

Decision and reasons for Decision of Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10013
Decision reference:	[2023] ACTOFOI 16
Applicant:	'CH'
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Third Party:	'CI'
Agency reference:	CMTEDDFOI 2023-018
Date:	18 August 2023
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – reveal the reason for a government decision and any background or contextual information that informed the decision – contribute to the administration of justice generally, including procedural fairness – prejudice the protection of an individual’s right to privacy or any other right under the <i>Human Rights Act 2004</i>

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the ACT *Freedom of Information Act 2016 (FOI Act)*.
2. For the reasons set out below I have decided to vary the decision of the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) dated 21 March 2023 under s 82(2)(b) of the FOI Act.

Background of Ombudsman review

3. On 30 January 2023, the FOI applicant lodged a request with the Environment, Planning and Sustainable Development Directorate (**EPSDD**) for access to:

“copies of reports made in response to complaints made against me by [name removed] of [address removed].”

4. On 30 January 2023, EPSDD identified that this request would be better handled by CMTEDD and transferred the request to the under s 57(2) of the FOI Act.¹
5. On 24 February 2023, CMTEDD consulted a third party (**the third party**), having identified that disclosure of portions of the information at issue could reasonably be expected to be of concern to them under s 38 of the FOI Act.²
6. On 21 March 2023, CMTEDD made a decision to grant full access to 3 documents and partial access to a further 8 documents.
7. On 27 March 2023, the FOI applicant sought Ombudsman review of the respondent's decision to refuse access in part to 8 documents, under s 73 of the FOI Act.
8. On 17 May 2023, the third party requested, under s 77(2) of the FOI Act, to participate in the Ombudsman review.
9. On 19 May 2023, the delegate decided, under s 77(3) of the FOI Act, to allow the third party to participate in this Ombudsman review.
10. On 20 July 2023, I provided my preliminary views to the parties in a draft consideration.
11. On 24 July 2023, 26 July 2023 and 27 July 2023, the applicant, CMTEDD and the third party provided their respective responses to the draft consideration.

Information at issue

12. The information at issue in this matter is records concerning complaints made about the FOI applicant by the third party.
13. The identity of the third party is known to the FOI applicant and the existence of the complaints is known by the FOI applicant.
14. In making my decision, I have had regard to:
 - the FOI applicant's review application
 - the respondent's decision
 - the records of third party consultation conducted by CMTEDD

¹ Section 57(2) of the FOI Act.

² Section 38(2) of the FOI Act requires that third parties be consulted prior to giving access to the information. Section 38(3) provides a threshold for what may be reasonably be expected to be of concern to a relevant third party.

- the FOI Act, in particular Schedule 2, s 2.2(a)(ii)
- an unedited copy of the information at issue
- the *Human Rights Act 2004* (**Human Rights Act**)
- the *Information Privacy Act 2014* (**Information Privacy Act**)
- the ACT Ombudsman FOI guidelines, and
- the additional submissions of the parties in response to my draft consideration.

Relevant law

15. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.³ This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.⁴
16. Contrary to the public interest information is defined in s 16 of the FOI Act 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
17. The public interest test in s 17 sets out the process for balancing public interest factors favouring disclosure and nondisclosure respectively. This balancing test must be used to determine whether disclosure would be contrary to the public interest.
18. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.⁵
19. Schedule 2 of the FOI Act sets out public interest factors to be balanced when conducting the s 17 test to determine the public interest.

The contentions of the parties

20. In its decision notice, the respondent said:

Having reviewed the documents, I consider the protection of an individual's right to privacy is a significant factor. Protection of personal information for an individual when engaging with government during a complaints process, in my opinion, outweighs the benefit which may be derived

³ Section 7 of the FOI Act.

⁴ Section 35(1)(c) of the FOI Act.

⁵ Section 35(1)(c) of the FOI Act.

from releasing the personal information of an individual involved in this matter. Additionally, I have decided that release of this information could prejudice their right to privacy under the *Human Rights Act 2004*.

Individuals are entitled to expect the personal information they have supplied as part of a government process will be dealt with in a manner that protects their privacy. Considering the type of information to be withheld from release, I am satisfied that the factors in favour of release can still be met while protecting the personal identities of the individuals involved.

21. In their submissions to CMTEDD during consultation, the third party stated:

I object to all information in the attached document to be provided...

22. In the application for Ombudsman review, the FOI applicant said:

There were 11 reports and only 3 were given to me with much of the information not making any sense and such reports containing predominantly incorrect information. The other 8 reports contained no reports and pages of again information that makes no sense to me at all.

Apparently the third party/parties did not want the reports made available to me...

23. The FOI applicant had no further submissions in response to my draft consideration.

24. The third party made additional submissions to my draft consideration, stating:

I believe only complaints made against the applicant should be provided to them (i.e from the complaints online database) and not any emails as these emails are directly related to correspondence between myself and EPA over the internal process of EPA itself for attending the onsite, their assessment process etc and is outside the scope of the complaints against the applicant.

25. The third party also objected to the release of the results from testing related to one of the complaints. These results, however, had already been provided to the applicant as part of the initial decision.

26. I find that these test results are within the scope of the application as it refers to reports made in response to complaints and test results taken in the handling of a complaint are directly relevant to the complaint and its conclusion.

27. The respondent made additional submissions to my draft consideration raising concerns that disclosure could result in a breach of the Information Privacy Act. These will be addressed in the section detailing factors favouring nondisclosure below.

Consideration

Public interest test

28. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:

- 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
- 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 2.1
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure
- decide whether, on balance, disclosure of the information would be contrary to the public interest
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

Factors favouring disclosure

29. In its original decision, CMTEDD relied on 2 factors favouring disclosure.

Reveal the reason for a government decision and any background or contextual information that informed the decision (Schedule 2, s 2.1(a)(viii))

30. A factor favouring disclosure is that disclosure could reasonably be expected to reveal the reason for a government decision and background or contextual information that informed the decision.⁶

31. I agree this factor is relevant in this matter as the information at issue concerns complaints that had been made and actions that were taken in response to these complaints.

32. I afford this factor a low weight as there is material concerning the processes followed in handling these complaints present within the information at issue, however large portions of this subset of material had either already been provided to the applicant with as part of initial complaint handling and as part of the original decision.

⁶ Schedule 2, s 2.1(a)(viii) of the FOI Act.

Contribute to the administration of justice generally, including procedural fairness (Schedule 2, s 2.1(a)(xiii))

33. A factor favouring disclosure is that disclosure could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.⁷
34. I agree this factor is relevant for this review in that disclosure of the information at issue could allow the applicant to be given the opportunity to respond to complaints made about them.
35. I afford this factor low weight as the redacted material from the original decision does not concern any deliberations on the substance of the complaints made, rather they pertain to internal records of contacts between the agency and the third party in the making of the complaints in the first instance.

Factors favouring nondisclosure

36. In the original decision CMTEDD identified one factor favouring nondisclosure.

Prejudice 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))

37. A factor favouring nondisclosure is that disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act.⁸
38. Section 12 of the Human Rights Act provides:
- Everyone has the right—
- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
 - (b) not to have his or her reputation unlawfully attacked.
39. I agree that this factor is relevant.
40. The framing of the original request was specific in that it related exclusively to records from complaints made about the applicant by the third party. Any document found to be within scope by CMTEDD is therefore going to be related to the third party.

⁷ Schedule 2, s 2.1(a)(xiii) of the FOI Act.

⁸ Schedule 2, s 2.2(a)(ii) of the FOI Act.

41. In their additional submissions on the draft consideration, the respondent noted that disclosure could represent a breach of the Information Privacy Act, referring to the Territory Privacy Principles (**TPP**) and more specifically TPP 5 and TPP 6 concerning notification of potential disclosure and the specific purposes for which information can be disclosed respectively.
42. These submissions stated:

There is concern that the release of a complainant’s name and details to the subject of their complaint is a breach of the *Information Privacy Act 2014*.

...

The individual has not consented to the disclosure of their personal information for a secondary purpose (TPP 6.1(a)), nor would they reasonably expect the secondary disclosure of their personal information, as Freedom of Information (FOI) laws are not related to the primary purpose of collection (i.e., lodging a complaint with the EPA), as required by TPP 6.2(a). Furthermore, the individual, when lodging their complaint, has not been informed under Territory Privacy Principle 5 that their personal information could be disclosed under FOI legislation.
43. I disagree the scope of redactions that I have arrived at in this decision would represent a breach, especially as compared to the original decision. As stated above at paragraph 40, the very specific nature of the original request being framed as ‘reports of made in response to complaints made against me by (third party’s name) of (third party’s address)’ means all information found to be within the scope of the request relates to the third party.
44. Further, the FOI applicant is already aware of the subject matter of the complaints and who had lodged them as a function of the handling of the complaints in the first instance. On this basis, I do not accept the additional submissions on this issue should lead to a different decision.
45. At the same time, I have taken into account that the information at issue contains 2 separate types of personal information—information disclosing the identity of the third party, and sensitive information about the third party.
46. As the identity of the third party is already known to the applicant, and finding documents within scope confirms that they relate to the third party, I consider it unlikely that disclosure of the third party’s name within the information disclosed could represent an arbitrary or unlawful interference with the privacy of the third party. Accordingly, I am inclined to afford low weight to this factor as it relates to information disclosing the identity of the third party.

47. By contrast, I consider that disclosure of parts of the information at issue comprising sensitive personal information would be a significant intrusion into the privacy of the third party, and I am inclined to afford significant weight to this factor.

Balancing the factors

48. In making this decision, I have considered 2 factors favouring disclosure and one factor favouring non-disclosure.

49. Balancing public interest factors is not merely a tallying exercise, where the public interest is established solely by the number of applicable factors on either side. I considered the relative importance and weight each factor should be given. The weight given to the factors depends on the effect that disclosing the information would have on the public interest.

50. The FOI Act also has a pro-disclosure bias. The public interest test and weighing of factors is approached as scales 'laden in favour of disclosure'.⁹

51. In this matter, I have afforded the 2 factors favouring disclosure low weight, while affording the factor favouring nondisclosure low weight in respect of some of the information at issue, and significant weight in respect of other parts of the information at issue.

Conclusion

52. For these reasons, my decision is to **vary** CMTEDD's decision under s 82(2)(b) of the FOI Act.

53. Information about the third party's name and address, which is already known to the applicant, is suitable for release, but other information concerning the third party which is not related specifically to any reports about complaints is not suitable for release.

54. The documents in this review do not need to be included on the CMTEDD disclosure log.¹⁰

David Fintan
Senior Assistant Ombudsman
18 August 2023

⁹ [Explanatory Statement, Freedom of Information Bill 2016](#).

¹⁰ Section 28(6)(a) of the FOI Act provides that a disclosure log must not include an access application for personal information.