

Decision and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10036
Applicant:	'CU'
Respondent:	Environment, Planning and Sustainable Development Directorate
Respondent reference:	FOI 23/066170
Date:	7 March 2024
Decision reference:	[2024] ACTOFOI 2
Catchwords:	<i>Freedom of Information Act 2016</i> – refusing to deal with application – information already available to the applicant – information has already been given to the applicant under the <i>Freedom of Information Act 2016</i> – information is usually available for purchase – reasonable steps to identify all government information within scope – information not held by respondent

Decision

1. For the purpose of s 82 of the *Freedom of Information Act 2016* (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. For the reasons set out below, the Environment, Planning and Sustainable Development Directorate's (**EPSDD**) decision of 1 August 2023 refusing to deal with the applicant's access application pursuant to s 43 of the FOI Act (because the information sought was already available to the applicant) should be **confirmed** under s 82(2)(a) of the FOI Act.

Background to Ombudsman review

Access application subject of this review

3. On 22 June 2023, the applicant applied to EPSDD for access to:

... documents, correspondence, or minutes EPSDD hold in regards to the request, action, approval and processing of custodianship change and split of... [block 23, section 41 Lyneham] so that the section of the block that is a car park is built on is managed by TCCS roads ACT as opposed to Sports and Recreation, as per management plan.
4. On 1 August 2023, EPSDD decided to refuse to deal with the application under ss 43(1)d), 45(e) and 45(g) of the FOI Act.
5. On 22 August 2023, the applicant applied for Ombudsman review of EPSDD's decision of 1 August 2023.
6. On 5 February 2024, the Acting Senior Assistant Ombudsman provided her preliminary view to the parties in a draft consideration.
7. On 9 February 2024, EPSDD indicated it accepted the draft consideration making no further submissions.
8. On 29 February 2024, the applicant provided their response to the draft consideration, making additional submissions in support of their view that the original decision was incorrect.

Previous access applications

9. Prior to making the access application the subject of this review, the applicant made several access applications to EPSDD in relation to Block 23, Section 41 Lyneham.¹

¹ Part of block 23, section 41 Lyneham was at the time of the access application being used as a car park by a private school.

10. On 6 January 2023, in response to an access application made on 11 October 2022, EPSDD decided to:²

- refuse to deal with part of the application under s 43(1)(d) of the FOI Act because the information was already available to the applicant (EPSDD provided the applicant with a link³ to this information)
- grant full access to 95 documents
- grant partial access to 21 documents, and
- refuse access to one document.

11. On 12 May 2023, in response to an access application made on 16 January 2023, EPSDD decided to grant full access to 5 documents:⁴

Scope of Ombudsman review

12. The issues to be decided in this Ombudsman review are:

- whether the information sought was already available to the applicant, and
- whether EPSDD has taken all reasonable steps to identify all government information within the scope of the application.

13. In making my decision, I have had regard to:

- the applicant's access application and review application
- the respondent's decision of 1 August 2023 and further submissions
- the FOI Act, in particular ss 6, 7, 34, 43 and 45

² [EPSDD 22/135476 - Environment, Planning and Sustainable Development Directorate - Environment \(act.gov.au\)](#).

³ [EPSDD 19/28355 - Environment, Planning and Sustainable Development Directorate - Environment \(act.gov.au\)](#)

⁴ [EPSDD 23/004893 - Environment, Planning and Sustainable Development Directorate - Environment \(act.gov.au\)](#).

- the respondent's FOI processing file relating to the access application, including evidence of searches
- the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act
- the submissions of the applicant in response to the draft consideration
- relevant case law including:
 - ["CM" and ACT Health Directorate \[2023\] ACTOFOI 20 \(28 September 2023\)](#)
 - ["BV" and Environment, Planning and Sustainable Development Directorate \[2022\] ACTOFOI 10 \(17 November 2022\)](#).

Relevant law

14. Section 7 of the FOI Act gives every person 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.⁵
15. Section 34(1) of the FOI Act states an agency or Minister deciding an access application must take reasonable steps to identify all information within the scope of the application.
16. Section 43(1)(d) of the FOI Act provides that a respondent may refuse to deal with an access application if the government information is already available to the applicant.

⁵ Section 35(1)(c) of the [FOI Act](#).

17. Section 45 of the FOI Act clarifies that for the purposes of s 43(1)(d), government information is already available to the applicant only if the information:
- a) is publicly available; or
 - b) is available to the applicant from, or for inspection at, a place the respondent, another agency or Minister operates, free of charge; or
 - c) is available as part of a public register established under a territory law; or
 - d) is available to the applicant because it has been produced in accordance with a subpoena or court order; or
 - e) has previously been given to the applicant under the FOI Act; or
 - f) has otherwise previously been given to the applicant; or
 - g) is usually available for purchase.
18. There is no requirement for the respondent to consult with the applicant before deciding to refuse to deal with an application on the grounds the information is already available to the applicant.⁶

The contentions of the parties

19. EPSDD's decision notice dated 1 August 2023 said:

I have decided to refuse to deal with your application under sections 43(1)(d) and sections 45(e) and 45(g) of the Act.

Comprehensive searches were conducted and 10 documents containing information within the scope of your application were identified.

Five documents within scope of your application, were made available to you under a previous access application processed and is publicly available via the disclosure log: [EPSDD 22/135476 - Environment, Planning and Sustainable Development Directorate - Environment \(act.gov.au\)](#).

⁶ Section 43(1)(d) is not a ground listed in s 46 of the FOI Act, which sets out consultation requirements before refusing to deal with certain applications.

Five documents within the scope of your application, are available as part of the Land Titles public register on the Access Canberra website: [Land title lodgements - Access Canberra \(act.gov.au\)](https://www.accesscanberra.act.gov.au).

Under section 43(1)(d) of the Act a respondent agency may refuse to deal with an access application wholly or in part if the government information is already available to the applicant. Section 45 sets out the circumstances in which government information is already available to the applicant. Those circumstances include where the government information has previously been given to the applicant under the Act (section 45(e)) or is available for purchase (section 45(g)).

20. In the application for Ombudsman review, the applicant submitted:

The information provided by EPSDFOI on Friday the 6th of January 2023 (... FOI EPSDD 22/135476), and the information provided on 22nd of June 2023 (FOI EPSDD 23/066170) does not provide a transparent response to the query and request for information.

It signals to documents that are not relevant to the request, and it may be reasonable to assume that it excludes documents that are more relevant to the information requested.

21. Regarding the 10 documents already available to the applicant identified by EPSDD, the applicant submitted:

None of these documents provide information about why block 23 (aka 27) was split into two along the boundary of the car par, nor do they indicate that TCCS roads ACT are to become the custodians, or that a car park is permissible on the site.

Our specific FOI request is (and was):

On the ACTmapi Land Custodian map, it states that part of block 23 (represented as block 27) is managed by TCCS Roads ACT. This is, coincidentally, the site of a car park developed by BCC, and this is the site that the Lyneham Community are seeking information about.

- why is block 23 (aka block 27) split into two blocks on the custodian map?
... more specifically, is the northern section of block 23 (aka 27), managed by TCCS ACT Roads, and the remainder of the block is managed by TCCS Sport and Recreation Facilities, the custodians of the entire site, as per the transitional Management Plan ([Instrument No. 143 of 2000](#))
- What documents or correspondence does EPSDD hold in regards to the request, action and approval for the modification of the land custodian map, to action this split on the public ACTMapi land custodian map?

In summary, what documents, correspondence, or minutes does EPSDD hold in regard to the request, action, approval and processing of custodianships change and split of block 23 (northern end), so that the section of the block that a car park is built on is managed by TCCS Roads ACT as opposed to Sports and Recreation, as per management plan.

...

Email correspondence was received from EPSDD FOI team on the 22 June 2022... regarding the custodian ship split of block 23. The response was confusing and indicated that the reason that block 23 is split is half on the custodian map is that the northern car park section of the block **may** be managed by TCCS city presentation under a licence to the adjacent school, and the remainder of the block is managed by TCCS Sport and Recreation Facilities.

However, in the same email, they stated that no such licence exists over the site, just sublease (1644327), which is for a Sporting Facility and ancillary carparking...

22. In further submissions to the ACT Ombudsman, EPSDD said:

The applicant has submitted multiple access applications in relation to the Lyneham oval carpark across multiple directorates.

On 5 July 2023, an email was sent to Transport Canberra and City Services (TCCS) requesting transfer of this application. TCCS provided a response on 17 July 2023, stating "TCCS has decided on a number of FOIs relating to this block and section, including broad scopes encompassing any records we hold in relation to the car park... it is my understanding that the applicant is seeking access to information on the Territory and Custodian maps, which is outside of TCCS and no previous searches have identified relevant records. TCCS is unable to accept transfer as it is unlikely we hold additional information."

...

On 27 June 2023, the below responses were provided to the applicant:

Why is block 23 (aka block 27) split into two blocks on the custodian map? ... more specifically, why is the northern section of block 23 (aka 27), the car park, managed by TCCS ACT Roads, and the remainder of the block is managed by TCCS Sport and Recreation Facilities.

In a number of situations there may be two or more directorate/agencies or parts of a directorate that share custodianship of a block, in these circumstances the map outlines a boundary (or part block) of custodianship. An example of a part block is where Sport and Recreation (CMTEDD) is the custodian of the oval and City Services (TCCS) is the custodian of the playground where both facilities are found on the one block.

In this instance the car part, managed by TCCS ACT Roads may be managed under a licence to the adjacent school, and the remainder of the block is managed by TCCS Sport and Recreation Facilities which would be managed by city presentation.

Why do the Custodian map and the Territory Plan map differ? (why is there a boundary change, sectioning off the car park at the northern end of block 23 (aka 27) in the custodian map and not the Territory Map).

The ACT custodianship map shows the ACT Government custodians for public or unleased blocks in ACT and as mentioned above there are situations where different parts or multiple directorates/agencies manage a block. The Territory Plan map shows the land uses from the [Territory Plan](#) and is not aligned to the specific custodianship polygons.

... a 'Notice of Decision' for DA201629628. It details, on pg 9 that the school has a licence agreement to use the car park. This agreement wasn't included in previous FOI docs received (but was in scope of the requests). Can you please make sure of its existence or not.

There is no licence over this site, just sublease (1644327), this is incorrectly referred to as a licence in the Notice of Decision for DA-201629628.

23. In further submissions to the ACT Ombudsman, the applicant said:

I am still unsure why there is NO documentation for the creation of block 27 in the ACTMAPI custodian map.

(Note: The documents released relate to a separate division at the south of the block)

And I am concerned that dual block numbers cover the site (ie it's block 23 and it's also block 27). This is unique and a red flag.

Usually the creation or significant changes of a block requires documentation.

I think it's important for internal integrity to understand what's going on at this site, as it's protected public land with environmental and public significance, and it's involved in an ongoing legal process.

24. These submissions are discussed in more detail below.

Consideration

Whether information was already available to the applicant

25. Where information is already publicly available, there is no need for an access application to be processed and a respondent may refuse to deal with the application.⁷
26. The applicant submitted the information provided previously did not deliver answers to the questions she had asked.
27. The respondent submitted the information requested was already available to the applicant.
28. I agree with the respondent. I am satisfied that EPSDD has provided a reasonable response to the applicant's questions. I am also satisfied the information requested was either already provided to the applicant under a previous access application, or is available to purchase as part of the [Land Titles public register](#) on the Access Canberra website.

Identifying information within the scope of the application

29. In the review application, the applicant submitted that documents that are relevant to the request may have been excluded from consideration.
30. The applicant additionally submitted, in response to the draft consideration, that there should be more documentation than what has been identified.
31. The FOI Act requires the agency or Minister to take 'reasonable steps' to identify all the government information within the scope of the access application.⁸

⁷ Section 43(1)(d) of the [FOI Act](#) and [Explanatory Statement, Freedom of Information Bill 2016 \(ACT\)](#).

⁸ Section 34(1) of the [FOI Act](#).

32. The FOI Act is silent on what constitutes 'reasonable steps', only providing guidance that backup systems can, but are not required to be, searched.⁹
33. As explained in "["BV" and EPSDD](#)", what is required to satisfy the obligation to take reasonable steps to identify information will depend on the nature of the requested information.¹⁰
34. What amounts to reasonable steps may vary in different circumstances. It would, however, include at a minimum a search of electronic records and a manual search of physical records, as applicable.¹¹
35. In addition, it is also reasonable to take into account the information located in response to past access applications, and any information that may have been provided informally to the applicant.
36. EPSDD has given the ACT Ombudsman copies of the information it considers is already available to the applicant. EPSDD has also provided evidence of searches undertaken in response to the access application.
37. The FOI Act is ultimately concerned with information that exists, how it is identified, and whether it is in the public interest to disclose the information. The FOI Act is not concerned with perceptions of potential gaps in record keeping in the event an FOI applicant believes that documents do, or should, exist.

⁹ Section 34(2) of the [FOI Act](#).

¹⁰ "["BV" and Environment, Planning and Sustainable Development Directorate \[2022\] ACTOFOI 10](#), [36].

¹¹ [Explanatory Statement, Freedom of Information Bill 2016 \(ACT\)](#).

38. Taking into account the information already available to the applicant and the responses EPSDD provided to the questions asked by the applicant, I am satisfied EPSDD has taken reasonable steps to identify all information within the scope of the application.

Conclusion

39. For the reasons set out above, my decision is to **confirm** EPSDD's decision under s 82(2)(a) of the FOI Act.

David Fintan

Senior Assistant Ombudsman

7 March 2024