

AV and Environment, Planning and Sustainable Development Directorate **[2020] ACTOFOI 12 (15 April 2020)**

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

Application Number	AFOI-RR/19/10039
Decision Reference	[2020] ACTOFOI 12
Applicant	AV
Respondent	Environment, Planning and Sustainable Development Directorate
Decision Date	15 April 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – economy of the territory – trade secrets or research of an agency or person – competitive commercial activities of an agency

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) FOI Act), I set aside the decision of the Environment, Planning and Sustainable Development Directorate (EPSDD), dated 12 December 2019, with respect to the information at issue in this review, and substitute it with a decision that information at issue be disclosed to the applicant.

Background of Ombudsman review

3. On 15 November 2019, the applicant applied to the respondent for access to:
The valuation done on 4 Lex Banning Street, Wright (block 16, section 59).
4. On 12 December 2019, the respondent advised the applicant it had identified two documents falling within the scope of the access application. The respondent refused access to both documents in full.

5. In making its decision, the respondent found that the disclosure of the information could reasonably be expected to:
 - prejudice the economy of the Territory (Schedule 2, s 2.2(a)(viii) of the FOI Act)
 - prejudice trade secrets or research of an agency or person (Schedule 2, s 2.2(a)(xi) of the FOI Act)
 - prejudice the competitive commercial activities of an agency (Schedule 2, s 2.2(a) (xiii) of the FOI Act).
6. On 23 December 2019, the applicant sought an Ombudsman review of the respondent's decision under s 73 of the FOI Act.
7. On 9 January 2020, the applicant significantly amended the scope of their access application to only include the:
 - ... valuation figure or figures obtained prior to the sale of the land.
8. The applicant's amended access application refers to the block of land identified in their initial access application, being 4 Lex Banning Street, Wright (Block 16, Section 59).
9. On 10 January 2020, our Office informed the respondent of the revised scope of the access application and sought the respondent's response.
10. On 30 January 2020, 5 February 2020, and 13 February 2020, the Ombudsman sought a response from the respondent. The respondent did not provide a response, or further submissions regarding the revised access application.
11. On 27 March 2020, I provided my preliminary views about the respondent's decision to the parties in my draft consideration.
12. No further submissions were received by either the applicant or the respondent.

Scope of Ombudsman review

13. The information at issue in this Ombudsman review is the valuation figure of one block of land that is contained in a property valuation report provided to EPSDD by a third party.
14. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information would be contrary to the public interest.
15. In making my draft consideration, I have had regard to:
 - the respondent's decision
 - the FOI Act, in particular, ss 6, 7, 16, 17 and Schedule 2
 - an unedited copy of the information at issue
 - the applicant's access application and review application

- relevant case law, in particular *Australian Broadcasting Corporation and Australian Fisheries Management Authority*,¹ *CH32GI and Department of Justice and Attorney-General; Third Parties*,² *Google Australia Pty Ltd and Wing Aviation Pty Ltd and Environment, Planning and Sustainable Development Directorate*,³ *Google Australia Pty Ltd and Wing Aviation Pty Ltd and Environment, Planning and Sustainable Development Directorate*,⁴ and *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards Pty Ltd (Third Party)*.⁵

Relevant law

16. Section 7 of the FOI Act provides every person with an enforceable right of access to information held by the ACT government. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.
17. Information that is contrary to the public interest 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 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.
19. 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.
20. 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.
21. 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

22. In its decision notice to the applicant, the respondent asserted:

¹ [2016] AICmr 43.

² [2012] QICmr 60.

³ [2019] ACTOFOI 13.

⁴ [2019] ACTOFOI 14.

⁵ (2003) 6 QAR 242.

A primary function of the Agency is to contribute to the Territory's economy by conducting land sales. These documents provide granular detail of the valuation process, price setting inputs and other commercial advice which is fundamental to the process of selling land in a commercial setting and is core to the Agency's ability to operate in a commercial manner. Releasing this information would compromise the Agency's ability to operate commercially in the land market and prejudice the competitive commercial activities of the Agency.

The valuation reports contain information, which could disclose the methodology and research of the third party that prepared the reports. This could provide an advantage to any competitors in the marketplace.

Release of the information could set a precedent, in which potential buyers apply for access to the valuations of blocks available for sale, this could put the Agency at a competitive disadvantage, and possibly delay or cause loss of sales.

23. In response, the applicant asserted:

... refusing access to this information is unwarranted & undermines the transparent process the government should be following when releasing & selling land.

24. I have considered these submissions below.

Considerations

25. I have carefully considered an unedited copy of the information at issue together with the information provided by the applicant and respondent.

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

26. Neither party to this Ombudsman review has 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, disclosure of the information sought must be assessed, on balance, under the public interest test set out in s 17 of the FOI Act.

Public interest test

27. 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.

28. 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.

Irrelevant factors

29. Section 17 of the FOI Act lists irrelevant factors that are not to be taken into account when deciding whether the disclosure of information would, on balance, be contrary to the public interest.
30. I note the irrelevant factors listed in s 17(2) and am satisfied that I have not considered any in this review.

Factors favouring disclosure

31. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.
32. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, the respondent identified 2.1(a)(viii) – reveal the reason for a government decision and any background or contextual information that informed the decision, as a relevant factor.
33. In this case, I am satisfied that disclosure of the valuation figure of the block of land could reasonably be expected to assist with the proper working of representative democracy by increasing scrutiny, discussion, comment and review of the ESPDDs business dealings. As a result, I agree this factor is relevant and afford it significant weight.
34. 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.⁶ This concept is promoted through the objects of the FOI Act.⁷

Factors favouring nondisclosure

35. Of the factors favouring nondisclosure listed in Schedule 2, s 2.2, the respondent identified the following as relevant to the information sought:
 - prejudice the economy of the Territory
 - prejudice trade secrets or research of an agency or person
 - prejudice the competitive commercial activities of an agency.
36. I have discussed each of these factors below in detail.

Prejudice the economy of the Territory

37. A factor favouring non-disclosure under Schedule 2, s 2.2(a)(viii) of the FOI Act is that disclosure of the information could reasonably be expected to prejudice the economy of the Territory.

⁶ See s 17 of the FOI Act.

⁷ See s 6(b) of the FOI Act.

38. EPSDD contends that a primary function of the Suburban Land Agency is to contribute to the Territory's economy by conducting land sales, and that releasing the valuation report would compromise the agency's ability to operate commercially in the land market and prejudice the competitive commercial activities of the agency.
39. I have considered this contention and consider that it is important that the ACT government is able to protect the commercial interests of its constituents by ensuring they are on equal footing with other private sector investors, when considering large scale investment options such as the Molonglo Valley region (which incorporates the block of land in question under this review).
40. I also accept that releasing the granular detail of the valuation process and other comprehensive commercial advice provided to EPSDD may impact the Territory's economy regarding land sales, but I note the applicant's amended access application only seeks the valuation figure for a single block of land.
41. As the respondent has not provided any further submissions regarding how the release of a dated property valuation figure would impact on its future land sales, I am not satisfied that releasing this information would reasonably be expected to prejudice the economy of the Territory.

Prejudice trade secrets or research of an agency or person

42. Another factor favouring non-disclosure under Schedule 2, s 2(a)(xi) of the FOI Act is that disclosure of the information could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person.
43. As outlined at paragraph [21], EPSDD contended that the valuation report could disclose the methodology and research of the third party that prepared the report, providing a competitive advantage to any competitors in the marketplace. In coming to this conclusion, they did not, however, consult the relevant third party, consistent with s 38 of the FOI Act, because they decided not to give access to the information.
44. In determining whether, on balance, disclosure of information could reasonably be expected to prejudice the trade secrets or research, there is a requirement:
*...that the particular prejudice or adverse effect... could reasonably be expected to flow from disclosure. This phrase requires an expectation that is reasonably based... it is not enough to simply assert that disclosure will result in some kind of adverse consequence.*⁸

⁸ [Stewart and SunWater Limited \[2012\] QICmr 70](#) at [83] – cited in *Google Australia Pty Ltd and Wing Aviation Pty Ltd and Environment, Planning and Sustainable Development Directorate* [2019] ACTOFOI 14.

45. In considering whether the information constitutes 'trade secrets', it must, in my view, contain information which gives an agency or person an advantage over their competitors while the information remains generally unknown.⁹ A trade secret may be prejudiced where the disclosure of the information in question will destroy or diminish the commercial value of the information.¹⁰
46. I consider the original scope of the access application, which includes the full valuation report could potentially have revealed the third party's assessments and professional judgements as part of the valuation process. However, I do not consider that the applicant's revised access application, which only seeks the valuation figure for one block of land, can reasonably be considered a trade secret or reveal the specifics of any underlying research that was undertaken to compile the report.
47. The respondent further contends that releasing information that discloses the '*methodology and research*' of a third party could provide an advantage to competitors in the marketplace, thereby prejudicing the trade secrets or research of the company who prepared the valuation reports. I have discussed this contention further below.
48. For these reasons, based on the information available to me, I am not satisfied that release of this information sought by the applicant would prejudice the third party's trade secrets or research.

Prejudice the competitive commercial activities of an agency

49. A factor favouring non-disclosure under Schedule 2, s 2.2(a) (xiii) of the FOI Act is that disclosure of the information could reasonably be expected to prejudice the competitive commercial activities of an agency.
50. Information has a commercial value if:
- *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.*¹¹
51. Information that may once have been valuable may become aged or out-of-date such that it has no, or limited commercial value.¹² Further, information that is publicly available has no commercial value that can be destroyed or diminished by disclosure under the FOI Act.

⁹ *Australian Broadcasting Corporation and Australian Fisheries Management Authority* [2016] AICmr 43 at [19].

¹⁰ *Google Australia Pty Ltd and Wing Aviation Pty Ltd and Environment, Planning and Sustainable Development Directorate* [2019] ACTOFOI 13 at 54.

¹¹ *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards Pty Ltd (Third Party)* (2002 L0004, 30 June 2003) at paragraphs 45-46 cited in [CH32GI and Department of Justice and Attorney-General; Third Parties at 70](#).

52. The FOI Act's Explanatory Statement states – *'In making a decision on the public interest the decision maker must be able to articulate the harm to the public interest that would occur from release ... The fact that the information is part of a category of information that may typically be contrary to the public interest to disclose is not sufficient to deny release. It must be the case that the particular information being considered is, on balance, contrary to the public interest to disclose.'*¹³
53. There is no evidence before me of the existence of a genuine, arms-length buyer(s), who is prepared to pay either the agency or the third party who prepared the valuation report, for this information. I consider it improbable that a genuine market for the purchase of this dated information exists.
54. I have also considered the respondent's statement that releasing the valuation figure would *'compromise the Agency's ability to operate commercially in the land market and prejudice the competitive commercial activities of the Agency'*.
55. I am not convinced this statement sufficiently establishes that the now dated valuation figure is important or essential to the profitability or viability of ESPDD continuing business operations involving the sale of land.

Balancing the factors

56. As I have not identified any public interest factors favouring nondisclosure, I am satisfied that, the public interest factors favouring disclosure outweigh the public interest factors favouring nondisclosure.

Conclusion

57. For the above reasons, under s 82(2)(c) FOI Act), I set aside the decision of EPSDD, dated 12 December 2019, with respect to the information at issue in this review, and make a substitute decision, being:
- Partial release of the document titled: Valuation Report North Wright Single Resident Block, with the valuation figure relating to section 59 block 16, which is included on page 28, to be disclosed to the applicant.

Louise Macleod
Senior Assistant Ombudsman

15 April 2020

¹² [Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards Pty Ltd \(Third Party\)](#) (2002 L0004, 30 June 2003) at paragraphs paragraph 47 citing *Re Brown and Minister for Administrative Services* (1990) 21 ALD 526, at p5.33, para 22).

¹³ [Explanatory Statement – Freedom of Information Bill 2016 \(ACT\)](#) p14.