

‘BY’ and Chief Minister, Treasury and Economic Development

Directorate [2023] ACTOFOI 4 (18 January 2023)

Decision and reasons for decision of Acting Senior Assistant Ombudsman, Susan Penn-Turrall

Application number	AFOI-RR/22/10023
Decision Reference	[2023] ACTOFOI 4
Applicant	‘BY’
Respondent	Chief Minister, Treasury and Economic Development Directorate
Date	18 January 2023
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – contribute to positive and informed debate on important issues or matters of public interest – inform the community of the government’s operations, including the policies, guidelines and codes of conduct followed by the government in dealings with members of the community – prejudice trade secrets, business affairs or research of an agency or person – information could prejudice the protection of an individual’s right to privacy

Decision

1. For the purpose of s 82 of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. For the reasons set out below, I have decided to **vary** the decision of the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) dated 30 August 2022 under s 82(2)(b) of the FOI Act to:
 - refuse to give access to parts of documents 1-10, and document 30 under s 35(1)(c) of the FOI Act; and
 - give access to the remaining parts of documents 1-10

Background of Ombudsman review

3. On 13 May 2022, an access application was made under s 30 of the FOI Act for access to government information held by CMTEDD.
4. On 16 May 2022, the scope of the access application was confirmed as:¹

Information about the incident in the form of

 - Investigation reports conducted by WorkSafe
 - Manufacturer specifications in the form of data sheets on the failed formwork systems
 - Information provided to WorkSafe by the manufacturers they investigated
5. On 22 June 2022, CMTEDD invited third parties to provide their views on whether the information is contrary to the public interest information under s 38 of the FOI Act.
6. On 11 July 2022, the applicant to this review (**applicant**) provided submissions to CMTEDD objecting to the release of part of the information in relation to which they were consulted, specifically information identifying the applicant (**business information**).
7. On 30 August 2022, the CMTEDD information officer informed the applicant 11 documents concerning their business affairs were identified within the scope of the request.
8. In relation to the information of concern to the applicant, CMTEDD decided to:
 - refuse access to parts of documents 1-10 on the ground the information is contrary to the public interest information under s 35(1)(c) of the FOI Act, and
 - give access in full to document 30
9. On 23 September 2022, the applicant applied for Ombudsman review of CMTEDD's decision.
10. On 19 December 2022, the delegate provided their preliminary views about the respondent's decision to the parties in a draft consideration. Neither party provided a response to the draft consideration.

Information at issue

11. The information at issue in this Ombudsman review is the business information contained in documents 1-10 and 30 to which access was given (the **WorkSafe documents**).

¹ The access application included a link to a WorkSafe ACT Safety alert about an incident which occurred on 9 April 2019 available here: <https://www.worksafe.act.gov.au/health-and-safety-portal/safety-alerts/formwork-collapse>.

12. The issue to be decided in this Ombudsman review is whether the business information is 'contrary to the public interest information' for the purposes of the FOI Act.
13. In making my decision, I have had regard to:
 - the applicant's submissions to the respondent and review application
 - the respondent's decision
 - the FOI Act, in particular ss 6, 7, 16, 17, 35, 50, 72, Schedule 1 and Schedule 2
 - the respondent's FOI processing file relating to the access application
 - guidelines made by the ACT Ombudsman under s 66 of the FOI Act
 - the *Work Health and Safety Act 2011* (ACT) (**WHS Act**), and
 - an unedited copy of the information at issue.

Relevant law

14. 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.
15. 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.
16. 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.
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. Section 50 of the FOI Act applies if an access application is made for government information in a record containing information contrary to the public interest and it is practicable to give access to a copy of the record from which information contrary to the public interest has been deleted.
19. Section 72 of the FOI Act provides the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

20. Schedule 1 of the FOI Act sets out categories of information taken to be contrary to the public interest information for the purpose of the definition in s 16 of the FOI Act.
21. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.

The contentions of the parties

22. CMTEDD's decision notice dated 30 August 2022 said:

Having considered the factors identified as relevant in this matter, I consider that release of the information contained in the documents may contribute to debate in this matter, but I question the extent to whether it would be positive and informed debate and to what extent this is a matter of public interest.

I do however accept that there is a factor for disclosure in releasing information that demonstrates how a government agency undertakes its regulatory function.

Noting that the 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, I must consider the above factors for disclosure of the information, but I afford them only some weight in my consideration...

Having reviewed the documents, I consider that the protection of an individual's right to privacy, especially in the course of dealing with the ACT Government is a significant factor. As a result, I have decided that release of this personal information (identifying details and names of individuals not employed by the ACT Public Service) could prejudice their right to privacy under the Human Rights Act 2004. Parties involved have provided their personal information for the purposes of working with the ACT Government in a regulatory manner and this, in my opinion, outweighs the benefit which may be derived from releasing the personal information of individuals involved.

I have also considered the impact of disclosing information which relates to business affairs...

Considering the type of information to be withheld from release, I am satisfied that the factors in favour of release can still be met while protecting the personal information and business information of the individuals involved. I therefore weight the factor for nondisclosure more highly than the factor in favour of release in this instance.

Having applied the test outlined in section 17 of the Act and deciding that release of personal information contained in the documents is not in the public interest to release, I have chosen to redact this specific information in accordance with section 50(2). Noting the pro-disclosure intent of the Act, I am satisfied that redacting only the information that I believe is not in the public interest to release will ensure that the intent of the Act is met and will provide you with access to the majority of the information held by CMTEDD within the scope of your request.

23. In response to consultation with CMTEDD, the applicant stated:

We have decided to contest our name being used in this report...product are manufactured, approved and passed to Australian Standards. We provided all the test reports and technical details the investigation office requested at the time of the investigation. If our name is involved in a report which goes out Public, we are concerned that there will be unnecessary negative impact on our company's reputation.

24. These submissions are discussed in more detail below.

Preliminary issue

25. As set out above in paragraph [11], the business information is contained within the WorkSafe documents. As a preliminary issue, I have also considered whether the WorkSafe documents themselves are 'contrary to the public interest information' for the purposes of the FOI Act. This is discussed in detail below.

Considerations

26. Neither party to this Ombudsman review has suggested there is information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act.
27. I have considered an unedited copy of the WorkSafe documents including the business information, together with the information provided by the applicant and the respondent.
28. I do not consider the WorkSafe documents to be contrary to the public interest information under Schedule 1 of the FOI Act. I will proceed to apply the public interest test.

Public interest test

29. The test set out in s 17 of the FOI Act prescribes the following 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.
30. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.

Irrelevant factors

31. In conducting the public interest test, I did not have regard to any of the irrelevant factors which a decision-maker is prohibited from considering under s 17(2) of the FOI Act, including the applicant's identity, circumstances, or reason for seeking access to the information.²

² Section 17(2)(f) of the FOI Act.

Factors favouring disclosure

32. In deciding the access application, CMTEDD identified two factors favouring disclosure of the WorkSafe documents, in addition to the pro-disclosure bias.

Contribute to positive and informed debate on important issues or matters of public interest

33. A 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.³

34. WorkSafe ACT monitors and enforces compliance with the WHS Act, including by conducting investigations of work health and safety (**WHS**) incidents. I consider the performance of these activities is a matter of public interest as it relates to the regulation of workplaces in the ACT.

35. The Work Health and Safety (Office of the Work Health and Safety Commissioner) Compliance and Enforcement Policy 2020-2024 states:⁴

Investigations are undertaken for a range of reasons, such as to determine the causes of an incident, to assess compliance with the laws, to determine what action may be needed to prevent a further occurrence, and to determine what action may be appropriate to enforce compliance with the laws....

Where an inspection or investigation reveals evidence of an alleged breach, WorkSafe will consider what enforcement action will be taken...

At any stage of an inspection, audit, investigation or prosecution, WorkSafe may disclose information about a case for the purposes of preventing similar offences from occurring.

36. Disclosure of the WorkSafe documents would reveal contextual information about the WHS incident and the regulatory activities of WorkSafe. I consider it is reasonably likely disclosure could contribute to positive and informed debate on workplace health and safety issues.

37. In this case, release of the WorkSafe documents would reveal information about the investigation of a particular WHS incident.

38. I have given moderate weight to this factor as while I conclude there is considerable interest in the government's accountability in respect of the regulation of workplaces, the WorkSafe documents only relate to a single WHS incident where some information about that incident has been made publicly available by WorkSafe ACT.

³ Schedule 2, s 2.1(a)(ii) of the FOI Act.

⁴ [Work Health and Safety \(Office of the Work Health and Safety Commissioner\) Compliance and Enforcement Policy 2020-2024](#) made under the WHS Act, section 2.37 (Compliance and Enforcement Policy).

Inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in dealings with members of the community

39. The existence of a reasonable expectation disclosure of information could inform the community of the government's operations, including the policies, guidelines and code of conduct followed by the government in dealings with members of the community is a factor favouring disclosure under the FOI Act.⁵
40. I am satisfied release of the WorkSafe documents would inform the community about the WorkSafe investigation, by revealing details about the regulatory process and the information considered by the investigators.
41. I have afforded moderate weight to this factor, as I consider disclosure would inform the community about how the regulator undertakes its compliance functions under the WHS Act regarding a particular WHS incident.

Pro-disclosure bias

42. In addition to the non-exhaustive factors favouring disclosure listed in Schedule 2, s 2.1, 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.⁶ This concept is promoted through the objects of the FOI Act.⁷

Factors favouring nondisclosure

43. In deciding the part of the access application concerning the WorkSafe documents, CMTEDD identified two factors favouring non-disclosure in the public interest.

Prejudice trade secrets, business affairs or research of an agency or person

44. A reasonable expectation that disclosure of information could prejudice the trade secrets, business affairs or research of an agency or person weighs against disclosure in the FOI Act.⁸ In this matter it is the business affairs aspect which is relevant rather than trade secrets or research.

⁵ Schedule 2, s 2.1(a)(iii) of the FOI Act.

⁶ Section 9 of the FOI Act.

⁷ Section 6 of the FOI Act.

⁸ Schedule 2, s 2.2(a)(xi) of the FOI Act.

45. I consider information about the applicant's business appears in the WorkSafe documents because of an investigation of a WHS incident by the regulator. Based on my examination of the WorkSafe documents, I accept the publication of this information could significantly damage the reputation of the applicant.
46. While CMTEDD have advised the non-compliance issues involving the person conducting a business or undertaking (PCBU) in relation to the WHS incident were substantiated, I am not aware of any conclusions were made by WorkSafe ACT about the involvement of the applicant's business. I have afforded significant weight to this factor.

Information could prejudice the protection of an individual's right to privacy

47. A reasonable expectation disclosure could prejudice an individual's right to privacy under the Human Rights Act is a factor favouring nondisclosure under the FOI Act.⁹
48. Section 12 of the Human Rights Act provides:
- Everyone has the right—
- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
 - (b) not to have his or her reputation unlawfully attacked.
49. In considering whether the disclosure of this information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act, relevant matters include any detriment disclosure may cause, the nature of the information, and the circumstances in which the information was collected.¹⁰
50. The WorkSafe documents include the full names and signatures of third parties. I consider their personal information is included in the material because of services rendered to the applicant, as opposed to direct involvement in the investigation of the WHS incident by WorkSafe ACT.
51. I do not consider the personal information of these individuals is related to the WHS incident and for this reason, those individuals would not expect their personal information to be disclosed for an unrelated purpose. However, I do not consider detriment would necessarily result from disclosure of the limited personal information of the third parties.
52. For these reasons, I give this factor moderate weight for the purposes of this review.

⁹ Schedule 2, s 2.2(a)(ii) of the FOI Act.

¹⁰ [FOI Guidelines, Considering the Public Interest](#) at [9.3].

Balancing the factors

53. I have identified 2 factors favouring disclosure and two factors favouring non-disclosure in addition to the pro-disclosure bias.
54. I have given moderate weight to the 2 factors favouring disclosure as the release of the WorkSafe documents could promote these factors to a limited degree, noting the information relates to a single WHS incident.
55. I considered 2 factors favouring non-disclosure, which I afforded moderate and significant weight respectively.
56. 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 they have identified. The weight given to a factor will depend on the effect that disclosing the information would have on the public interest.
57. The FOI Act has a pro-disclosure bias, 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.'¹¹
58. I am satisfied, on balance, the public interest factors favouring non-disclosure of information regarding the applicant's business, and the personal information of the third parties, outweighs the public interest factors favouring disclosure of this information.

¹¹ [Explanatory Statement, Freedom of Information Bill 2016.](#)

Conclusion

59. For the reasons set out above in this draft consideration, I intend to vary CMTEDD's decision under s 82(2)(b) of the FOI Act to:

- refuse to give access to parts of documents 1-10, and document 30 which contains the business information of the applicant and the personal information of third parties under s 35(1)(c) of the FOI Act; and
- give access to the remaining parts of documents 1-10.

Susan Penn-Turrall

Acting Senior Assistant Ombudsman

18 January 2023