

## ***Alistair Coe and ACT Health Directorate [2018] ACTOFOI 4*** **(5 September 2018)**

### **Decision and reasons for decision of ACT Ombudsman, Michael Manthorpe PSM**

Application Number:	AFOI-RR/18/10014
Decision Reference:	[2018] ACTOFOI 4
Applicant:	Mr Alistair Coe MLA
Respondent:	ACT Health Directorate
Decision Date:	5 September 2018
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> — deciding access — whether disclosure of information is contrary to the public interest — right to privacy — prejudice to the business affairs of an agency or person.

### **Decision**

1. Under s 82(1) of the ACT *Freedom of Information Act 2016* (FOI Act), I set aside the decision of ACT Health Directorate (ACT Health) of 13 May 2018 to refuse access to certain information and substitute it with my decision that:
  - the PwC partner’s name is not contrary to the public interest information, and
  - with the exception of the hourly and daily rate information,<sup>1</sup> PwC’s business information is not contrary to the public interest information.
2. I confirm ACT Health’s decision as it relates to the hourly and daily rate information.

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<sup>1</sup> The hourly and daily rate information in this case includes information that can be used to calculate PwC’s hourly or daily rates, such as the ‘expected days allocated’.

3. The applicant is not seeking access to any personal contact information, aside from the PwC partner's name. Personal contact information, other than the PwC partner's name, is therefore outside the scope of this decision.
4. ACT Health must now give the applicant access to a copy of documents 24, 25, 28 and 29 with only the hourly and daily rate information and personal contact information deleted, but with the name of the PwC partner and all other PwC business information released.

### Scope and background of Ombudsman review

5. In late 2017, ACT Health engaged consultancy firm PricewaterhouseCoopers (PwC) to conduct a governance scan. In December 2017, PwC produced a document titled 'ACT Health Australian Health Departments and Directorates Governance Scan' (the Governance Scan).
6. On 26 March 2018, Mr Alistair Coe MLA (the applicant) applied to ACT Health for access to documents relating to the separation of ACT Health since 1 January 2017.
7. On 26 April 2018, ACT Health undertook third party consultation with PwC under s 38 of the FOI Act.<sup>2</sup>
8. On 30 April 2018, PwC responded to ACT Health, objecting to the disclosure of:
  - personally identifiable information (names, addresses, signatures, emails, position, etc), and
  - commercially sensitive information (client names, contract conditions, pricing, fee structures, estimated days effort).
9. On 13 May 2018, ACT Health advised the applicant that it had identified 29 documents within the scope of his access application. ACT Health decided to give the applicant access to 12 documents in full and the remaining 17 documents in part. In making its decision, ACT Health relied on the personal privacy public interest consideration (schedule 2.2(a)(ii)) and the trade secrets, business affairs, and research public interest consideration (schedule 2.2(a)(xi)) of the FOI Act.
10. As a preliminary issue, ACT Health's decision notice does not explain how it decided the access application. However, I consider it apparent that ACT Health has decided, pursuant to s 35(1)(c) of the FOI Act, to refuse to give access to information on the basis that the information refused is

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<sup>2</sup> Section 38 provides that if the respondent considers that some or all of the government information applied for is not contrary to the public interest information, but disclosure may reasonably be expected to be of concern to a person or other entity other than the Territory, the respondent must take reasonable steps to consult with the relevant third party before deciding to give access to the information (ss 38(1)-(2)).

contrary to the public interest information. In this case, ACT Health refused access by considering the personal privacy and business affairs public interest factors.

11. As a further preliminary issue, ACT Health's decision notice does not meet the contents of notice requirements of s 54 of the FOI Act. Section 54 relevantly provides that a decision notice refusing to give access to government information because disclosure of the information would, on balance, be contrary to the public interest, must include a description of the information, and a statement of reasons for the decision setting out:

- the findings on any material questions of fact referring to the evidence or other material on which the findings were based
- the relevant factors favouring disclosure
- the relevant factors favouring nondisclosure
- how the factors were balanced, and
- the harm to the public interest that can be reasonably expected to occur from disclosure.<sup>3</sup>

12. While not meeting the notice requirements of the FOI Act is a procedural defect, I have had regard to the information at issue and do not consider the procedural defect in this case alters ACT Health's underlying decision to refuse access to information.

13. On 25 May 2018, the applicant sought Ombudsman review of ACT Health's decision under s 73 of the FOI Act. In his application, the applicant explained that he is seeking access to the contract value for PwC's work in producing the Governance Scan. The applicant also explained that he is seeking access to an email from PwC to ACT Health titled 'Draft Engagement Letter – Governance Scan'.<sup>4</sup>

14. During the course of this Ombudsman review, the applicant advised that the information sought is the names of individuals involved in the 'business dealings' to engage PwC to produce the Governance Scan. In this context, I consider that only the PwC partner was involved in these 'business dealings', and therefore the names of PwC employees are not sought. I note that the applicant is not seeking contact information for individuals, such as their email addresses or telephone numbers.

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<sup>3</sup> ACT Health's decision notice merely lists the factors that it considers favour nondisclosure.

<sup>4</sup> Identified on ACT Health's schedule of documents as document 29.

15. On 1 June 2018, ACT Health notified PwC of this Ombudsman review.<sup>5</sup> PwC did not apply to be a participant to this review.<sup>6</sup>
16. I provided my preliminary views about ACT Health's decision to the parties in my draft consideration dated 31 July 2018. The applicant has accepted my draft consideration.<sup>7</sup>
17. On 31 August 2018, ACT Health provided submissions maintaining that the trade secrets, business affairs, and research public interest considerations are 'relevant'.
18. I have examined an unedited copy of the 17 documents to which the applicant has been given partial access. It is apparent to me that the information sought by the applicant (the information sought) is contained within four documents:
  - a request for quotation under \$25,000, document 24 (9 pages including the covering email)
  - a request for quotation under \$25,000, document 25 (9 pages including the covering email)
  - a letter of invitation, document 28 (9 pages including covering email, request for quotation and general terms and conditions for purchase orders), and
  - a draft engagement letter, document 29 (10 pages, including covering email)
19. The information sought can be categorised as:
  - the name of a PwC partner, and
  - PwC's business information (a description of work to be undertaken by PwC, PwC's fees, including both its hourly and daily rates and the total value of the quote or contract, and PwC's terms).
20. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information sought would be contrary to the public interest.

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<sup>5</sup> Section 76(1) of the FOI Act provides that the decision maker, on receiving notice of an application for an Ombudsman review (under s 75), must tell each relevant third party consulted under section 38 of the application.

<sup>6</sup> Section 77 of the FOI Act provides that the applicant and agency or Minister for the relevant reviewable decision are participants in the review, and any other person may apply to the Ombudsman to participate in the review.

<sup>7</sup> On 15 August 2018.

21. In making my decision, I have had regard to:

- The applicant's application for Ombudsman review
- ACT Health's decision
- the FOI Act, in particular ss 7, 16, 17, 35, 38, 50, 72 and schedule 2
- the Explanatory Statement to the Freedom of Information Bill 2016
- ACT Health's FOI processing file relating to the access application
- an unedited copy of the information sought
- the submissions of the parties, including ACT Health's response to my draft consideration, and
- relevant case law, in particular *Mangan and The Treasury*,<sup>8</sup> *CH32GI and Department of Justice and Attorney-General*<sup>9</sup> and *Stewart and SunWater Limited*.<sup>10</sup>

## Relevant law

22. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.<sup>11</sup> This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.

23. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information sought because the information being sought is contrary to the public interest information.<sup>12</sup>

24. 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.

25. The public interest test set out in s 17 involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.

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<sup>8</sup> [2005] AATA 898 ('*Mangan*').

<sup>9</sup> [2012] QICmr 60.

<sup>10</sup> [2012] QICmr 70.

<sup>11</sup> Section 7.

<sup>12</sup> Section 35(1)(c).

26. Section 72 of the FOI Act provides that it is the person seeking to prevent disclosure of government information that has the onus of establishing that the information is contrary to the public interest information. The person seeking to prevent disclosure in this Ombudsman review is ACT Health.

## The contentions of the parties

27. In its decision notice, ACT Health said:

I have decided that 17 documents are to be partially released in accordance with the provisions under the Act, Sch 2.2 (a)(ii), as the information is personal information about an individual and Sch 2.2 (xi), as information concerns the trade secrets, business affairs, and research of a relevant third party. The release of these documents would prejudice the competitive commercial activities of this organisation.

28. In his application for Ombudsman review, the applicant said:

I believe that the value of the Governance Scan performed by PricewaterhouseCoopers (PwC) does not need to be redacted. Information regarding expenditure on contracts less than \$25,000 has previously been made available by the ACT Government. I note that on a number of occasions the value of contracts below the \$25,000 procurement threshold have been provided, including as part of the Questions on Notice process.

I also note that the Notifiable Invoices Register reflects that more than \$5.9 million dollars' worth of payments have been made to PwC by the ACT Government since 12 July 2016, and that the disclosure of the value of this relatively small contract would not affect their commercial viability. There is significant public interest in the separation of ACT Health, and the Governance Scan performed by PwC appears to be key document underpinning this substantial organisational restructure. I therefore believe the public interest in publishing the value of the work outweighs other commercial factors.

## Considerations

29. For ACT Health to be able to rely on s 35(1)(c) to refuse access to the information sought, the information sought must comprise contrary to the public interest information. I now need to consider the tests in the FOI Act to decide whether the information sought is contrary to the public interest information.

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

30. No suggestion has been made that the information sought is taken to be contrary to the public interest to disclose under schedule 1. Therefore, for the information sought to be contrary to the

public interest information, disclosure of the information sought must, on balance, be contrary to the public interest under the test set out in s 17.

*Public interest test*

31. To determine whether disclosure of information is, on balance, contrary to the public interest, s 17(1) 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.
32. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) are considered.

*Irrelevant factors*

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

*Factors favouring disclosure – name of a PwC partner*

34. In response to consultation, PwC objected to the disclosure of personally identifiable information (names, addresses, signatures, emails, position, etc). However, of the personally identifying information contained within the documents, it is only the name of a PwC partner that remains at issue in this Ombudsman review.
35. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. Of the factors favouring disclosure listed in schedule 2, s 2.1, I consider that one is

relevant to the partner's name in this case. Disclosure of the partner's name could reasonably be expected to ensure effective oversight of expenditure of public funds.<sup>13</sup>

36. Additionally, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of representative democracy.<sup>14</sup> This concept is promoted through the objects of the FOI Act.<sup>15</sup>

37. As distinct from an employee, a partner of a firm is a part-owner of the business. In this case, the partner also represents PwC in the business dealings. Therefore, I consider that disclosing the partner's name in this case would assist the proper working of representative democracy by increasing scrutiny, discussion, comment and review of the ACT Government's business dealings with PwC.

38. For these reasons, I am satisfied that disclosure of the partner's name could reasonably be expected to promote the objects of the FOI Act.

#### *Factors favouring disclosure – business information*

39. Of the factors favouring disclosure listed in schedule 2, s 2.1, I consider that three are relevant to the business information. Disclosure of the business information could reasonably be expected to:

- ensure effective oversight of expenditure of public funds<sup>16</sup>
- promote open discussion of public affairs and enhance the government's accountability,<sup>17</sup> and
- reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>18</sup>

40. Under the *Government Procurements Act 2001*,<sup>19</sup> all government contracts worth more than \$25 000 must be proactively published on the notifiable contracts register. While a contract is not required to be reported where the value is less than \$25,000, I consider that threshold is not determinative of the public interest value in disclosing the substance of an individual contract. In my view, it remains open to agencies to give access to information about lower value contracts

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<sup>13</sup> Schedule 2, s 2.1(a)(iv).

<sup>14</sup> See s 17 of the FOI Act.

<sup>15</sup> See s 6(b) of the FOI Act.

<sup>16</sup> Schedule 2, s 2.1(a)(iv).

<sup>17</sup> Schedule 2, s 2.1(a)(i).

<sup>18</sup> Schedule 2, s 2.1(a)(vii).

<sup>19</sup> Part 3. See also s 12A of the *Government Procurement Regulation 2007*.

through open access arrangements, where it is reasonably practicable and in the public interest to do so.

41. In this case, I am satisfied that disclosure of the business information could reasonably be expected to assist with the proper working of representative democracy by increasing scrutiny, discussion, comment and review of the ACT Government's business dealings with PwC (noting the applicant's contention that PwC has received more than \$5.9 million dollars' worth of payments from the ACT Government since 12 July 2016). Therefore, as an additional public interest factor favouring disclosure of the business information, disclosure of the business information could reasonably be expected to promote the objects of the FOI Act.

#### *Factors favouring nondisclosure*

##### Personal information

42. I am satisfied that the name of the PwC Partner is personal information.<sup>20</sup>
43. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure. The factor relevant to the protection of personal information in schedule 2, s 2.2 is the protection of an individual's right to privacy, or any other right under the *Human Rights Act 2004* (Human Rights Act). However, the Human Rights Act does not provide a general right to privacy. Rather, the Human Rights Act provides the right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and not to have one's reputation unlawfully attacked.
44. It is recognised in other Australian FOI jurisdictions, where there is the absence of Human Rights legislation, that prejudice to the protection of an individual's right to privacy can be a public interest factor favouring nondisclosure.<sup>21</sup> In this Ombudsman review, I consider that this is the factor favouring nondisclosure of the partner's name.
45. However, in this case the PwC Partner was not acting in a personal or private capacity. Rather, he was representing his firm in business dealings with the ACT Government, and it is reasonable to expect to be open to a reasonable level of public scrutiny in these circumstances. For this reason, I give little weight to the public interest factor favouring nondisclosure of the partner's name.

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<sup>20</sup> See: FOI Act, Dictionary for the definition of 'Personal Information.'

<sup>21</sup> This is a public interest factor identified by the Australian Information Commissioner, see: *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* at [6.22]. Although these Guidelines are not binding, I consider them to be a relevant source of information to assist in the identification of potential public interest factors.

### Business information

46. As I discussed above, and in my draft consideration that was provided to ACT Health on 31 July 2018, ACT Health did not apply the s 17 public interest test when making its decision, nor did it explain the harm to the public interest that could reasonably be expected to occur from disclosure. In response to my draft consideration, ACT Health responded by maintaining ‘that the trade secrets, business affairs, and research public interest considerations ... are relevant’ in this case, but did not provide any reasons supporting its position.
47. In an Ombudsman review, it is the person seeking to prevent disclosure of government information that bears the onus of establishing that the information is contrary to the public interest information.<sup>22</sup> It is ACT Health that bears the onus in this case. As ACT Health has not provided any reasons to support its contentions, I am not satisfied that PwC’s business information contains trade secrets or research in this case. The only business information consideration apparent to me is the effect of disclosure of the business information on PwC’s business affairs.<sup>23</sup>
48. The term ‘business affairs’, in the context of FOI legislation, has been interpreted to be ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.<sup>24</sup>
49. Where disclosure could cause reputational harm to, or increase competitive pressures on PwC, I consider there will be a public interest in nondisclosure. However, the effect of disclosure will vary depending on the nature of the information. For example, the breakdown of pricing to an hourly or daily rate provides more insight into the business affairs of the business, and may therefore be more commercially sensitive, than the aggregate sum of the contract price.
50. The nature of pricing information was considered by the Queensland Information Commissioner in *CH32GI and Department of Justice and Attorney-General*.<sup>25</sup> In that case, the Commissioner

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<sup>22</sup> Under s 72 of the FOI Act.

<sup>23</sup> Schedule 2.2(a)(xi) ‘disclosure of the information could reasonably be expected to ... prejudice trade secrets, business affairs or research of an agency or person’.

<sup>24</sup> *Mangan*, above n 8, at [40], citing *Cockcroft and Attorney-General’s Department and Australian Iron and Steel Pty Ltd (party joined)* (1985) 12 ALD 462.

<sup>25</sup> [2012] QICmr 60.

considered that the sensitivity of commercial pricing information will depend on the factors in each case. The Commissioner discussed:

These key factors include: the nature and detail of the pricing information; whether it is current or merely historical; the nature and custom of the particular market; and a variety of other circumstances which may affect its sensitivity in any particular case.<sup>26</sup>

51. The question of whether pricing information should be released in relation to the commercial activities of third parties was also considered by the Queensland Information Commissioner in *Stewart and SunWater Limited*.<sup>27</sup> In that case, the Commissioner discussed:

The pricing contained within the Category B information represents the total figure for each year. It does not provide detailed descriptions of the components of the prices or disclose any profit margins or costs or reveal what percentage of income is derived from performing the Agreement. As a result, I consider the degree of commercial sensitivity the pricing information has in this case is low.<sup>28</sup>

52. In this Ombudsman review, I am satisfied that disclosing the aggregate sum of the quoted value for the Governance Scan would not disclose commercially sensitive information.
53. In the requests for quotation, I consider that the disclosure of the hourly or daily rates, and other information which could be used to calculate these rate (specifically the expected days allocated), could disclose commercially sensitive information, as it could reasonably harm PwC, and/or benefit its competitors, in commercial negotiations with the government.
54. The remaining business information sought relates to the proposed content of the Governance Scan, the process for conducting the scan, and information about PwC's terms of business. In my view, this is information generally provided for the provision of work of this kind.
55. The substance of the work is apparent from the completed Governance Scan. I consider that PwC's terms are both general and consistent with those expected for a contract for business services and therefore would not disclose commercially sensitive information.
56. I am satisfied that disclosing this business information would not reveal any particularly competitive information of PwC. Therefore, with the exception of the hourly and daily rate information, I am satisfied that disclosure of the business information would not have an adverse effect on the business affairs of PwC.

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<sup>26</sup> *CH32GI and Department of Justice and Attorney-General* [2012] QICmr 60 [54].

<sup>27</sup> [2012] QICmr 70.

<sup>28</sup> *Stewart and SunWater Limited* [2012] QICmr 70 [98].

57. Therefore, I am satisfied that the public interest in nondisclosure of the contract sum or other business information should be given less weight than the public interest in the nondisclosure of the breakdown of PwC's pricing to an hourly or daily rate.

*Balancing the factors*

58. I am satisfied that, on balance, the public interest factors favouring *disclosure* outweigh the public interest factors favouring nondisclosure for all of the information sought, with the exception of the hourly and daily rate information (or information, such as the expected days allocated, which could be used to calculate the hourly or daily rate information).

59. In relation to the hourly and daily rate information, I am satisfied that on balance, the public interest factors favouring *nondisclosure* outweigh the public interest factors favouring disclosure. I consider that the hourly and daily rate information is commercially sensitive information. I also consider disclosing the hourly and daily rate information would only provide a marginal public interest benefit.

**Conclusion**

60. Giving the applicant access to the hourly and daily rate information would, on balance, be contrary to the public interest. In relation to the hourly and daily rate information, I confirm ACT Health's decision to refuse access under s 35(1)(c) of the FOI Act.

61. Giving the applicant access to the remaining information sought would not be contrary to the public interest. I set aside ACT Health's decision with respect to the remaining information sought and substitute it with a decision to give the applicant access.

**Michael Manthorpe PSM**  
**ACT Ombudsman**  
**5 September 2018**