

## ***Elizabeth Lee MLA, Ben Ponton and Chief Minister, Treasury and Economic Development Directorate [2023] ACTOFOI 1 (9 January 2023)***

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

<b>Application number:</b>	AFOI-RR/22/10016
<b>Decision reference:</b>	[2023] ACTOFOI 1
<b>Applicant:</b>	Elizabeth Lee MLA
<b>Respondent:</b>	Chief Minister, Treasury and Economic Development Directorate
<b>Third Party:</b>	Ben Ponton
<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 (ACT)</i></i>

### **Decision**

1. For the reasons set out below, I have decided to **vary** the decision of the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) dated 2 August 2022.

### **Background of Ombudsman review**

2. On 24 June 2022, the applicant applied to the Environment, Planning and Sustainable Development Directorate (EPSDD) for access to:

*“Ben Ponton’s employment contract with the Environment, Planning and Sustainable Development Directorate (EPSDD).”*

3. On 24 June 2022, EPSDD transferred the access application to CMTEDD under s 57 of the FOI Act.
4. On 2 August 2022, CMTEDD advised the applicant it had identified one document as falling within the scope of the access application and decided to refuse access to this document in its entirety.
5. On 24 August 2022, the applicant sought Ombudsman review of CMTEDD's (the respondent) decision under s 73 of the FOI Act.
6. My Office attempted informal resolution of this review under s 80A of the FOI Act, which was unsuccessful in concluding the matter.
7. On 26 September 2022, Ben Ponton requested to be joined to this review as a third party under s 77 of the FOI Act and the delegate accepted this request.
8. On 16 December 2022, I provided my preliminary views to the parties in a draft consideration.
9. On 19 December 2022, the parties each indicated they accepted my draft consideration and had no further submissions to provide.

### **Information at issue**

10. The information at issue in this Ombudsman review is Ben Ponton's employment contract in his role as Director-General of EPSDD.
11. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information at issue would be contrary to the public interest.
12. In making this decision, I have had regard to:
  - the applicant's access application and review application
  - the respondent's decision
  - the FOI Act, in particular Schedule 2, s 2.2(a)(ii) and s 2.1(a)(i)
  - the *Human Rights Act 2004* (ACT)
  - an unedited copy of the information at issue
  - the consultation undertaken by the respondent with the third party
  - submissions from the third party in response to attempted informal resolution
  - relevant administrative decisions and case law, including:
    - *'BM' and Justice and Community Safety Directorate* [2021] ACTOFOI 14
    - *Colakovski v Australian Telecommunications Corporation* [1991] FCA 170.

## **Relevant law**

13. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.<sup>1</sup> This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.<sup>2</sup>
14. 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.
15. The public interest test in s 17 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.
16. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.<sup>3</sup>
17. 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.

## **The submissions of the parties**

18. In its decision notice, the respondent said:

I have taken into account the views of Mr Ponton as provided to me under section 38 of the Act. Mr Ponton 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.

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 Ponton 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.

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

The decision-maker has refused access to information or parts of information that was requested.

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.

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<sup>1</sup> Section 7 of the FOI Act.

<sup>2</sup> Section 35(1)(c) of the FOI Act.

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

20. When consulted by the respondent, the third party initially said:

I have reviewed and note that one way or another, the information contained within my employment contract with the Environment, Planning and Sustainable Development Directorate is all publicly available, just not in the consolidated form of my employment contract. On that basis, I do not object to the release of the information as requested, subject to consideration of the following.

I think that it would be perfectly reasonable, particularly if this information is to be published online, for my signature to be redacted.

21. When my Office consulted the third party on potential informal resolution – on the basis they had not objected to release previously, except for their signature – they made the following submissions:

Having now reflected on the ‘material considered’ and the detailed reasons provided by the CMTEDD Information Officer I have reconsidered my original position and now support those detailed reasons, as outlined in the attached, to support the decision of non-disclosure of my employment contract with the ACT Public Service to the applicant.

I note that the applicant does not appear to have provided a rebuttal to the CMTEDD Information Officer’s detailed reasons for the decision (non-disclosure) - refer to Attachment A of the Notice, issued under Section 75 of the Freedom of Information Act, 2007 and dated 31 August 2022, which is also attached and was provided to me by CMTEDD on 31 August 2022.

## **Consideration**

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

22. No party to this Ombudsman review suggested the information at issue contains information that would be contrary to the public interest to disclose under Schedule 1 of the FOI Act.
23. Therefore, for the information at issue to be ‘contrary to the public interest information’, it must on balance be contrary to the public interest under the test set out at s 17 of the FOI Act.

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

24. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:<sup>4</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

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<sup>4</sup> Section 17(1) of the FOI Act.

interest

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

***Irrelevant factors***

25. I do not consider that any irrelevant factors, which I am prohibited from considering, arise in this review.

***Factors favouring disclosure***

26. CMTEDD's decision letter to the applicant stated it had identified no factors favouring disclosure.

27. However, CMTEDD's decision letter did consider whether the factor at Schedule 2.1 (a)(i) was relevant in this matter – that disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.<sup>5</sup>

28. CMTEDD's decision found that this factor was not relevant in this matter, stating the following:

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.

29. I consider this factor is relevant to this review.

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

30. A reasonable expectation that disclosure could promote open discussion of public affairs and enhance the government's accountability is a factor favouring disclosure under the FOI Act.<sup>6</sup>

31. CMTEDD's decision letter noted this would be the factor that could apply if they believed any factors existed favouring disclosure of the information at issue.

The most relevant factor under schedule 2.1 that favours disclosure for this document, is (a)(i) "disclosure of the information could reasonably be expected to do any of the following (a) promote open discussion of public affairs and enhance the government's accountability."

32. CMTEDD's reasoning for why this factor is not relevant centred on the question of the likelihood of disclosure resulting in more open discussion of public affairs and enhancing the government's accountability.

33. I agree with CMTEDD that one person's contract of employment alone is less revealing than cases where documents had been sought related to recruitment processes.

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<sup>5</sup> Schedule 2, s 2.1(a)(i) of the FOI Act.

<sup>6</sup> Schedule 2, s 2.1(a)(i) of the FOI Act.

34. However, I find there to be important distinctions between the facts of this matter and the cases referred to in CMTEDD's decision letter. Revealing information about recruitment processes could give insights into matters such as actual or perceived bias, procedural fairness, and timeliness of decision-making.
35. Information regarding an individual's employment contract at the Director-General level can reveal information about adherence with legislative guidelines governing how their contract is structured and whether public funds are being used appropriately in terms of remuneration for these individuals.
36. Mr Ponton is the Director-General of EPSDD, a position with sufficient significance to warrant employment details being presented to the ACT Legislative Assembly, as recognised in CMTEDD's decision letter:

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.

37. The employment terms for people at the senior level of the ACT public service, such as Mr Ponton, are set out in the *Public Sector Management Act 1994* (ACT)<sup>7</sup>, the *Public Sector Management Standards 2016* (ACT)<sup>8</sup> and relevant determinations made by the Remuneration Tribunal under the *Remuneration Tribunal Act 1995* (ACT).<sup>9</sup>
38. As such, the employment contracts for Mr Ponton and others in the senior levels of the ACT public service are standardised based on these provisions, with the only likely differences being where the individual has negotiated specific terms and conditions, such as extra remuneration, non-monetary compensation, or the pay level for their classification.
39. As an individual charged with running an ACT directorate whose contractual terms are specified by legislation, I consider there is a public interest in ensuring that government funds applied in accordance with those terms are being spent appropriately.
40. CMTEDD's decision letter made reference to *Colakovski v Australian Telecommunications Corporation*<sup>10</sup>, in which information sought about an individual's identity was deemed to be:

*'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'.*

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<sup>7</sup> [Public Sector Management Act 1994.](#)

<sup>8</sup> [Public Sector Management Standards 2016.](#)

<sup>9</sup> [Remuneration Tribunal Act 1995.](#)

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

41. The facts of that matter distinguish it from this matter, as *Colakovski* involved a person seeking the identity of an unknown caller to their property, while this matter seeks documentation related to a known individual and how government funds are applied in relation to that individual's remuneration.
42. On this basis, I find this factor is relevant for the purpose of this review. As noted by Mr Ponton in his response to initial third-party consultation, the information contained within the contract is publicly available, only not in the consolidated form of the actual contract.

***Factors favouring nondisclosure***

43. CMTEDD's decision letter to the applicant stated it had identified one factor favouring nondisclosure.

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

44. CMTEDD found this factor to be relevant in this matter, stating that:

The release of this information would cause a significant intrusion into the privacy of Mr Ponton which would impact his rights under the *Human Rights Act 2004*.

45. The relevant right in this instance comes from s 12(a) of the *Human Rights Act 2004 (ACT)*, which states:

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily;

46. CMTEDD's decision letter does not explain how disclosure of the information at issue would present an either arbitrary or unlawful interference with Mr Ponton's right to privacy under s 12(a).
47. It merely states that disclosure goes beyond what is provided to the Legislative Assembly on a periodic basis and this extended disclosure would impact Mr Ponton's rights.
48. Given this decision letter does not explain how disclosure would actually be arbitrary or unlawful, I afford this factor low weight in considering this review.

***What is already public?***

49. As stated by Mr Ponton in his response to third party consultation, the contents of his employment contract are available publicly in sections across multiple sources including:
  - the information periodically provided to the Legislative Assembly which would indicate if Mr Ponton was being paid outside the typical pay range for his classification

- the Standard Employment Terms contained in the *Public Sector Management Standards 2016* (ACT)
  - publicly available determinations on remuneration which provide ranges for pay at each employee classification
  - information contained in EPSDD annual reports on his term length.
50. Mr Ponton initially raised no objections to any information being released, aside from his signature, which I note is already publicly available on EPSDD Annual Reports, albeit in a more stylised form.
51. While Mr Ponton is entitled to object to the release of the information at issue in the consolidated form of his contract, the public nature of the contents – except for some specific details, such as the position number – must be considered when assessing the information’s suitability for release.

***Balancing the factors***

52. In making my decision, I considered one factor favouring disclosure and one factor favouring nondisclosure.
53. Balancing public interest factors is not merely a tallying exercise, where the public interest is established solely by the number of applicable factors on either side. I considered the relative importance and weight each factor should be given. The weight given to factors depends on the effect that disclosing the information could reasonably be expected to have on the public interest.
54. The FOI Act also has a pro-disclosure bias. The public interest test and weighing of factors is approached as scales ‘laden in favour of disclosure’.<sup>11</sup>
55. I afforded both factors a low weight in my consideration. The amount of the information at issue which is already in the public eye has a reductive effect on both the potential to be revealing if disclosed and the potential harm if disclosed.
56. Ultimately, I find there is a limited benefit to disclosure, but also no actual harm that can result from disclosure.

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<sup>11</sup> [Explanatory Statement, Freedom of Information Bill 2016.](#)



## **Conclusion**

57. For these reasons, my decision is to vary CMTEDD's decision under **s 82(2)(b)** of the FOI Act, allowing for a partial release of the information at issue to redact a limited amount of personal information not already in the public domain.

**Iain Anderson**

**ACT Ombudsman**

**9 January 2023**