

Decision and reasons of Acting Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10034
Applicant:	'CT'
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Third Party:	Department of Foreign Affairs and Trade
Agency reference:	CMTEDDFOI 2023-149
Date:	4 March 2024
Decision reference:	[2024] ACTOFOI 1
Catchwords:	<i>Freedom of Information Act 2016</i> – deciding access – whether disclosure of information is contrary to the public interest – promote open discussion of public affairs and enhance the government’s accountability – inform the community of the government’s operations, including the policies, guidelines, and codes of conduct followed by the government in its dealings with members of the community – reveal the reason for a government decision and any background or contextual information that informed the decision – prejudice the protection of an individual’s right to privacy or any other right under the <i>Human Rights Act 2004</i> – prejudice intergovernmental relations

Decision

1. For the reasons set out below I have decided the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) dated 20 July 2023 should be varied under s 82(2)(b) of the FOI Act.
2. The practical effect of this variation would be to disclose some additional information, including to ensure consistency of redactions across the information at issue.

Background to Ombudsman review

3. On 28 April 2023, the applicant applied for access to:

All information including the applicable laws, policies, procedures, protocols, minutes of the meetings, data recorded in any form, relevant research, records of the phone calls & all communications, obligations of the decision makers and relevant compliance info, involvement and awareness of the Ministers, complaints regarding the installations (if happened more than once in 2023) and the removal of around 80 plus flags depicting the Sikh Khanda symbol from the flagpoles located at Kings Avenue, Commonwealth Avenue and all other venues on or around 3 April 2023 (any time in 2023).

4. This was part of a larger request originally submitted to the Education Directorate which was partially transferred to CMTEDD on 28 April 2023.
5. This review solely concerns this part of the request, not the part processed separately by the Education Directorate.
6. On 20 July 2023, CMTEDD identified 43 documents within the scope of the application granting full access to 2 documents, partial access to 32 documents and refusing access to the remaining 9 documents.
7. On 8 August 2023, the applicant applied for Ombudsman review under s 73 of the FOI Act.
8. On 12 September 2023, the Department of Foreign Affairs and Trade (DFAT) requested to participate in this review as a third party under s 77 of the FOI Act.
9. On 19 September 2023, the delegate approved DFAT's request to join as a third party to the review.
10. On 9 January 2024, I provided my preliminary view to the parties involved in a draft consideration.
11. On 10 January 2024, CMTEDD indicated they accept the draft consideration making no further submissions.
12. On 17 January 2024, DFAT indicated they accept the draft consideration making no further submissions.
13. On 24 January 2024, the applicant provided their response to the draft consideration noting they welcomed the variation but making additional submissions seeking additional information be released in the final decision.

Information at issue

14. The information at issue in this matter is the 32 documents in relation to which CMTEDD granted partial access, and the 9 documents in relation to which CMTEDD refused access.

15. In making my draft consideration, I have had regard to:

- the applicant's review application
- the respondent's decision
- submissions made by DFAT
- the FOI Act
- an unedited copy of the information at issue
- the ACT Ombudsman FOI Guidelines
- the submissions of the applicant in response to my draft consideration
- relevant case law, including:
 - *BG and Education Directorate* [2021] ACTOFOI 06 (15 June 2021)
 - *Leanne Castley MLA and ACT Health Directorate* [2023] ACTOFOI 21 (28 September 2023)
 - *Jon Stanhope and Chief Minister, Treasury and Economic Development Directorate* [2020] ACTOFOI 24 (26 November 2020)
 - *Construction Forestry Maritime Mining and Energy Union and Chief Minister, Treasury and Economic Development Directorate* [2023] ACTOFOI 8 (26 May 2023).

Relevant law

16. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.¹ This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.²

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

17. Section 16(1) of the FOI Act provides that information is contrary to the public interest information if—
 - (a) it is taken to be contrary to the public interest to disclose under schedule 1; or
 - (b) disclosing the information would, on balance, be contrary to the public interest under the test set out in section 17.
18. The public interest test in s 17 sets out the process for balancing public interest factors favouring disclosure and nondisclosure respectively. This balancing test must be used to determine whether disclosure would be contrary to the public interest.
19. The FOI Act permits refusal of access to information where the information sought is “contrary to the public interest information”.
20. Schedule 2 of the FOI Act sets out public interest factors to be balanced when conducting the s 17 test to determine the public interest.³

The contentions of the parties

21. In its decision notice, the respondent said:

Having applied the test outlined in section 17 of the Act and deciding that release of personal information contained in the documents is not in the public interest to release, I have chosen to redact this specific information in accordance with section 50(2). Noting the pro-disclosure intent of the Act, I am satisfied that redacting only the information that I believe is not in the public interest to release will ensure that the intent of the Act is met and will provide you with access to the majority of the information held by CMTEDD within the scope of your request.

22. In the application for Ombudsman review, the applicant noted their belief that CMTEDD had not provided all requested information, citing a number of categories of information they believe had not been addressed as part of the original decision.
23. The applicant’s response to the draft consideration raised concerns that categories of information they believe to be relevant to the review were not addressed in the original decision. To the extent that any documents exist that, if disclosed, would address the concerns of the applicant raised after the draft consideration they would likely not be held by the ACT government.

³ Section 35(1)(c) of the FOI Act.

24. Having reviewed the information at issue, I am satisfied that sufficient searches were conducted in this matter and therefore I am satisfied that reasonable steps were taken to identify government information within the scope of the application as required by s 34(1) of the FOI Act.

Third party participation

25. The ACT Ombudsman FOI Guidelines allow for parties to request to make confidential submissions in a review, subject to the approval of the delegate.⁴

26. DFAT asked to be allowed to make confidential submissions to this review, which was approved by the delegate.

27. In its submissions, DFAT noted the importance of maintaining the confidentiality of advice and correspondence sent between DFAT and CMTEDD, citing a range of factors under the FOI Act.

Consideration

Public interest test

28. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following 5 steps:

- 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
- 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
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure
- decide whether, on balance, disclosure of the information would be contrary to the public interest, and
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

⁴ ACT Ombudsman FOI Guideline 6 – Ombudsman reviews [6. Ombudsman Guidelines - Ombudsman reviews and complaints \(act.gov.au\)](#)

Factors favouring disclosure

29. In its original decision, CMTEDD relied on 3 factors favouring disclosure. I agree these factors are relevant, and I have taken these factors into account in this Ombudsman review.

Promote open discussion of public affairs and enhance the government's accountability (Sch 2, s 2.1(a)(i))

30. CMTEDD stated that this factor was relevant in the original decision, noting a reasonable expectation that disclosure could contribute to open discussion of public affairs.⁵

31. I agree that this factor is relevant in this review to a limited extent.

32. The public display of flags and the involvement of multiple government bodies in the sequence of events involved in their removal, and subsequent alteration to be restored, is a matter or affair of public interest, and disclosure could enhance the accountability of government in relation to this matter.

33. I note the majority of these events played out publicly and are known to the community at large as a result of the inherently public nature of flags being flown, then removed, and then flown again with an updated design. These events also attracted media attention.⁶

34. I afford this factor medium weight in this draft consideration.

Inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community (Sch 2, s 2.1(a)(iii))

35. CMTEDD identified this factor as being relevant in the original decision, noting that it would be reasonably likely to inform the public on government operations concerning the processes and policies around the service offered by the Territory in flying flags in public places.⁷

⁵ Schedule 2, s 2.1(a)(i) of the FOI Act.

⁶ [Controversy around Sikh flags in Canberra highlights tensions between India and Khalistan separatists - ABC News.](#)

⁷ Schedule 2, s 2.1(a)(iii) of the FOI Act.

36. The ACT government offers a paid service through the National Capital Authority (NCA) to rent space on flagpoles for members of the public, community groups and others to display flags according to certain parameters.⁸
37. I note from the public information concerning flags and banners the ACT Property Group's Flag and Banner service is currently under review, and I encourage any updated policies and procedures arising from this review to be proactively published for the public to see pursuant to the open access arrangements under the FOI Act.
38. It is in the public interest that the process of applying for, and displaying, flags is open and transparent, including to allow prospective applicants to know how their application will be handled and the process for any issues with designs to be resolved.
39. I agree that this factor is relevant and afford it significant weight in this draft consideration.

Reveal the reason for a government decision and any background or contextual information that informed the decision (Sch 2, s 2.1(a)(viii))

40. In the original decision, CMTEDD noted the relevance of this factor and the reasonable expectation that disclosure of the information at issue could provide background for government decisions.⁹
41. I agree and give this factor a moderate weight in this review.

Factors favouring nondisclosure

42. In its original decision, CMTEDD relied on 2 factors favouring nondisclosure.

Prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act 2004 (Sch 2, s 2.2(a)(ii))

43. A reasonable expectation that disclosure could prejudice an individual's right to privacy or any other right under the *Human Rights Act* favours nondisclosure under the FOI Act.¹⁰

⁸ [Flags and banners - Treasury \(act.gov.au\)](https://act.gov.au/flags-and-banners)

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

¹⁰ Schedule 2, s 2.2(a)(ii) of the FOI Act.

44. Section 12 of the Human Rights Act provides that:

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.

45. In making the redactions to the information at issue, CMTEDD drew a distinction between the names and contact details of ACT Government employees, which were disclosed, and the information of Australian Government employees and members of the public whose information was redacted.

46. Members of the ACT public service are known in their work capacity and there is therefore little to no prejudice to their privacy in the disclosure of their names in their work capacity.¹¹

47. By contrast, there is a greater likelihood that disclosure of the contact details and names of DFAT employees could prejudice their right to privacy. These workers have a far lesser degree of public contact in their day to day role and there is a public interest in these details not being made publicly available for security purposes.

48. There is also a risk of prejudice for the right to privacy of any members of the public whose names and contact details are contained within the information at issue. CMTEDD consulted these third parties as is required under s 38 of the FOI Act and determined their personal information was contrary to the public interest to disclose. I agree that the assessment of the public interest in disclosure for these details is correct.

49. I agree that this factor is relevant in this review and I find that the distinction between categories of persons whose details were disclosed or not disclosed was appropriate. Accordingly, I afford this factor a significant weight in this draft consideration.

Prejudice intergovernmental relations (Sch 2, s 2.2(a)(x))

50. A reasonable expectation that disclosure could prejudice intergovernmental relations favours nondisclosure when considering the public interest.¹²

¹¹ *Construction Forestry Maritime Mining and Energy Union and Chief Minister, Treasury and Economic Development Directorate* [2023] ACTOFOI 8

¹² Schedule 2, s 2.2(a)(x) of the FOI Act.

51. The purpose of this factor is to protect the relationships between the Territory and other governments. This factor may be relevant where disclosure would have the effect of revealing information provided to the Territory by another government in confidence.¹³
52. Having reviewed the information at issue alongside the submissions made by CMTEDD and the confidential submissions provided by DFAT, I agree this factor is relevant in this review.
53. While there is a public interest in disclosure, including for the reasons described above, there is also public value, and therefore a public interest, in governments being able to share information confidentially to allow for a greater level of frankness in advice and to support a willingness by governments to share information in the public interest.
54. I consider this to be the case particularly in relation to matters concerning international relations, where the Territory is likely to rely more heavily on the Australian Government, including DFAT, to provide information of a kind that the Territory is less likely to be in a position to access itself. Put another way, I recognise that the Territory relies on DFAT for such information.
55. Accordingly, I afford this factor significant weight in this draft consideration, especially in relation to the sections of the information at issue that relate to the interactions between DFAT and the ACT Government.

Balancing the factors

56. In making this decision, I considered 3 factors favouring disclosure and 2 factors favouring nondisclosure.
57. Balancing public interest factors is not merely a tallying exercise, where the public interest is established solely by the number of applicable factors on either side. I considered the relative importance and weight each factor should be given. The weight given to the factors depends on the effect that disclosing the information would have on the public interest.
58. The FOI Act also has a pro-disclosure bias. The public interest test and weighing of factors is approached as scales 'laden in favour of disclosure'.¹⁴

¹³ 'BG' and Education Directorate [2021] ACTFOI 06 (15 June 2021)

¹⁴ [Explanatory Memorandum, Freedom of Information Bill 2016](#)

59. In this instance, I have afforded one factor favouring disclosure significant weight and 2 factors favouring disclosure a moderate weight, while affording both factors favouring nondisclosure a significant weight.

Conclusion

60. For these reasons, my decision is to **vary** CMTEDD's decision under s 82(2)(b) of the FOI Act.

Katrina Dwyer
Acting Senior Assistant Ombudsman
4 March 2024