

## **'BS' and Chief Minister, Treasury and Economic Development Directorate [2022] ACTOFOI 5 (19 May 2022)**

### **Decision and reasons for decision of Acting Senior Assistant Ombudsman, Symone Andersen**

<b>Application Number</b>	AFOI-RR/22/10006
<b>Decision Reference</b>	[2022] ACTOFOI 5
<b>Applicant</b>	'BS'
<b>Respondent</b>	Chief Minister, Treasury and Economic Development Directorate
<b>Decision Date</b>	19 May 2022
<b>Catchwords</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – open access information – contribute to positive and informed debate on important issues or matters of public interest – reveal the reason for a government decision and any background or contextual information that informed the decision – ensure effective oversight of expenditure of public funds – prejudice trade secrets, business affairs or research of an agency or person – prejudice an agency's ability to obtain confidential information – prejudice the competitive commercial activities of an agency

### **Decision**

1. For the purposes of s 82 of the *Freedom of Information Act 2016 (FOI Act)*, I am a delegate of the ACT Ombudsman.
2. Under s 82(2)(a) of the FOI Act, I **confirm** the decision of Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**), dated 21 February 2022.

## Background of Ombudsman review

3. On 7 February 2022, the applicant applied for access to information held by CMTEDD under the FOI Act. The access application was for:

...a current copy (via email) of the 'public liability insurance' policy and/or 'surety bond' instrument for the Chief Minister, Treasury and Economic Development Directorate (ACT Human Rights Commission) subject to the Freedom of Information Act (FOI Act).

4. On 10 February 2022, CMTEDD provided an initial response to this request and notified the applicant they had passed on the request to the Justice and Community Safety Directorate (**JACS**) to address the portion of the request relating to the ACT Human Rights Commission. This response invited the applicant to clarify the scope of the request.

5. On 10 February 2022, the applicant clarified the scope of their request to:

A copy of the 'reinsurance' documents is hereby requested and we await the JACS FOI response also.

6. On 21 February 2022, the CMTEDD information officer informed the applicant that one document had been identified within the scope of their request and they had decided to refuse access to this document in its entirety.
7. On 16 March 2022, the applicant applied for Ombudsman review of the CMTEDD decision to refuse access to the document.
8. On 27 April 2022, I provided my preliminary views about the respondent's decision to the parties in a draft consideration.
9. Neither the applicant or the respondent provided submissions in relation to my draft consideration.

## Scope of Ombudsman review

10. CMTEDD's response to the applicant on 10 February 2022 noted that the original request had been forwarded on to JACS for their consideration and invited the applicant to clarify the scope of their access application which occurred on the same day.
11. This Ombudsman review is limited to the decision made by CMTEDD on the amended application, not any outcome from the referral to JACS on the original scope of the application.

## 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 21 February 2022.
13. The document is a reinsurance document, setting out the terms and conditions agreed to by the insurer and the ACT Government. Insurance arrangements for ACT Government are handled by the ACT Insurance Authority (ACTIA). ACTIA insures the Territory and this policy is reinsurance with a third party arranged by ACTIA to spread its own risk exposure.
14. This review is therefore to determine whether the decision to refuse access to this document is still the correct and preferable decision.
15. In making my decision, I have had regard to:
  - the applicant's original access application, the clarified scope of their application and application for Ombudsman review
  - CMTEDD's decision letter and correspondence with the applicant clarifying the scope of their request
  - the FOI Act, in particular Schedule 2
  - *Ombudsman Freedom of Information Guidelines Open Access Information*
  - relevant case law, including:
    - *Re Mangan and the Treasury* [2005] AATA 898
    - *Manteena Commercial Pty Ltd and Education Directorate* [2022] ACTOFOI 1 (4 February 2022)
    - *Commonwealth Bank of Australia v CAN 076 848 112 Pty Limited* [2015] NSWSC 666
    - *Beneficial Finance Corporation Limited v Price Waterhouse* (1996) 68 SASR 19
    - *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards Pty Ltd (Third Party)* (2002 L0004, 30 June 2003), and
    - *Jon Stanhope and Environment, Planning and Sustainable Development Directorate* [2021] ACTOFOI 2 (9 April 2021); and
  - An unedited copy of the information at issue.

## Relevant law

16. Every person enjoys an enforceable right of access to government information.<sup>1</sup> This right is subject to provisions of the FOI Act which allow for access to be refused under certain circumstances where the information is deemed to be contrary to the public interest information.<sup>2</sup>
17. 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
18. 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.
19. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.<sup>3</sup>
20. 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.
21. Section 23 of the FOI Act sets out what is open access information.
22. Section 24 of the FOI Act provides:
  - (1) An agency or Minister must make open access information of the agency or Minister publicly available unless the information is contrary to the public interest information.

## The contentions of the parties

23. The information officer at CMTEDD identified two factors favouring disclosure and two factors favouring nondisclosure. The officer decided:  
  
I have decided to refuse access to this document in its entirety as I consider the information would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the Act.
24. The applicant's application for Ombudsman review contends that:  
  
The decision-maker has not made open access information publicly available.
25. No further submissions were made by either the applicant or the respondent.

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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.

## Considerations

### *Open access information*

26. The applicant submits that the information at issue is open access information. Open access information is 'government information' which agencies and Ministers must routinely publish under the FOI Act, outside of the formal access application process. It can also include additional information that agencies choose to publish in accordance with the pro-disclosure objectives of the FOI Act.<sup>4</sup>

27. The types of open access information that agencies must publish include:<sup>5</sup>

- functional information
- tabled documents
- policy documents
- budget papers
- information about government grants
- the agency's disclosure log
- a statement listing all boards, councils, committees, panels and other bodies advising the agency, and any report or recommendations prepared by these bodies, and
- ministerial briefs more than 5 years old.

28. The *Ombudsman Freedom of Information Guidelines* state:

Agencies are not required to publish details about incidental functions they undertake (for example, corporate, HR or public relations functions). The aim of these requirements is to provide the ACT community with a clear understanding of the functions undertaken by an agency and the decisions they are required to make under legislation/policy.

29. My decision is the information at issue is not open access information as it relates to a corporate function performed by CMTEDD.

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

30. Neither party in this review suggested the information sought contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. 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.

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<sup>4</sup> *Ombudsman Freedom of Information Guidelines Open Access Information* at 4.2.

<sup>5</sup> Section 23(1) of the FOI Act.

*Public interest test*

31. The test set out in s 17 of the FOI Act prescribes the following five 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.

*Irrelevant factors*

32. I do not consider that any of the irrelevant factors listed at s 17(2) that I am prohibited from considering arise in this review.<sup>7</sup>

*Factors favouring disclosure*

33. CMTEDD identified two factors favouring disclosure which they relied upon in their decision. Neither factor identified by CMTEDD was given significant analysis as compared to the factors identified favouring nondisclosure. I identified a further factor favouring disclosure after carefully considering the contents of the information at issue.

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

34. A reasonable expectation that disclosure of information could contribute to positive and informed debate on important issues or matters of public interest favours disclosure under the FOI Act.<sup>8</sup> CMTEDD decided this is a relevant factor in this matter with the decision letter stating:
- Release of this information could promote informed public discussion of insurance-related issues for the ACT Government.

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

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

<sup>8</sup> Schedule 2, s2.1(a)(ii) of the FOI Act.

35. I agree that this factor is a relevant consideration in this matter as it could provoke discussion on the contents of the reinsurance policy, particularly around the areas where coverage has been obtained and potential gaps in coverage, intentional or unintentional. It could also then feed into discussions around future insurance policies taken out by the ACTIA which handles the insurance arrangements.

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

36. A reasonable expectation that disclosure of information could reveal the reason for a government decision and any background or contextual information that informed the decision favours disclosure under the FOI Act.<sup>9</sup> CMTEDD decided this is a relevant factor in this matter stating that disclosure:

...may also reveal decisions of Government in respect to insurance for the Territory.

37. I agree that disclosure could reveal decisions of government, however the information at issue would reveal the final decision made rather than the reasons, background or contextual information that the FOI Act refers to.

Ensure effective oversight of expenditure of public funds

38. A reasonable expectation that disclosure of information could ensure effective oversight of the expenditure of public funds favours disclosure under the FOI Act.<sup>10</sup> I consider this to be a relevant factor as disclosure of the information at issue could assist to ensure the insurance policy has been taken out at an appropriate cost and provides value for money.

39. During CMTEDD's analysis of the factors favouring nondisclosure it noted:

Breaching confidentiality of such documents could reveal financial capacity, which could cause an obvious prejudice for the ACT government.

40. I disagree with this characterisation and instead find it supports disclosure under this factor. Given the ACT Government provides an annual Budget which publicly indicates the overall financial capacity of the ACT government, this is not confidential information and knowing that ACT government funds have been appropriately spent is in the public interest.

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<sup>9</sup> Schedule 2, s2.1(a)(viii) of the FOI Act.

<sup>10</sup> Schedule 2, s2.1(a)(iv) of the FOI Act.

*Factors favouring nondisclosure*

41. CMTEDD identified two factors favouring nondisclosure which they relied upon in their decision. I identified a further factor favouring nondisclosure.

Prejudice trade secrets, business affairs or research of an agency or person

42. A reasonable expectation that disclosure of information could prejudice the trade secrets, business affairs or research of an agency or person weighs against disclosure in the FOI Act.<sup>11</sup> In this matter it is the business affairs aspect which is relevant rather than trade secrets or research.
43. CMTEDD's decision letter made reference to *Re Mangan and the Treasury* [2005] AATA 898 which holds business affairs to be 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.<sup>12</sup>
44. I agree that disclosure of the information at issue could prejudice the business affairs of the ACT Government's insurers by revealing the specific values of premiums, total coverage, excess costs and deductibles which could enable other insurance companies to ascertain elements of their business model and operations.
45. This potential impact of disclosure I find to be analogous to the decision in *Manteena Commercial Pty Ltd and Education Directorate* [2022] ACTOFOI 1 (4 February 2022) where costs were found to be contrary to the public interest to disclose as they could reveal more information about the partner's operations and business model to their competitors.<sup>13</sup>

Prejudice an agency's ability to obtain confidential information

46. A reasonable expectation that disclosure of information could prejudice an agency's ability to obtain confidential information weighs against disclosure in the FOI Act.<sup>14</sup> CMTEDD's decision letter states:

The document contains highly confidential information and the expectation between the ACT Government and its Insurers is that the information remains confidential. I note that an agreement to treat documents as confidential does not need to be formal. A general understanding that communications of a particular nature will be treated in confidence will suffice. The understanding of confidentiality may be inferred from the circumstances in which the communication occurred, including the relationship between the parties and the nature of the information communicated. If this information were released in the public domain, it would potentially damage the ACT Insurance Agency's (ACTIA) relationships with its insurers...

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<sup>11</sup> Schedule 2, 2.2(a)(xi) of the FOI Act.

<sup>12</sup> *Re Mangan and the Treasury* [2005] AATA 898.

<sup>13</sup> *Manteena Commercial Pty Ltd and Education Directorate* [2022] ACTOFOI 1 (4 February 2022) at [70].

<sup>14</sup> Schedule 2, 2.2(a)(xii) of the FOI Act.



47. An expectation of confidentiality does not itself comprise a legal basis for nondisclosure under the FOI Act. The FOI Act provides an enforceable right of access to government information and, while an expectation of confidentiality can inform the applicability of other factors favouring nondisclosure, it does not itself form a basis for nondisclosure.
48. I do accept that disclosure of the information at issue may affect the willingness of insurers to be frank in their communications during the tender and negotiation process for future insurance contracts. This potential impact is lessened as the release of a finalised reinsurance policy is less revealing about these communications than the release of any negotiations or communications going into the scope of a future policy. I also note the regular publication of contracts and tenders online for the public to see, via Tenders ACT and the Contracts Register via the ACT Government procurement webpage, without fears of impacts on future dealings.
49. The decision letter from CMTEDD referred to *Commonwealth Bank of Australia v CAN 076 848 112 Pty Limited* where Bell J referred to the decision of Lander J in *Beneficial Finance Corporation Limited v Price Waterhouse* (1996) 68 SASR 19 quoting:<sup>15</sup>
- It is for reasons such as this that the insurance arrangements of a defendant are generally regarded as confidential.<sup>16</sup>
50. The full context of this case specifically relates to a plaintiff seeking the release of insurance arrangements to gain a tactical advantage over the party seeking to keep their arrangements private. This matter is not an analogous situation to the facts at hand as there is no indication the FOI applicant will gain a tactical advantage from the release of this information.

Prejudice the competitive commercial activities of an agency

51. A reasonable expectation that disclosure of information could prejudice the competitive commercial activities of an agency weighs against disclosure in the FOI Act.<sup>17</sup>
52. This factor was not referred to in CMTEDD's decision letter however I find it to be relevant for the information at issue. As referred to at paragraphs 36 and 37, the disclosure of the information at issue would reveal specific figures and the specific areas of coverage for the insurance policy.
53. Information has a commercial value if:

<sup>15</sup> *Beneficial Finance Corporation Limited v Price Waterhouse* (1996) 68 SASR 19 at [42].

<sup>16</sup> *Commonwealth Bank of Australia v ACN 076 848 112 Pty Limited* [2015] NSWSC 666 at [23].

<sup>17</sup> Schedule 2, 2.2(a)(xiii) of the FOI Act.

- it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged (i.e., because it is important or essential to the profitability or viability of a continuing business operation, or a pending 'one-off' commercial transaction); or
- a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained from a government agency which has possession of it.<sup>18</sup>

54. I draw a connection between this matter and the decision in *Jon Stanhope and Environment, Planning and Sustainable Development Directorate* [2021] ACTOFOI 2 (9 April 2021), specifically in relation to the ongoing commercial value of valuations for future work<sup>19</sup>. The parameters of insurance coverage such as premiums serve as a baseline for future coverage, being raised or lowered depending on changes to the risk environment in the intervening period.

55. I am satisfied on this basis that the specific details of the reinsurance policy do have commercial value and disclosure could prejudice the competitive commercial activities of the insurer as well as ACTIA's bargaining position for future insurance contracts.

#### *Balancing the factors*

56. In making my decision, I considered three factors favouring disclosure and three favouring nondisclosure.

57. I gave some weight to the three factors favouring disclosure as the release of the information at issue could all promote these public interest factors to a moderate degree.

58. I considered three factors favouring nondisclosure giving low weight to the factor concerning confidential information and more significant weight to the factors concerning prejudicing business affairs and prejudicing competitive commercial activities.

59. 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 disclosure could reasonably be expected to have on the public interest.

60. The FOI Act has a pro-disclosure bias. The public interest test and weighing of factors is approached as scales 'laden in favour of disclosure.'<sup>20</sup>

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<sup>18</sup> *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards Pty Ltd (Third Party)* (2002 L0004, 30 June 2003) at [45]-[46].

<sup>19</sup> *Jon Stanhope and Environment, Planning and Sustainable Development Directorate* [2021] ACTOFOI 2 (9 April 2021) at [67] to [71].

<sup>20</sup> [Explanatory Statement, Freedom of Information Bill 2016](#).

61. In this case, my decision is that there were three factors favouring disclosure of the information to a moderate degree, one factor favouring nondisclosure to a low degree and two factors favouring nondisclosure to a significant degree.
62. I have noted my issues with CMTEDD's reasons in this notice however consider the decision to refuse access to the information was the correct outcome.

## **Conclusion**

63. Under s 82(2)(a), I confirm the respondent's decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

**Symone Andersen**  
**Acting Senior Assistant Ombudsman**  
**19 May 2022**