

'BW' and Chief Minister, Treasury and Economic Development Directorate **[2022] ACTOFOI 11 (13 December 2022)**

Decision and reasons for decision of Senior Assistant Ombudsman David Fintan

Application Number	AFOI-RR/22/10012
Decision Reference	[2022] ACTOFOI 11
Applicant	'BW'
Respondent	Chief Minister, Treasury and Economic Development Directorate
Decision Date	13 December 2022
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – refusing to deal with application – information already available to applicant – prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating, or dealing with a contravention or possible contravention of the law – promote open discussion of public affairs and enhance the government's accountability – reveal the reasons for a government decision and any background or contextual information that informed the decision – prejudice trade secrets, business affairs or research of an agency or person – prejudice the protection of an individual's right to privacy

Decision

1. For the purpose of s 82 of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. Under s 82(2)(c) of the FOI Act, I have decided to **set aside and substitute** the decision of the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) dated 18 July 2022.

Background of Ombudsman review

3. On 29 May 2022, the applicant applied under s 30 of the FOI Act for access to government information held by CMTEDD. The access application was for:

Stop work order notice by Construction Audit team (Access Canberra) was placed on the construction works at Block 14, Section 152 Palmerston, Monday 23 May 2022, under section 53 (1) Building Act 2004. A site inspection occurred on Friday 20 May 2022.

Requesting any documents relating to the stop work order, including but not limited too [sic]:

1. Stop notice?
2. Reason for the stop work order?
3. What was the building construction non-compliance?
4. What was the audit findings of Construction Audit team or building certifier on building construction?
5. What rectification for the building non-compliance been requested or ordered, if any by Construction Audit team, building certifier or any other authority?
6. Any other information relevant to audit findings and non-compliance

An audit of the building construction works at Block 14, Section 152 Palmerston, was conducted by the Construction Audit team (Access Canberra), during the period December 2021 – current. An onsite inspection occurred 7 March 2022. A number of building non-compliance issues were identified, with requests/orders to rectify the non-compliance and plans of on-going monitoring of the rectification by Construction Audit team.

Requesting any documents relating to the audit findings and non-compliance found by the Construction Audit team, including but not limited too[sic]:

1. What was the identified building non-compliance that was found?
2. What was the audit findings of the Construction Audit team or building certifier on building construction?
3. What was the rectification (requested or ordered) for the building non-compliance and by what date, by the Construction Audit team, building certifier or any other authority?
4. What has been flagged by the Construction Audit team to be monitored and how or what on-going monitoring was specified?
5. Any other information relating to audit findings, non-compliance, rectification and monitoring

4. On 23 June 2022, CMTEDD invited third parties to provide their views on whether the information is contrary to the public interest information under s 38 of the FOI Act.
5. On 24 June 2022, a third party confirmed in writing to CMTEDD they did not object to the release of the information in relation to which they were consulted.
6. On 11 July 2022, another third party provided submissions to CMTEDD objecting to the release of the information in relation to which they were consulted.

7. On 18 July 2022, the CMTEDD information officer informed the applicant that 11 documents had been identified within the scope of their request. CMTEDD decided to:
 - refuse to deal with the part of the access application seeking access to the stop work sign under ss 43(1)(d) and 45(a) of the FOI Act (information already available) because the stop work sign was already publicly available, and
 - refuse access to the remaining information on the ground the information is contrary to the public interest information under s 35(1)(c) of the FOI Act.
8. On 20 July 2022, the applicant applied for Ombudsman review of CMTEDD's decision.
9. Our Office attempted to assist the parties to resolve the matter informally under s 80A of the FOI Act, but this was unsuccessful.
10. On 19 September 2022, our Office wrote to CMTEDD to confirm the total number of documents identified in the access decision, as the material provided to our Office appeared to include 13 documents.
11. On 20 September 2022, CMTEDD stated 2 documents identified by our Office were included as attachments in another document. For the purpose of this review, I am satisfied 11 documents were included in CMTEDD's decision of 18 July 2022.¹
12. On 15 November 2022, the delegate provided their preliminary views about the respondent's decision to the parties in a draft consideration. On the same day, the applicant accepted the draft consideration.
13. On 25 November 2022, CMTEDD provided submissions in response to the draft consideration. These submissions required careful consideration before making my decision.

Information at issue

14. The information at issue in this Ombudsman review is the information in documents 1-11, in relation to which the applicant was refused access (**the audit documents**).
15. The issue to be decided is whether these documents – the audit documents – are 'contrary to the public interest information' for the purposes of the FOI Act.

¹ The Stop Notice dated 7 March 2022, and the General Inspection Report dated 7 March 2022, were included as attachments in an email sent from the Senior Inspector, Construction Audit Team (CMTEDD) dated 7 March 2022 (document 04).

16. In making my decision, I have had regard to:
- the applicant's access application and review application
 - the respondent's decision of 18 July 2022 and further submissions
 - the FOI Act, in particular ss 6, 7, 16, 17, 35, 43, 45, 50, 72, Schedule 1 and Schedule 2
 - the *Building Act 2004* (ACT) (**Building Act**)
 - the *Human Rights Act 2004* (ACT) (**Human Rights Act**)
 - the respondent's FOI processing file relating to the access application
 - an unedited copy of the information at issue
 - guidelines made by the ACT Ombudsman under s 66 of the FOI Act

Relevant law

17. Section 7 of the FOI Act gives every person 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.
18. '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.
19. 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.
20. Section 35(1)(c) of the FOI Act provides 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.
21. Section 50 of the FOI Act applies if an access application is made for government information in a record containing information contrary to the public interest and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted.

22. 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.
23. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose.
24. Schedule 2 of the FOI Act sets out a non-exhaustive list of public interest factors that must be considered, where relevant, when determining the public interest.

The parties' submissions

25. CMTEDD's decision notice dated 18 July 2022 stated:

I have decided to refuse access to part of these documents under sections 43(1)(d) and 45(a) of the Act. We have been advised by Access Canberra that the Stop Work Notice is already displayed on site and is visible to the general public...

The remaining documents I have found to be exempt under schedule 1 of the Act. The information identified refers to a current investigation and could prejudice outcomes. It also identifies methods used during investigations, disclosure of which could impede future investigations. Additionally, the Construction Occupations Registrar has made the decision that this information is not to be made available to the public under Section 59(a)(6) of the Building Act 2004.

26. CMTEDD's submission to this Office on 26 August 2022 stated:

Noting that this FOI request concerns an ongoing investigation that may escalate to the courts and that any information released to an FOI applicant will become uncontrolled and may subsequently be released to the public...releasing the documents...may unfairly prejudice the matter should it be escalated and presented in front of a court of law and (2) would be contrary to public interest as the information concerns an ongoing investigation.

Noting that this FOI request concerns documents other than Stop Work Notices, I quote s 59A, Building Act 2004 and suggest that s 59A only does not require the Registrar to release documents other than Stop Work Notices to the public and releasing the documents included in the binder would not be appropriate or necessary as they are documents other than Stop Work Notice(s)...

The services are provided by businesses under contract with the lessee and the applicant is not a party to these contracts. The material in the pack is potentially damaging to the businesses involved and, further, its public release could have a permanent negative impact on the sale price of the property...

The potential impact on purchaser confidence at point of sale could be very real but unfair/unwarranted once corrected. Noting the extensive photos of the property internals, many of which are contextual and are in no way relevant to the concerns raised by the applicant though their complaint. ...There is enough information to at least partly construe a floor plan, again, which are never released as part of the planning process due to privacy and safety/security considerations for future occupants (who are also not represented in this process) ...

27. In the application for Ombudsman review, the applicant submitted:

I am a severely impacted stakeholder and I am entitled to know what was identified, rectification of and my numerous complaints of non-compliance addressed. Taken this matter up over 90 occasions. There has been obstruction to the investigation and instance of corruption and omission of duties of a government official and officials not carrying out their responsibilities you would reasonable [sic] expect.

28. These submissions are discussed in more detail below.

Considerations

29. I have considered an unedited copy of the audit documents together with the information provided by the applicant and the respondent.

Refusing to deal with application—information already available to applicant

30. Section 43(1)(d) of the FOI Act provides that a respondent may refuse to deal with an access application wholly or in part if the government information is already available to the applicant.

31. Government information is already available to the applicant if the information is made publicly available by the respondent, or by another agency or Minister.²

32. Where a stop notice has been issued in relation to building work on a parcel of land, the construction occupations registrar may display a sign on or near the parcel of land.³

33. CMTEDD identified that photographs of the stop work notice sign displayed on a fence at the relevant building site installed by the Construction Audit Team, fell within the scope of the access application.

34. I accept the stop work notice sign was made publicly available, and agree with CMTEDD's original decision to refuse to deal with the part of the access application concerning the stop work notice sign photographs.

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

35. The FOI Act contains an exception to Schedule 1, where information identifying corruption or the commission of an offence by a public official, or that a law enforcement investigation has exceeded lawful limits, is not taken to be contrary to the public interest to disclose.

36. The review applicant has submitted the audit documents relate to matters which involve instances of corruption by government officials.

² Section 45(a) of the FOI Act.

³ Section 53A(2) of the Building Act.

37. I have reviewed a copy of the audit documents. I consider disclosure of this information would not identify corruption or the commission of an offence by a public official. I am satisfied this exception is not relevant in this matter.

Prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating, or dealing with a contravention or possible contravention of the law

38. Under Schedule 1, s 1.14(1)(f) of the FOI Act, information the disclosure of which would or could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating, or dealing with a contravention or possible contravention of the law is taken to be contrary to the public interest information.⁴

39. The purpose of this provision is to maintain the integrity of law enforcement methods or procedures. For this provision to apply, there must be an identifiable lawful method or procedure used to prevent, detect, investigate, or deal with a contravention of possible contravention of the law.⁵

40. Having examined the audit documents, I am satisfied they include an identifiable method or procedure used by the Construction Audit Team for detecting, investigating, and dealing with contraventions, or possible contraventions, with the Building Act, the *Building (General) Regulation 2008* (ACT) and respective codes.

41. The next issue is whether disclosure would or could reasonably be expected to prejudice the effectiveness of those methods.

42. CMTEDD has submitted the audit documents refer to a current investigation because the relevant building work is not complete and is subject to ongoing monitoring until a certificate of occupancy is issued.⁶ In the original decision, CMTEDD stated the methods used during investigations are identified in the audit documents.

43. I accept some parts of the audit documents show how non-compliance issues were detected by the Senior Inspector; and how these issues were addressed. However, other parts of the audit documents do not contain any information about these methods or procedures.

⁴ Schedule 1, s 1.14(1)(f) of the FOI Act.

⁵ [FOI Guidelines, Considering the Public Interest](#) at [6.17], page 42.

⁶ Section 69 of the Building Act.

44. Generally, Schedule 1, s 1.14(1)(f) of the FOI Act will not apply to routine procedures or methods which are already known to the public or documents containing general information. Release of information about an overt or well-known method or procedure will be unlikely to prejudice the method or procedure.⁷
45. I consider there is insufficient evidence to support a finding that the methods or procedures used by the Construction Audit Team to detect, investigate, and deal with building compliance issues are anything other than routine in nature and well-known in the building industry. For example, the methods or procedures clearly include visual assessment of the visible and accessible elements of building sites, which is an overt method or procedure.
46. In these circumstances, I am not satisfied release of the audit documents would or could reasonably be expected to prejudice the effectiveness of methods or procedures used by the Construction Audit Team to prevent, detect, investigate, or deal with contraventions or possible contraventions of the law.
47. Accordingly, in my view, CMTEDD has not discharged the onus imposed by s 72 of the FOI Act and established release of the audit documents would or could reasonably be expected to prejudice the effectiveness of these methods and procedures.
48. As I do not consider the audit documents to be contrary to the public interest information under Schedule 1 of the FOI Act, I will proceed to apply the public interest test.

Public interest test

49. The test set out in s 17 of the FOI Act prescribes the following 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.
50. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.

⁷ [FOI Guidelines, Considering the Public Interest](#) at [6.17], page 42.

Irrelevant factors

51. In submissions to this Ombudsman review, the applicant explained why they were seeking the audit documents.
52. In conducting the public interest test, I did not take into account any irrelevant factors which a decision-maker is prohibited from considering under s 17(2) of the FOI Act, including the applicant's identity, circumstances, or reason for seeking access to the information.⁸

Factors favouring disclosure

53. In deciding the access application, CMTEDD did not conduct the public interest test as CMTEDD decided the audit documents were taken to be contrary to the public interest information under Schedule 1, s 1.14(1)(f) of the FOI Act.
54. I have identified 2 factors favouring disclosure relevant to this review.

Promote open discussion of public affairs and enhance the government's accountability

55. A factor favouring disclosure is that disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.⁹
56. The Construction Audit Team audits and inspects the work of building certifiers, builders and building assessors. I consider that the performance of these activities is a matter of public interest as it relates to the regulation of building works in the ACT.
57. Disclosure of the audit documents would reveal the way in which the Construction Audit Team detects, investigates, and deals with issues of non-compliance with the Building Act, including through the issuing of stop work notices.
58. In this case, release of the audit documents would only reveal information about compliance issues with respect to a particular building site.
59. I have given moderate weight to this factor. While I conclude there is considerable interest in the government's accountability in respect of the regulation of building works, the audit documents only relate to a single building site, meaning that disclosure would promote this factor to a limited extent.

⁸ Section 17(2)(f) of the FOI Act.

⁹ Schedule 2, s 2.1(a)(i) of the FOI Act.

Reveal the reason for a government decision and any background or contextual information that informed the decision

60. The existence of a reasonable expectation disclosure of information could reveal the reason for a government decision and any background or contextual information informing the decision is a factor favouring disclosure under the FOI Act.¹⁰
61. I am satisfied the audit documents would reveal the reasons why the stop notices were issued in relation to this building site, including details of the non-compliance issues and the basis for taking action.
62. I have afforded moderate weight to this factor, as I consider disclosure would reveal the reasons for a decision to issue a stop work notice in respect of this particular building site only.

Pro-disclosure bias

63. In addition to the factors favouring disclosure listed in Schedule 2, s 2.1, the FOI Act has an express pro-disclosure bias, which reflects the importance of public access to government information for the proper working of representative democracy.¹¹ This concept is also promoted through the objects of the FOI Act.¹²

Factors favouring nondisclosure

64. I have identified one factor favouring nondisclosure relevant to this review. In response to the draft consideration, CMTEDD identified another factor favouring nondisclosure.

Prejudice trade secrets, business affairs or research of an agency or person

65. A reasonable expectation disclosure of information could prejudice the trade secrets, business affairs or research of an agency or person weighs against disclosure in the FOI Act.¹³ In this matter, it is the business affairs aspect which is relevant rather than trade secrets or research.
66. In further submissions to this Office, CMTEDD noted the release of the audit documents could potentially be damaging to a third-party business and may have a negative impact on the sale of the property.

¹⁰ Schedule 2, s 2.1(a)(viii) of the FOI Act.

¹¹ Section 17 of the FOI Act.

¹² Section 6(b) of the FOI Act.

¹³ Schedule 2, s 2.2(a)(xi)

67. In processing the access application, CMTEDD consulted with the third party who objected to release of the audit documents. The third party submitted that disclosure would significantly affect their business and expose their business's dealings with the ACT Government on compliance and regulatory matters, causing reputational damage. I note the third party has not applied to participate in this Ombudsman review.¹⁴
68. I consider that through publishing a stop notice sign which is publicly available at the building site, the public has already been notified of the fact a stop work notice was issued.
69. I also consider that information about the business is included in the material as a result of the compliance activities of the Construction Audit Team, as opposed to a business relationship between the third party and the ACT Government.
70. It is not apparent that the audit documents contain commercially sensitive or valuable information of the third party. I do not consider release of the audit documents would give any competitors of the third party any unfair commercial advantage.
71. I accept the publication of this information could damage the reputation of the relevant business. However, as the non-compliance issues appear to have been substantiated, I do not consider the impact on the business affairs of the third party would be unreasonable or unfair. I have afforded minor weight to this factor.

Information could prejudice the protection of an individual's right to privacy

72. A reasonable expectation disclosure could prejudice an individual's right to privacy under the Human Rights Act is a factor favouring nondisclosure under the FOI Act.¹⁵
73. In response to the draft consideration, CMTEDD said:

Photos

Releasing the photos, which include floor layouts, of the non-compliances may reveal the internal layout of the building on the property, thus prejudicing the owners' right to privacy...

Crown Lessees

The names of the Crown lessees fall within a similar category...While the names of crown lessees is available on a public register upon payment of a fee (the land titles register), I note that material disclosed pursuant to FOI is published online and so it may nonetheless be of concern to the owners...

Mobile phone numbers

Often mobile phones used by ACT PS officers are their private phones. It is unclear if this is a private number or not...

¹⁴ Section 77 of the FOI Act.

¹⁵ Schedule 2, s 2.2(a)(ii) of the FOI Act.

74. Section 12 of the Human Rights Act provides:

Everyone has the right—

(a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and

(b) not to have his or her reputation unlawfully attacked.

75. In considering whether the disclosure of this information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act, relevant matters include any detriment disclosure may cause, the nature of the information, and the circumstances in which the information was collected.¹⁶

76. In respect of the images which would reveal the internal layout of the building, I do not accept disclosure could prejudice the owner's right to privacy. I note the approved building plans for the respective site have been made publicly available by the Environment, Planning and Sustainable Development Directorate.¹⁷

77. In respect of the full names of the Crown lessees, I do not accept disclosure could prejudice their right to privacy. In my view, disclosure of the audit documents would reveal limited personal information, being the identification of those individuals as the Crown lease holders. I note this personal information is capable of being retrieved from the land title register.

78. The audit documents contain the mobile phone number of a member of the Construction Audit Team. Our Office has contacted this individual and confirmed the mobile phone number is a work mobile number, which is routinely disclosed to members of the public. I do not accept disclosure in these circumstances could prejudice an individual's right to privacy.

79. For these reasons, I do not give this factor any significant weight for the purposes of this review.

Balancing the factors

80. I have identified 2 factors favouring disclosure and one factor favouring nondisclosure in addition to the pro-disclosure bias.

81. I have given moderate weight to the 2 factors favouring disclosure as the release of the audit documents could promote these public interest factors to a limited degree as the information relates to a single building site.

¹⁶ [FOI Guidelines, Considering the Public Interest](#) at [9.3].

¹⁷ [EPSDD 21/97660 - Environment, Planning and Sustainable Development Directorate - Environment \(act.gov.au\)](#).

82. I considered 2 factors favouring nondisclosure, which I afforded minor or no significant weight.
83. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being considered in the public interest. The decision-maker's task is to consider the relative importance and weight of each factor they have identified. The weight given to a factor will depend on the effect disclosing the information would have on the public interest.
84. The FOI Act has a pro-disclosure bias, and therefore the public interest test should not be approached on the basis there are empty scales in equilibrium, waiting for arguments to be put on each side, rather the scales are 'laden in favour of disclosure.'¹⁸
85. I am satisfied, on balance, the public interest factors favouring disclosure outweigh the public interest factors favouring non-disclosure in this review.

Conclusion

86. For the reasons set out above, I have decided to set aside CMTEDD's decision under s 82(2)(c) of the FOI Act and substitute a decision:
- to refuse to deal with the part of the access application seeking the stop notice photographs, and
 - the applicant should be given access to the information at issue.

David Fintan

Senior Assistant Ombudsman

13 December 2022

¹⁸ [Explanatory Statement, Freedom of Information Bill 2016.](#)