

'AF' and Community Services Directorate [2018] ACTOFOI 11 (17 December 2018)

Decision and reasons for decision of Senior Assistant Ombudsman, Paul Pfitzner

Application Number:	AFOI-RR/18/10006
Decision Reference:	[2018] ACTOFOI 11
Applicant:	'AF'
Respondent:	Community Services Directorate
Decision Date:	17 December 2018
Catchwords:	<i>Freedom of Information Act 2016</i> (ACT) – deciding access – whether disclosure of information is contrary to the public interest – prejudice to business affairs – whether reasonable steps have been taken to identify information within the scope of the application

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016* (the FOI Act).
2. Under s 82(1)(c) of the FOI Act, I set aside the decision of the Community Services Directorate (CSD) of 21 March 2018, as it relates to the information at issue in this review, a review report prepared by Robson Environmental Pty Ltd (Robson) (the review report). I substitute my decision that the review report is not contrary to the public interest information.
3. I have also decided that CSD, in making its decision, took reasonable steps to identify all government information within the scope of the access application.
4. CSD must now give the applicant access to an unedited copy of the review report.
5. As I consider that the review report constitutes personal information of the applicant, it should not be published by CSD, either on its disclosure log or otherwise.

Background of Ombudsman review

6. The applicant is a Housing ACT tenant.
7. On 23 January 2018, the applicant applied to CSD for access to all documents mentioning herself in agency records, specifically referencing tenancy issues including ongoing mould issues.
8. On 1 February 2018, the applicant clarified that she is only seeking documents created subsequent to a previous FOI request that she made in 2014.
9. On 7 February 2018, CSD undertook third party consultation with Robson under s 38 of the FOI Act¹ in relation to:
 - a 27 page mould assessment report for the applicant's home, dated August-September 2017 (the 2017 mould report), and
 - the review report, a Robson review of a three page Eco Health Solutions Pty Ltd (Eco Health), 'Report of Water Damage and Mould Assessment' for the applicant's home, dated 13 October 2017.
10. On 7 February 2018, Robson responded to CSD objecting to disclosure of the 2017 mould report. Its response did not, however, address the review report.
11. On 7 February 2018, CSD undertook third party consultation with Capital Restorations Pty Ltd (Capital), in relation to a three page water damage scope and quotation document for the applicant's home dated 18 December 2017 (the Capital document). On 1 March 2018, Capital responded to CSD with no objection to the Capital document being disclosed.
12. On 6 March 2018, CSD arranged with the applicant to provide her with the Capital document as part of the first stage of a two-stage release of documents. On 8 March 2018, CSD gave the applicant access to the Capital document in full.
13. On 6 March 2018, CSD undertook a second round of consultation with Robson in relation to the review report, among other documents. On 12 March 2018, Robson objected to disclosure of the review report, along with the other documents on which consultation occurred.
14. On 21 March 2018, CSD advised the applicant that it had identified a total of 177 documents across both stages of release. CSD gave the applicant access to 144 documents in full, 26 documents in

¹ Section 38 provides that where disclosure of information may reasonably be expected to be of concern to a relevant third party, the agency must take reasonable steps to consult with the relevant third party before deciding to give access to the information.

part, and refused access to the remaining seven documents. CSD's decision to refuse access to information in these 33 documents relied on:

- information being protected information under the *Housing Assistance Act 2007*, s 28 other than information disclosed to a person to whom the information relates (Schedule 1, s 1.3(5)), and
- disclosure prejudicing:
 - the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004* (Schedule 2, s 2.2(a)(ii))
 - trade secrets, business affairs or research of an agency or person (Schedule 2, s 2.2(a)(xi)), and
 - an agency's ability to obtain confidential information (Schedule 2, s 2.2(a)(xii)).

15. On 1 May 2018, the applicant sought Ombudsman review of CSD's decision under s 73 of the FOI Act.

16. On 14 June 2018, CSD confirmed with our Office that it had notified Robson of this Ombudsman review, as it is required to do under s 76 of the FOI Act. Robson has not applied to participate in this review.

Scope of Ombudsman review

17. In making her application, and in relation to the review report, the applicant explained:

I submitted an external report on mould in my property. Then a mould specialist (Robson Environmental) reviewed it. Their report was withheld as "prejudice trade secrets, business affairs or research of an agency or person". I paid for the report and supplied it to Housing ACT. I seek to know the review's contents to compare with the subsequent reports by Robson Environmental and Capital Restorations (both provided to me) and subsequent positions by Housing ACT.

18. On 24 and 25 June 2018, the applicant made a series of submissions, in essence contending that:

- some of the information (which she has identified) is not readable
- the Capital document she received appears to be incomplete, and
- there are additional documents within the scope of her application which have not been provided to her.

19. The applicant's contentions relating to the existence of further documents raise the issue of whether CSD has taken reasonable steps to identify all of the government information within the scope of the applicant's access application, as it is required to do under s 34 of the FOI Act.
20. I provided my preliminary views about CSD's decision to the parties in my draft consideration dated 16 November 2018. CSD responded by agreeing with the draft consideration to the release of the review report, noting its original decision was based on an objection from Robson.
21. The applicant responded saying that she disagrees that CSD has taken reasonable steps to identify all of the government information with the scope of the access application. She also advised that she cannot read some of the information provided to her, either using reading aids or increasing the zoom size.
22. As a preliminary issue, I consider that the information the applicant has referenced as unreadable is, in fact, able to be read. CSD may, however, wish to provide the applicant with a clearer copy of that information, if one exists. Our Office will inform CSD of the details of that information separate to this decision, but I will not consider this issue any further as part of this Ombudsman review.
23. The issues to be decided in this Ombudsman review are whether:
 - CSD has taken reasonable steps to identify all government information within the scope of the access application, and
 - the review report comprises contrary to the public interest information, as CSD has found.
24. In making my decision, I have had regard to:
 - the applicant's application for Ombudsman review
 - CSD's decision of 21 March 2018 (the decision under review)
 - the FOI Act, in particular ss 6, 7, 9, 16, 17, 34, 35, 72 and Schedule 2
 - CSD's FOI processing file relating to the access application, in particular an unedited copy of the review report
 - relevant case law, and
 - the submissions of the parties.

Relevant law

25. Section 7 of the FOI Act gives every person an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.
26. Section 9 of the FOI Act expressly provides that it is the intention of the Legislative Assembly that the FOI Act be administered with a pro-disclosure bias and discretions given under the FOI Act should be exercised as far as possible in favour of disclosing government information.
27. Section 34 of the FOI Act provides that an agency or Minister deciding an access application must take reasonable steps to identify all government information within the scope of the application.
28. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information because the information is contrary to the public interest information.
29. Contrary to the public interest information is defined in s 16 as —
 - information—
 - (a) that is taken to be contrary to the public interest to disclose under schedule 1; or
 - (b) the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17.
30. The public interest test set out in s 17 involves a process of balancing the public interest factors favouring disclosure against the public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
31. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of the government information has the onus of establishing the information is contrary to the public interest information.
32. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

The contentions of the parties

33. The applicant contends that further documents exist that have not been provided to her.
34. The applicant also contends that she should be given access to the review report, which is an evaluation of the Eco Health 'Report of Water Damage and Mould Assessment'. The applicant paid for the Eco Health report, but did not pay for the review report.
35. CSD refused the applicant access to the review report on the basis that it would, on balance, be contrary to the public interest to disclose. The decision notice indicates CSD's view that disclosure of the review report could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person, although no further reasons were provided as to how disclosure could have that result. In responding to my draft consideration, CSD reiterated that its original decision was based on objection by Robson following third party consultation, as discussed above,² has agreed to my draft consideration and no longer maintains that contention.
36. In its consultation responses to CSD, Robson contended that disclosure of the review report would:
 - a) reveal information having a commercial value which could be, or could reasonably be expected to be, destroyed or diminished if disclosed; and
 - b) would have an adverse effect on the operation or activities of a business.
37. Robson's detailed arguments are directed towards the larger, scientific, and more detailed 2017 mould report, rather than the review report. It did not explain how the review report has a commercial value, or how disclosure would adversely affect its business.

Considerations

Identifying information within the scope of the application

38. The FOI Act requires that the agency or Minister must take 'reasonable steps' to identify all the government information within the scope of the access application (s 34) before making a decision that it does not hold the information (s 35(1)(b)).³

² At [20].

³ See: Explanatory Statement, Freedom of Information Bill 2016 (ACT) 23, citing *Nash and Queensland Police Service* [2012] QICmr 45 at [15]—[16].

39. The FOI Act is silent on what constitutes 'reasonable steps'. The meaning of 'reasonable', in the context of searches for documents sought under FOI legislation, has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.⁴
40. What amounts to reasonable steps may vary in different circumstances. It would, however, include a search of electronic records and a manual search of physical records, where applicable.⁵
41. In considering whether reasonable steps have been taken to identify all relevant information, some relevant factors include:
- the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - the agency's practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s; and
 - the nature of the government activity the request relates to.⁶
42. During the course of this Ombudsman review, our Office provided CSD with details of the applicant's contentions. On 11 July 2018, CSD advised that Housing ACT has:
- on CSD's request, undertaken multiple and comprehensive further searches that have not identified any further relevant documents, and
 - confirmed that there are no additional pages to the Capital document.

⁴ Considered by the Administrative Appeal Tribunal in relation to s 24A of the *Freedom of Information Act 1982* (Cth) in the decision of *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138 at [19]. More recently, the Tribunal applied this approach in *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770 at [19].

⁵ See: Explanatory Statement, Freedom of Information Bill 2016 (ACT) 23.

⁶ *Nash and Queensland Police Service* [2012] QICmr 45 at [14] — [16]; *PDE and the University of Queensland* [2009] QICmr 7 at [37].

43. In addition, it is apparent from my examination of the FOI case file that CSD has made extensive internal enquiries. It has also undertaken extensive informal consultation with the applicant regarding the information it holds, including explaining to her the steps it has taken and how the information it has identified flows from her earlier 2014 FOI application. The FOI Act obliges an agency to assist an applicant to make an access application.⁷ In my view, CSD has met and indeed gone beyond this obligation and made substantial efforts to assist the applicant to obtain maximum access to the relevant information that it has identified.
44. I acknowledge the applicant's contentions that, in her view, further information should exist. I am mindful that an agency's ability to effectively identify the information it holds is dependent on the quality and efficiency of its document management systems and processes. While assessing the reasonableness of an agency's searches for information requires consideration of the agency's practices and procedures, including its information management approach, that does not extend to a review or audit of those practices and procedures.
45. Accordingly, with consideration to the factors above at [41], I am satisfied that CSD has taken reasonable steps to identify all of the government information within the scope of the access application.

Contrary to the public interest information

46. For CSD to be able to rely on s 35(1)(c) to refuse access to the review report, it must comprise contrary to the public interest information. I now need to consider the tests in the FOI Act to decide whether the review report is contrary to the public interest information.

Information that is taken to be contrary to the public interest to disclose under Schedule 1

47. CSD does not contend that the review report is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the review report to be contrary to the public interest information, disclosure of the review report must, on balance, be contrary to the public interest under the test set out in s 17.

⁷ Expressly under s 31, but also implied by ss 6(a), 6(b), 6(e), 6(f), 7 and 9.

Public interest test

48. To determine whether information is, on balance, contrary to the public interest to disclose, s 17(1) of the FOI Act prescribes the following five steps:

- (a) identify any factor favouring disclosure that applies in relation to the information (a *relevant factor favouring disclosure*), including any factor mentioned in schedule 2, section 2.1;
- (b) identify any factor favouring nondisclosure that applies in relation to the information (a *relevant factor favouring nondisclosure*), including any factor mentioned in schedule 2, section 2.2;
- (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
- (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;
- (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.

49. In addition, the irrelevant factors listed in s 17(2) must not be taken into account when applying the public interest test.

Irrelevant factors

50. I have noted the irrelevant factors listed in s 17(2) and am satisfied I have not considered any irrelevant factors in this case.

Factors favouring disclosure

51. CSD has not identified any public interest factors favouring disclosure.

52. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. I consider that one of those factors is relevant in this case – that is, disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.⁸ Specifically, disclosure could reveal Housing ACT's decisions relating to the applicant's tenancy and any remedial work on her home.

⁸ Schedule 2, s 2.1(a)(viii).

53. In addition, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of a representative democracy.⁹ This concept is promoted through the objects of the FOI Act.¹⁰

54. I am satisfied that these are the relevant considerations favouring disclosure in this case.

Factors favouring nondisclosure

55. CSD found that releasing the review report could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person. No reasons for this were, however, included in its decision notice, nor provided as part of this Ombudsman review process.

56. CSD did, however, refer to the consultation with Robson that it undertook while processing the applicant's access application. I have considered Robson's responses, including its response of 12 March 2018 which specifically references the review report. These responses focus on the more substantial 2017 mould report and the possible harm to the business that would result from its release. No specific reasons for Robson's objections to the release of the review report have been provided, other than a suggestion that it could be used to cause damage to the author and Robson, and disclosure could hamper rectification and remediation of the property.

57. The review report contains the observations and views of the reviewer, setting out where she agrees and does not agree with the Eco Health report. It does not appear to describe the particular methodology used, nor does it, in my view, contain any proprietary processes of Robson.

58. I am not satisfied the review report has any commercial value, beyond its value in use to Housing ACT, nor is it apparent how disclosure could have an adverse effect on the operations or activities of Robson.

59. I am satisfied that Robson's contention that disclosure would hamper the remediation of the applicant's home, the property that is the subject of the report, is not a relevant consideration in this Ombudsman review. I am not satisfied that is a business concern of Robson's, nor has CSD raised that as an issue.

60. I am not satisfied there are any relevant factors favouring nondisclosure in this case.

⁹ See s 9 of the FOI Act.

¹⁰ See s 6(b) of the FOI Act.

Balancing the factors

61. As I have not identified any public interest factors favouring nondisclosure, I am satisfied that, on balance, giving the applicant access to the review report would not be contrary to the public interest.
62. As the review report relates to the residence of the applicant, I am satisfied it contains her personal information.¹¹ I am therefore satisfied the report should not be released publicly by CSD, whether on the disclosure log or otherwise, after being released to the applicant.

Conclusion

63. I am satisfied that CSD has taken reasonable steps to identify all government information within the scope of the access application, as it is required to do under s 34 of the FOI Act.
64. The review report is not contrary to the public interest information for the purposes of s 16 of the FOI Act. The review report does, however, constitute personal information of the applicant and therefore not should be released publicly.

Paul Pfitzner
Senior Assistant Ombudsman
17 December 2018

¹¹ The review report is information about the applicant's home and living conditions. As such, it says something about her and her personal circumstances.