

Decision and reasons of ACT Ombudsman

Application number:	AFOI-RR/23/10030
Applicant:	Elizabeth Lee MLA
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Third Party:	Derise Cubin
Agency reference:	CMTEDDFOI 2023-161
Date:	13 May 2024
Decision reference:	[2024] ACTOFOI 5
Catchwords:	<i>Freedom of Information Act 2016</i> – deciding access – whether disclosure of information is contrary to the public interest – information subject to legal professional privilege – information in possession of integrity commission or inspector of the integrity commission – promote open discussion of public affairs and enhance the government’s accountability – contribute to positive and informed debate on important issues or matters of public interest – 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>

Decision

1. For the reasons set out below, the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) dated 30 June 2023 is varied under s 82(2)(b) of the FOI Act.

Background of Ombudsman review

2. On 5 May 2023, the applicant applied to the Justice and Community Safety Directorate (JACS) for access to:
 1. Any correspondence (from the Minister, or his office) between the ACT Attorney-General and the ACT Commissioner for Fair Trading in regard to Annual Reports Hearings and any conflicts of interest that were declared (2020–21 to Present).
 2. Any briefings, documentation and correspondence relating to the conflict of interest declared by the ACT Commissioner for Fair Trading on November 26, 2021
3. On 8 May 2023, the request was transferred under s 57 of the FOI Act to CMTEDD in full for processing.
4. On 30 June 2023, CMTEDD identified 92 documents within the scope of the application; granting full access to 42 documents, partial access to 42 documents and refusing access to the remaining 8 documents.
5. On 19 July 2023, the applicant applied for Ombudsman review under s 73 of the FOI Act.
6. On 27 October 2023, the ACT Commissioner for Fair Trading, Derise Cubin, accepted an invitation to join this review as a third party under s 77 of the FOI Act.
7. On 22 February 2024, I provided my draft consideration to the parties.

8. On 23 February 2024, the applicant indicated they accepted my draft consideration, providing no additional submissions.
9. On 5 March 2024, the respondent and Ms Cubin both provided additional submissions for my consideration in making my final decision.

Information at issue

10. The information at issue in this matter is the 50 documents either released partially or refused in full, plus material contained within the documents initially redacted as being outside scope.
11. In making my decision, I have had regard to:
 - the applicant's review application
 - the respondent's decision
 - further submissions by the respondent on my proposed decision
 - submissions by Ms Cubin on my proposed decision
 - the FOI Act
 - the *Human Rights Act 2004* (Human Rights Act)
 - an unedited copy of the information at issue
 - the ACT FOI Guidelines
 - relevant case law, including:
 - *'BY' and Chief Minister, Treasury and Economic Development Directorate* [2023] ACTOFOI 4

- *Elizabeth Lee MLA, Ben Ponton and Chief Minister, Treasury and Economic Development Directorate [2023] ACTOFOI 1*
- *'CG' and Major Projects Canberra [2023] ACTOFOI 15*
- *'BK' and Environment, Planning and Sustainable Development Directorate [2021] ACTOFOI 12*

Relevant law

12. 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
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 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.
15. The FOI Act permits refusal of access to information where the information sought is “contrary to the public interest information”.

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

16. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose.
17. 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

18. In its decision notice, the respondent said:

I am satisfied there is public interest in the release of this information and have placed considerable weight on the above factors. However, this factor is to be balanced against the factors favouring nondisclosure.

...

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 has been met.

19. In the application for Ombudsman review, the applicant stated that the information at issue should be disclosed because ‘the issue in question involves possible misconduct...’.

Consideration

Scoping

20. Portions of the information at issue were not disclosed in the original decision as they had been deemed out of scope.

³ Section 35(1)(c) of the FOI Act.

21. Having reviewed the material in line with the original request, I consider sections of this material is within the scope of the application as it was set out by the applicant.
22. I consider the remainder of the information redacted because it was deemed out of scope of the application was correctly assessed and remains outside scope.
23. I am satisfied that none of the material now within scope is subject to a Schedule 1 factor.
24. Noting this material is considered within scope and no Schedule 1 factors apply, the additional information will now be subject to the public interest test to determine whether it is within the public interest to release any of this material.

Schedule 1 factors

25. In the original decision, CMTEDD relied upon two factors from Schedule 1 to refuse access to portions of the information.

Information subject to legal professional privilege (Schedule 1, s 1.2)

26. In order for this factor to be relevant for sections of the information at issue, the redacted information would need to be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege.
27. Having reviewed the material, I am satisfied these sections of information were brought into existence for the dominant purpose of providing legal advice or services.

28. I therefore agree this factor applies to the relevant sections of information in line with the original decision.

Information in possession of integrity commission or inspector of the integrity commission (Schedule 1, s 1.1B)

29. In order for this factor to be relevant, sections of the information would be information in the possession of the ACT Integrity Commission (ACTIC) or the Inspector of the ACTIC unless the information is administrative in nature.

30. Having reviewed the material being correspondence between or sent to or from ACTIC staff, the information meets the possession requirement set out in the FOI Act.

31. I am satisfied this information is not administrative in nature and therefore the Schedule 1 factor applies to these sections of the information at issue.

Public interest test

32. I agree the remainder of the information at issue does not contain information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the remainder of the information at issue to be contrary to the public interest information, disclosure must, on balance, be contrary to the public interest test set out in s 17 of the FOI Act.

33. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five 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;
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

Factors favouring disclosure

34. In the original decision, CMTEDD relied upon three factors favouring disclosure.

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

35. A reasonable expectation that disclosure would promote open discussion of public affairs and enhance the government's accountability weighs in favour of disclosure.⁴

36. This factor was identified as being relevant in the original decision, noting the value in providing context around the conflict of interest disclosure made by the ACT Commissioner for Fair Trading.

37. I agree this factor is relevant and afford it a strong weight in my decision.

38. I consider that disclosure could reasonably be expected to provide greater accountability concerning the initial disclosure of the conflict of interest and

⁴ Schedule 2, s 2.1(a)(i) of the FOI Act.

handling of the relevant conflict of interest once the disclosure had been made.

Contribute to positive and informed debate on important issues or matters of public interest (Schedule 2, s 2.1(a)(ii))

39. CMTEDD identified this factor as being relevant in the original decision, noting there is a reasonable expectation that disclosure would contribute to positive and informed debate on important issues or matters of public interest.⁵

40. I agree this factor is relevant for this review. The handling of conflict of interest matters within government is a matter of public interest at all stages of the process from the initial identification and disclosure of an actual or potential conflict through to the design and implementation of mitigating strategies.

41. I therefore afford this factor a strong weight in my decision.

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

42. A reasonable expectation that disclosure could reveal the reason for a government decision and any background or contextual information that informed the decision favours disclosure.⁶

43. I agree this factor is relevant, noting the potential for disclosure of the information at issue to give insight into the process of handling questions taken on notice by the ACT Government and how closely the process for

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

⁶ Schedule 2, s 2.1(a)(viii) of the FOI Act.

managing conflicts of interest once they have been disclosed in practice follows the publicly available policies on this area.⁷

44. Accordingly, I have afforded this factor a moderate weight in my decision.

Factors favouring nondisclosure

45. In their original decision, CMTEDD relied upon one factor favouring nondisclosure.

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

46. 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.⁸

47. 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.

48. CMTEDD considered this factor relevant with regards to the redaction of direct mobile telephone numbers for members of the ACT public service where those numbers could be used for home purposes, noting that providing those numbers publicly would represent a prejudice to these individuals' right to privacy.

⁷ Main conflict interest of policy [here](#), public information of examples of conflicts of interest [here](#) and an information sheet on conflicts of interest [here](#).

⁸ Schedule 2, s 2.2(a)(ii) of the FOI Act.

49. I agree this is a reasonable distinction to make, noting that any email addresses or work specific telephone numbers are disclosed in the original decision. Even if those work telephone numbers are not used in a personal capacity, I consider the potential for interference with these individuals' personal lives if they were to be contacted outside work hours weighs against disclosure of these mobile numbers.
50. This factor also applies to the information at issue concerning the specific reasoning behind the conflict of interest disclosure made by the ACT Commissioner of Fair Trading.
51. The majority of the content of the conflict of interest disclosure is already a matter of public record, having been partially disclosed by CMTEDD in previous FOI decisions on 22 January 2023.⁹ Additional disclosures by CMTEDD on 29 January 2024 publicly disclosed the issue at the heart of the conflict of interest disclosure.
52. In the decision of 22 January 2023 a balance was drawn where the ACT Commissioner of Fair Trading's disclosure was provided partially with the specific reason behind the disclosure being redacted, citing this factor as weighing against disclosure.
53. The Human Rights Act (extracted above) protects the privacy of individuals where there would be an unlawful or arbitrary interference with their privacy and if their reputation would be unlawfully attacked.

⁹ The decisions referred to are [here](#) and [here](#).

54. There is no evidence to suggest that disclosure of this information would be unlawful. Therefore, in order for disclosure to breach the ACT Commissioner of Fair Trading's privacy, it would need to be established that disclosure would represent an arbitrary interference with their privacy.
55. Where an individual holds a significant position within the ACT public service, this brings with it an understanding they will have a reduced expectation of privacy where this intersects with the performance of their role.
56. There is a public interest generally in allowing for confidentiality in disclosing conflicts of interest, to enable people in these positions to proactively disclose actual or potential conflicts so that appropriate management strategies can be considered, without needing to be concerned about the reasons being disclosed more widely without appropriate reason.
57. Some conflicts of interest may be particularly sensitive: for example, it may be necessary in some roles to disclose past matters from an office holder or a close family member's personal history. Disclosing a conflict that involves a close family member may subject the family member to close scrutiny and significantly interfere with their privacy when they themselves have not chosen to take on a significant public role or office.
58. The critical issue with actual or potential conflicts of interest is that all actual or potential conflicts are actively disclosed and that appropriate strategies are put in place to manage them. It may then be necessary to publicly acknowledge a conflict of interest and the strategy put in place to manage it, for example if a conflict has actually materialised or has become a publicly contentious subject, in order to maintain public confidence in the integrity of

an official, institution or process. Disclosing the strategy put in place to manage the conflict may in most cases be sufficient to demonstrate that, whatever the nature of the conflict, appropriate steps have been taken to ensure that the conflict will have no impact upon the issue at hand.

59. In some contexts, it may be desirable to go further and to publicly disclose the nature of the conflict: the public interest in demonstrating that the strategy is sufficient by disclosing the conflict being managed may in some circumstances outweigh the public interest in maintaining confidentiality of the conflict.
60. At the same time, an actual or potential conflict of interest should not be disclosed simply because a campaign has been instigated for its disclosure and because those campaigners assert that they cannot be satisfied that the strategy is sufficient unless they know the nature of the conflict being managed. The conflict of interest would have to be material in all the circumstances, and the sensitivity of the information would need to be weighed against the materiality of the conflict. It may also be dependent on the nature of the role and functions of the person who has the conflict.
61. In this matter, the public interest in confidentiality of conflict of interest disclosures is balanced against the public interest in disclosure of the reasons behind the conflict of interest disclosure made by the ACT Commissioner of Fair Trading. On the one hand, the strategy to manage the conflict has been disclosed already through FOI. That strategy would appear sufficient to remove any conflict the Commissioner may have, regardless of its nature: the Commissioner will not make any decisions or give legal instructions in the

legal case that prompted the conflict disclosure and will not be briefed or consulted upon the matter, and all decisions will be made by a person acting as Commissioner who is independent from the Commissioner. On the other hand, given the conflict of interest has materialised, its disclosure would provide additional context and background and put beyond any doubt the appropriateness of the strategy.

62. This is balanced against the additional public interest in disclosure of the reasons behind the conflict of interest disclosure made by the ACT Commissioner of Fair Trading in that it would provide additional context and background to the actions taken by the ACT Commissioner of Fair Trading and other officials.
63. Both CMTEDD and Ms Cubin made submissions raising the issue of whether releasing the conflict of interest disclosure would be an arbitrary interference with the privacy of members of Ms Cubin's family. Ms Cubin's submission notes that in the course of this ongoing issue about the conflict of interest disclosure she has had significant concerns for the safety of her family and has taken multiple steps to address these concerns. Ms Cubin's husband does not currently hold a significant position with the ACT Public Service, hence there is no reason why he should currently have a reduced expectation of privacy - however the ACAT case which led to the conflict of interest declaration relates to a decision he made when he was the holder of a significant position with the ACT Public Service.

64. Having set out the issues concerned in the paragraphs above, I note that in my view it should and would be very rare for it to be appropriate to release an actual conflict of interest declaration under FOI, as opposed to simply the release of details of the strategy used to manage the declared conflict.
65. Ultimately, in the particular facts of this matter and noting that the substance of the conflict of interest disclosure has been publicly disclosed, including in documents released by CMETDD on 29 January 2024, I am of the view that disclosure of the reasons behind the conflict of interest disclosure would not represent an arbitrary interference with the ACT Commissioner of Fair Trading's privacy nor with that of her husband, and I intend to amend the redactions in the information at issue accordingly.
66. Nevertheless, I afford this factor a strong weight in my decision in line with the above distinctions for material to be redacted and released.

Balancing the factors

67. In making this decision, I considered three factors favouring disclosure and one factor favouring nondisclosure.
68. 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.

69. 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'.¹⁰

70. In this instance, I have afforded two factors favouring disclosure a strong weight and one a moderate weight while affording one factor favouring nondisclosure a strong weight.

Conclusion

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

Iain Anderson

ACT Ombudsman

13 May 2024

¹⁰ [Explanatory Memorandum, Freedom of Information Bill 2016](#)