

‘CA’ and Environment, Planning and Sustainable Development

Directorate [2023] ACTOFOI 7 (22 March 2023)

Decision and reasons for decision of ACT Ombudsman, Iain Anderson

| | |
|---------------------------|---|
| Application number | AFOI-RR/22/10032 |
| Agency reference | 22/144625 |
| Decision reference | [2023] ACTOFOI 7 |
| Applicant | ‘CA’ |
| Respondent | Environment, Planning and Sustainable Development Directorate |
| Date | 22 March 2023 |
| Catchwords | <i>Freedom of Information Act 2016 (ACT)</i> – requirements for decision notice – 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 a deliberative process of government |

Decision

1. For the reasons set out below, I have decided to **set aside** the Environment, Planning and Sustainable Development Directorate’s (**EPSDD**) decision dated 29 November 2022 refusing access to a draft plan for the Gungahlin Community Centre (**the draft plan**).
2. I make a **substitute** decision to give access to the draft plan.

Background of Ombudsman review

3. On 1 November 2022, the applicant, a journalist, applied to EPSDD for access to “a draft plan for the Gungahlin Community Centre”.
4. On 29 November 2022, EPSDD decided to refuse access to the one document identified as being within the scope of the application because disclosure of the information would, on balance, be contrary to the public interest.

5. On 6 December 2022, the applicant applied for Ombudsman review of EPSDD's decision.
6. On 15 December 2022, EPSDD provided submissions to the Ombudsman.
7. On 21 December 2022, the applicant provided submissions to the Ombudsman.
8. On 2 March 2023, I provided my preliminary views to the parties in a draft consideration. On the same day the review applicant accepted my draft consideration.
9. On 16 March 2023, EPSDD accepted my draft consideration.

Information at issue

10. The information at issue in this Ombudsman review is the draft plan in relation to which the applicant was refused access under EPSDD's decision of 29 November 2022.
11. The issue to be decided in this Ombudsman review is whether the draft plan is 'contrary to the public interest information' for the purpose of the FOI Act.
12. In making my decision, I have had regard to:
 - the applicant's access application and review application
 - the respondent's decision and further submissions
 - the FOI Act, in particular ss 6, 7, 16, 17, 35, 54, 72 and Schedule 2
 - the *Legislation Act 2001* (ACT) (**Legislation Act**)
 - guidelines made by the ACT Ombudsman under s 66 of the FOI Act (**the guidelines**)
 - an unedited copy of the draft plan
 - publicly available information about the planned Gungahlin Community Centre, and
 - relevant case law, including:
 - *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 (14 March 1984)
 - *Johnson and Department of Transport; Department of Public Works* (2004) 6 QAR 307
 - *Barling and Brisbane City Council* [2017] QICmr 47 (15 September 2017)
 - *Pallara Action Group Inc and Brisbane City Council* (Unreported, Queensland Information Commissioner, 21 September 2012)
 - *Johnston and Brisbane City Council* (Unreported, Queensland Information Commissioner, 6 December 2013)

Relevant law

13. Section 7 of the FOI Act gives every person an enforceable right of access to government information.¹ This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.²
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.³
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.
18. Section 54 of the FOI Act lists the requirements for the decision notice to be given to the applicant if a decision is made to refuse to give access to government information. The decision notice must include:
 - a description of the information
 - a statement of reasons for the decision setting out –
 - the findings on any material questions of fact referring to the evidence or other material on which the findings were based; and
 - the relevant factors favouring disclosure; and
 - the relevant factors favouring nondisclosure; and
 - how the factors were balanced; and
 - the harm to the public interest that can be reasonably expected to occur from disclosure.

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

³ Section 35(1)(c) of the FOI Act.

19. Section 72 of the FOI Act provides in an Ombudsman review, a person seeking to prevent disclosure of government information has the onus of establishing that the information is contrary to the public interest information.

The submissions of the parties

20. EPSDD's decision notice dated 29 November 2022 said:

The draft document identified has been prepared to inform Government of potential options for the development of a Community Centre in Gungahlin. This is yet to be considered by Government.

I have deliberated on how release of this information would reveal reasons for government considerations and how principles of transparency and accountability would be served. It is my view that this information is subject to an active ongoing deliberative process and contains information that is being prepared for evaluating matters relating to the potential development of a Community Centre in Gungahlin. The premature release of this information may impede the effective completion, and prejudice the integrity, of these processes, a factor under Schedule 2.2(a)(xvi) of the Act and therefore, is contrary to the public interest to release.

The deliberative process may also be prejudiced by the release of the document at this point in time as it may cause undue disruption and provide a lack of clarity regarding future intent of Government, and the reallocation of resources to deal with further public debate or pressure.

21. In further submissions received on 15 December 2022, EPSDD said:

It was determined that the draft Community Centre Plan at Gungahlin is subject to an ongoing deliberative government process and the current draft document has been prepared for the initial evaluation of the Gungahlin Community Centre Plan, for consideration by the Minister. Therefore, premature release of the plan to the media before presentation to the Minister and community consultation, would prejudice the integrity of an active ongoing deliberative government process.

If the document is released to the public prior to consideration, it would compromise the deliberative process of government, and cause a lack of clarity, and impede the effective completion of the Plan.

When the Gungahlin Community Centre Plan has been considered by the Minister, and agreement given to commence community consultation, it will be made available to the public.

22. In their application for Ombudsman review, the applicant said:

This is of community interest and would be reported as a plan - rather than a final decision made by the government.

23. These submissions are discussed in more detail below.

Consideration

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

24. Neither of the parties participating in this Ombudsman review have suggested the draft plan is information which is taken to be contrary to the public interest under Schedule 1.

25. 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.⁴

Public interest test

26. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following 5 steps:⁵

- 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.

Pro-disclosure bias

27. In addition to the non-exhaustive factors favouring disclosure listed in Schedule 2, s 2.1, the FOI Act is intended to be administered with a pro-disclosure bias and relevant discretions be exercised as far as possible in favour of disclosing government information.⁶ This concept is promoted through the objects of the FOI Act.⁷

Irrelevant factors

28. In conducting the public interest test, I did not consider any of the irrelevant factors which a decision-maker is prohibited from considering under s 17(2) of the FOI Act, including the applicant's identity, circumstances, or reason for seeking access to the information.⁸

⁴ Explanatory Statement, Freedom of Information Bill 2016 (ACT).

⁵ Section 17(1) of the FOI Act.

⁶ Section 9 of the FOI Act.

⁷ Section 6 of the FOI Act.

⁸ Section 17(2)(f) of the FOI Act.

Factors favouring disclosure

29. In deciding the access application, EPSDD considered one factor favouring disclosure in the public interest, in addition to the pro-disclosure bias.

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

30. A factor favouring disclosure is where disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.⁹

31. The draft plan is described as a 'Prelim Planning Study' prepared by a third party for EPSDD in relation to the ACT Government's commitment to develop a new community centre in the Gungahlin town centre.¹⁰

32. The draft plan comprises floor and area plans, site maps, elevations, sections, and imagery for a proposed centre.

33. The ACT Government has allocated \$300,000 to undertake a feasibility and design study for the centre, through a community co-design approach with an estimated completion date of June 2023.¹¹

34. The EPSDD Annual Report 2021-2022 states:¹²

The feasibility study investigating the requirements and preferred site for the new Gungahlin Community Centre began in May 2022. Discussions will take place with a range of community and government stakeholders to understand and develop the functional requirements for the facility.

This will be reviewed by the independent Gungahlin Community Panel before progressing to concept design and site selection...

A consultant has been engaged to undertake site selection, concept design and engagement on the new Gungahlin Community Centre.

35. During the Standing Committee on Planning, Transport and City Services' (**the Committee**) Inquiry into the Annual and Financial Reports 2021-2022, in response to the Committee's questions about the proposed Gungahlin community centre, EPSDD said:

At this stage we are preparing a paper for government consideration, taking into consideration a variety of community needs for Gungahlin—things like youth centres, spaces for community support, exhibition spaces and outdoor activity elements. We have certainly done a lot of work there. We have some preliminary concept plans that we would want to put to government for their consideration before we embark on the next step. That also includes potential site selection. There has been a lot of work with the community to identify not only needs but an appropriate site, and maintaining that connectivity to the group centre...

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

¹⁰ [Parliamentary and Governing Agreement for the 10th ACT Legislative Assembly, November 2020.](#)

¹¹ [EPSDD Annual Report 2021-22, page 288.](#)

¹² [EPSDD Annual Report 2021-22, pages 26, 87.](#)

Certainly, that phase of consultation is completed, and it is now for government consideration as to the next steps....

That is part of what we would be putting to government. It would be a proposed site and some concept designs specifically around that site to meet the community needs that we have heard about. It was a really good co-design process that we took, on the back of the work that the SLA had been doing with the Gungahlin community more broadly, in terms of the sites within the group centre.

It will be up to a government decision, in terms of what those next steps look like. Certainly, there will be further engagement with the community in any case.

36. The applicant has submitted the public have the right to know how the plan has progressed, given a commitment was made for the facility in February 2019.¹³
37. I consider the provision of community facilities, including maintaining and developing community facilities, is a matter of public interest.
38. I consider release of the draft plan could inform open discussion about the community's engagement in the planning process for the Gungahlin community centre project.
39. I consider release of the draft plan could increase transparency regarding the consideration of the proposed Gungahlin community centre by the ACT Government as disclosure would reveal information about the project, including a potential site location for the centre.
40. I acknowledge EPSDD's submission the draft plan relates to an ongoing process where the Minister is yet to make a final decision on the new facility. It is possible, for example, for other proposals to be considered as part of the project. I note release of the draft plan would not reveal information about the ACT Government's consideration of the proposal.
41. I consider release of the draft plan would promote this public interest factor to a moderate extent as disclosure would allow members of the public to understand a preliminary proposal presently under consideration by the ACT Government.
42. I afford moderate weight to this factor.

Factors favouring non-disclosure

43. EPSDD's decision notice identified one factor favouring nondisclosure in the public interest.

Prejudice a deliberative process of government

44. A factor favouring nondisclosure is where disclosure could reasonably be expected to prejudice a deliberative process of government.¹⁴

¹³ [Legislative Assembly for the ACT, 2019 Week 02 Hansard \(Wednesday, 20 February 2019\), page 533-547.](#)

¹⁴ Schedule 2, s 2.2(a)(xvi) of the FOI Act.

45. A deliberative process involves the weighing up or evaluation of arguments or considerations related to a process that is being undertaken within government to consider whether and how to make or implement a decision.¹⁵
46. As the FOI Act does not define 'prejudice', it should be given its ordinary meaning which is "harm or injury that results or may result from some action or judgement".¹⁶
47. I accept ESPDD's submission the draft plan relates to a deliberative process of government, being consideration of proposed options to develop a new community centre in Gungahlin.
48. In my view, however, EPSDD's decision notice merely asserts that release of the draft plan may prejudice a deliberative process – referring to potential delay, undue disruption, lack of clarity, or reallocation of resources to deal with public debate or pressure – but makes no attempt to describe how release of the draft plan would have this effect.
49. In further submissions, EPSDD said the draft plan will be made available to the public after it has been considered by the Minister, and agreement given to commence community consultation.
50. I consider the Gungahlin community centre project is well known as a result of previous engagement with the community and publication of information by the ACT Government.
51. In June 2021, members of the public were invited to provide feedback on the project through the 'Your Say conversations' platform.¹⁷ Future community consultation is also planned to take place before a final decision is made about the centre.¹⁸
52. I accept the deliberative process is ongoing as the Minister has yet to consider the draft plan or make a final decision about the project. The fact a deliberative process is ongoing does not itself satisfy a conclusion release of the information would have a prejudicial effect.¹⁹
53. There is no evidence before me which supports the conclusion that release of the draft plan could be reasonably expected to interfere with the ability of the government to objectively consider its options and reach a decision.²⁰
54. I do not consider this factor applies in relation to the draft plan.

¹⁵ *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 (14 March 1984), [58].

¹⁶ The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.

¹⁷ [Gungahlin Community and Recreation Facilities Listening Report](#).

¹⁸ See <https://yoursayconversations.act.gov.au/gungahlin-community-facilities>.

¹⁹ *Johnson and Department of Transport; Department of Public Works (2004) 6 QAR 307* at [39].

²⁰ *Barling and Brisbane City Council [2017] QICmr 47 (15 September 2017)* at [32] citing *Pallara Action Group Inc and Brisbane City Council (Unreported, Queensland Information Commissioner, 21 September 2012)* at [42]-[43] and *Johnston and Brisbane City Council (Unreported, Queensland Information Commissioner, 6 December 2013)* at [39] and [42].

Balancing the factors

55. A decision notice for an access application must set out reasons for the decision, including findings on material questions of fact referring to evidence or other material on which the findings were based.²¹
56. In my view, ESPDD's decision notice does not set out how the identified public interest factors were balanced.²² The notice also does not sufficiently explain the harm to the public interest that may reasonably be expected to occur from disclosure.²³
57. I do not consider EPSDD has provided me with sufficient information to support a decision that the entire draft plan is contrary to the public interest information.²⁴
58. I have considered one factor favouring disclosure and one factor favouring nondisclosure in the public interest in addition to the pro-disclosure bias.
59. I have given moderate weight to the factor favouring disclosure, as release of the draft plan would promote open discussion and enhance the government's accountability to a moderate extend.
60. I have decided the factor favouring nondisclosure does not apply in relation to the draft plan.
61. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being considered in the public interest. The decision-maker's task is to consider the relative importance and weight of each factor they have identified. The weight given to a factor will depend on the effect disclosing the information would have on the public interest.
62. The FOI Act has a pro-disclosure bias and as a result the public interest test should not be approached on the basis there are empty scales in equilibrium, waiting for arguments to be put on each side, rather the scales are 'laden in favour of disclosure'.²⁵
63. As I have not identified any public interest factors favouring nondisclosure apply, on balance, disclosure of the information is in the public interest.

²¹ Section 51(1) of the FOI Act. See also section 179 of the Legislation Act.

²² Section 54(2)(b)(iv) of the FOI Act.

²³ Section 54(2)(b)(v) of the FOI Act.

²⁴ Section 72 of the FOI Act.

²⁵ [Explanatory Statement](#), Freedom of Information Bill 2016.

Conclusion

64. For the reasons set out above, I set aside EPSDD's decision under s 82(2)(c) of the FOI Act and make a substitute decision to give access to the draft plan.

Iain Anderson
ACT Ombudsman
22 March 2023