

Geocon Pty Ltd and Transport Canberra and City Services Directorate **[2020] ACTOFOI 8 (13 March 2020)**

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

Application Number	AFOI-RR/19/10028
Decision Reference	[2020] ACTOFOI 8
Applicant	Geocon Pty Ltd
Respondent	Transport Canberra and City Services Directorate
Decision Date	13 March 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – deemed refusal decision – reasonable steps

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the ACT *Freedom of Information Act 2016* (FOI Act).
2. Under s 82(2)(a) of the ACT *Freedom of Information Act 2016* (FOI Act), I **confirm** the decision of Transport Canberra and City Services Directorate (**respondent**), dated 15 October 2019.

Background of Ombudsman review

3. On 5 July 2019, the applicant applied to the respondent for access to information relating to:
 1. Communications
 - a. Between:
 - i. TCCS;
 - ii. Transport Canberra, or
 - iii. Office of the Minister for Transport and City Services and Commissioner for Fair Trading
 - b. That relate to our touch upon each and any of:
 - i. The 7% statements;
 - ii. The Light Rail statement
 - iii. The 10 Minute statement

- iv. The inquiry by the Commissioner for Fair Trading, or
 - v. The terminating point at Woden of the Light Rail Stage 2
 - c. That occurred
 - i. In relation to the 7% statements, between 1 July 2018 to 30 June 2019
 - ii. In relation to the Light Rail statement, between 1 July 2018 to 30 June 2019
 - iii. In relation to the 10 Minute statement, between 1 May 2019 to 30 June 2019
 - iv. In relation to the inquiry by the Commissioner for Fair Trading, between 1 July 2018 and 30 June 2019
 - v. In relation to the terminating point at Woden of the Light Rail Stage 2, between 1 July 2018 to 30 June 2019
 - d. Other than communications;
 - i. to the extent, and only to the extent, access would identify a confidential source of information in relation to the enforcement or administration of the law section 1.4(b) Sch 1 *Freedom of Information Act*), or
 - ii. to the extent access would include government information created or received by a Minister in the Minister's capacity as a member of the Legislative Assembly.
 2. Documents created between 1 January 2018 and 15 June 2018 evidencing or relating to the formulation of the statement contained at para 3.1 of the Light Rail Submission that Light Rail Stage 2 would terminate at "Callam Street".
 3. Documents prepare [sic] between 1 June 2018 and 30 June 2019 evidencing a decision by TCCS or Transport Canberra
 - a. on the location of the terminal on Callam Street, Phillip; or if there is no decision on one location
 - b. on the possible locations of the terminal on Callam Street, Phillip.
4. On 20 August 2019, the applicant revised the scope of the access application to:
 - a. [as before]
 - b. [as before]
 - c. [as before]
 - d. Other than communications:
 - i. to the extent, and only to the extent, access would identify a confidential source of information in relation to the enforcement or administration of the law section 1.4(b) Sch 1 *Freedom of Information Act*), or
 - ii. to the extent access would include government information created or received by a Minister in the Minister's capacity as a member of the Legislative Assembly.
 - iii. comprising correspondence between TCCS and Zapari Property, GZ Developments, Geocon Bowes Street and GRE Sales Pty Ltd or Geocon Group Pty Ltd or the legal representatives thereof
 - iv. comprising copies of Geocn marketing material, for example screenshots of Geocn website, marketing material (ie sales brochures), Canberra Times or other newspaper articles about Grand Central Towers
 - v. comprising emails, and other communications passed between staff of TCCS
 - vi. comprising extracts of legislation and extracts of land title searches and similar searches
 - vii. comprising communications between the TCCS and the ACT Government Solicitor's Office for the purposes of obtaining legal advice
 - viii. comprising the Joint Standing Committee report relating to ACT light Rail stage 2.
5. Following a number of extension of time agreements negotiated with the applicant, the respondent was required to provide a decision on the access application by 30 September 2019.

6. The respondent failed to do so and as a result, was deemed to have refused access to the information sought (deemed refusal).¹
7. On 1 October 2019, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
8. I note that following this review application, it was open to the respondent to apply to the Ombudsman for further processing time in accordance with s 42 of the FOI Act but they did not do so. Rather, they continued to process the application.
9. On 15 October 2019, the respondent advised the applicant of its decision that it did not hold the information sought.
10. On 28 February 2020, I provided my preliminary views about the respondent's decision to the parties in my draft consideration. Neither party provided additional submissions in relation to this draft consideration.

Scope of Ombudsman review

11. As a preliminary issue, I note that where there is a deemed refusal, there is nothing preventing the respondent from continuing to process the access application and it is the Ombudsman's expectation that respondents will continue to do so.²
12. This is relevant in this review, as the respondent has since proceeded to make an actual decision on the access application.
13. As a result, for the purposes of this review, this decision is now substituted for the deemed refusal decision – that is the decision under review is that the information at issue is not held by the applicant.³
14. In making my decision, I have had regard to:
 - the applicant's access application and review application
 - the respondent's decision
 - the FOI Act, in particular ss 7, 34, 35 and 80
 - the respondent's FOI processing file relating to the access application
 - relevant case law, including *Re Cristovao and Secretary, Department of Social Security*,⁴ *De Tarle and Australian Securities and Investments Commission*,⁵ *Nash and Queensland Police Service*,⁶ and *PDE and the University of Queensland*.⁷

¹ Section 39(1)(a) of the FOI Act.

² Section 39(3) of the FOI Act.

³ Following further consultation, the applicant has confirmed they wish for the actual decision to be reviewed.

⁴ (1998) 53 ALD 138.

⁵ *(Freedom of information)* [2015] AATA 770.

⁶ [2012] QICmr 45.

⁷ [2009] QICmr 7.

Relevant law

15. Section 7 of the FOI Act provides every person with an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.
16. Section 34 of the FOI Act provides that an agency or Minister deciding an access application must take reasonable steps to identify all government information within the scope of the application.
17. Section 35(1)(c) of the FOI Act provides that a respondent may decide an access application by deciding the information is not held by the respondent.

The contentions of the parties

18. On 15 October 2019, the respondent submitted:

As you may be aware, machinery of government changes moved construction matters relating to light rail to the new agency Major Projects Canberra during the period we have had request 19-068. During the transition period, the TCCS FOI team progressed the matter as if the documents were held by TCCS however were unable to identify documents. These documents moved with officers to the new agency and attempts to transfer the request to Major Projects Canberra were unsuccessful not least of which was as a result of the delay in TCCS identifying the location of the documents now held by the new agency.

19. In their application for review, the applicant did not provide submissions. They did, however, advise they were seeking the following:
 - set aside the decision of the Respondent.
 - grant access to the documents specified in the FOI request by the Applicant on 5 July 2019 as modified on 20 August 2019.

Considerations

20. The FOI Act requires that the agency or Minister must take 'reasonable steps' to identify all government information within the scope of the access application⁸ before making a decision that it does not hold the information sought.⁹

⁸ Section 34 of the FOI Act.

⁹ Section 35(1)(b) of the FOI Act.

21. 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 is judged to be appropriate or suitable to the circumstances or purpose.¹⁰
22. 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.¹¹
23. In considering whether reasonable steps have been taken to identify all relevant information, some relevant factors include:
 - the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities (particular with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - the agency's practices and procedures (including but not exclusive to its information management approach), and
 - other factors reasonable inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s, and
 - the nature of the government activity the request relates to.¹²
24. From my initial examination of the processing file, it was not apparent the respondent made extensive internal enquiries in order to try and locate any relevant documents.
25. There was evidence of a meeting organised for 26 September 2019 to discuss this matter with Major Projects Canberra (MPC), but there were no further records about what transpired in this meeting or whether the meeting went ahead.
26. Within the processing file, there was also a Minute for the Information Officer which explained that:

During this period, TCCS liaised with MPC to identify documents relevant to [the access application]. MPC advised TCCS that they held relevant documents, however the documents were not provided to TCCS. Due to documents on the light rail being moved with officers from TCCS to MPC, TCCS were unable to access databases and conduct any searches.
27. There was no evidence on the processing file of relevant documents being moved to MPC, and only evidence that MPC had requested further information on 8 October 2019 about the proposed transfer.

¹⁰ Considered by the Administrative Appeal Tribunal in relation to s 24A of the *Freedom of Information Act 1982* (Cth) in the decision of *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138 at [19]. More recently, the Tribunal applied this approach in *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770 at [19].

¹¹ See Explanatory Statement, *Freedom of Information Bill 2016* (ACT) 23.

¹² *Nash and Queensland Police Service* [2012] QICmr 45 at [14] — [16]; *PDE and the University of Queensland* [2009] QICmr 7 at [37].

28. An email dated 2 October 2019 on the processing file, noting this was after the date of receipt of the s 75 notice from our Office, also raised further questions about what had occurred in the processing of the application, with this email suggesting that TCCS had attempted to discuss transferring the access application to MPC for the following reasons:
- most of the documents, or at least the knowledge about the documents, appeared to lie with MPC
 - TCCS only held documents that were provided to the ACT Government Solicitor's Office (ACTGSO) by staff now working at MPC¹³
 - an internal conversation indicated 'there are thousands of documents potentially within the scope of the access application' – and that a similar request lodged with the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) had identified 7,000 documents in scope of the access application.
29. This suggested the respondent did identify at least some documents within the scope of the access application and there were potentially a large number of documents. However, the subsequent decision notice made no mention of these documents. As a result, it appeared that a decision had been made regarding disclosure of these documents.
30. As a result, on 31 October 2019, our Office again sought further information from the respondent regarding the searches undertaken.
31. On 21 November 2019, the respondent confirmed:
- ...the lead officer in the TCCS FOI team had verbal conversations with a number of TCCS staff to determine if they held any documents of relevance. The lead officer was unable to identify a business area in TCCS who believed they held documents in scope of the request. This was all responded to verbally and no file notes were made. As such, the processing file previously provided to you is complete. In the absence of being able to provide this evidence to you, TCCS FOI team has emailed relevant business areas to confirm that no documents are held.
32. In further submissions, on 5 December 2019, the respondent also provided internal emails explaining why they did not hold the information at issue:
- The FOI team identified the Communications team and Transport Canberra team as the business units that would likely hold the information at issue.
 - The teams confirmed the information at issue went with TCCS staff who were transferred to MPC. Therefore, when MPC was established on 1 July 2019, the information at issue came into the possession of MPC as MPC became the agency responsible for Light Rail Stage 2 construction.
33. This additional information did not, however, address our residual concerns about possible inconsistencies in terms of identified documents in scope of the access application, and the lack of evidence confirming the respondent's statements about MPC now being in possession of the information sought.

¹³ ('GSO documents').

34. As a result, on 10 January 2020, under s 80 of the FOI Act, our Office directed the respondent to conduct a further search for information.
35. Following a telephone discussion with the respondent on 28 January 2020, the respondent provided a response to the s 80 direction.
36. The response included copies of completed search Minutes by relevant business areas. While the information in the Minute sent to the business area expected to hold the information sought was limited, the other two Minutes indicate that TCCS undertook searches to identify the relevant information. This includes searching Outlook emails, email archives and calendars, electronic directories and personal devices.
37. On the basis of this information, I am now satisfied the respondent has undertaken reasonable steps to identify if the respondent did hold the information sought.
38. Given that a new agency is responsible for Light Rail Stage 2, I also accept that it is likely that any relevant information would be in the possession of the new agency, being MPC. I also understand that a separate access application has been made to MPC by the applicant.
39. I now need to consider the issue of evidence of relevant documents being transferred to MPC. The respondent has now addressed this by:
 - providing a file note that confirms the transfer, and
 - confirming the ACTGSO documents were provided by TCCS to the ACTGSO, but subsequently, the ACTGSO returned these documents to MPC.
40. As a final issue, I note, however, that TCCS originally considered that the scope of the access application could be significant, with thousands of documents potentially being relevant. In a meeting with our Office, TCCS indicated that, on further review, they have now interpreted the scope to be narrower. This appears to be reflected in the outcome of the similar access application decided by MPC.
41. The FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of representative democracy.¹⁴ This concept is promoted through the objects of the FOI Act.¹⁵ Consistent with these objectives, I consider it important that agencies broadly and fairly read the scope of access applications.

¹⁴ See s 17 of the FOI Act.

¹⁵ See s 6(b) of the FOI Act.

42. It is the Ombudsman's view that requests must not be read with the exactitude that applies to legislation or a set of pleadings.¹⁶ It is unclear whether MPC has adopted a narrower approach to the scope than originally envisaged by TCCS. This is, however, outside the scope of this review.

Conclusion

43. The FOI Act provides every person with the right to access government information. Where government information being sought cannot be found by the respondent, after it has taken reasonable steps to identify it, the respondent can decide the information is not held by it.
44. For the reasons outlined above, I consider the respondent has taken reasonable steps to identify all government information within the scope of the applicant's access application, as it is required to do under s 34 of the FOI Act.
45. Despite these searches, they were unable to identify any information held by their agency within the scope of the access application. As a result, I confirm the respondent's decision that they do not hold the information sought under s 82(2)(a) of the FOI Act.

Louise Macleod
Senior Assistant Ombudsman

13 March 2020

¹⁶ *Re Russell Island Development Association Inc and Department of Primary Industries and Energy* (1994) 33 ALD 683 confirming *Re Gould and Department of Health* [1985] AATA 63.