

Decision and reasons of ACT Ombudsman

Application number:	AFOI-RR/24/80003
Applicant:	Jo Clay MLA
Respondent:	City Renewal Authority
Respondent reference:	24/036508
Date:	17 December 2024
Decision reference:	[2024] ACTOFOI 21
Catchwords:	<i>Freedom of Information Act 2016</i> – deciding access – whether disclosure of information is contrary to the public interest – promote open discussion of public affairs and enhance the government’s accountability – contribute to positive and informed debate on important issues or matters of public interest – prejudice a deliberative process of government.

Decision

1. The applicant applied for Ombudsman review of a decision made by City Renewal Authority (**CRA**) to refuse access to correspondence about housing requirements for a draft deed of sale of land in the City Renewal Precinct.
2. Under s 82(2)(c) of the *Freedom of Information Act 2016* (**FOI Act**), my decision is to **set aside** the decision made by CRA. I make a **substitute** decision that the information is not contrary to the public interest information and should be released to the applicant.

Background to Ombudsman review

3. On 24 March 2024, the applicant applied to the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) for access to:

The City Renewal Authority is in the process of selling Section 121 City for development.

The City Renewal Authority advises that in August 2022 the Authority's Project Director sought advice from Housing ACT about the public housing dwellings that had been identified for Section 121 City.

The City Renewal Authority also advises that in March 2023 the Project Director sought input from the Office of Coordinator- General for Housing into the specific affordable housing requirements for Section 121 City.

Under the FOI Act 2016 I would like to request access to the following documents:

- Documents, including emails, records of phone conversations between the Project Director and Housing ACT on public housing dwellings in Section 121 City and any emails, briefs between the Project Director and other officers within the City Renewal Authority about the advice provided by Housing ACT.
- Documents, including emails, records of phone conversations between the Project Director and the Office of Coordinator- General for Housing on affordable dwellings in Section 121 City and any emails, briefs between the Project Director and other officers within the City Renewal Authority about the advice provided by the Office of Coordinator- General for Housing.

4. On 4 April 2024, the access application was transferred to CRA under s 57 of the FOI Act. CRA is responsible for delivering urban renewal of central Canberra.
5. On 17 May 2024, CRA decided to give full access to one document, partial access to one document (with only a staff mobile number deleted), and to refuse access to one document (3 documents total).
6. On 14 June 2024, the applicant applied for Ombudsman review of CRA's decision.
7. On 18 June 2024, my Office sought relevant information from CRA for the purpose of the review.

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8. On 27 June 2024, my Office contacted CRA to determine if my Office could assist the parties to resolve the review matter informally.
9. On 26 August 2024, CRA provided additional submissions in support of the decision to refuse access to the draft deed email. At this time, my Office ceased informal resolution activities.
10. On 4 November 2024, I provided a draft consideration to the parties outlining my preliminary view and giving them a final opportunity to make submissions prior to making a final decision.
11. On 5 November 2024, the applicant accepted my preliminary view.
12. On 11 November 2024, CRA accepted the draft consideration. Neither party provided further submissions.

Information at issue

13. The information at issue in this Ombudsman review is one document to which CRA refused access (**draft deed email**).¹ The draft deed email, which is identified as document 1, contains a proposed housing requirements clause for the draft deed of sale for Block 1 Section 121 City.²
14. Within both documents 1 and 3, CRA decided to refuse access to the mobile numbers of staff of the CRA and CMTEDD. The applicant does not contest this part of the original decision.
15. In my decision, I have had regard to:
 - the applicant's access application and review application

¹ Document 1. Document 2 was released in full. Document 3 was released in part (only mobile number of staff member deleted). See [EPSSD FOI Disclosure log - 24/036508, Schedule](#).

² Prior to being subdivided the site referred to in the application was known as City Section 63 South (see note 3 - [City Renewal Authority and Suburban Land Agency \(Housing Targets\) Determination 2024](#)).

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- the respondent's decision of 17 May 2024, FOI processing file and additional submissions of 26 August 2024
- the FOI Act, particularly ss 16, 17, 35 and Schedule 2
- the Freedom of Information Guidelines (FOI Guidelines) made under s 66 of the FOI Act
- relevant case law including:
 - ['CA' and Environment, Planning and Sustainable Development Directorate \[2023\] ACTOFOI 7 \(22 March 2023\)](#)
 - ['CF' and Icon Water \[2023\] ACTOFOI 14 \(28 July 2023\)](#)
 - [Re JE Waterford and Department of Treasury \(No 2\) \[1984\] AATA 67 \(14 March 1984\).](#)

Relevant law

16. 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.³
17. Section 35(1)(c) of the FOI Act provides 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.
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.

³ FOI Act s 35(1)(c).

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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. Schedule 2 of the FOI Act sets out a non-exhaustive list of public interest factors which must be considered, where relevant, when determining the public interest.
21. Section 72 of the FOI Act provides in an Ombudsman review, a person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

The submissions of the parties

22. In the decision notice, CRA said:

One document relevant to your application includes information regarding an ongoing deliberative process of an agency. I have considered how the public interest would be advanced by releasing this information in part or in whole. It is my view that the information if disclosed, could reasonably be expected to prejudice a deliberative process of government under schedule 2, 2.2(a)(xvi). On balance, and the information available to me, I am satisfied that the disclosure of this information is not in the public interest.

23. In submissions to this review, CRA explained:

Block 1 Section 121 City is on the Indicative Land Release Program...⁴The Authority released this site on 4 May 2023 for expressions of interest. The Authority is undertaking a two-stage process for this land sale. It is currently an active commercial sale. The package of information released for expressions of interest establishes the conditions for sale including permitted uses, design objectives and the Government's desired outcomes. The package includes a draft Deed (the final document after consultation within Government) which will formalise the conditions for sale.

Desired housing type and quantity is included. Respondents propose how they will achieve the desired outcomes for the block...until contracts are exchanged there is

⁴ The [Indicative Land Release Program](#) (ILRP) identifies ACT Government land which may be released over a 5 year cycle, for a range of uses. The ILRP is published each year.

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opportunity for the preferred respondent to not proceed. In the Authority's view, if different information (to that provided to them) about the potential uses for the site, housing types etc...were released it could cause confusion for the preferred respondent, change in revenue / conditions being negotiated and/or the failure of the sale...

24. In the Ombudsman review application, the applicant said:

This information is important in understanding the reasons that despite a legislated public and community housing target for this block, that Housing ACT refused these dwellings when offered by the CRA.

The decision to not proceed with public housing on this block which was legislated in 2019 was informed in some part by the Treasury advice received.

Given this decision has been made against legislated government targets in NI2019-571⁵ this information is important to allow public scrutiny of the ACT Government's legislated housing targets made under the City Renewal Authority and Suburban Land Agency Act 2017.

This information is also important in understanding the practical implementation complexities of the ACT Government's stated policies of salt and pepper public housing,⁶ particularly as this location had a legislated public housing target and the City suburb has low public housing as a share of housing.

Given recent scrutiny of Housing ACT's Growth and Renewal Program by the ACT Auditor-General⁷ and ongoing scrutiny of land deals within the ACT, it is important to understand why land releases which were legislated to contain public and community housing are able to be sold without these conditions. Particularly when a third entity (not CRA or ACT Housing) is influencing these decisions.

It is also clear that this is not the only instance whereby legislated public housing targets are not met for budgetary reasons and this guidance will inform public discussion and scrutiny of the funding of ACT Housing by the ACT Government, another example of budget affecting the uptake of public housing can be see [sic] in QON 1817.⁸

This information will also be important for scrutinising future projects nearby such as the planned West Basin redevelopment and in understanding how the salt and

⁵ [City Renewal Authority and Suburban Land Agency \(Housing Target\) Determination 2019 \(No 2\)*](#).

⁶ Community Services Directorate (**CSD**), Housing ACT Policy, Salt and Peppering (information released following a different an access application made to CSD, [FOI-HOU-23/25](#), see page 22-23).

⁷ [ACT Auditor-General's Performance Audit Report, Management of the Growing and Renewing Public Housing Program Report No. 3, 2024](#).

⁸ ACT Legislative Assembly, [Question on Notice – Housing \(No. 1817\)](#).

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pepper public housing approach will interact with this, given that there are no current stated assurances that this area will contain any public housing.⁹

It is also important to receive additional information regarding this decision as other avenues for scrutiny which have been pursued, including questions directly to the minister in Question Time received answers which did not address cost as this treasury information might.¹⁰ (Hansard, 5 June 2024).

Consideration

25. The key issue to be decided in this Ombudsman review is whether the draft deed email is contrary to the public interest information.

Public interest test

26. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:

- 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
- 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
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure
- decide whether, on balance, disclosure of the information would be contrary to the public interest
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

⁹ ACT Legislative Assembly, Select Committee on Estimates 2023–2024, [26 July 2023](#) and [20 November 2023](#).

¹⁰ ACT Legislative Assembly, Daily Hansard [5 June 2024](#).

Factors favouring disclosure

27. CRA identified 2 factors favouring disclosure of the draft deed email. For the reasons set out below, I do not consider any other factors favouring disclosure apply.

Promote open discussion of public affairs and enhance the government's accountability (Schedule 2, s 2.1(a)(i))

28. CRA did not identify in the decision notice how disclosure of the draft deed email would promote open discussion of public affairs or enhance the government's accountability. I consider housing availability is a matter of public affairs.

29. For certain developments in an urban renewal precinct the Minister must determine housing targets (a housing target determination) for a development for the minimum number of dwellings in the development for affordable, community and public housing.¹¹ The housing targets for section 63 (now known as Block 1 Section 121) were:¹²

- affordable housing - 60
- public housing - 5
- community housing - 5.

30. Disclosure of the draft deed email would reveal proposed housing requirements for the site which could promote open discussion about housing and enhance CRA's accountability of their function to buy and sell leases of land and meet affordable, community and public housing targets.¹³

¹¹ [City Renewal Authority and Suburban Land Agency Act 2017 \(ACT\)](#) (CRA and SLA Act) s 65.

¹² [City Renewal Authority and Suburban Land Agency \(Housing Target\) Determination 2019 \(No 2\)*](#). See also [City Renewal Authority and Suburban Land Agency \(Housing Targets\) Determination 2024*](#) (note 3).

¹³ CRA and SLA Act ss 9(1)(b), (h).

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31. I note a revised affordable housing requirement clause for the draft deed of sale was published by EPSDD within information released in the decision under review as open access information.¹⁴
32. I consider the draft deed email does not contain the reasons for the decision to amend the housing requirements or information about the rationale or reasons for the changes between the draft clauses, or feedback on the draft deed.
33. I attribute moderate weight to this factor as while disclosure would promote open discussion of housing availability and enhance the CRA's accountability release of the draft email would not reveal what informed the decision.

Contribute to positive and informed debate on important issues or matters of public interest (Schedule 2, s 2.1(a)(ii))

34. A reasonable expectation disclosure could contribute to positive and informed debate on important issues or matters of public interest favours disclosure under the FOI Act.
35. CRA did not expand on how release of the draft deed email would contribute to positive and informed debate on important issues or matters of public interest.
36. I consider disclosure of the draft deed email would inform the community about the incorporation of housing targets into the draft deed for the sale process. Release of information about the changes to the housing requirements in the draft deed could reasonably be expected to contribute to positive and informed debate on housing matters.

¹⁴ [EPSDD FOI Disclosure log - 24/036508, Documents](#) (document 2).

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37. As discussed above, I do not consider release of an earlier draft clause would reveal detail about the inclusion of housing affordability requirements because the email only contains proposed revisions to a draft clause and does not include information about the need for those changes.

38. I attribute moderate weight to this factor.

Factors favouring nondisclosure

39. In the decision notice, CRA identified 2 factors favouring nondisclosure of the draft deed email.

40. As discussed above, the applicant did not seek review of CRA's decision to refuse access to the mobile numbers of staff in documents 1 or 3. For this reason, one factor favouring nondisclosure is relevant in this review matter.

Prejudice a deliberative process of government (Schedule 2, s 2.2(xvi))

41. A factor favouring nondisclosure is a reasonable expectation disclosure of information could prejudice a deliberative process of government.¹⁵ In the decision, CRA identified this factor as relevant to the draft deed email because disclosure could prejudice the finalisation of the sale of Block 1 Section 121 City.

42. A deliberative process involves the weighing up or evaluation of arguments or considerations related to a process that is being undertaken within government to consider whether and how to make or implement a decision.¹⁶

43. CRA submitted the land sale is a two-stage process. The expression of interest (EOI) process for the sale of the site commenced 4 May 2023 and closed on

¹⁵ FOI Act Schedule 2, s 2.2(xvi).

¹⁶ [Re JE Waterford and Department of Treasury \(No 2\) \[1984\] AATA 67 \(14 March 1984\)](#) at [58].

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4 July 2023.¹⁷ While I accept the sale is ongoing, I do not agree that CRA is continuing to deliberate on the draft deed clauses.

44. In submissions to my office, CRA said disclosure could harm the finalisation of the sale process as the preferred respondent could decide not to proceed, become confused or cause changes in revenue / conditions being negotiated resulting in the sale not going ahead.
45. Importantly, when deciding whether disclosure of information would, on balance, be contrary to the public interest a factor which cannot be taken into account is that access to the information could result in confusion or unnecessary debate.¹⁸
46. I accept release of an earlier draft clause relating to housing affordability requirements would disclose a version of the clause which is different from the draft deed provided by CRA for the expression of interest process as part of the sale of the site.
47. I do not consider it is reasonably likely release of different draft information previously considered by government, which was rejected from the final draft deed, would cause a preferred respondent to act in a manner that would cause harm to the ability of CRA to finalise the sale.
48. Particularly, I do not accept CRA's position release of the earlier draft clause would prejudice a deliberative process in circumstances where the EOI process has concluded a later revised draft clause (described as such) is already publicly available.¹⁹

¹⁷ [CRA, Blog – Milestone land release to reshare City Centre.](#)

¹⁸ FOI Act s 17(2)(d).

¹⁹ [EPSDD FOI Disclosure log - 24/036508.](#)

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49. Even in circumstances where a further draft clause was not publicly available, I do not consider there is a reasonable basis to conclude release of the draft deed email could have any prejudicial effect on CRA's ability to objectively consider the proposals submitted and complete contracts for the sale.²⁰

50. I do not consider this factor applies to the draft deed email.

Balancing the factors

51. Having identified public interest factors favouring disclosure and factors favouring non-disclosure, I now must consider the public interest balancing test set out in s 17 of the FOI Act.

52. In this matter, I identified 2 public interest factors favouring disclosure and I attributed moderate weight to these factors.

53. I considered one public interest factor favouring nondisclosure and determined this factor did not apply to the draft deed email.

54. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and non-disclosure, with the higher quantity being considered in the public interest. The decision-maker's task is to consider the relative importance and weight of each factor identified. The weight given to a factor will depend on the effect disclosing the information has on the public interest.

55. The FOI Act has a pro-disclosure bias,²¹ and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side. Rather, the scales are 'laden in favour of disclosure'.²²

²⁰[CA' and Environment, Planning and Sustainable Development Directorate \[2023\] ACTOFOI 7 \(22 March 2023\) \[52\]-\[53\].](#)

²¹ FOI Act s 9.

²² [Explanatory Statement, Freedom of Information Bill 2016.](#)

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56. On balance, the public interest factors favouring disclosure outweigh the public interest in nondisclosure of the draft deed email.

Conclusion

57. For the reasons set out above I set aside the decision made by CRA under s 82(2)(c) that the draft deed email is, on balance, contrary to the public interest information.

58. I make a substitute decision to give access to the draft deed email.

Iain Anderson
ACT Ombudsman
17 December 2024