

## Decisions and reasons of Acting Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10047
Applicant:	Owners Corporation of Units Plan No 3637
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Respondent reference:	CMTEDDFOI-2023-296
Date:	19 August 2024
Decision reference:	[2024] ACTOFOI 14
Catchwords:	<i>Freedom of Information Act 2016</i> – consulting applicant before refusing to deal with certain applications – unreasonable and substantial diversion of resources required to deal with application – extent to which public resources would be advanced

### Decision

1. For the purpose of s 82 of the *Freedom of Information Act 2016* (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. For the reasons set out below, the decision of Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) to refuse to deal with the application made on 19 October 2023 is confirmed under s 82 (2)(a) of the *Freedom of Information Act 2016* (**FOI Act**).
3. I have made this decision because I am satisfied that dealing with this application would require an unreasonable and substantial diversion of CMTEDD's resources.

## Background of Ombudsman review

4. The applicant applied for Ombudsman review of a decision made by the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) to refuse to deal with the application on the ground dealing with the application would require an unreasonable and substantial diversion of resources.
5. On 16 August 2023, MinterEllison, acting for the Owners Corporation of Units Plan No 3637 (**applicant**) applied to CMTEDD for:
  1. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:
    - a) the attached emergency rectification order in relation to the Property dated 1 April 2021 (**ERO**); and
    - b) the attached notice of intention to make a rectification order in relation to the Property dated 17 December 2021 (**NOI**);
  2. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decisions recorded in the contents of the attached email dated 10 April 2023, being the decisions:
    - a) not to issue a rectification order in relation to the Property; and
    - b) that the ERO and associated propping on the Property must remain in place until such time as the defects are rectified;
  3. all government information which the Construction Occupation Registrar's office received, created or considered, following the site visits at the Property on:
    - a) 4 February 2021;
    - b) 28 March 2022; and
    - c) 5 June 2023; and
  4. any other government information which the Construction Occupation Registrar's office received, created or considered on and from 17 December 2021 to date, in relation to the ERO or NOI.
6. On 18 August 2023, CMTEDD contacted the applicant to request evidence of identification and MinterEllison's authorisation because the application was for access to personal information.<sup>1</sup> The applicant responded stating as the

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<sup>1</sup> [Freedom of Information Act 2016](#) (**FOI Act**) s 30(3).

applicant is a corporation, the application did not involve personal information.

7. On 22 August 2023, CMTEDD wrote to the applicant to clarify if the scope of the application included personal information and request a reduction in scope.
8. On 25 August 2023, the applicant confirmed the scope of their application did not include the personal information of members of the Owners Corporation and advised the scope of their application is as follows:
  1. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:
    - b) the attached emergency rectification order in relation to the Property dated 1 April 2021 (**ERO**); and
    - c) the attached notice of intention to make a rectification order in relation to the Property dated 17 December 2021 (**NOI**);
  2. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decisions recorded in the contents of the attached email dated 10 April 2023, being the decisions:
    - a) not to issue a rectification order in relation to the Property; and
    - b) that the ERO and associated propping on the Property must remain in place until such time as the defects are rectified;
  3. all government information which the Construction Occupation Registrar's office received, created or considered, following the site visits at the Property on:
    - a) 4 February 2021;
    - b) 28 March 2022; and
    - c) 5 June 2023.
9. On 5 October 2023, CMTEDD wrote to the applicant notifying of their intention to refuse to deal with the application and advised the consultation period would end on 19 October 2023.
10. On 12 October 2023, the applicant advised they wished to consult with CMTEDD on the application including on the following proposed amended application:

- (a) the information was received, created or considered between 17 December 2021 and 23 March 2023 by:
  - (i) Richard Muir, the Deputy Construction Occupations Registrar who signed the notice of intention dated 17 December 2021 to make a rectification order in relation to the Property (**NOI**) (copy enclosed); and/or
  - (ii) the Constructions Occupations Registrar; and
- (b) the information relates to, or was relied upon in the making of, the decision not to make a rectification order in relation to the Property.

The amended scope would exclude government information which:

- a) relates only to the emergency rectification order dated 1 April 2021
  - b) is in the possession of the ACT Civil and Administrative Tribunal in relation to proceeding AT 37/2021;
  - c) is subject to legal professional privilege;
  - d) is publicly available (including legislation and case law);
  - e) is in draft form; and/or
  - f) is identical to the documents which accompanied the FOI Request (including the NOI).
11. On 18 October 2023, the applicant contacted CMTEDD to again advise they wished to consult with CMTEDD before a decision is made.
  12. On 19 October 2023, CMTEDD decided to refuse to deal with the application on the ground dealing with the application would require an unreasonable and substantial diversion of CMTEDD's resources.
  13. On 9 November 2023, the applicant applied for Ombudsman review of CMTEDD's decision.
  14. On 6 December 2023, CMTEDD provided relevant information to the Ombudsman and made additional submissions about why the proposed amended application at [10] would not remove the ground for refusal.
  15. On 16 February 2024, CMTEDD's additional submissions to the Ombudsman responding to the issues raised in the review application were shared with the applicant.

16. On 22 February 2024, the applicant provided further submissions to the Ombudsman. On 23 February 2024, these submissions were sent by the Ombudsman to CMTEDD in an attempt to assist with informal resolution.
17. On 5 March 2024, CMTEDD provided a response to the applicant's further submissions to the Ombudsman. As it was evident that an informal resolution would not be successful, the Ombudsman proceeded to form its preliminary view of the substantive issues.
18. On 12 July 2024, I, as Acting Senior Assistant Ombudsman, provided the parties with my preliminary view set out in a draft consideration. The draft consideration included all matters that I relied on in forming my view and both parties were given an opportunity to provide a response.
19. On 18 July 2024, CMTEDD accepted the draft consideration.
20. On 19 July 2024, the applicant provided additional submissions to the Ombudsman in response to the draft consideration.

### **Preliminary issue – Requirement to consult with the applicant**

21. In the review application, the applicant submitted CMTEDD did not comply with the obligation to consult with the applicant prior to deciding to refuse to deal with the application; and made the decision before the end of the consultation period.
22. Before refusing to deal with an access application, the respondent is required to notify the applicant of its intention to refuse to deal with the application; and give the applicant a reasonable opportunity to consult with the respondent and negotiate or refine the scope of the application.<sup>2</sup>

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<sup>2</sup> [FOI Act](#) s 46.

23. The consultation period is the period of 10 working days starting on the day after the day the notice was given under section 46(1)(a), or any longer period agreed between the parties before or after the end of the 10 working days.<sup>3</sup>
24. An agency must consider any submissions made or information provided by the applicant during the consultation period before deciding to refuse the request.<sup>4</sup>
25. In the notice of 5 October 2023, CMTEDD told the applicant of the intention to refuse to deal with the application on the ground the application would require an unreasonable and substantial diversion of resources and advised the period for consultation. I consider the notice issued by CMTEDD was sufficient.
26. In this matter, the consultation period began on 6 October 2023 – the day after the day the notice of intention to refuse was given to the applicant. As the parties did not agree to extend the consultation period, the final day of the consultation period was 19 October 2023 (i.e. the 10th working day).
27. Both parties acknowledge there was contact between CMTEDD and the applicant prior to the decision being made on 19 October 2023, specifically the applicant’s letter of 12 October 2023 and a phone call on 18 October 2023.
28. However, CMTEDD did not respond in writing to the applicant’s proposed amended application of 12 October 2023, during the consultation period and the applicant did not submit an amended application at that time.
29. The applicant submits that had consultation between the applicant and respondent occurred, the applicant would have been able to ascertain relevant information, such as the volume of request and hours of work

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<sup>3</sup> [FOI Act s 46\(4\)](#).

<sup>4</sup> [Explanatory Statement, Freedom of Information Bill 2016](#).

required to review government information against the proposed amended application. Neither of these were provided to the applicant before a decision was made.

30. I accept giving the applicant a reasonable opportunity to consult with the respondent would generally involve communication between the parties about the ground for refusal, and how an applicant could make an amended application that would remove the ground for refusal.
31. I consider further consultation may have benefitted the applicant, and CMTEDD could have proposed an extension of the consultation period for the purpose of responding to the applicant's letter of 12 October 2023.
32. Where it was apparent the proposed amended application would not have removed the ground for refusal, CMTEDD should have considered if any further information could be provided to the applicant to assist them to make an amended application.<sup>5</sup>
33. I agree CMTEDD did not engage with the applicant in writing about the proposed amended application and concluded the consultation period on the 10th working day. I note the applicant provided additional information during the consultation period, which was considered by CMTEDD in making the decision.
34. For the purpose of this review, the Ombudsman has facilitated consultation between the parties on the ground of refusal by sharing the additional submissions of both parties with each other.

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<sup>5</sup> [\*Justin Warren and Department of Human Services \(Freedom of information\) \[2019\] AICmr 22\*](#), [40].

35. The applicant maintains they have not submitted an amended application but sought to clarify the scope of their application. CMTEDD maintains in any event, the proposed revised scope would not remove the ground for refusal.
36. It is my view that section 46 requirements were not properly complied with by CMTEDD and their consultation with the applicant was insufficient.
37. In their response of 19 July 2024 to my draft consideration, the applicant submitted there was no evidentiary basis for my preliminary view that even if CMTEDD had consulted the applicant on the potential revised scope, this would not have changed CMTEDD's refusal to deal with the application. The applicant submitted consultation would have allowed for an understanding of documents sought which would not have resulted in a refusal to deal with the application.
38. As part of an attempt of informal resolution, the Ombudsman facilitated a consultation process between the applicant and CMTEDD. Submissions received as part of this Ombudsman review were shared between parties and the parties' positions have not changed. I therefore confirm my view that even if CMTEDD had properly complied with the requirements of section 46, it is unlikely to have changed CMTEDD's refusal to deal with the appl
39. As such, the remainder of this review has focused on the substance of the issues.

### **Scope of Ombudsman review**

40. The key issue to be decided in this Ombudsman review is whether dealing with the application would involve an unreasonable and substantial diversion of resources.
41. In making my decision, I have had regard to:
  - the applicant's access application and review application



- the respondent's decision of 19 October 2023
- submissions made by the applicant and respondent in the course of this review
- the FOI Act, in particular ss 6, 7, 35, 38, 43, 44 and 46
- the Freedom of Information Guidelines made under s 66 of the FOI Act, and
- relevant case law including:
  - [\*Justin Warren and Department of Human Services \(Freedom of information\)\* \[2019\] AICmr 22](#)
  - [\*Daniel Burdon and Suburban Land Agency\* \[2019\] ACTOFOI 12](#)
  - [\*Cainfrano v Director General, Premier's Department\* \[2006\] NSWADI 137](#)
  - [\*Langer and Telstra Corporation Ltd\* \[2002\] AATA 341](#)
  - [\*Elizabeth Lee MLA and Chief Minister, Treasury and Economic Development Directorate\* \[2023\] ACTOFOI 12](#)

## **Relevant law**

42. 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.
43. A respondent may decide an access application by refusing to deal with an access application wholly or in part if dealing with the application would require an unreasonable and substantial diversion of the respondent's resources (ss 35(1)(d), 43(1)(a) and 44 of the FOI Act).
44. Section 44 of the FOI Act provides:
- ... dealing with an access application would require an unreasonable and substantial diversion of the respondent's resources only if:

- a) the resources required to identify, locate, collate and examine any information held by the respondent, including the resources required in obtaining the views of relevant third parties under section 38, would substantially inhibit the ability of the respondent to exercise its functions; and
- b) 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.

45. Where a respondent considers some or all of the information applied for is not contrary to the public interest information, but disclosure may reasonably be expected to be of concern to a person or another entity, the respondent is required to take reasonable steps to consult the relevant third party under s 38 of the FOI Act.

### **The submissions of the parties**

46. In the decision notice, CMTEDD estimated dealing with the application would require the examination of over 200 documents (some between 100–300 pages each), extensive third-party consultation with at least 8 third parties (excluding unit owners) and involve more than 40 hours of processing time.
47. CMTEDD noted while the applicant had identified a list of information which is irrelevant to the scope of the application (see [10]), the resources required to deal with the application were not reduced because additional work would be required to cross reference and remove the irrelevant material.
48. CMTEDD identified the information requested contains the names of individuals with complaint information, details related to the emergency rectification orders, circumstances relevant to the non-compliance and information which is commercially sensitive.
49. CMTEDD has submitted the information requested is likely to also be of concern to individual property owners where third-party consultation would be required, as the applicant had not provided evidence of authority to act for these individuals, or consent to receive their personal information.

50. CMTEDD explained the extent to which the public interest would be advanced did not justify the use of the resources required to deal with the application as this information is likely to be determined to be contrary to the public interest information, or already available to the applicant.
51. In their Ombudsman review application, the applicant said CMTEDD did not explain how the diversion of the estimated resources would substantially inhibit the ability of CMTEDD to exercise its functions; and did not appropriately consider how the public interest might be advanced by release of the requested information.
52. The applicant submitted as consultation did not occur, the estimates arrived at by CMTEDD did not accurately reflect what resources would be required to deal with the application to provide relevant information in scope.
53. For example, the applicant has submitted the information which is responsive to the application must have been received, created, or considered either by the Construction Occupations Registrar or the Deputy in the specified period; and secondly the information relates to, or was relied upon in, making the decision not to make a rectification order.
54. The applicant submits CMTEDD did not take into account the second limb of the clarified scope and for this reason the estimate of resources is greater than what is actually required.
55. The applicant also submitted third party concerns made by the respondent are not justified as personal information was excluded from the scope of their application.
56. These submissions are discussed in more detail below.

## Consideration

### ***Resources required to deal with the application (section 44(1)(a))***

57. CMTEDD decided the resources required to identify, locate, collate, and examine any information held by CMTEDD (including third party consultation) would substantially inhibit the ability of CMTEDD to exercise its functions.
58. The option to decide not to deal with an access application because it would require an unreasonable and substantial diversion of resources seeks to ensure the capacity of respondents to discharge their normal functions is not undermined by processing unreasonably burdensome access applications.
59. There is no set level of information and processing time that should be considered to result in an unreasonable and substantial diversion of resources—the assessment must be made on a case-by-case basis by the decision-maker.
60. The former Senior Assistant Ombudsman, in *Daniel Burdon and Suburban Land Agency*,<sup>6</sup> considered a non-exhaustive list of factors relevant when making an assessment of what constitutes an unreasonable and substantial diversion of resources:
- the terms of the request, especially if the request was expressed globally
  - the demonstrated importance of the documents
  - the size of the respondent and extent of its resources
  - the respondent's estimate of number of documents, pages, processing time and cost

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<sup>6</sup> [Daniel Burdon and Suburban Land Agency \[2019\] ACTOFOI 12](#) at [38] (**Burdon**) citing [Cainfrano v Director General, Premier's Department \[2006\] NSWADT 137](#) at [62]-[63].

- 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.
61. The former Senior Assistant Ombudsman found it was not necessary that respondents demonstrate that processing an access application would require such resources so as to disrupt the delivery of its primary business functions; rather, the question is whether processing the access application would unreasonably and substantially divert the resources of the respondent.<sup>7</sup>
62. The weight of opinion expressed by the Administrative Appeals Tribunal is that a diversion of an agency's resources will be 'substantial' if the diversion can be described as being 'real or of substance' rather than 'large'. This view was expressed by Deputy President Forgie in *Langer and Telstra Corporation Ltd* [2002] AATA 341 and most recently adopted and applied by Deputy President Boyle in *Cambridge; Chief Executive Officer, Services Australia and (Freedom of Information)* [2021] AAT 1142.
63. I accept the terms of the request used by the applicant captures a broad range of information concerning the decision not to make a rectification order in relation to a particular property.
64. For example, CMTEDD has identified the scope of information sought captures information about building approvals, development applications, defects register, occupancy certificates and review of building plans in relation to the property.
65. In response to the draft consideration, the applicant submitted CMTEDD's estimates of the resources required to deal with the application did not consider the fact the volume of information to be assessed would be reduced

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<sup>7</sup> [Burdon](#) at [42].

by the exclusion of information is irrelevant to the scope of the application, namely elements covered by the 'second limb' of the application.

66. While I accept the applicant attempted to narrow the scope of their request by listing categories of irrelevant information that could be excluded, I consider that it would still require examination of all information which was received, created, or considered by the decision-makers within the specified period to locate information in scope and exclude irrelevant information. As such, it would not reduce the resources needed to consider the request.
67. For example, it would not be possible for CMTEDD to identify information which relates only to the emergency rectification order dated 1 April 2021 or in the possession of the ACT Civil and Administrative Tribunal (**ACAT**) without examining the contents of those records or cross-referencing.
68. During the course of the review CMTEDD provided an updated estimate of the volume of information (from its earlier assessment of over 200 documents with some between 100–300 pages). The new assessment was that 309 documents comprising 2,420 pages of material would need to be examined (excluding development applications; and documents covered by legal professional privilege or before the Administrative and Civil Appeals Tribunal).
69. I note that the applicant has requested particulars of the documents CMTEDD estimated it would need to be assessed. However, CMTEDD requested the schedule compiled for the purpose of calculating file size and estimating the resources required to decide the application not be shared with any other party, noting the information included third party personal information. For this reason, the schedule has not been provided to the applicant.

70. CMTEDD estimated they would need to consult at least 8 third parties on 2420 pages of information (potentially involving 19360 pages to send the binder of documents to each third party) taking approximately 3226 hours. CMTEDD noted that on further review potentially 62 third parties may need to be consulted (individual owners of 56 units, one additional property owner, three Ministers, and agents of the Owner's Corporation, and a builder).
71. I acknowledge the applicant's position that the individual unit owners are members of the Owner's Corporation who is the applicant; and the applicant has not sought personal information for the purpose of their application.
72. Although the applicant had advised that personal information could be redacted, this does not necessarily negate the need to consult with third parties who are not the unit owners.
73. While I consider there could be ways for CMTEDD to more effectively target the consultation, I nonetheless agree that extensive third-party consultation would be required with at least 7 third parties, as release of information about the actions of the regulator concerns their business affairs (i.e. as these third parties operate within the construction / property industry).
74. CMTEDD processed the most access applications across the ACT directorates in the last financial year.<sup>8</sup> On average, around 30 active applications are managed between 5 staff within the CMTEDD's FOI team. I note that while CMTEDD is not a small directorate in terms of staff, it has many disparate functions.
75. My view is the time and human resources estimated to deal with this application are of such substance it would have a real impact on the ability of

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<sup>8</sup> [A report on the operation of the Freedom of Information Act 2016 for 2022-23, ACT Ombudsman, page 8.](#)

CMTEDD to effectively process FOI applications and exercise its other functions if these resources were diverted.

76. I believe the volume of work, time required to complete the application and size of the directorate to be a fair estimate of resources required to deal with this application.

77. Accordingly, I consider the diversion of the resources required to deal with the application would substantially inhibit the ability of CMTEDD to exercise its functions.

***The extent to which the public interest would be advanced (section 44(1)(b))***

78. CMTEDD decided the extent to which the public interest would be advanced by giving access to the requested information does not justify the use of the required resources.

79. CMTEDD identified two factors favouring non-disclosure under Schedule 2, being ss 2.2(a)(xi) (prejudice trade secrets, business affairs or research of an agency or person) and 2.2(a)(ii) (prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004*) for the purpose of assessing the extent to which the public interest would be advanced. I acknowledge the applicant's view that this assessment does not equate to a public interest test for the purpose of section 17.

80. As set out in the Explanatory Statement for the Freedom of Information Bill 2016:<sup>9</sup>

In considering whether the use of what might otherwise be an unreasonable level of resources is justified, the decision maker must assess the extent to which the public interest would be advanced 'in granting' the request. That is if the information were to be granted to the community to what degree would the public interest be advanced and is that proportionate to the level of public resources that would need to be invested in processing the request?

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<sup>9</sup> [Explanatory Statement, Freedom of Information Bill 2016.](#)



It must also be remembered that at this stage in the process where all the information has not been identified it is neither required nor possible to apply a full clause 17 analysis of the public interest. The question to be resolved is whether the potential advancement of the public interest in granting the information referred to in the request justifies the level of resources required to process the request.

81. The FOI Act must 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.<sup>10</sup> This is particularly relevant when considering the amount of resourcing a respondent should reasonably be expected to allocate to the processing of an access application.<sup>11</sup>
82. The information requested concerns a decision made by the Deputy Construction Occupations Registrar to not issue a rectification order. I note information about this decision was provided to the applicant by email dated 10 April 2023.
83. I accept the information sought concerns an ongoing dispute regarding rectification works, where the information relates to government action which affects a group of individuals.
84. While release of the information may provide greater insight into the decision-making process, there is no evidence before me that release of the information would otherwise advance the public interest.
85. The applicant submitted that the draft consideration gave insufficient weight to the advancement of the public interest as, in the applicant's view, releasing the information would further an understanding of whether the regulator has properly discharged its statutory duties and functions.
86. I concede that granting access to information may be used to further scrutinize the action or inaction of a regulator. Nonetheless, I note that

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<sup>10</sup> [FOI Act](#) s 6.

<sup>11</sup> [Elizabeth Lee MLA and Chief Minister, Treasury and Economic Development Directorate \[2023\] ACTOFOI 12](#) at [40].

information relevant to the decision was previously made available to the applicant. I am not satisfied there is sufficient evidence before me that release of the information at issue would reveal deficiencies in the conduct of the regulator.

87. I am not persuaded the potential extent to which the public interest would be advanced in giving access to the requested information justifies the use of the required resources.

### **Conclusion**

88. I am satisfied that CMTEDD's dealing of this application would substantially divert their resources under s 44(1)(a) and find the extent to which public interest would be advanced under s 44(1)(b) of the FOI Act is minimal and does not justify the use of resources.

89. For the reasons set out above in this decision, I confirm CMTEDD's decision of 19 October 2023.

**Georgia Ramsay**

**Acting Senior Assistant Ombudsman**

**19 August 2024**