

***Dentsu X and Chief Minister, Treasury and Economic Development
Directorate [2019] ACTOFOI 7 (24 April 2019)***

**Decision and reasons for decision of
Senior Assistant Ombudsman, Louise MacLeod**

Application Number:	AFOI-RR/18/10028
Decision Reference:	[2019] ACTOFOI 7
Applicant:	Dentsu X
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Decision Date:	24 April 2019
Catchwords:	<i>Freedom of Information Act 2016 (ACT) – deciding access – whether disclosure of information is contrary to the public interest – right to privacy – prejudice to business affairs – ability to obtain confidential information.</i>

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016* (FOI Act).
2. Under s 82(1)(a) of the FOI Act, I confirm the decision of Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 3 October 2018, as it relates to copies of Media Booking Authorities (MBA) and emails between Dentsu X and the ACT Government.

3. Under s 82(1)(c) of the FOI Act, I set aside the decision of CMTEDD as it relates to the total cost of MBAs dated 30 July 2018¹, 6 August 2018² and 9 August 2018³, and substitute it with a decision that the information is contrary to the public interest information.
4. CMTEDD must give the applicant access to:
 - a copy of the emails between Dentsu X and the ACT Government, redacted under s 50 of the FOI Act to delete the names and contact information of Dentsu X employees only
 - a copy of MBAs redacted under s 50 of the FOI Act to delete the cost of individual items and gross media expenditure only, and
 - a copy of the MBAs dated 30 July 2018, 6 August 2018 and 9 August 2018, further redacted under s 50 of the FOI Act to delete the total cost.

Scope and background of Ombudsman review

5. Dentsu X is an advertising agency engaged by the Federal and ACT Governments to run a campaign on voluntary assisted dying.
6. On 14 August 2018, an applicant (the FOI applicant) applied to CMTEDD for access to all documents relating to Federal laws on voluntary assisted dying, as it impacts the ACT from 1 April 2018.
7. On 10 September 2018, CMTEDD consulted with Dentsu X under s 38 of the FOI Act in relation to 124 pages of information concerning its liaison with the ACT Government on advertising activities.⁴
8. On 2 October 2018, Dentsu X responded, objecting to disclosure of information in its MBAs and emails with the ACT Government, on the basis that this would reveal confidential and commercially sensitive information relating to its staff-client liaison and commercial methodology.

¹ MBA titled 'CY 2018 Search' (Version 1 as of 30 July 2018), which singles out the cost of an advertising placement with 'Google'.

² MBA titled 'CY 2018 National & Metro Press' (Version 2 as of 6 August 2018), which on two pages, singles out the cost of a newspaper advertising placement with 'The Australian'.

³ MBA titled 'CY 2018 Street Press' (Version 3 as of 9 August 2018) which singles out the cost of an advertising placement in 'Canberra Weekly'; and MBA titled 'CY 2018 Out of Home', which singles out the cost of an advertising placement in the 'Canberra Centre Internal'.

⁴ Section 38 provides that if an agency considers that the government information applied for is not contrary to the public interest information; but disclosure of the information may reasonably be expected to be of concern to a relevant third party, the agency must take reasonable steps to consult with the third party before deciding to give access to the information.

9. On 3 October 2018, CMTEDD identified 248 pages of information within the scope of the application. CMTEDD decided to grant access to 57 pages of information in full, 175 pages of information in part, and refused access to 16 pages of information.⁵
10. On 2 November 2018, Dentsu X sought Ombudsman review of CMTEDD's decision under s 73 of the FOI Act. Dentsu X objects to CMTEDD's decision to give access to the following information at issue in this review:
 - emails between Dentsu X and the ACT Government
 - the job titles of Dentsu X employees and suppliers as they appear in those emails
 - costing information in the MBAs
 - descriptions of advertising in the MBAs, and
 - terms and conditions in the MBAs.
11. In its submissions to this review, Dentsu X argues that the information at issue is contrary to the public interest to disclose as it contains:
 - the personal information of staff and suppliers
 - commercially sensitive information, which if disclosed, could prejudice its business affairs, and
 - confidential communications with the ACT government.
12. I provided my preliminary views about CMTEDD's decision to the parties in my draft consideration dated 2 April 2019.
13. In response, Dentsu X maintains that particular terms and conditions in the MBAs, the terms of business with Amnet Australia Pty Ltd (Amnet), is contrary to the public interest information. It maintains the terms of business are confidential contractual terms governing services provided by Amnet, which if disclosed, could prejudice its business affairs.
14. Dentsu X also sought to clarify that the total cost of an individual advertisement with The Australian newspaper, which is set out on multiple pages of an MBA dated 6 August 2018, would be redacted.⁶

⁵ The FOI applicant was provided with 124 pages of information on 3 October 2018. CMTEDD, however, deferred releasing the remaining 124 pages to the application, as Dentsu X had objected to release, pending any Ombudsman review.

⁶ MBA titled 'CY 2018 National & Metro Press' (Version 2 as of 6 August 2018), which on two pages, singles out the cost of a newspaper advertising placement with 'The Australian'.

15. CMTEDD noted the draft consideration, but did not provide any further submissions.
16. The issue to be decided in this Ombudsman review is whether giving the FOI applicant access to the information at issue would be contrary to the public interest, as Dentsu X contends.
17. In making my decision, I have had regard to:
 - the applicant's application for Ombudsman review
 - CMTEDD's decision
 - the FOI Act, in particular ss 7, 16, 17, 35, 50, 72 and Schedule 2
 - CMTEDD's FOI processing file relating to the access application
 - the submissions of the parties, and
 - relevant case law, in particular *CH32GI and Department of Justice and Attorney-General*⁷ and *Alistair Coe and ACT Health Directorate*⁸.

Relevant law

18. 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.
19. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information because it is contrary to the public interest information.
20. Contrary to the public interest information is defined in s 16 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.
21. The public interest test set out in s 17 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.

⁷ [2012] QICmr 60 (*CH32GI*).

⁸ [2018] ACTOFOI 4.

22. 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 the contrary to the public interest information has been deleted.
23. Section 72 of the FOI Act provides that it is the person seeking to prevent disclosure of government information that has the onus of establishing that the information is contrary to the public interest information.
24. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

The contentions of the parties

25. In its reasons for decision, CMTEDD said:

I consider that release of the information contained in the documents within the scope of your request may promote open discussion of public affairs, and contribute to positive and informed debate of important issues. This includes issues taken into consideration and the steps taken to legislate for voluntary assisted dying. I am satisfied that information contained within these documents is within the public interest to release as they reveal the reason for a government decision and any background or contextual information that has formed that decision.

26. In explaining its decision to Dentsu X, CMTEDD also said:

I have ... decided to leave information that in my opinion could not reasonably impact the business affairs of Dentsu X. This includes the start date, end date of each MBA (which is publically available information that can be found on the ACT Government's Notifiable Invoices register) and the 'Special Comments and Terms and Conditions' included in the MBA's. These components form part of the contract for the MBA between the ACT Government and Dentsu X. I am satisfied that it is in the public interest for this information to be released especially as it is in relation to the expenditure of public funds.

27. In its application for Ombudsman review, Dentsu X argued that:

The public interest would not be served by the disclosure of further information of a confidential and commercially sensitive nature, which would operate to: (i) disrupt and erode the market competition between advertising agencies and suppliers of advertising inventory; and (ii) dissuade advertising agencies and such suppliers from doing business with government agencies in the future if precedent was set for the public disclosure of their confidential and commercially sensitive information, which will materially affect their business affairs.

Dentsu X is of the view that CMTEDD failed to fully appreciate how the disclosure of its information could be used by those in the advertising industry with specialist knowledge of media planning and buying (such as competitor agencies, advertisers, and publishers and other suppliers selling advertising inventory) to the detriment of Dentsu X.

Considerations

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

28. No suggestion has been made that the information at issue contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the information at issue to be contrary to the public interest information, disclosure of the information at issue must, on balance, be contrary to the public interest under the test set out in s 17.

The public interest test

29. To determine whether disclosure of information is, on balance, contrary to the public interest, s 17(1) prescribes the following five 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.

30. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) are considered.

Irrelevant factors

31. I have noted the irrelevant factors listed in s 17(2) and I am satisfied that I have not considered those factors.

Factors favouring disclosure

32. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. Of the factors favouring disclosure in Schedule 2, s 2.1, CMTEDD found two relevant in this case, that disclosure could reasonably be expected to:

- contribute to positive and informed debate on important issues or matters of public interest,⁹ and
- reveal the reason for a government decision and any background or contextual information that informed the decision.¹⁰

33. I agree with CMTEDD that these are the relevant public interest factors favouring disclosure in this case. Given the information relates to a public campaign on a major policy issue, I agree with CMTEDD the disclosure of the majority of this information would serve to promote positive and informed debate. I also consider the nature of the information directly relates to government decision making with regard to assisted dying campaigns in the ACT, and disclosure would provide relevant background to that decision making. Therefore, I consider that significant weight should be given to these factors favouring disclosure.

Factors favouring nondisclosure

34. In making its decision, CMTEDD found the disclosure of some of the 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 2004*,¹¹ and
- the trade secrets, business affairs or research of an agency or person.¹²

⁹ Schedule 2, s 2.1 (a)(ii).

¹⁰ Schedule 2, s 2.1 (a)(viii).

¹¹ Schedule 2, s 2.2 (a)(ii).

¹² Schedule 2, s 2.2 (a)(xi).

35. Dentsu X submits that these factors favouring nondisclosure also apply to the information at issue. It also argues that some of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information.¹³

Right to privacy

Job titles of staff and suppliers

36. In its decision, CMTEDD considered the names and contact information of Dentsu X employees was personal information that is contrary to the public interest, and redacted that information. They did not, however, redact the job titles of Dentsu X staff members and suppliers.

37. Dentsu X argues that disclosing the job titles of staff members and suppliers would lead to the identification of its staff or suppliers, including non-executive level staff members, to people within the same industry.

38. I have examined the emails which refer to Dentsu X employees and suppliers. Regardless of their level within the organisation, it is clear that Dentsu X employees and suppliers are dealing with the ACT Government in their professional capacity, not in a personal or private capacity. Therefore, I do not accept that disclosing their job titles could reasonably prejudice their right to privacy.

Business affairs

Costing information

39. Costing information is contained in each MBA that remains at issue in this review. This includes information regarding gross media expenditure, budget/approved media costs, costs of individual advertising items and the total cost.

40. CMTEDD decided that disclosing the total cost in each MBA would not be contrary to the public interest information. Dentsu X objects to disclosure of the total cost where there is just one advertising item on the MBA, therefore disclosing the cost of that item.

41. Dentsu X also objects to CMTEDD disclosing information outlining the gross media expenditure and/or the budget/approved media costs.

42. Dentsu X argues disclosing this costing information would permit competitors to:

- reverse engineer its specific commercial deal with the Federal Government
- understand Dentsu X's broader commercial model and business affairs, and
- reverse engineer the rates Dentsu X has negotiated with its suppliers.

¹³ Schedule 2, s 2.2 (a)(xii).

43. In *CH32GI*, the Queensland Right to Information Commissioner considered that the sensitivity of commercial information, such as pricing information, will depend on the factors in each case:

These key factors include: the nature and detail of the pricing information; whether it is current or merely historical; the nature and custom of the particular market; and a variety of other circumstances which may affect its sensitivity in any particular case.¹⁴

44. The prejudice to business affairs in relation to pricing information for a government tender process was discussed in *Alistair Coe and ACT Health Directorate*:

Where disclosure would cause reputational harm to, or increase competitive pressures in PwC, I consider there will be a public interest in nondisclosure. However, the effect of disclosure will vary depending on the nature of the information. For example, the breakdown of pricing to an hourly or daily rate provides more insight into the business affairs of the business, and may therefore be more commercially sensitive, than the aggregate sum of the contract price.¹⁵

45. I have examined the MBAs, and while some include a number of items, there are four MBAs where only one advertising item is listed.¹⁶ In those MBAs, I note that disclosing the total cost for the MBA would also disclose the price of the individual item.
46. It is clear that CMTEDD intended to redact costing information that would identify the cost of individual items in the MBAs. In the case of the four MBAs with only one item, I accept Dentsu X's objection to disclosure of the total cost, as it would allow competitors to identify the price of individual advertising items and compare rates. Therefore, I agree with Dentsu X that this information, if disclosed, could prejudice its business affairs.
47. I have also examined the information outlining gross media expenditure and budget/approved media costs in the MBAs. I note CMTEDD has already redacted the gross media expenditure information on the basis that disclosure could prejudice Dentsu X business affairs.
48. I also note the budget/approved media cost is the same as the total cost already disclosed by CMTEDD. Consequently, I am not satisfied that disclosing this information could reasonably prejudice the business affairs of Dentsu X.

¹⁴ [2012] QICmr 60 at [50].

¹⁵ [2018] ACTOFOI 4 at [49].

¹⁶ MBA dated 30 July 2018 titled 'CY 2018 Search', which singles out the cost of an advertising placement with 'Google'; MBA dated 6 August 2018 titled 'CY 2018 National & Metro Press', which singles out the cost of an advertising placement with 'The Australian' over two pages; MBA dated 9 August titled 'CY 2018 Street Press', which singles out the cost of an advertising placement in 'Canberra Weekly'; and MBA dated 9 August 2018 titled 'CY 2018 Out of Home', which singles out the cost of an advertising placement in the 'Canberra Centre Internal'.

Description of advertising including campaign start and end dates

49. In its decision, CMTEDD did not consider the start and end dates of campaigns described in the MBA, or the descriptions of individual advertising items in the MBA, to be contrary to the public interest information.
50. In relation to the start and end date of the campaign, CMTEDD considered the information could not reasonably prejudice the business affairs of Dentsu X as that information is already published on the ACT Government Notifiable Invoices Register.¹⁷
51. Dentsu X argue that, like the costing information discussed above, disclosing the description of individual advertising items, and the start and end dates of campaigns would reveal their commercial model and negotiating position with suppliers.
52. I do not consider that disclosing campaign dates provides any insight into Dentsu X's commercial model or price negotiations with suppliers, particularly given the cost of individual advertising items has already been redacted.
53. In relation to the description of individual advertising items on each MBA, I am not satisfied that disclosing the names of the advertising suppliers would prejudice its business affairs. There is no evidence before me to suggest that this information reveals a unique approach taken by Dentsu X.
54. Therefore, in relation to this information, I am not satisfied disclosure could reasonably be expected to prejudice the business affairs of Dentsu X.

Terms and conditions

55. Dentsu X also object to the disclosure of the following information in the MBAs:
 - terms and conditions of the MBAs, and
 - special comments at the bottom of each MBA which includes terms of business with Amnet, a separate company providing services to Dentsu X.
56. Each MBA contains terms and conditions between the Federal Government and Dentsu X, which derive from a deed between the two parties. Dentsu X argues that disclosing these terms and conditions would provide an insight into how Dentsu X structured its deal with the Federal Government.
57. I have examined the terms and conditions attached to the MBAs. They appear to be standard contractual arrangements in place as part of Dentsu X's media booking process with

¹⁷ See: <https://www.procurement.act.gov.au/about/act-government-notifiable-invoices-register>.

Commonwealth agencies. Based on the information before me, I am not satisfied that this information could reasonably reveal commercially sensitive information that would undermine the competitiveness of Dentsu X.

58. In relation to Amnet's terms of business, Dentsu X argues that they are confidential contractual terms governing the services provided by Amnet.
59. The Amnet terms of business are accessible through a weblink provided in the MBAs, however they are not listed on the Amnet website or able to be located by a websearch. In submissions to this review addressing the draft consideration, Dentsu X contends:

An analogy may be drawn to an unlisted telephone number. Were Dentsu X to have shared an unlisted telephone number with the CMTEDD, it would have the reasonable expectation that this telephone number would be kept confidential and not published. Here instead of an unlisted number, it is an 'unlisted' website containing confidential contractual terms.

This expectation of confidentiality is supported by the content of the terms, which refer to such commercial terms as being confidential information, as well as the very nature of the terms, which outline the level of commercial and legal risk that Amnet is willing to undertake in its business affairs.

60. I accept that Amnet's terms of business are available to those who have been given a specific website address, however, it is conceivable that the information could be shared and accessed by others. This is, in my view, inconsistent with the way in which confidential or commercially sensitive information might be handled.
61. The terms of business appear to be used for Amnet's operations in Australia more broadly and therefore would be common to its contractual arrangements with others. There is nothing particular about the terms of business applying to the MBAs between Dentsu X and the ACT Government. Similar terms of business are published for Amnet's operations overseas.¹⁸ In these circumstances, I do not consider Amnet's terms of business could reasonably be considered confidential or commercially sensitive.
62. For these reasons I am not satisfied that disclosing the terms and conditions, including terms of business with Amnet, could reasonably be expected to prejudice the business affairs of Dentsu X.

Emails between the ACT Government and Dentsu X

63. Dentsu X also argues that disclosing emails between Dentsu X and the ACT Government would reveal a unique proprietary methodology for media planning and buying.
64. Dentsu X argues that:

¹⁸ See <https://dentsu.ch/wp-content/uploads/2017/03/2017-02-28-AMNET-Swiss-Terms-of-Business.pdf> accessed 17 April 2019.

With the context of the information in the MBAs, Dentsu X's competitors could analyse and understand Dentsu X's proposed mix of print advertising, online and out of home, the suppliers that Dentsu X works with, Dentsu X's insights on the benefits of certain placements, as well as recommendations it made for the times and dates for the campaign, and the underlying media strategy. They can piece together the reasons why certain decisions were made and unravel Dentsu X's methodology.

65. CMTEDD has already removed the financial figures from the emails which it decided was prejudicial to the business affairs of Dentsu X. In relation to the remaining content of the emails, I agree with CMTEDD that the emails can be considered normal 'back and forth' between the two parties.¹⁹
66. On my examination, the emails comprise general communication between the company and the ACT Government on the delivery of advertising services. I do not accept that disclosing the emails would reveal methodology that is unique to Dentsu X, or any agency engaging with government, and possibly prejudice its business affairs.

Agency's ability to obtain confidential information

67. Dentsu X raises further arguments in relation to its emails with the ACT Government. The advertising agency contends that it did not expect these emails to be disclosed and suggests that disclosure would inhibit other private sector companies from 'frank and open discussions and sharing their own, similar, confidential information in their dealings with the Federal Government'.²⁰
68. I accept that Dentsu X may have expected its information to remain confidential. However, businesses that provide information to government do so with the knowledge that the information may be subject to a Freedom of Information access application, and that a balance must be achieved between their commercial affairs and the principles of transparency and open government.
69. Therefore, I am not satisfied that Dentsu X has discharged its onus under s 72 of the FOI Act to establish that the information is contrary to the public interest to disclose.

¹⁹ CMTEDD's decision letter, 3 October 2018.

²⁰ Submissions from Dentsu X to the ACT Ombudsman.

Balancing the factors

70. I am satisfied that, on balance, the public interest factors favouring disclosure outweigh the public interest factors favouring nondisclosure for the information at issue, with the exception of the total cost of MBAs dated 30 July 2018, 6 August 2018 and 9 August 2018.²¹

Conclusion

71. Information relating to the total cost of MBA's dated 30 July 2018, 6 August 2018 and 9 August 2018, is, on balance, contrary to the public interest information for the purposes of s 16 of the FOI Act.

72. The remaining information at issue is not contrary to the public interest information.

Louise MacLeod
Senior Assistant Ombudsman
24 April 2019

²¹ See paragraph [45].