

United Workers Union and Chief Minister, Treasury and Economic Development Directorate [2020] ACTOFOI 9 (20 March 2020)

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

Application Number	AFOI-RR/19/10036
Decision Reference	[2020] ACTOFOI 9
Applicant	United Workers Union
Respondent	Chief Minister, Treasury and Economic Development Directorate
Decision Date	20 March 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – whether Schedule 1, s 1.3 applies to ss 35 and 36 of the <i>Gambling and Racing Control Act 1999 (ACT)</i> - whether decisions under ss 35 and 36 of the <i>Gambling and Racing Control Act 1999</i> are within the scope of a review request under the <i>Freedom of Information Act 2016 (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. For the reasons set out below, in this, my decision, I **confirm** the decision of the Chief Minister, Treasury and Economic Development Directorate (respondent), dated 4 December 2019 under s 82(2)(a) of the FOI Act.

Background of Ombudsman review

3. On 17 October 2019, the applicant applied to the respondent for access to:
 1. Casino control procedures which have been approved by the ACT Gambling and Racing Commission which include the following:
 - a. security of the Casino, including gaming equipment, cash, chips, staff and patron safety.

- b. operation of the Casino's closed-circuit television system and other security systems.
- c. the level of supervision that is appropriate and reasonable for a casino employee in relation to the employee's prescribed functions.
- d. job descriptions (including responsibilities) of casino employees.
- e. rosters for gaming and security classification employees including shift start and finish times, job titles but excluding employee names.
- f. rostering requirements including minimum staffing levels.
- g. any other casino control procedures, which relate to work done by employees with job titles or job descriptions matching that of Cashier, Dealer, Inspector, Security Officer, Surveillance Officer or Pit Boss.

Please exclude from the above any casino control procedures about the conduct of authorised games and any accounting or record keeping in relation to gaming operations.

- 2. The policy the ACT Gambling and Racing Commission uses to assess proposed amendments of existing casino control procedures, or approval of new Casino control procedures between 1 July 2018 to present.
 - 3. Any industry or expert advice the ACT Gambling and Racing Commission has used between 1 July 2018 to present when assessing proposed amendments to, or approval of, new casino control procedures.
 - 4. Any other correspondence or advice the ACT Gambling and Racing Commission has used between 1 July 2018 to present when assessing proposed changes to casino control procedures.
 - 5. Any correspondence or meeting minutes between the ACT Gambling and Racing Commission and the Casino between 1 July 2018 to present, but excluding:
 - a) any financial reporting by the Casino to the ACT Gambling and Racing Commission and;
 - b) any correspondence by the Casino to the ACT Gambling and Racing Commission which would be considered daily or weekly reporting.
 - 6. Any written warnings that were issued to the Casino in 2018-19 by the ACT Gambling and Racing Commission.
4. On 24 October 2019, in consultation with the ACT Gambling and Racing Commission (Commission), the applicant agreed to vary point 1 of their request to only include existing casino control procedures, and provided clarification that point 1 excludes the conduct of authorised games and any accounting or record keeping.
5. On 24 October 2019, the Commission also advised the applicant that:
- Access Canberra does not create, maintain or have copies of staff rosters. Rostering of staff is a matter for Casino Canberra.
6. On 5 November 2019, the respondent consulted with relevant third parties as required under s 38 of the FOI Act. The third parties consulted objected to disclosure of the information as it was contrary to the public interest.
7. On 4 December 2019, the respondent advised the applicant it had identified 74 documents as falling within the scope of points 1-2 and 5-6 of the access application. It refused access to all these documents in full on the grounds that it was contrary to the public interest information, relying on Schedule 1, s 1.3(6) of the FOI Act.
8. The respondent also advised it did not identify any documents within the scope of points 3-4 of the access application.

9. On 5 December 2019, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
10. On 27 February 2020, I provided my preliminary views about the respondent's decision to the parties.
11. The respondent did not provide submissions in relation to my draft consideration.
12. On 6 March 2020, the applicant provided submissions in relation to my draft consideration. I have discussed these further below.

Scope of Ombudsman review

13. The information at issue in this Ombudsman review are the 74 documents the respondent refused access to in full.
14. 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.
15. In making my decision, I have had regard to:
 - the applicant's access application and review application
 - the respondent's decision
 - the FOI Act, in particular ss 7, 16, 17, 35, 72, and Schedule 1
 - the *Gambling and Racing Control Act 1999* (ACT) (GRC Act)
 - the *Casino Control Act 2006* (ACT) (Casino Control Act)
 - the respondent's FOI processing file relating to the access application
 - an unedited copy of the information at issue
 - relevant case law, including *SRB and SRC and Department of Health, Housing, Local Government and Community Services*.¹

Relevant law

16. 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.
17. 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.

¹ [1994] AATA 79.

18. 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.
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 categories of information that is taken to be contrary to the public interest to disclose. In particular, s 1.3(6) 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.
21. A provision of a law is a secrecy provision for the purposes of Sch 1, s 1.3(7) 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.
22. Section 35(2) of the GRC Act relevant provides:

A person who is or has been a gaming officer must not disclose any information obtained under or in relation to the administration of a gaming law, except as permitted by this part.
23. Section 36(1) of the GRC Act provides:

The commission may disclose information obtained under or in relation to the administration of a gaming law that does not and is not likely to—

 - (a) directly or indirectly identify a particular person; or
 - (b) disclose matters about the personal affairs of a particular person.
24. Section 37 of the GRC Act provides that the commission may disclose information obtained under, or in relation to, the administration of a gaming law in particular circumstances.

The contentions of the parties

25. In its decision notice, the respondent said:

The documents you have requested fall within section 1.6(6) of the [FOI] Act as it is information that the disclosure of is prohibited by a secrecy provision under the law.

Noting section 9 of the *Freedom of Information Act 2016* which promotes pro disclosure of information, the Gambling and Racing Commission was asked if any of the documentation within the scope of the request is able to be released as part of a permitted disclosure under the *Gambling and Racing Control Act 1999*. In this instance, the Commission has decided not to exercise its discretion to release any information within the scope of your request.

26. In the application for Ombudsman review, the applicant said:

The information we have requested substantially relates to the administration of gaming law. For instance, all of point 1 relates to casino control procedures. Any reference to a particular person

would be incidental and could reasonably be redacted while still providing the requested information. Likewise, point 2 refers to a policy and rather than any particular person. For point 5 and 6 the blanket exemption seems to go beyond what is necessary. For example, correspondence that relates to amendments to policies / procedures or to job descriptions would be unlikely to identify a particular person or their personal affairs. We believe that some of the information relating to the sale and the probity process also would not necessarily identify a particular person or their personal affairs.

27. In response to my draft consideration, the applicant further contended that:

We do not believe that cl35,(2) has the effect of prohibiting a person from disclosing general information in relation to the administration of a gaming law that does not identify an individual or their personal affairs...

... Given there is nothing to prohibit a person from disclosing information that does not directly or indirectly identify a particular person or their affairs there will be definitely be information which is not subject to a secrecy provision.

Considerations

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

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

29. 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 35 of the GRC Act.
30. Section 35(2) of the GRC Act prohibits the Commission to disclose any information obtained under, or in relation to, the administration of a gaming law, except as permitted under ss 36 and 37 of the GRC Act.
31. From the information before me, I am satisfied the information comprises information obtained under and/or in relation to the administration of a gaming law, in particular Division 5.6 of the Casino Control Act. The information relates to the casino's control procedures, including detailed operations of the casino.
32. As disclosure of the information at issue is prohibited under law, being the GRC Act, the information officer was correct to consider the relevant sections in the GRC Act and appropriately consult with the Commission to consider whether disclosure under ss 36 and 37 of the GRC Act was possible.
33. Sections 36 and 37 of the GRC Act are discretionary provisions, which the Commission has declined to exercise, as noted in the respondent's submissions.

34. This is the case even with respect to information, which does not, and is not likely to, disclose matters about the personal affairs of a particular person. As the applicant has recognised, such information is not prohibited from being disclosed, but the fact remains that it is at the discretion of the Commission not to disclose such information.
35. The decision by the Commission not to exercise their discretion in this regard is a decision under the GRC Act and not the FOI Act and therefore, not within the scope of this review.
36. The FOI Act is not intended to displace other laws which prohibit disclosure. While the GRC 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 GRC Act.
37. This issue was considered by the Administrative Appeals Tribunal in *SRB and SRC and Department of Health, Housing, Local Government and Community Services*:²

... the applicant contends that the Minister should have considered releasing the documents under sub-paragraph (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...
38. In this FOI review, I am only able to consider whether Schedule 1, s 1.3 of the FOI Act applies to the information at issue. Accordingly, as the respondent has declined to exercise its discretion under the GRC Act to disclose the information, and disclosure of the information at issue is prohibited by the secrecy provisions of s 35(2) of the GRC Act, it is taken to be contrary to the public interest to disclose under Schedule 1, s 1.3(6) of the FOI Act.

Conclusion

39. I confirm the respondent's decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

Louise Macleod
Senior Assistant Ombudsman

20 March 2020

² [1994] AATA 79.