

'BK' and Environment, Planning and Sustainable Development Directorate**[2021] ACTOFOI 12 (23 September 2021)****Decision and reasons for decision of Acting Senior Assistant****Ombudsman Symone Andersen**

Application Number	AFOI-RR/21/10016
Decision Reference	[2021] ACTOFOI 12
Applicant	'BK'
Respondent	Environment, Planning and Sustainable Development Directorate
Decision Date	23 September 2021
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – Cabinet information – Promote open discussion of public affairs and enhance the government's accountability – Contribute to positive and informed debate on important issues and matters of public interest – Reveal the reason for a government decision and any background or contextual information that informed the decision – An individual's right to privacy

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**).
2. Under **s 82(2)(c)** of the FOI Act, I **set aside** the decision of the Environment, Planning and Sustainable Development Directorate (**EPSDD**) and **substitute** my decision that the applicant should be given access to the information at issue.

Background of Ombudsman review

3. On 31 January 2021, the applicant applied to EPSDD for access to information related to the ACT Government's *Managing Buildings Better* project. On 16 February 2021, the parties agreed to reduce the scope of the access application to:
 1. From the formation of the Unit Title Reform Consultative Group in 2019:
 - Public consultation submissions (excluding personal identifying details of individuals)
 - Records and reports of consultations with the industry and community consultative group
 2. Reports containing overall recommendations of the reform project
 3. Any documents discussing 'tenant rights of attendance at general meetings or election of tenant representatives', to the extent that this covers any documents not already included in the other points.
4. EPSDD identified 24 documents in scope. On 9 April 2021, EPSDD decided the access application by giving the applicant access to 5 documents in full, 5 documents in part and refusing access to 14 documents. In making its decision, EPSDD relied on ss 6, 17, 45, 50 and Schedule 1 and 2 of the FOI Act.
5. On 28 April 2021, the applicant applied to the ACT Ombudsman for review of EPSDD's decision under s 73 of the FOI Act.
6. On 11 August 2021, I provided the parties with my draft consideration. This set out my preliminary view and invited the parties to make additional submissions before I made my final decision. My preliminary view was that EPSDD's decision should be set aside and substituted and that the applicant should be given access to the information at issue.
7. On 11 August 2021, the applicant responded to my draft consideration accepting the view I set out in it.
8. On 7 September 2021, EPSDD responded to my draft consideration. EPSDD accepted much of the reasoning in my draft consideration. However, it maintains that documents 9, 11 and 13 contain information that is taken to be contrary to the public interest under Schedule 1, s 1.6(1)(a). EPSDD also alternatively submitted that information in these documents may be taken to be contrary to the public interest under Schedule 1, s 1.6(1)(d).

Information at issue

9. The information at issue in this review is information that EPSDD refused access to, except documents 21, 22 and 23, which the applicant accepts are entirely comprised of information that is taken to be contrary to the public interest information.
10. The issue to be decided is whether giving the applicant access to the information at issue would be contrary to the public interest.
11. In making my decision, I had regard to:
 - the applicant's original access application and application for Ombudsman review
 - EPSDD's decision
 - EPSDD's submissions, including its response to my draft consideration
 - the FOI Act, particularly ss 7, 9, 17, 50 and 72 and Schedule 1 and 2
 - EPSDD's processing file
 - an unedited copy of the information at issue, and
 - the *Human Rights Act 2006* (ACT) (Human Rights Act)

Relevant law

12. Every person enjoys an enforceable right of access to government information.¹ However, the FOI Act creates an exception to this right by allowing for refusal of access to information that is 'contrary to the public interest information'.²
13. 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 be contrary to the public interest under the test set out in section 17
14. Section 17 sets out the test to be used in balancing public interest factors favouring disclosure and non-disclosure respectively. This balancing test must be used to determine whether disclosure would be contrary to the public interest.

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

15. The party seeking to prevent disclosure of information bears the onus of establishing that information is contrary to the public interest information.³
16. Schedule 1 of the FOI Act sets out categories of information that are taken to be contrary to the public interest to disclose, while Schedule 2 of the FOI Act sets out public interest factors to be balanced when determining whether disclosure is in the public interest.

The contentions of the parties

17. EPSDD's decision notice said:

Access to some of the information is refused under Schedule 1.6(1)(a) as information submitted to Cabinet for its consideration, or brought into existence for this purpose, and is taken to be contrary to the public interest.

18. On the other hand, the applicant's review application contends:

The decision-maker has identified that documents 2-3, 5, 7-9 and 11-23 are subject to the s 1.6(1)(a) Cabinet information exemption. Documents 21-23 are obviously covered by the exemption. The remaining documents... must have been included as attachments to Documents 21-23, or to a future Cabinet submission that does not as yet exist. I note, however, that the decision notice does not state whether the decision-maker considered the application of the purely factual information exception, or whether an edited document containing only purely factual information could be provided. Section 6.9 of FOI Guideline 4 – Considering the Public Interest provides guidance as to how decision makers are to apply the exemption, including among other things the purely factual information exception and the definition of "information submitted to Cabinet", and recommends that decision-makers provide a clear explanation as to why s 1.6 applies to the documents. In this case, the decision-maker provided no explanation beyond stating that the information was submitted to Cabinet or brought into existence for Cabinet consideration, and that the corruption/commission of an offence exemption does not apply.

Considerations

19. I carefully considered an unredacted copy of the information at issue together with the information provided by the applicant and EPSDD.

³ Section 72 of the FOI Act.

20. The FOI Act contains an exception to Schedule 1, if information identifies corruption or the commission of an offence by a public official. I am satisfied this exception is not relevant in this matter.

Schedule 1, s 1.6(1)(a)

21. The first question is whether some of the information was incorrectly determined to be contrary to the public interest under Schedule 1, s 1.6(1)(a), which is set out below:
- (1) Information—
- (a) that has been submitted, or that a Minister proposes to submit, to Cabinet, for its consideration and that was brought into existence for that purpose
22. I observed that the information at issue includes information relating to the Strata Reform Consultative Group (SRCG) meetings and data collection results from the SRCG members. Documents 2-3, 5, 7-9, 11-20 appear to record minutes and agendas of meetings of the SRCG.
23. Accordingly, in my draft consideration, I stated that the information seems to have been brought into existence for a purpose independent of Cabinet. In forming this view, I noted that agendas and minutes are typical features of meetings of this nature. Further, I expressed the view that the records would have been made irrespective of whether information would later form part of a Cabinet submission.
24. In response to my draft consideration, EPSDD submitted:

The SRCG was established to provide advice to Government on proposed reforms of strata laws in connection with mixed-use developments and other related matters. The remit of the group included the development of specific legislative reform measures for Cabinet consideration, which necessarily required the contemplation and discussion of reform options, policy direction, regulatory impact and analysis. I understand that... documents 9, 11 and 13 of the SRCG capture, in part:

- specific policy discussion of the group that informed, and were reflected in, the terms of the draft bill prepared by EPSDD; and
- the group's explicit consideration, discussion and analysis of the terms of the draft Bill prepared by EPSDD, which in turn shaped its final terms.

It was the performance of this role (documented in the above minutes) that resulted in a final Bill for Cabinet's consideration, with the SRCG having significant input and decision-making capacity in

regards the Bill's specific measures/provisions. In our view, without the Government imperative to develop this legislation and to do so informed by the discussion, debate and views of the SRCG members, much of the group's meetings and ensuing discussions would not have occurred.

25. I am not persuaded by this submission because it does not grasp the distinction between information compiled in the development of policy and information compiled specifically for submission to Cabinet.

26. In making this decision, I referred to the ACT Government's Cabinet Handbook, which says:

Cabinet documents are strictly confidential and are the property of the ACT. Confidentiality is protected in the following ways...

- a. Cabinet documents (including drafts) should contain the Dissemination Limiting Marker (Sensitive: Cabinet)...

27. In *Jon Stanhope and Environment, Planning and Sustainable Development Directorate*, the Ombudsman commented that:

The presence of the DLM cannot be relied upon on its own but does support the view the document was created for Cabinet.⁴

28. The DLM is not absent from documents 9, 11 and 13 by mistake. It is absent because they are not Cabinet Submissions and they are not confidential. This goes to the heart of the matter, as the information was recorded for the administration of SRCG meetings. Any subsequent consideration of matters raised in those meetings by Cabinet does not retrospectively alter this because the FOI Act refers to the purpose for information being brought into existence.

Schedule 1, s 1.6(1)(d)

29. EPSDD's response to my draft consideration raised the argument that the information it initially took to be contrary to the public interest under Schedule 1, s 1.6(1)(a) was in fact contrary to the public interest under Schedule 1, s 1.6(1)(d).

⁴ *Jon Stanhope and Environment, Planning and Sustainable Development Directorate* [2021] ACTOFOI 2 at [31].

30. Schedule 1, s 1.6(1)(d) applies to information 'the disclosure of which would reveal any deliberation of Cabinet'.
31. The issue with EPSDD's submission vis-à-vis this provision, is that it mistakes the nature of a Cabinet deliberation and the reason that the FOI Act protects such deliberations from disclosure.
32. In *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate*,⁵ the information at issue was an attachment to a Cabinet submission. In that review, the Ombudsman accepted the information at issue had been created for a deliberative purpose of Cabinet. However, the information was a standalone document summarising the processes and results of consultation activities. The Ombudsman considered that while Cabinet could be informed by the results of consultation processes, and may have deliberated on options arising from it, the information itself did not disclose a deliberation or decision of Cabinet.
33. In *Jon Stanhope and ACT Health Directorate*,⁶ the Ombudsman referred to this distinction in deciding that the ACT's Capital Asset Development Plan did not disclose a deliberation of Cabinet even if matters therein had been deliberated on by Cabinet. The Ombudsman referred, in that decision, to the Queensland Information Commissioner's comments in *Ryman and Department of Main Roads*, which are instructive in this matter as well:
- ... A document whose creation preceded 'active discussion and debate' in Cabinet... cannot logically constitute a record of what was actively discussed and debated in Cabinet on the occasion of the document's consideration by Cabinet.⁷
34. In this matter, EPSDD's own submission is that the meeting minutes and agendas were not themselves Cabinet submissions, but, like the Capital Asset Development Plan in *Jon Stanhope and ACT Health Directorate* may have contained information matching information considered by Cabinet at some later date.
35. Accordingly, I am not persuaded by the submission that the information at issue is taken to be contrary to the public interest under Schedule 1, s 1.6(1)(d).

⁵ *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 6 at [32]-[33].

⁶ *Jon Stanhope and ACT Health Directorate* [2020] ACTOFOI 22 at [31].

⁷ *Ryman and Department of Main Roads* (1996) 3 QAR 416 at [39] quoting *Re Hudson as agent for Fencray Pty Ltd and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at [36]-[47].

36. Having decided that Schedule 1, s 1.6 is not applicable with respect to the information at issue, I consider that the applicant should be given access to it. However, a small amount of the information at issue was refused on the basis of Schedule 2, s 2.2(a)(ii) which protects an individual's right to privacy under the Human Rights Act. I have balanced this factor against factors favouring disclosure below.

Public interest test

37. To determine whether access should have been refused to information deleted in accordance with Schedule 2, s 2.2(a)(ii) of the FOI Act prescribes the following five steps:

- 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 disclosure that applies in relation to the information (a relevant factor favouring non-disclosure), including any factor mentioned in Schedule 2, s 2.1
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring non-disclosure
- decide whether, on balance, disclosure of the information would be contrary to the public interest, and
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information

Irrelevant factors

38. I do not consider that any of the irrelevant factors listed under s 17(2) arose in the making of this decision.

Factors favouring disclosure

39. EPSDD's decision letter found three factors favouring disclosure to be relevant: Schedule 2, s 2.1(a)(i), 2.1(a)(ii) and 2.1(a)(viii).

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

40. A reasonable expectation that information could promote open discussion of public affairs and enhance the government's accountability favours disclosure under the FOI Act.⁸
41. EPSDD found this factor applicable. I agree and am satisfied that disclosing this information at issue will promote this public interest factor to a moderate degree. Housing policy is a matter of considerable public interest in the Australian Capital Territory (the Territory) and open discussion and enhanced government accountability is likely to be supported by access to information of the kind that is in issue here.

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

42. A reasonable expectation that information could contribute to positive and informed debate on important issues and matters of public interest favours disclosure under the FOI Act.⁹
43. EPSDD found that disclosure of the information at issue could reasonably be expected to promote this public interest factor. I agree. Providing contextual information regarding the government's decision-making processes around strata and building policies could help inform people who wish to take a position on related issues. In making this finding, I am satisfied that strata policy and potential reforms are matters of public interest in the Territory. I expect the information at issue could promote this public interest factor to a moderate degree.

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

44. A reasonable expectation that 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.¹⁰
45. EPSDD found that disclosure of the information at issue could reasonably be expected to promote this public interest factor. I agree. The information reveals much about who has input into strata reform and what the input is. This reveals context and reasoning behind government decisions. The information at issue could reasonably be expected to promote this factor to a considerable degree as a result.

⁸ Schedule 2, s 2.1(a)(i) of the FOI Act.

⁹ Schedule 2, s 2.1(a)(ii) of the FOI Act.

¹⁰ Schedule 2, s 2.1(a)(viii) of the FOI Act.

Pro-disclosure bias

46. The FOI Act also requires the adoption of a pro-disclosure bias when administering the Act. The bias reflects the importance of public access to government information for the proper working of representative democracy. This concept is promoted through the objects of the FOI Act.
47. For these reasons, I am satisfied that disclosure of the information at issue could reasonably be expected to promote the objects of the FOI Act and the two relevant factors favouring disclosure in this review.

Factors favouring nondisclosure

48. EPSDD's decision letter found one factor favouring non-disclosure relevant: Schedule 2, s 2.2(a)(ii). I discuss the applicability on this factor below.

An individual's right to privacy

49. A reasonable expectation that disclosure could prejudice a person's right to privacy under the Human Rights Act favours non-disclosure under the FOI Act.
50. EPSDD's original decision found that some personal information in document 17 could reasonably be expected to prejudice an individual's right to privacy under the Human Rights Act to an extent that would outweigh the factors favouring disclosure.
51. The Human Rights Act provides that:
- Everyone has the right—
- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily...
52. In my draft consideration, I stated that I do not agree with EPSDD's conclusion that disclosing the names and job titles of individuals listed in document 17 could prejudice any individuals' right to privacy under the Human Rights Act. The function of the panel is apparently a public one and as such I consider that the individuals involved are participating in public life, rather than suffering from intrusion into their private spheres. EPSDD did not make any additional submissions on this point. I maintain the view that Schedule 2, s 2.2(a)(ii) is inapplicable in this review.

Balancing the factors

53. Taking into account all the relevant public interest factors, and having formed the view that no factor favouring non-disclosure is applicable, I decided the public interest weighs in favour of disclosure.

Conclusion

54. My decision is to **set aside** EPSDD's decision to refuse access to the information under s 35(1)(c) of the FOI Act. I **substitute** my decision that the applicant should be given access to the information at issue.

Symone Andersen
Acting Senior Assistant Ombudsman
23 September 2021