

DETERMINATION

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

Applicant	Mr Mitch Williams MP
Agency	South Australian Water Corporation
Ombudsman reference	2011//6498
Agency reference	SAW73224; SA Water 11/12134
Provisional determination	The determination of the agency is reversed.

REASONS

Background

1. The Adelaide Desalination Project is being developed by the agency as part of the SA Government's Water Proofing Adelaide Strategy, at a cost of \$1.84 billion to the agency.¹ The project includes the construction of a desalination plant and a transfer pipeline. In March 2009, AdelaideAqua D&C Consortium (**AdelaideAqua**) was awarded the contract by the government to design, build, operate and maintain the infrastructure of the desalination plant.² I understand that the relevant contract in this instance is the Design and Construction contract (**the contract**).
2. The SA government announced in a media release on 22 September 2008 that the three short-listed bidders to build the desalination plant stated that they could deliver 'first water' 12 months ahead of the original schedule. The then Premier stated:

'When tender documents were released, we asked bidders to consider if they could deliver the plant earlier than the initial advised target date of December 2011.'

'I am delighted that all three of the consortia have looked at the logistics of building a desalination plant of the size and capacity that we wanted, and say they have found ways to deliver the project 12 months earlier - by December 2010,' Mr Rann said.

'Under this revised timeline, the plant would operate at a lower capacity initially, with water delivery gradually increasing to 150 million litres a day by June 2011. ...
3. I understand that 'first water' is defined in the contract as a continuous and safe flow of 10 per cent of the desalination plant's 50 gigalitres (Stage 1) annual capacity, which equates to 5 billion litres of desalinated water.
4. A fatal industrial worksite accident occurred on 16 July 2010.
5. On 28 August 2010, the agency issued a media statement which stated *inter alia*:

Minister for Water Paul Caica today announced the Adelaide Desalination Plant is now expected to start producing drinking water in early 2011. Mr Caica said he has been

¹ See <http://www.sawater.com.au/NR/rdonlyres/AADD2731-5406-415C-9912-3AA5BCC50AFA/0/ADPContractsFactSheetSummaryv20.pdf>, p2.

² AdelaideAqua is a multi-national unincorporated consortium of companies comprising McConnell Dowell Constructors Pty Ltd, Abigroup Contractors Pty Ltd and Acciona Agua Pty Ltd.

advised by the desalination project team that early indications are for the first drop³ of water to be produced from the plant in April 2011.

'While this date is four months later than our original target for first water, the construction program has been affected by the tragic fatality which occurred on site last month,' he said. 'While the investigation into the fatality continues, SA Water and the contractor remain conscious of the need to continue to maintain the highest safety standards.'

'Following the incident, restrictions were imposed on site by SafeWork SA to undertake early investigations. These have now been released and most construction work has restarted.

'SA Water and AdelaideAqua are coordinating their efforts to ensure all aspects of the construction program are reviewed to ensure the safety and wellbeing of all workers on site remains the most important priority. Both groups are working hard to re-establish the full on-site construction and workforce capacity.

'The recent rain and wind in Adelaide has also impacted on the delay.

'Initial advice from SA Water is that the delay in first water is unlikely to have an impact on the overall cost of the project.'

7. The Legislative Council established a Select Committee (**the Select Committee**) on 24 October 2010 to inquire into:
 - (a) The management and administration of the project, including all issues relating to the cost and financing of this project;
 - (b) The procedures and practices used to deliver the project, including those with regard to workplace safety;
 - (c) The related matters of worker deaths and injuries; and
 - (d) Any other relevant matter.
8. It was later announced in a media statement by the agency:

SA Water has been advised by AdelaideAqua, the consortium constructing the Adelaide Desalination Plant, that following a recent review of the construction program first water will now be supplied in late July 2011 and not April 2011 as had been previously advised.⁴
9. On 2 August 2011, the Minister the Hon Paul Caica MP commented with regard to the first water milestone that '...the contractual arrangements are in relation to the delivery of that 10%, that wasn't achieved and then no other arrangements were put in place with respect to replacing that.'⁵
10. I understand that the 'first water' milestone was not achieved by AdelaideAqua until October 2011.
11. I also understand that both the agency and AdelaideAqua contributed to an initiative in order to improve the progress under the contract. It appears that \$46 million was paid by the agency, although it is not clear when this occurred. The Minister stated that this payment was a means of 'providing certainty of delivery while maintaining a focus on key outcomes such as safety, the environment and plant performance, including durability of the asset. The aim was to achieve 10 out of 10 for each of the three key areas: safety, environment and performance.'⁶
12. The applicant is concerned that incentive payments were provided to AdelaideAqua in order to achieve milestones, such as the 'first water'; however, these milestones have not been met. Further, he submits that no contractual penalty provisions have been invoked by the agency against AdelaideAqua for failure to deliver the first water. In addition, the applicant claims that the state government has announced significant

³ AdelaideAqua advises that the term 'first drop' has no contractual force, and is a term of convenience used to refer to the first flow of unmineralised 'permeate' (Letter to Ombudsman dated 23 December 2011).

⁴ Media Statement SA Water 17 December 2010.

⁵ ABC radio, 2 August 2011.

⁶ Hon Paul Caica MP, Estimates Committee A, 5 July 2011, p385.

increases in the price of water, which have been attributed in part by the Treasurer to the cost of the desalination plant. In response to this, AdelaideAqua advises that it has not received any 'incentive payments' and that penalties have been imposed as a result of delays.⁷ I also note reports in the media stating that the agency announced on 1 Dec 2011 that they would be enforcing contractual provisions relating to financial consequences for delays.⁸

FOI application

13. Against this background, by application under the *Freedom of Information Act 1991* (**the FOI Act; the Act**) received by the agency on 11 April 2011, the applicant requested access to:

Correspondence between SA Water and AdelaideAqua regarding progress failure of First Water Critical Milestone and completion loan repayment (**the application**).

14. Mr Andrew Atterton, Accredited FOI Officer of the agency determined the application on 30 June 2011.⁹ Mr Atterton located 12 documents within the scope of the application; and he refused access to all 12 documents on the basis of exemption clauses 7, 9 and 13 of Schedule 1 to the FOI Act. Mr Atterton's determination was set out in a schedule, a copy of which I have attached and marked as **Attachment 1**. I refer to the documents numerically, as set out in the schedule.
15. On internal review, the agency's Chief Executive, Mr John Ringham confirmed Mr Atterton's determination, by determination dated 12 August 2011 (**the agency's determination**) - although the exemptions in support varied from those in Mr Atterton's determination.
16. The Chief Executive argued clauses 7, 15 and 16 of Schedule 1 to the FOI Act to support the agency's determination. The agency's argument was directed to the public interest component of these clauses:
- It is in the public interest that successful completion commissioning and operation of the Adelaide Desalination Plant be achieved
 - In order to facilitate this, SA Water needs to maintain with AdelaideAqua a constructive and communicative working relationship, and a relationship of mutual respect
 - This relationship would be at risk if the documents the subject of this review are disclosed
 - The contract between SA Water and AdelaideAqua involves significant sums of money
 - It is in the public interest that contractual issues between SA Water and AdelaideAqua be resolved at the least possible cost to SA Water (and hence the public)
 - One of the range of methods open to SA Water to achieve such resolution will be negotiation, which cannot be effectively employed unless the negotiating parties have a level of confidence in the privacy of their negotiations and disclosures
 - That confidence would be lost if the documents the subject of this review are required be disclosed
 - I consider that the public interest in achieving a successful outcome of the contract operationally and financially on balance outweighs the public interest in opening correspondence under the contract to public scrutiny at this time.

External review

17. On 9 September 2011, the applicant applied for an external review of the agency's determination under section 39 of the Act. I notified the agency of my review on 26

⁷ Letter from AdelaideAqua to the SA Ombudsman dated 23 December 2012.

⁸ AdelaideNow 2 Dec 2011 <http://www.adelaidenow.com.au/news/south-australia/consumers-unlikely-to-recoup-money-from-desal-delay-penalties/story-e6frea83-1226211778028>

⁹ The agency extended the time to deal with the application under section 14A of the FOI Act.

September 2011; and was then provided on request, the relevant documentation and copies of documents 1-12 by the agency.

Relevant provisions of the FOI Act

18. The objects of the FOI Act are set out in section 3(1), 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 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
19. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are
 - (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; and
 - (c)
20. Section 3A(1) states that the Parliament intends:
 - (a) that this Act should be interpreted and applied so as to further the objects of this Act; and
 - (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.
21. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.¹⁰ Schedule 1 to the FOI Act lists various clauses, (including clauses 7, 13, 15 and 16) which may be claimed by an agency as a basis for refusing access.
22. When making a determination to refuse access to documents, the agency must give reasons for its determination and the facts underlying these reasons, together with a reference to the sources of information on which those findings are based.¹¹
23. Under section 48 of the Act, the onus is on the agency to justify its determination in any proceedings under the Act - I consider this includes the external review process under section 39.
24. Section 39(11) of the FOI Act provides that at the conclusion of an external review, I may confirm, vary or reverse the agency's determination in an external review based on the circumstances existing at the time of review.

¹⁰ Section 20(1)(a) and section 4 definition FOI Act.

¹¹ Section 23(2)(f) FOI Act.

Provisional determination

25. On 29 November 2011, I informed the agency, AdelaideAqua and the applicant of my tentative views about the agency's determination, by way of a 'provisional determination'. I attached to my provisional determination **Attachment 1**, and **Attachment 2** in which I set out the relevant exemption clauses claimed by the agency as a basis for refusing access, and what was required to be shown in order to justify claiming these provisions pursuant to the agency's burden under section 48 of the FOI Act.
26. For ease of reference, I have attached **Attachment 2** to this determination.
27. In my provisional determination, I considered that apart from the public interest, the agency had failed to address the components of each of the four clauses claimed as a basis for refusing access to the documents. It had also failed to consider the contents of each of the documents in its determination. I was not persuaded that the agency had justified its determination.
28. In relation to the public interest arguments of the agency, I considered that the agency had not engaged in the requisite balancing process, as required by clauses 7, 15 and 16 (and 9).
29. I cited the case of *Everingham v Director-General of Education*, in which the District Court stated:

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.¹²

30. The District Court has also commented on the '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.¹³

31. Further, in *Everingham*, the court said:

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.¹⁴

32. I also noted that in relation to the public interest argument, I consider the matter of government accountability is a significant factor in favour of disclosure of government information. It is the policy underpinning of the FOI Act. I referred to the comments of Mason J (as he then was) in the case *Commonwealth of Australia v John Fairfax & Sons Ltd & Ors* (1981) 147 CLR 39:

... It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.¹⁵

¹² Per Judge Bowering *Everingham v Director -General of Education* D2959 unreported, 13 November 1992. The judge in this instance was considering the operation of clause 9(1)(b) of Schedule 1 to the Act. This provision is worded in identical terms to the public interest components of the clauses claimed by the agency in its determination (namely clauses 7, 15 and 16).

¹³ Per Judge Lunn *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54 at p70.

¹⁴ *Ibid.*

¹⁵ *Commonwealth of Australia v John Fairfax & Sons Ltd & Ors* (1981) 147 CLR 39 CLR, pp 51-52.

33. Also the comments of McHugh J in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at pp 190-191 are apposite:

... governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest.

34. In my provisional determination, I foreshadowed reversing the agency's determination. In my cover letter to the parties, I wrote:

The views I have expressed in my provisional determination are tentative only, and are subject to my receipt and consideration of submissions from you [and the other parties]. I shall be taking into account these submissions before finalising my determination in this review.

Please provide your submissions and response to my provisional determination by close of business on 4 January 2012.

I propose to finalise my determination after that date.

35. The agency responded with supplementary submissions, and AdelaideAqua also responded. Both were received by my office on 3 January 2012. I have incorporated these submissions into my views below. In light of the agency's onus of proof under section 48, I also later communicated with the agency to learn of any dealings or disputes between the agency and AdelaideAqua in relation to the contract.

Response to provisional determination - submissions from AdelaideAqua

36. Apart from addressing some 'factual inaccuracies' (which I have rectified above), in response to my provisional determination, AdelaideAqua submits that the documents are exempt in that they:

... relate to confidential, without prejudice discussions and negotiations between SA Water and AdelaideAqua D&C relating to the parties' respective commercial positions under the D&C Contract, including regarding the parties' views about the contractual implications of the delays and the parties' proposals for addressing those contractual implications.

These discussions continue.

Settlement privilege is an important head of privilege and aspect of confidentiality and it is in the public interest that it be maintained, especially in the context of continuing discussions and negotiations. Breach of settlement privilege is a ground for breach of confidence action. Breach of it may irrevocably compromise any legal proceedings brought in respect of the delays and monies outstanding under the contract.

For these reasons, we suggest, the documents are and ought to be exempt pursuant to clauses 4(1)(b), 11(b) and 13 of Schedule 1 to the FOI Act and accordingly AdelaideAqua D&C invites the Ombudsman to reconsider his provisional determination.

However if the Ombudsman considered that these reasons are not sufficient alone for him to affirm the initial decision, we respectfully submit that the Ombudsman could invite full submissions from SA Water and any interested parties before a final determination is made, and make a full inquiry into the merits of the decision with the benefit of those submissions.

We would be pleased to have a further opportunity to respond to any queries the Ombudsman may have in light of the comments outlined in this letter, and, in any event, respectfully request that the Ombudsman give AdelaideAqua D&C prior notice of the final decision before it is published.

37. I do not propose to hear further submissions from AdelaideAqua or the agency. I gave sufficient notice to the parties about wishing to receive submissions and my intentions in my cover letter to my provisional determination, regarding finalising my review.

Response to provisional determination - the agency's supplementary submissions

38. Below I summarise the agency's supplementary submissions:

Clause 13(1)(a) of Schedule 1 - documents 1, 4, 6, 7, 8, 9, 11, 12

The agency submits that AdelaideAqua asserts 'confidentiality rights' over these documents, and therefore disclosure may found an action for breach of confidence (in equity).

Clause 7(1)(c) of Schedule 1 - documents 1, 5, 7, 9, 11, 12

39. The agency submits that the information within these documents concerns the business, professional, commercial or financial affairs of AdelaideAqua and/or the agency. AdelaideAqua may be discouraged from disclosing information of the type contained in the documents to the agency in future, as it will be concerned that any letters it sends to the agency may be publicly disclosed. Disclosure also would mean compromising the agency's bargaining position and possible unfavourable treatment by AdelaideAqua in future discussions (or reticence to enter into discussions) and correspondence. If AdelaideAqua is discouraged from frank communication with the agency, this would also adversely affect the agency's ability to achieve optimum outcome on the project (ie delivery of the project in accordance with specification at the least possible cost). Any diminution in standards or increase in cost is contrary to the public interest.

Clause 15 of Schedule 1 - documents 1, 2, 5, 6, 10, 12

40. In relation to these documents, the agency submits that disclosure is likely to have the effect of discouraging AdelaideAqua from committing any proposals, programming or the like for future action to writing, as it will be concerned that any letters it sends to the agency will be publicly disclosed. This will reduce the agency's ability to explore solutions to problems with AdelaideAqua in the future, with a potential adverse effect on the agency's ability to manage costs or contain costs to the extent than it would otherwise be possible. This affects the agency's financial interests; and whilst the quantum of costs cannot be estimated, they would be, by the nature of the project, substantial. The public interest in avoiding a substantial cost burden may outweigh the public interest in disclosure of the information. Further, if AdelaideAqua considers that its business and financial affairs have been adversely affected by disclosure of documentation by the agency, it may bring a claim for compensation against the agency, which in turn would affect the agency's financial interests. The public interest in avoiding a substantial cost burden may outweigh the public interest in disclosure of information.

Clause 16 (1)(iv) of Schedule 1 - documents 1, 2, 3, 4, 6, 7, 9, 10, 11, 12

41. In respect of these documents, the agency submits that the agency's functions include the economical establishment and operation of water related infrastructure, such as the desalination plant. A disclosure that compromises the agency's ability to communicate and negotiate with the contractor risks substantially compromising the agency's ability to deliver this infrastructure in an economical way. The agency further relies on its arguments in relation to the claim of clause 15. The agency argues that the increased cost of public infrastructure is contrary to the public interest. The increased cost burden

may outweigh the public interest in disclosure of information. In relation to document 2, the agency acknowledges its seemingly innocuous nature; however, it submits that disclosure of matters under discussion between the agency and AdelaideAqua will undermine confidence in the privacy of its discussions and communications with the agency, which can be expected to result in AdelaideAqua limiting its communications and interactions with the agency.

Consideration of the parties' submissions

Clause 4(1)(b) and 11(b)

42. I am not persuaded by these exemption claims of AdelaideAqua. These clauses provide respectively:

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–

...

(b) to prejudice the fair trial of any person or the impartial adjudication of any case;

11–Documents relating to judicial functions etc

A document is an exempt document if it contains matter–

...

(b) prepared for the purposes of proceedings (including any transcript of the proceedings) that are being heard or are to be heard before a court or tribunal;

43. No evidence has been presented by AdelaideAqua (or the agency) in support of these two claims of exemption.

44. Further, the contract provides for resolution of disputes. I am informed by the agency that there is one matter in dispute which is currently going through the dispute resolution process provided for under the contract. I am also informed that while the documents under review relate to the same general factual matrix that has given rise to the dispute, the dispute had not arisen at the time of the creation of the documents under review and the information in the documents is not being considered in the dispute resolution process.

Clause 13(1)(a)

45. I note that neither the agency nor AdelaideAqua rely on clause 13(b) of Schedule 1 in their submissions.

46. Insufficient evidence has been provided by both the agency and AdelaideAqua to show under clause 13(1)(a) that disclosure of **documents 1, 4, 6, 7, 8, 9, 11, 12 (or the other four documents)** may found an action for breach of confidence (in equity), under the test set out by Gummow J in the case of *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) and Another* (1987) 74 ALR 428.¹⁶ Neither the agency nor AdelaideAqua has addressed the contents of the documents and the claim with any appropriate specificity. I note that it does not appear that the agency itself is asserting any 'confidentiality rights' over the documents, or that it imparted or received these or other documents under review, in confidence.

47. Under the contract, there are obligations of confidentiality with respect to 'Project Documents' only. I would have thought that had the agency and AdelaideAqua wished to ensure confidentiality of communications of the type in these documents, this could

¹⁶ I refer to Attachment 2. This test was accepted in the SA District Court in *Ekaton Corporation Pty Ltd v Chapman & Department of Health, Department of Health v Chapman* [2010] SADC 150 (9 December 2010), unreported.

have been provided for under the contract. I further note the comments of the District Court in the case of *Ekaton* which I have set out below.

48. Finally, on the basis of the submissions of the parties, I do not consider the settlement privilege is applicable in relation to the documents. No substantiation of this claim has been put forward by the parties.

Clause 7(1)(c)

49. While I accept that **documents 1, 5, 7, 9, 11,12** generally concern the business, commercial or financial affairs of AdelaideAqua or the agency, I am not persuaded that disclosure of the documents would adversely impact on those affairs. Even if I am wrong about this, I am not persuaded that disclosure of the documents would on balance, be contrary to the public interest.
50. There is already a significant amount of information in the public domain about AdelaideAqua's progress failures under the contract in achieving the first water milestone, some of which I have noted above. Additional negative information about AdelaideAqua's performance in this regard appears in submissions to the Select Committee.¹⁷ I note that the agency's Chief Executive is reported to have announced that the agency intends to enforce the contract against AdelaideAqua.¹⁸ I am not aware of any adverse impact on the affairs of AdelaideAqua or the agency as a result of this publicity. I consider that disputes arising in contractual relations are accepted as part of the 'cut and thrust' of business dealings; and the contract reflects this in its provisions for resolution of disputes.
51. I note that the agency has publicly described the warranties and indemnities available to it under the contract, as well as the agency's ability to bring an action for breach of contract in the event of the contractor failing to satisfy these warranties. Further, in respect of timeliness, payment obligations and security of performance under the contract, the agency has publicly detailed the obligations under the contract, and states:

Warranties and indemnities: The D&C Contractor provides a number of warranties to SA Water in respect of the Desalination Plant and how it will perform its works, including that the Desalination Plant will be fit for purpose and satisfy all of the technical requirements of the D&C Contract. If the D&C Contractor breaches these warranties SA Water can bring an action against the D&C Contractor for breach of contract.

Time obligations: The D&C contract contains a detailed regime to ensure that the desalination plant is completed on time, and there are financial mechanisms within the D&C Contract to incentivise the D&C Contractor to complete its works on time. The D&C Contractor will only be entitled to an extension of time if specified causes of delay actually delay it in completing its activities. The D&C Contractor accepts the risk of any costs, loss, expense or damage resulting from any delay to its works in all other circumstances.

Payment: In consideration of performing the works (within the times required under the D&C Contract), the D&C Contractor will be entitled to monthly payments for work performed, up to the total contract price.

Security for performance: The D&C Contractor has provided unconditional undertakings/bank guarantees to SA Water as security for the performance of its obligations and liabilities - such as liabilities (for example defect rectification) arising from failure to meet plant performance, reliability and durability requirements. To further secure the

¹⁷ See for example Attachment 4 of the submission of SA Water dated 21 January 2011; SA Water Response to Questions taken On Notice 20 April 2011 at <http://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=3&CId=223>.

¹⁸ AdelaideNow 2 Dec 2011 <http://www.adelaidenow.com.au/news/south-australia/consumers-unlikely-to-recoup-money-from-desal-delay-penalties/story-e6frea83-1226211778028>

performance of the D&C Contractor's obligations and liabilities, each entity forming the D&C Contractor has procured for SA Water a parent company guarantee in favour of SA Water. Under these guarantees, the guarantors unconditionally and irrevocably guarantee to SA Water (amongst other things) the performance of the D&C Contractor's obligations.

...

Events of default: Under the D&C Contract SA Water has a range of remedies available to it in the event of default by the D&C Contractor, escalating to termination if a serious default (for instance a recurring breach of OHS&W obligations) is not rectified.¹⁹

52. I am not persuaded by the agency's fears about the discouragement or loss of frankness in AdelaideAqua's future communications to the agency for fear of public disclosure. It is evident from the terms of the contract that contractual relations between the parties were generated against the background of the FOI Act and therefore that their communications may be subject to public scrutiny under the Act. I also note the District Court's comments in the decision of *Ekaton Corporation Pty Ltd v Chapman & Department of Health, Department of Health v Chapman* which I have cited in Attachment 2, that:

... it is to be assumed that both government and the private sector will be aware of the Act and the kind of information it protects and that which it does not and that the parties will be able to structure their negotiations accordingly.²⁰

53. AdelaideAqua itself is on the public record (in its evidence to the Select Committee) showing that it is aware of and understands the need for scrutiny of its actions:

Naturally, with a project of this size and importance, AA D&C is being intensely scrutinised and audited for compliance across every aspect of the project. AA D&C have always welcomed and embraced close scrutiny of its operations, and continues to do so.²¹

54. Further, the documents are somewhat dated; and, according to the agency, are not the subject of consideration in the current dispute between the parties under the contract. It is difficult to see that their disclosure will adversely affect and weaken the agency's position in future negotiations.
55. I consider that the public interest in disclosure of the documents outweighs the unfavourable public interest consequences submitted by the agency. I refer to the objects of the FOI Act, and the cases cited above of *Fairfax* and *Heinemann Publishers*. The desalination project is a major publicly funded project, and has been described as the largest capital project in the history of the state.²² Considerable public monies have been and will be expended on the project. In my view, there is a strong public interest favouring accountability and an ability by the public to scrutinise the parties' performance under the contract. This includes the communications in the documents which are the subject of review.

Clause 15

56. In my view, the submissions of the agency above in support of exempting **documents 1, 2, 5, 6, 10, 12** from disclosure under this clause are highly speculative and lack any evidentiary basis. AdelaideAqua can be taken to be aware of the FOI Act in its

¹⁹<http://www.sawater.com.au/NR/rdonlyres/AADD2731-5406-415C-9912-3AA5BCC50AFA/0/ADPContractsFactSheetSummaryv20.pdf>

²⁰ *Ekaton Corporation Pty Ltd v Chapman & Department of Health, Department of Health v Chapman* [2010] SADC 150 (9 December 2010), unreported, para 63.

²¹ AdelaideAqua D&C Consortium: Submission to the Select Committee on Lonsdale-Based Adelaide Desalination Plant, p3 at

<http://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=3&CId=223>

²² Ibid.

contractual dealings and negotiations with the agency, and to have structured them accordingly (see the case of *Ekaton*). It is apparent that the agency and AdelaideAqua chose not to give any contractual force of confidentiality relating to AdelaideAqua's 'proposals, programming and the like for future action' in the contract, when they would have had the opportunity to do so. AdelaideAqua can be taken to be aware that their letters relating to dealings and negotiations with the agency might potentially be the subject of public scrutiny under the FOI Act. These documents are no exception.

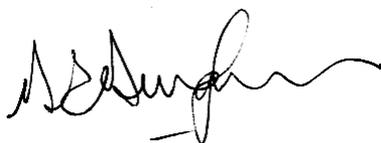
57. The submissions of the agency are insufficient to persuade me that there will be an adverse effect on its financial resources, let also a 'substantial' one, if the documents were to be released. As the District Court indicated in the case of *Konieczka v South Australia Police*,²³ the test is a high one. Other decisions in interstate FOI jurisdictions agree with the view that the word 'substantial' in similarly worded exemptions means 'grave, weighty, significant or serious', and that the onus of establishing a 'substantial adverse effect' is a heavy one.²⁴ The agency has not met this onus. I also refer to my previous comments about 'adverse effect' above. I consider the age of the documents lessens any sensitivity that may have attached to the documents, as well as the fact that they are not the subject of current proceedings or dispute between AdelaideAqua and the agency. In relation to the public interest claim, I have not been persuaded to resile from my views I my provisional determination, and I refer to my reasons above under clause 7(1)(c).

Clause 16(1)(a)(iv)(b)

58. Likewise with **documents 1, 2, 3, 4, 6, 7, 9, 10, 11, 12** and the claim of this clause, I am not persuaded that disclosure would have a significant or 'substantial' deleterious impact on the agency's effective performance of its functions and its ability to deliver the desalination plant infrastructure in an economical way. Again, the agency's submissions are extremely speculative and lack an evidentiary foundation. I refer to my reasons above, where I comment also on the age of the documents; the fact that the documents are not relevant to any current proceedings; and the notion that the agency and AdelaideAqua can be considered to have conducted their negotiations against the FOI legislative framework in this state. I comment also that documents such as document 2 are innocuous in nature, as recognised by the agency. It is difficult to see how disclosure of the content of these documents could have the impact predicted by the agency. In relation to the public interest claim, I refer to my reasons above under clause 7(1)(c).

Determination

59. In light of the above and pursuant to my powers under section 39 (11) of the FOI Act, I reverse the determination of the agency.



Richard Bingham
SA OMBUDSMAN

23 April 2012

Atts

²³ [2006]SADC 134, unreported, 8 December 2006.

²⁴ *Re Cairns Port Authority and Department of Lands*(1994) 1 QAR 663, at 724-725, paragraphs 148-150.