

## ***AY and Office of the ACT Ombudsman [2020] ACTOFOI 18 (28 June 2020)***

### **Decision and reasons for decision of Senior Assistant Ombudsman, Louise Macleod**

<b>Application Number</b>	AFOI-RR/20/10015
<b>Decision Reference</b>	[2020] ACTOFOI 18
<b>Applicant</b>	AY
<b>Respondent</b>	Office of the ACT Ombudsman
<b>Decision Date</b>	28 June 2020
<b>Catchwords</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – legal professional privilege

### **Decision**

1. For the purposes of s 82 of the ACT *Freedom of Information Act 2016 (FOI Act)*, I am a delegate of the Office of the ACT Ombudsman (**ACT Ombudsman**).
2. Under s 82(2)(a) of the FOI Act, I **confirm** the decision of the ACT Ombudsman, dated 23 March 2020.

### **Background of Ombudsman review**

3. On 2 March 2020, the applicant applied to the ACT Ombudsman for access to:  

‘...all matters raised in my correspondence with your office’.
4. On 10 March 2020, the ACT Ombudsman identified nine documents within the scope of the access application.
5. The ACT Ombudsman decided to give the applicant full access to four documents and partial access to five documents.

6. In making its decision, the ACT Ombudsman found some of the information requested was contrary to the public interest to disclose under Schedule 1 of the FOI Act, because it was information subject to legal professional privilege.
7. On 8 April 2020, the applicant applied for a review of the ACT Ombudsman's decision under s 73 of the FOI Act.
8. On 10 June 2020, I provided my preliminary views about the respondent's decision to the parties in my draft consideration.
9. On 14 June 2020, the applicant provided further submissions in relation to my draft consideration. I have discussed these further below.
10. The respondent did not provided submissions in relation to my draft consideration.

## Scope of Ombudsman review

### *Preliminary issues*

#### Missing information

11. As a preliminary issue, I have considered the applicant's contention that not all the relevant information within the scope of their access application was identified by the ACT Ombudsman.
12. The applicant states:

I note that neither your email to ActewAGL regarding my complaint, or the response from ActewAGL have been included in the response to my request. The scope of my request included "all documents describing the grounds and reasons you are relying on to say to me that ActewAGL is not subject to the ACT FOI legislation" and therefore any emails between the Ombudsman's Office and ActewAGL regarding my complaint are relevant to my FOI request.
13. I have considered the unredacted information and have sought further clarification from the ACT Ombudsman about the searches conducted in relation to this matter.
14. It appears the documents specified by the applicant as 'missing', that is, emails between the ACT Ombudsman and ACTEWAGL, do not exist in relation to this matter. That is, the emails the applicant is seeking were not created and therefore not sent, or received, by the ACT Ombudsman. We have been advised that the relevant team did not contact ACTEWAGL in relation to this matter, as an assessment was able to be made on the basis of publically available information.
15. Further, I agree with the applicant that some of the emails between the FOI applicant and the ACT Ombudsman's office sent between January and February 2020, regarding an earlier approach to the ACT Ombudsman were not included within the scope of the access application.

16. As the applicant already has copies of these documents (being emails sent to them, and sent by them), I do not consider this information needs to be considered further as part of this review. However, I consider it best practice for the decision-maker on the access application to include *all* documents within the scope of the access application or confirm with the FOI applicant the documents that had already been provided would not be included. Alternatively, it would have been open to the decision-maker to refuse to deal with this part of the application under ss 43(1)(d) and 45(e) of the FOI Act, on the grounds that the information had already been provided to the FOI applicant or is otherwise available to them.

17. In response to the draft consideration, the applicant states:

The advice does not appear to concur with the information on page 3 of Document 2 which was released. It says: *2020-700118 – Incoming Email – FOI reply from ActewAGL*.

18. On review of the ACT Ombudsman's records, this information is an extract from a letter from ACTEWAGL to the applicant, provided by the applicant to the ACT Ombudsman on 6 January 2020. This is not correspondence between the ACT Ombudsman and ACTEWAGL.

Privacy concerns

19. I have also considered the applicant's request that further redactions be made to the information published on the ACT Ombudsman's disclosure log.

20. Section 28 of the FOI Act requires an agency to publish on its disclosure log information including: a copy of the access application, the decision notice and the information provided to the applicant. The only exception is whether the information is personal information, or information about an applicant's business, commercial or professional affairs and publication would be unreasonable in the circumstances.<sup>1</sup>

21. The applicant states:

I note that on page 2 of Document 6, the name of the organisation has not been redacted prior to online publication. I also note that the acronym ARPI appears twice on page 5 of Document 6. I believe the online publication of ARPI's name is information which could reasonably identify me as the FOI applicant and it should therefore be redacted.

Notice has not been sufficiently redacted regarding public reference to the FOI applicant to avoid a personal breach of privacy hence personal risk.

An elementary, cursory public search reveals that only one name is commonly in the public domain regarding ARPI.

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<sup>1</sup> See s 28(6) of the FOI Act.

22. Following further searches about ARPI, I am not satisfied this information is the personal information of the applicant or reasonably identifies the applicant with certainty to members of the public. I also consider this information does not comprise of business information that would be unreasonable to release.
23. ARPI is a separate legal entity to the applicant, and while the identity of the applicant may appear in connection with the organisation, it is not the only name connected with the organisation. For this reason, I am not satisfied the applicant's identity is clearly ascertainable by members of the public.

### **Information at issue**

24. Of the nine documents identified by the ACT Ombudsman within the scope of this review, four documents were released in full. The remaining five documents were released in part.
25. The information redacted from these five documents is the information at issue in this review. This information comprises of legal advice provided to the ACT Ombudsman by a Senior Legal Officer in 2013, 2018 and 2020.
26. The issue to be decided in this 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 original access application, review application and submissions in response to my draft consideration
  - the ACT Ombudsman's decision
  - the FOI Act, in particular ss 7, 16, 50, 72, and Schedule 1
  - an unedited copy of the information at issue
  - ACT Ombudsman Freedom of Information Guidelines - Considering the Public Interest
  - relevant case law, including; 'AO' and Chief Minister, Treasury and Economic Development Directorate<sup>2</sup>, *Waterford v Commonwealth of Australia*<sup>3</sup>, *Mann v Carnell*.<sup>4</sup>

### **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.

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<sup>2</sup> [2020] ACTOFOI 1 (21 January 2020).

<sup>3</sup> (1987) 163 CLR 54.

<sup>4</sup> (1999) 201 CLR 1 [29].

30. 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.
31. 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.
32. 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.
33. Schedule 1 of the FOI Act sets out the categories of information that are taken to be contrary to the public interest to disclose, unless the information identifies corruption or the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law.
34. In particular, s 1.2 of Schedule 1 provides that disclosure of information is taken to be contrary to the public interest if its disclosure would be privileged from production or admission into evidence in a legal proceeding on the grounds of legal professional privilege (LPP).

## The contentions of the parties

35. In its decision notice, the ACT Ombudsman states:

I have deleted material from documents 1 to 5 in the schedule of documents, under Schedule 1 section 1.2 because the original record contained contrary to the public interest information.

36. In their application for Ombudsman review, the applicant states:

I am aware that agencies should consider whether it is reasonably practicable to provide an applicant with access to material within a document that is not of itself privileged. I am also aware there is a long standing convention in relation to FOI administration that an agency should not claim an exemption on the ground of legal professional privilege unless it is considered that 'real harm' would result from releasing the information.

I am seeking a review of your decisions not to release Documents 1 to 5 in full as your decision does not advise whether consideration was given to providing access to any material that is not privileged in the redacted parts of the documents, nor does it inform the real harm that would result from the release of the information in the document.

37. I note the applicant also raised significant additional considerations in their response to the draft consideration. These do not, however, relate to the information at issue and the decision on the access application made by the ACT Ombudsman on 23 March 2020. They appear to be broader concerns regarding the nature of infrastructure in the ACT and the relationship

between ACT Government and ACTEWAGL, which would need to be raised with the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) or the applicant's local member.

38. I have reviewed all the information provided to our Office in response and taken into account these submissions where relevant below.

## Considerations

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

40. The applicant states:

Reasons and grounds claimed under s 72 by the ACT Government/ACTEWAGL that disclosure is contrary to the public interest have been omitted. It could be argued that such an attempt at non-disclosure conceivably raises a 'possible risk' of corruption in public administration or the 'misuse of power' in a law enforcement investigation by allegedly seeking for undisclosed reasons to 'separate' the electricity arm (only) of ACTEWAGL from Government.

41. I acknowledge the applicant's concern regarding possible corruption in public administration, however, having reviewed the redacted information, I am satisfied the redacted information does not identify corruption or the commission of an offence by a public official. That is, the information at issue does not identify corruption, an offence, or misuse of power in a law enforcement investigation. As a result, Schedule 1 provisions are relevant to the information at issue.

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

42. For the information at issue to be taken to be contrary to the public interest to disclose under Schedule 1, s 1.2 of the FOI Act, the information at issue must be subject to Legal Professional Privilege (LPP).

43. Under Schedule 1, s 1.2 of the FOI Act, LPP covers information:

...that would be privileged from production or admission into evidence in a legal proceeding on the grounds of legal professional privilege.

44. *Waterford v Commonwealth of Australia*<sup>5</sup> sets out the three common law factors that must exist for LPP to apply:

- an independent legal practitioner and client relationship must exist; and
- the communication must have been made for the dominant purpose of giving or receiving legal advice, or for use in litigation (actual or anticipated); and

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<sup>5</sup> (1987) 163 CLR 54.

- the advice must have been confidential.

*Does a legal practitioner and client relationship exist?*

45. The information at issue was advice provided by a Senior Legal Officer within the Ombudsman's office, to the ACT Ombudsman and his delegates.

46. For this reason, I consider that an independent legal practitioner and client relationship exists.

*What was the dominant purpose of the information?*

47. The ACT Ombudsman sought legal advice from its internal legal team about its jurisdiction. The advice was provided by the Senior Legal Practitioner, in their professional capacity.

48. After reviewing this information, I am of the view the information was created for the dominant purpose of providing legal advice.

*Was the information communicated in confidence?*

49. The information at issue comprises of legal advice provided by the Ombudsman's Senior Legal Officer in 2013, 2018 and 2020.

50. The advice provided in 2020 is marked with 'Legal Advice – In Confidence'. The emails referring to advice provided in 2013 and 2018 are marked 'DLM: Sensitive-Legal'.

51. The Freedom of Information Guidelines provide that simply marking documents as such is not determinative that a particular document is confidential.<sup>6</sup>

52. Having reviewed the documents, I am satisfied the content of the documents is confidential, and there is no information before me to suggest the information has been disseminated outside the Ombudsman Office.

53. For these reasons, I consider the information at issue was communicated in confidence.

54. Having considered the three factors required to establish LPP above, and finding that each factor applies, I am satisfied that LPP attaches to the documents.

*Was LPP waived?*

55. Once LPP has been established, it is possible for LLP to be waived, meaning the protection no longer attaches to the documents.

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<sup>6</sup> Ombudsman FOI Guidelines: Considering the public interest, page 17.

56. LPP is waived if the information at issue was released to the public at large, or a third party (unless this is done on a confidential basis).<sup>7</sup> I do not consider sharing legal advice internally, within the one organisation, amounts to a waiver of LPP.
57. On the information before me, there is no indication the ACT Ombudsman has waived LPP.
58. I have also considered the applicant's submission that there exists a convention that agencies should release information subject to LPP, unless there is 'real harm' in disclosing the information.
59. While there is a pro-disclosure bias in the FOI Act and it may be open to agencies to disclose information that is considered contrary to the public interest information, they are not required to do so and there is no 'real harm' test in the ACT FOI Act.
60. For these reasons, I consider the information at issue is subject to LPP and it would be contrary to disclose this information under schedule 1, 1.2 of the FOI Act.
61. I note the applicant has indicated that he is seeking the reasons why the ACT Ombudsman has decided that ACTEWAGL is not subject to ACT FOI legislation. While the ACT Ombudsman has elected not to waive legal professional privilege on the advice provided in relation to this matter and provide a copy of the relevant advice to the FOI applicant, I note a summary of the reasons for this decision has already been provided to the applicant.

*Other matters*

62. In response to my draft consideration, the applicant states:

Reasons and grounds for believing disclosure of the documents that relate to the cause of the blackout is against the public interest are unexplained. Such belief goes to the heart of the matter, namely, accountability, governance and public interest.
63. While I agree this information could be of the public interest, this review is about the ACT Ombudsman's decision on 23 March 2020 to release information to the applicant, rather than actions or decisions made by other entities.
64. I am required to consider whether the information at issue in this review is contrary to the public interest to disclose. The information at issue does not include information about the cause of the blackout referred to by the applicant. The ACT Ombudsman does not hold this information.

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<sup>7</sup> *Mann v Carnell* (1999) 201 CLR 1 [29].



## Conclusion

65. Under s 82(2)(a), I **confirm** the respondent's decision of 23 March 2020, to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

**Louise Macleod**  
**Senior Assistant Ombudsman**

**28 June 2020**