

***Jon Stanhope and Chief Minister, Treasury and Economic Development******Directorate [2020] ACTOFOI 24 (26 November 2020)*****Decision and reasons for decision of ACT Ombudsman, Michael Manthorpe PSM**

<b>Application Number</b>	AFOI-RR/20/10033
<b>Decision Reference</b>	[2020] ACTOFOI 24
<b>Applicant</b>	Jon Stanhope
<b>Respondent</b>	Chief Minister, Treasury and Economic Development Directorate
<b>Decision Date</b>	26 November 2020
<b>Catchwords</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – enhance government’s accountability – positive and informed debate – reveal reasons for government decisions – individual’s right to privacy – intergovernmental relations

**Decision**

1. Under s 82(2)(b) of the *Freedom of Information Act 2016 (FOI Act)*, my decision is to **vary** the decision of the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**), dated 14 July 2020.

**Background of Ombudsman review**

2. On 21 May 2020, the applicant applied to CMTEDD for access to:
  - a. All documents... in the possession of the ACT Government, related to or concerning... the negotiation of and finalisation of the agreed land swap between the ACT and Commonwealth Governments, involving the Curtin Horse Paddocks and land at West Basin.
  - b. ... any and all documents concerning the valuation of the land included in the land swap and any and all documents emanating from or considered by the Procurement Board which are relevant to the land swap
3. The scope of this request was refined on 28 May 2020 such that:

- a. ... the request relates to all documents included within the scope of the request from 1 January 2019 with the exception of documents submitted to or generated by the Procurement Board, in relation to which I do not refine the original request;
  - b. ... documents that would be privileged, pursuant to the FOI Act, from release on the ground of legal professional privilege be excluded from the request;
  - c. ... emails of an administrative nature be excluded from the request; and
  - d. ... information that is Cabinet information be excluded but only where that information may be lawfully withheld from release pursuant to the FOI Act.
4. On 14 July 2020, CMTEDD advised the applicant it identified eight documents within the scope of the access application. CMTEDD gave the applicant full access to one document, partial access to two documents and refused access to five documents. In making its decision, CMTEDD relied on ss 17, 50 and Schedule 2 of the FOI Act.
  5. On 4 September 2020, I provided my preliminary views about CMTEDD's decision to the parties in a draft consideration.
  6. On 7 September 2020, the applicant provided submissions in relation to my draft consideration.
  7. On 11 September 2020 and 18 September 2020, CMTEDD provided submissions in response to my draft consideration.
  8. I address these additional submissions in relation to each document below.

## Information at issue

9. The information at issue in this review comprises:
  - Document one: an email chain, with the subject 'MEDIA ENQUIRY' relating to the West Basin Land Swap (**the land swap**) from which CMTEDD deleted personal information of a journalist
  - Document two: a draft project plan relating to the land swap
  - Document three: a letter from the ACT Chief Minister to the Commonwealth Assistant Minister for Regional Development and Territories, the Hon. Nola Marino MP.
  - Documents four and five: two email chains
  - Document eight: a brief referred to only as 'Issue' in the Schedule that CMTEDD provided to the applicant. The brief is labelled as a 'Question Time Brief'.

10. The issue before me in this review is whether CMTEDD erred in deciding that the information at issue is contrary to the public interest to disclose.
11. In making this decision, I had regard to:
- the applicant's access application and review application to the Ombudsman
  - CMTEDD's decision notice
  - the FOI Act, in particular ss 6, 7, 9, 17, 50 and Schedule 2
  - an unedited copy of the information at issue
  - the applicant's submissions to my draft consideration
  - CMTEDD's submissions in response to my draft consideration, and
  - relevant case law, including *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate (Coe No. 1)*,<sup>1</sup> *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate (Coe No. 2)*<sup>2</sup> and *Queensland Newspapers and Department of Justice and Attorney-General; Carmody (Third Party)*<sup>3</sup>

## Relevant law

12. 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.<sup>4</sup>
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, on balance, be contrary to the public interest under the test set out in section 17.
14. 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.

---

<sup>1</sup> [2018] ACTOFOI 3.

<sup>2</sup> [2020] ACTOFOI 3.

<sup>3</sup> [2016] QICmr 23 (*Queensland Newspapers*).

<sup>4</sup> Section 7 of the FOI Act.

15. 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 information.
16. Section 50 of the FOI Act applies if an access application is made for government information in a record containing contrary to the public interest information and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted.
17. 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 information.<sup>5</sup>
18. 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**

19. In its decision notice, CMTEDD said:

I consider it unreasonable to release information that could reveal the name and contact details of the person or persons that have been in contact with the ACT Government...

I also consider that the release of the documents could prejudice intergovernmental relations.

20. CMTEDD consulted with relevant third parties before making a decision on the applicant's original application. CMTEDD consulted with Assistant Minister Marino about document three, the letter. The Assistant Minister observed that Schedule 2, s 2.2(a)(x) of the FOI Act provides that information that could reasonably be expected to prejudice intergovernmental relations may, when balanced against other factors, be contrary to the public interest information. CMTEDD refused access to this document on the basis that it could reasonably be expected to prejudice intergovernmental relations.
21. The other Commonwealth entity CMTEDD consulted with was the National Capital Authority (NCA). CMTEDD's consultation with the NCA was in relation to document two, the draft project plan. The NCA raised no objection to this information being disclosed to the applicant other than requesting minor redactions of personal information to prevent

---

<sup>5</sup> Section 72 of the FOI Act.

prejudice to individuals' privacy. CMTEDD refused access to this document on the basis that it could reasonably be expected to prejudice intergovernmental relations.

22. The applicant's application for Ombudsman review said:

... the ACT Government refused to respond to a very polite request from one of my journalist colleagues at Canberra City News for advice on the value it had placed on the land at Curtin the ownership of which it had resolved to transfer to the Commonwealth Government. I think it is a fairly fundamental principle of Governance that citizens be informed of the value of a public asset that its Government had decided to give away.

23. After I provided my preliminary views to each party in my draft consideration, the applicant submitted:

The FOI Act provides that a factor favouring non-disclosure is that the information could "reasonably" be expected to prejudice intergovernmental relations ... I note that the CMTEDD decision maker claims "I am satisfied that the release of the documents could prejudice intergovernmental relations and the Directorates ability to obtain confidential information..." This assertion does not appear to have been based on any objective evidence or indeed an expression of a view or opinion on the matter by a Commonwealth official.

... Without such evidence it is not clear to me on what basis it can be said that the "reasonable" expectation test has been satisfied.

24. CMTEDD also made submissions at this stage of the review. CMTEDD took the position that the response from Assistant Minister Marino was sufficient evidence on which to base a reasonable expectation that intergovernmental relations could suffer prejudice.

Alternatively, CMTEDD sought particular redactions in the event that I decided to release document two in part. I deal with these submissions below.

## **Preliminary issue**

25. Section 54(2) of the FOI Act requires a decision notice to include a description of information to which access is refused.

26. Document eight is described as 'Issue' in the schedule of documents provided to the applicant. I reviewed this document. It is a brief for the Chief Minister to rely on in Question Time. In my draft consideration I observed that CMTEDD should have provided the applicant

with an adequate description of this document which could have been done without revealing the information it contained, which CMTEDD decided to refuse access to.

## Considerations

27. I have examined an unedited copy of the information at issue and all of the contentions of the parties.

### *Public interest*

28. 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.

29. 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*

30. I note the irrelevant factors listed in s 17(2) of the FOI Act and I do not consider any irrelevant factors arise 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 set out in Schedule 2, I consider three are relevant, one of which was identified in CMTEDD's decision.

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

33. In its decision letter, CMTEDD gave significant weight to this factor in Schedule 2, s 2.1(a)(ii) of the Act, stating that disclosure of the information at issue could reasonably be expected to contribute to positive and informed debate on important issues or matters of public interest.
34. As the information relates to a land deal between the ACT and Commonwealth Governments involving the Curtin Horse Paddocks (originally ACT land) and land at West Basin (originally Commonwealth land), I agree with CMTEDD's assessment that this factor favouring disclosure is relevant and should be afforded significant weight, except in relation to the personal information of the journalist in document one.

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

35. Schedule 2, s 2.1(a)(i) of the FOI Act provides that another factor favouring disclosure is if the information at issue could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.
36. While CMTEDD did not identify this factor in its decision, I consider it is relevant to the information at issue, except for the personal information of the journalist in document one, as it relates to a current land deal which may impact many members of the ACT community and warrants informed discussion in the community.
37. Numerous individuals and organisations have been quoted in media coverage of the land swap, including the ACT Equestrian Association and the Lake Burley Griffin Guardians group. The disclosure of information about this agreement could reasonably be expected to promote open, informed discussion about this matter, including possible impact on community use of the land at Curtin for sport and recreation and the environment surrounding Lake Burley Griffin.<sup>6</sup>

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

---

<sup>6</sup> <https://the-riotact.com/shock-and-outrage-at-west-basin-land-swap-with-curtin-horse-paddocks/365850>.

38. Schedule 2, s 2.1(a)(viii) provides that another factor favouring disclosure is if the information would reveal the reason for a government decision, and any background or contextual information that informed the decision.
39. While CMTEDD did not identify this factor in its decision, I consider it is relevant to the information at issue, except for the personal information of the journalist in document one, as its disclosure could reasonably be expected to reveal some of the reasons for and background which informed the decision about the land deal. This would provide a greater understanding in the community about the decision concerning the land swap and promote the objects of the FOI Act, including greater transparency and openness, and government accountability.

#### Pro-disclosure bias

40. 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.<sup>7</sup> This concept is promoted throughout the Act,<sup>8</sup> and reflects its objects.<sup>9</sup>
41. For these reasons, I decide that disclosure of the information sought could reasonably be expected to promote the objects of the FOI Act. Section 17 requires that I balance this consideration against any relevant factors favouring non-disclosure.

#### *Factors favouring non-disclosure*

42. Of the factors favouring non-disclosure listed in Schedule 2, s 2.2, I decide that two are relevant in this review. Disclosure could reasonably be expected to prejudice an individual's right to privacy and prejudice intergovernmental relations. I discuss these factors in more detail below.

#### Individual's right to privacy

43. A factor favouring non-disclosure under the FOI Act is Schedule 2, s 2.2(a)(ii), that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act.

---

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

<sup>8</sup> Section 9 of the FOI Act.

<sup>9</sup> Section 6 of the FOI Act.



44. CMTEDD decided not to disclose the name of the person making media enquiries about the deal between the ACT and Commonwealth governments on this basis, and this information was redacted.
45. In considering this issue, I note the Human Rights Act does not provide a general right to privacy. It provides the right not to have one's privacy interfered with unlawfully or arbitrarily.
46. This means the FOI Act requires me to consider not simply whether the information is personal, but whether the disclosure could reasonably be expected to prejudice the right to privacy enjoyed under s 12 of the Human Rights Act and whether any interference with privacy is unlawful or arbitrary.
47. The information at issue is personal information about a journalist who works for the Canberra Times, who has reported in that publication on this land swap.<sup>10</sup> I am satisfied they are acting in their professional capacity, as the correspondence originates from their work email address at the Canberra Times and the email subject is 'MEDIA ENQUIRY'.

#### Intergovernmental relations

48. Schedule 2, s 2.2(x) of the FOI Act provides that a factor favouring non-disclosure is that information could reasonably be expected to prejudice intergovernmental relations.
49. Regarding this factor, CMTEDD advised:

The documents identified provide details of several sensitive land issues that are subject to ongoing negotiations and deliberations. Information contained in these documents was provided in confidence to assist parties to negotiate an amicable solution for various land matters. The release of these documents could adversely affect these negotiations and deliberations by damaging continued level of trust and co-operation in the relations between the officers conducting negotiations.

I consider that maintaining good working relations between the ACT and the Commonwealth are crucial to the ongoing negotiations on this issue and on future matters. I am satisfied that the release of the documents could prejudice intergovernmental relations and the Directorate's ability to obtain confidential information by impairing the future flow of information between the ACT and the

---

<sup>10</sup> <https://www.canberratimes.com.au/story/6693998/west-basin-land-swap-finally-completed-to-allow-waterfront-development/>.

Commonwealth. As a result, this will prejudice the deliberative process of the Directorate. I am satisfied that all factors favouring non-disclosure carry very significant weight.

50. I have considered the intergovernmental relations factor in *Coe No. 1* and *Coe No. 2*.
51. *Coe No. 1* concerned ongoing negotiations between the ACT and Commonwealth governments about matters relating to another land deal. The information at issue included communications between the Chief Minister and the Commonwealth Finance Minister and between senior CMTEDD and Department of Finance officials. These communications had been made in confidence. In that case, I accepted CMTEDD's submission that disclosing certain information about ongoing negotiations could reasonably be expected to prejudice intergovernmental relations.
52. In *Coe No. 1*, I cited the Queensland Information Commissioner in *Queensland Newspapers and Department of Justice and Attorney-General; Carmody (Third Party)* which discussed how the purpose of the intergovernmental relations public interest factor is to:
- [G]ive weight to the public interest in protecting confidential communications between State and another government where disclosure would reasonably be expected to prejudice the relations between those two governments.<sup>11</sup>
53. In *Coe No. 2*, I considered the purpose of the intergovernmental relations public interest factor is to protect the relationships between Australian governments, and preserve an agency's ability to obtain confidential information which relates to protecting these relationships.<sup>12</sup> I noted it must be greater than a hesitancy on part of an agency to release the information, but that the release would lead to a loss of trust and cooperation between agency officers.<sup>13</sup>
54. Accordingly, for the intergovernmental relations factor to apply, I consider it must involve confidential communications the disclosure of which could reasonably be expected to prejudice relations by, for instance, leading to a loss of trust and cooperation between agency officers.<sup>14</sup>
55. I have considered the applicability of and weighting to be given to the factor with respect to each document CMTEDD applied it to.

---

<sup>11</sup> *Queensland Newspapers* at [220].

<sup>12</sup> *Coe No. 2* at [32].

<sup>13</sup> *Coe No. 1* at [31].

<sup>14</sup> *Coe No. 1* at [31].

*Document two*

56. This document is a draft project plan relating to the land swap. It includes timeframes for actions to be completed through to 2021. In my draft consideration, I accepted this information could reasonably be expected to prejudice intergovernmental relations because the draft was an intergovernmental communication of a draft or contingent nature that the governments may agree to change when formulating the final plan.
57. The applicant's response to my draft consideration was nevertheless persuasive. The applicant submitted that CMTEDD did not rely on any objective evidence that disclosure could reasonably be expected to prejudice the relationship between the ACT and Commonwealth governments. Indeed, the NCA were consulted about the possible disclosure of the document and did not object.
58. On 16 September 2020, CMTEDD was invited to provide a response to this submission. CMTEDD maintained that disclosing this document could reasonably be expected to prejudice intergovernmental relations. Broadly, I am persuaded by the applicant's submission and concur that CMTEDD could not rely on any objective evidence to form the view that it was reasonable to expect disclosure to prejudice its relationship with the Commonwealth government.
59. In my view, there is only one exception to this. Document two contains a small amount of information in its final row, which is sensitive, the subject of ongoing intergovernmental negotiation and deliberation, not in the public domain and which another Commonwealth third party objected to, albeit when being consulted about another document. My decision is there is sufficient evidence to reasonably expect disclosure of that information would prejudice intergovernmental relations, particularly in the context of ongoing negotiations.

*Document three*

60. This document is a letter from the Chief Minister of the ACT to Assistant Minister Marino, dated 12 February 2020 and relating to the land swap.
61. CMTEDD expressed the view that disclosing this document would prejudice 'freedom of correspondence in intergovernmental relations'. This is not a concept that is recognised by the FOI Act. However, I accept the communication is a confidential one, of an intergovernmental nature. I have considered Assistant Minister Marino's response, provided when consulted by CMTEDD about the release of the letter. Assistant Minister Marino

objected to disclosure and referred to the intergovernmental relations factor. I am not wholly persuaded by this argument, but accept the information contained at the second bullet point is sensitive information which is the subject of ongoing intergovernmental negotiation and deliberation, and is not in the public domain. In my view, the particular information could reasonably be expected to prejudice intergovernmental relations.

*Document eight*

62. This document is a Question Time Brief prepared for the Chief Minister. It relates to the land swap. I reviewed this document, which contains ‘talking points’, ‘key information’ and a ‘background’ section. I do not see any evidence on which I can base a reasonable expectation that disclosure could prejudice intergovernmental relations. Generally speaking, the inclusion of information in the ‘talking points’ part of a brief that is to be used to respond to questions is indicative of the possibility the government may disclose it.
63. With respect to document eight, I consider there is one exception to my general view that disclosure could not reasonably be expected to prejudice intergovernmental relations. I accept that the information contained in the ‘background’ section of the document that Assistant Minister Marino objected to disclosing is sensitive information that is not in the public domain, which is the subject of ongoing intergovernmental negotiation and deliberation and that could reasonably be expected to prejudice intergovernmental relations.

*Document four*

64. Document four comprises email correspondence between ACT Government officials. The correspondence is primarily administrative in nature. The emails do not include details of Commonwealth officials, discuss substantive issues or the draft plan in any detail.
65. CMTEDD’s submission after my draft consideration reiterated that disclosing this document could reasonably be expected to prejudice intergovernmental relations. I do not accept this view, as the document does not contain any confidential communication exchanged between the governments that could reasonably be expected to prejudice intergovernmental relations.

*Document five*

66. Document five is an email meeting invitation which lists questions for discussion at a meeting between ACT and Commonwealth officials regarding the land deal. It appears to set out timeframes for certain actions leading up to public announcement of the land deal.
67. CMTEDD reiterated that disclosure could reasonably be expected to prejudice intergovernmental relations. However, it did not specify how this may occur. I do not accept the information could reasonably be expected to prejudice the relationship between the governments because it does not contain any detail about ongoing negotiations or substantive discussions.

#### *Balancing the factors*

68. I have identified three public interest factors which favour disclosure and two which favour non-disclosure. I have considered these factors while conducting the balancing test set out in s 17 of the FOI Act.
69. I note that balancing public interest factors is not simply a matter of quantifying the number of relevant factors and deciding the higher quantity represents the public interest. My task as the decision-maker is to consider how to weigh each applicable factor. The weight I give to each factor is based on my judgement of the effect that disclosure could reasonably be expected to have.
70. I note the pro-disclosure bias the FOI Act requires. The public interest test is not to be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side. Rather, the scales are 'laden in favour of disclosure'.<sup>15</sup>

#### Personal information of a journalist in document one

71. First, I consider disclosing the name of a journalist making media enquiries with the ACT Government could not reasonably be expected to prejudice that person's privacy under the Human Rights Act. I did not decide that any factors favouring disclosure or any other factors favouring non-disclosure applied to this information. I do not consider CMTEDD discharged the onus imposed by s 72 of the FOI Act by showing that this information is contrary to the public interest. The applicant should be given access to this information.

#### Information refused on the basis of prejudice to intergovernmental relations

---

<sup>15</sup> Explanatory Statement, [Freedom of Information Bill 2016 \(ACT\)](#) 13.

*Documents four and five*

72. I do not consider that information in documents four or five could reasonably be expected to prejudice intergovernmental relations. It is my decision that CMTEDD should give the applicant access to these documents because it has not discharged the onus imposed by s 72 of the FOI Act and established that any of the information in these documents is contrary to the public interest.

*Documents two, three and eight*

73. I do not consider that most of the information in documents two, three and eight could reasonably be expected to prejudice intergovernmental relations. The sole exception is particular information that is sensitive, not in the public domain and relates to a matter that is the subject of ongoing intergovernmental negotiation and deliberation. This information is at the last row of document two, the second bullet point of document three and the final bullet point of document eight. It is my decision that the views put forward by CMTEDD and Assistant Minister Marino in the course of consultation are sufficient evidence on which to base a reasonable expectation that disclosing this information could reasonably be expected to prejudice the relationship between the ACT and Commonwealth governments. I afforded this factor considerable weight. In my view, it is in the public interest this particular information not be disclosed.

## Conclusions

74. Under s 82(2)(b) my decision is to **vary** CMTEDD's decision, under s 35(1)(c) of the FOI Act to refuse access to the information at issue.

75. The applicant should be given access to all the information at issue, except for:

- Document two – the information in the entire last row
- Document three – the information in the second bullet point
- Document eight – the information in the final bullet point.

**Michael Manthorpe PSM**  
ACT Ombudsman  
26 November 2020