

***Karen Paxton and Chief Minister, Treasury and Economic  
Development Directorate [2019] ACTOFOI 1 (9 January 2019)***

**Decision and reasons for decision of  
Acting Senior Assistant Ombudsman, Cathy Milfull**

Application Number:	AFOI-RR/18/10026
Decision Reference:	[2019] ACTOFOI 1
Applicant:	Ms Karen Paxton
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Decision Date:	9 January 2019
Catchwords:	<i>Freedom of Information Act 2016</i> (ACT) – deciding access – whether reasonable steps have been taken to identify all government information within the scope of the access application

**Decision**

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016* (FOI Act).
2. Under s 82(1)(b) of the FOI Act, I vary the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 12 September 2018, as it relates to the further information sought by the applicant (the information sought), to decide that the information sought is not held by CMTEDD.

## Background of Ombudsman review

3. Ms Karen Paxton (the applicant) is the owner of a piece of land, a former railway easement, in Fyshwick, ACT (the property).
4. On 24 August 2018, the applicant applied to CMTEDD for access to:
  - any and all documentation supporting the reasoning and decision for the increase in the property's valuation by 305%, and
  - the valuations for other former railway easements in the area.
5. On 12 September 2018, CMTEDD advised the applicant that it had identified three documents falling within scope of the access application. CMTEDD decided to give the applicant access to two documents in part and refuse access to the third document.
6. CMTEDD refused access to information in the three documents (the information refused) on the basis that the information is contrary to the public interest to disclose under the FOI Act, because it is information the disclosure of which is prohibited by a secrecy provision of a law (Schedule 1, s 1.3(6)).
7. On 9 October 2018, the applicant applied under s 73 of the FOI Act for Ombudsman review of CMTEDD's decision, seeking the information refused, as well as any other information that supports the reasoning and decision for the increase in the property valuation.
8. Our Office provided preliminary views about CMTEDD's decision to the parties in a draft consideration dated 13 December 2018. The applicant agreed with the draft consideration and CMTEDD responded without comment.

## Scope of Ombudsman review

9. Noting that an applicant cannot broaden the scope of an access application on review, I consider that the applicant, in seeking the reasoning and decision for the increase in valuation, is contending that further information exists within the scope of her access application that was not identified by CMTEDD.<sup>1</sup>
10. Through her application and during this Ombudsman review, the applicant has indicated that she is seeking information to establish the rationale underlying the increase in the value to the

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<sup>1</sup> Under s 34 of the FOI Act, an agency or Minister deciding an access application must take reasonable steps to identify all government information within the scope of the access application.

property. The property was subject to a 305 per cent increase between 2016 and 2017, in contrast to other surrounding properties, for which the unimproved value remained the same or increased by a smaller proportion.

11. As a preliminary issue, I have examined an unedited copy of the three documents that CMTEDD identified as within the scope of the access application. The information refused comprises the specific addresses, unimproved values, sale dates, sale prices, and other details of various pieces of land within Fyshwick in the ACT. I am satisfied that this information does not serve to explain the rationale underlying the recorded increase in the value of the property. Therefore, those documents, containing the information refused, are outside the scope of this Ombudsman review.
12. The only issue to be decided in this Ombudsman review is whether CMTEDD has taken reasonable steps to identify *all government information* within the scope of the access application, being any information that serves to identify the rationale and decision for the recorded increase in the value of the property.
13. In making my decision, I have had regard to:
  - the applicant's application for Ombudsman review
  - CMTEDD's decision
  - the FOI Act, in particular ss 7, 34 and 35
  - the submissions of the parties, and
  - relevant case law, in particular *De Tarle and Australian Securities and Investments Commission (Freedom of information)*<sup>2</sup> and *Nash and Queensland Police Service*.<sup>3</sup>

## Relevant law

14. Section 7 of the FOI Act provides every person with an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.
15. Section 34 of the FOI Act provides that an agency or Minister deciding an access application (the respondent) must take reasonable steps to identify all government information within the scope of the application.

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<sup>2</sup> [2015] AATA 770.

<sup>3</sup> [2012] QICmr 45.

16. Section 35(1)(b) of the FOI Act provides that a respondent may decide an access application by deciding that the information is not held by the respondent.

## The contentions of the parties

17. The applicant contends that there must be documentation in existence which explains the decision to increase the value of the property, whether that be due to:

- an individual assessment of the property, which considered factors specific to the property, or
- an increase in the value of 'benchmark blocks' in Fyshwick that impacted the valuation for the property.

18. CMTEDD contends that it has taken reasonable steps to identify all relevant documentation, but that no further relevant information exists. In support of its position, CMTEDD explained that:

- revaluation processes were conducted on a group basis for the suburb of Fyshwick
- valuations are signed off as part of the annual report and budget processes, and
- individual valuation reports are not prepared for each property on an annual basis, but can be obtained through the objections process – that is, a process whereby a property owner can lodge an objection with the Commissioner for ACT Revenue regarding the latest unimproved land valuation for their property.<sup>4</sup>

19. CMTEDD further explained that:

- individual valuation reports are not generally prepared outside of the objections process
- individual valuation reports for commercial properties could be obtained via the objections process, but are not created 'upfront' as part of the valuation change process, and
- this was still the case for properties in suburbs, such as Fyshwick, where more tailored assessments are completed because the area has undergone a significant period of change.

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<sup>4</sup> Explained by CMTEDD in its submissions dated 7 November 2018. For further information about the objections process see: <https://www.revenue.act.gov.au/rates/rights-and-objections>.

## Considerations

### Identifying information within the scope of the application

20. The FOI Act requires that the agency or Minister must take ‘reasonable steps’ to identify all the government information within the scope of the access application (s 34) before making a decision that it does not hold the information (s 35(1)(b)).<sup>5</sup>
21. The FOI Act is silent on what constitutes ‘reasonable steps’. The meaning of ‘reasonable’, in the context of searches for documents sought under FOI has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.<sup>6</sup>
22. What amounts to reasonable steps may vary in different circumstances. It would, however, include a search of electronic records and a manual search of physical records, where applicable.<sup>7</sup>
23. In considering whether reasonable steps have been taken to identify all relevant information, some relevant factors include:
  - the administrative arrangements of government
  - the agency structure
  - the agency’s functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
  - the agency’s practices and procedures (including but not exclusive to its information management approach); and
  - other factors reasonably inferred from information supplied by the applicant including:
    - the nature and age of the requested document/s; and
    - the nature of the government activity the request relates to.<sup>8</sup>
24. CMTEDD advises that it has undertaken document searches consistent with CMTEDD FOI protocols, including searches of all relevant databases and in accordance with guidance from its

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<sup>5</sup> See: Explanatory Statement, Freedom of Information Bill 2016 (ACT) 23, citing *Nash and Queensland Police Service* [2012] QICmr 45 at [15]–[16].

<sup>6</sup> Considered by the Administrative Appeal Tribunal in relation to s 24A of the *Freedom of Information Act 1982* (Cth) in the decision of *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138 at [19]. More recently, the Tribunal applied this approach in *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770 at [19].

<sup>7</sup> See: Explanatory Statement, Freedom of Information Bill 2016 (ACT) 23.

<sup>8</sup> *Ibid*; *Nash and Queensland Police Service* [2012] QICmr 45 at [14] — [16]; *PDE and the University of Queensland* [2009] QICmr 7 at [37].

Information Access Team. This includes searches by the ACT Valuation Office, which is part of the ACT Revenue Office, as well as by CMTEDD more broadly, for the following types of documents:

all electronic and non-electronic record keeping databases, systems and files, electronic or non-electronic forms and in draft or final forms: notes and correspondence; records of meetings and telephone conversations; files; emails; Cisco Jabber files; media releases; minutes; briefings; meeting minutes; submissions; invitations; tenders; external consultation documentation; contracts; notebooks; diaries; photos; sound and visual recordings; maps; diagrams; drawings; and plans.

25. CMTEDD said that there are no individual reports available that provide reasons or rational for the decisions to increase the valuation on the property. At the request of our Office, additional documentation was provided regarding valuations processes for 2016, 2017 and 2018. Having examined those documents, I do, however, agree with CMTEDD that they are not within the scope of this review. This is because they provide no further guidance as to the reasons behind the increase to the valuation of the property in 2017, in comparison to other properties in the area. They are documents regarding valuation processes of a general nature only.
26. The FOI Act provides every person with the right to access government information. Where the government information being sought cannot be found by the agency, after it has taken reasonable steps to identify it, the agency can decide that the information is not held by it.
27. The nature of the information sought is reasons on which a particular administrative decision, namely the increased valuation of the property, was based. I accept that if there was evidence or other reasons on which the decision was based, CMTEDD, and the ACT Revenue Office in particular, would know this information existed and be able to locate it. For that reason, and based on the evidence of the searches that CMTEDD has provided, I am thus satisfied that there is no relevant valuation information in existence.

## Conclusion

28. I am satisfied that CMTEDD has taken reasonable steps to identify all government information within the scope of the applicant's access application, as it is required to do under s 34 of the FOI Act.

Cathy Milfull  
Acting Senior Assistant Ombudsman  
9 January 2019