

***Google Australia Pty Ltd and Wing Aviation Pty Ltd and Environment,
Planning and Sustainable Development Directorate [2019] ACTOFOI 13
(25 July 2019)***

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

Application Number:	AFOI-RR/19/10008
Decision Reference:	[2019] ACTOFOI 13
Applicant:	Google Australia Pty Ltd and Wing Aviation Pty Ltd
Respondent:	Environment, Planning and Sustainable Development Directorate
Decision Date:	25 July 2019
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – third party review applicant – deciding access – whether disclosure of information is contrary to the public interest – trade secrets, business affairs or research of an agency or a person

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)(b) of the FOI Act, I vary the decision of the Environment, Planning and Sustainable Development Directorate (EPSDD) dated 25 February 2019, with respect to the information at issue in this review, being a Fauna Study Report and related email between the applicant and the ACT Government.
3. Consistent with the EPSDD's decision, I consider that partial access should be provided to the email, redacting the names and email addresses of Wing staff.

4. I also agree that partial access should be given to the Fauna Study Report, however, I consider that:
- the information in Section 4.3, including the map at Figure 4-1, relating to potential environmental risk areas is contrary to the public interest information and should be redacted
 - consistent with the EPSDD's decision, some of the information in Section 5.2 relating to the Fauna Study Report's recommendations is contrary to the public interest information and should be redacted.

Background of Ombudsman review

5. On 27 November 2018, an applicant (FOI applicant) applied to the EPSDD for access to: documents relevant to the actual or potential environmental impacts on wildlife and birdlife of the operation of drones for commercial purposes (including trials) within the ACT from 2016 to the present.
6. On 18 December 2018, the FOI applicant refined the scope of the information requested to: information in relation to: the actual or potential environmental impacts on wildlife and birdlife of the operation of drones for commercial purposes (including trials) within the ACT. Within the timeframe of 1 September 2017 to 12 December 2018. The documents [being sought] in relation to this matter are as follows:
- correspondence
 - details of any complaints received as they relate to the environmental impacts to wildlife and birdlife
 - final copies of reports or studies
 - internal presentations (presentation to EPSDD staff or presentations provided by EPSDD staff to other ACT Government staff).

Third party consultation

7. On 29 January 2019, the EPSDD undertook third party consultation with Google Australia Pty Ltd and Wing Aviation Pty Ltd (Wing) under s 38 of the FOI Act in relation to a Project Wing Fauna Study Report (Fauna Study Report)¹ and a related email between Wing and the EPSDD.² The email includes, as an attachment, two pages of the Fauna Study Report. For the purpose of this

¹ Identified as Ref No. 6 on the EPSDD's schedule of documents. Ref No. 6 comprises the Project Wing Fauna Study Report hereafter referred to as the 'Fauna Study Report'.

² Identified as Ref No. 5 and 7 on the EPSDD's schedule of documents. 1. Ref No. 5 constitutes an email referring to an attachment. Ref No. 7 is the email attachment, which consists of colour copies of a map of Project Wing's test site from page 3, and a map outlining environmental risk areas from page 21.

review I have dealt with the attachment as a part of the Fauna Study Report and the email as a standalone document.

8. Wing operates a commercial drone delivery service in the ACT on a trial basis, which commenced in 2017 under the name 'Project Wing'. Project Wing delivers items such as medication, takeaway food and other small goods by drone from its operational headquarters in the Gungahlin area.
9. On 18 February 2019, Wing objected to the disclosure of the Fauna Study Report and email on the basis that it would:
 - prejudice its trade secrets, business affairs or research (Schedule 2, s 2.2(a)(xi))
 - prejudice the economy of the Territory (Schedule 2, s 2.2(a)(viii))
 - prejudice the protection of their Wing's staff right to privacy (Schedule 2, s 2.2(a)(ii))

Decision on access application

10. On 25 February 2019, the EPSDD advised the FOI applicant that it had identified 30 documents within the scope of the access application. The EPSDD decided to give the FOI applicant access to 27 documents in full and three documents in part. This included giving partial access to the Fauna Study Report, only redacting the report's recommendations on the grounds of prejudice to Wing's trade secrets, business affairs and research. The decision also gave partial access to the email, redacting the names and email addresses of Wing staff.
11. On 3 April 2019, Wing sought Ombudsman review under s 73 of the FOI Act of the EPSDD decision as it relates to release of the Fauna Study Report and the email (the information at issue).

Application for Ombudsman review

12. Wing objects to disclosure of the Fauna Study Report and email on the basis disclosure would prejudice its business affairs, the economy of the Territory, and the flow of information to regulatory agencies. Wing also argues that some of the information in the Fauna Study Report is not within the scope of the applicant's access application.
13. On 28 June 2019, I provided my preliminary views about the EPSDD decision to the parties in my draft consideration.
14. The applicant and EPSDD did not provide any submissions in relation to my draft consideration.

Scope of Ombudsman review

15. The issues to be decided in this Ombudsman review are whether:
- all the information at issue is within the scope of the access application, and
 - giving the FOI applicant access to the information at issue would be contrary to the public interest, as Wing contends.
16. In making my decision, I have had regard to:
- Wing's application for Ombudsman review, dated 3 April 2019
 - the EPSDD's decision, dated 25 February 2019
 - the FOI Act, in particular ss 7, 16, 17, 35, 50, 72, and Schedule 2
 - the respondent's FOI processing file relating to the access application
 - an unedited copy of the information at issue, and
 - relevant case law.

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

21. 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.
22. 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.
23. 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

24. During third party consultation, Wing argued the information at issue was, on balance, contrary to the public interest information because disclosure would:
 - not contribute to informed debate or inform the community of government decision making, as the Fauna Study Report is now outdated and does not provide an insight into the broader risk mitigation framework within which Wing operates
 - prejudice its trade secrets, business affairs and research by revealing sensitive commercial information that Wing has obtained in the Fauna Study Report at its own expense, and which relates to its future plans for expansion and the location of its operations,³ and
 - prejudice the economy of the Territory by revealing sensitive technology and business information to the detriment of Wing's business and its ability to grow the technology sector in the Territory.⁴
25. Wing also argued that some of the information in the Fauna Study Report is outside the scope of the applicant's access application because it comprises sensitive commercial and technology affairs of Wing, and personal details of Wing and ACT Government personnel.
26. The EPSDD decision did not address Wing's objections in any way, or in particular, explain why it had decided the Fauna Study Report's recommendations were the only information that could reasonably be expected to prejudice Wing's trade secrets, business affairs and research.

³ Schedule 2, s 2.2(xi) of the FOI Act.

⁴ Schedule 2, s 2.2(xi) of the FOI Act.

27. In its application for Ombudsman review, Wing reiterated its early objections and further argued that disclosing the information would prejudice the flow of information to regulatory agencies. Wing contends that disclosing the information at issue would deter it, and future investors, from disclosing their commercial activities to government or otherwise investing in innovative projects in the Territory.

Considerations

28. I have reviewed an unredacted copy of the information at issue. It comprises:
- A Fauna Study Report, commissioned by Wing and written by consulting firm NGH Environmental, assessing the possible environmental impacts of Project Wing's trial operations in Greenway, Canberra. The report summarises relevant environmental research and literature, identifies potential risk areas for threatened wildlife, and makes recommendations to Wing to address identified risks.
 - An email from Wing to the EPSDD attaching a colour copy of pages 3 and 21 of the Fauna Study Report. Page 3 of the report consists of a map of Project Wing's test site in Greenway, and page 21 is a map showing environmental risk areas in the trial area. As discussed above,⁵ for the purpose of this review, I have dealt with the attachment as a part of the Fauna Study Report and the email as a standalone document.

Whether all of the information at issue is within the scope of the applicant's access application

29. Wing contends that information in the Fauna Study Report concerning Wing's flight paths, the size and shape of its drones, risk mitigation strategies, future business expansion plans, and business research, are outside the scope of the access application.
30. I note the FOI applicant is seeking access to 'final reports and studies as they relate to the environmental impacts to wildlife and birdlife'.
31. From my examination, it is apparent the Fauna Study Report is a final report relating to the environmental impacts to birdlife. While I accept that some parts of the report do relate to Wing's flight paths, drones and business operations, it is clear they do so in the context of considering environmental impacts to surrounding birdlife. To accept Wing's argument would result in an unduly narrow, and in my view, incorrect characterisation of the information.

⁵ At paragraph [7].

32. Therefore, I consider the Fauna Study Report in its entirety to be within the scope of the applicant's access application. I will now consider whether the information at issue is contrary to the public interest information.

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

33. There is no suggestion from either Wing or the EPSDD that the information at issue contains contrary to the public interest information 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 of the FOI Act.

Public interest test

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

Irrelevant factors

36. I have noted the irrelevant factors outlined in s 17(2) of the FOI Act and I am satisfied that I have not considered any irrelevant factors in this review.

Factors favouring disclosure

37. Schedule 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.
38. It is not clear from the EPSDD's decision what factors favouring disclosure were considered relevant in relation to the information at issue.

39. Wing contends there are no factors favouring disclosure, and in particular, that disclosure does *not* contribute to:
- informed debate on important matters of public interest (Schedule 2, s 2.1(a)(ii)), or
 - informing the community of the government's operations ((Schedule 2, s 2.1(a)(iii)).
40. Wing says the information at issue relates to Project Wing's past trials which utilised a specific geographical area no longer used by Wing as well as obsolete drone designs. Therefore, according to Wing, the information is highly location-specific and would not inform debate on the company's current operations.
41. The Fauna Study Report relates to Project Wing's trial operation previously run out of Greenway. I note that Project Wing no longer operates in Greenway and its headquarters and operations have moved to the Gungahlin area.
42. I disagree with Wing that information relating to its previous trials would not contribute to informed debate on the use of drones in the ACT. Disclosing information about Wing's earlier trials could well be relevant to public debate in terms of the impact of its early operations on the environment and wildlife in the ACT at a point in time.
43. In this case the documents are about a project that was incomplete at the time they were created but it is not apparent to me that these are draft versions of documents. They appear to be final versions of audit reports, diagrams and emails. There were also legal obligations to provide these documents.
44. Schedule 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. Of those factors, and having regard to my views above, I consider the following to be relevant to this review:
- contribute to positive debate and informed debate on important issues or matters of public interest (Schedule 2, s 2.1(a)(ii))
 - 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)).
45. Additionally, I note the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of representative democracy.⁶ This concept is promoted through the objects of the FOI Act.⁷

⁶ See s 17 of the FOI Act.

⁷ See s 6(b) of the FOI Act.

Factors favouring nondisclosure

Trade secrets, business affairs or research of an agency or a person

46. The EPSDD has redacted the detailed recommendations on pages 22 and 23 of the Fauna Study Report on the grounds of possible prejudice to Wing's trade secrets, business affairs and research.
47. Wing submits the Fauna Study Report in its entirety should be refused on these grounds. It says the report discloses Project Wing's strategic business plans to expand into new geographical areas and move its operations to alternative locations. It argues that disclosing this information alludes to Project Wing's commercial viability in the ACT to the detriment of the company.
48. Wing also submits that particular information in the Fauna Study Report is prejudicial to its trade secrets, business affairs and research, specifically:
 - Any information referring to or alluding to the (redacted) recommendations mentioned elsewhere in the report.
 - All information discussing the 'measures to minimise the impacts to wildlife' at Section 5.2 of the report.
 - All information discussing 'potential risk areas' at Section 4.3 of the report. This includes a map, at page 21, which Wing argues is a visual representation of the report's recommendations.
49. Wing appears to have provided the Fauna Study Report to the EPSDD to peer review. The report is not publicly available, nor is it available for purchase by the public. Some of the information in the report is, however, already publically available. This includes:
 - information about Project Wing's risk parameters at pages 8 and 9 of the report, including a detailed drawing of Wing's drones, and the project's risk factors as they relate to animals in the area,⁸ and
 - a summary of the report's recommendations, included in the conclusion at page 27.⁹
50. In addition, Project Wing's move from Greenway to Gungahlin, in light of environmental and noise concerns, is public knowledge and has been widely reported by the media.¹⁰

⁸ See <https://www.techrepublic.com/article/project-wing-a-cheat-sheet/> accessed 3 June 2019.

⁹ This information was published on the EPSDD's Disclosure Log in relation to this FOI access application. See document titled 'Potential Impacts of Drones on Urban Wildlife_External', Ref No. 11 on the EPSDD's document schedule.

¹⁰ See <https://www.canberratimes.com.au/story/6009932/wings-delivery-drone-service-gets-the-green-light/> and <https://www.canberratimes.com.au/story/5995059/a-noisy-nuisance-drones-slammed-in-submissions-to-new-inquiry/> accessed 3 June 2019.

51. Having regard to the information that is already publically available, I do not consider the Fauna Study Report or the related email should be refused in its entirety.
52. I consider below whether it would, however, be appropriate to redact any parts of these documents on the basis they contain contrary to the public interest information.
53. Section 4.3 of the Fauna Study Report covers 'Potential Risk Areas' and clearly contains specific advice from the consultant concerning Wing's commercial operations, including proposed flight paths and use of technology, as they relate to risk mitigation strategies. I also note this part of the report has been prepared with information provided by Wing using its unmanned aircraft traffic management system (UTM).
54. In considering whether the information constitutes 'trade secrets', it must, in my view, contain information which give an agency or person an advantage over their competitors while the information remains generally unknown.¹¹ A trade secret may be prejudiced where the disclosure of the information in question will destroy or diminish the commercial value of the information.
55. Section 4.3 of the Fauna Study Report discusses the safest flight routes for Project Wing's deliveries identified using Wing's UTM. This information is not publicly available.¹² I am satisfied disclosing the information would reveal specific business options that Wing could potentially use to its competitive commercial advantage.
56. I note the map at page 21 of the Fauna Study Report (Figure 4-1) also forms part of the 'Potential Risk Areas' discussion in Section 4.3. It is apparent from my examination that the map visually depicts the commercially sensitive information about potential risk areas referred to in Section 4.3. I also agree with Wing that the map visually depicts the report's detailed recommendations already redacted by the EPSDD.
57. For the reasons outlined above, I consider disclosing the information in Section 4.3 on 'Potential Risk Areas', including the map at page 21, could reasonably be expected to prejudice Wing's trade secrets, business affairs and research and I afford this factor significant weight.
58. With regard to the email, as discussed above at [7], I have dealt with the email attachment as a part of the Fauna Study Report. In the email itself, the EPSDD has already redacted the personal details of Project Wing staff. I am satisfied the email does not contain any information that could otherwise prejudice Wing's trade secrets, business affairs or research.

¹¹ *Australian Broadcasting Corporation and Australian Fisheries Management Authority* [2016] AICmr 43 at [19].

¹² See: https://wing.com/intl/en_au/australia/

59. With regards to the remaining information, including that which discusses the ‘measures to minimise the impacts to wildlife’ in Section 5.2 of the Fauna Study Report, I am not persuaded it could reasonably be expected to prejudice Wing’s trade secrets, business affairs and research.

This is because the information:

- is already publically available, as discussed above at paragraphs [4949]-[50]
- does not specifically discuss the locations of any future Wing base locations or how Wing plans to expand, and/or
- is otherwise general in nature and does not contain specific details about Wing’s commercial affairs such as proposed flight paths or equipment.

Economy of the Territory

60. Wing submits the success of Project Wing in the ACT will add to the economy of the Territory directly and indirectly, and that disclosing the information at issue:

... has the potential to prejudice the economy of the Territory, by prejudicing the success of Project Wing ... both in absolute monetary terms, but also regarding the diversity of the economy and the potential loss of Wing’s influence in growing the technology sector.

61. Schedule 2, s 2.2(a)(viii) of the FOI Act relevantly provides that if, on balance, disclosure of information could reasonably be expected to prejudice the economy of the Territory, then it is a factor favouring nondisclosure.

62. The FOI Act does not define ‘economy’, however, I consider it clear that Schedule 2, s 2.2(a)(viii) of the FOI Act was intended to recognise that certain information should be kept confidential in order to carry out the Territory’s economic policy. This could include circumstances in which disclosure may prevent the Territory from obtaining commercial and investment advice in future without the concern of broader disclosure.¹³

63. In considering the Territory’s economic policy, I am of the view it is relevant to consider the guidance on economic indicators for the ACT as provided by ACT Treasury.¹⁴ They include economic growth, the labour market, prices and the housing market.

64. I accept the information at issue, in particular the Fauna Study Report, was provided by Wing to the ACT Government voluntarily. It is not apparent, however, that disclosing the report could reasonably be expected to prevent future commercial and investment advice flowing to the ACT Government from Wing or other investors.

¹³ *Northern Queensland Conservation Inc and Queensland Territory* [2016] QICmr 21 at [59], [61].

¹⁴ See: <https://apps.treasury.act.gov.au/snapshot>

65. Additionally, based on the information available to me, Wing has not sufficiently explained its purported influence on the growth of the Territory's technology sector or, more relevantly, how disclosing the information at issue could possibly impact the ACT Government's ability to carry out its economic policy.
66. I am not satisfied that Wing has discharged its onus under s 72 of the FOI to sufficiently explain how disclosure of the information could reasonably be expected to prejudice the economy of the Territory. Accordingly, I am not satisfied that Schedule 2, s 2.2(a)(viii) of the FOI Act is a relevant factor favouring nondisclosure in this case.

The flow of information to a regulatory agency

67. The Fauna Study Report contains recommendations from NGH Environmental about consulting with government agencies and relevant organisations about the impact of Project Wing's Greenway trial.
68. Wing submits that:
- By disclosing this information listing agencies to be consulted and recommended points for discussion, both Wing and future investors in the Territory may be deterred from disclosing their commercial activities to regulatory agencies such as those identified in the Fauna Study if there is a risk proprietary information will be released to the public.
69. From my examination it is apparent the organisations identified in the Fauna Study Report are not regulatory agencies for the purposes of the FOI Act. Even if those organisations were regulatory agencies I do not accept that investors would be uncooperative in providing information to regulators in future, particularly where mandatory compliance frameworks and the penalties apply.
70. I note the consultation with the organisations proposed in the Fauna Study Report would be in Wing's best interests and failure to do so would likely be to the detriment of Wing and its viability in the Territory.
71. For the reasons outlined above, I do not accept that disclosure of the information at issue could reasonably be expected to prejudice the flow of information to a regulator in future, therefore I do not consider this is a relevant public interest factor favouring nondisclosure in this case.

Balancing the factors

72. In relation to information concerning Section 4.3 of the Fauna Study Report concerning 'Potential Risk Areas', I consider that on balance, the public interest factors favouring nondisclosure outweigh the public interest factors favouring disclosure.

73. In relation to the remaining information at issue, I am satisfied that on balance, the public interest factors favouring disclosure outweigh those favouring nondisclosure.

Conclusion

74. The information in Section 4.3 of the Fauna Study Report concerning 'Potential Risk Areas' is, on balance, contrary to the public interest information for the purposes of s 16 of the FOI Act.

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

Louise Macleod
Senior Assistant Ombudsman
25 July 2019