

***Alistair Coe and Chief Minister, Treasury and Economic
Development Directorate [2019] ACTOFOI 3 (29 January 2019)***

**Decision and reasons for decision of
ACT Ombudsman, Michael Manthorpe PSM**

Application Number:	AFOI-RR/18/30010
Decision Reference:	[2019] ACTOFOI 3
Applicant:	Mr Alistair Coe MLA
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Decision Date:	29 January 2019
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – prejudice to intergovernmental relations – prejudice to a deliberative process of government.

Decision

1. Under s 82(1)(c) of the *Freedom of Information Act 2016* (FOI Act), I set aside the decision of Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 27 August 2018, with respect to the information sought in this review, being a ministerial brief on Commonwealth land matters (the brief).¹ I substitute my decision that the brief is not contrary to the public interest information.
2. CMTEDD must now give the applicant access to an unedited copy of the brief.

¹ Identified by CMTEDD as document number 180 on its Freedom of Information Request Schedule.

Scope and background of Ombudsman review

3. On 30 July 2018, Mr Alistair Coe MLA (the applicant) applied to CMTEDD for access to the final briefing notes and documents prepared for the Select Committee on Estimates 2018-19 hearings.
4. On 27 August 2018, CMTEDD advised the applicant that it had identified a total of 250 documents within the scope of the access application. CMTEDD gave the applicant access to 135 documents in full, 113 documents in part, and refused access to the remaining two documents.
5. In making its decision, CMTEDD decided that the 115 documents contain contrary to the public interest information.²
6. On 25 September 2018, the applicant sought Ombudsman review of CMTEDD's decision under s 73 of the FOI Act, only to the extent that it relates to one document, the brief.
7. CMTEDD refused access to the brief in full. CMTEDD's decision relied on disclosure prejudicing:
 - intergovernmental relations (Schedule 2, s 2.2(a)(x))
 - an agency's ability to obtain confidential information (Schedule 2, s 2.2(a)(xii)), and
 - a deliberative process of government (Schedule 2, s 2.2(a)(xvi)).
8. We provided preliminary views about CMTEDD's decision to the parties in a draft consideration dated 13 December 2018. CMTEDD responded by noting the draft consideration, while the applicant did not respond.³
9. The issue to be decided in this Ombudsman review is whether giving the applicant access to the brief would be contrary to the public interest, as CMTEDD found.
10. In making my decision, I have had regard to:
 - the applicant's application for Ombudsman review
 - CMTEDD's decision
 - the FOI Act, in particular ss 7, 16, 17, 35 and Schedule 2
 - relevant case law, in particular *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate*,⁴ and *Queensland Newspapers and Department of Justice and Attorney-General; Carmody (Third Party)*⁵

² A decision under s 35(1)(c) of the FOI Act.

³ CMTEDD noted the draft consideration of the ACT Ombudsman's Office to release the document in full to the applicant in a letter to the Ombudsman dated 21 January 2019.

⁴ [2018] ACTOFOI 3 (*Coe No. 1*).

⁵ [2016] QICmr 23 (*Queensland Newspapers*).

- CMTEDD's FOI processing file relating to the access application, including an unedited copy of the brief, and
- the submissions of the parties.

Relevant law

11. 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.
12. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information because it is contrary to the public interest information.
13. Contrary to the public interest information is defined in s 16 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.
14. The public interest test set out in s 17 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.

The contentions of the parties

15. In its reasons for decision, CMTEDD said:

Information contained in this document [the brief] was provided in confidence to assist parties to negotiate an amicable solution for various land matters. The release of this document could adversely affect these negotiations and deliberations by damaging the continued level of trust and co-operation in the relations between officers conducting negotiations. I consider that maintaining good working relations between the ACT and the Commonwealth are crucial to the ongoing negotiations on this issue and on future matters. I am satisfied that the release of the document could prejudice intergovernmental relations and the Directorate's ability to obtain confidential information by impairing the future flow of information between the ACT and the Commonwealth. As a result, this will prejudice the deliberative process of the Directorate.

16. In his application for Ombudsman review, the applicant said:

The briefs used during Estimates are intended to assist the Minister and senior public officials in answering questions posed by the Committee during the public hearings. I note that the general

format of the documents includes a section titled 'Talking points' which witnesses use as a guide or sometimes read out as part of their answers. The documents have subsequent headings such as 'Key information' or 'Background information' which may be identified as not suitable for public disclosure.

...

It is evident from the titles of the sections, the use of the briefs by witnesses during the hearings, and their eventual release that a portion of information within each brief that must be able to be put on the public record or spoken about, for example information under 'Talking points'. Information that is deemed sensitive or possibly not suitable for disclosure, is often included later in the document and is marked as such.

I do not believe that the Commonwealth Land Matters brief would have been included as part of the Estimates pack if there was not at minimum some information within the document that could be used or spoken about publicly during the hearings.

17. CMTEDD further submitted:

The [briefing] template used by CMTEDD is a standard template which contains subheadings to assist users of the document. The subheadings cannot be considered, as asserted by the applicant, to be the statements that the Minister would make on the topic. Rather the paragraphs provided are key points of interest in relation to the topic. The disclosure of this information at the Select Committee Estimates hearing is at the total discretion of the Minister for whom they were prepared.

In relation to [the brief], the Chief Minister is aware of the sensitivities surrounding Commonwealth Land matters. These concerns were considered by the ACT Ombudsman in the decision in *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 3 (28 August 2018). In this decision the ACT Ombudsman upheld CMTEDD's decision that the release of the information contained in the documents was contrary to the public interest as its release could be reasonably expected to prejudice intergovernmental relation and the deliberative process of government. The release of the information contained in [the brief] is expected to have the same impacts.

Considerations

18. I have examined an unedited copy of the brief, the information it contains can be categorised as:

- *talking points* on Commonwealth land matters prepared for the Chief Minister at the Select Committee on Estimates, and
- *background information* on Commonwealth land matters.

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

19. No suggestion has been made that the brief contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the brief to be contrary to the public interest information, disclosure of the brief must, on balance, be contrary to the public interest under the test set out in s 17.

The public interest test

20. To determine whether disclosure of information is, on balance, contrary to the public interest, s 17(1) prescribes the following five steps:

- (a) identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in schedule 2, section 2.1;
- (b) identify any factor favouring nondisclosure that applies in relation to the information (a relevant factor favouring nondisclosure), including any factor mentioned in schedule 2, section 2.2;
- (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
- (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;
- (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.

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

Irrelevant factors

22. I have noted the irrelevant factors listed in s 17(2) and I am satisfied that I have not considered any irrelevant factors in this case.

Factors favouring disclosure

23. Schedule 2 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. Of the factors favouring disclosure in Schedule 2, CMTEDD found one relevant in this case. Disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of public interest.⁶

⁶ Schedule 2, s 2.1(a)(ii).

24. The brief contains information that is directly related to an important ACT Government issue, the Commonwealth land matters. I agree with the applicant that disclosure of the brief would serve to promote informed debate and allow the public to understand and discuss the issue. Therefore, as a public interest factor favouring disclosure, disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.⁷
25. In addition to the factors referred to above, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of a representative democracy.⁸ This concept is promoted through the objects of the FOI Act.⁹ I consider that giving access to the information sought would support this feature of the FOI Act.
26. I am satisfied that these are the relevant considerations favouring disclosure in this case.

Factors favouring nondisclosure

27. CMTEDD found that the disclosure of the brief could reasonably be expected to prejudice:
- intergovernmental relations¹⁰
 - an agency's ability to obtain confidential information,¹¹ and
 - a deliberative process of government.¹²
28. CMTEDD contends that the brief provides details of a number of sensitive land issues that are subject to ongoing negotiations and deliberations with the Commonwealth, such that disclosure would affect the working relationship between the ACT and the Commonwealth governments.
29. CMTEDD also contends that disclosure of the brief would have the same impacts as those identified in the Ombudsman review case of *Coe No. 1*.

⁷ Schedule 2, s 2.1(a)(i).

⁸ See s 9 of the FOI Act.

⁹ See s 6(b) of the FOI Act.

¹⁰ Schedule 2, s 2.2(a)(x).

¹¹ Schedule 2, s 2.2(a)(xii).

¹² Schedule 2, s 2.2(a)(xvi).

Intergovernmental relations and confidential information as considered in Coe No. 1

30. In *Coe No. 1*, I accepted that there are ongoing negotiations between the ACT and Commonwealth governments over various land matters. In that case, I accepted CMTEDD's contentions that disclosing information about the negotiations, while the negotiations are underway, could reasonably prejudice the relationship between the two governments.
31. I cited the Queensland Information Commissioner case of *Queensland Newspapers* that discussed the purpose of the intergovernmental relations public interest factor is to:
- [G]ive weight to the public interest in protecting confidential communications between State and another government where disclosure would reasonably be expected to prejudice the relations between those two governments.¹³
32. I consider that the clear purpose of the intergovernmental relations public interest factor is to protect the relationships between Australian governments. I also consider that the additional factor of protecting an agency's ability to obtain confidential information, in these circumstances, also relates to protecting those relationships.
33. Accordingly, for disclosure in this present case to damage the relationship between the ACT and the Commonwealth, disclosure of the brief must disclose the substance of confidential communications between the ACT and the Commonwealth governments.
34. In *Coe No. 1*, the link to intergovernmental communications was clear. In that case, the applicant had specifically sought access to 'various communications between the Chief Minister and the Minister for Finance, and various communications between senior officials within CMTEDD and Finance relating to negotiations and meetings over land matters'.¹⁴ Therefore, in that case I was primarily tasked with determining whether those communications were made in confidence, and whether disclosure could reasonably cause damage to the relationship.
35. In this Ombudsman review, the brief does not contain communications between the ACT and the Commonwealth. Rather, the brief comprises notes made from only the ACT government's perspective.

¹³ *Queensland Newspapers* at [220].

¹⁴ *Coe No. 1* at [17].

36. For these reasons, I consider that this matter can be distinguished from *Coe No. 1*, and I do not accept that disclosure of the brief could reasonably prejudice the ACT's relationship with the Commonwealth, or an agency's ability to obtain confidential information.

37. I am not satisfied that prejudice to intergovernmental relations, and prejudice to an agency's ability to obtain confidential information are relevant public interest factors favouring nondisclosure in this case.

Deliberative processes - talking points

38. CMTEDD found that disclosing the brief will prejudice a deliberative process. A deliberative process in government has been defined as a 'thinking processes - the process of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.'¹⁵

39. For the purposes of this Ombudsman review, I accept that the broader issue of the land matter negotiations between the ACT and the Commonwealth is a deliberative process. However, I am not satisfied disclosure of the brief would prejudice that process.

40. In relation to the talking points, CMTEDD agrees with the applicant that they are provided as a guide that may be read out as part of the Chief Minister's answers. However, CMTEDD contends that the paragraphs provided cannot be considered to be statements the Chief Minister would make on the topic. Rather, they are key points of interest in relation to the topic that may be disclosed at the Chief Minister's discretion.

41. While I acknowledge that the Chief Minister had a discretion to talk to any, all or none of the talking points, the fact that the Chief Minister had been briefed to talk to those points is, in my view, inconsistent with CMTEDD's contentions that disclosure of that information would prejudice a deliberative process of government. I consider that the talking points were prepared on the understanding that the Chief Minister *could* publicly disclose any or all of the information contained in them.

42. From my examination of the brief, nothing in its contents provides any indication to the Chief Minister that disclosing the talking points could damage a deliberative process of government. If the talking points were sensitive, I consider it would be incumbent on CMTEDD to have highlighted those sensitivities to the Chief Minister in the brief.

¹⁵ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at [28] – [29].

43. Further, the information in the brief is presented in general terms and, in my view, is largely publicly known. For these reasons, I am satisfied that disclosure of the talking points would not prejudice a deliberative process of government.

44. For these reasons, I have not identified any relevant factors favouring nondisclosure of the talking points in this case.

Deliberative processes - background information

45. The background information consists of just three bullet pointed sentences which identify land matters. The sentences do not include the substance of any negotiations, nor any view on the direction, progress or possible outcomes of any negotiations. I also consider that this information is already publicly known.¹⁶ For these reasons, I am satisfied that disclosure of the background information would not prejudice a deliberative process of government.

46. For these reasons, I have not identified any relevant factors favouring nondisclosure of the background information in this case.

Balancing the factors

47. As I have not identified any public interest factors favouring nondisclosure, I am satisfied that, on balance, giving the applicant access to the brief would not be contrary to the public interest.

Conclusion

48. The brief is not contrary to the public interest information for the purposes of s 16 of the FOI Act.

Michael Manthorpe
ACT Ombudsman
29 January 2018

¹⁶ An internet search found reference to all of the land sites listed, in news stories or other documents.