

Decision and reasons for decision of Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10011
Decision reference:	[2023] ACTOFOI 15
Applicant:	'CG'
Respondent:	Major Projects Canberra
Agency reference:	MPCFOI 2023/01
Date:	10 August 2023
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – promote open discussion of public affairs and enhance the government’s accountability – contribute to positive and informed debate on important issues or matters of public interest – ensure effective oversight of expenditure of public funds – prejudice the protection of an individual’s right to privacy or any other right under the <i>Human Rights Act</i> – prejudice the trade secrets, business affairs or research of an agency or person

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**).
2. For the reasons set out below, I have decided to **vary** the decision of Major Projects Canberra (**MPC**) dated 23 March 2023 under s 82(2)(b) of the FOI Act.

Background of Ombudsman review

3. On 24 January 2023, the applicant applied for access to:

Any documents which show the costs and benefits for the Light Rail Stage 2A and Stage 2B to Woden, including the emissions estimates for completing Stages 2A & 2B, and the costs borne by drivers and the community because of traffic disruptions.

4. On 23 March 2023, the respondent provided partial access to one document and a link to a second document that was identified as being within scope which already been made publicly available.
5. On 23 March 2023, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
6. On 7 July 2023, I provided my preliminary views to the parties in a draft consideration.
7. On 12 July and 14 July 2023, the applicant and MPC respectively provided their responses to my draft consideration.

Information at issue

8. The information at issue in this matter is the 'City to Commonwealth Park Light Rail Economic Appraisal Report' prepared by Ernst & Young (EY) in a consultant role, specifically 'Section 5 Methodology' to which access was refused in the original decision.
9. This review concerns this one document only. The decision to provide access in full to a publicly available document by providing a link for the convenience of the applicant is not under review.
10. In making my decision, I have had regard to:
 - the applicant's access application and review application
 - the respondent's decision
 - the FOI Act, in particular Schedule 2, s 2.2(a)(xi)
 - the *Human Rights Act 2004* (ACT) (**Human Rights Act**)
 - an unedited copy of the information at issue
 - the ACT Ombudsman FOI guidelines
 - relevant case law, including:
 - *Re Mangan and The Treasury* [2005] AATA 898
 - *CH32GI and Department of Justice and Attorney-General* [2012] QICmr 60.

Relevant law

11. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.¹ This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.²
12. 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.
13. 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.
14. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.³
15. 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

16. In its decision notice, the respondent said:

I note the document is marked draft, as it was considered a working paper as part of the preparation of the business case which was then presented to Cabinet.

As this document was prepared by MPC's consultant EY, section 5 Methodology contains EY methodologies developed over time as a result of significant investment using specialists across a range of disciplines, as well as drawing on knowledge and expertise acquired from previous economic appraisal engagements. I give the protection of our consultant's trade secrets, business affairs and research significant weight and consequently have redacted Section 5 Methodology in full.

17. In the application for Ombudsman review, the applicant did not make submissions but requested the decision not to release 'Section 5 Methodology' be reviewed.

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

³ Section 35(1)(c) of the FOI Act.

18. In further submissions to the Office, the applicant queried whether particular headline figures on costs and benefits of the project could be disclosed without disclosing the reasoning (methodology) to reach those costs and benefits such that concerns about prejudice to trade secrets, business affairs or research for the purposes of Schedule 2, s 2.2(a)(xi) of the FOI Act would not be engaged.

Consideration

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

19. Neither party in this Ombudsman review suggested the information at issue contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the information at issue to be contrary to the public interest information, it must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

Public interest test

20. 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

21. In its original decision, MPC identified three factors favouring disclosure of the information at issue.

***Promote open discussion of public affairs and enhance the government's accountability
(Schedule 2, s 2.1(a)(i))***

22. A factor favouring disclosure is that disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.⁴

23. I agree this factor is relevant for this review. Disclosure of the information in the report could reasonably be expected to enhance government accountability concerning decisions taken in the Light Rail project and I consider this has been reflected in the significant sections of the report that were released by MPC in the original decision.

24. My decision is that the methodology of EY in compiling this report is not a matter connected with government accountability or public affairs in such a way that it could reasonably be expected to promote, in a significant way, open discussion.

25. Rather, in this context, I consider the public interest lies predominantly in the conclusions presented to government for consideration in the report and the actions taken by government in response to the report.

26. I therefore afford this factor low weight in this review.

***Contribute to positive and informed debate on important issues or matters of public interest
(Schedule 2, s 2.1(a)(ii))***

27. A factor favouring disclosure is that disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of public interest.⁵

28. I agree this factor is relevant in this matter. Given the scale and importance of the Light Rail project as a whole to the Canberra community, it could reasonably be expected that disclosure of the information at issue would carry some capacity to contribute to or inform debate on the Light Rail project.

⁴ Schedule 2, s 2.1(a)(i) of the FOI Act.

⁵ Schedule 2, s 2.1(a)(ii) of the FOI Act.

29. However, for the same reasons as outlined above in relation to Schedule 2, s 2.1(a)(i) of the FOI Act, the methodology used by EY is, on balance, not a matter of significant public interest compared to the remainder of the information at issue, which was disclosed pursuant to the original decision.
30. I therefore afford this factor low weight in this review.

Ensure effective oversight of expenditure of public funds (Schedule 2, s 2.1(a)(iv))

31. A factor favouring disclosure is that disclosure could reasonably be expected to ensure effective oversight of expenditure of public funds.⁶
32. I agree this factor is relevant in this review. The Light Rail project is a large scale project involving significant cost and it is reasonable to expect that disclosure of material in this report could assist in oversight of expenditure of public monies.
33. I consider that MPC correctly weighed the public interest with regard to this factor noting the volume disclosed in the original decision and the limited potential oversight opportunity represented by possible disclosure of ‘Section 5 Methodology’ of the report.
34. While there may be some public interest in disclosure of ‘Section 5 Methodology’ to ascertain whether the methodology was sound in guiding conclusions put to government for consideration in spending public funds, I consider this is quite remote and I afford it low weight.

Factors favouring nondisclosure

35. In the original decision MPC identified two factors favouring non-disclosure.

Prejudice the protection of an individual’s right to privacy or any other right under the Human Rights Act (Schedule 2, s 2.2(a)(ii))

36. 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.⁷

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

⁷ Schedule 2, s 2.2(a)(ii) of the FOI Act.

37. 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.

38. When considering the right to privacy of an individual, there is generally a strong public interest in protecting this right. This is tempered by the extent to which the information is already well known or publicly available.⁸

39. One redaction for this factor appeared in the material released to the applicant pursuant to the original decision – namely, redaction of the name of an associate partner at EY.

40. I have taken into account that this same name appears unredacted in the final paragraph of the covering letter to the report via that person’s work email address. Given the wording of this letter, it is clearly open to assume the redacted name matches that of the email address.

41. As this detail has already been provided to the applicant, I consider disclosure of the previously redacted name unlikely to prejudice the individual’s right to privacy, and therefore afford this factor limited weight.

Prejudice the trade secrets, business affairs or research of an agency or person

(Schedule 2, s 2.2(a)(xi))

42. A factor favouring nondisclosure is that disclosure could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person.⁹

43. The information at issue contains specific information about the methodology used by EY in preparing the Economic Appraisal Report which includes formulas, equations and processes.

44. The Queensland Information Commissioner has defined trade secrets as:

a formula, pattern, device or compilation of information which gives an advantage over competitors who do not know or use it.¹⁰

45. Having reviewed the information at issue I am satisfied that most of the information in ‘Section 5 Methodology’ is information that meets the above definition of a ‘trade secret’, with

⁸ ACT FOI Guidelines, s 9.3

⁹ Schedule 2, s 2.2(a)(xi) of the FOI Act.

¹⁰ CH32GI and Department of Justice and Attorney-General [2012] QICmr 60 at 67

the exception of some information being the information about total project costs in 'Section 5.4 Project Costs' per [48] below.

46. I have also taken into account potential prejudice to the business affairs of EY, defined as:

'the totality of the money-making affairs' of an agency or person as distinct from 'private or internal affairs'¹¹

47. I am satisfied that disclosure of EY's methodology in compiling the report could reasonably be expected to prejudice EY within the meaning of Schedule 2, s 2.2(a)(xi) of the FOI Act, by giving their competitors an advantage in granting them access to these methods without being required to develop these processes themselves. I therefore afford this factor significant weight in my deliberations.

48. In response to the applicant's further submissions at [18] above, and having further reviewed the information at issue, I am satisfied that the information in 'Section 5.4 Project Costs' is information that:

- discloses total project costs already disclosed in other parts of the EY report released pursuant to MPC's original decision, and
- does not disclose the methodology by which those total project costs were calculated.

49. Accordingly, I have adjusted the proposed redactions to the information at issue from my draft consideration to disclose the information in 'Section 5.4 Project Costs' as it simply repeats figures already disclosed without disclosing EY's methodology.

Balancing the factors

50. In making my decision, I considered 3 factors favouring disclosure and 2 factors favouring nondisclosure.

51. 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.

¹¹ *Re Mangan and The Treasury* [2005] AATA 898

52. 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'.¹²
53. In this matter I have afforded the three factors favouring disclosure low weight while affording one factor favouring nondisclosure significant weight and the other no weight.

Conclusion

54. For these reasons my decision is to **vary** MPC's decision under s 82(2)(b) of the FOI Act.
55. The material redacted under Schedule 2, s 2.2(a)(ii) should be disclosed alongside Chapter 5.4 of Section 5 which had been redacted under Schedule 2, s 2.2(a)(xi).
56. The remainder of the material originally refused in reliance on Schedule 2, s2.2(a)(xi) should not be disclosed.

David Fintan
Senior Assistant Ombudsman
10 August 2023

¹² [Explanatory Statement, Freedom of Information Bill 2016](#).