

**Decision and reasons of Senior Assistant Ombudsman**

Application number:	AFOI-RR/23/70002
Applicant:	Village 25 Pty Ltd
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Respondent reference:	CMTEDDFOI 2023-333
Date:	12 February 2025
Decision reference:	[2025] ACTOFOI 1
Catchwords:	<i>Freedom of Information Act 2016</i> – deciding access – searches – reasonable steps to identify all government information within the scope of the application – inform the community of the government’s operations – reveal the reason for a government decision and any background or contextual information that informed that decision – 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 – contribute to the protection of the environment – reveal environmental or health risks or measures relating to public health and safety – prejudice flow of information to the police or another law enforcement or regulatory agency – prejudice trade secrets, business affairs or research of an agency or persons

## 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. The applicant applied for Ombudsman review of the Chief Minister, Treasury and Economic Development Directorate's (**CMTEDD**) decision refusing access to part of the information sought on the grounds it is contrary to the public interest information.
3. For the reasons set out below, I have decided to **set aside** CMTEDD's decision under s 82(2)(c) that the information sought is contrary to the public interest information, and make a **substitute** decision to release the information at issue (excluding personal information).

## Background to Ombudsman review

4. On 3 July 2023, the applicant applied to the Environment, Planning and Sustainable Development Directorate (**EPSDD**) for information relating to Development Approval 201936510.<sup>1</sup>
5. On 18 September 2023 CMTEDD accepted from EPSDD a partial transfer of the access application in relation to:

... documents relating to the operation of an asphalt process plant called Capital Asphalt plant located at 5 Paspaley Street, Hume ACT 2620:

1. Any advice or documents submitted to the EPA not caught by the request above that led to its final support for the DA, including any independent review of the air quality modelling referred to at page 12 of the Development Approval.
2. Any application for an environmental authorisation under s49(1)(a) of the Environment Protection Act 1997 (**EP Act**) to the operation of the Plant by the

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<sup>1</sup> The decision EPSDD made on this application on 18 September 2023 (EPSDD's decision) is available on the [EPSDD Disclosure Log](#).

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- EPA, and documents submitted with such an application relating air emissions subsequent or connected to the Development Approval.
3. Documents evidencing the assessment of air quality issues as part of the application referred to in paragraph 7 [of the access application to EPSDD].
  4. Any notice of determination granting an environmental authorisation under s49(1)(a) of the EP Act to the operation of the Plant by the EPA following receipt of an application referred to in paragraph 7 [of the access application to EPSDD] (**Authorisation**).
  5. Any approved amendments to an environmental authorisation impacting upon or in any way altering conditions in the Authorisation addressing air quality and air emissions.
  6. Any environmental management plan (**EMP**) accepted by the EPA prior to the commissioning of the Plant and any approved variations to the EMP.
  7. Any reports or records of air quality/ air pollution/ odour complaints provided to the EPA under the Authorisation.
  8. Correspondence, if any, between the period 25 May 2020 to date, between the owner of the Plant and the EPA in respect of compliance or non-compliance with conditions of the Authorisation relating to air emissions, air pollution or odour and changes to conditions of the Authorisation dealing with air emissions, air pollution or odour.
  9. Copies of any prevention notices of prohibition orders issued since 25 May 2020 dealing with air emissions, air pollution and odour and documents evidencing compliance with any such notices.
6. On 20 November 2023, CMTEDD advised the applicant it had identified 10 documents within the scope of the access application. The documents identified were within scope of points 1-4, 6 and 8 of the application. CMTEDD notified the applicant it did not identify any information within scope of points 5, 7 and 9 of the access application.
  7. CMTEDD decided to grant partial access to 6 documents and refused access to 4 documents.
  8. On 15 December 2023, the applicant applied for Ombudsman review of CMTEDD's access decision.

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9. On 18 November 2024, I provided my preliminary view to the parties in a draft consideration.
10. On 11 December 2024, the applicant accepted the draft consideration.
11. On 7 February 2025, CMTEDD provided a response in respect of my preliminary view on the scope and searches, but did not provide any additional submissions.

### **Third party consultation**

12. Prior to making its decision, CMTEDD consulted the following third parties:
  - Southern Asphalt Services Pty Ltd (**Southern**), the operator of the asphalt plant in respect of which Development Approval 201936510 was granted, which is known by the registered business name Capital Asphalt
  - SLR Consulting Australia Pty Ltd (**SLR**), a firm engaged by Southern Asphalt Production Pty Ltd to perform emissions testing in connection with Development Approval 201936510, and
  - Ektimo Pty Ltd (**Ektimo**), a firm engaged by SLR on behalf of Southern to perform emission testing at Capital Asphalt.
13. Ektimo expressed no concern with the release of information but requested that names of staff be redacted.
14. Neither Southern or SLR provided a response to CMTEDD's consultation notice. CMTEDD took this to mean that these third parties did not contest the release of information.
15. CMTEDD has informed the third parties of this review, and none have applied to join this review.

**Preliminary issue – scope and searches**

16. Having reviewed unredacted copies of the documents identified by CMTEDD as being within the scope of the access application, I had concerns that some information within scope might have been inadvertently excluded.
17. Document 7 is an environmental management plan (**EMP**) prepared by SLR on behalf of Southern. The EMP was required to be provided to the EPA as a condition of [Environmental Authorisation No. 1247](#) (**Authorisation**). However, it is not clear how Document 7 came to be in the possession of CMTEDD, as it is not accompanied by a cover letter, email or similar, which one would ordinarily expect to see. For the purposes of this review, I would like to know how Document 7 came to be held by CMTEDD and whether it was accompanied by other information.
18. Document 8 consists of several email chains sent between 15 July 2021 and 7 August 2023 involving the Environment Protection Authority (**EPA**) and third parties regarding emissions testing. In submissions to this review, the applicant noted that the emails in Document 8 refer to 2 attachments that do not appear to have been included:
  - ‘photo of the ports on the stack’ attached to email dated 15 July 2021 on page 79, and
  - ‘results from the stack testing as per Cl. 18.1, 19.1 and 20.1’ attached to email dated 7 August 2023 on page 81.
19. CMTEDD initially advised Documents 9 and 10, identified as ‘Emission Testing Report January 2023’ and ‘Emission Testing Report December 2021’ (**reports**) are the emissions testing results referenced within Document 8 and were included within the scope of the access application.

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20. Even if this is correct, it does not obviate CMTEDD's obligation under s 34(1) of the FOI Act to take reasonable steps to identify all government information within the scope of the application. Moreover, under s 68 of the FOI Act, the Ombudsman, in undertaking this review, 'is entitled to full and free access at reasonable times to all relevant government information'.
21. Accordingly, in my draft consideration, I invited CMTEDD to conduct additional searches to locate, for example, a cover letter or email attaching Document 7; and locate complete copies of the emails comprising Document 8, including the attachments referred to within Document 8, or to otherwise provide additional submissions on this issue.
22. CMTEDD conducted additional searches as invited and advised that no additional information was identified.
23. In *'AF' and Community Services Directorate*<sup>2</sup> the Senior Assistant Ombudsman stated:

The FOI Act is silent on what constitutes 'reasonable steps'. The meaning of 'reasonable', in the context of searches for documents sought under FOI legislation, has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as judged to be appropriate or suitable to the circumstances or purpose.<sup>3</sup>
24. What amounts to reasonable steps may vary in different circumstances. It would, however, include a search of electronic records and a manual search of physical records, where applicable.<sup>4</sup>
25. In response to my invitation to conduct additional searches for information, CMTEDD advised that it had been given access to electronic records held by

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<sup>2</sup> [\[2018\] ACTOFOI 11 \(17 December 2018\)](#).

<sup>3</sup> *'AF' and Community Services Directorate* at [39], citing *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138 and [De Tarle and Australian Securities and Investments Commission \(Freedom of Information\) \[2015\] AATA 770](#).

<sup>4</sup> Clause 23 of the [Explanatory Statement to the Freedom of Information Bill 2016 \(ACT\)](#).

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Access Canberra and had reviewed those records.

26. I am satisfied that CMTEDD has taken reasonable steps to identify all government information within the scope of the access application, as it is required to do so under s 34(1) of the FOI Act.

### **Information at issue**

27. In its application for Ombudsman review, the applicant confirmed it does not seek review in relation to the redaction of personal information and provided a schedule of documents to which it seeks access.

28. I have carefully reviewed the information at issue to identify the personal information redacted by CMTEDD. I have identified 3 documents<sup>5</sup> that were released in part with only personal information redacted. These 3 documents are excluded from this review.

29. The redactions applied to personal information in the remaining documents are not subject to review.

30. In their application for review, the applicant has expressly identified 5 documents to which they request access.<sup>6</sup>

31. The information at issue in this Ombudsman review is the 4 documents CMTEDD decided to refuse access to in full (Documents 1, 7, 9 and 10) and the information within Documents 3 and 8 to which CMTEDD refused access in part (excluding personal information).

32. The documents relate to the development and approval, operation and environmental impact of the Capital Asphalt Plant Hume, run by Southern.

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<sup>5</sup> Documents 4-6 had only personal information redacted and were identified as such by CMTEDD on the schedule.

<sup>6</sup> The applicant seeks access to documents 1, 7, 9 and 10, and access to the information redacted in document 3.

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33. The information at issue includes:

- an air quality impact assessment (Document 1)
- an internal minute (Document 3)
- an environmental management plan (Document 7)
- email chains sent between 15 July 2021 and 7 August 2023 involving the EPA and third parties regarding emissions testing (Document 8), and
- emissions testing reports (Documents 9 and 10).

34. The key issue to be decided in this Ombudsman review is whether the information at issue is 'contrary to the public interest information' for the purposes of the FOI Act.

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

- the applicant's access application and review application
- the respondent's decision of 20 November 2023 and submission in response to my draft consideration
- the [FOI Act](#), in particular ss 7, 16, 35 and Schedule 2, s 2.2
- the respondent's FOI processing file relating to the access application
- the [Freedom of Information Guidelines](#) (**FOI Guidelines**) made under s 66 of the FOI Act,
- the [Environment Protection Act 1997](#) (**Environment Act**) and
- relevant case law, including:
  - ['AF' and Community Services Directorate \[2018\] ACTOFOI 11 \(17 December 2018\)](#)
  - [Village 25 Pty Ltd, Downer EDI Works Pty Ltd and Chief Minister, Treasury and Economic Development Directorate \[2024\] ACTOFOI 13 \(Village 25 No. 1\)](#).

### **Relevant law**

36. 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.<sup>7</sup>



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37. 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.
38. 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.
39. 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.
40. Section 38 of the FOI Act provides that reasonable steps must be taken to relevant third parties if disclosure of government information may reasonably be expected to be of concern to a relevant third party.
41. 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 contrary to the public interest information has been deleted.
42. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.

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<sup>7</sup> Section 35(1)(c) of the [FOI Act](#).

### The contentions of the parties

#### 43. CMTEDD's decision notice dated 20 November 2023 said:

The release of this information can reasonably be expected to provide some background and context into the administration and decision-making process relating to the operation of an asphalt processing plant, and the handling of complaints from the community.

##### Factors favouring nondisclosure in the public interest:

... Schedule 2 section 2.2(a)(xi) allows for government information to be withheld from release if disclosure of the information could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person. I note that the disclosure of a large quantity of the documents in scope, could potentially cause damage to the business' reputation and impact the competitive commercial activities of the business. These materials contain information about their business and internal processes, procedures, risk management plans, and responses to compliance activities. This is a serious issue and I weight this provision substantially.

The Act provides under Schedule 2 section 2.2 (ix) that information can be withheld if disclosure could prejudice the flow of information to a regulatory entity. Businesses working with Access Canberra have the right to expect that their business affairs will not be prejudiced by participating in regulatory activities in cooperation with a government agency. Businesses provide their information to government authorities and entities in good faith and if confidentiality is not maintained businesses may be prejudiced and be less willing to participate in future exercises. While a concern, I weight this provision moderately.

#### 44. In their application for Ombudsman review, the applicant stated:

... the agency has failed to give proper weight to the inherent pro-disclosure bias in the operation of the Act...

##### Failure to consider all public interest factors favouring disclosure

An agency... must identify any factor favouring disclosure that applies in relation to the information, including any factor mentioned in Schedule 2, section 2.1 (s 17(1)(a) of the FOI Act).

The Notice of Decision only identifies three factors favouring disclosure in the public interest. It does not refer to other relevant matters set out in Schedule 2 section 2.1(a) of the FOI Act that must be taken into account in favour of disclosure...

...had the additional public interest factors been taken into account, the public interest would outweigh the factors against disclosure and that items (ii), (x) and

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(xi) should have been given strong weight having regard to the types of documents that have not been disclosed...

Misapplication of public interest factors against disclosure

... The production of documents does not *"prejudice the flow of information to the police or another law enforcement or regulatory agency"*. The protection of 'flow of information' is generally in the context of preserving the identify [sic] of informants... Although the Environment Protection Agency (**EPA**) is clearly a regulatory agency, the Applicant is required... to provide the information to the agency on a regular basis. In this sense the material is not voluntarily submitted. Therefore, there would be no prejudice incurred and the flow of information would not be stifled as it is a mandatory requirement.

The terms 'trade secret' and 'business affairs' have been held by courts to have limited definitions and cannot be used to withhold information that do not fall within the meaning. The case law indicates that a trade secret is not merely something that is confidential to a business; it must also be an asset of, and usable in, a particular trade... Further, the meaning of *"business affairs"* refers to matters concerning the business undertakings of the person, which is to be carried on in an organised way for the purpose of obtaining profit or gain... 'Research' has interpreted [sic] in the same context as 'business affairs' and disclosure of the research *"must be reasonably be expected to have an unreasonable adverse effect"* on business affairs for it to be withheld...

... The Developmental Approval and Environmental Authorisation are public documents and the public cannot determine whether the conditions within the approval and authorisation have been complied with, or if it is achieving its intended purpose without access to the documents it is referring to...

45. These submissions are discussed in more detail below.

## **Consideration**

### ***Public interest test***

46. 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

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- 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, and
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

47. In addition, there is an initial step of ensuring that none of the irrelevant factors listed at s 17(2) of the FOI Act are considered.

***Irrelevant factors***

48. I have noted the irrelevant factors listed at s 17(2) of the FOI Act and I do not consider that any irrelevant factors arise in this Ombudsman review.

***Factors favouring disclosure***

49. In its original decision, CMTEDD identified 3 factors favouring disclosure and placed substantial weight on these factors. In their application for review, the applicant submitted an additional 6 factors favouring disclosure were also relevant.

***Inform the community of the government's operations (Schedule 2, s 2.1(a)(iii))***

50. CMTEDD identified that disclosure could reasonably be expected to inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community.

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51. I agree this factor is relevant. Release of the information at issue could reasonably be expected to inform the community of the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community, for example in relation to how EPA undertakes its functions as a regulatory agency. This would include the way in which EPA determines and monitors compliance with the Environment Act.
52. I attribute moderate weight to this factor, as I consider there is considerable interest in the government's accountability in respect of the regulation of environmental matters.

**Reveal the reason for a government decision and any background or contextual information that informed that decision (Schedule 2, s 2.1(a)(viii))**

53. CMTEDD identified as relevant a reasonable expectation disclosure of information could reveal the reason for a government decision and any background or contextual information that informed the decision favours disclosure under the FOI Act.
54. I accept that disclosure of the information at issue could provide some background or contextual information which could have informed any decisions made by the government in relation to the approval and oversight of the Capital Asphalt Plant Hume.
55. I consider release would promote this factor and I attribute moderate weight to this factor.
56. The applicant has additionally submitted, in relation to Document 3 (an internal minute relating to the grant of an environmental authorisation):

The Environmental Authorisation is a public document and therefore any review of it must be released to the public.

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The internal minute for grant of environmental authorisation provides an explanation for why the Environmental Authorisation was granted and what issues were taken into consideration when granting the authorisation. This section of the minute should not be redacted, it is in the public interest to know the issues relevant to the grant of an environmental authorisation to be transparent and properly understood by the public... This goes to ensuring both the proper working of government and understanding how those issues have been addressed and the protection of the environment.

As such this is relevant to public factors in favour of disclosure pursuant to Sch 2 s 2.1(a)(x) and (a)(xi) of the *Freedom of Information Act 2016*.

57. The applicant has submitted that a review of an Environmental Authorisation must be released to the public. Document 3, however, does not relate to a review of an Environmental Authorisation; rather, it is a minute recommending an application for an Environmental Authorisation be granted.
58. After deciding to grant an Environmental Authorisation under s 49 of the Environment Act, the EPA is required to notify the applicant and the public of its decision.
59. Section 50 of the Environment Act states:
- (3) The authority must also prepare a notice stating that the authorisation—
    - (a) has been granted; and
    - (b) is available to the public under section 19 (Public access to documents).
  - (4) The notice under subsection (3) is a notifiable instrument.
60. I have located online the [notifiable instrument](#) that states [Environmental Authorisation No. 1247 \(Authorisation\)](#) has been granted. I note the notifiable instrument provides that an electronic copy of the Authorisation is available for public inspection on the Access Canberra website.
61. I have located and reviewed the [Authorisation](#) publicly available online. I note the Authorisation was also released in part, with only personal information removed to the applicant. I have compared the information in the Authorisation to the information redacted in Document 3.

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62. I have identified there is information redacted in Document 3 that is already available to the applicant and publicly available in the Authorisation. For the sake of consistency, I am inclined to release the information redacted in Document 3 that is already available to the applicant and publicly available in the Authorisation.

**Contribute to the administration of justice generally, including procedural fairness (Schedule 2, s 2.1(a)(xiii))**

63. CMTEDD identified as relevant a reasonable expectation disclosure of information could contribute to the administration of justice generally, including procedural fairness, favours disclosure under the FOI Act.

64. CMTEDD did not expand on why it identified this factor as relevant, other than to note the release of the information could reasonably be expected to provide some background and context into the handling of complaints from the community.

65. I agree that affording procedural fairness is an important part of managing complaints. However, I am inclined to disagree this factor is relevant in this review. The information at issue does not include complaints made about the operation of the Capital Asphalt Plant Hume.

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

66. The applicant submitted that disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.

67. I agree this factor is relevant in this review to a limited extent.

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68. I consider my observations above at paragraph [51]-[53] are also relevant to this factor. I consider the approval and oversight of an operation such as the Capital Asphalt Plant Hume, is a matter of public interest, and disclosure could enhance the accountability of government in relation to this matter.

69. However, I note the information at issue relates to a single site, meaning that disclosure would promote this factor to a limited extent.

70. I attribute minor weight to this factor.

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

71. The applicant submitted that a relevant factor favouring disclosure is that disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of public interest.

72. I agree this factor is relevant in this review.

73. As I observed above at paragraphs [51]-[53], the approval and oversight of industrial operations is a matter of public interest.

74. The public in and around the ACT may be impacted by industrial operations and hold environmental concerns. Additionally, I agree with the statement by the Acting Senior Assistant Ombudsman in Village 25 Pty Ltd No 1 that the way in which the EPA detects, investigates and deals with issues of non-compliance is an important issue and a matter of public interest.<sup>8</sup>

75. Village 25 No. 1 dealt with a similar matter but can be distinguished from this review in that the information at issue in that review also included what the Acting Senior Assistant Ombudsman categorised as 'complaints response

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<sup>8</sup> [Village 25 Pty Ltd, Downer EDI Works Pty Ltd and Chief Minister, Treasury and Economic Development Directorate \[2024\] ACTOFOI 13 \(Village 25 No. 1\)](#).



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information'. The information at issue in this review does not include any complaints or complaints response information.

76. The release of the information at issue would contribute to positive and informed debate on these matters of public interest, but only regarding a single site, and would not address in any detail how the EPA detects, investigates and deals with issues of non-compliance.

77. I attribute moderate weight to this factor.

**Allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official (Schedule 2, s 2.1(a)(v))**

78. The applicant submitted that a relevant factor favouring disclosure is that disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official.

79. The Office's FOI Guidelines provide examples of where this factor may be relevant, including where disclosure would:

- reveal allegations received about an agency, or
- explain the results of an investigation into conduct breaches by an ACT public servant.

80. The applicant has not articulated why they consider this factor is relevant to the information at issue. I have carefully reviewed the information at issue and cannot identify possible deficiencies in the conduct or administration of an agency or public official. Rather, the information at issue relates to the development and approval, operation and environmental impact of the Capital Asphalt Plant Hume and includes information about the regulation of the Plant.

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81. I am inclined to disagree this factor is relevant; however, I welcome additional submissions from the applicant on this point.

**Reveal that the information was incorrect, out-of-date, misleading, gratuitous unfairly subjective or irrelevant (Schedule 2, s 2.1(a)(ix))**

82. The applicant submitted that a relevant factor favouring disclosure is that disclosure could reasonably be expected to reveal that the information was for the purposes of s 2.1(a)(ix) of Schedule 2:

- (A) incorrect, or
- (B) out-of-date, or
- (C) misleading, or
- (D) gratuitous, or
- (E) unfairly subjective, or
- (F) irrelevant.

83. For this factor to apply, there would need to be evidence that one or more of the above elements apply to the information sought.

84. The applicant has not articulated why they consider this factor applies to the information at issue. The information at issue relates to the development and approval, operation and environmental impact of the Capital Asphalt Plant Hume.

85. There is nothing within the information at issue that suggests the information sought is in some way incorrect, out-of-date, misleading, gratuitous, unfairly subjective or irrelevant.

86. I am inclined to disagree that this factor is relevant in this review.

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**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))**

87. The applicant submitted 2 similar factors favouring disclosure apply, stating that disclosure could reasonably be expected to:

- contribute to the protection of the environment, and
- reveal environmental or health risks or measures relating to public health and safety.

88. The applicant additionally submitted, in relation to Document 3:

The internal minute for grant of environmental authorisation provides an explanation for why the Environmental Authorisation was granted and what issues were taken into consideration when granting the authorisation. This section of the minute should not be redacted, it is in the public interest to know the issues relevant to the grant of an environmental authorisation to be transparent and properly understood by the public... This goes to... understanding how those issues have been addressed and the protection of the environment.

89. Given the similarity of these factors I will address them together.

90. I agree that these factors are relevant. Disclosure of the information at issue could share environmental management information for a particular area, that is, the area in which the Capital Asphalt Plant Hume is located, and explain the environmental risks associated with a particular activity - the operation of the Plant.

91. However, I note the information at issue relates to a single site, meaning that disclosure would promote these factors to a limited extent.

92. I afford each of these factors moderate weight.

***Factors favouring nondisclosure***

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93. CMTEDD identified 2 factors favouring nondisclosure relevant to this review, excluding the disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy under the Human Rights Act (Schedule 2, s 2.2(a)(ii) of the FOI Act). This factor is not being considered in this review as the applicant has agreed to exclude personal information from the scope of the review.

**Prejudice flow of information to the police or another law enforcement or regulatory agency (Schedule 2, s 2.2(a)(ix))**

94. CMTEDD identified in its decision that disclosure of the information at issue could reasonably be expected to prejudice the flow of information to the police or another law enforcement or regulatory agency.

95. In its decision notice to Southern, CMTEDD stated:

... I am of the view that the release of commercially sensitive information of this nature could prejudice the flow of information to a regulatory authority and has the potential to undermine the government's ability to obtain this type of information when undertaking regulatory activity in the future...

96. The Office's FOI Guidelines state this factor applies in situations where disclosure could reasonably be expected to discourage individuals from coming forward with relevant information and concerns, and/or negatively impact a 'free flow' of information to these agencies – either in relation to a particular case or generally.<sup>9</sup>

97. It appears to me that the information at issue is essentially information provided to the EPA by Southern in compliance with conditions imposed in relation to Development Approval 201936510 and the Authorisation.

I understand that if Southern did not comply with these conditions – that is, by providing information of this kind – then these instruments would not take

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<sup>9</sup> [FOI Guideline 4 Considering the public interest](#), [8.9].

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effect, or would cease to have effect.

98. In these circumstances, I do not accept that release of the information at issue would have a chilling effect on the willingness of entities such as Southern to provide information to the EPA as regulator, or otherwise prejudice the flow of information, especially information required as a condition of statutory approvals and authorisations.

99. I afford this factor no weight.

**Prejudice trade secrets, business affairs or research of an agency or persons  
(Schedule 2, s 2.2(a)(xi))**

100. CMTEDD identified in its decision that disclosure of the information at issue could reasonably be expected to prejudice the trade secrets, business affairs and research of an agency or person favours nondisclosure under the FOI Act, stating:

... the disclosure of a large quantity of the documents in scope, could potentially cause damage to the business' reputation and impact the competitive commercial activities of the business. These materials contain information about their business and internal processes, procedures, risk management plans, and responses to compliance activities. This is a serious issue...

101. In its decision notice to Southern, CMTEDD stated:

... some of the information contained within the released could potentially cause damage to [Southern's] reputation and impact on the competitive commercial activities of their business. These materials contain information about their business and internal processes, procedures, risk management plans and responses to compliance activities. Businesses working with Access Canberra also have the right to expect that their business affairs will not be prejudiced by participating in regulatory activities in cooperation with a government agency...

102. I am not persuaded that disclosure of the information at issue could reasonably be expected to prejudice the business affairs of Southern. The

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information provided by Southern was done so to comply with a regulatory framework, and to enable Southern to operate.

103. Southern did not participate in consultation with CMTEDD prior to the original decision being made and has not sought to become a party to this review. In the absence of any submissions from Southern, there is no information available to me that indicates the release of the information at issue could reasonably be expected to prejudice the trade secrets, business affairs and research of an agency or person.

104. I afford this factor no weight.

***Balancing the factors***

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

106. In this matter, I identified 6 public interest factors apply which favour disclosure of the information at issue, and I attribute moderate weight to 5 of these factors and minor weight to 1 factor.

107. I also identified 2 public interest factors that favour nondisclosure of the information at issue; however, I attribute nil weight to each of those factors.

108. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, 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 that disclosing the information has on the public interest.

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109. The FOI Act has a pro-disclosure bias,<sup>10</sup> 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'.<sup>11</sup>

110. In my view, the public interest factors favouring disclosure outweigh the public interest factors favouring nondisclosure of the information at issue.

### **Conclusion**

111. For the reasons set out above, CMTEDD's decision that the information at issue is contrary to the public interest information under s 82(2)(c) of the FOI Act is set aside.

112. I make a substitute decision to release the information at issue (excluding personal information).

**David Fintan**  
**Senior Assistant Ombudsman**  
**12 February 2025**

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<sup>10</sup> Section 17 of the [FOI Act](#).

<sup>11</sup> [Explanatory Statement, Freedom of Information Bill 2016](#).