

Manteena Commercial Pty Ltd and Education Directorate**[2022] ACTOFOI 1 (4 February 2022)****Decision and reasons for decision of Acting Senior Assistant Ombudsman,
Symone Andersen**

Application Number:	AFOI-RR/21/10009
Decision Reference:	[2022] ACTOFOI 1
Applicant:	Manteena Commercial Pty Ltd
Respondent:	Education Directorate
Decision Date:	4 February 2022
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – decision-maker to tell relevant third parties – identifying all government information within scope – legal professional privilege – 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 – ensure effective oversight of expenditure of public funds – allow or assist inquiry into possible deficiencies in the conduct or administration of an agency – reveal the reason for a government decision and any background or contextual information that informed the decision – trade secrets, business affairs and research – competitive commercial activities of an agency – disclosure log – balancing public interest factors

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (FOI Act)*.
2. Under **s 82(2)(b)** of the FOI Act, I decided to **vary** the decision of the Education Directorate (**Education**), dated 12 February 2021.

Background of Ombudsman review

3. On 12 November 2020, Manteena Commercial Pty Ltd (**Manteena**), lodged an access application under the FOI Act with Education. Manteena applied for access to:

Information relating to the procurement of construction services by the Australian Capital Territory, as represented by the ACT Education Directorate [specifically in relation to the Campbell School Procurement and Throsby School Procurement].
4. On 12 February 2021, Education decided to release 14 documents in full, 51 documents in part, and refused access to 8 documents.
5. On 12 March 2021, Manteena applied for Ombudsman review of Education's decision under s 73 of the FOI Act.
6. On 24 August 2021, I provided the parties with my preliminary view which I set out in a draft consideration. The purpose of my draft consideration was to provide each party with an opportunity to make last submissions before I made my final decision.
7. On 1 September 2021, Education responded to my draft consideration and on 3 September 2021, Manteena responded to my draft consideration. The submissions required careful consideration which I undertook before making my final decision. I address the parties' responses to my draft consideration in my reasons below.

Information at issue

8. The information at issue in this Ombudsman review was the information which Education decided to refuse Manteena access to in a particular subset of the documents. These documents were documents 17, 18, 31, 42 and 45.
9. The issue to be decided was whether giving Manteena access to the information at issue would be contrary to the public interest.

10. In making my decision, I had regard to:

- Manteena’s original access application and application for Ombudsman review, including attached submissions
- Manteena’s response to my draft consideration
- Education’s decision letter
- Education’s submissions, including the response to my draft consideration
- the FOI Act
- the Explanatory Statement to the Freedom of Information Bill 2016 (ACT)
- the ACT Ombudsman Freedom of Information Guideline 4 – Considering the Public Interest
- the *Evidence Act 2011* (ACT) (Evidence Act), particularly s 118, and
- relevant cases including *Re Langer and Telstra Corporation Ltd* [2002] AATA 341, *AWB Ltd v Cole (No 5)* (2006) 234 ALR 651, *Community and Public Sector Union and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 7 (14 November 2018), *‘AF’ and Community Services Directorate* [2018] ACTOFOI 11 (17 December 2018), *Manteena Commercial Pty Ltd and Major Projects Canberra* [2021] ACTOFOI 9 (8 September 2021).

Relevant law

11. The FOI Act gives every person an enforceable right of access to government information.¹

However, refusal of access is permitted when the information is contrary to the public interest information.²

12. 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

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

13. The test set out in s 17 provides for the balancing of public interest factors favouring disclosure and nondisclosure respectively.
14. Schedule 2 of the FOI Act lists public interest factors to be balanced when conducting the s 17 test to determine the public interest.

The contentions of the parties

15. In making the decision of 12 February 2021, Education's Information Officer identified five factors favouring disclosure and four factors favouring nondisclosure. Education's Information Officer decided that:

I place significant weight on the rights of third party organisations to have their business affairs, trade secrets and commercial interests protected, as well as the potential negative impact that could arise for the Directorate from the release of such information as those organisations may be less inclined to do business with the Directorate in future.

16. Manteena provided a list of redactions which it submitted were incorrectly decided. The basis for these redactions varied. Some were decided upon on the basis that the information was contrary to the public interest information under Schedule 1, s 1.2 and some were decided upon after balancing Schedule 2 factors.
17. I addressed these contentions in more detail in my reasons below.

Preliminary issues

Document 9

18. Education refused access to Document 9, however another directorate, Major Projects Canberra (MPC), gave Manteena access to this document in the context of another FOI decision dated 12 February 2021 (it was Document 25 on the schedule for that decision).
19. In my draft consideration, I proposed that this document be excluded from this review because there is no practical benefit in considering Education's redactions to it in light of the decision made by MPC to give access to it. Both parties responded to my draft consideration accepting this approach. Therefore Document 9 does not comprise part of the information at issue in this review.

Relevant third party notified under s 76(2)

20. In making my decision, I considered the fact that Manteena is one of two tenderers referred to in the information at issue.
21. I received confirmation from Education that it had notified the other tenderer (the competing tenderer) of this review and of the view set out in my draft consideration and I noted that the third party did not apply to participate in the review under s 77 of the FOI Act.
22. The relevance of that fact for present purposes was purely procedural— I was satisfied that the competing tenderer was given an opportunity to apply to participate in the review and it was my responsibility as the decision-maker to ensure that procedural fairness was observed. I did not draw any inference from or make any finding based on the fact that the competing tenderer elected not to apply to participate in the review.

Whether Education complied with its obligation to conduct reasonable searches

23. Section 34 of the FOI Act requires the respondent to an access application to ‘take reasonable steps to identify all relevant information’.
24. Manteena’s review application stated that:

No documents have been released which relate to the decision to undertake a re-evaluation of the tender or to form a new [Tender Evaluation Team] TET. Documents are clearly missing and further documents need to be released to meet the scope of the application.
25. In my draft consideration, I noted that Education’s position was that ‘[T]he information that Manteena claims is not provided is covered in record 23’ and invited the parties to make further submissions.
26. In response to my draft consideration, Manteena submitted:

The answer provided by Education to Manteena’s concerns about the absence of any document relating to the decision to undertake a re-evaluation of the tender or to form a new TET is unsatisfactory. Document 23 merely records the fact that a direction to form a new TET has been issued. Manteena’s concern is that there have been no documents produced that contain any communications about the need for, or reasoning behind, the re-evaluation of the tender or formation of a new TET. Our client is also concerned that there have been no documents produced that contain any communications about the reasoning behind the decision to go to a best and final offer (BAFO).

27. To address Manteena's submission above, further information was sought from Education.

Education responded by stating that:

On 17 November 2020, a request for all records relevant to the scope of the request was sent by the Directorate's FOI team to the following business areas:

- Director-General's office
- Deputy Director-General's office
- Executive General Manager, Business Services office
- Executive Branch Manager, Infrastructure and Capital Works
- Executive Branch Manager, Infrastructure and Capital works office
- Executive General Manager, School Improvement
- School Operations mailbox
- Communications and Media mailbox

...

Records were collated from the business areas by the Directorate's FOI team, including checking for and following up on missing attachments, and setting aside duplicates and records that were outside of scope. The records relevant to the scope were then amalgamated from the different business areas and listed in the schedule in date order to produce a cohesive report. The records were then reviewed in detail and any additional records that were identified as missing were obtained from the business area.

After receiving [correspondence regarding Manteena's response to the draft consideration], an additional search was requested of the primary business area. The search parameter that was used follows:

Period of interest- around 15 February to 15 April 2020

Scope—any records that were not provided in response to the FOI call for records which address the decisions to:

- go to BAFO, and
- replace the TET

The response received was that all available records within the scope of the request had been produced and considered.

28. I appreciate the logic of Manteena's submission as presumably the decision to go to a BAFO did indeed create a document trail. Education's response does not necessarily answer Manteena's

submission in a manner that is likely to be satisfactory to Manteena. However, under the FOI Act the question for my consideration was whether the steps taken by Education to attempt to identify government information were reasonable.

29. The FOI Act does not define ‘reasonable steps’ and this is an issue which a preceding Senior Assistant Ombudsman remarked upon in prior decisions.³

30. I considered the test set out in the Administrative Appeals Tribunal case of *Re Langer and Telstra Corporation Ltd*, in which Deputy President Forgie observed:

... the first limb... requires that the department take such steps to discover the requested documents as are appropriate in the circumstances. The circumstances that are relevant in determining the steps that are appropriate include the subject matter of the documents sought, the file management systems, any destruction schedules followed... and steps that have already been taken to locate documents...⁴

31. The steps outlined by Education, in my view, were appropriate in the circumstances, even though Manteena plausibly submits that there are reasonable grounds for thinking that some information may exist which Education has not been able to find.

32. I decided this because I do not consider that a direction to conduct a further search under s 79(1)(b) could reasonably be expected to lead to the production of more government information.

Scoping

33. Manteena submitted that Education had incorrectly redacted information in documents 18 and 42 on the basis of scoping. In my draft consideration, I took the view that redactions in Document 18 appeared to relate to matters other than the Campbell or Throsby school procurements and that redactions in Document 42 appeared to relate to schools other than Campbell and Throsby. I indicated in my draft consideration that I would welcome further submissions from the parties.

34. In relation to Document 18, Manteena’s response to my draft consideration made submissions contesting my preliminary view.

³ See *Community and Public Sector Union and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 7 (14 November 2018); *‘AF’ and Community Services Directorate* [2018] ACTOFOI 11 (17 December 2018).

⁴ *Re Langer and Telstra Corporation Ltd* [2002] AATA 341 at [95].

35. One issue which was apparent from Manteena's submissions was confusion about redactions made under Schedule 1, s 1.2 which Manteena inferred were not out-of-scope because the context in which they were situated suggested that the redacted information was in-scope. This was the case for the redactions on page 2, page 3 and the first redaction on page 6.
36. Manteena also submitted that the out-of-scope information redacted on page 5 of Document 18 was in-scope. I accept that the final bullet point relates to the relevant scheme and should be disclosed and I note that the final redaction, on page 8 of this document should be treated identically.
37. Manteena submitted that the heading 'Delivering a new Primary School at Throsby' led it to infer that the second section redacted from page 8 was in fact in-scope. This is incorrect. The information relates to other schools, but because Manteena was not able to see the redacted information I appreciate why it may have drawn this inference.
38. In relation to Document 42, Manteena requested that I review the document and I did. I decided that the redactions for out-of-scope information did indeed comprise out-of-scope information.

Considerations

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

39. Education decided that some of the information Manteena applied for was taken to be contrary to the public interest to disclose because it is information that would be privileged from production in a legal proceeding.⁵ The information at issue which was refused under Schedule 1, s 1.2 is contained in documents 17, 18 and 31 only.
40. Section 118 of the Evidence Act is the provision a claim of privilege can rely on in the Australian Capital Territory. It provides:

Evidence must not be presented if, on objection by a client, the court finds that presenting the evidence would result in disclosure of—

 - (a) A confidential communication made between the client and a lawyer; or
 - (b) A confidential communication made between 2 or more lawyers acting for the client; or
 - (c) The contents of confidential documents... prepared by the client, lawyer or someone else;

⁵ Schedule 1, s 1.2 of the FOI Act.

for the dominant purpose of the lawyer or 1 or more of the lawyers, providing legal advice to the client.

41. In this review, Manteena contested the finding that Schedule 1, s 1.2 applied on the basis that the communications were not between clients and lawyers or lawyers in the manner outlined in s 118 of the Evidence Act and that some of the redacted information was not conveyed for the dominant purpose of the lawyer or one or more of the lawyers providing legal advice to the client.

42. Education's submissions in this review referred to the fourth of the Ombudsman's FOI Guidelines.⁶ Education quoted:

The communication does not, however, have to be directly between a client and their legal practitioner. LPP [Legal professional privilege] may also attach to... internal emails between officers of an agency, for example, where those officers are discussing the practical implications of certain legal advice obtained.

43. In my draft consideration, my preliminary view was that Education correctly stated the law in their submissions and the information it decided to refuse access to under Schedule 1, s 1.2 was decided correctly.

44. In response to my draft consideration, Manteena submitted that there may be some inconsistency between the phrasing given by the Ombudsman guidelines and the court in *AWB Ltd v Cole (No 5) (Cole)*,⁷ which addressed the issue of internal communications. The court said:

Privilege extends to any document prepared by a lawyer or client from which one might infer the nature of the advice sought or given. The principle extends to internal documents or parts of documents of the client, or of the lawyer, reproducing or otherwise revealing communications which would be covered by privilege.

45. Accordingly, Manteena submitted that:

Privilege does not attach to an internal communication merely because the comments or directions in that communication arise from, or follow after, the obtaining of legal advice. Privilege will only attach to a communication if one might infer from the communication the nature of the advice sought or given.

46. I accepted Manteena's submissions on this point of law. Although I disagree that the phrasing in the Ombudsman's guidelines is inconsistent with the view in *Cole*, it is immaterial for present

⁶ [ACT Ombudsman Guideline No. 4.](#)

⁷ (2006) 234 CLR 651 at 665.

purposes because I re-examined the information at issue according to the articulation given in *Cole*.

47. Having reviewed the information at issue I continued to hold the view that one might infer the contents of the legal advice upon viewing the redacted material because the redacted material essentially outlines steps the legal advice advised Education to take.

Public interest test

48. The remainder of the information at issue was deemed to be contrary to the public interest by Education having conducted the public interest balancing test in s 17.

49. Section 17 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 2.1
- (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, and
- (e) unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

Irrelevant factors

50. I did not consider that any irrelevant factors I was prohibited from considering by s 17(2) arise in this review.

Factors favouring disclosure

51. The parties referred me to five factors favouring disclosure under Schedule 2, s 2.1 of the FOI Act.

Promote open discussion of public affairs and enhance the government's accountability

52. A reasonable expectation that information could promote open discussion of public affairs and enhance the government's accountability favours disclosure under the FOI Act.⁸

⁸ Schedule 2, s 2.1(a)(i) of the FOI Act.

53. Education's Information Officer decided that this is a relevant factor. I accepted this finding, as the information at issue could reasonably be expected to enable members of the public to transparently examine the fairness of the procurement process.

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

54. A reasonable expectation that information could contribute to positive and informed debate on an important issue or matter of public interest favours disclosure under the FOI Act.⁹

55. Education's Information Officer decided that this is a relevant factor. I accepted this finding, as the information at issue could reasonably be expected to contribute to positive and informed debate about the transparency of government procurement processes.

Ensure effective oversight of expenditure of public funds

56. A reasonable expectation that information could ensure effective oversight of expenditure of public funds favours disclosure under the FOI Act.¹⁰

57. Education's Information Officer decided this was a relevant factor. I accepted this finding, as the information at issue could reasonably be expected to ensure effective oversight of expenditure of public funds by shedding light on why funds are awarded to certain tenderers over others.

Allow or assist inquiry into possible deficiencies in the conduct or administration of an agency

58. A reasonable expectation that information could allow or assist inquiry into possible deficiencies in the conduct or administration of an agency favours disclosure under the FOI Act.¹¹

59. Education's Information Officer decided this was relevant factor. I accepted this finding, as the information at issue could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency.

⁹ Schedule 2, s 2.1(a)(ii) of the FOI Act.

¹⁰ Schedule 2, s 2.1(a)(iv) of the FOI Act.

¹¹ Schedule 2, s 2.1(a)(v) of the FOI Act.

Reveal the reason for a government decision and any background or contextual information that informed the decision

60. A reasonable expectation that 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.¹²
61. Education's Information Officer decided this was a relevant factor. I accepted this finding as the information at issue could reasonably be expected to reveal the reason for Education's decision vis-à-vis the procurement and offers background and contextual information about the decision.

Factors favouring nondisclosure

62. Two factors favouring nondisclosure were relevant in this review. These factors are relevant in relation to documents 31 and 45.
63. In Education's response to my draft consideration, specifically in relation to my proposal that references in Document 31 to Turner & Townsend and the ESBS Report be redacted, I was informed that:

As noted in the Directorate's submission in response to the s 75 notice from the Ombudsman, the Turner & Townsend Tender Report was released to Manteena via the FOI decision of Major Projects Canberra (MPC). Similarly, the ESBS report was released in MPC's decision. Whilst [Education] did not release either report and sought to redact all references to Turner & Townsend and ESBS throughout the documents it held, any objections to release of the information would be irrelevant as it has already been provided to Manteena and made public through MPC's decision.

64. Accordingly, I understand that Manteena has access to Document 31. For the sake of completeness in the present review, I have included the reasons for my decision on Document 31, noting Education's point that Manteena has already been given access to it.

Trade secrets, business affairs and research

65. A reasonable expectation that disclosure could prejudice the trade secrets, business affairs and research of an agency or person favours nondisclosure under the FOI Act.¹³

¹² Schedule 2, s 2.1(a)(viii) of the FOI Act.

¹³ Schedule 2, s 2.2(a)(xi) of the FOI Act.

66. In my draft consideration, my preliminary view was that this factor was not relevant to Document 31 because that document related instead to the competitive commercial activities of Education.
67. However, my preliminary view was that this factor was relevant to part of Document 45. While my preliminary view was that disclosing the tender assessment scores and price could not reasonably be expected to prejudice the trade secrets, business affairs and research of either Manteena or the competitor, I noted my inclination was to accept that the TET comments could reasonably be expected to be prejudicial because of the inherent overlap between the substance of the tender and the way the business would approach the task and the corresponding assessment by the TET. My view was that the risk of prejudice was considerable.
68. In response to my draft consideration, Manteena accepted my preliminary view that disclosing the comments could reasonably be expected to prejudice the business affairs of the competitor, on the basis of my view that the scores and cost on page 1 of Document 45 was in the public interest to disclose.
69. Education responded to my draft consideration by submitting that:

At a minimum, the cost submitted by [competing tenderer] is their confidential information and should not be released to Manteena.
70. In making my decision, I considered this submission and ultimately decided in agreement with it despite the view I originally set out in my draft consideration. I was satisfied that revealing the price offered by the competing tenderer could reasonably be expected to prejudice its business affairs by potentially enabling other competitors to ascertain important elements of its business model and operations.

Competitive commercial activities of an agency

71. A reasonable expectation that disclosure could prejudice the competitive commercial activities of an agency weighs against disclosure under the FOI Act.¹⁴
72. In my draft consideration, my preliminary view was that some of the information under the 'Issues' heading in Document 31 was information relating to the budget appropriation for procurement. I indicated that I accepted that disclosing this information could reasonably be expected to prejudice the competitive commercial activities of Education.

¹⁴ Schedule 2, s 2.2(a)(xiii) of the FOI Act.

73. In response to my preliminary view on Document 31, Manteena submitted that:

We do not press for the release of the figure which represents the budget appropriation. However, it is clear that both of the redactions on document 31 go beyond the mere redaction of a number. In particular, the second redacted paragraph seems, from the remaining context, to be commentary about a process that will be implemented...

74. I reviewed Document 31 for fresh consideration. The first redaction under the 'Issues' heading would reveal the number because it discusses percentages in relation to that number. The second redaction was made under Schedule 1, s 1.2 and was applied appropriately.

75. My draft consideration also dealt with the applicability of this factor to Document 45.

Document 45 contains tender scores and comments made by the TET about Manteena and a competing tenderer. In my draft consideration I said that Education did not adequately explain how its competitive commercial activities could be affected by disclosure of the information.

76. In response to my draft consideration, Education submitted that:

The proposed release of the information on page 1 [of Document 45] is of significant concern to the Directorate because it would undermine the Directorate's ability to achieve best value for money from its procurement activities. There are a relatively small number of companies that can undertake the type of work needed by the Directorate. Therefore, any contraction or loss of confidence in that market would be detrimental to the Directorate being able to achieve its objectives.

77. I was not persuaded by this submission. In *Manteena Commercial Pty Ltd and Major Projects Canberra*,¹⁵ I described a similar argument as 'unreasonably speculative' and I considered that to be the case in this review as well. As I said in that decision, I do not accept that the information is sufficiently sensitive that its disclosure could reasonably be expected to deter private sector entities from seeking commercially valuable opportunities. That is one part of the problem with the submission. The other problem is that the FOI Act is only one of many laws which affect a company like Manteena or the competing tenderer. None of the other laws that apply, whether they are workplace health and safety laws or laws about employee entitlements or liability to pay taxation have resulted in private sector entities withdrawing from the economy in a way that is detrimental to society because it prejudices the competitive commercial activities of government agencies that do business with them. For this latter reason, as well as the former, I was not satisfied that disclosing the price on page 1 could

¹⁵ [2021] ACTOFOI 9 (8 September 2021).

reasonably be expected to result in entities declining commercially valuable opportunities in public procurement and thereby prejudicing Education's commercial activities.

78. However, I note I was persuaded by Education's submission that revealing the price offered could reasonably be expected to prejudice the competing tenderer's business affairs as discussed above at [65]-[70].

Balancing the factors

79. Taking all the factors that I identified as relevant, I balanced them to determine the public interest.
80. I decided that five public interest factors favoured disclosure and two public interest factors favoured non-disclosure.
81. Balancing public interest factors is not merely quantifying the number of factors that apply. My decision must reflect consideration of the relative importance and weight of each factor. The weight given to factors depends on the effect that disclosing the information could reasonably be expected to have on the public interest.
82. The FOI Act has a pro-disclosure bias. The public interest test and weighing of factors is approached as scales 'laden in favour of disclosure'.¹⁶
83. I gave medium weight to three factors favouring disclosure (promoting open discussion, contributing to positive and informed debate, and assisting inquiry into possible deficiencies) and considerable weight to two factors favouring disclosure (ensure oversight of public funds and reveal the reason for a government decision).
84. Turning to factors favouring non-disclosure, I gave considerable weight to the risk of prejudice to business affairs vis-à-vis information about the competing tenderer contained in the comments of the TET in Document 45 and the price that the competing tenderer offered. I decided that disclosing the price offered by the competing tenderer and the comments of the TET could reasonably be expected to prejudice the business affairs of that tenderer.
85. I also accepted that the information redacted from Document 31, which was the available funding appropriation, could reasonably be expected to prejudice the competitive commercial activities of Education. In relation to the available funding appropriation amount, I also decided that the public interest factors favouring disclosure would not be advanced much by disclosure.

¹⁶ [Explanatory Statement, Freedom of Information Bill 2016](#).

The amount is not, for example, the amount actually spent or the reason for the procurement decision, which would be examples of information that could reasonably be expected to advance the public interest in the present context.

86. Naturally, the public interest factors I relied on in favour of disclosure could only reasonably be expected to be advanced through publication of information on the disclosure log. Disclosing the information (other than contrary to the public interest information) solely to Manteena does not, for example, contribute to positive and informed debate in the community.
87. In response to my draft consideration, Education submitted, in relation to Document 45 that:

At a minimum, the cost submitted by [competing tenderer] is their confidential information and should not be released to Manteena, and by extension should not be published on the Directorate's disclosure log. Through Manteena's objection, are they indicating that information about the assessment of their performance and the price they submitted should be made public on the disclosure log? The treatment of information by and about [competing tenderer] must be consistent with the same type of information about Manteena.
88. Section 28(6)(b) of the FOI Act prohibits a disclosure log from including:

information about an applicant's business, commercial, financial or professional affairs, the publication of which would be unreasonable in the circumstances.
89. As it happens, s 28(6)(b) can only apply to Manteena and not the competing tenderer because it unambiguously applies to 'an applicant'. My consideration here was limited to whether it would be unreasonable for Manteena's tender scores to be disclosed on the disclosure log.
90. In the present circumstances, I agree that it would be illogical for one of the tenderers to have its information redacted and the other published on the disclosure log. Because my decision was different to the view I set out in my draft consideration— I decided that the prices offered by the competing tenderer is contrary to the public interest information— I only had to consider whether the TET scores should appear on the disclosure log. The public interest factors favouring disclosure which I relied on could only be said to be applicable if the information was actually visible to the public.
91. In other circumstances, it might be the case that other public interest factors are relevant and support disclosing information solely to the applicant. The example given in s 28(6)(b) of the FOI Act is 'information about unsubstantiated food safety allegations made against the

applicant's business, the publication of which could unduly damage the reputation of the applicant's business.'

92. I saw no comparable risk in the present circumstances, only the opportunity for the public to enjoy visibility of the tender process by observing the scores awarded by the TET. However, I decided the comments made by the TET and the price should not be disclosed at all because they are sufficiently prejudicial to the competing tenderer's business affairs and are therefore contrary to the public interest information.

Conclusion

93. For these reasons, my decision was to **vary** Education's decision of 12 February 2021 under **s 82(2)(b)** of the FOI Act.

94. The following information is contrary to the public interest to disclose:

- information which Education refused access to under Schedule 1, s 1.2,
- information in Document 31, redacted from the paragraph under the 'Issues' heading
- information comprising the TET comments in Document 45 and the price offered (but not the TET scores which should be disclosed).

95. The applicant is to be given access to the remainder of the information at issue, including the final bullet point redacted on page 5 of Document 18 and replicated on page 8 of the same.

Symone Andersen

Acting Senior Assistant Ombudsman

4 February 2022