

## ***Elizabeth Lee MLA and Chief Minister, Treasury and Economic Development Directorate [2023] ACTOFOI 2 (9 January 2023)***

### **Decision and reasons for decision of ACT Ombudsman, Iain Anderson**

<b>Application number:</b>	AFOI-RR/22/10017
<b>Applicant:</b>	Elizabeth Lee MLA
<b>Respondent:</b>	Chief Minister, Treasury and Economic Development Directorate
<b>Third Party:</b>	Duncan Edghill
<b>Date:</b>	9 January 2023
<b>Catchwords</b>	<i>Freedom of Information Act 2016 (ACT) – deciding access – whether disclosure of information is contrary to the public interest – promote open discussion of public affairs and enhance the government’s accountability – prejudice the protection of an individual’s right to privacy or other right under the <i>Human Rights Act 2004</i></i>

### **Decision**

1. For the reasons set out below, I **vary** the decision of the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) dated 2 August 2022 under s 82(2)(b) of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**).

### **Background of Ombudsman review**

2. On 24 June 2022, the applicant applied to Major Projects Canberra (**MPC**) for access to:  
*“A copy of Duncan Edghill’s employment contract with MPC”*
3. On 28 June 2022, MPC transferred the access application to CMTEDD under s 57 of the FOI Act.
4. On 13 July 2022, CMTEDD invited Mr Edghill to provide their views on whether the information is contrary to the public interest information under s 38 of the FOI Act.

5. On 2 August 2022, CMTEDD advised the applicant it had identified one document as falling within the scope of the access application and they had decided to refuse access to this document in its entirety under s 35(1)(c) of the FOI Act.
6. On 24 August 2022, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
7. On 6 September 2022, Mr Edghill applied to participate in the review under s 77 of the FOI Act and the delegate accepted this request.
8. My Office attempted to assist the parties to resolve the matter informally under s 80A of the FOI Act however this was unsuccessful.
9. On 16 December 2022, I provided my preliminary views about the respondent's decision to the parties in a draft consideration.
10. On 19 December 2022, the applicant and the respondent in this matter advised they have no further submissions to provide.
11. On 20 December 2022, Mr Edghill provided further submissions in response to the draft consideration.

## **Information at issue**

12. The information at issue in this Ombudsman review is the document the applicant was refused access to under CMTEDD's decision of 2 August 2022 (**employment contract**).
13. The issue to be decided in this Ombudsman review is whether the employment contract is 'contrary to the public interest information' for the purpose of the FOI Act.
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 6, 7, 16, 17, 35, 72, 77, 80 and Schedule 2
  - the *Human Rights Act 2004* (ACT) (**Human Rights Act**)
  - the *Information Privacy Act 2014* (**Information Privacy Act**)
  - the *Public Sector Management Act 1994* (ACT) (**Public Sector Management Act**)
  - the *Public Sector Management Standards 2016* (ACT) (**the Standards**)
  - determinations made by the ACT Remuneration Tribunal under s 10 of the *Remunerations Tribunal Act 1995* (ACT) (**Remuneration Tribunal Act**)

- the ACT Public Service Director-General and Executive Handbook (**the ACTPS Executive Handbook**)<sup>1</sup>
- an unedited copy of the information at issue
- the consultation undertaken by the respondent with Mr Edghill
- submissions from Mr Edghill in response to attempted informal resolution and my draft consideration
- relevant case law, including:
  - *'BM' and Justice and Community Safety Directorate* [2021] ACTOFOI 14
  - *Colakovski v Australian Telecommunications Corporation* [1991] FCA 170.

## Relevant law

15. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.<sup>2</sup> This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.<sup>3</sup>
16. 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.
17. The public interest test in s 17 of the FOI Act sets out the process for balancing public interest factors favouring disclosure and nondisclosure respectively. This balancing test must be used to determine whether disclosure would be contrary to the public interest.
18. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.<sup>4</sup>
19. Schedule 2 of the FOI Act sets out public interest factors to be balanced when conducting the s 17 test to determine the public interest.

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<sup>1</sup> The ACT Public Service Director-General and Executive Handbook, August 2017, available here: <https://www.cmtedd.act.gov.au/employment-framework/for-executives/actps-executive-employment-conditions>.

<sup>2</sup> Section 7 of the FOI Act.

<sup>3</sup> Section 35(1)(c) of the FOI Act.

<sup>4</sup> Section 35(1)(c) of the FOI Act.

## The contentions of the parties

20. CMTEDD considered but rejected one factor favouring disclosure and relied on one factor favouring non-disclosure of the employment contract. In the decision notice dated 2 August 2022, CMTEDD said:

I have reviewed the document within the scope of your request and have not identified any factors that favour disclosure as outlined in schedule 2.1 of the Act that I believe could 'reasonably be expected to occur' regarding this document.

The most relevant factor under schedule 2.1 that favours disclosure for this document is... [to] promote open discussion of public affairs and enhance the government's accountability...

Mr Edghill contends that release of the documents within the scope of the request would be an unreasonable release of his personal information as the documents identified contain personal information about his personal affairs.

In considering Mr Edghill's contentions, and as identified above, some information including the names of executives, classification and whether they are engaged at a higher salary is tabled in the Legislative Assembly on a six-monthly basis. However, I consider that the document you have requested may contain additional personal information which goes beyond what is tabled.

These details I consider are personal to Mr Edghill and is not information that would normally be disclosed during the execution of Mr Edghill's normal duties.

In making this decision, I note that while salary information is tabled in the ACT Legislative Assembly, it is possible that the salary or conditions of Mr Edghill's contract are different to that of a standard ACT Government Executive contract. It is possible for staff at the same classification to be paid different amounts or have different negotiated employment conditions that are confidential and not known to other staff. I consider that release of the information within the scope of this request would either confirm or deny Mr Edghill's salary and employment conditions.

The release of this information would cause a significant intrusion into the privacy of Mr Edghill which would impact his rights under the Human Rights Act 2004. Given the nature of the information, I have given significant weight to this factor.

Having applied the test outlined in section 17 of the Act and noting that there are no factors in favour of disclosure, I have decided that releasing personal information of Mr Edghill as contained in the document found to be within the scope of your request, is contrary to the public interest to release. Therefore, I have chosen to withhold this document from release in its entirety.

21. In the application for Ombudsman review, the applicant said:

The freedom information officer has determined that the factor favouring non-disclosure – "prejudice the protection of an individual's right to privacy" outweighs the public interest in this request. I ask the Ombudsman to re-consider the decision, as the information can be released with the possibility of redaction of the relevant sections, able to prejudice the privacy of the Public Servant in question. Doing so will allow for the release of information which is expected to lead an open discussion of public affairs and enhance the government's accountability.

22. When consulted by CMTEDD, Mr Edghill submitted:

I respectfully object to the release of my employment contract in response to this FOI request... While I understand that certain details of my employment are quite rightly public – such as my name, directorate and classification - throughout my career I have always held my employment contracts themselves to be a private matter between myself and my employer. To publish my employment contract publicly would be contrary to how I have confidentially handled that document to date, and contrary to how I maintain my own personal privacy...

At no time during my employment with the ACT Government or during any recruitment process have I been informed my actual employment contract would be made public. Indeed, with reference to the ACTPS Executive Employment Conditions – ACTPS Director-General and Executive Handbook –section 1.1.7 Tabling of Executive Contracts, those employment conditions state that only certain information relating to my employment would be publicly tabled, not my actual employment contract itself.

Provision of my actual contract would go beyond the provision of information required to be presented to the Legislative Assembly under s56 of the Public Sector Management Standards.

## Considerations

23. I have carefully considered an unedited copy of the information at issue together with the information provided by all parties.

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

24. None of the parties participating in this Ombudsman review have suggested the employment contract is information which is taken to be contrary to the public interest under Schedule 1.

25. Therefore, the public interest test set out in s 17 of the FOI Act is the relevant consideration for whether the information is contrary to the public interest information.<sup>5</sup>

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

26. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following 5 steps:<sup>6</sup>

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

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

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<sup>5</sup> Explanatory Statement, Freedom of Information Bill 2016 (ACT).

<sup>6</sup> Section 17(1) of the FOI Act.

**Irrelevant factors**

28. In conducting the public interest test, I did not consider 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.<sup>7</sup>

**Factors favouring disclosure**

29. In deciding the access application, CMTEDD considered one factor favouring disclosure, but ultimately decided disclosure of the employment contract could not reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.<sup>8</sup>

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

30. A reasonable expectation disclosure could promote open discussion of public affairs and enhance the government's accountability favours disclosure under the FOI Act.<sup>9</sup>

31. In the decision notice dated 2 August 2022, CMTEDD said:

In considering the document within the scope of your request, I note that you have only sought access to a single document, namely the executive contract for Mr Edghill. I am not satisfied that the same argument as used in the case of BA and Merit Protection Commissioner, in relation to public interest can be said for a single document containing only information about an individual's salary and employment conditions. In addition, the name of the executive, their classification and whether they are engaged at a higher salary are already presented to the Legislative Assembly and are available to the public...

The release of this single document in my opinion does not provide enough detail to allow for a discussion about transparent recruitment or could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.

32. CMTEDD's decision letter also made reference to *Colakovski v Australian Telecommunications Corporation*<sup>10</sup> in which disclosure of an individual's identity was said to be unreasonable where the information is:

*'of no demonstrable relevance to the affairs of government and [is] likely to do no more than excite or satisfy the curiosity of people about the personal affairs of the individual'.*

33. In *Colakovski*, a request was made for information about records created by a telecommunications company in the course of investigating a number of repeated calls to the applicant where disclosure would reveal the identity of the caller. I consider the facts of this matter are distinguished from *Colakovski*.

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<sup>7</sup> Section 17(2)(f) of the FOI Act.

<sup>8</sup> Schedule 2, s 2.1(a)(i) of the FOI Act.

<sup>9</sup> Schedule 2, s 2.1(a)(i) of the FOI Act

<sup>10</sup> *Colakovski v Australian Telecommunications Corporation* [1991] FCA 170.

34. The employment contract relates to the engagement of the Director-General of MPC, by the head of service, on behalf of the Territory. I consider the processes by which the ACT Government engages members of the senior executive service (**SES member**), is a matter of public interest, particularly the integrity, fairness, and transparency of these processes.
35. The Public Sector Management Act and the Standards provide the legislative framework for the engagement of SES members, including conditions of employment and procedural requirements.
36. The employment contract comprises information about the remuneration of the SES member, their employment terms, benefits, and operation of the contract. Release of the employment contract could therefore allow members of the public to transparently examine the engagement process.
37. I accept disclosure of the employment contract would not reveal details about the consideration of the successful candidate in the recruitment process, apart from the outcome. I also accept disclosure may only promote this factor to a limited extent as it relates to the engagement of an individual SES member.
38. Accordingly, I have given minor weight to this factor.

***Pro-disclosure bias***

39. In addition to the non-exhaustive factors favouring disclosure listed in Schedule 2, s 2.1, the FOI Act is intended to be administered with a pro-disclosure bias and relevant discretions be exercised as far as possible in favour of disclosing government information.<sup>11</sup> This concept is promoted through the objects of the FOI Act.<sup>12</sup>

***Factors favouring non-disclosure***

40. CMTEDD's decision notice identified one factor favouring non-disclosure of the employment contract.

**Prejudice the protection of an individual's right to privacy or other right under the Human Rights Act 2004**

41. A reasonable expectation disclosure could prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act is a factor favouring nondisclosure under the FOI Act.<sup>13</sup> In this matter, it is the consideration of the right to privacy which is relevant.

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<sup>11</sup> Section 9 of the FOI Act.

<sup>12</sup> Section 6 of the FOI Act.

<sup>13</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

42. 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.
43. In considering whether the disclosure of this information could reasonably be expected to prejudice the protection of an individual's 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.
44. The personal information of Mr Edghill was collected by CMTEDD for the purpose of their engagement as an SES member. I note this information does not include sensitive information.<sup>14</sup>
45. The ACTPS Executive Handbook advises SES members, in accordance with the Standards, certain information about their contracts is tabled in the ACT Legislative Assembly.
46. I accept it is unlikely SES members are informed their entire employment contracts will be made publicly available. However, it is not apparent the employment contracts are treated with confidentiality, and I have not observed a dissemination limiting marker (**DLM**) on the employment contract to indicate its sensitivity.
47. The Standards provide the Chief Minister must present to the ACT Legislative Assembly a long-term SES member's name, classification, and the salary of the SES member if under s 52 of the Public Sector Management Act they are engaged at a higher salary.<sup>15</sup>
48. Detail of Mr Edghill's engagement including their full name, classification level at the time of engagement, the fact they were engaged on a long-term basis, and not at a higher salary, were tabled in the ACT Legislative Assembly in April 2020.<sup>16</sup>
49. The remuneration, allowances, and other entitlements for holders of certain positions are determined by the ACT Remuneration Tribunal under s 10 of the Remuneration Tribunal Act. As these determinations are published and the classification of long-term SES members is publicly available,<sup>17</sup> I consider the salary of Mr Edghill set by the ACT Remuneration Tribunal can be

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<sup>14</sup> As defined in the Information Privacy Act.

<sup>15</sup> Section 56 of the Standards.

<sup>16</sup> [Engagement of Long-Term Senior Executive Service Members Between 1 September 2019 and 29 February 2020 pursuant to Section 56 of the Standards, April 2020.](#)

<sup>17</sup> [Determination 2 of 2019, Head of Service, Directors-General and Executives made under the Remuneration Tribunal Act, section 10.](#)



readily determined.

50. I have identified parts of the employment contract simply refer to the applicable legislative framework or describe the obligations of the SES member in accordance with the Public Sector Management Act and the Standards.<sup>18</sup> I note the structure of the employment contract is also set out in the ACTPS Executive Handbook.<sup>19</sup>
51. I note the position title, directorate, and signature of Mr Edghill appears in the transmittal certificate within the MPC's annual report and is publicly available.<sup>20</sup>
52. In response to my draft consideration, Mr Edghill provided additional submissions objecting to the public release of their signature on the employment contract.
53. I do not consider the disclosure of the information already in the public domain, excluding the signature, resulting from Mr Edghill's engagement and duties as an SES member could prejudice the protection of an individual's right to privacy. Accordingly, this factor does not apply to this information in the employment contract.
54. The residual parts of the employment contract include information about whether certain employer benefits were elected, the total remuneration of the third-party including superannuation contributions, their position number, details of a variation of the employment contract and the signature of Mr Edghill.
55. The Information Privacy Act contains the Territory Privacy Principles (**TPP**), which govern public sector agencies' collection, management, use and disclosure of personal information.
56. TPP 6.1 provides an agency must not use or disclose personal information about an individual collected for a particular purpose for another purpose (secondary purpose) without consent, or unless one of the exceptions in TPP 6.2 or 6.3 apply.
57. TPP 6.2 applies if:<sup>21</sup>
  - (a) the individual would reasonably expect the public sector agency to use or disclose the information for the secondary purpose and the secondary purpose is—
    - (i) if the information is sensitive information—directly related to the primary purpose; or
    - (ii) if the information is not sensitive information—related to the primary purpose; or
58. I have considered Mr Edghill objections to the release of their employment contract and their concerns about the possibility of misuse of personal details should the employment contract be

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<sup>18</sup> Public Sector Management Act, ss 9, 31, 33,

<sup>19</sup> ACTPS Executive Handbook, pages 14-19.

<sup>20</sup> [Annual Report 2020-2021, Major Projects Canberra.](#)

<sup>21</sup> Schedule 1, s 6.2(a) of the Information Privacy Act.

made available in the public domain.

59. An individual would not reasonably expect personal information contained in their employment contract to be used or disclosed for a secondary purpose unrelated to their engagement. I have attributed moderate weight to this factor in respect of these parts of the employment contract.

### ***Balancing the factors***

60. In forming my preliminary view, I considered one factor favouring disclosure and one factor favouring nondisclosure, in addition to the pro-disclosure bias.
61. I have given minor weight to the factor favouring disclosure, as release of the employment contract would promote this factor to a limited extent.
62. I have given moderate weight to the factor favouring non-disclosure in respect of parts of the employment contact, as disclosure could amount to a breach of the TPPs.<sup>22</sup> I have decided this factor does not apply to the remainder of the employment contract.
63. 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 disclosing the information would have on the public interest.
64. The FOI Act has a pro-disclosure bias and as a result the public interest test should not be approached on the basis 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>23</sup>
65. I am satisfied, in respect of certain personal information contained in the employment contract, on balance, the public interest factors favouring non-disclosure outweigh the public interest factors favouring disclosure.
66. In respect of the remainder of the information, I am satisfied, on balance, the public interest factors favouring disclosure outweigh the factors favouring non-disclosure.

### **Conclusion**

67. For these reasons, my decision is to vary CMTEDD's decision of 2 August 2022 under s 82(2)(b) of the FOI Act.

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<sup>22</sup> 'BM' and Justice and Community Safety Directorate [2021] ACTOFOI 14 (23 November 2021).

<sup>23</sup> Explanatory Statement, Freedom of Information Bill 2016.

68. Parts of the employment contract which identify whether certain employer benefits were elected, the total remuneration including superannuation contributions, position number, signature, and details of a variation where release would prejudice the protection of an individual's right to privacy under Schedule 2.2(ii) of the FOI Act is contrary to the public interest information and should be withheld from release.
69. The applicant is to be given access to the remainder of the employment contract.

**Iain Anderson**

**ACT Ombudsman**

**9 January 2023**