or reviewed in accordance with the resolution.

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## Comments

72. Section 23(2)(f) of the FOI Act provides that when making a determination to refuse access to documents, the agency needs to present reasons for its determination and the facts underlying these reasons, together with a reference to the sources on which those findings are based. In my view, the agency in this matter failed to provide reasons for its determination to the extent required by the FOI Act until well into the external review, and some of the reasons proffered for refusing access prior to my provisional determination were in my view inadequate.<sup>17</sup> This contributed to delays in progressing this review, and obvious frustration for the applicant. I appreciate that the agency has been under considerable pressure during for the last 18 months or so, and has experienced a number of significant changes during that time, but I do not resile from my criticism of the agency. It is important that the agency ensures that it is adequately resourced to deal with FOI applications in timely manner, and in accordance with the FOI Act.
73. In addition, although the FOI Act does not require agencies to provide a document list or schedule, I consider that it would have been beneficial for a schedule such as the one annexed to have been provided to the applicant at an early stage in the FOI process as it would have assisted the applicant to articulate its claims regarding the sufficiency of the agency's searches.



Richard Bingham  
SA OMBUDSMAN

28 February 2011

Annexure: Schedule to determination

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<sup>17</sup> I make this comment having regard to sections 23(2)(f) and 48 of the FOI Act, but note the agency's concessions in response to my provisional determination.



OmbudsmanSA

Save the Chelsea Action Group and the City of Burnside - 2010/00886

Schedule to determination

Council Meeting	Specific Reference	Current Status	Matter Claimed Exempt	Ombudsman's determination
	Extract of minutes of Council meeting (comprising Resolutions C7548 and 7549) <b>Document 1.1</b> (3 pages)	Partially released	Names of interested parties 1 and 2 from item 2 of C7458 and item 2 of C7459  - clause 7(1)(b) and 13(1)	Not exempt - agency's determination reversed
	Meeting Agenda Item 18.4 <b>Document 1.2</b> (3 pages)	Partially released	Names of interested parties and dates from 'Attachments'  Name of interested party 3 from 'Prev. Resolution'  Item 7 of 'Officer's recommendation'  Names of interested parties + from item 10 of 'Discussion' - dot point 1 relates to document 1.3 - dot point 2 relates to document 1.5 - dot point 3 relates to documents 1.4 and 1.6  Name of interested party 3 + from item 12 of 'Discussion'  - clause 7(1)(b) and 13(1)	Not exempt - agency's determination reversed
28 July 2009 Council Meeting	Email exchange with interested party 2, being an email from interested party 2 dated 10 June 2009, email from Council dated 10 June 2009, and email from interested party 2 dated 19 June 2009 <b>Document 1.3</b> (2 pages)	Partially released	Name, contact details and signature block of representative of interested party, including the name of the interested party + name in cc field  - clause 7(1)(b) and 13(1)	Not exempt - agency's determination reversed
	Letter from solicitors for interested party 3 dated 25 June 2009. <b>Document 1.4</b> (1 page)	Partially released	Reference number, name and contact details of firm and author, and name of interested party  - clause 7(1)(b) and 13(1)	Not exempt - agency's determination reversed
	Email from interested party 1 dated 26 June 2009 <b>Document 1.5</b> (1 page)	Partially released	Name and contact details of a representative of interested party and the title of another, and the name of the interested party  - clause 7(1)(b) and 13(1)	Not exempt - agency's determination reversed
	Letter from solicitors for interested party 3 dated 10 July 2009 <b>Document 1.6</b> (1 page)	Partially released	Reference number, name and contact details of firm and author, and name of interested party +  - clause 7(1)(b) and 13(1)	Not exempt - agency's determination reversed

	Extract of minutes of Council meeting (comprising Resolutions C7582, 7583 and 7584) <a href="#">Document 2.1</a> (2 pages)	Released in full		Not applicable - released
31 August 2009 Council Meeting	Meeting Agenda Item 17.1, dated 18 August 2009 <a href="#">Document 2.2</a> (4 pages)	Partially released	Name of interested party 3 from item 1 of C7491  Names of interested parties 1 and 2 from item 2 of C7549  Number of interested parties and names of interested parties + from item 12 of 'Discussion' - dot point 1 relates to interested party 2 - dot point 2 relates to interested party 1 - dot point 3 relates to interested party 3  Name of interested party 3 from item 13 of 'Discussion'  - <a href="#">clause 7(1)(b) and 13(1)</a>	Not exempt - agency's determination reversed
	Meeting Adjourned Agenda Item 10.1, dated 25 August 2009 <a href="#">Document 2.3</a> (4 pages)	Unclear (aside from the headers, documents 2.2 and 2.3 are identical)	Same as for document 2.2  - <a href="#">clause 7(1)(b) and 13(1)</a>	Not exempt - agency's determination reversed
	Extract of minutes of Council meeting (comprising Resolutions C7739, 7740, 7741, 7742, 7743 and 7744) <a href="#">Document 3.1</a> (5 pages)	Partially released	Price from items 3 and 4 of C7739, C7742 and C7743  - <a href="#">clause 7(1)(b) and 13(1)</a>	Exempt - agency's determination confirmed
	Meeting Agenda Item 18.2 <a href="#">Document 3.2</a> (4 pages)	Partially released	Item 16 from 'Discussion' - claimed to contain 'information relevant to the valuation/valuation methodology'  - <a href="#">clause 7(1)(b)</a>	Not exempt - agency's determination reversed
	Valuation by Maloney Field Services (with relevant Certificates of Title) <a href="#">Document 3.3</a> (10 pages)	Partially released	Part of each of the 5 pages, including valuation amounts, lease terms and observations (plans and CTs released)  - <a href="#">clause 7(1)(b)</a>	Partially exempt - agency's determination varied
15 December 2009 Council Meeting	Outline of Expressions of Interest Process <a href="#">Document 3.4</a> (5 pages)	Released in full		Not applicable - released
	Draft LMA <a href="#">Document 3.5</a> (12 pages)	Released in full		Not applicable - released
	Outline of Conditions of Sale <a href="#">Document 3.6</a> (5 pages)	Released in full		Not applicable - released
	Draft Conditions of Lease <a href="#">Document 3.7</a> (6 pages)	Released in full		Not applicable - released