

## ***50 Emu Drive Pty Ltd and Environment, Planning and Sustainable Development Directorate [2020] ACTOFOI 20 (17 August 2020)***

### **Decision and reasons for decision of Senior Assistant Ombudsman, Louise Macleod**

<b>Application Number</b>	AFOI-RR/20/10011
<b>Decision Reference</b>	[2020] ACTOFOI 20
<b>Applicant</b>	50 Emu Drive Pty Ltd
<b>Respondent</b>	Environment, Planning and Sustainable Development Directorate
<b>Decision Date</b>	17 August 2020
<b>Catchwords</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – transferring application between agencies – treating two applications as one – delegated authority of Information Officer – refusal to deal with documents – whether disclosure of information is contrary to the public interest – promote open discussion – positive and informed debate – prohibited under law ( <i>Public Interest Disclosure Act 2012</i> ) – legal professional privilege – individual’s right to privacy – agency’s ability to obtain confidential information – management function of an agency or the conduct of industrial relations

### **Decision**

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the ACT *Freedom of Information Act 2016 (FOI Act)*.
2. Under s 82(2)(c) of the FOI Act, I **set aside and substitute** the decision of the Environment, Planning and Sustainable Development Directorate (EPSDD), dated 11 February 2020.

## Background of Ombudsman review

### *Access application*

3. On 18 December 2019, the FOI applicant applied to EPSDD for access to:
  - ... the documents associated with the Decision by Mr Simmons including a copy of the report by CPM
  - ... [they enclosed a copy of a] letter from Mr Craig Simmons of 23 July 2019 and the statement of reasons dated 2 September 2019 ...
4. On the same date, the FOI applicant applied to the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) for access to documents held by the Public Sector Standards Commissioner, including:
  - ... documents associated with Mr Ian McPhee's decision, and notes ... we enclose a copy of Mr Ian McPhee's decision as contained in his letter of 29 November 2019. Therefore, our client seeks documents that are in the possession, custody or control of Mr McPhee in respect of this decision, including a copy of the report by CPM.
5. As discussed below, CMTEDD subsequently transferred its access application to EPSDD. EPSDD then treated the two access applications as one, pursuant to s 43(2) of the FOI Act.
6. On 11 February 2020, EPSDD notified the FOI applicant that it had identified 17 documents as falling within the scope of the access application, and proposed to:
  - give full access to one document (document 1)
  - refuse access to 16 documents (documents 2-17).
7. This was because some of the information sought was assessed as being contrary to the public interest information, as is discussed further below.
8. On 11 March 2020, the applicant sought Ombudsman review of EPSDD's decision under s 73 of the FOI Act as it relates to their refusal to release documents 2-17.
9. On 10 July 2020, the delegate, acting Senior Assistant Ombudsman Cathy Milfull provided her preliminary views about the respondent's decision to the parties in a draft consideration.
10. On 22 July 2020, EPSDD notified our Office the information at issue may be of concern to a third party and undertook the consultation process with CPM Reviews Pty Ltd (who investigated and commissioned the Public Interest Disclosure (PID) report, discussed further below). CPM Reviews Pty Ltd did not object to our Office's draft consideration, which involved partial release of the legal section of the PID report. EPSDD confirmed they had no further submissions in relation to the draft consideration.

11. On 10 July 2020, the applicant sought an extension of time to Friday 31 July 2020 to respond to the draft consideration, which was granted.
12. On 30 July 2020, the applicant sought a further extension of time. Our Office granted an extension to 4 August 2020.
13. On 4 August 2020, the applicant confirmed they were not making any further submissions.

## Preliminary issues

### *Validity of CMTEDD's transfer to EPSDD*

14. As noted above, the FOI applicant made two separate applications under s 30 of the FOI Act, one to EPSDD and the other to CMTEDD, seeking access to information held by these agencies.
15. Although the FOI applicant filed an access application addressed to CMTEDD, it was decided that EPSDD would respond to the access application. As a result, CMTEDD transferred its access application to EPSDD pursuant to s 58 of the FOI Act to facilitate a decision being made by EPSDD.
16. As a preliminary issue, I have considered whether this action taken by CMTEDD was permitted under the Act.
17. The applicant states:

There is an incongruity in allowing subordinate parts of government to respond to FOI applicants to overseeing entities, in this case the Public Sector Standards Commissioner (the Commissioner). This is the case here because the Commissioner was reviewing the actions of the Environment, Planning and Sustainable Development Directorate (EPSDD) in the context of maladministration. This is neither good practice nor does it promote open government, nor the perception of open and transparent government.
18. While I acknowledge these concerns, as outlined in the Explanatory Statement to the Freedom of Information Bill 2016, s 58 is designed to facilitate the cooperation of agencies and Ministers when responding to open access applications – ideally, supporting open government, by reducing duplication and ensuring requested information gets to the applicant ‘as quickly as possible’.<sup>1</sup>
19. As in this matter, s 58(4) enables the transfer of an application from one agency or Minister, to another. Consequently, I consider it was open to CMTEDD to transfer the application to EPSDD, and for EPSDD to decide to make a decision on this application under s 58 the FOI Act.
20. Section 58(5) does, however, require that notice of the transfer be provided to the applicant by the receiving agency, no later than 10 working days after the application was received.

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<sup>1</sup> See Explanatory Statement, [Freedom of Information Bill 2016](#) (ACT) 35.

21. EPSDD states:

The applicant was advised by CMTEDD of the transfer and also by EPSDD in the decision letter. However, as the applicant was not also notified by EPSDD of CMTEDD's transfer, the notification requirement at section 58(2)(c)(ii) of the Act was not met.

22. I agree with EPSDD that regardless of CMTEDD's actions and information provided subsequently in its decision notice, it did not meet its obligations under s 58(4)(b) to provide notice to the applicant. However, on the material before me, there is no evidence that the applicant, or any other person, has suffered any disadvantage by EPSDD's oversight to adhere to s 58 of the FOI Act; nor do I consider this review has been impacted by this oversight.

23. Where an access application is transferred to another agency or Minister, s 58(2)(c)(i) requires that all relevant information be identified by the original agency and then given to the new agency.

24. In relation to CMTEDD transferring the access application to EPSDD, the applicant states:

There is also a legal prohibition. The Public Service Commissioner sits separately and has a separate statutory function. It was for the Commissioner or his staff to respond to the Commissioner's FOI Application, because it related to documents he had. While it is accepted that there would have been overlap in documents, where the Commissioner's decision was a review of a decision made by EPSDD, it would be expected that there would be additional documents to which he had regard, beyond those considered by EPSDD. From both a hierarchical as well as temporal approach, then, the EPSDD should not have been permitted to respond to the Commissioner's FOI Application.

25. On 19 June 2020, EPSDD provided a copy of the transfer documents to our Office that they received from CMTEDD on 21 January 2020.

26. On review of the documents provided, our Office does not consider any of these documents, which were not included as part of EPSDD's original decision, fall within the scope of the FOI access application.

27. On 3 July 2020, our Office requested that CMTEDD undertake further searches to confirm that all documents within scope of the original access application were located.

28. On 9 July 2020, CMTEDD confirmed they had undertaken further searches and no further documents within scope of the access application were identified.

29. Based upon the information available, I consider all relevant material has been identified and listed in EPSDD's schedule of documents, which is attached to the decision notice.

*Validity of dealing with two access applications as one*

30. EPSDD, following the above transfer activities, had two FOI access applications from the same FOI applicant. EPSDD then decided to treat the two access applications as one under s 43(2) of the FOI Act.

31. Section 43(2) of the FOI Act provides that a respondent may consider two or more applications as one, if the applications are related and are made by the same FOI applicant. In this instance, the two access applications were both made by the same FOI applicant, and both relate to the same investigation of alleged maladministration conducted pursuant to the *Public Interest Disclosure Act 2012* (PID Act), which I consider makes the two applications related.

32. The applicant states:

In this instance it was not the case that two applications went to the same decision maker, which would mean effectively there was only one respondent. Here, there were two applications directed to two different respondents. The Act does not permit recipients to unilaterally aggregate applications where there are two different recipients.

33. I do not agree with the applicant that the fact that one of the access applications involved was transferred to them from CMTEDD (i.e. that the original recipients were different), prevents the applications being treated as one application consistent with s 43(2). I do not consider this factor sufficient to make the two applications unrelated. Accordingly, I consider it was open to EPSDD to have treated the two access applications as one and have not considered this matter further as part of this review.

#### *Delegated authority*

34. As a preliminary issue, I have considered the applicant's submissions about the delegation of authority to the EPSDD Information Officer identified as the decision-maker in the decision-notice.

35. The applicant states:

We note that the ability to make a decision under the Act is predicated on the relevant decision maker having the delegated authority. Absent proof, it is not clear whether the Decision Maker had that requisite authority. While he no doubt did, we are not privy to the internal workings of government and the Decision Maker did not establish the nexus between the asserted authority as an 'Information Officer' and holding one of the positions outlined in the instrument of delegation.

36. Section 18 of the FOI Act requires agencies to appoint a person as its Information Officer, with s 33 then requiring that access applications be dealt with by the Information Officer.

37. The decision-maker on the original access application, which is the subject of this review, is identified in EPSDD's decision notice dated 11 February 2020, as follows:

I am an Information Officer appointed under section 18 of the FOI Act to deal with access application made under Part 5 of the FOI Act.

38. On 20 April 2020, EPSDD confirmed this person holds the position PN EO0699 – Deputy Director-General, Sustainability and the Built Environment.

39. This position is listed in the relevant delegation instrument, which is published on the ACT Legislation Register and specifies persons within EPSDD that are currently appointed as Information Officers.<sup>2</sup> On this basis, I am satisfied the decision-maker had the required delegation to make a decision about the access application, and I do not consider it necessary to consider this matter further, as part of this review.
40. While I consider it sufficient for the EPSDD decision-maker to have provided their full name and indicate they are an Information Officer, I encourage all agencies to consider providing additional details about the decision-maker in future decision records. This enables the relevant delegation instrument to be referred to where necessary.
41. Such details could include the position number of the staff member and/or the appropriate position description. The information provided should be consistent with the details used to identify the authorised officer in the applicable delegation instrument.

#### *Third party consultation*

42. I note that as EPSDD's decision was to not release information,<sup>3</sup> it was not required to take reasonable steps to consult with any relevant third parties before making a decision.<sup>4</sup>

### **Information at issue**

43. The information at issue in this Ombudsman review is the information that EPSDD decided should be disclosed to the FOI applicant. It can be categorised as follows:
- information obtained as part of an investigation under the PID Act (documents 4-11, and 14-16)
  - internal correspondence, divided into two further categories: development approval, and obligations under subpoena, and
  - information that the FOI applicant already had access to (documents 2-3, 12-13, and 17).
44. In making my decision, I have had regard to:
- the applicant's access application and review application
  - the respondent's decision
  - the respondent's FOI processing file relating to the access application

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<sup>2</sup> See [Freedom of Information \(Environment, Planning and Sustainable Development Directorate Information Officers\) Appointment 2018 \(No 2\) Notifiable instrument NI2018-657](#).

<sup>3</sup> Section 38(1)(a) of the FOI Act.

<sup>4</sup> Section 38(2) of the FOI Act.

- an unedited copy of the information at issue
- the FOI Act, in particular ss 6, 16-18, 30, 33, 35, 43, 45, 48, 50, 72, Schedule 1 and Schedule 2
- *Human Rights Act 2004* (HR Act)<sup>5</sup>
- the *Information Privacy Act 2014* (IP Act)
- the *Legislation Act 2001*, in particular ss 133 and 160
- the PID Act, in particular ss 6-8, and 44
- the *Public Interest Disclosure Bill 2012* – Explanatory Statement
- the Freedom of Information (Environment, Planning and Sustainable Development Directorate Information Officers) Appointment 2018 (No 2) Notifiable instrument NI2018-657
- relevant case law, including; *BA and Merit Protection Commissioner*;<sup>6</sup> *Jones v University of Canberra & Ors*;<sup>7</sup> *Walker v Secretary, Department of Health and Ageing*;<sup>8</sup> *Waterford v Commonwealth of Australia*;<sup>9</sup> *Ransley and Commissioner of Taxation (Freedom of Information)*;<sup>10</sup> *Alistair Coe and ACT Health Directorate*;<sup>11</sup> and *Taggart and Queensland Police Service*.<sup>12</sup>

## Relevant law

45. Section 7 of the FOI Act provides every person with an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.
46. 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.
47. 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.

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<sup>5</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

<sup>6</sup> [2014] AICmr 9.

<sup>7</sup> [2016] ACTSC 78.

<sup>8</sup> [2016] FCA 233.

<sup>9</sup> (1987) 163 CLR 54.

<sup>10</sup> [2015] AATA 728.

<sup>11</sup> [2018] ACTOFOI 4.

<sup>12</sup> [2015] QICmr 16.

48. Section 35(1)(c) of the FOI Act provides that 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.
49. Section 43 of the FOI Act provides that an access application may be decided by refusing to deal with the application. There are a number of reasons why an agency can refuse to deal with an application. Relevant to this review, this includes where the government information is already available to the applicant.
50. Section 45 of the FOI Act details when information is considered already available to the applicant pursuant to s 43. Relevant to this review, this includes when the information has otherwise previously been given to the applicant.
51. Section 50 of the FOI Act applies if an access application is made for government information in a record containing contrary to the public interest information and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted.
52. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.
53. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose.
54. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

## The contentions of the parties

55. In applying for this review, the applicant states:
  - ... the Decision of the Decision Maker should also be set aside. This is because the Decision Maker applied the test in section 17 of the Freedom of Information Act 2016 (ACT) (the Act) wrongly. He placed too great an emphasis on a perceived infringement of privacy and did not place sufficient weight on the advancement of government accountability. He also failed to consider the 'pro disclosure bias' that ought to be applied.
56. In its decision-notice, EPSDD states:
  - Information has been identified to fall under Schedule 1.2 and 1.3(6) and is therefore taken to be contrary to the public interest to disclose.
  - Some of the correspondence captured by your application may be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege.
57. These submissions are discussed in more detail below.



## Considerations

58. I have carefully considered an unedited copy of the information at issue together with the information provided by the applicant and respondent.
59. Taking this information into account, I have discussed below EPSDDs decision to refuse to deal with certain documents in scope of the request, and I have then proceeded to discuss whether the residual information in scope of this review consists of contrary to the public interest information - commencing with the application of Schedule 1 of the FOI Act, before applying the public interest test under s 17 of the FOI Act to any remaining information.

### *Refusing to deal with certain documents*

60. EPSDD refused to deal with documents 2, 12-13, and 17, in full, on the basis that the government information was already available to the applicant.
61. Section 43 of the FOI Act enables a respondent to refuse to deal with an access application under a number of circumstances, including where the government information has previously been given to the FOI applicant.<sup>13</sup> Section 45 details the circumstances where information is considered already available to the applicant.
62. While EPSDD did not identify which subsection of s 45 applied to the above documents, I consider that the information in documents 2, 12-13, and 17 has otherwise been given to the applicant. They were created by the applicant's legal representative and would continue to be held by them and therefore, this factor does not need to be considered further as part of this review.

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

63. Information mentioned in Schedule 1 of the Act is taken to be contrary to the public interest to disclose, unless the information identifies corruption or the commission of an offence.
64. I have reviewed a copy of the unredacted information and do not consider that the information identifies corruption or the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law. Accordingly, if information is considered to fall under Schedule 1, then disclosure of the information is considered to be contrary to the public interest information.

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<sup>13</sup> Sections 43(1)(d) and 45(f) FOI Act.

65. In its decision notice, EPSDD submits that some of the information sought consists of contrary to the public interest information under Schedule 1 of the FOI Act, being:

- information disclosure of which is prohibited under law<sup>14</sup>
- information subject to legal professional privilege.<sup>15</sup>

66. The applicant did not address Schedule 1 factors in their application for review.

#### Prohibited under law

67. Schedule 1.3 provides that the disclosure of information, which is prohibited by the secrecy provision of a law, is contrary to the public interest. This includes information prohibited from disclosure under specific legislation listed in the FOI Act, as well as any other information prohibited by the secrecy provision of a law.<sup>16</sup>

68. A secrecy provision is defined as a provision of a law that:

- (a) applies to information obtained in the exercise of a function under the law; and*
- (b) prohibits people mentioned in the provision from disclosing the information, whether the prohibition is absolute or subject to stated exceptions or qualifications.*<sup>17</sup>

69. In relation to the information at issue, EPSDD asserts that information in documents 4-11, and 14-16 fall within the scope of this provision, because the PID Act, specifically s 44 of the PID Act, prohibits the release of this information in its entirety.

70. The PID Act sets out how a person can make a public interest disclosure, the responsibility of the entity who investigates the disclosure, as well as protections for the discloser – including restrictions on disclosure. Specifically, s 44 of the PID Act provides that certain ‘protected information’ is prohibited from disclosure in certain circumstances.

71. I consider these provisions meet the definition of a ‘secrecy provision’ under the FOI Act – as they:

- apply to information obtained as part of a PID investigation – that is, information obtained in the exercise of a function under the PID Act<sup>18</sup>, and
- make it an offence if a person recklessly divulges ‘information about a person’, obtained by a ‘person to whom this section applies’.<sup>19</sup>

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<sup>14</sup> Schedule 1, s 1.3 of the FOI Act.

<sup>15</sup> Schedule 1, s 1.2 of the FOI Act.

<sup>16</sup> Schedule 1, s 1.3(6) of the FOI Act.

<sup>17</sup> Schedule 1, s 1.3(7) of the FOI Act.

<sup>18</sup> Schedule 1, s 1.3(7)(a) of the FOI Act.

<sup>19</sup> Section 44 (1) and (2) of the FOI Act.

72. As a result, I agree with EPSDD that disclosure of information considered to be ‘protected information’ under the PID Act is contrary to the public interest to disclose under Schedule 1, s 1.3(6) of the FOI Act.
73. I now need to address whether the information contained in documents 4-11 and 14-16, is prohibited from release. I have discussed this in detail below, taking into account the definition of ‘protected information’ under the PID Act.

*What information is protected under the PID Act?*

74. For information to be ‘protected information’ under the PID Act, the information must:
- be ‘about a person’ and
  - have been disclosed to, or obtained by, a relevant person exercising a function under the PID Act.
75. The PID Act does not define the term ‘about a person’. The Macquarie Dictionary relevantly defines ‘about’ as ‘of; concerning; in regard to’ and as ‘connected with’.
76. I consider this to mean that the term ‘about a person’ incorporates information about an individual or a corporation, taking into account the relevant provisions of the *Legislation Act 2001*.<sup>20</sup> I also consider that such information is not limited to information that identifies an individual or corporation, but includes all information that can reasonably be said to be ‘about them’.
77. This interpretation is consistent with that of Professor McMillan in *BA and Merit Protection Commissioner*:

*Another way of construing the requirement that information be ‘about an individual’ is to regard that phrase as expanding rather than limiting the concept of personal information. The concept applies not only to the item of information that identifies a person, but to other information ‘about’ them. In the present case, for example, personal information includes a referee’s comments about a person’s career, performance, attitudes and aptitude. Similarly, it was held in *Smallbone v New South Wales Bar Association* [2011] FCA 1145 at [56] that the views expressed by the author of a reference may also be personal information about the author.*

*In summary, personal information can be information or an opinion of any kind, ranging from sensitive and confidential information to information that is publicly available from other sources. It can include vocational assessment and routine work information, as well as private or domestic information.*<sup>21</sup>

<sup>20</sup> Section 160(1) of the *Legislation Act 2001* (ACT) states - *In an Act or statutory instrument, a reference to a “person” generally includes a reference to a corporation as well as an individual.*

<sup>21</sup> [2014] AICmr 9 at [56]-[57].

79. The comments of the Supreme Court of the ACT in *Jones v University of Canberra & Ors* are also relevant here, with Chief Justice Refshauge indicating that the PID Act should be given a liberal interpretation:

*It is clear from the Presentation Speech and the terms of the Public Interest Disclosure Act that it is to be regarded as beneficial legislation or, as it is sometimes called remedial legislation. That is, it gives a benefit to a person and remedies the likelihood of injustice. See Estate of McComb [1999] VSC 311; [1999] 3 VR 485 at 490.*

*Thus, it should be given a liberal interpretation, as explained by Isaacs J in Bull v Attorney-General (NSW) [1913] HCA 60; (1913) 17 CLR 370 at 384. Such a liberal interpretation is not limited to the situation where there is ambiguity, however, though in that situation, ambiguous provisions will be interpreted in a manner favourable to those who benefit from the provisions. See R v Kearney; Ex parte Jurlama [1984] HCA 14; (1984) 158 CLR 426 at 433. Accordingly, the provisions will be interpreted to give the fullest relief that a fair meaning of the language of the provisions will allow: Khoury v Government Insurance Office (NSW) [1984] HCA 55; (1984) 165 CLR 622 at 638.*

*In my view, this is the approach that I should take to the Public Interest Disclosure Act and I will do so.<sup>22</sup>*

80. Therefore, I consider ‘information about a person’ to be sufficiently broad to encompass the following information:

- an individual or corporation’s identity
- an individual or corporation’s action’s and views, including opinions
- any information relating to an individual or corporation’s PID disclosure.

81. If ‘information is about a person’, then the next question is whether this information was disclosed to, or obtained by a person, to whom s 44 of the PID Act applies.

82. Section 44 of the PID Act includes the following:

***person to whom this section applies means –***

*(a) A person who is or has been –*

*(iii) a disclosure officer; or*

*(iv) an investigating entity; or*

*(b) anyone else who has exercised a function under this Act.*

83. As a result, I consider any ‘information about a person’ obtained during an investigation under the PID Act, to have been collected by a ‘person to whom this section applies’.

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<sup>22</sup> [2016] ACTSC 78 at [27]-[29].

*Does the information at issue meet the definition of 'protected information'*

*Transcripts of interviews (documents 4-7)*

84. I consider that a transcript of an interview that was conducted for the purpose of carrying out an investigation under the PID Act, consists of information obtained by an investigating entity, which is about a person, being information about the interviewee's actions and views. Accordingly, I consider this information to be 'protected information', and therefore contrary to the public interest to disclose.

*Report (document 14)*

85. The report contains a range of information, so for clarity I have broken this information into separate categories.

**GENERAL - INFORMATION IDENTIFYING PARTIES**

86. I consider all information that identifies, or could reasonably identify, a person who participated in the PID investigation to meet the definition of 'protected information'.<sup>23</sup> Accordingly, I consider this information to be 'protected information', and therefore contrary to the public interest to disclose.

**INVESTIGATION (sections 1 - 3, and 5 - 11)**

87. I consider all information that relates to the investigation to consist of information that was not previously held by the investigating entity, and consequently, to be information obtained during the investigation. Further, I consider this information consists of information about a person, as this information includes the actions and views of the parties who were interviewed, as well as the findings that are based upon those actions and views, which I consider to also be 'protected information'. Accordingly, I consider this information to be 'protected information', and therefore contrary to the public interest to disclose.

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<sup>23</sup> This also includes Schedule 1, s 1.9 (a) of the FOI Act.

**LAW (section 4)**

88. I do not consider information that outlines the legal obligations that apply to the investigating entity to be information obtained during the PID investigation; rather it is information generated by the investigating entity to clarify their legal obligations in carrying out their functions under the PID Act. As a result, I do not consider this to be 'protected information'. I have considered further below whether, on balance, it is in the public interest to release this information.

*Correspondence (documents 8-11)*

89. Documents 8-11 consist of email correspondence relating to the PID investigation. I have considered these emails carefully and I am satisfied that all but four emails (contained in document 8) are correspondence with the investigating entity, including actions taken and views expressed by a person. I consider this information is 'protected information' and contrary to the public interest to disclose.

90. I consider that three of the four emails in document 8 are internal correspondence relating to development approval, meaning this information was not obtained by a person carrying out a function under the PID Act, and therefore is not 'protected information' under the PID Act. The fourth email relates to legal obligations, unrelated to the PID Act. I have considered further below whether, on balance, it is the public interest to release this information.

*Other information (documents 15 and 16)*

91. These documents contain information provided by the discloser, or their representative, in relation to their public interest disclosure. I consider this information is 'protected information'<sup>24</sup> and contrary to the public interest to disclose.

Legal professional privilege

92. Schedule 1, s 1.2 of the FOI Act provides that any information that would be privileged from production or admission into evidence in a legal proceeding on the grounds of legal professional privilege, is prohibited to be released under the FOI Act.

93. EPSDD asserts that legal professional privilege applies to all information in document 8.

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<sup>24</sup> I also consider Schedule 1, s 1.9(a) applies to this information.

94. I have explained above the reasons I consider document 8(1) consists of Schedule 1.3 information that should not be disclosed. This leaves:
- document 8(2), which comprises internal correspondence relating to developmental approval
  - documents 8(3)-(5), which comprise internal correspondence involving a subpoena.
95. EPSDD asserts that legal professional privilege applies to this information.
96. Legal professional privilege is not defined in the FOI Act, however, in accordance with common law principles, for legal professional privilege to apply the following criteria must be met:<sup>25</sup>
- an independent legal practitioner and client relationship must exist – that is, was the information sought from a legal practitioner in their professional capacity<sup>26</sup>
  - the communication must have been made for the dominate purpose of giving or receiving legal advice
  - the advice must have been confidential.

#### *Documents 8(2)-(4)*

97. It is not apparent from the nature of these emails that they were the product of an independent legal practitioner and client relationship. Unless EPSDD can provide further submissions evidencing this, as well as evidencing that the information was created for the dominate purpose of giving or receiving legal advice, and the advice is confidential, then I consider that EPSDD has not discharged its onus to establish that these documents are protected by legal professional privilege.
98. I have considered further below whether, on balance, it is in the public interest to release this information.

#### *Document 8(5)*

99. This document was sent from an ACT Government Solicitor to an EPSDD employee, with the email subject line - “Sensitive: Legal”, as well as the contents relating to the agency complying with legal obligations. I consider that a legal practitioner and client relationship exists, this communication was made for the dominate purpose of giving legal advice, and the information is confidential in nature. Further, it does not appear that EPSDD has waived its privilege regarding this document.

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<sup>25</sup> *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.

<sup>26</sup> *Ransley and Commissioner of Taxation (Freedom of Information)* [2015] AATA 728 at [13].

100. Accordingly, I consider the disclosure of the information in document 8(5) would be contrary to the public interest to disclose under Schedule 1, s 1.2, as the information would be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege.

*Public interest test*

101. I now need to consider whether any of the information at issue that I have assessed above as outside the scope of Schedule 1 of the FOI Act, is, nevertheless on balance, contrary to the public interest to release.

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

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

103. 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.

104. The remaining information to be considered against the above public interest test is:

- document 8 – emails containing internal correspondence, 8(2) relating to development approval, whereas 8(3)-(4) relating to subpoenas.
- document 14 – Parts of the PID report that relate to the legal obligations that apply to the investigating entity in carrying out their investigation under the PID Act.

*Irrelevant factors*

105. I have noted the irrelevant factors listed in s 17(2) of the FOI Act and do not consider that any irrelevant factors arise in this Ombudsman review.



*Factors favouring disclosure*

106. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. EPSDD states the following factors applied to the original information sought:

- (i) promote open discussion of public affairs and enhance the government's accountability<sup>27</sup>
- (ii) contribute to positive and informed debate on important issues or matters of public interest<sup>28</sup>
- (iii) inform the community of the governments operations including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community<sup>29</sup>
- (viii) reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>30</sup>

107. The applicant does not dispute the above, but questions the weight applied to certain factors, when they state:

In weighing up the factors in section 17, far too little emphasis, if in fact any, was placed upon the enhancement of government accountability ... an allegation was made of maladministration ... This is a serious matter. And an investigation the followed and the Report was commissioned. However, the Report itself was not provided. This is critical because the complainant, nor any other person for that matter, is not able to understand the basis of the ultimate findings.

108. As the scope of the remaining information has been narrowed significantly, I consider that only the first two factors listed above (i) and (ii) remain relevant. This is because the remaining information does not include references to policies, guidelines or codes of conduct, nor does it relate to a decision, so it cannot be said that disclosure would reveal the reasons for a government decision, or provide any background or contextual information that informed a decision.

109. I consider that the remaining information at issue could reasonably be expected to promote open discussion of public affairs, enhance the government's accountability by showing the ordinary functions carried out by government employees, and contribute to positive and informed debate on important issues or matters of public interest.<sup>31</sup>

110. I consider these factors should be given considerable weight. Additionally, 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.<sup>32</sup> This concept is promoted through the objects of the FOI Act.<sup>33</sup>

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<sup>27</sup> Schedule 2, s 2.1(a)(i) of the FOI Act.

<sup>28</sup> Schedule 2, s 2.1(a)(ii) of the FOI Act.

<sup>29</sup> Schedule 2, s 2.1(a)(iii) of the FOI Act.

<sup>30</sup> Schedule 2, s 2.1(a)(viii) of the FOI Act.

<sup>31</sup> Schedule 2, s 2.1(a)(i) and (ii) of the FOI Act.

<sup>32</sup> See s 17 of the FOI Act.

<sup>33</sup> See s 6(b) of the FOI Act.

### *Factors favouring nondisclosure*

111. Schedule 2, s 2.2 of the FOI Act contains a list of public interest factors favouring nondisclosure.

Of these, EPSDD states that the release of this information would prejudice:

- the protection of an individual's right to privacy or any other right under the HR Act<sup>34</sup>
- an agency's ability to obtain confidential information<sup>35</sup>
- the management function of an agency or the conduct of industrial relations by an agency.<sup>36</sup>

112. I have discussed each of these factors below in the context of the remaining information at issue.

### Individual's right to privacy

113. A factor favouring non-disclosure is that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the HR Act.

114. EPSDD states:

The information identified as relevant to your request is of a sensitive, personal nature.

It is my view that the disclosure of this information would infringe upon individuals' rights concerning their privacy and reputation.

115. The applicant states:

It appears that various individuals at the Environment, Planning and Sustainable Development Directorate (EPSDD) were asked about the operation of government in the context of assisting with an investigation into matters relating to a planning decision, and whether there was any maladministration. These individuals were, we assume, employees and officers of the relevant government department, and there is nothing which offends the Human Rights Act in our view, because such disclosure was done in the furtherance of their employment with the government.

116. Section 12(a) of the HR Act provides that everyone has the right 'not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily'. It does not provide a general right to privacy,<sup>37</sup> but can essentially be viewed as the right of an individual to preserve their personal sphere from interference from others.

117. The IP Act identifies the circumstances in which the disclosure of information may constitute a breach of an individual's privacy. An individual's personal information can only be disclosed in accordance with the Territory Privacy Principles listed in Schedule 1 of the IP Act.

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<sup>34</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

<sup>35</sup> Schedule 2, s 2.2(a)(xii) of the FOI Act.

<sup>36</sup> Schedule 2, s 2.2(a)(xv) of the FOI Act.

<sup>37</sup> *Alistair Coe and ACT Health Directorate* [2018] ACTOFOI 4 at [43].

118. Personal information is defined in s 8 of the IP Act as:

(a) information or an opinion about an identified individual or an individual who is reasonably identifiable—

(i) whether the information or opinion is true or not; and

(ii) whether the information or opinion is recorded in a material form or not.

119. The disclosure of information about agency staff is not generally considered to prejudice the protection of the individual's right to privacy where the information is wholly related to the individual's routine day-to-day work activities.<sup>38</sup> I consider the disclosure of the remaining information at issue would only reveal that government employees are performing their duties, which I consider would contribute to accountability and transparency of government action and decision-making.

120. For the reasons listed above, I am not satisfied that the remaining information at issue could reasonably be expected to prejudice the protection of an individual's right to privacy.

#### Agency's ability to obtain confidential information

121. A factor favouring non-disclosure is that disclosure of the remaining information at issue could reasonably be expected to prejudice the agency's ability to obtain confidential information.

122. EPSDD states:

There is a clear expectation by the interviewees that the information communicated in the investigative process would remain confidential. I have regarded the nature of the engagement with these parties and sensitivity of the information against how the identified information would advance the community's understanding of the operations under the PID Act and the transparency in government dealings.

I have determined that the release of certain information relevant to your application could reasonably be expected to harm the future supply of such confidential information.

123. The applicant states:

... for the reasons outlined in Crowe and Department of the Treasury [2013] AICmr 69 (29 August 2013), namely that ' "frankness and candour" contentions have generally fallen into disfavour, at least when advanced on a class claim basis' [46]. This was further elaborated on in paragraph [47].<sup>39</sup>

In other words, by taking a class claim basis exemption against disclosure in the Decision, because interviewees were allegedly providing the information on a confidential basis, the risk is that no consideration is given to what the actual contents of that information might be and whether it should be disclosed.

124. Turning to the remaining information at issue, I do not consider the information contained in the internal correspondence in documents 8(2)-(4) was made in confidence, and accordingly, I do not consider releasing this information will prejudice the agency's ability to obtain confidential information in the future.

<sup>38</sup> *Taggart and Queensland Police Service* [2015] QICmr 16 at [17].

<sup>39</sup> See above n 22.

125. In relation to document 14, the report does not contain any statements as to confidentiality, and no further information has been provided that evidences that the document was prepared in confidence. I note that the report has 'Sensitive: Personal' attached to it, however, the information that remains in issue does not relate to personal information; rather it relates to publically available legal obligations relevant to the investigating entity.

126. I do not consider the remaining information at issue to consist of confidential information, and accordingly, I do not consider that release of this information would prejudice the agency's ability to obtain confidential information in future.

#### Prejudicing the management function of an agency or the conduct of industrial relations

127. A factor favouring non-disclosure is that disclosure of the information could reasonably be expected to prejudice the management function of an agency or the conduct of industrial relations by an agency.

128. EPSDD states:

Information captured by this request was supplied as part of an agency workplace investigation ... On balance, I have decided that the disclosure of this information may make complainants or witnesses reluctant to fully participate in future investigations and effectively prejudice this management function of the agency.

129. The applicant states:

... the Decision Maker neglected to consider that the agency in question is comprised of public servants who are therefore subject to considerations of transparency and open government. Secondly, he did not seem to consider that in the context of an investigation into maladministration, this sort of class claim exemption basis would only have the effect of magnifying the concerns as to the maladministration, and therefore there ought to be a tendency towards disclosure where possible, consistent with the objects of the FOI Act, such as expressed in section 9. The result here by the Decision Maker is precisely the sort of outcome that the Court in Sankey cautioned against.

130. The remaining information at issue, includes the part of the PID report that details the investigators legal obligations, and internal correspondence that do not relate to the PID investigation.

131. EPSDDs submissions do not address how the disclosure of this remaining information can reasonably be expected to prejudice the management function of their agency, and as the onus rests on EPSDD, I am not satisfied this factor favouring non-disclosure is applicable.

### *Balancing the factors*

132. The applicant states:

The Decision Maker erred in weighing up the various factors in section 17 of the Act. Specifically, far too much emphasis was placed on a perceived need for privacy and confidentiality, and far too little upon the need for transparent and open government, particularly noting the objects of the Act as well as the pro disclosure bias evident in section 9.

133. I have not identified any public interest factors favouring non-disclosure. I have identified two public interest factors favouring disclosure, and taking into account the pro-disclosure bias of the FOI Act, I consider that the remaining information at issue should be released.

### **Conclusion**

134. In relation to document 14 and document 8, under s 82(2)(c) of the FOI Act, I **set aside** the respondent's decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act, **and substitute** in the following decision:

#### Document 8

- Release, in part, the information contained in documents 8(2), 8(3) and 8(4).

#### Document 14

- Release, in part, the information contained in section 4 of the report.

**Louise Macleod**  
**Senior Assistant Ombudsman**

**17 August 2020**