

## ***Canberra Metro Construction and Chief Minister, Treasury and Economic Development Directorate [2019] ACTOFOI 8 (5 June 2019)***

### **Decision and reasons for decision of ACT Ombudsman, Michael Manthorpe PSM**

<b>Application Number:</b>	AFOI-RR/19/10009
<b>Decision Reference:</b>	[2019] ACTOFOI 8
<b>Applicant:</b>	Canberra Metro Construction
<b>Respondent:</b>	Chief Minister, Treasury and Economic Development Directorate
<b>Decision Date:</b>	5 June 2019
<b>Catchwords:</b>	<i>Freedom of Information Act 2016</i> (ACT) – third party review applicant – deciding access – whether disclosure of information is contrary to the public interest – security of the Commonwealth, Territory or a State – security, law enforcement or public safety information – trade secrets, business affairs or research of an agency or a person – flow of information to a regulatory agency – fair treatment of an individual

### **Decision**

1. Under s 82(1)(a) of the ACT *Freedom of Information Act 2016* (FOI Act), I confirm the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 21 February 2019, with respect to the information at issue in this review, being documents relating to the electrical safety of the Canberra Light Rail project.

## Background of Ombudsman review

2. On 23 November 2018, an applicant (FOI applicant) applied to CMTEDD for access to:

Documents, photos and reports related to the Canberra Light Rail project safety audit and inspection of electrical works. Of particular interest is the 11KV cabling with relation to compliance, installation drawings and inspection reports. Reports from the Utility Technical Regulator and Specialist Electrical Engineering Group (SEEG).
3. On 6 December 2018, the FOI applicant refined the scope of the information requested to:
  - HV, LV cable and pit installation, planned compared to as constructed and inspection/audit findings if they exist
  - Traffic Signal pit and cable installation planned compared to as constructed and inspection/audit findings if they exist
  - Cable installation compliance with relevant Australian Standards, and
  - The qualifications, training and experience of the person/s supervising and installing the cable/s if known.
4. On 19 December 2018, the FOI applicant agreed to further refine the scope to documents between 19 September 2018 and 19 December 2018.

### Third party consultation

5. On 30 January 2019, CMTEDD undertook third party consultation with Canberra Metro Construction (CMC) and SEEG under s 38 of the FOI Act in relation to 515 pages of information comprising reports, emails, drawings, plans, specifications and related documents regarding the Canberra Light Rail project.
6. CMC is a consortium of engineering, operations and maintenance companies engaged by the ACT Government to deliver the Canberra Light Rail project. SEEG is the independent electrical certifier for the project.
7. On 11 February 2019, SEEG responded to CMTEDD with no objection to the information being disclosed.
8. On 20 February 2019, CMC objected to disclosure of the information on the basis the information is contrary to the public interest under Schedule 1 of the FOI Act because it:
  - could reasonably be expected to damage the security of the Commonwealth, the Territory or a State (Schedule 1, s 1.13), and

- comprises law enforcement or public safety information (Schedule 1, s 1.14).
9. CMC also argued that the information was on balance contrary to the public interest under Schedule 2 of the FOI Act because disclosure would prejudice:
- security, law enforcement or public safety (Schedule 2, s 2.2(a)(iii))
  - the flow of information to the police or another law enforcement or regulatory agency (Schedule 2, s 2.2(a)(ix))
  - trade secrets, business affairs or research of an agency or person (Schedule 2, s 2.2(a)(xi)), and
  - the fair treatment of an individual in relation to unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct (Schedule 2, s 2.2(b)(v)).

#### Decision on access application

10. On 21 February 2019, CMTEDD advised the FOI applicant that it had identified 80 documents within the scope of the access application. No documents were identified in relation to the 'qualifications, training and experience of the person/s supervising and installing the cable/s'.
11. Of those 80 documents within the scope of the access application, there were 854 pages of information comprising:
- 515 pages of information subject to third party consultation on 30 January 2019
  - a further 144 pages of information which CMTEDD considered to be 'identical or similar in nature' to the above 515 pages and did not provide for consultation, and
  - 195 pages of images.<sup>1</sup>
12. CMTEDD decided to give the FOI applicant access to 25 documents in full, 54 documents in part and refused access to 1 document. This included:
- two pages of information, which were refused in full
  - the 195 pages of images referenced above, which were released in full, and
  - the residual 657 pages of information, which it decided to release in full or in part.

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<sup>1</sup> Identified as document 79 'Separate binder – Images' on CMTEDD's document schedule.

13. In making its decision, CMTEDD found some of the information to be contrary to the public interest information because it:
- contains information subject to legal professional privilege (Schedule 1, s 1.2)
  - would prejudice the protection of an individual's right to privacy (Schedule 2, s 2.2(a)(ii)), and
  - would prejudice the trade secrets, business affairs or research of an agency or person (Schedule 2, s 2.2(a)(ix)).

#### Application for Ombudsman review

14. On 5 April 2019, CMC sought Ombudsman review of CMTEDD's decision under s 73 of the FOI Act to release information comprising reports, emails, drawings, plans, specifications and related documents regarding the Canberra Light Rail project contained in the 657 pages referred to above (the information at issue).<sup>2</sup>
15. CMC has also raised with the ACT Ombudsman that it was not consulted on all information of concern to them as a relevant third party.
16. On 8 April 2019, the FOI applicant applied to be a participant in this Ombudsman review under s 77(2) of the FOI Act. On 8 April 2019, the delegate decided under s 77(3) of the FOI Act to allow the FOI applicant to participate.
17. On 13 May 2019, I provided my preliminary views about CMTEDD's decision to the parties in my draft consideration.
18. On 20 and 22 May 2019, CMTEDD provided additional submissions clarifying their decision.
19. CMC and the FOI applicant did not provide any submissions in relation to my draft consideration.

#### **Scope of Ombudsman review**

20. As a preliminary issue, I have considered whether the third party consultation undertaken by CMTEDD in relation to the information at issue was consistent with their obligations under the FOI Act.
21. I have not, however, considered whether consultation should also have been undertaken on the 195 pages of images referred to above.<sup>3</sup> This information does not form part of the information at issue and therefore, is outside of the scope of this review.

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<sup>2</sup> At paragraph [12].

<sup>3</sup> At paragraph [12].

*Whether the third party consultation with CMC complied with the FOI Act*

22. As discussed at paragraph [5], CMTEDD consulted with CMC in relation to 515 pages of information, with contentions provided in response on 20 February 2019.<sup>4</sup> However, in its notice of decision to CMC, CMTEDD identified a further 144 pages of information within the scope of the access application that was 'identical or similar in nature', even though some of those pages were duplicates of information already included.
23. These additional documents were not provided to CMC, but CMTEDD advised that they considered CMC's contentions of 20 February 2019 when assessing them for possible disclosure.<sup>5</sup>
24. I consider it clear that CMTEDD concluded the 144 pages of information was of concern to CMC as a relevant third party. As a result, it was not sufficient, in my view, for CMTEDD to consider again the previous submissions made by CMC, and not consult CMC in relation to the additional 144 pages of information.
25. The consultation requirements in s 38 of the FOI Act were not met by CMTEDD in regards to the 144 pages of information.
26. I am, nevertheless, satisfied that this procedural defect will be corrected in this Ombudsman review. This is because CMC, in its application for review, provided relevant submissions in relation to all the information at issue, which includes the 144 pages that they were not consulted on.
27. Therefore, the issue to be decided in this Ombudsman review is whether giving the FOI applicant access to the information at issue would be contrary to the public interest.
28. In making my decision, I have had regard to:
  - CMC's application for Ombudsman review
  - CMTEDD's decision
  - the FOI Act, in particular ss 7, 16, 17, 35, 50, 72, Schedule 1 and Schedule 2
  - CMTEDD's FOI processing file relating to the access application
  - an unedited copy of the information at issue, and

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<sup>4</sup> CMTEDD's notice of decision dated 21 February 2019.

<sup>5</sup> CMTEDD's notice of decision dated 21 February 2019.

- relevant case law, in particular *Attorney-General's Department v Cockcroft*,<sup>6</sup> *Murphy and Treasury Department*,<sup>7</sup> *Re B and Brisbane North Regional Health Authority*<sup>8</sup> and *AH and Chief Minister, Treasury and Economic Development Directorate*.<sup>9</sup>

## Relevant law

29. 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.
30. 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.
31. 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.
32. 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.
33. 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 the contrary to the public interest information has been deleted.
34. Section 72 of the FOI Act provides that it is the person seeking to prevent disclosure of government information that has the onus of establishing that the information is contrary to the public interest information.

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<sup>6</sup> (1986) 64 ALR 97.

<sup>7</sup> (1995) 2 QAR 744.

<sup>8</sup> (1994) 1 QAR 279.

<sup>9</sup> [2018] ACTOFOI 12.

## The contentions of the parties

35. In its decision notice, CMTEDD said:

I have decided to release 25 documents in full and grant partial access to 54 documents and withhold from release 1 document. The information that has been withheld from release or redacted in the documents I consider to be information that is contrary to the public interest in accordance with section 16 of the Act, or would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the Act.

36. In the application for Ombudsman review, the applicant said:

...CMC contends that CMTEDD was wrong to decide that the Review Information should be released (fully or partially). CMC respectfully requests the ACT Ombudsman to set aside the original decision and, in its place, decide that the Review Information should not be disclosed to the access applicant or to the public. It is open to the ACT Ombudsman to arrive at this conclusion on the bases [sic] that:

- (a) The Review Information falls within one of the categories mentioned in Schedule 1 to the FOI Act – that is, the Review Information is ‘National, Territory or State security information’ (section 1.13 of Schedule 1) and/or ‘Law enforcement or public safety information’ (section 1.14). If the ACT Ombudsman accepted this characterisation of the Review Information, then it follows that the information is deemed to be contrary to the public interest to disclose. There is no need to undertake the balancing exercise set out in section 17 of the FOI Act.
- (b) Further, or alternatively, disclosure of the Review Information would, on balance, be contrary to the public interest under the test set out in section 17 of the FOI Act – that is, the factors favouring non-disclosure outweigh the factors favouring disclosure.

## Considerations

37. I have reviewed an unredacted copy of the information at issue. It comprises email correspondence, diagrams, and various reports relating to the Canberra Light Rail project.

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

38. CMC contends that the information at issue is contrary to the public interest to disclose under Schedule 1 of the FOI Act.

39. I have reviewed the information at issue and I am satisfied that it does not identify corruption, an offence, or misuse of power in a law enforcement investigation. As a result, Schedule 1 provisions may be relevant to the information at issue. Consequently, I will now proceed to consider whether

the information at issue is contrary to the public interest information to disclose under Schedule 1 of the FOI Act.

Security of the Commonwealth, the Territory or a State

40. Information which would, or could reasonably be expected to damage the security of the Commonwealth, the Territory or a State is taken to be contrary to the public interest information under Schedule 1, s 1.13 of the FOI Act. Under the FOI Act:

- Security of the Commonwealth includes matters relating to detecting, preventing or suppressing activities, whether within or outside Australia, that are subversive of, or hostile to, the interests of the Commonwealth.<sup>10</sup>
- Security of the Territory or a State includes matters relating to detecting, preventing or suppressing activities within or outside the Territory or a State, that are subversive of, or hostile to, the interests of the Territory or a State.<sup>11</sup>

41. During the third party consultation, CMC argued that the information at issue was contrary to the public interest information under Schedule 1, s 1.13 of the FOI Act, as disclosure would:

- provide a level of detail about the Canberra Light Rail's bridge structure designs, overhead wire structures and power substations, including any alleged 'weak spots', that could be used in targeted attacks on the network or associated infrastructure or by prospective vandals, and
- disclose parts of the Intra-Government Communications Network (ICON), a Commonwealth network of secure fibre optics links, which enables secure communication of up to PROTECTED level information.

42. In its decision, CMTEDD considered the information at issue was not contrary to the public interest under Schedule 1, s 1.13 of the FOI Act having regard to the following:

- the lack of national security markers on the documents and transmission between parties using unclassified networks
- that it is possible to apply for information about the ICON network through a publicly available 'dial before you dig' service, and

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<sup>10</sup> Schedule 1, s 1.13(2)(a).

<sup>11</sup> Schedule 1, s 1.13(3).

- that other Australian rail projects have published similar information about locations of infrastructure and technical details, including maps of proposed optical fibre communications network and chamber substations.

43. CMTEDD concluded that:

Taking into account that information about the Canberra Light Rail is already available online, the fact that similar information has been made available by other jurisdictions and that there has been no attempt to protect the release of this information in accordance with the Protective Security Policy Framework, I am not satisfied that the information in these documents can be considered to be national security information.

44. In submissions to this Ombudsman review, CMC contends CMTEDD's decision is wrong because:

- The absence of security markers is not determinative in considering whether disclosing information would be expected to damage the security of the Territory.
- Referring to the publication of information on other Australian rail projects is misplaced. Light rail, as distinct from heavy rail, is lighter with a higher centre of gravity, more accessible to the general public, and therefore at an increased vulnerability to targeted attack. Also, the level of detail published on other rail projects is general in nature, and does not contain the same level of specificity as the information at issue.
- Referring to the 'dial before you dig' service is also misleading, as information may be released in a variety of formats taking into account 'Territory and Commonwealth interests'; a request to 'dial before you dig' would not allow a person to obtain a map of the whole ICON network; and information can only be requested in relation to completed projects.

45. In response to my draft consideration, CMTEDD contends that the lack of security markers was only one of the considerations CMTEDD took into account when deciding whether disclosure of the information at issue could reasonably be expected to harm the security of the Commonwealth or Territory.<sup>12</sup>

46. CMTEDD further submits:

the primary reasons for not accepting Canberra Metro Construction's assertion that the documents contained national security information, or information that could damage the security of the Commonwealth or Territory was that Canberra Metro Construction failed to show there was 'real' or

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<sup>12</sup> See CMTEDD's Draft Consideration response, page 2.

‘substantial’ grounds for expecting the damage to occur which can be supported by evidence or reasoning...

47. I agree with CMTEDD’s submissions that CMC has not sufficiently explained or demonstrated how disclosure of the information could damage the security of the Commonwealth or Territory.
48. The phrase ‘reasonably be expected’ is an objective test considered in *Attorney-General’s Department v Cockcroft*<sup>13</sup> (*Cockcroft*) in relation to s 43(1)(c)(ii) of the *Freedom of Information Act 1982* (Cth). Bowen CJ and Beaumont J stated that:

In our opinion, in the present context, the words ‘could reasonably be expected to prejudice the future supply of information’ were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous ... It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based.

49. I consider that the discussions in *Cockcroft* are relevant in this Ombudsman review.
50. Accordingly, the words ‘could reasonably be expected’ in Schedule 1, s 1.13 of the FOI Act should be given their ordinary meaning and the expectation must be reasonably based, highly likely and not merely speculative, conjectural or hypothetical.<sup>14</sup>
51. I have considered CMC’s view that the information at issue is of a greater level of specificity than information released about the light rail to date, or in relation to other Australian rail projects. I have also considered CMC’s view that light rail is more vulnerable to attack than heavy rail.
52. While I appreciate CMC’s concerns, the information before me is not sufficient to demonstrate that CMC’s expectation of a targeted attack that could damage the security of the Commonwealth or the Territory, resulting from disclosure of the information at issue, is more than a mere possibility.
53. With respect to ICON, it is also not clear from the information at issue how disclosure could damage the security interests of the Commonwealth, with CMC suggesting only that

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<sup>13</sup> (1986) 64 ALR 97 at [106].

<sup>14</sup> *Murphy and Treasury Department* (1995) 2 QAR 744 at paragraph 44, citing *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [160].

disclosure could result in 'enquiries'. This is an outcome that would appear to be consistent with the pro-disclosure objectives of the FOI Act, with no apparent security implications.

54. It is apparent from CMTEDD's decision that the ACT Government does not share CMC's concerns about the security risks related to disclosure. The submissions provided by CMC do not, in my view, displace the ACT Government's position, nor do they demonstrate that the risk to the security of the Commonwealth or the Territory is reasonably based, highly likely and not merely speculative, conjectural or hypothetical.
55. In response to my draft consideration, CMTEDD provided additional information about how they assessed CMC's contentions regarding damage to the security of the Commonwealth or Territory.
56. During the course of processing the access application, CMTEDD consulted with various parts of ACT Government to assess the risk that disclosure of the information at issue might pose to public safety or the security of the Canberra Light Rail project. During consultation with ACT agencies, CMTEDD was also advised that the Canberra Light Rail system was not included on the critical infrastructure list<sup>15</sup> for the ACT.
57. In consultation with Access Canberra, CMTEDD says it was advised that:
- ... a majority of infrastructure for the light rail project could be seen by walking along the route. In addition, it was noted that whilst the information did provide details which could be used with people with relevant expertise to disrupt the Canberra Light Rail system, this would be only one of several ways that harm to the Light Rail system could occur. Moreover, it was noted that if an individual did want to disrupt or damage the Canberra Light Rail system, targeting electrical components is less likely than other methods of disruption, for example driving a car in front of a light rail vehicle...
58. CMTEDD says it also consulted with Transport Canberra and City Services:
- ... and was not made aware of any evidence to suggest the Canberra Light Rail project was at an increased risk of harm when compared to other ACT Government assets, for example the Canberra bus network and associated infrastructure.
59. In the absence of additional submissions from CMC, in my view, CMC has not discharged its onus under s 72 of the FOI Act to sufficiently explain how disclosure of the information would, or could reasonably be expected to damage the security of the Commonwealth, Territory or a State. As a

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<sup>15</sup> The critical infrastructure list is a register of information relating to critical infrastructure assets in accordance with the *Security of Critical Infrastructures Act 2018* (Cth). This register is managed by the Critical Infrastructure Centre: <https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/security-coordination/critical-infrastructure-resilience>

result, based on the additional submissions from CMTEDD, I am satisfied that disclosing the information at issue is not contrary to the public interest under Schedule 1, s 1.13 of the FOI Act.

Law enforcement or public safety information

60. In CMC's consultation response to CMTEDD, they objected to the disclosure of the information on the basis that:

The detailed information in the Earthing and Bonding Design Report dated 26 May 2017 might be abused by prospective vandals thereby prejudicing the security of light rail vehicles and also the protection of the public. These risks, presented by the disclosure of detailed and highly technical information concerning the CLR project, render the CMTEDD Information 'contrary to the public interest information'.

61. In its decision, CMTEDD considered whether the information at issue was law enforcement and public safety information under Schedule 1, s 1.14 of the FOI Act, which if disclosed, could reasonably be expected to:

- endanger the security of a building, structure or vehicle,<sup>16</sup> and/or
- prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety.<sup>17</sup>

62. CMTEDD concluded that neither Schedule 1, ss 1.14(g) nor 1.14(h) of the FOI Act applied, having regard for the following:

- the same reasons for not accepting that disclosure could reasonably be expected to damage the security of the Commonwealth<sup>18</sup>
- that releasing the information could not reasonably increase the risk of damage to infrastructure, beyond what could reasonably be expected from an individual identifying infrastructure from the publicly available Canberra Light Rail route, and
- that the information at issue does not outline the methods or process for protecting the light rail system.

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<sup>16</sup> Schedule 1, s 1.14(h).

<sup>17</sup> Schedule 1, s 1.14(g).

<sup>18</sup> See paragraph [40].

63. CMTEDD also suggested that the scope of Schedule 1, s 1.14(g) of the FOI Act may be limited to documents that outline the method or process for protecting public safety and provided the example of policing plans for major public events. I disagree with this conclusion.
64. Nevertheless, as discussed above at [50], the phrase 'would, or could reasonably be expected to' indicates that the expectation must be reasonably based, highly likely and not merely speculative, conjectural or hypothetical.
65. While CMC has explained what the expectation is, they have not sufficiently explained how this expectation could eventuate as a result of disclosure of the information at issue. From the information before me, it is unclear why disclosure of the information at issue would increase the risk of possible vandalism of, or damage occurring to, the Canberra Light Rail network.
66. Therefore, I am not satisfied the information at issue is contrary to the public interest to disclose under Schedule 1, s 1.14 of the FOI Act.

*Public interest test*

67. As I am not satisfied the information at issue should be taken to be contrary to the public interest under Schedule 1, I will now apply the public interest test to consider the additional public interest factors, for and against disclosure, raised by CMC and CMTEDD during the course of this Ombudsman review.
68. 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.
69. 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*

70. In submissions to this Ombudsman review, CMC contends that:

... there is little to be gained by releasing technical information about an incomplete project, where works are still to be undertaken, rectified (where required) and certification is still to be sought.

71. They also contend that there is a risk that disclosing interim communications about the progress of incomplete project works under FOI might prejudice the flow of information to regulatory agencies in future:

Such a risk may cause contractors to be less candid when communicating with regulators on major infrastructure projects, particularly while works continue to be undertaken.

72. It is apparent that CMC are concerned that disclosing the information at issue would be misleading and result in a misunderstanding about the state of the Canberra Light Rail project, and dissuade contractors from communicating issues at an early stage.

73. To be clear, in making my decision, I have not, however, had regard to the following two irrelevant factors:

- that access to the information could result in a person misinterpreting or misunderstanding the information (s 17(2)(b) of the FOI Act), and
- that access could inhibit frankness in the provision of advice from the public service (s 17(2)(e) of the FOI Act).

#### *Factors favouring disclosure*

74. Schedule 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.

75. Of the factors favouring disclosure listed in Schedule 2.1 of the FOI Act, CMTEDD identified the following factors favouring disclosure:

- promote open discussion of public affairs and enhance the government's accountability<sup>19</sup>
- contribute to positive and informed debate on important issues or matters of public interest,<sup>20</sup> and
- ensure effective oversight of expenditure of public funds.<sup>21</sup>

76. In its decision, CMTEDD addressed CMC's view that there are no factors favouring disclosure:

... I consider that the release of information contained in these documents may reveal environmental or health risks, or measures relating to public health and safety through the provision of documents relating to the compliance of the electrical systems on the Canberra Light Rail project. The Canberra Light Rail project is a significant project for the ACT Government and is expected to be used by a large number of individuals

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<sup>19</sup> Schedule 2, s 2.1(a)(i).

<sup>20</sup> Schedule 2, s 2.1(a)(ii).

<sup>21</sup> Schedule 2, s 2.1(a)(iv).

once operational. The release of documents showing the certification process, including areas that require attention before being signed off by relevant regulators ... is in my opinion, in the public interest as these issues if not correctly addressed have the potential to cause harm to users of the Canberra Light Rail system.

77. CMC submitted to this review that the factors favouring disclosure cannot reasonably be expected to apply to information about electrical works, which are incomplete or otherwise subject to rectification works. They also contend that relevant information about the light rail project is available on the project website and online contract register:

The information that CMC has chosen to release to the public is not only comprehensive and up-to-date, but also gives an overview of the project in a way that meaningfully informs the public. The same cannot be said about the [information at issue].

78. I agree with CMTEDD that disclosing the information at issue would contribute to open discussion and informed debate. There is considerable public interest in the Canberra Light Rail's electrical installation and its compliance.
79. I do not agree with CMC that the above factors are not relevant simply because the information at issue is specific to the Canberra Light Rail project before it was complete. This information provides information about the project at a point in time, and could well be relevant to public debate in terms of the management of, and public expenditure on, the Canberra Light Rail project.
80. I also do not consider the case of *AH and Chief Minister, Treasury and Economic Development Directorate*<sup>22</sup> to be applicable in this Ombudsman review, as contended by CMC in submissions to this review. That decision examined the release of a draft version of an audit report and management plan which the site owner and developer were under no obligation to provide.
81. In this case, the documents are about a project that was incomplete at the time they were created, but it is not apparent to me that these are draft versions of documents. They appear to be final versions of audit reports, diagrams and emails. There were also legal obligations to provide these documents.
82. As a result, I am satisfied that the above listed factors are relevant considerations favouring disclosure in this case.

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<sup>22</sup> [2018] ACTOFOI 12.

83. Additionally, I note that 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>23</sup> This concept is promoted through the objects of the FOI Act.<sup>24</sup>

*Factors favouring nondisclosure*

84. As discussed above, CMC submits that the information was on balance contrary to the public interest under Schedule 2 of the FOI Act because disclosure would prejudice:

- security, law enforcement or public safety (Schedule 2, s 2.2(a)(iii))
- trade secrets, business affairs or research (Schedule 2, s 2.2(a)(xi))
- the flow of information to the police or another law enforcement or regulatory agency (Schedule 2, s 2.2(a)(ix)), and
- the fair treatment of an individual in relation to unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct (Schedule 2, s 2.2(b)(v)).

85. I have discussed the potential relevance of these factors to this case below.

Security, law enforcement or public safety

86. In CMC's consultation response to CMTEDD, they submit that should Schedule 1, s 1.14 of the FOI Act not apply to their contentions, in the alternative, Schedule 2, s 2.2(a)(iii) of the FOI Act applies to the information at issue for the same reasons.

87. CMC's application for Ombudsman review did not provide additional submissions with regard to this factor and how it applies to the disclosure of the information at issue.

88. I consider that Schedule 2, s 2.2(a)(iii) of the FOI Act has the same threshold test as Schedule 1, s 1.14 of the FOI Act in that the prejudice needs to be reasonably based, highly likely and not merely speculative, conjectural or hypothetical, as discussed from [48] to [50] above.

89. For the same reasons outlined in relation to Schedule 1, s 1.14 of the FOI Act,<sup>25</sup> and based on the information before me, I am not satisfied CMC has discharged their onus in regards to this factor and therefore, do not consider this to be a relevant factor favouring nondisclosure.

Trade secrets, business affairs or research of an agency or a person

90. In CMC's consultation response to CMTEDD, they submit that disclosure of the information at issue could be reasonably expected to prejudice trade secrets, business affairs or research of CMC, and

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<sup>23</sup> See s 17 of the FOI Act.

<sup>24</sup> See s 6(b) of the FOI Act.

<sup>25</sup> At paragraph [59].

potentially other parties on the Canberra Light Rail project. These initial submissions did not, however, provide any further details on what negative implications there might be on CMC's business.

91. CMC's application for Ombudsman review did not provide further information in this regard, other than to highlight situations where, in its view, project information was exchanged in confidence. CMC contends that:

While the Earth and Bonding Design Report Package 02 (Stage 3) contains an express statement regarding confidentiality, the same applies to all documents which were transmitted pursuant to contractual obligations or otherwise and in circumstances where it was clear that the information was not to be used for other purposes.

92. In my view, it is relevant to consider whether disclosure of the information at issue would found an action by a person for breach of confidence under general law.<sup>26</sup>
93. In their application for Ombudsman review, CMC referred to "relevant project agreements" requiring information about the Canberra Light Rail project to be kept "secret and confidential" by all parties. CMC has not, however, detailed the project agreements and/or confidentiality deeds and therefore, I am unable to confirm the scope and application of the confidentiality clause.
94. In summary, it is not clear to me what prejudice disclosure of the information at issue could have on CMC's business affairs, even if there was information exchanged in confidence.
95. Accordingly, based on the reasons above, I am not persuaded that Schedule 2, s 2.2(a)(xi) of the FOI Act is a relevant factor favouring nondisclosure in this Ombudsman review.

#### The flow of information to a regulatory agency

96. In CMC's consultation response to CMTEDD, they submit that the disclosure of information at issue could be expected to prejudice the flow of information to a regularly agency, the Utilities Technical Regulator (UTR). They contend that:

The disclosure of this interim correspondence is not only unhelpful (in that it reveals only part of the picture), but it may also have an adverse effect on candid correspondence passing between contractors and regulators on major infrastructure projects (in particular, while works are still being undertaken and completed).

97. CMC's application for Ombudsman review re-iterated this argument, and cited a previous Ombudsman FOI case<sup>27</sup> as relevant to this review.
98. I accept that the information at issue contains information provided by CMC to the UTR. I do not, however, agree with CMC's submissions that disclosing the information under FOI may

<sup>26</sup> *Re Kamminga and Australian National University* (1992) 15 AAR 297.

<sup>27</sup> *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 3.

mean contractors will be less candid when providing interim information to regulators on major infrastructure projects.

99. Whilst there are some risks in contractors not being as forthcoming in providing voluntary information to the UTR in the future, in particular in relation to major infrastructure projects, I do not accept that it is likely that there will be a significantly reduced level of cooperation with the regulator given the mandatory compliance framework set up under the *Utilities (Technical Regulation) Act 2014* and the applicable penalties.
100. In this Ombudsman review, the documents such as the Earthing and Bonding Design Principles<sup>28</sup> report were provided to the UTR as part of CMC's contractual and legal obligations under the *Utilities (Technical Regulation) Act 2014*.<sup>29</sup> This report was submitted to the UTR to demonstrate CMC's compliance with the relevant legislation. It was, and is, in CMC's best interests to provide such information to government. Failure to cooperate would be to the detriment of CMC.
101. I do not consider *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate*<sup>30</sup> to be relevant, as suggested by CMC, and note the difference in the relationship between the parties in this case. That decision considered the flow of information between the Commonwealth and Territory governments, distinct from between a regulator and a consortium delivering a major infrastructure project on behalf of government.
102. I note that CMTEDD's decision also discusses, in the context of the flow of information to the regulator, whether disclosure would prejudice an agency's ability to obtain confidential information. This is a further factor favouring nondisclosure. I have not, however, addressed this factor separately as:
- CMTEDD found it did not apply for the same reasons as above
  - this factor was not raised as relevant by CMC specifically
  - I have also considered CMC's contentions regarding confidentiality at paragraphs [91]-[94] above.
103. For the reasons outlined above, I do not accept that disclosure of the information at issue could reasonably be expected to prejudice the flow of information to a regulator in future, therefore I do not consider this is a relevant public interest factor favouring nondisclosure in this case.

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<sup>28</sup> Identified by CMTEDD as document 5.

<sup>29</sup> The *Light Rail Regulated Utility (Electrical) Network Code* (Network Code) is a technical code under part 3 of the *Utilities (Technical Regulation) Act 2014* (ACT). The Network Code requires a light rail regulated utility to design, construct, operate and maintain the light rail utility network in a safe and reliable manner and in a way that prevents interference with, and damage to, other infrastructure including other utilities.

<sup>30</sup> *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 3.

Fair treatment of an individual

104. In response to the third party consultation, CMC objected to disclosing the information at issue on the basis that it contains alleged failures, before the conclusion of the Canberra Light Rail project, and without any relevant information about rectification.

105. CMC contends disclosing the information at issue would amount to disclosing unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct which would prejudice the fair treatment of particular individuals. CMC argued that particular individuals working on the Canberra Light Rail project are identifiable in the information at issue even though their names have been redacted by virtue of their specific roles, for example, those undertaking cabling works or supervising such works.

106. In its decision, CMTEDD concluded that the information at issue did not comprise of unsubstantiated allegations because:

- any compliance issues were identified by relevant experts and supported with evidence
- many of the issues of non-compliance were acknowledged by CMC.

107. I agree with CMTEDD that the information at issue does not comprise 'unsubstantiated allegations'. I consider it to be factual information provided as a part of compliance reporting and project updates, by technical specialists and the independent electrical certifier.

108. Therefore, I do not reasonably consider that the information at issue contains unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct the disclosure of which could reasonably be expected to prejudice the fair treatment of an individual.

*Balancing the factors*

109. As I have not identified any public interest factors favouring nondisclosure, I am satisfied that, on balance, giving the FOI applicant access to the information at issue would not be contrary to the public interest.

## **Conclusion**

110. Disclosure of the information at issue is not contrary to the public interest for the purposes of s 16 of the FOI Act.

**Michael Manthorpe PSM**

**ACT Ombudsman**

**5 June 2019**