

## ***'AH' and Chief Minister, Treasury and Economic Development Directorate [2018] ACTOFOI 12 (24 December 2018)***

### **Decision and reasons for decision of Senior Assistant Ombudsman, Paul Pfitzner**

<b>Application Number:</b>	AFOI-RR/18/30005
<b>Decision Reference:</b>	[2018] ACTOFOI 12
<b>Applicant:</b>	'AH'
<b>Respondent:</b>	Chief Minister, Treasury and Economic Development Directorate
<b>Decision Date:</b>	24 December 2018
<b>Catchwords:</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether information is within the scope of the access application – whether disclosure of information is contrary to the public interest – draft information – information provided in confidence – impede the protection of the environment

### **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)(b) of the FOI Act, I vary the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 10 May 2018, as it relates to the information sought in this review, a draft site audit report and a draft environmental management plan (the information sought). I consider that the information sought, which CMTEDD contends is outside the scope of the applicant's access application, is within the scope of the access application, but it is contrary to the public interest information for the purposes of s 16 of the FOI Act.

3. As the information sought is contrary to the public interest information, I agree that CMTEDD does not have to give the applicant access to the information.

## Background of Ombudsman review

4. On 20 March 2018, the applicant applied to the Environmental Protection Authority (EPA) for access to various information relating to the Former Shell Canberra Depot, 16 Ipswich Street, Fyshwick ACT, including:
  - Site Audit Report (3 July 2017) 16 Ipswich Street Fyshwick
  - ECS (June 2017) Environment Management Plan 16 Ipswich Street Fyshwick ACT
5. While the applicant made the access application to the EPA, CMTEDD undertook the FOI processing in consultation with the EPA.<sup>1</sup>
6. On 10 May 2018, CMTEDD advised the applicant that it had identified 30 documents falling within the scope of the access application. CMTEDD decided to give the applicant access to 28 documents in full, and to the remaining two documents in part. However, it did not identify the site audit report or the environmental management plan as being information it held.
7. In its decision, CMTEDD explained that some documents, including the site audit report and the environmental management plan, were referenced by an external company, but were not provided to EPA.
8. On 3 June 2018, the applicant applied under s 73 of the FOI Act for Ombudsman review of CMTEDD's decision.
9. In her application for review, the applicant contended that the EPA 'had been given' the site audit report and the environmental management plan.
10. I provided my preliminary views about CMTEDD's decision to the parties in my draft consideration dated 20 September 2018.
11. In my draft consideration, I acknowledged that an email trail, which the applicant had been provided following a prior FOI request, suggested that an external company had sent a draft version of the site audit report and the environmental management plan to the EPA. My

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<sup>1</sup> The EPA is a statutory position under the *Environment Protection Act 1997*. Administration of that Act and environmental protection policy falls under the Environment, Planning and Sustainable Development Directorate (see: notifiable instrument *Administrative Arrangements 2018 (No1)*). However, under the *Administrative Arrangements 2018 (No 1)*, environment protection generally is a matter relating to Access Canberra, within CMTEDD (under the *Public Sector Management Act 1994 (ACT)*, s 21(8)).

understanding at that time was that the applicant was not, however, seeking access to those draft versions.

## Scope of Ombudsman review

12. On 3 October 2018, in response to my draft consideration, the applicant submitted that the site audit report and the environmental management plan, even in draft form, are within the scope of her access application and it is those two documents that she is seeking in this Ombudsman review.
13. On 5 October 2018, our Office informed CMTEDD of the applicant's response. We sought a copy of the information sought and invited CMTEDD's views on whether that information comprises contrary to the public interest information.
14. On 2 November 2018, CMTEDD submitted that the information sought is outside the scope of the applicant's access application, but even if it were within scope, disclosure of that information would be contrary to the public interest.
15. In conducting an Ombudsman review of decision refusing to give access to information, it is open to me to change the basis on which the decision was made.<sup>2</sup>

### *Scope of access application*

16. As a preliminary issue, I will address the issue of whether the information sought is within the scope of the access application.
17. The approach to interpreting the scope of an FOI access application was considered by the Administrative Appeals Tribunal (AAT) in the case of *Re Timothy Edward Anderson and Australian Federal Police*<sup>3</sup> where the AAT explained:

[A] request for access to documents containing information on a specified subject matter should be construed as a request for access to documents or parts of documents that can fairly be characterised as containing information of that type.<sup>4</sup>

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<sup>2</sup> Under s 82(2) of the FOI Act, the Ombudsman may exercise any function given under the FOI Act to the agency or Minister for making the decision.

<sup>3</sup> [1986] AATA 79 ('Anderson').

<sup>4</sup> At [19].

18. In *Anderson*, the AAT discussed the 'need for a common sense approach to the identification of the documents',<sup>5</sup> while not 'suggesting a narrow or pedantic approach to the construction of any request for access'.<sup>6</sup>
19. In this case, it is not in dispute that the applicant specifically sought access to the site audit report and the environmental management plan, nor that those documents, in their final form, would be within the scope of the access application.
20. CMTEDD advised that the final site audit report and the environmental management plan were never provided to the EPA and therefore are not held by the EPA for the purposes of the access application. I accept this contention. It separately contends that the draft versions of those documents are outside the scope of the access application. It relevantly submits:

[The applicant] was aware of the existence of the draft documents from earlier correspondence with the EPA but chose to seek access to only the final documents, requesting them specifically by name and date. In determining this matter, the Ombudsman must acknowledge that [the applicant] has intimate knowledge of this issue and therefore it is not unreasonable for CMTEDD to interpret [the applicant's] request for specific documents as her only wanting those final versions.
21. In my view, where an access application identifies specific documents which are held by the agency, it will usually be sufficient for the agency to consider only those documents in processing the application. However, where the agency determines that the specific documents are *not* held, it is incumbent upon it to identify whether there are other documents which can fairly be characterised as containing information of the type requested by the applicant.
22. In this case, this would apply to the draft versions of the site audit report and the draft environmental management plan if they contain the same type of information as contained in the final version of these documents.
23. While a final version of those documents is unavailable, from my examination of the information sought the draft content appears to be fully developed. As such, I am satisfied that the information sought is of the type, and may well be the same information, as that contained in the final version.
24. For this reason, I consider that the information sought falls within the scope of the access application. In reaching this conclusion, I have considered the substance of the information sought over the form of the document.

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<sup>5</sup> At [17].

<sup>6</sup> At [20].

25. I accept that there are many circumstances in which draft documents do not fall within the scope of an access application. In this case the information of the type sought is, however, only held by the EPA in draft form and that information is fully developed. I therefore consider that it falls within the scope of the access application.
26. Accordingly, the only remaining issue to be decided in this Ombudsman review is whether the information sought is contrary to the public interest information, as CMTEDD contends.
27. 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 and Schedule 2
  - CMTEDD's FOI processing file relating to the access application, and
  - the submissions of the parties.

## Relevant law

28. 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.
29. 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.
30. The public interest test set out in s 17 involves a process of balancing the public interest factors favouring disclosure against the public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
31. Section 35(1) of the FOI Act provides for how an access application can be decided, including by refusing to give access to the information because it is contrary to the public interest information (s 35(1)(c)).

## The contentions of the parties

### 32. CMTEDD relevantly contends:

CMTEDD strongly objects to the release of the draft documents as these draft documents were provided to CMTEDD to assist the EPA in its environmental protection functions. The site owner and developer were under no obligation to provide these documents and the provision was done so with a mutual understanding of confidentiality. These documents were provided to assist in resolving issues and in the promotion of a cooperative relationship between the ACT Government and applicants. CMTEDD is concerned that release of the draft documents would undermine the working relationships that the ACT Government has with this stakeholder and may impact the ability of the ACT government to develop cooperative working relationships with other organisations in the future. The relevant factors in favour of non-disclosure in this instance are schedule 2.2(a)(xii), prejudice the agency's ability to obtain confidential information and schedule 2.2(a)(xvi) prejudice a deliberative process of government for the reasons outlined above. Moreover CMTEDD notes that the documents contain a significant amount of information which relate to the business affairs and research of an agency or person (schedule 2.2(a)(xi)).

### 33. In response, the applicant relevantly submits:

CMTEDD claims that "the site owner and developer were under no obligation to provide these documents". If not at this stage but certainly at a DA stage they were under obligation to produce these documents or at least a later version of them.

...

The ACT Environment Protection Act makes provisions under section 19 and 21 for the public inspection of documents .... environmental audit reports under division 9.2.

...

This above legislation requires that the onus be directly placed on the applicant to request an exemption from release and to stipulate the areas which were not in the public interest to be released. This applicant failed to do so at the time and in writing. Presumably because the documents in question were not considered confidential when submitted.

Since, as you would have determined, none of these conditions of exemption in the EP Act have been applied to the reports, the subject of my request, then the more general *Freedom of Information Act* cannot "suppose" them twelve months after the fact.

...

I wish to further refute the particular reasons in favour of non-disclosure in this instance as submitted by CMTEDD.

[A] Schedule 2.2(a)(xii) - prejudice an agency's ability to obtain confidential information;

This CMTEDD claim is not relevant in this case. Because of its nature, scientific data is not confidential information, given that the soil characteristics and water quality are able to be tested and measured at any time by any other qualified person.

## Considerations

34. The information sought is a draft version of each of the site audit report and the environmental management plan.

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

35. CMTEDD has not submitted that the information sought is taken to be contrary to the public interest to disclose under Schedule 1. Therefore, for the information sought to be contrary to the public interest information, disclosure must, on balance, be contrary to the public interest under the test set out in s 17.

### *Public interest test*

36. To determine whether information is, on balance, contrary to the public interest to disclose, s 17(1) of the FOI Act 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.
37. In addition, there is the initial step of ensuring that none of the irrelevant factors listed in s 17(2) are considered.

### *Irrelevant factors*

38. I have noted the irrelevant factors listed in s 17(2) and am satisfied that I have not considered any irrelevant factors in this case.

*Factors favouring disclosure*

39. 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 listed in Schedule 2, s 2.1, the applicant submits that disclosure could reasonably be expected to:

- promote open discussion of public affairs and enhance the government's accountability (Schedule 2, s 2.1(a)(i))
- contribute to positive and informed debate on important issues or matters of public interest (Schedule 2, s 2.1(a)(ii))
- 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 (Schedule 2, s 2.1(a)(iii))
- reveal the reason for a government decision and any background or contextual information that informed the decision (Schedule 2, s 2.1(a)(viii))
- reveal that the information was—
  - incorrect
  - out-of-date
  - misleading
  - unfairly subjective, or
  - irrelevant (Schedule 2, s 2.1(a)(ix))
- contribute to the protection of the environment (Schedule 2, s 2.1(a)(x)), and
- reveal environmental or health risks or measures relating to public health and safety (Schedule 2, s 2.1(a)(xi))

40. Given that the information sought in this Ombudsman review is in draft form, that information was provided voluntarily to the EPA by the Former Shell Canberra Depot site owner and developer, and it is not the EPA's own assessment of the site, I do not agree with the applicant that the first five factors listed above are relevant public interest factors in this case.

41. However, I agree with the applicant that the final two factors, that disclosure could contribute to the protection of the environment and reveal environmental or health risks or measures relating to public health and safety, are relevant public interest factors favouring disclosure in this case. I give each moderate weight.



*Factors favouring nondisclosure*

42. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure. CMTEDD contends that disclosure of the information sought could reasonably be expected to:

- prejudice the agency's ability to obtain confidential information (Schedule 2, s 2.2(a)(xii))
- prejudice a deliberative process of government (Schedule 2, s 2.2(a)(xvi)), and
- prejudice to the business affairs and research of an agency or person (Schedule 2, s 2.2(a)(xi)).

43. In my view, CMTEDD has not adequately explained how disclosure of the information sought would prejudice a deliberative process of government, or the business affairs or research of an agency or person, and it is not apparent to me that disclosure, in this case, could reasonably be expected to have those results. Therefore, I do not agree that these are relevant public interest factors in this case.

44. However, I do agree with CMTEDD that the other factor mentioned is relevant. I also consider that the potential to impede the protection of the environment (Schedule 2, s 2.2(a)(vii), by adversely impacting the EPA's environmental protection functions, is an additional public interest factor favouring nondisclosure in this case.

Prejudicing an agency ability to obtain confidential information and impeding the protection of the environment.

45. CMTEDD contends that the site owner and developer were under no obligation to provide the information sought, and the provision of those documents to the EPA was done so with a mutual understanding of confidentiality.

46. The applicant contends that the site owner and developer were required by ACT *Environment Protection Act 1997* (EP Act) to provide the information sought, or a later version of the site audit report and the environmental management plan, at the development application stage of the development.

47. While this may be the case under the EP Act, the information sought in this case is not the finalised audit report and the environmental management plan, it is merely a draft version of those documents. I also note that the EP Act has its own disclosure requirements.

48. I accept CMTEDD's contentions that the site owner and developer were under no obligation to provide these draft documents to the EPA, and, in this case, they have done so with a mutual understanding of confidentiality.
49. Where a site owner or developer provides confidential environmental information to the EPA on a voluntary basis, without being under any obligation to do so, I am satisfied that disclosure of that information in response to an access application made under the FOI Act could reasonably be expected to dissuade developers in the future from providing similar information to the EPA.
50. I accept CMTEDD's contention that disclosure of the information sought may impact the ability of the ACT government to develop cooperative working relationships with other organisations in the future. I am satisfied this could adversely affect the EPA's ability to carry out its environmental protection functions.

*Balancing the factors*

51. I am satisfied that, on balance, the public interest factors favouring nondisclosure outweigh the public interest factors favouring disclosure in this case. In particular, there is a substantial public interest in protecting the flow of confidential, voluntary environmental information to the EPA.

## **Conclusion**

52. The information sought falls within the scope of the applicant's access application, but it is contrary to the public interest information for the purposes of s 16 of the FOI Act.
53. I vary CMTEDD's reasons for its decision, but agree that it can refuse the applicant access to the information sought.

**Paul Pfitzner**  
**Senior Assistant Ombudsman**  
**24 December 2018**