

'AN' and Chief Minister, Treasury and Economic Development Directorate [2019] ACTOFOI 20 (16 December 2019)

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

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| Application Number | AFOI-RR/19/10027 |
| Decision Reference | [2019] ACTOFOI 20 |
| Applicant | 'AN' |
| Respondent | Chief Minister, Treasury and Economic Development Directorate |
| Decision Date | 16 December 2019 |
| Catchwords | <i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – law enforcement or public safety information – legal professional privilege |

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(1)(a) of the FOI Act, I **confirm** the decision of the Chief Minister, Treasury and Economic Development Directorate (**respondent**), dated 4 September 2019.

Background of Ombudsman review

3. On 8 August 2019, the applicant applied to the respondent for access to:

...All documents from 1 August 2018 until 8 August 2019 in relation to case number: CMTEDDFOI 2019-018. We also seek all documents from 1 November 2018 to 8 August 2019 in relation to case number: 6886 which relates to the details and findings for the internal review of case number 6886 undertaken by Tanya Rough for Unit Owners located at 33 Eggleston Crescent Chifley. The date range should cover the period: 1 November 2018 - 8 August 2019...

4. On 4 September 2019, the respondent advised the applicant it had identified 19 documents falling within the scope of the access application. The respondent gave the applicant access to 17 documents in full and refused access to two documents in full.
5. In making its decision, the respondent relied on Schedule 1, ss 1.14 and 1.2 of the FOI Act.
6. On 30 September 2019, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
7. On 18 November 2019, I provided my preliminary views about the respondent's decision to the parties in my draft consideration.
8. On 18 November 2019, the respondent advised they accepted the draft consideration.
9. The applicant did not provide submissions in relation to the draft consideration.

Information at issue

10. The issues to be decided in this review are:
 - whether CMTEDD has taken reasonable steps to identify all government information within the scope of the access application
 - whether giving the applicant access to two documents, being documents 18 and 19 in the document schedule, would be contrary to the public interest.
11. In making my draft consideration, I have had regard to:
 - the applicant's access application and application for Ombudsman review
 - the respondent's decision
 - the FOI Act, in particular ss 7, 16, 34, 35 and Schedule 1
 - the respondent's FOI processing file relating to the access application
 - an unedited copy of the information at issue
 - relevant case law, including *Jones and Queensland Police Service*,¹ *94HQWR and Queensland Police Service* and *Commissioner of Australian Federal Police*² and *Propend Finance Pty Ltd*.³

¹ [2015] QICmr 15.

² [2014] QICmr 45.

³ (1997) 188 CLR 501.

Relevant law

12. 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.
13. 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.
14. 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.
15. Section 34 of the FOI Act provides that an agency or Minister deciding an access application must take reasonable steps to identify all government information within the scope of the application.
16. Section 35(1)(b) of the FOI Act provides that a respondent may decide an access application by deciding the information is not held by the respondent.
17. 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.
18. 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.
19. 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.
20. Schedule 1 of the FOI Act sets out the categories of information that is taken to be contrary to the public interest to disclose.

The contentions of the parties

21. In its decision notice, the respondent said:

I have decided to grant access in full to 17 documents relevant to your request. I have decided to refuse access to 1 document as I consider it to contain contrary to the public interest information under schedule 1 of the Act.

22. In their application for Ombudsman review, the applicant contended further information exists that has not been provided. The applicant said:

The reason for the review is due to the fact that I still consider there are documents relevant to my request that are missing or have been unable to be located within the Access Canberra Offices. I also request that the adequacy of searches be further scrutinised from the FOI perspective.

23. During the course of this review, this Office sought further clarification from the applicant about the documents they considered to be missing. On 16 October 2019, the applicant advised:

..I remain concerned that there are no documents held on file created or authored by Ms Tanya Rough who was working on our case.

Accordingly, as part of this review request we seek the following information:

- all documents created or authored by Ms Tanya Rough;
- we seek review of the two documents no [sic] disclosed by CMTEDD ((being documents 18 and 19 from the document schedule); and
- we seek review of whether CMTEDD undertook all reasonable searches, as required by the *Freedom of Information Act 2016*, to identify all government information within scope of [the] access application.

24. As a preliminary issue and to provide clarity, I have reviewed the respondent's decision notice and schedule of documents. It is apparent the respondent refused access to two documents (documents 18 and 19) and not one document, as outlined in their decision notice.

Considerations

25. I have examined an unedited copy of the information at issue together with submissions provided by the parties.

Identifying information within the scope of the application

26. The FOI Act requires that the agency or Minister must take 'reasonable steps' to identify all the government information within the scope of the access application⁴ before making a decision that it does not hold the information.⁵

⁴ Section 34 of the FOI Act.

⁵ Section 35(1)(b) of the FOI Act.

27. The FOI Act is silent on what constitutes 'reasonable steps'. The meaning of 'reasonable', in the context of searches for documents sought under FOI, has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.⁶
28. What amounts to reasonable steps may vary in different circumstances. It would, however, include a search of electronic records and a manual search of physical records, where applicable.⁷
29. In considering whether reasonable steps have been taken to identify all government information, some relevant factors include:
- the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and other legal obligations that fall to it)
 - the agency's practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the request document/s; and
 - the nature of the government activity the request relates to.⁸
30. The respondent advised it has undertaken searches consistent with the its FOI protocols, including searches of all relevant databases and in accordance with guidance from its Building and Compliance and Information and Communications Technology Security (ICT) teams. In submissions to this review, dated 9 October 2019, the respondent advised:
- 'the case number is currently 'active' and being worked on by Access Canberra. As a result, the relevant documents are easily identified and are well known to the individuals in Access Canberra who are working on the case, and
 - a second document search was undertaken following notice of this Ombudsman review and no additional documents were identified.'

⁶ Considered by the Administrative Appeal Tribunal in relation to s 24A of the *Freedom of Information Act 1982* (Cth) in the decision of *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138 at [19]. More recently, the Tribunal applied this approach in *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770 at [19].

⁷ See: Explanatory Statement, *Freedom of Information Bill 2016* (ACT) 23.

⁸ *Nash and Queensland Police Service* [2012] QICmr 45 at [14] — [16]; *PDE and the University of Queensland* [2009] QICmr 7 at [37].

31. The respondent clarified the term 'internal review' used by Ms Rough, who no longer works at the agency:

Access Canberra has confirmed that while Ms Rough may have used the term 'internal review', an internal review within Access Canberra doesn't mean a formal process but rather refers to the instance in which a case is allocated from officer 'a' to officer 'b'.

32. The respondent also provided information from its ICT Team:

We have been advised by our ICT Security Investigations team that [a search of Ms Rough's computer] would likely take 1-2 months and would require a significant investment of time and resources.

33. I consider it apparent, from my review of the respondent's processing file and taking into account their submissions, the respondent has made extensive internal enquiries regarding the existence of a report authored by an ex-staff member of the agency and/or "all documents created or authored by Ms Tanya Rough."

34. The respondent also noted, in submissions to this review:

CMTEDD believes it is possible that some of the documents [the applicant] expected to receive as part of the 4 September 2109 decision are part of the documents that were withheld from release.

35. I have reviewed the documents not disclosed by the respondent (bundle) and can confirm the information the applicant expected to receive are not part of this bundle.

36. Therefore, I consider the respondent has taken reasonable steps to identify all the government information within the scope of the access application.

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

37. The respondent contends the information in documents 18 and 19 is contrary to the public interest information to disclose under Schedule 1, ss 1.14(a) and 1.2 of the FOI Act.

38. I have reviewed the information at issue and I am satisfied it does not fall under the exceptions outlined in Schedule 1 of the FOI Act. 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 may be relevant to the information at issue. Consequently, I will now proceed to consider whether the information at issue is contrary to the public interest information to disclose under Schedule 1 of the FOI Act.

Law enforcement or public safety information

39. The respondent decided some of the information in document 18 is contrary to the public interest to disclose under Schedule 1, s 1.14 of the FOI Act.

40. Schedule 1, s 1.14(a) of the FOI Act provides that information is taken to be contrary to the public interest to disclose if disclosure of the information would, or could reasonably be expected to –

- (a) prejudice the investigation of a contravention or possible contravention of the law in a particular case

41. The respondent's decision letter states:

Releasing this information at this time may prejudice the investigation and impact Access Canberra's ability to take appropriate action in the future in relation to this matter. This information may be able to be released at a later date following completion of the investigation and finalisation of any actions taken as a result.

42. I have reviewed the information at issue in document 18 and I am satisfied the information relates to other relevant projects/investigations/licence decisions, which are ongoing.

43. I accept the respondent's decision that disclosure of this information may impact Access Canberra's ability to take appropriate action in the future. I consider disclosure of this information could enable a person subject to the investigation to take obstructive steps to prejudice an ongoing investigation.

44. Accordingly, I consider Schedule 1, s 1.14 of the FOI Act to be a relevant factor to some of the information in document 18.

Legal professional privilege

45. The respondent contends the remaining information in document 18 and all of document 19 is contrary to the public interest information to disclose under Schedule 1, s 1.2 of the FOI Act because it comprises confidential information provided to a legal practitioner and a request for legal advice.

46. The information at issue comprises a request for legal advice submission to the ACT Government Solicitor including supporting documents.
47. The respondent decided not to disclose the names of the attachments in document 18. Document 19 contains the aforementioned attachments. Accordingly, I have decided to deal with these together.
48. Under Schedule 1, s 1.2 of the FOI Act, legal professional privilege (LPP) is information:
 - ...that would be privileged from production or admission into evidence in a legal proceeding on the grounds of legal professional privilege.
49. LPP is not defined in the FOI Act, however, in accordance with common law principles, for LPP to apply:
 - an independent legal practitioner and client relationship must exist
 - the communication (as opposed to the document per se) must have been made for the purpose of giving or receiving legal advice, or for use in litigation (actual or anticipated), and
 - the advice must have been confidential.
50. To determine whether LPP applies to the information contained in document 19, I have considered below whether each of the above elements exist in this case.

Does a legal practitioner and client relationship exist?

51. I am satisfied the information at issue was created in the context of a legal practitioner-client relationship because:
 - the ACT Government Solicitor provides legal services, including advice and representation to the ACT, its government agencies, ministers and office holders.
 - the respondent is an ACT government agency and engaged the ACT Government Solicitor to provide advice in relation to a building matter in the Territory.

What was the information's purpose?

52. The respondent sought independent legal advice from the ACT Government Solicitor in relation to a building matter and proposed action. As the Queensland Information Commissioner has noted, legal advice can involve more than just advising the client about the law, it also includes what can sensibly be done in the relevant legal context.⁹

⁹ *Jones and Queensland Police Service* [2015] QICmr 15 (26 June 2015) at [30].

53. The information at issue contains the respondent's request for legal advice and supporting documents to allow the ACT Government Solicitor to provide fully informed legal advice. After reviewing this information, I am of the view it was created for the purpose of seeking legal advice and for use in existing or reasonably anticipated legal proceedings.

Was the information communicated in confidence?

54. LPP applies to confidential communications between the client and legal practitioner.
55. The information at issue comprises the confidential request provided to the ACT Government Solicitor from the respondent. The circumstances surrounding how the information at issue was provided to the respondent indicates there was an implied mutual understanding of confidentiality.¹⁰

Has privilege been waived?

56. There is no indication from the information at issue that LPP has been waived by the respondent.
57. Therefore, for the reasons above, I consider disclosure of the information at issue would disclose information subject to LPP as defined by Schedule 1, s 1.2 of the FOI Act.

Conclusion

58. I confirm the respondent's decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.
59. I consider the respondent has taken reasonable steps to identify all government information within the scope of the applicant's access application, as required by s 34 of the FOI Act.

Louise Macleod
Senior Assistant Ombudsman
16 December 2019

¹⁰ 94HQWR and Queensland Police Service [2014] QICmr 45 at [18]-[21].