Burdon and Suburban Land Agency [2019] ACTOFOI 12 (19 June 2019)

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

Application Number:	AFOI-RR/18/10035
Decision Reference:	[2019] ACTOFOI 12
Applicant:	Mr Daniel Burdon
Respondent:	Suburban Land Agency
Decision Date:	19 June 2019
Catchwords:	*Freedom of Information Act 2016* (ACT) – deciding access – refusing to deal with application – consulting applicant before refusing to deal with certain applications – unreasonable and substantial diversion of resources – third party consultation

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the ACT *Freedom of Information Act 2016* (FOI Act).

2. Under s 82(1)(a) of the FOI Act, I confirm the decision of the Suburban Land Agency (SLA) of 7 December 2018. SLA was correct in refusing to deal with the access application under s 43(1)(a) of the FOI Act on the basis that to do so would require an unreasonable and substantial diversion of its resources.

Scope and background of Ombudsman review

3. On 27 September 2018, the applicant, a journalist with The Canberra Times, applied to SLA for the following information:

> …all documents that include the Suburban Land Agency register, or registers, of the Agency's board members' and executive staff members' potential conflicts of interest, unredacted. I also seek copies of all Agency internal board meeting agendas and minutes held since the establishment of the Agency in

> July 1, 2017 (not what appear to be summaries of said documents already made public on the Agency's website...

4. On 11 October 2018, SLA emailed the applicant and indicated:

> …initial searches include a substantial volume of documents that upon viewing contain duplicates/drafts which may affect the Directorates ability to process your request due to volume and extensive third party consultations…

5. On 11 October 2018, the applicant agreed to refine the scope of the request to:

> …final documents not duplicates and associates emails, but on the condition, they are the internal version, not what appear to be summaries of minutes as published on the SLA website…

6. On 15 November 2018, following a preliminary search for information, SLA gave the applicant notice of its intention to refuse to deal with the access application as doing so would be an unreasonable and substantial diversion of its resources. SLA reasoned that:
    - it had identified extensive information which related to a large number of individual third parties which included the personal information of members of the public and information relating to business affairs.
    - the work involved in dealing with the application, including the third party consultation, would require an unreasonable and substantial diversion of the agency's resources.
    - the public benefit in expending the resources necessary to undertake extensive third-party consultation, and assess third party responses, did not outweigh the detriment caused to the public by impeding the ability of the SLA to undertake its primary business functions.
7. SLA also noted the applicant had not identified any particular Board Member or Executive in its access application, and invited the applicant to refine or negotiate a revised scope of the request.
8. The applicant did not respond to SLA's notice of intention to refuse to deal with the access application.
9. On 7 December 2018, SLA wrote to the applicant advising of its decision to refuse to deal with the access application under s 43(1)(a) of the FOI Act. This was because it considered the work involved in dealing with the application would, if carried out, be an unreasonable and substantial diversion of the agency's resources.
10. On 14 December 2019, the applicant sought Ombudsman review of SLA's decision under s 73 of the FOI Act.

11. On 7 June 2019, I provided my preliminary views about SLAs decision to the parties in my draft consideration. The parties did not provide any submissions in relation to my draft consideration.

12. As a preliminary issue I have considered whether appropriate consultation was undertaken with the applicant as required by s 46 of the FOI Act.

13. Before refusing a request because dealing with the application would require an unreasonable and substantial diversion of the respondent's resources, SLA was required under s 46 to:

    - notify the applicant of its intention to refuse to deal with the application, and
    - give the applicant the opportunity to consult with the agency and negotiate and refine the scope of the request.

14. I am satisfied that SLA gave the applicant reasonable written notice of their intention to refuse to deal with his application, and the opportunity to refine the scope of the access application, in its letters of 11 October 2018 and 7 December 2018.

15. Therefore, the only issue to be determined is whether dealing with the applicant's access application would require an unreasonable and substantial diversion of SLAs resources.

16. In making my decision, I have had regard to:

    - the applicant's application for review
    - SLAs decision
    - the FOI Act, in particular ss 35, 38, 43, 44 and 46
    - relevant case law, in particular *Re SRB and SRC and Department of Health, Housing, Local Government and Community Services*,[1] *Cianfrano and Premier's Department*[2] and *Colefax and Department of Education and Communities (NSW)*[3], and
    - SLAs submissions to this Ombudsman review.

Relevant law

17. 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.

[1] (1994) 33 ALD 171 (*Re SRB and SRC*).
[2] [2006] NSWADT 137 (*Cianfrano*).
[3] [2013] NSWADT 130 (*Colefax*).

18. Section 35 sets out how an access application can be decided. Under s 35(1)(d), the respondent (in this case, SLA) may refuse to deal with an access application for the reasons set out in s 43 of the FOI Act.
19. Section 38 sets out when third party consultation must be undertaken and who is a relevant third party.
20. Section 43(1)(a) provides the respondent may refuse to deal with an access application if dealing with the application would require an unreasonable and substantial diversion of resources.
21. Section 44 sets out what is meant by 'unreasonable and substantial diversion of resources'. This provision only applies if the resources required to identify, locate, collate and examine information (including obtaining the views of relevant third parties) would substantially inhibit the ability of the respondent to exercise its functions. In addition, it must be demonstrated that the extent to which the public interest would be advanced, would not justify the use of these resources.

The contentions of the parties

22. In his application for Ombudsman review, the applicant made the following contentions:

    - He disagrees that SLA would need to undertake significant third party consultation. The applicant argues that, to his knowledge, SLA board and executives have declared only 29 potential conflicts of interest since SLA was created.
    - He further argues that similar information has been released under FOI and not refused due to third party consultation. The applicant gave the example of a gift register that included more than 80 gift recipients and providers.
    - SLA did not apply the public interest test, and public interest factors favouring disclosure, in particular Schedule 2, s 2.1 (a) (i), (ii), (iii), (iv), (v), (vi), (vii), (viii).
    - Releasing the information in full would accord with the objects of the FOI Act, in particular those in ss 6(c) and (d).

23. In its submissions to this Ombudsman review, SLA provided more detailed reasons supporting its decision to refuse to deal with the access application on the grounds that doing so would amount to an unreasonable and substantial diversion of its resources. According to SLA:

    - Of the 80 documents identified as within the scope of the access application, 54 contained information concerning third parties.

- There are 155 instances of third party information relating to private interest declarations, including shareholdings and intention to purchase private land, and personal relationships.
- It would need to consult with approximately 35 relevant third parties, and involve complex document preparation to ensure the 155 instances of third-party information is only provided to the relevant third party to which the information pertains. This would require time-consuming manual redactions on numerous copies of documents and drafting 29 consultation letters to each party seeking submissions.
- At least four staff would be required in the processing of the access application, including the FOI Officer, the peer reviewer, and the Assistant Director in the Information Management Team (which comprises six staff under a Director and the Information Officer).
- It estimates over 100 hours would be required to initiate the third party consultation process, plus additional time for consideration and processing of any objections raised by relevant third parties.

Considerations

24. In its submissions to this review, SLA provided an unredacted copy of the processing file, containing all of the information identified as within the scope of the access application.

25. I have examined the information and it comprises declarations of interest registers, Board meeting agendas and minutes, and disclosures from SLA Board members and executives.

Unreasonable and substantial diversion of the respondent's resources

26. Under s 44 of the FOI Act, dealing with an access application will only be considered an unreasonable and substantial diversion of resources where:

    - the resources required to identify, locate, collate and examine any information held by the respondent (including the resources required for third party consultation) would substantially inhibit the ability of the respondent to exercise its functions, and
    - the extent to which the public interest would be advanced by giving access to the information does not justify the use of the required resources.

<u>What resources were required to deal with the access application?</u>

27. SLA concluded it was the resources required for third party consultation under s 38 that would amount to an unreasonable and substantial diversion of its resources. It is necessary, therefore,

to consider what third party consultation was required of SLA and what resources would be involved in processing the applicant's access application.

28. Section 38(2) of the FOI Act requires that reasonable steps are taken to consult with relevant third parties before deciding to give access to information. Relevantly, under s 38:

    - a relevant third party is a person or entity, other than the Territory, to which the disclosure of information may reasonably be expected to be of concern.[4]
    - disclosing information may reasonably be expected to be of concern to a third party if the information concerns trade secrets, business affairs or research of the relevant third party.[5]
    - disclosing information may also be of concern to an individual if it is personal information, or if disclosure would or could reasonably be expected to affect a person's rights under the *Human Rights Act 2004*.[6]

29. From my examination, it is apparent the file contains information that 'may reasonably be expected to be of concern' to the SLA Board and Executive. The declarations of interest and the Board minutes contain detailed information about the SLA Board and Executive's personal relationships, and financial and property transactions of a personal and business nature.

30. Therefore, I accept that SLA was required to take reasonable steps to consult all of the SLA Board and Executive officers mentioned in the information sought, before deciding to give access to the information, pursuant to s 38(2) of the FOI Act.

31. SLA contends the third party consultation required in this matter would involve four of its six FOI staff, and at least 100 hours of work, not including the time required to deal with any objections raised by third parties. SLA justified these calculations by reference to the number of third parties identified (approximately 35), the number of instances of third party information (155), and the need to manually redact the information for 29 separate consultation letters.

32. I have considered the applicant's argument that third party consultation required for a gift register is similar to declarations of interest records and registers. I do not agree with the applicant's assessment. A declaration of interest register contains sensitive personal and commercially confidential information. In contrast, a gift register only records gifts received from other parties and does not contain commercially sensitive or personal information relating to the person making the disclosure.

[4] Section 38(1)(b) of the FOI Act.
[5] Section 38(3)(c) of the FOI Act.
[6] Section 38(3)(a) of the FOI Act.

33. I have also considered the applicant's attempt to refine the scope of his access application on 11 October 2018 to 'final documents'. I have concluded this did not have any practical effect on reducing the resources required for third party consultation. While it may have reduced the volume of documents, it did not reduce the complexity involved in compiling and redacting the information sought for third party consultation.

34. Having examined the information sought, I accept that it contains the quantity of third party information estimated by SLA. It is also apparent to me the third party information is closely intertwined with other third party information throughout the documents.

35. Therefore, in order to undertake the required consultation under s 38 and avoid providing third party information to the wrong person or entity during consultation, I also accept SLAs view that significant manual redactions would be required for 29 separate consultation letters.

36. The estimated time of at least 100 hours, is in my view, a reasonable calculation of the time needed to undertake the third party consultation particularly having regard to the manual redactions required for separate consultation letters. However, contrary to SLAs view, I consider the 100 hours would reasonably include the time taken to consider and address any objections from third parties.

Whether the resources required would substantially inhibit the ability of the agency to exercise its functions

37. It is necessary to have regard to what work is required to deal with the application in the context of the agency's functions and its resources.[7]

38. *Cianfrano and Premier's Department*[8] discusses the considerations that are relevant when making an assessment of what constitutes 'unreasonable and substantial diversion of resources'. The following non-exhaustive list of factors were identified:

- the terms of the request, especially if the request was expressed globally.
- the demonstrated importance of the documents.
- the size of the agency and extent of its resources.
- the agency's estimate of number of documents, pages, processing time and cost (salary of FOI staff).
- the reasonableness of the initial assessment and whether the applicant has been cooperative in refining the scope, and
- whether the processing time is more than 40 hours' work.[9]

[7] *Underwood* [2016] QICmr 48.
[8] [2006] NSWADT 137 (*Cianfrano*), confirmed in *Colefax and Department of Education and Communities (NSW))* [2013] NSWADT 130.
[9] *Cianfrano* at [62 – 63].

39. SLA concluded that dealing with the access application would impede its primary business functions, but did not provide any further detail. It did, however, detail how the third party consultation would impact its FOI processing team. Specifically, that undertaking third party consultation would involve four of its six FOI staff, and at least 100 hours of work. As noted above,[10] I accept SLAs estimate of the resources required to undertake third party consultation in this case.

40. The FOI Act must also be applied with a view to facilitating and promoting the disclosure of the maximum amount of government information, promptly, and at the lowest reasonable cost.[11] This, in my view, is particularly relevant when considering the amount of resourcing an agency should reasonably be expected to allocate to the processing of an FOI access application.

41. Having regard to this object of the FOI Act, it is appropriate that reasonable limits be imposed on the resources expended on processing individual FOI access applications, to ensure that access to government information provided by an agency can be dealt with promptly and at the lowest reasonable cost.

42. It is not necessary, in my view, that SLA demonstrate that processing an access application would require such resources so as to disrupt the delivery of its primary business functions, which includes conducting Government land sales and acquisitions, and undertaking civil works for Government estate developments.

43. The question is whether processing the access application would unreasonably divert the resources of the agency. It is not necessary to show the unreasonableness is overwhelming, rather, the considerations for and against the situation must be balanced to form a judgement on reasonableness based on the objective evidence.[12]

44. In the case of *Re SRB and SRC*, the AAT considered 'resources of the agency' did not mean the resources an agency might be able to obtain or even resources constituted by the filling of establishment positions. It also did not mean the resources of a large Department. Rather, the resources were those reasonably required to deal with an FOI application consistent with attendance to other priorities.[13]

[10] See paragraph [36].
[11] See s 6(f) of the FOI Act.
[12] See *Re SRB and SRC and Department of Health, Housing, Local Government and Community Services* (1994) 33 ALD 171 at [34].
[13] See *Re SRB and SRC and Department of Health, Housing, Local Government and Community Services* (1994) 33 ALD 171 at [29].

45. In the present case, I accept the time and human resources estimated are such that it would substantially impact on the SLAs ability to undertake its FOI responsibilities as an ACT Government agency, thereby unreasonably diverting its resources.

Whether the public interest in providing access justifies the resources required to deal with the access application

46. In its decision, SLA concluded "the public benefit in expending the resources necessary to undertake extensive third-party consultation, and assessment of third party responses, did not outweigh the detriment caused to the public by impeding the ability of the SLA to undertake its primary business functions".[14]

47. As discussed above, SLA did not detail how the agency's primary business function would be impeded by dealing with the applicant's access application. Nor did it specifically address what public interest, if any, would be advanced by giving access to the information.

48. The applicant argues that SLA should have considered the public interest in disclosing the information, as well as the objects of the FOI Act. In particular, that FOI Act is intended to:

    - enable the public to participate more effectively in government processes and to promote improved decision-making within government, and[15]
    - make the people and bodies that are responsible for governing the Territory more accountable to the public.[16]

49. I agree with the applicant these are relevant considerations, and I note they are relevant in dealing with any access application. However, as outlined above at paragraph [41], the FOI Act must also be applied with a view to facilitating and promoting the disclosure of the maximum amount of government information, promptly, and at the lowest reasonable cost.

50. I also agree with the applicant there are public interest factors favouring the disclosure of information. Although the applicant has not provided any detail in support of his submissions, I accept that disclosing possible conflicts of interest would contribute to greater transparency and accountability in the SLA Board and Executive's decision making. This, of course, must be balanced with the competing public interest in protecting individual's right to privacy and avoiding prejudice to the business affairs of third parties.

[14] SLAs notice of refusal to deal with the access application, dated 15 November 2019, discussed at paragraph [6] above.
[15] See s 6(c) of the FOI Act.
[16] See s 6(d) of the FOI Act.

51. Overall, based on the information before me in this review, I am not satisfied the relevant public interest factors in this case justify the significant resources required to undertake third party consultation, particularly given the impact processing would have on SLAs ability to deliver its FOI function.

52. For these reasons, I am satisfied the grounds upon which SLA refused to deal with the applicant's access application were reasonable. That is, I accept that in this case the resources required to undertake third party consultation would have amounted to an unreasonable and substantial diversion of resources.

Conclusion

53. I confirm SLAs decision to refuse to deal with the applicant's access application under s43(1)(a)on the grounds doing so would require an unreasonable and substantial diversion of its resources.

Louise MacLeod
Senior Assistant Ombudsman
19 June 2019