

Pialligo Estate Operations Pty Ltd and Chief Minister, Treasury and Economic Development Directorate [2020] ACTOFOI 17
(24 June 2020)

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

Application Number	AFOI-RR/20/10004
Decision Reference	[2020] ACTOFOI 17
Applicant	Pialligo Estate Operations Pty Ltd
Respondent	Chief Minister, Treasury and Economic Development Directorate
Decision Date	24 June 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – delegated authority of the Information Officer –third party consultation –contribute to the administration of justice generally including procedural fairness –contribute to the administration of justice for a person – trade secrets and business affairs

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 **confirm** the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) dated 20 December 2019, under s 82(2)(a) of the FOI Act.

Background of Ombudsman review

3. On 4 November 2019, an applicant (FOI applicant) applied to CMTEDD for access to:

WorkSafe documents into workplace accident and injury sustained by our client, Mr Darien Sealy, at 12 Beltana Road, Pialligo on 13 June 2019 while in the employ of Pialligo Estate Operations Limited (ABN 85 324 346 082).
4. CMTEDD identified a total of 41 documents, comprising of 167 pages of information, as being within the scope of this access application.

Third party consultation

5. On 20 November 2019, CMTEDD undertook third party consultation with the applicant, under s 38 of the FOI Act, identifying 34 documents, comprising of 155 pages relating to the applicant's operation and management.¹
6. On 10 December 2019, the applicant advised CMTEDD 'Pialligo Estate does not agree to release this information due to commercially confidential and sensitive information it contains'.
7. On 12 December 2019, the applicant further told CMTEDD they objected to any disclosure of the information as it included 'proprietary information' and 'personal information', and contended that it should be 'withheld in its entirety'.²

Decision on access

8. On 20 December 2019, CMTEDD advised the FOI applicant it had decided to provide access to six documents in full and partial access to the remaining 35 documents.³
9. This included the decision to release some of the information the applicant had been consulted on and objected to release. The applicant was advised of this decision on the same day as the FOI applicant.

Application for Ombudsman review

10. On 31 January 2020, the applicant sought Ombudsman review of CMTEDDs decision under s 73 of the FOI Act, as it relates to the disclosure of the information at issue.
11. On 8 May 2020, I provided my preliminary views about CMTEDDs decision to the parties in my draft consideration.
12. On 8 May 2020, CMTEDD advised it did not wish to make any further submissions, noting I proposed to confirm its decision.
13. On 15 May 2020, the applicant provided further submissions in relation to my draft consideration. These are discussed below.

¹ Letter CMTEDD to Pialligo Estate Operations, dated 20 November 2019.

² Email Trinity Law to CMTEDD, dated 12 December 2019, referred to in decision letter dated 20 December 2019 and provided in section 75 response.

³ Letter from the respondent to the FOI applicant, 20 December 2019.

Preliminary issues

Delegated authority

14. As a preliminary issue, I have considered the applicant's submissions about the delegation of authority to the CMTEDD officer identified as the decision-maker in the decision-record. The applicant states:

... the ability to make a decision under the Act is predicated on the relevant decision maker having the delegated authority. Absent proof, it is not clear whether the Decision Maker had that requisite authority. He did not establish the nexus between the asserted authority as an 'Information Officer' and holding one of the positions outlined in the instrument of delegation.⁴

15. Section 18 of the FOI Act requires agencies to appoint a person as its Information Officer, with s 33 then requiring that access applications be dealt with by the Information Officer.

16. The decision-maker on the original access application, which is the subject of this review, is identified in CMTEDD's decision notice as follows:

Authority

As an appointed Information Officer under section 18 of the Act, I am authorised to make a decision on access or amendment to government information in the possession or control of CMTEDD.⁵

17. On 29 May 2020, CMTEDD confirmed this person holds the position P39518 – Senior Director, Corporate Management.

18. This position is listed in the relevant delegation instrument, which is published on the ACT Legislation Register and specifies persons within CMTEDD that are currently appointed as information officers.⁶ On this basis, I am satisfied the decision-maker had the required delegation to make a decision about the access application, and I do not consider it necessary to consider this matter further, as part of this review.

19. While I consider it sufficient for the CMTEDD decision-maker to have provided their full name and indicate they are an Information Officer, I would, nevertheless, encourage CMTEDD to consider providing additional details about the decision-maker in future decision records. This would enable the relevant delegation instrument to be referred to where necessary.

20. Such details could include the position number of the staff member and/or the appropriate position description. The information provided should be consistent with the details used to identify the authorised officer in the applicable delegation instrument.

⁴ Ombudsman Application, Annexure A, page 4, dated 31 January 2020.

⁵ Letter respondent to applicant, dated 20 December 2019.

⁶ Refer to *Freedom of Information (Chief Minister, Treasury and Economic Development Directorate Information Officers) Appointment 2020 (No 1)*, [Notifiable Instrument NI2020-121](#).

Third party consultation

21. The applicant has submitted that CMTEDD incorrectly applied s 38 of the FOI Act, regarding third party consultation:

In his decision, the Decision Maker indicated that Pialligo did not elaborate as to how the release of the information could reasonably be expected to prejudice the business affairs of Pialligo, nor specify what the associated issues are. Pialligo was not required to because that is not what the legislation requires. Pialligo merely needed to demonstrate that the documents being proposed to be disclosed were of such a character that this meant that, by virtue of section 38, they were deemed to be of concern.

22. The applicant further states that:

Although difficult to divine, it appears the Decision Maker has accepted that the documents were of the same character set out in section 38(3). Assuming this is correct, Pialligo agrees with that conclusion. Pialligo however does not agree that, having reached that conclusion, it was open to the Decision Maker to then apply the balance test in section 17. The test ends with section 38, and in the absence of any other provisions in the legislation, it follows that the views of the relevant third party should be accepted and disclosure should not be granted.

23. Section 38 of the FOI Act requires an agency to consult with a third party where they are considering disclosure of information that may reasonably be expected to be of concern to a relevant third party. The Ombudsman also considers there must be a rational basis for this concern.⁷
24. Section 38(3) specifies that disclosure of government information may reasonably be expected to be of concern if it concerns 'the trade secrets, business affairs, or research' of the third party.⁸ As per their letter of 20 November 2019 to the applicant, it was on this basis that CMTEDD consulted with the applicant, as an identified relevant third party, regarding the information they intended to release.
25. The applicant subsequently provided its objections to CMTEDD regarding the release of the information at issue.⁹ However, CMTEDD decided the applicant had not provided sufficient detail to demonstrate that releasing the information at issue would be contrary to the public interest.
26. The applicant suggests that by considering its objections to disclosure in the consultation process, but then proceeding to apply the public interest test under s 17, CMTEDD did not apply the FOI Act correctly. They also raise concerns that the onus has been placed on the applicant to demonstrate the information at issue is contrary to the public interest information.

⁷ See *Remondis* at n 10.

⁸ Section 38(3)(c) of the FOI Act.

⁹ In two emails dated 10 and 12 December 2019.

27. In response to the draft consideration, the applicant stated:

Nothing in the text of section 38 invites the decision maker to conduct a further balance test **after** consulting with third parties. It does not contemplate that the decision maker should return to the issue of whether the information is contrary to the public interest information as being the deciding factor. There is simply nothing in the section which suggests that.

....

Under section 38, the third party is only invited to participate where the information has already been established by the decision maker not be contrary to the public interest. To make that threshold determination and then invite the third party to provide their views and then place the onus on them to show it is contrary to the public interest in circumstances where such a finding has already been made is counterintuitive. That cannot have been the intended operation of the section

28. I agree that s 38 does not expressly state that the agency is required to undertake the s 17 balancing test after consultation with the third party. However, this provision cannot be read in isolation when determining the legislative requirements for making a decision on an access application. I must consider the sections around it and the FOI Act as a whole.

29. This approach is consistent with s 140 of the *Legislation Act 2001*, which requires the provisions of an Act to be read in the context of the Act as a whole, and the principles of statutory interpretation. The meaning of a specific provision cannot be determined without considering the sections around it. As the High Court has explained:

The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'.¹⁰

30. After taking into account ss 17, 38 and 72 of the FOI Act, in particular, as well as the objects of the FOI Act, as I explain further below, I consider the correct interpretation is that decision-makers are required to undertake a further balancing test. I consider the applicant's interpretation is inconsistent with the provisions and intentions of the FOI Act. This is because **not** requiring a further balancing test after consultation would render the consultation provisions futile – either suggesting the decision-maker should proceed to release the information sought regardless of the views of the third party; or as the applicant appears to be suggesting, enabling the third party to essentially veto the release of government information, which would undermine the objects of the FOI Act.

¹⁰ See *Project Blue Sky v ABA* [1998] HCA 28 at [69].

31. Under s 16 of the FOI Act, information is taken to be contrary to the public interest to disclose under Schedule 1, or the disclosure of which would, on balance be contrary to the public interest under the test set out in s 17. If the decision-maker is not satisfied this is the case, then the information sought must be disclosed.¹¹
32. Under s 72 of the FOI Act, a person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.
33. Section 38 requires the decision-maker to make a preliminary decision, and then, if a relevant third party is identified, consult with them about the information of concern they intend to release.
34. This section does not, however, discharge the obligation on the decision-maker to apply the public interest test, where required under s 17 of the FOI Act, and proceed to make a final decision on the relevant access application; nor does it anyway bar the decision-maker from making a final decision, after making the preliminary decision, as suggested by the applicant.
35. I consider the purpose of s 38 is to give relevant third parties the opportunity to articulate their objections to the disclosure of information and how disclosure would cause prejudice, so this information can be considered by the decision-maker, who may previously have been unaware of the full effects the disclosure of the information may have on the third party.
36. This interpretation is consistent with:
- the language of s 38 which requires the respondent to *consider* whether a particular set of circumstances applies, and
 - s 38(5)(b) which requires the agency or Minister to invite the relevant third party to provide its views on whether the information is contrary to the public interest information – that is, the FOI Act goes beyond asking the third party to demonstrate that the information is of concern to them, as contended by the applicant.
37. It is also consistent with the explanatory statement to the *Freedom of Information Bill 2016* which relevantly provides:

In contrast to other decisions to be made by agencies and Ministers under the Bill, the requirement for consultation is conditional on the decision maker considering that, on the material available to the

¹¹ See s 17(1)(e) of the FOI Act, which requires the decision-maker to allow access to the information unless disclosure of the information would, on balance, be contrary to the public interest.

decision maker at that point in time, the information subject to the request is not contrary to the public interest to release. As this is an interlocutory decision in the process of determining the public interest in the release of the information, the requirement can only be applied in the context of the decision-maker's view on the matter at that point in time. It is not a final decision on the public interest in relation to the release of the information and merits review of this decision is not available.

Currently, decision makers are required to consult on information that may affect a third party even when that information may well be information that will not be released for another reason. To avoid unnecessary delays in the decision making process, a decision maker is only required to consult on information that they believe may be in the public interest to release. Where elements of the request are relevant to the third party and others are not, only the information that is of concern to the third party and may otherwise be disclosed need be consulted on. The processing of any other information that is not expected to be of concern to a third party can continue while the consultation process is being undertaken.¹²

38. Consequently, if a third party provides further information as part of the consultation process, the decision-maker must then determine whether the information sought contains contrary to the public interest information - that is, they must consider whether the additional information and/or submissions from the relevant third party change their view that the information consists of contrary to the public interest information.
39. As a result, I consider that CMTEDD met its obligations under s 38 of the Act. I do, however, acknowledge the decision letter provided to the applicant by CMTEDD did not fully set out its reasoning for deciding to grant partial access to the information at issue. The information provided to the applicant was limited, in comparison to the full decision record provided to the original FOI applicant. As previously advised, and consistent with the FOI Guidelines, it would be best practice for objecting third parties to be provided with a copy of the full decision record provided to the FOI applicant, subject to any required redactions on privacy grounds, with a covering letter – rather than a summary of what has occurred.
40. Regardless, as the applicant has had the chance to put forward further submissions as part of this review process and I have proceeded to apply the public interest test to the remaining information at issue below, I do not consider this matter needs to be addressed further as part of this review.

Information at issue

41. The information at issue in this review is the 34 documents the applicant was consulted about, that CMTEDD proposed to partially or fully release. This comprises of Worksafe ACT documents, including copies of risk assessments, health and safety management plans and workplace visit reports, as well as policy and procedure documents.

¹² See https://www.legislation.act.gov.au/View/es/db_53834/20160505-63422/PDF/db_53834.PDF at p. 25.

42. The issue to be decided in this Ombudsman review is whether giving the FOI applicant access to the information at issue would be contrary to the public interest.
43. In making my decision, I have had regard to:
- the FOI applicant's request
 - the applicant's access application, review application and response to my draft consideration
 - the respondent's decision
 - the FOI Act, in particular ss 7, 16, 17, 35, 38, 72 and Schedule 2
 - the respondent's FOI processing file relating to the access application
 - an unedited copy of the information at issue, and
 - relevant case law, particularly, *Remondis Australia Pty Ltd and Chief Minister, Treasury and Economic Development Directorate*¹³, *Willsford and Brisbane City Council*¹⁴ *AC and Justice and Community Safety Directorate*,¹⁵ and *Cannon and Australian Quality Egg Farms Ltd.*¹⁶

Relevant law

44. 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.
45. 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.
46. 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.
47. 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.

¹³ [2019] ACTOFOI 17 (*Remondis*)

¹⁴ (1996) 3 QAR 368 (*Willsford*)

¹⁵ [2018] ACTOFOI 5 (10 October 2018) (AC).

¹⁶ (1994) 1 QAR 491 (*Cannon*).

48. Section 38 of the FOI Act requires the respondent to consult with a third party if they consider the information at issue to 'reasonably be expected to be of concern to a person or another entity'.
49. 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.
50. 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

51. In its decision notice, CMTEDD said:

Businesses undertaking activities in the ACT may expect that any sensitive business information they provide to the Government will be held in confidence. However, businesses that provide information to government do so with the knowledge that government held information may also be subject to an access application made under Freedom of Information legislation. If this information is requested, as an Information Officer, I am required to balance the commercial interests of businesses with the principles of openness and transparency using the test set out in section 17 of the Act. The weight of the public interest in protecting business information will depend on a variety of factors, including how commercially sensitive the information is, its age, its current relevance, and the extent to which it has entered the public domain. While you have objected to the release of the information consulted on, you did not elaborate as to how the release of this information could reasonably be expected to prejudice the business affairs of Pialligo Estate, nor specify what the associated issues are.

52. In the application for Ombudsman review, the applicant [said]:

Trade Secrets and Commercial Sensitivity

Pialligo is an award-winning establishment. Part of its success is that it has, over the years, developed alongside its recipes and culture, its own particular commercial practices and business systems. To permit that information to be released into the public domain means that Pialligo's intellectual property will be disseminated without its consent, with the real potential for harm to its business and establishment. By way of example only, in the proposed documents to be released, there are policies and procedures which are unique to Pialligo's establishment.

As a successful and well-established business with years of experience and standing in the community, how it goes about matters and its business is not be something which should be disclosed.

Considerations

53. I have reviewed an unredacted copy of the information at issue together with submissions provided by the review participants.

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

54. 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

55. 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.

56. Additionally, there is a step of ensuring that none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.

Irrelevant factors

57. I have noted the irrelevant factors listed in s 17(2) of the FOI Act and I am satisfied I have not considered any irrelevant factors in this case. This is discussed further at paragraphs 64-66 below.

Factors favouring disclosure

58. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, CMTEDD identified two relevant factors in this case:

- disclosure could reasonably be expected to contribute to the administration of justice generally, including procedural fairness¹⁷
- disclosure could contribute to the administration of justice for a person.¹⁸

¹⁷ Schedule 2, 2.1(a)(xiii) of the FOI Act

¹⁸ Schedule 2, 2.1(a)(xiv) of the FOI Act.

59. CMTEDD submitted that giving the FOI applicant a complete record of the information associated with the access application request could contribute to the administration of justice for a person, as the documents relate to a workplace incident.
60. The applicant did not specifically provide submissions in response to these factors, but advised they were concerned about any disclosure of the information at issue.¹⁹
61. The ‘public interest’ in disclosing information that could contribute to legal proceedings was considered by the Queensland Information Commissioner in *Willsford*.²⁰ In that case, the Commissioner said:
- it should be sufficient to find 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 held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.²¹
62. I consider the Commissioner’s discussions in *Willsford* are relevant to this Ombudsman review.
63. I agree with CMTEDDs submissions and consider the information at issue contains health and safety risk management plans, as well as photographs of the applicant’s place of business, which may benefit the original FOI applicant and enable that person to evaluate their position with respect to a cause of action or damages.
64. I also consider there is a strong public interest in the disclosure of this information so as to allow public scrutiny into workplace incidents and workplace health and safety risks, as discussed by the Ombudsman in ‘AC’.²²
65. The applicant states:
- We note as an aside that significant emphasis in the Draft Consideration has been placed in allowing the disclosure as it forms part of potential legal proceedings in respect of a workplace injury. This is an irrelevant consideration. Legal proceedings have their own machinery dealing with information and documents and we highlight as examples subpoenas and notices of non-party productions.
66. I acknowledge the FOI applicant’s subjective circumstances and reasons for seeking government information is an irrelevant consideration under s 17(2)(f) of the FOI Act. However, in considering whether the release of information could, for example, contribute to the administration of justice for a person, the FOI Act requires some consideration of individual circumstances. While the

¹⁹ Emails Pialligo Estate to CMTEDD, dated 10 and 12 December 2019.

²⁰ (1996) 3 QAR 368.

²¹ *Willsford*, above n 2 at [17]. This decision has been followed and discussed in subsequent cases. See: *Beale and Department of Community Safety* [2012] QICmr 15 and 1OS3KF and *Department of Community Safety* [2011] QICmr 48.

²² See AC above at n 12.

subjective reasons for why the FOI applicant wants the information is not relevant, consistent with Schedule 2, 2.1(a)(xiii) and (xiv), I consider the impact on an individual from releasing information, where the release of that information could reasonably be expected to contribute to the administration of justice for that person, is a legitimate consideration that is required as part of the s 17(1)(a) step in the balancing process.

67. Furthermore, I do not consider the fact that other mechanisms may exist for obtaining the information (including though legal proceedings) to displace the relevance of these factors for disclosure included in Schedule 2.1 of the FOI Act, nor is this a relevant consideration.
68. I also note that obtaining information through legal proceedings is distinct from the FOI process. The FOI process has broader aims around improving transparency, and promoting public awareness and debate at low or no cost, unlike the discovery process in legal proceedings which can be costly and is confined to documents related to individual proceedings as determined by the pleadings in that particular case. Further, unlike documents obtained through discovery, documents obtained though FOI can be used for a range of other purposes that contribute to the administration of justice generally and for that of an individual.
69. As a result, I place significant weight on these factors favouring disclosure.
70. In addition, I have identified that release of the information in question may advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government.²³

Factors favouring nondisclosure

71. I have carefully considered the public interest factors favouring nondisclosure of the information at issue.
72. In making its decision on the original access application, CMTEDD advised it considered the following factors favouring nondisclosure to be relevant:
- prejudice trade secrets, business affairs or research of an agency or person²⁴
 - prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004*,²⁵ and
 - prejudice the competitive commercial activities of an agency.²⁶

²³ Schedule 2, 2.1(a)(vii) of the FOI Act.

²⁴ Schedule 2, s 2.2(a)(xi) of the FOI Act.

²⁵ Ibid. at Schedule 2, s 2.2(a)(ii).

73. Based on this, CMTEDD decided not to release some of the information it had consulted with the applicant about.
74. Regarding the remaining information at issue in this review, the applicant contends disclosure would prejudice its trade secrets and business affairs. As a result, consistent with s 72 of the FOI Act, which places the onus on the person seeking to prevent disclosure, I have proceeded to discuss whether I consider this factor to be relevant to the remaining information at issue below.

Trade secrets and business affairs

75. Schedule 2, s 2.2(a)(xi) of the FOI Act provides that if disclosure of information could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person then it is contrary to the public interest information.
76. Any such *prejudice* identified is a factor favouring nondisclosure that decision-makers must take into account when applying the public interest test. The FOI Act does not, however, provide for information not to be disclosed, simply because it concerns a trade secret or business affairs, as was suggested by the applicant in responding to the draft consideration.
77. CMTEDD explained in its decision notice to the applicant that it had redacted some information which it considered may prejudice the applicant's business affairs, including information about the applicant's suppliers. I have reviewed a copy of the redacted material and I agree with the redactions made in this regard.
78. In terms of the remaining information at issue, I am not, however, satisfied the applicant has discharged its onus under s 72 of the FOI Act to establish that the information is contrary to the public interest to disclose for the reasons outlined below.
79. For information to be considered a 'trade secret', there must be a formula, pattern, device or compilation of information which will give advantage over competitors.²⁷ The applicant has stated that the policies and procedures are unique, but has not discharged its onus of establishing how this information gives them advantage over their competitors; as opposed to ensuring they adhere to their usual safety obligations under law.

²⁶ Ibid. at Schedule 2, s 2.2(a)(xiii).

²⁷ For an explanation of the characteristics of 'trade secrets' see *Cannon* above at n 13 at [42-49] in the context of commercial value.

80. Nor is there any suggestion that disclosure would prejudice the research of the applicant. As a result, I have proceeded to consider below whether disclosure of the information at issue could reasonably be expected to prejudice the business affairs of the applicant.
81. The term ‘business affairs’ has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.²⁸ I agree with this interpretation.
82. The applicant asserted that its ‘policies and procedures are unique to its establishment’ and these have, over time, ‘developed alongside its recipes and culture, its own particular commercial practices and business systems’. However, the applicant did not provide further detail about the specific operational and financial impact disclosure of this information would have on their business – that is, what competitive advantage could be gained from this information.
83. From my examination of the material, the information at issue includes risk assessments, health and safety risk management plans, and some policy/procedure documents about how the applicant handles grievances. This information appears to be general in nature, rather than revealing specific or practical commercially sensitive information developed by the applicant.
84. For this reason, I am not satisfied disclosing information would disclose commercially sensitive information, or that the information would be contrary to the public interest to disclose.

Balancing the factors

85. As I have not identified any public interest factors favouring nondisclosure, I am satisfied that, on balance, giving the FOI applicant access to the information at issue would not be contrary to the public interest.

²⁸ *Mangan and The Treasury* [2005] AATA 898, at [40], citing *Cockcroft and Attorney-General’s Department and Australian Iron and Steel Pty Ltd (party joined)* (1985) 12 ALD 462.

Conclusion

86. I consider the decision of CMTEDD, dated 20 December 2019, should be **confirmed** under s 82(2)(a) of the FOI Act.

Louise Macleod

Senior Assistant Ombudsman

24 June 2020