

***Alistair Coe and Chief Minister, Treasury and Economic Development  
Directorate [2018] ACTOFOI 3 (28 August 2018)***

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

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| Application Number: | AFOI-RR/18/10008  |
| Decision Reference: | [2018] ACTOFOI 3  |
| Applicant:          | Mr Alistair Coe MLA   |
| Respondent:         | Chief Minister, Treasury and Economic Development Directorate   |
| Decision Date:      | 28 August 2018  |
| Catchwords:         | <i>Freedom of Information Act 2016 (ACT) — deciding access — whether disclosure of information is contrary to the public interest — prejudice intergovernmental relations — prejudice a deliberative process of government.</i> |

## Decision

1. Under s 82(1) of the *Freedom of Information Act 2016* (FOI Act), I confirm the decision of Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 3 May 2018.

## Scope and background of Ombudsman review

2. On 9 March 2018, Mr Alistair Coe MLA (the applicant) applied to CMTEDD for access to six specific documents relating to negotiations between the ACT and Commonwealth governments regarding West Basin and other land matters. The applicant identified the documents sought by date and description.<sup>1</sup>
3. On 9 April 2018, CMTEDD undertook third party consultation with the Commonwealth Department of Finance (Finance) in relation to the six documents under s 38 of the FOI Act.
4. On 1 May 2018, Finance responded to CMTEDD objecting to disclosure of the six documents on the basis that their release would risk damage to the relationship between officers of Finance and CMTEDD.
5. On 3 May 2018, CMTEDD advised the applicant that it had identified six documents within the scope of the access application (the information sought). CMTEDD refused access to the information sought in full on the basis that the information sought would, on balance, be contrary to the public interest to disclose as disclosure could prejudice intergovernmental relations. In making its decision, CMTEDD relied on s 35(1)(c) of the FOI Act.
6. On 17 May 2018, the applicant sought Ombudsman review of CMTEDD's decision under s 73 of the FOI Act.
7. I provided my preliminary views about CMTEDD's decision to the parties in my draft consideration dated 31 July 2018. Both CMTEDD and the applicant have accepted my draft consideration.<sup>2</sup> I am now proceeding to finalise this Ombudsman review with this formal decision.
8. 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, as CMTEDD has found.

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<sup>1</sup> The documents are: 1. A letter to Chief Minister Barr from Minister Cormann dated 2 August 2017, 2. An email from the Department of Finance to CMTEDD regarding Commonwealth ACT land matters dated 7 September 2017, 3. A meeting invitation from the Department of Finance to discuss land matters and agenda dated 20 September 2017, 4. An email from the Department of Finance – land matters, including Table of Actions from 20 September 2017 meeting dated 9 October 2017, 5. A meeting invitation from the Department of Finance to discuss land matters dated 30 October 2017, 6. Letter to Chief Minister Barr from Minister Cormann dated 8 December 2017.

<sup>2</sup> CMTEDD by email on 3 August 2018, and the applicant by email on 15 August 2018.

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

- the applicant's application for Ombudsman review
- CMTEDD's decision
- the FOI Act, in particular ss 7, 16, 17, 35, 50 and schedule 2
- CMTEDD's FOI processing file relating to the access application
- an unedited copy of the information sought
- the submissions of the parties, and
- relevant case law, in particular *Queensland Newspapers Pty Ltd and Queensland Police Service*,<sup>3</sup> and *Queensland Newspapers and Department of Justice and Attorney-General; Carmody (Third Party)*.<sup>4</sup>

## Relevant law

10. Section 7 of the FOI Act provides every person with 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.
11. 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.
12. 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.
13. 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.
14. Under s 50 of the FOI Act, where it is practicable to give access to a copy of a record from which contrary to the public interest information has been deleted, access must be given to the copy.

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<sup>3</sup> [2014] QICmr 5 (*Queensland Newspapers No 1*).

<sup>4</sup> [2016] QICmr 23 (*Queensland Newspapers No 2*).

## The contentions of the parties

15. In its reasons for decision, CMTEDD said:

... I consider that the release of the documents could prejudice intergovernmental relations. The documents identified provide details of a number of sensitive land issues that are subject to ongoing negotiations and deliberations. Information contained in these documents was provided in confidence to assist parties to negotiate an amicable solution for various land matters. The release of these documents could adversely affect these negotiations and deliberations by damaging continued level of trust and co-operation in the relations between the officers conducting negotiations. I consider that maintaining good working relations between the ACT and the Commonwealth are crucial to the ongoing negotiations on this issue and on future matters. I am satisfied that the release of the documents could prejudice intergovernmental relations and the Directorate's ability to obtain confidential information by impairing the future flow of information between the ACT and the Commonwealth ...

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

... I do not believe that my request would impair the future sharing of information to an extent that information could no longer be shared between the ACT and Federal Governments on this matter. I do not believe that the release of this information would halt the development given millions of dollars have already been committed to ensure its completion. Nor do I believe that all the information contained within the documents would be of such a prejudicial or confidential nature as to completely exempt their release.

Information is regularly shared between the ACT and Commonwealth on a range of issues, including information on which policy or projects are based. It is reasonable that key information on land and financial matters related to significant projects are a matter of public record, and this type of information is regularly disclosed at all levels of government proactively or upon request. I do not believe that the disclosure of these documents would result in public officials no longer being able to discuss matters related to the West Basin or perform their regular duties. I believe the disclosure would allow for a more transparent and accountable debate, and that this is essential given the considerable scale of the West Basin project for the ACT.

Furthermore, the ACT government has committed to the West Basin project as a key development, with millions of dollars being spent on completing the multistage works. This project has been widely reported on and scrutinised by the Legislative Assembly and the media. It is reasonable there is a keen level of interest in the development, and how West Basin will progress. A considerable level of funding has been directed to this project over a number of years, and I would submit that it is highly unlikely that the documents within my request would result in a reversal of that commitment.

## Considerations

17. I have examined an unedited copy of the information sought. It is not in dispute that the information sought comprises various communications between the Chief Minister and the Minister for Finance, and various communications between senior officials within CMTEDD and Finance relating to negotiations and meetings over land matters.
18. For CMTEDD 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*

19. No suggestion has been made that the information sought is taken to be contrary to the public interest to disclose under schedule 1 of the FOI Act. 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.

### *The public interest test*

20. 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.
21. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) are considered.

*Irrelevant factors*

22. 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*

23. 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 in schedule 2, s 2.1, CMTEDD found three relevant in this case. Disclosure could reasonably be expected to:

- promote open discussion of public affairs and enhance the government's accountability<sup>5</sup>
- contribute to positive and informed debate on important issues or matters of public interest,<sup>6</sup> and
- reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>7</sup>

24. The applicant contends that key information on land and financial matters related to significant projects should reasonably be a matter of public record, and that there is a public interest in disclosure of the information sought as disclosure will provide for greater accountability and transparency in the negotiations that are underway between the ACT and Commonwealth governments. These contentions relate to the public interest factors favouring disclosure identified by CMTEDD. I have not identified any other factors relevant to this case.

*Factors favouring nondisclosure*

25. CMTEDD submits that all of the matters covered in the information sought are subject to ongoing negotiation and deliberation with the Commonwealth Government, and both CMTEDD and Finance contend that disclosure in this case would prejudice those negotiations.

26. This is based on:

- there being ongoing negotiations and deliberations between the ACT and Commonwealth governments

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<sup>5</sup> Schedule 2, s 2.1(a)(i).

<sup>6</sup> Schedule 2, s 2.1(a)(ii).

<sup>7</sup> Schedule 2, s 2.1(a)(vii).

- the information being shared in confidence, and
- disclosure affecting the level of trust and cooperation between the officers conducting the negotiations.

27. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure. Of the factors favouring nondisclosure, CMTEDD found three relevant in this case. Disclosure could reasonably be expected to prejudice:

- intergovernmental relations<sup>8</sup>
- an agency's ability to obtain confidential information,<sup>9</sup> and
- a deliberative process of government.<sup>10</sup>

#### Ongoing intergovernmental negotiations and information communicated in confidence

28. I accept CMTEDD's submissions that all of the matters included in the information sought are subject to ongoing negotiations between the ACT and Commonwealth governments.

29. The FOI Act recognises that there can be a public interest harm in disclosing information received in confidence.<sup>11</sup> In this case I accept that such harm could occur if information provided by the Commonwealth Government during ongoing negotiations, and on the expectation that it will remain confidential, were disclosed by the ACT Government.

30. 'Prejudice to intergovernmental relations' as a factor favouring non-disclosure was considered by the Queensland Information Commissioner in *Queensland Newspapers and Department of Justice and Attorney-General; Carmody (Third Party)*.<sup>12</sup> In that case, the Commissioner considered that the purpose of that factor is to 'give weight to the public interest in protecting confidential communications between the State and another government where disclosure could reasonably be expected to prejudice the relations between those two governments'.<sup>13</sup> In an earlier case, the Commissioner had determined this consideration does not apply where the information is of a very general nature, or otherwise publicly available, such that it would not result in agencies being hesitant to provide information in the future.<sup>14</sup>

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<sup>8</sup> Schedule 2, s 2.2(a)(x).

<sup>9</sup> Schedule 2, s 2.2(a)(xii).

<sup>10</sup> Schedule 2, s 2.2(a)(xvi).

<sup>11</sup> Explanatory Statement, Freedom of Information Bill 2016 (ACT) 2.

<sup>12</sup> *Queensland Newspapers No 2*.

<sup>13</sup> *Queensland Newspapers No 2* at [220].

<sup>14</sup> *Queensland Newspapers No 1* at [38].

31. CMTEDD contends that disclosure of the information sought would affect the level of trust and co-operation between the ACT and Commonwealth officers. I draw a distinction between an agency being hesitant to provide information, and a loss of trust and co-operation between agency officers. I consider that professional public servants from the ACT and Commonwealth governments would not lose trust in each other, or cease co-operation, as all public servants undertake their work in the knowledge that government held information may be sought and disclosed through FOI processes.
32. However, the information sought in this Ombudsman review is not general in nature, nor is it publicly available. Rather, it is the subject of ongoing confidential negotiations between the ACT and Commonwealth governments. For these reasons, I am satisfied that there is a substantial public interest in protecting the ongoing intergovernmental negotiations, and that this is a factor favouring nondisclosure of the information communicated in confidence in this case.

#### Deliberative processes of government

33. The FOI Act recognises that disclosure made under the FOI Act can prejudice the deliberative processes of government.<sup>15</sup> I accept, in this case that such harm could occur to ongoing deliberations.
34. ‘Prejudice to a deliberative process’ was also considered by the Queensland Information Commissioner in *Queensland Newspapers Pty Ltd and Queensland Police Service*,<sup>16</sup> with the Commissioner considering the factor can arise where:

releasing information would cause disruptive public debate, reallocation of resources to deal with the disruption (resources which would otherwise be involved in finalising the deliberative process) and interference with the ability of an agency to objectively consider its options and reach a decision.<sup>17</sup>
35. In this Ombudsman review, I accept that disclosure of the information sought could cause disruptive public debate, and hinder the ability of decisions to be made in regard to the land matters.

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<sup>15</sup> Schedule 2, s 2.2 (a)(xvi).

<sup>16</sup> ‘*Queensland Newspapers No 1*’.

<sup>17</sup> ‘*Queensland Newspapers No 1*’ at [29].

*Balancing the factors*

36. Although there is a strong public interest in transparency and accountability in this case, there is also a substantial public interest in protecting the confidentiality of ongoing negotiations between the ACT and Commonwealth governments. The information sought was communicated with the expectation that the information would remain in confidence while the land matters are subject to negotiations.
37. I consider that disclosure of the information sought, where the deliberative processes of government are ongoing, could reasonably interrupt or create difficulties for the efficiency and effectiveness of those processes. I would not necessarily reach the same conclusion if the deliberative processes of government, and the negotiations between the ACT and Commonwealth governments, had concluded.
38. In this case, I am satisfied that, on balance, the public interest factors favouring nondisclosure outweigh the public interest factors favouring disclosure.

*Editing the documents*

39. The applicant contends that not all the information contained within the documents would be of such a prejudicial or confidential nature as to completely exempt their release. From my examination of the documents, it appears that some information, such as the covering emails for the meeting invitations, does not contain information which would be contrary to the public interest to disclose. However, I am satisfied that giving the applicant access to these meeting invitations without the attached meeting agenda does not contain any of the information sought and therefore is of no practical value to the applicant.

## Conclusion

40. Giving the applicant access to the information sought would, on balance, be contrary to the public interest. I confirm CMTEDD's decision to refuse access under s 35(1)(c) of the FOI Act.
41. For the purposes of s 50 of the FOI Act, in this case it is not reasonably practicable to give the applicant access to a copy of the record from which the contrary to the public interest information has been deleted.

Michael Manthorpe PSM  
ACT Ombudsman  
28 August 2018