ACT Ombudsman

OMBUDSMAN AN OFFICER OF THE ACT LEGISLATIVE ASSEMBLY

MBA Group Training Ltd and Chief Minister, Treasury and Economic Development Directorate [2020] ACTOFOI 19 (10 July 2020)

Decision and reasons for decision of Acting Senior Assistant Ombudsman, Cathy Milfull

Application Number	AFOI-RR/20/10005
Decision Reference	[2020] ACTOFOI 19
Applicant	MBA Group Training Ltd
Respondent	Chief Minister, Treasury and Economic Development Directorate
Decision Date	10 July 2020
Catchwords	*Freedom of Information Act 2016* (ACT) – deciding access – third party consultation – whether agency took reasonable steps – whether disclosure of information is contrary to the public interest – business affairs – individual privacy

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. Under s 82(2)(b) of the FOI Act, I **vary** the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD), dated 8 January 2020.

Background of Ombudsman review

3. On 11 November 2019, CMTEDD received an access application for information collected by WorkSafe ACT during its investigation of a workplace accident, including 'all records of interviews or statements.'

4. Before making a decision in respect of the application, CMTEDD contacted a number of third parties to obtain their views on the possible disclosure of information, as it was obliged to under s 38 of the FOI Act.

5. One of the third parties contacted by CMTEDD was the applicant in this review, MBA Group Training Ltd (MBA). MBA was contacted about one document that fell within the scope of the access application. This document is the transcript of a WorkSafe ACT investigator interviewing a former MBA employee (who was an employee of MBA at the time of the accident).

6. On 8 January 2020, CMTEDD advised MBA that it had decided to provide partial access to the transcript, subject to several minor deletions. Deletions included the interviewee's date of birth, place of residence, living arrangements and health status. These sections of the transcript were considered to be contrary to the public interest information because their disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy under the *Human Rights Act 2004* (HR Act).[1] The public interest factors in favour of disclosure, which I discuss in this decision, did not outweigh the public interest in protecting the individual's privacy in respect of those particular sections of the transcript.

7. On 2 February 2020, MBA sought an Ombudsman review of CMTEDD's decision, on the basis that the entire transcript was contrary to the public interest information.

Preliminary issue

8. As a preliminary issue, I have considered whether the third party consultation undertaken by CMTEDD in relation to the information at issue was consistent with s 38 of the FOI Act.

9. Section 38(2) of the FOI Act required CMTEDD to consult with relevant third parties before deciding to give access to the information. A relevant third party includes:
   - an individual – where the information is *personal information* of the individual, and disclosure would, or could reasonably, be expected to affect their rights under the HR Act[2]
   - an entity - where the information concerns the entity's trade secrets, business affairs or research.[3]

10. The FOI Act defines personal information as:

[1] Schedule 2, s 2.2.(a)(ii) of the FOI Act.
[2] Section 38(3)(a) of the FOI Act.
[3] Section 38(3)(c) of the FOI Act.

> information or an opinion… about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion…[4]

Did CMTEDD take reasonable steps to consult with the interviewee?

11. On 3 December 2019, MBA received CMTEDD's letter inviting consultation. The letter was addressed to the interviewee. At the time of the interview, the interviewee was an employee of MBA. The letter indicated that consultation was invited in respect of s 38(3)(c) - that is, because the information at issue concerns MBA trade secrets, business affairs or research.

12. On 24 December 2019, MBA proceeded to make submissions in respect of:
    - their trade secrets and business affairs, and
    - on behalf of their former employee, potential prejudice of their right to privacy under the HR Act.

13. MBA reported that their former employee is 'currently overseas' and 'not contactable by telephone or mail'. As a result, I understand that CMTEDD took no further steps to try to contact the person.

14. I am satisfied that MBA, as an entity, was consulted appropriately. I consider that CMTEDD should, however, have consulted the former employee about personal information that was not deleted, in the context of s 38(3)(a).

15. In the particular circumstances of this review, I do not think there are any reasonable steps that CMTEDD failed to take in their attempts to contact the interviewee. An open source search, for example, does not provide any contact details for the individual. In forming the view that CMTEDD discharged the obligation imposed by s 38, I have had regard to MBA's submissions and s 9 of the FOI Act, which requires a pro-disclosure bias in the administration of the Act.[5]

Were all relevant third parties consulted?

16. Section 38 of the FOI Act requires decision-makers to identify relevant third parties during the scoping stage of deciding the access application. This will not necessarily include all individuals, or entities, who are mentioned or discussed in relevant documents, but rather those that *disclosure may reasonably be expected to be of concern to*.

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[4] Dictionary of the FOI Act.
[5] Section 9 of the FOI Act.

17. The phrase 'reasonably be expected' is an objective test, considered in *Attorney-General's Department v Cockroft ('Cockroft')* in relation to s 43(1)(c)(ii) of the *Freedom of Information Act 1982* (Cth). In that case, Bowen CJ and Beaumont J stated that:

    > In our opinion, in the present context, the words 'could reasonably be expected to prejudice… were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous… It is undesirable to attempt any paraphrase of these words.[6]

18. In addition, s 38(3) also limits the situations in which disclosure may reasonably be expected to be of concern, consistent with the objectives of the FOI Act, including to facilitate, promptly and at the lowest reasonable cost, disclosure of the maximum amount of government information. Whether these situations apply will depend on the nature of the relevant information and the context in which it has been presented.

19. When initially reviewing the information at issue, it was unclear to our Office whether CMTEDD had actively considered whether numerous third parties referred to in the transcript should have been consulted or not. As a result, on 25 March 2020, the ACT Ombudsman sought additional information from CMTEDD about its consultation process.

20. On 1 April 2020, CMTEDD indicated that some, but not all, third parties mentioned in the transcript had been consulted. However, it was unclear, from the records, if this consultation had in fact occurred.

21. On 22 June 2020, a draft consideration was provided to each party, giving them an opportunity to make further submissions.

22. On 29 June 2020, CMTEDD provided further submissions, clarifying that the individuals referred to in the transcript had **not** been consulted, because it had been determined that the information was not reasonably expected to be of concern to them.

23. Following this clarification, I agree with CMTEDD that while some third parties were mentioned in the information at issue, disclosure could not reasonably be expected to be of concern to them and, as a result, consultation was not required.

[6] *Cockroft and Attorney-General's Department and Australian Iron Steel Pty Ltd* (1986) 64 ALR 97 at 106.

24. I consider it is best practice for agencies to record its decisions to consult, or not consult, with a third party when dealing with access applications to ensure accurate record keeping and to avoid any confusion in future matters about whether consultation took place.

Scope of Ombudsman review

25. The information at issue in this Ombudsman review is the interview transcript, minus the deletions that CMTEDD decided to make- including the date of birth, place of residence, living arrangements and health status of the individual.

26. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information at issue would be contrary to the public interest.

27. In making my decision, I have had regard to:
    - the applicant's access application and review application to the Ombudsman
    - the respondent's decision
    - the respondent's submissions to the draft consideration
    - the FOI Act, in particular ss 7, 16, 17, 35, 50, 72 and Schedule 2
    - the respondent's FOI processing file relating to the access application
    - an unedited copy of the information at issue
    - relevant case law, including: *Cockroft and Attorney-General's Department and Australian Iron Steel Pty Ltd*;[7] *Peter Gerard Cannon and Australian Quality Egg Farms Limited*;[8] *Mangan and The Treasury*[9] and *Willsford and Brisbane City Council*.[10]

Relevant law

28. 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.

29. 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

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[7] (1986) 64 ALR 97.
[8] (1994) 1 QAR 491.
[9] [2005] AATA 898.
[10] (1996) 3 QAR 368.

(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 of the FOI Act 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.

31. Section 35(1)(a) of the FOI Act provides that an access application may be decided by deciding to give access to government information.

32. Section 50 of the FOI Act applies if an access application is made for government information in a record containing contrary to the public interest information and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted.

33. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

34. 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

35. CMTEDD's decision notice said:

> disclosure of some of the information captured in this consultation is not contrary to the public interest. Therefore, I must provide access to the information requested.

36. MBA's application for Ombudsman review said:

> The decision failed to take into account that the release of the statement would provide the recipient with access to trade secrets and confidential information of MBA Group Training Limited… It should also be noted that it is our understanding that [the former employee who gave the interview transcribed in the information at issue] has not been contacted about the release of this information. Statements are usually made to authorities without fear that it would be subject to an FOI or subpoena application and this presumption should remain.

37. I have addressed the consultation issues above, and discuss the other submission made in detail below.

Considerations

38. I have carefully considered an unedited copy of the information at issue together with the information provided by the applicant and respondent.

39. For the reasons set out below, I am satisfied that access to the information at issue should be granted, subject to additional deletions which I will detail below.

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

40. Neither party to this Ombudsman review has suggested the information sought 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 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 of the FOI Act.

Public interest test

41. To determine whether disclosure of information is, on balance, contrary to the public interest, 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.

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

Irrelevant factors

43. In making submissions to CMTEDD, the applicant contended that the FOI application is 'not a genuine application' and is merely 'a guise to obtain sensitive information'.

44. Section 17(2) of the FOI Act lists irrelevant factors that are not to be taken into account when deciding whether disclosure of information would, on balance, be contrary to the public interest.

45. Relevantly, s 17(2)(f) does not allow me to consider the applicant's reasons for seeking the information. Accordingly, I have not considered any submission relating to the FOI applicant's motives for making the original access application.

46. I have noted the other factors listed in s 17(2) and do not consider that any arise in this review.

Factors favouring disclosure

47. Of the factors favouring disclosure that are listed in Schedule 2, s 2.1, CMTEDDs decision letter identifies two relevant factors favouring disclosure:

- the information is the personal information of the person making the request (Schedule 2, s 2.2(b)(i))
- disclosure of the information could reasonably be expected to contribute to the administration of justice generally, including procedural fairness (Schedule 2, s 2.1(a)(xiii)).

48. I agree with CMTEDD that these factors are relevant and afford them some weight. The transcript does include personal information about the FOI applicant and, while I understand the criminal proceedings regarding the accident described in the transcript have concluded, it is possible there may be future legal action about this matter.

49. I also consider the factor for disclosure at Schedule 2, s 2.2(a)(xiv) – the administration of justice for a person, to also be relevant here and should be afforded considerable weight.

50. The interview transcript could reasonably be expected to assist the injured person in obtaining legal advice, and enhance the ability of a legal practitioner to advise them on whether the person has been the subject of a civil wrong and what remedies they may be able to pursue.

51. I consider the following comments of the Queensland Information Commissioner relevant here:

> it should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if an applicant can demonstrate that- loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be available under the law the applicant has a reasonable basis for seeking to pursue the remedy and disclosure of the information… would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.[11]

52. For these reasons, I am satisfied that disclosure of the information sought could reasonably be expected to promote the objects of the FOI Act and the factors above.

Factors favouring nondisclosure

53. Of the factors favouring nondisclosure that are listed in Schedule 2, s 2.2, MBA contends that disclosure of the information at issue could reasonably be expected to prejudice:

[11] *Willsford and Brisbane City Council* (1996) 3 QAR 368 at [17].

- the protection of an individual's right to privacy under the HR Act (Schedule 2, s 2.2(a)(ii))
- MBAs trade secrets or business affairs (Schedule 2, s 2.2(a)(xi))

54. I have discussed each of these factors below in detail.

Individual's right to privacy

55. A factor favouring nondisclosure under Schedule 2, s 2.2(a)(ii) of the FOI Act is that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the HR Act.

56. As noted above, the respondent has decided to delete some information from the interview transcript relying on Schedule 2, s 2.2(a)(ii).

57. The applicant, however, contends that the entirety of the document is contrary to the public interest information because it could reasonably be expected to prejudice an individual's right to privacy under the HR Act, and declined to identify any relevant sections that, in its view, access should or should not be given to. On 6 March 2020, MBA advised:

> The transcript contains information generally which should not be released to a third party. Whilst we would appreciate it if… name was redacted throughout the transcript, it is clearly an interview with him and our position is that the entirety of the transcript should not be released.

58. MBA has raised in its submissions that the former employee who gave the interview transcribed in the information at issue was not contacted about the release of the information. They have also indicated that the 'presumption should remain' that a statement made to authorities should remain private.

59. I have discussed the consultation process in this matter at [8]-[23] and there is no such presumption within the FOI Act. I have, nevertheless, considered below whether disclosure could reasonably be expected to prejudice the former employee's right to privacy under the FOI Act, based on the information before me.

60. The respondent has decided to redact some personal information from the interview transcript, including interviewee's date of birth, place of birth and information about medications the person may have taken, but I acknowledge the interview transcript still contains personal information, such as the name of the interviewee.

61. The HR Act does not, however, provide a general right to privacy. It provides the right not to have one's privacy interfered with unlawfully or arbitrarily.[12]

62. The FOI Act requires not that I consider whether information is personal, but whether the disclosure of information, whether personal information or not, could reasonably be expected to prejudice the right to privacy that the former MBA employee enjoys under s 12 of the HR Act. Consequently, the issue before me is whether the personal information remaining could reasonably be expected to interfere with the former employee's privacy unlawfully or arbitrarily.

63. I have identified some additional sections of the document which I consider should be deleted on privacy grounds. This includes:

   - the final ten words on the twelfth line on page three of the transcript, which CMTEDD has agreed, as part of the review process should be redacted because it is sensitive personal information.
   - line two of page six and the seventh word of line five on page six – this is because I consider it may tend to reveal the nature of the other sensitive personal information that is being redacted.

64. More broadly, I am not, based on the information before me, satisfied that disclosure of the remaining sections of the transcript would interfere with the former employee's privacy unlawfully or arbitrarily. In making this decision, I have taken into account that while specific information about the former employee may not be publically available, as CMTEDD has highlighted, the incident that is discussed in the transcript resulted in a significant amount of media attention.

65. MBA's own submissions indicated that even if the name of the employee were to be redacted, he is known to many in the community to be a former MBA employee that was involved in the placement of school-based apprentices in the ACT. This further suggests that information about this incident, excluding more sensitive information about the former employee (e.g. health information) which has been redacted, is, at least to some extent, in the public arena and no longer private.

66. Given this context, and acknowledging that the information was provided to WorkSafe ACT for the purposes of an investigation, I am not satisfied, that disclosure of the information at issue

[12] Section 12 of the HR Act.

could or would be reasonably expected to interfere with a person's right to privacy under the HR Act.

Trade secrets or business affairs of an agency or person

67. Schedule 2, s 2.2(a)(xi) provides that the disclosure of information could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person, it is a factor favouring nondisclosure.

68. MBA has not specified particular parts of the transcript to which this factor against non-disclosure applies – as noted above, they suggest the whole transcript should not be disclosed. Nevertheless, I have reviewed the information at issue to form my own view about whether this factor is relevant.

69. MBA does not suggest that its research could be impacted by the disclosure, but submits that:

> release of the statement would provide the recipient with access to trade secrets and confidential information of MBA Group Training Limited.'

70. The term 'trade secrets', refers to contexts in which:

> a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information.[13]

71. I have reviewed the information at issue and do not consider that any of it fits this definition. As a result, in the absence of more specific submissions, I do not consider that any of the information at issue constitutes a trade secret and have proceeded to consider whether disclosure could prejudice MBAs trade secrets.

72. The term 'business affairs' refers to:

> the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs.[14]

73. I have reviewed the information at issue and do not consider that any of it is related to the money-making affairs of MBA.

74. Some of the information at issue refers to the amount of training the person injured in the workplace accident had received from MBA. There is no detailed discussion of training

[13] *Peter Gerard Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at [43], citing *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37.
[14] *Mangan and The Treasury* [2005] AATA 898 at [40], citing *Cockroft and Attorney-General's Department and Australian Iron Steel Pty Ltd* (partly joined) (1986) 64 ALR 97.

methods or an underlying philosophy that MBA applies to training apprentices that I consider could prejudice the competitive advantage of MBA.

75. The information at issue also contains information about presentations MBA makes to people outside the business, such as prospective apprentices. This information is, however, focused on the fact that such presentations occur, as opposed to any specific methodology or philosophy behind them. Given this and the fact the target audience of MBAs presentations is the public at large, I do not consider that disclosure of any of the information at issue could reasonably be expected to prejudice MBAs business affairs.

76. As a result, in the absence of more specific submissions about precisely which sections MBA object to, I do not consider the disclosure of the information at issue could reasonably be expected to prejudice the business affairs of MBA.

77. I do not consider that MBA has discharged the onus it bears under s 72 to show this factor favouring non-disclosure is relevant to this Ombudsman review. Accordingly, I do not consider this factor should be afforded any weight.

Balancing the factors

78. As the decision-maker, I need to decide whether or not the information at issue is contrary to the public interest information. Unless this is the case, the information must be disclosed.

79. MBA has said that is does not consider the information at issue to have probative value or that there is a public interest in the transcript being released. This contention fails to grasp the pro-disclosure bias of the FOI Act.

80. To determine whether the information is contrary to the public interest to disclosure, I must consider the public interest balancing test as set out in s 17 of the FOI Act.

81. I have identified three factors favouring disclosure that apply to the information at issue, and one factor favouring nondisclosure. I note that balancing public interest factors is not simply an exercise in quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity constituting the public interest. The decision-maker must consider the relative importance of, and weight given to, each factor identified. The weight given to a factor depends on the effect that disclosing the information would have on the public interest.

82. As noted above, the FOI Act also has a pro-disclosure bias. Accordingly, the public interest consideration is not approached on the basis of empty scales in equilibrium. The scales are 'laden in favour of disclosure'.[15]

83. I am satisfied that, on balance, the public interest factors favouring disclosure outweigh the public interest factors favouring nondisclosure, except where I have indicated that I consider additional deletions should be made under s 50 of the FOI Act as discussed above at [63].

Conclusion

84. Under s 82(2)(b), I **vary** the respondent's decision to give access to the information at issue under s 35(1)(a) of the FOI Act.

85. I consider that access should be given to the information at issue, with the exception of information listed below, which should be deleted. Section 50 permits such deletions.

- the final ten words on the twelfth line on page three of the transcript, which CMTEDD has agreed, as part of the review process should be redacted because it is sensitive personal information.
- line two of page six and the seventh word of line five on page six – this is because I consider it may tend to reveal the nature of the other sensitive personal information that is being redacted.

Cathy Milfull
Acting Senior Assistant Ombudsman

10 July 2020

[15] Explanatory Statement, Freedom of Information Bill 2016.