

'AO' and Chief Minister, Treasury and Economic Development Directorate [2020] ACTOFOI 1 (21 January 2020)

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

Application Number	AFOI-RR/19/10018
Decision Reference	[2020] ACTOFOI 1
Applicant	'AO'
Respondent	Chief Minister, Treasury and Economic Development Directorate
Decision Date	21 January 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT) – deciding access – whether disclosure of information is contrary to the public interest – disclosure prohibited by a secrecy provision of a law – Tax Administration Act 1999 (ACT)</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. Under s 82(2)(a) of the FOI Act, I **confirm** the decision of the Chief Minister, Treasury and Economic Development Directorate (**respondent**), dated 29 July 2019, with respect to the remaining information at issue in this review, being data, briefs and market data analysis.

Background of Ombudsman review

3. On 1 July 2019, the applicant applied to the respondent for access to:

...all factual information, including but not limited to data, supporting the ACT Government's claim variously made publicly and in correspondence with me, most recently in a letter from the Chief Minister dated 25 June 2019, that prior to the 2017 ACT Budget announcement of changes to the methodology for calculating rates on unit-titled properties: 'Houses were paying more in rates than units with similar market values and returns'.

4. On 29 July 2019, the respondent advised the applicant it had identified 23 documents falling within the scope of the access application. The respondent gave the applicant access to 12 documents in part and refused access to 11 documents. In making its decision, the respondent considered the information sought to be contrary to the public interest to disclose on the basis it contained Cabinet information¹ and/or its disclosure was prohibited under law.²
5. On 5 August 2019, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
6. Our office provided preliminary views about the respondent's decision to the parties in a draft consideration dated 13 November 2019. On 18 November 2019, the respondent advised they accepted the draft consideration. On 18 November 2019, the applicant provided additional submissions to the draft consideration. I have addressed these submissions below.³
7. On 16 December 2019, I provided the respondent a copy of the applicant's additional submissions to the draft consideration and sought further submissions.
8. On 15 January 2020, my office had a meeting with the respondent to determine whether some additional information could be disclosed to the applicant.

Information at issue

Delegation issues

9. As a preliminary issue, I have considered the applicant's submissions about the delegation of the decision-maker:

The letter of decision on my application was signed by the Information Officer but contained purported decisions by the same person as a tax officer/delegate of the Commissioner for Revenue (TAA officer) under the TAA Act [sic].

Except as provided by the FOI Act, an Information Officer is not subject to direction. I suggest that the Information Officer should have stated that he had taken account of the views or decisions of another person acting under the TAA (even if it was himself) and given reasons for agreeing with that person.

¹ Schedule 1, s 1.6 of the FOI Act.

² Schedule 1, s 1.3 of the FOI Act.

³ See discussion at [33] and [42].

10. The respondent's decision notice outlines the authority of the information officer:

I am an Information Officer appointed by the Director-General of CMTEDD

...

I am a tax officer for the purposes of the *Taxation Administration Act 1999* (TAA), and also a delegate of the Commissioner of ACT Revenue for the purpose of section 96 of the TAA.

11. For the reasons below at [39], I am satisfied the information officer has exercised both delegations appropriately.

Scope of the review

12. In their application for Ombudsman review, the applicant advised that they did not dispute the respondent's decision insofar as it relates to Cabinet information.
13. Therefore, as outlined in the draft consideration, the information at issue in this review was the remaining information which the respondent has refused access to on the basis that disclosure of the information is prohibited under law, in particular, the secrecy provision in s 95 of the *ACT Taxation Administration Act 1999* (Tax Act). That information comprises data, briefs and market data analysis.
14. Taking into account correspondence between the applicant and the respondent, I note that the applicant is still seeking information about 'rental returns' in particular, which he could not identify in the information that the respondent did decide to release to him. I have since confirmed with the respondent that document 18 was the only document within the scope of the request that contains such information, which was not released to the respondent on the grounds that it was contrary to the public interest information.
15. Taking into account the applicant's submissions, in my request to the respondent of 16 December 2019, our office inquired as to whether the respondent would agree to release some further information, in particular, what appeared to be publicly sourced information that had been incorporated into document 18 and related to rental returns information.
16. Following the further meeting with the respondent on 15 January 2020, the respondent agreed to provide this information. Consequently, I have now removed this information from the scope of this review request, and it will be provided by the respondent to the applicant. This consists of screenshots from *Allhomes.com* of rental returns information for particular properties.
17. As a result, I have proceeded to discuss below whether the residual information at issue should be considered contrary to the public interest to disclose.

18. In making my draft consideration, I have had regard to:
- the applicant's access application and review application
 - the respondent's decision and submissions to this review
 - the applicant's submissions to the draft consideration
 - the respondent's submissions during a meeting with my office
 - the FOI Act, in particular ss 7, 16, 35, 50, 72 and Schedule 1
 - the Tax Act, in particular ss 95-97
 - the respondent's FOI processing file relating to the access application, and
 - an unedited copy of the information at issue.

Relevant law

19. 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.
20. 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.
21. 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.
22. 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.
23. 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.
24. 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.
25. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose. In particular, s 1.3 of Schedule 1 provides that disclosure of

information is taken to be contrary to the public interest if its disclosure is prohibited by a secrecy provision of a law.

26. A provision of a law is a secrecy provision for the purposes of the FOI Act if it –

- (a) applies to information obtained in the exercise of a function under the law; and
- (b) prohibits people mentioned in the provision from disclosing the information, whether the prohibition is absolute or subject to stated exceptions or qualifications.⁴

27. Section 95(2) of the Tax Act relevantly provides:

a person who is or has been a tax officer must not disclose any information obtained under or in relation to the administration of a tax law, except as permitted by this part.

28. Section 96(1) of the Tax Act provides:

The commissioner may disclose information obtained under or in relation to the administration of a tax law that does not or is not likely to:

- (a) directly or indirectly identify a particular taxpayer; or
- (b) disclose matters about the personal affairs of a particular taxpayer.

29. 'Taxpayer' means a person who has been assessed as liable to pay an amount of tax, who has paid an amount of tax or who is liable or may be liable to pay tax.⁵

30. Section 97 of the Tax Act provides that a tax officer may disclose information obtained under or in relation to the administration of a tax law in particular identified circumstances.

The contentions of the parties

31. In its decision notice, the respondent said:

Any information that falls within the meaning of 'information obtained under or in relation to the administration of a tax law' ("taxpayer information") in section 95(2) of the TAA [Tax Act] is prohibited by law from disclosure. Sections 96 and 97 allow for disclosure of taxpayer information in certain circumstances, however, I am satisfied that none of these circumstances apply for where documents or information is withheld from release.

Having considered the three documents subject to partial release, I am satisfied that the parts withheld comprise of taxpayer information that would allow for identified of individual taxpayer affairs directly or indirectly. As such, relevant sections of documents are subject to the secrecy provision in Division 9.4 of the TAA and not for disclosure.

⁴ Schedule 1, s 1.3(7) of the FOI Act.

⁵ Tax Act, Dictionary, definition of 'taxpayer'.

32. In their application for Ombudsman review, the applicant said:

I have been denied access to factual information which relates to a key claimed rationale for the Government's decision to change the rating methodology for units, which has affected thousands of ratepayers and is a matter of great public interest.

[The decision] to withhold this information appears contrary to the objects of the FOI Act...it appears that all the withheld factual information is public information as outlined in my email to [the information officer] dated 2 August 2018.

33. In submissions to the draft consideration, the applicant further contends:

I contend that the withheld 'property information' is permitted information, so its disclosure is not prohibited by the Tax Act.

Considerations

34. I have examined an unedited copy of the information at issue together with submissions provided by the applicant and respondent.

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

35. For the information at issue to be taken to be contrary to the public interest to disclose under Schedule 1, s 1.3 of the FOI Act, disclosure of the information at issue must be prohibited under a law. In this case, the respondent found disclosure of the information at issue was prohibited by s 95 of the Tax Act.

36. Section 95(2) of the Tax Act prohibits a tax officer to disclose any information obtained under, or in relation to the administration of a tax law, except as permitted under ss 96 and/or 97 of the Tax Act.

37. In submissions to this review, the respondent advised the information at issue comprised information generated by the respondent in the administration of tax laws.

38. I have reviewed the remaining information at issue and I am satisfied the information was obtained under, or in relation to, the administration of a tax law. Therefore, disclosure of the information at issue is prohibited by s 95(2) of the Tax Act, unless one of the permitted disclosures in ss 96 and 97 of the Tax Act applies.

39. I have reviewed the information at issue and I am satisfied that it comprises taxpayer information – all of which was obtained under, or in relation to, the administration of a tax law. As disclosure of this information at issue is prohibited under law, in this instance, the Tax Act, the information officer was correct to consider the relevant sections in the Tax Act, and make a

decision under the Tax Act as to whether disclosure under ss 96 and 97 of the Tax Act was permitted, as a delegate of the Commissioner of Taxation.

40. Sections 96 and 97 of the Tax Act are discretionary provisions, which the respondent has declined to exercise. In submissions to this review, the respondent confirmed its approach stating that:

... After reviewing the documents, I am satisfied that disclosure under Section 96 and 97 of the TAA have no application in this case as the withheld documents and information contain taxpayer information that is not the personal information of [the applicant]....

41. The draft consideration noted that the respondent's decision in this regard is a decision under the Tax Act and not the FOI Act and therefore, not within scope of this review.

42. In submissions to the draft consideration, the applicant contended:

Section 95 of the Tax Act permits disclosure of information by removing, as provided for in Part 9, the prohibition that would otherwise apply. In Part 9, section 96 does two things which ought not to be confused or conflated: it (a) specifies what the Commissioner is to do with information the disclosure of which is permitted (which I will call 'permitted information') and (b) defines permitted information.

...

For (b) the section effectively defines 'permitted information' as information that is not or is not likely to directly or indirectly identify a particular taxpayer or disclose matters about the personal affairs of a particular taxpayer/ Whether or not information is permitted information is a matter of fact.

The section does not give the Commissioner a discretion to decide whether or not information is permitted information. The section does not state, for example, 'if the Commissioner determines/or is satisfied that the information is or is not...the Commissioner may disclose it'.

43. The applicant contends that permitted information included within the information at issue is "street addresses, block identifiers, unimproved values, rates payable, market/sale values (however described) and rental returns (however described)."⁶
44. I agree with the applicant that whether information is likely to directly or indirectly identify a particular taxpayer, or disclose matters about the personal affairs of a particular taxpayer, is a matter of fact. The power to disclose information under ss 96 and 97 is still, however, discretionary, and a matter for the respondent to decide – that is, the respondent is not required to disclose information because it does not identify the taxpayer, or disclose matters about a taxpayer's personal affairs. I do not consider the prohibition of s 95(2) of the Tax Act limited as expressed by the applicant in his submissions.

⁶ Submissions to the draft consideration, dated 18 November 2019.

45. The respondent highlighted this distinction in their submissions, noting that:

Even where disclosure is permitted under the Tax Act, the disclosure of taxpayer information remains at the discretion of the Commissioner or tax officer.

46. As a result, I am also of the view, outlined in the draft consideration, that the decision the respondent made not to exercise this discretion is not within the scope of this review.

47. In making this decision, I have taken into account further advice from the respondent that:

- in some instances, it is unclear whether the information was obtained from ACT Revenue Office's databases or sourced from publicly available information
- some of the permitted information, on its own may appear innocuous, but when combined with the rest of the information, can generate a composite – 'a mosaic' – that can disclose matters about the personal affairs of a particular taxpayer (s 96(1)(b) of the Tax Act)

48. I note that, as outlined above, the respondent has now agreed to release additional information that was from publicly available sources. As a result, I do not need to consider whether this material has the necessary quality of confidentiality to be covered by s 92(2) of the Tax Act.

49. While the Tax Act provides some discretion in terms of permitted disclosures, it is outside the scope of an Ombudsman FOI review to determine whether or not an appropriate decision has been made under the Tax Act. The Administrative Appeals Tribunal addressed a similar issue in *Srb and Src and Department of Health, Housing, Local Government and Community Services* stating that:⁷

...The applicant contends that the Minister should have considered releasing the documents under subparagraph (a). In our opinion, this is a matter that is beyond the scope of the application under consideration. The Minister has chosen to exercise his discretion in a way that is not reviewable by the Tribunal in these proceedings...We cannot require that the discretion be exercised in another way...

50. Accordingly, as the respondent has declined to exercise its discretion under the Tax Act to disclose the information at issue, disclosure of the information at issue is prohibited by the secrecy provisions of s 95(2) of the Tax Act, and is taken to be contrary to the public interest to disclose under Schedule 1, s 1.3(6) of the FOI Act.

⁷ [1994] AATA 79.

Conclusion

51. I consider the respondent's decision, made under s 35(1)(c) of the FOI Act, to refuse access to the information at issue be **confirmed**.
52. As agreed with the respondent, the respondent will disclose some of the information contained in document 18 being publicly sourced information which remains to be publicly available.
53. Therefore, the remaining information at issue should not be disclosed.

Cathy Milfull

Acting Senior Assistant Ombudsman

21 January 2020