

DETERMINATION

External review pursuant to *Freedom of Information Act 1991*

Applicant: Mr Martin Hamilton-Smith MP
Agency: Department of Transport, Energy and Infrastructure
Ombudsman reference: 2010/00074
Determination: The determination of the agency is reversed

REASONS FOR DETERMINATION

Background

- 1 There is a long history to this matter. In the interests of brevity I will only document some of it. Other than certain submissions that I have been asked not to disclose, I am satisfied that both parties are aware of the history and relevant issues.
- 2 Mr Martin Hamilton-Smith MP applied under the *Freedom of Information Act 1991* (the FOI Act) to the Department for Transport, Energy and Infrastructure (the agency) for:
 - Findings of the latest audits and inspections of the condition of road, rail and tram bridges in South Australia.
 - Any reports of work that is required in relation to bridges.
 - Any correspondence between Transport SA and TransAdelaide in relation to the condition of bridges and work that is required.
- 3 Mr Rick Hennig, an accredited freedom of information officer of the agency, determined the application in a letter to the applicant dated 16 March 2009. Three documents were released. Mr Hennig determined that 703 documents were exempt from release, on the basis of clauses 4(1)(a) and 4(2)(a)(v) and (b) of Schedule 1 to the FOI Act. It appears from the schedule attached to the determination that of the 703 documents that were not released (the exempt documents):
 - 696 are 'bridge inspection reports' relating to specific bridges throughout South Australia;
 - two relate to earthquake risks;
 - the remaining five are sundry documents relating to specific bridges.
- 4 On 3 April 2009, Mr Hamilton-Smith applied for an internal review of Mr Hennig's determination. Mr Jim Hallion, the Chief Executive Officer of the agency, made a further determination in a letter to the applicant dated 20 April 2009.
- 5 Mr Hallion's letter dated 20 April 2009 indicates that his determination was based upon an investigation conducted by an 'Internal Review Panel'. With respect to the exempt documents, Mr Hallion's determination reads:

The 703 exempted documents are all quite similar. The documents are extremely detailed reports containing extensive detail of the structural integrity of bridges in South Australia. The documents provide in depth detail about possible strengths and weaknesses in each structure, their design, life spans, management, inspection history and frequency, and list any work required.

It was immediately clear to the IRP that the release of such a level of detail about critical built infrastructure poses a significant level of risk of malicious damage to those structures. When considering the implications of such damage, it was apparent that it would endanger the structure, and in that event, endanger the life or physical safety of members of the public. These considerations demonstrated that the application of clauses 4(1)(a) and 4(2)(a)(v) is correct.

Whilst the application of clause 4(1)(a) is not subject to a public interest test, the application of clause 4(2)(a)(v) is.

The IRP determined that whilst there is a public interest in knowing the state of critical built infrastructure, government plans and works programs, there is also a significant public interest in maintaining the integrity of that infrastructure to ensure that the safety and security of the infrastructure, and the lives and general safety of the public. The IRP considered that the absolute requirement for such protection far outweighed any generalised interest in the content of the documents.

The IRP then considered whether it was possible to redact exempt material from the reports, and/or whether the removal of the identification of the bridge from the documents would enable partial release.

On examination, it was clear to the IRP that the documents contain such a level of detail, that redaction of components is not feasible. It was also apparent that the removal of any reference to the identity of the bridge was not a feasible option as the detail contained in the reports is of such detail that it would still be possible to identify the structure.

The IRP concluded that clauses 4(1)(a) and 4(2)(a)(v) were correctly applied, and that the 703 documents should remain exempt from release.

Determination

As per section 29(3) of the FOI Act, I have the power to confirm, vary or reverse the original determination, and in light of the IRP's investigation, I am confirming the original determination.

- 6 The applicant applied to my office for an external review of this determination under section 39(2) of the FOI Act in a letter dated 12 May 2009.

Relevant exemption provisions

- 7 Clause 4 of Schedule 1 to the FOI Act relevantly provides:

- 4— Documents affecting law enforcement and public safety
- (1) A document is an exempt document if it contains matter the disclosure of which could reasonably be expected—
 - (a) to endanger the life or physical safety of any person.
- (2) A document is an exempt document if it contains matter the disclosure of which—
 - (a) could reasonably be expected—
 - (v) to endanger the security of any building, structure or vehicle; and
 - (b) would, on balance, be contrary to the public interest.

Summary of external review process

- 8 My office has communicated with the agency, and to a lesser extent Mr Hamilton-Smith, on numerous occasions during what has turned out to be a long external review. It was immediately clear to my office that the agency would forcefully argue that the documents are exempt. I expressed my view that the documents were not fully exempt. I gave the agency numerous opportunities to tailor its exemption claims to specific matter or information within the documents, rather than rely on overarching arguments to the effect that the documents are exempt in their entirety.
- 9 On two occasions Mr Hamilton-Smith was prepared to narrow his application. Firstly, he advised that he is interested in information which may be relevant to public safety and the state government's response to such issues - such as information concerning the structural integrity and safety of bridges, and urgent and/or safety related maintenance - rather than routine maintenance issues. This did not take us very far, presumably because the agency's concerns were not with routine maintenance such as painting. In his second attempt to narrow the application, Mr Hamilton-Smith advised that he would only seek access to the bridge inspection reports where the bridge is rated 'Fair' or 'Poor', as well as the documents which are not bridge inspection reports. By my calculations there were 89 bridges rated 'Fair' and 18 rated 'Poor'.
- 10 Subsequent to this, I again invited the agency to tailor its arguments to specific information within the reduced number of documents. Initially, the agency maintained that these documents are exempt in their entirety. In a later letter, whilst again maintaining its position that the documents are exempt in their entirety, the agency 'proposed' that the documents be 'redacted to exclude any identifying information and sensitive engineering information'. Whilst, in my view, the agency's proposal was reminiscent of steps I had already asked to be taken, I agreed. In doing so, I:
- set time-lines for the further provision of information;
 - required the agency to provide Mr Hamilton-Smith with comprehensive reasons for its decision not to release various types of information within the documents (without disclosing information that is considered by the agency to be 'security in confidence'); and
 - asked that the documents make clear what information is being deleted because it is considered to be 'sensitive engineering information', and what is being deleted because it is 'identifying information'.
- 11 The agency has now provided Mr Hamilton-Smith with the 'redacted' copies of the documents for the bridges marked 'Fair' and 'Poor', but not yet, I understand, copies of the documents that are not bridge inspection reports.
- 12 In a letter to me dated 26 May 2010, Mr Hamilton-Smith advised that he would like access to the 'locality and imagery' of 22 bridges which he has nominated.¹ Mr Hamilton-Smith submitted that:
- it is in the public interest for South Australians to be made aware of this information on the grounds of safety;
 - freedom of information legislation was enacted partly to protect the public from information withheld that could threaten life and property. He believes that this

¹ That is, he is interested in 22 bridge inspection reports and would like to know what bridges they relate to.

matter is a genuine safety concern, as people using these bridges may be at risk of injury, and property at risk of damage;

- the agency's arguments that there may be a risk of the information falling into the hands of terrorists who could use it to blow up the state bridges and cause harm is extraordinary and implausible. The quantity of explosives required to execute such an act would be excessive. Such an attack would be impractical to orchestrate and bridges are not an easy target for such organisations who typically strike softer targets;
- it is more probable that the government seeks to avoid the scrutiny involved in having to reveal the location and the condition of these 22 bridges, the integrity of which is clearly in doubt.

13 In an earlier telephone conversation with my office, Mr Hamilton-Smith also indicated that he maintains his interest in the documents that are not bridge inspection reports.

Determination

14 My external review now relates to the parts of 22 bridge inspection reports that have not been released (this is basically information identifying the 22 bridges the inspection reports relate to) and the documents that are not bridge inspection reports. I will identify to the agency the 22 bridge inspection reports in a separate document.

15 Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the determination of the agency, based on the circumstances existing at the time of review. Under section 48 of the FOI Act the onus is on an agency to justify its determination in my external review.

16 In a letter to Mr Hamilton-Smith dated 1 March 2010, Mr Oerman of the agency provided the agency's reasons for exempting matter from the documents. To a large degree, these reasons mirror those given to me previously. To the extent that the agency has provided me with submissions that I have been asked not to disclose, I advise that I have had regard to all submissions provided by the agency.

17 After citing the District Court decision in *Ipex Information Technology Group Pty Ltd v The Department of Information Technology Services South Australia* (1997) LSJS 54, Mr Oerman states in his letter dated 1 March 2010:

Clause 4(1)(a) of Schedule 1 of the FOI Act

My "*predictive opinion*", as to the result of disclosure of the bridge inspection reports is that is that the disclosure of the bridge reports could reasonably be expected to endanger the life or physical safety of any person. This opinion is based on the following facts and factors, which in my view, are "*agreeable to reason: not irrational absurd or ridiculous*".

- Disclosure of the reports is disclosure to the world at large. There is no restriction on the further dissemination of the information once it is released through the FOI Act process. No conditions or controls can be imposed upon the use the reports after disclosure. The practical effect of disclosure under the FOI Act is to make them publicly available.
- Referred to earlier is the information which is contained within the reports. Much of this information is publicly known. Disclosure of the complete reports would clearly reveal this information.
- There are individuals and groups willing to cause damage to structures and to inflict injury on others;

- Australia has been at a medium level of counter terrorism since September 2001;
- The information contained within the documents could assist individuals or groups to damage or destroy those structures. The information would be valuable intelligence to such individuals or groups. Each individual report contains details such as what is inspected, the types of things looked for by the inspectors, the timing of repairs, possible underlying weaknesses and detailed photographs of the structure (which generally indicate weaknesses, damage and deterioration of the bridge). This is information which could be exploited by a person intent on damaging structures and inflicting injury on others.
- It follows that if the security of the structures is at risk, the life or physical safety of any person on or near the structure could also be endangered;
- The agency has a duty of care to protect the security of the community.
- This position demonstrates that we have applied our own internal expert engineering and security advice. The advice from our security personnel is supported by the Office of Transport Security (OTS) and the Australian Security and Intelligence Organisation (ASIO).

For these reasons I considered that it is reasonable to expect the above consequences could flow from disclosure of the reports. I cannot say whether these consequences will flow, but of course the test in clause 4(1)(a) does not require me to justify my decision to that level of certainty. I am not aware of any contrary opinion.

Clause 4(2)(a)(v) of Schedule 1 of the FOI Act

A document is exempt under clause 4(2)(a)(v) if it could reasonably be expected to endanger the security of any building, structure or vehicle and would, on balance, be contrary to the public interest.

My predictive opinion as to the result of the disclosure of the bridge inspection reports under this clause is based on the same factors as for clause 4(1)(a), which were, in my view, agreeable to reason: not irrational, absurd or ridiculous.

For the same reasons as referred to above with clause 4(1)(a), I consider that it is reasonable to expect the above consequences could flow from disclosure of the reports. I cannot say whether these consequences will flow, but as stated above the test in clause 4(1)(a) does not require me to justify my decision to that level of certainty. I consider that I properly applied the FOI Act.

In addition, under clause 4(2)(a)(v), there is an additional requirement, that is the release of the document would, on balance, be contrary to the public interest. Whilst I acknowledge there is a public interest in knowing the state of critical built infrastructure, government plans and works programs, there is also significant public interest in maintaining the integrity of that infrastructure to ensure that the safety and security of the infrastructure, and the lives and general safety of the public. This need for protection of the infrastructure outweighs any generalised interest in the content of the documents. I am not aware of any contrary opinion.

- 18 I consider it worthwhile to note that in the covering letter to me dated 1 March 2010, Mr Oerman states:

Please note that in accordance with your instructions, and to the best of this agency's ability, the data that has been redacted is referred to as "Identity Data", rather than the specific clauses of the FOI Act.

You have asked for clarification regarding the exemption of the identity of the bridges, and referred to paragraph 18 of your letter dated 7 July 2009. The agency has never claimed that a list detailing all of the bridges in the state is exempt, and in fact provided those details to Mr Hamilton-Smith in the initial determination of his application. The argument consistently put

forward by this agency is that the provision of engineering details or details regarding items such as necessary repairs or weaknesses in the structure of the bridge with the location of the bridge will enable individuals or groups to determine the strengths and weaknesses of those specific bridges with ease.

This removal of the identity of the bridge, including address, plan number, road number, file number and photographs that provide a method of identifying the bridge alleviates this problem.

- 19 The agency's offer to 'redact' documents referred not only to 'identifying information' but also to 'sensitive engineering information'. It is therefore noteworthy that only 'identifying information' has been removed by the agency.
- 20 My concern with the agency's arguments in this matter has primarily been with their general nature, and I am not satisfied that the mere removal of the identifying features from a bridge inspection report has provided a cure. I do not rule out the possibility that there are people that, if they are armed with useful information, may attempt to do damage to a bridge. Nor do I have cause to doubt the motives of the agency in making its claims.² Having said that, I am not satisfied that the agency has discharged its onus in justifying that there is matter within these documents that is exempt from disclosure under the FOI Act.
- 21 It is clear to me that there is information within these documents that could not, in any practical sense, assist a person minded to do damage to a bridge. This information cannot be exempt, even if it is known which bridge it relates to. Section 20(4) of the FOI Act therefore becomes relevant, as, if it is practicable to do so and the applicant would wish it, an agency must give access to a copy of a document from which the exempt matter has been deleted. The relevant question therefore becomes, what is the exempt matter?
- 22 It is in this respect that I find the agency's submissions generalised, and therefore lacking. It is not sufficient to merely remove the identities of the bridges and assert that there remains in the documents exempt matter, without stipulating what matter that might be. Whilst the agency has referred to types of information the documents contain, it has not attempted, in my view, to tailor its arguments to specific information or matter within the documents, despite having had ample opportunity to do so. For instance, at no stage has the agency pointed to a particular defect in a bridge and raised a concern that knowledge of that defect could be used the unsociable way submitted. It is therefore inherently difficult to separate the claimed exempt matter from what is obviously not so, and to assess whether release of this matter would satisfy the requirements of clause 4(1)(a) or clause 4(2)(a)(v) of Schedule 1 to the FOI Act. Although it is unnecessary to assess clause 4(2)(b) in the circumstances, I envisage an agency would be hard pressed to argue the release of matter would be, on balance, contrary to the public interest as required by 4(2)(b) in circumstances where 4(2)(a)(v) has not been made out. I also note and agree with Mr Hamilton-Smith that there is a public interest in the disclosure of these documents.
- 23 I remain unsatisfied, on the basis of the general types of information within the documents referred to by the agency, whether alone or in conjunction, that release could reasonably be expected to endanger the life or physical safety of a person, or to endanger the security of any building, structure or vehicle. Without particularity, I consider this is mere speculation that does not pass the test imposed by clause 4(1)(a) or clause 4(2)(a)(v) of Schedule 1 to the FOI Act.

² Here I am referring to Mr Hamilton-Smith's suggestion that the agency may be more concerned with avoiding scrutiny regarding the integrity of bridges.

- 24 It is therefore my view that the agency has not discharged its onus in justifying that parts of the bridge inspection reports are exempt from disclosure; and subject to appeal, the full 22 documents should be released. This includes the photographs.
- 25 Despite being asked to do so on numerous occasions, the agency has never provided me with submissions on why matter within the documents that are not bridge inspection reports are exempt. In this regard, the agency has again failed to discharge its onus in justifying its exemption claims. Subject to appeal, these documents should be released.
- 26 In light of my reasoning above, I reverse the agency's determination, pursuant to section 39(11) of the FOI Act.

Right of Appeal

- 27 Any person aggrieved by my determination may appeal to the District Court of South Australia under section 40(2) of the FOI Act.
- 28 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.

Richard Bingham
SA OMBUDSMAN

16 June 2010