

Elizabeth Lee MLA and Chief Minister, Treasury and Economic Development Directorate [2023] ACTOFOI 5 (22 February 2023)

Decision and reasons for decision of ACT Ombudsman,

Iain Anderson

Application number:	AFOI-RR/22/10020
Applicant:	Elizabeth Lee MLA
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Date:	22 February 2023
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – refusing to deal with an application – unreasonable and substantial diversion of resources

Decision

1. For the reasons set out below, I **confirm** the decision of the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) dated 19 August 2022 under s 82(2)(a) of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**).

Background

2. On 6 July 2022, the applicant applied to CMTEDD for access to all ministerial briefs created between 10 March 2022 and 10 April 2022, requesting:

... a copy of the [120] Ministerial Briefs with the titles outlined below.

I would like my request to include all question time briefs for that period. Duplicate documents as well as attachments to the ministerial briefs may be excluded.
3. On 8 July 2022, CMTEDD contacted the applicant to seek a rescope of the request, suggesting the applicant request a smaller number of briefs. On 15 July 2022, the applicant advised CMTEDD that a rescope was not possible.

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4. On 1 August 2022, CMTEDD notified the applicant under s 46 of the FOI Act, that it intended to refuse to deal with the access application on the basis that dealing with the application would require an unreasonable and substantial diversion of resources.¹
5. The consultation period CMTEDD gave to the applicant was 10 working days, expiring at the close of business on 15 August 2022. It does not appear the applicant responded to the consultation notice.
6. On 19 August 2022, CMTEDD decided, under s 43(1)(a) of the FOI Act, to refuse to deal with the access application because dealing with the application would require an unreasonable and substantial diversion of resources.²
7. On 31 August 2022, the applicant applied for Ombudsman review of CMTEDD's decision under s 73 of the FOI Act.
8. The issue to be decided in this Ombudsman review is whether dealing with the application would require an unreasonable and substantial diversion of the respondent's resources.
9. In making my decision, I have had regard to:
 - the applicant's access application and review application
 - the respondent's consultation notice and decision
 - the FOI Act, in particular ss 6, 7, 9, 34, 35, 38, 43, 44 and 46
 - the *Freedom of Information (Volume 3 – Dealing with Access Applications) Guidelines 2020*
 - the respondent's FOI processing file relating to the access application
 - relevant case law, including:
 - *Cianfrano and Premier's Department* [2006] NSWADT 137
 - *Underwood and Department of Housing and Public Works* [2016] QICmr 48
 - *Burdon and Suburban Land Agency* [2019] ACTOFOI 12
 - *'AQ' and Canberra Health Services* [2020] ACTOFOI 2
 - *'BI' and Canberra Health Services* [2021] ACTOFOI 10, and
 - *'BJ' and ACT Health Directorate* [2021] ACTOFOI 11

¹ Section 43(1)(a) of the FOI Act.

² Section 43(1)(a) of the FOI Act.

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10. On 20 January 2023, I provided my preliminary views to the parties in a draft consideration.
11. On 31 January 2023, the applicant indicated they accepted my draft consideration and had no further submissions to provide.
12. On 1 February 2023, CMTEDD indicated they accepted my draft consideration and had no further submissions to provide.

Relevant law

13. The FOI Act provides every person with an enforceable right of access to government information.³ This right is subject to other provisions of the FOI Act.
14. The respondent may, at any time, contact the applicant to clarify or re-negotiate the scope of the application.⁴
15. The respondent to an access application may refuse to deal with the application if dealing with it would require an unreasonable and substantial diversion of resources.⁵

Meaning of unreasonable and substantial diversion of resources

16. Section 44 of the FOI Act sets out the meaning of ‘unreasonable and substantial diversion of resources,’ providing:

For section 43(1)(a), dealing with an access application would require an unreasonable and substantial diversion of the respondent’s resources only if –

- (a) the resources required to identify, locate, collate and examine any information held by the respondent, including the resources required in obtaining the views of relevant third parties under section 38, would substantially inhibit the ability of the respondent to exercise its functions; and
- (b) the extent to which the public interest would be advanced by giving access to the information does not justify the use of the required resources.

Requirement to consult with the applicant

17. Section 46 of the FOI Act sets out the steps a respondent must take before refusing to deal with an application under, among other sections, s 43(1):

- (1) Before refusing to deal with an access application... the respondent must –
 - (a) tell the applicant, in writing, of –
 - (i) the intention to refuse to deal with the application; and

³ Section 7 of the FOI Act.

⁴ Section 34(3) of the FOI Act.

⁵ Section 43(1)(a) of the FOI Act.

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- (ii) the ground for refusal; and
- (iii) the period for consultation on the proposed refusal (the *consultation period*); and
- (b) give the applicant –
 - (i) a reasonable opportunity to consult with the respondent and to provide any additional information relevant to the application during the consultation period; and
 - (ii) any information that may assist the applicant make an application in a form that would remove the ground for refusal.
- (2) After any consultation with the respondent, the applicant may give the respondent an amended application.

Requirement to consult with relevant third parties

18. Section 38 of the FOI Act requires the respondent to take reasonable steps to consult with a relevant third party if they consider the information at issue to ‘reasonably be expected to be of concern to a person or another entity other than the Territory.’⁶

Other relevant provisions

19. The FOI Act contains a clear statement that:

It is the intention of the Legislative Assembly that this Act be administered with a pro-disclosure bias and discretions given under it be exercised as far as possible in favour of disclosing government information.⁷

The contentions of the parties

20. In its decision, the respondent relied on its reasons in the consultation notice to the applicant. In the consultation notice, the respondent reasoned that:

Specifically, you are seeking access to 120 ministerial briefs, in addition to all question time briefs for the period 10/03/2022 – 10/04/2022...

I intend to refuse to deal with your access application, under section 43(1)(a) of the FOI Act, because:

- dealing with the application would require an unreasonable and substantial diversion of resources pursuant to section 44(1)(a) of the Act, and
- the resources required does not justify the public interest, refer section 44(1)(b) of the Act.

I understand on 08 July 2022 my team contacted your office to seek a rescope of this request, such as requesting a smaller number of briefs at the one time. Your office responded on 15 July 2022 that a rescope was not possible.

As your request stands, this application would require a large portion of available FOI resources to process this request. This request is large in volume and complex in that many line areas would need to be consulted, in addition to potential third parties.

⁶ Section 38(1)(a) of the FOI Act.

⁷ Section 9 of the FOI Act.

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Balancing the public interest that would be advanced by processing this request in its current form, I have concluded that it does not justify the resources required to complete it.

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

I believe that my request (should it be granted) will promote robust public discussion of Government decisions and dealings, and lack of resourcing should not stand in the way of the public's right to this information.

... In addition, I have made similar requests to all other government directorates, and my requests were decided in favour of disclosure albeit an extension was required in some.

22. In submissions to this review, the respondent provided more detailed reasons supporting its decision to refuse to deal with the access application on the grounds that doing so would amount to an unreasonable and substantial diversion of its resources. The respondent contended:

In making my decision, I was conscious of the objects of the Act, and the pro-disclosure bias established under the Act. However, I also had to consider the implications that processing this request would have on other work of the FOI Team and the directorate more broadly.

... In deciding to refuse this request I considered the resources required to identify, retrieve, collate, consult, and make a decision on the information requested, and the extent to which the public interest would be advanced. While the identification and retrieval of the briefs requested would not be overly resource intensive; the broad scope of subjects covered by the requested briefs meant a substantial amount of time would need to be taken consulting with business areas and third parties as well as undertaking the public interest test for each brief.

Unreasonable and substantial diversion of resources

... [when] undertaking the required third-party consultations, in addition to inter-government consultation, I consider dealing with this access application would be a substantial drain on available resources. The CMTEDD FOI team has 3-4 full time members and as recently reported to the Ombudsman, undertook 412 access applications in 2021/22, more than double any other directorate.

Based on a sample of 12 of the identified briefs (10 per cent of the application), it is estimated that there could be 48 potential third parties. This does not take into account the consultation that would need to be undertaken within CMTEDD and across the ACT Government.

... Processing 120 briefs from across CMTEDD, and potential consultation with multiple third parties from state and federal governments to unions, grant recipients, and local business as well as other directorates, is not a small undertaking.

... it is a substantial diversion of resources, but it is also unreasonable due to the breadth and diverse nature of the request, with most line areas of CMTEDD needing to be involved in responding to it.

Public interest

... an access application usually has a central theme or scope... Ms Lee's access application is unusual, in that identifying the information is not difficult, however applying the public interest test is, because there is no cohesive narrative between the information being requested – it is essentially many briefs on different topics.

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Usually, when considering a range of documents in relation to an access application on a particular subject it is possible to apply the public interest in relation to the information as a whole, with additional consideration given to specific elements of the information as required.

This request differs in that, with the exception of the QTBs, there is no common subject matter or theme to the documents. This means that each document must be considered in isolation to the other documents with discrete public interest tests undertaken for each brief. This would equate to almost 100 separate access application.

Timing

... I estimate that the time required to process this application would exceed 120 working days.

23. These submissions are discussed in more detail below.

Considerations

24. I have carefully considered the information provided by the applicant and respondent.

Re-negotiating the application

25. Before refusing an access application because dealing with the application would require an unreasonable and substantial diversion of resources, the respondent is required under s 46 of the FOI Act to notify the applicant of its intention to refuse to deal with the application and give the applicant the opportunity to consult with the respondent and negotiate or refine the scope of the application.

26. There is some dispute as to the respondent's attempts to re-negotiate the scope of the application. The applicant contends the respondent simply asked the application to be withdrawn and re-made later, submitting:

On the 8th of July, my office received a call from the FOI Team at CMTEDD to discuss the request. The officer asked that I withdraw the request, or the request will be refused due to staff shortages, and a spike in the number of applications. My office has questioned whether any other options were available such as extensions, however the officer was adamant that the request had to be withdrawn and re-submitted at a later date or it will get refused.

On 15th of July my office has come back to the FOI Team at CMTEDD refusing to withdraw the application, or to alter it...

27. Conversely, the respondent contends that it sought a re-scoping of the application, such as narrowing the scope to cover a smaller number of briefs. In the consultation notice dated 1 August 2022, the respondent noted:

I understand on 08 July 2022 my team contacted your office to seek a rescope of this request, such as requesting a smaller number of briefs at the one time. Your office responded on 15 July 2022 that a rescope was not possible.

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28. In submissions to the Office, the respondent said, prior to informing the applicant of its intentions to refuse the request:

... staff from the CMTEDD Freedom of Information (FOI) team had approached Ms Lee's office suggesting a rescope, or suggesting multiple smaller requests spread over a period.

... The CMTEDD FOI team have a high-level of integrity and it is unlikely they would insist an applicant withdraw their access application. There is no record of this and the intention to refuse notice sent to Ms Lee outlines the dates of contact with the applicant and actions taken.

29. On balance, I consider it is likely there was a reasonable attempt by the respondent to re-negotiate the scope of the application, and when deciding whether to refuse to deal with the application, I consider that the respondent afforded the applicant a reasonable opportunity to consult.⁸ The respondent, in the consultation notice advised that:

Section 46(1) of the Act requires CMTEDD to provide you with the opportunity to amend your application before a decision to refuse to deal with your request can be made. The time allowed for you to amend your request... is 10 working days.

30. In any event, the applicant did not agree to a re-scoping of the application in the first instance and did not respond to the consultation notice with an amended application or otherwise.

What constitutes an unreasonable and substantial diversion of resources?

31. The option to decide not to deal with an access application because it would require an unreasonable and substantial diversion of resources seeks to ensure the capacity of respondents to discharge their normal functions is not undermined by processing unreasonably burdensome access applications.

32. There is no set level of information and processing time that should be considered to result in an unreasonable and substantial diversion of resources – the assessment must be made on an individual basis by the decision-maker.⁹

33. The Senior Assistant Ombudsman, in *Burdon and Suburban Land Agency*,¹⁰ identified a non-exhaustive list of factors relevant when making an assessment of what constitutes an unreasonable and substantial diversion of resources:

- the terms of the request, especially if the request was expressed globally
- the demonstrated importance of the documents

⁸ Section 43(1)(b)(i) of the FOI Act.

⁹ *Freedom of Information (Volume 3 – Dealing with Access Applications) Guidelines 2020*.

¹⁰ [2019] ACTOFOI 12.

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- the size of the respondent and extent of its resources
- the respondent's estimate of number of documents, pages, processing time and cost
- the reasonableness of the initial assessment and whether the applicant has been cooperative in refining the scope, and
- whether the processing time is more than 40 hours' work.¹¹

Would the resources required substantially inhibit the ability of the respondent to exercise its functions?

34. It is necessary to have regard to what work is required to deal with the application in the context of the respondent's functions and its resources.¹² This issue was considered by the Senior Assistant Ombudsman in *Burdon and Suburban Land Agency*.¹³

35. Citing *Cianfrano and Premier's Department*,¹⁴ the Senior Assistant Ombudsman found it was not necessary that respondents demonstrate that processing an access application would require such resources so as to disrupt the delivery of its primary business functions; rather, the question is whether processing the access application would unreasonably and substantially divert the resources of the respondent.¹⁵

36. The respondent concluded that dealing with the access application would impede its primary business functions, detailing:

- the CMTEDD FOI team has 3-4 full time members and undertook 412 access applications in 2021/22, more than double any other directorate
- estimates by comparison with similar requests that the time taken to process the access application would exceed 120 working days, with the application being actively worked on over most of the days
- the lack of a cohesive theme means the public interest test would be required to be applied to each document individually rather than to the information as a whole, and
- that consultation would be required with around 48 third parties as well as with other ACT government agencies, and internally with most line areas within CMTEDD.

¹¹ *Burdon and Suburban Land Agency* [2019] ACTOFOI 12 at [38].

¹² *Underwood and Department of Housing and Public Works* [2016] QICmr 48.

¹³ [2019] ACTOFOI 12.

¹⁴ *Cianfrano and Premier's Department* [2006] NSWADT 137.

¹⁵ *Burdon and Suburban Land Agency* [2019] ACTOFOI 12.

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37. I note that while CMTEDD is not a small Directorate in terms of staff, it has many disparate functions. It has a dedicated FOI team who deal with a high volume of FOI requests. My view is that the time and human resources estimated to deal with this application are such that it would substantially impact on the respondent's ability to undertake its responsibilities, thereby unreasonably and substantially diverting its resources.

Does the public interest in providing access justify the resources required to deal with the access application?

38. In its consultation notice to the applicant, relied upon in its decision, the respondent concluded "that balancing the public interest that would be advanced by processing this request in its current form, I have concluded that it does not justify the resources required to complete it."

39. In their application for Ombudsman review, the applicant indicated their view that the information requested would promote public discussion and disputed that a lack of resourcing should prevent processing the access application.

40. The FOI Act must be applied with a view to facilitating and promoting the disclosure of the maximum amount of government information, promptly, and at the lowest reasonable cost.¹⁶ This, in my view, is particularly relevant when considering the amount of resourcing a respondent should reasonably be expected to allocate to the processing of an access application.

41. Having regard to this object of the FOI Act, I consider it is appropriate that reasonable limits be imposed on the resources expended on processing individual access applications, to ensure that access to government information provided by an agency can be dealt with promptly and at the lowest reasonable cost.

42. Based on the information before me in this review, I am not satisfied that the public interest justifies the significant resources required to process the access application in its present form.

¹⁶ Section 6(f) of the FOI Act.

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Conclusion

43. For the reasons set out above, I consider the grounds upon which CMTEDD refused to deal with the applicant's access application were reasonable. The decision of the respondent, CMTEDD, of 19 August 2022 to refuse to deal with the access application under s 35(1)(d) of the FOI Act should be confirmed under s 82(2)(a) of the FOI Act, with respect to whether dealing with the application would require an unreasonable and substantial diversion of the respondent's resources.

Iain Anderson
ACT Ombudsman
22 February 2023