

Decision and reasons for decision of Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10015
Decision reference:	[2023] ACTOFOI 18
Applicant:	'CK'
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Agency reference:	CMTEDDFOI 2022-387
Date:	25 August 2023
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – promote open discussion of public affairs and enhance the government’s accountability – prejudice the protection of an individual’s right to privacy or any other right under the <i>Human Rights Act 2004</i>

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the ACT *Freedom of Information Act 2016 (FOI Act)*.
2. For the reasons set out below I have decided to vary the decision of the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) dated 2 March 2023 under s 82(2)(b) of the FOI Act.

Background of Ombudsman review

3. CMTEDD’s decision of 2 March 2023 was made in response to a request for access to information contained in 8 controlled activity orders.¹
4. CMTEDD’s decision was to give partial access to the 8 controlled activity orders, with some information to be removed so as not to prejudice the protection of an individual’s right to privacy.

¹ Controlled activity orders may be made under the [Planning and Development Act 2007](#).

5. The applicant in this Ombudsman review is a third party who was consulted by CMTEDD under s 38(2) of the FOI Act prior to the decision of 2 March 2023, on the ground that information in one of the controlled activity orders could reasonably be expected to be of concern to the third party.²
6. On 30 March 2023, the applicant lodged a request for Ombudsman review of CMTEDD's decision to provide partial access to the information of concern to them. The release of this information has been deferred under s 38(6) of the FOI Act pending the outcome of this review.
7. This Ombudsman review pertains solely to CMTEDD's decision of 2 March 2023 as it relates to the applicant.
8. On 11 July 2023, I provided my preliminary views to the parties in a draft consideration.
9. On 11 July 2023, CMTEDD indicated it accepted the draft consideration with no further submissions to make.
10. On 3 August 2023, the applicant indicated they did not accept the draft consideration without making new submissions and reiterating the concerns when applying for review.

Information at issue

11. The information at issue in this matter is controlled activity order reference 13093 of 20 August 2020, which relates to: "Having a building or structure that was constructed without approval – remove the structure or obtain development approval".³
12. In making my decision, I have had regard to:
 - the applicant's review application
 - the respondent's decision including a redacted version of the information at issue
 - the FOI Act, in particular Schedule 2, s 2.2(a)(ii)
 - the *Human Rights Act 2004* (**Human Rights Act**)

² s 38(2) of the FOI Act.

³ This controlled activity order is one of 18 identified by CMTEDD in a list published on its FOI disclosure log in response to FOI request reference CMTEDDFOI 2020-159 (see https://www.cmtedd.act.gov.au/_data/assets/pdf_file/0018/1641303/2020-159.pdf).

- an unedited copy of the information at issue, and
- the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act.

Relevant law

13. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.⁴ This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.⁵
14. Contrary to the public interest information is defined in s 16 of the FOI Act as:

Information –
 - (a) that is taken to be contrary to the public interest to disclose under schedule 1; or
 - (b) the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17
15. The public interest test in s 17 sets out the process for balancing public interest factors favouring disclosure and nondisclosure respectively. This balancing test must be used to determine whether disclosure would be contrary to the public interest.
16. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.⁶
17. Schedule 2 of the FOI Act sets out public interest factors to be balanced when conducting the s 17 test to determine the public interest.

The contentions of the parties

18. In its decision notice, CMTEDD said:

Considering the type of information to be withheld from release, I am satisfied that the factors in favour of release can still be met while protecting the personal identities of the individuals involved.

19. In the application for Ombudsman review, the applicant believed none of the information should be released noting concerns over their personal privacy.

⁴ Section 7 of the FOI Act.

⁵ Section 35(1)(c) of the FOI Act.

⁶ Section 35(1)(c) of the FOI Act.

Considerations

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

20. Neither party in this Ombudsman review suggested the information sought contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the information at issue to be contrary to the public interest information, it must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

Public interest test

21. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:
- identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in schedule 2, section 2.1;
 - identify any factor favouring nondisclosure that applies in relation to the information (a relevant factor favouring nondisclosure), including any factor mentioned in schedule 2, section 2.1;
 - balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
 - decide whether, on balance, disclosure of the information would be contrary to the public interest;
 - unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

Factors favouring disclosure

22. In their original decision, CMTEDD relied on one factor favouring disclosure regarding the information at issue.

***Promote open discussion of public affairs and enhance the government's accountability
(Schedule 2, s 2.1(a)(i))***

23. A factor favouring disclosure is that disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.⁷
24. I agree that this factor is relevant in this review, as disclosure of information contained in controlled activity orders could reasonably be expected to promote open discussion of, and enhance government accountability in relation to, a matter of public affairs, namely the use of controlled activity orders to support the objects of the *Planning and Development Act 2007*.
25. As per the Access Canberra website, controlled activity orders can be issued as a result of complaints, applications or on the initiative of Access Canberra.⁸
26. I afford this factor medium weight in this decision.

Factors favouring nondisclosure

27. In the original decision CMTEDD identified one factor favouring nondisclosure.

Prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act (Schedule 2, s2.2(a)(ii))

28. A factor favouring nondisclosure is that disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act.⁹
29. Section 12 of the Human Rights Act provides:
- Everyone has the right—
- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
 - (b) not to have his or her reputation unlawfully attacked.
30. I agree with CMTEDD that this factor is relevant in this review and the protection of an individual's right to privacy is a factor that should be given significant weight.

⁷ Schedule 2, s 2.1(a)(i) of the FOI Act.

⁸ [Controlled activity orders](#).

⁹ Schedule 2, s 2.2(a)(ii) of the FOI Act.

Balancing the factors

31. In making this decision I considered one favouring disclosure and one factor favouring non-disclosure.
32. Balancing public interest factors is not merely a tallying exercise, where the public interest is established solely by the number of applicable factors on either side. I considered the relative importance and weight each factor should be given. The weight given to the factors depends on the effect that disclosing the information would have on the public interest.
33. The FOI Act also has a pro-disclosure bias. The public interest test and weighing of factors is approached as scales 'laden in favour of disclosure'.¹⁰
34. On review, I consider CMTEDD's decision of 2 March 2023 gave the protection of personal privacy appropriate consideration and weight, in particular by finding that on balance any personal information capable of identifying an individual to whom a controlled activity order relates should not be released.
35. The only point of difference I wish to make in this decision is that I think some additional information, which was not identified for redaction in CMTEDD's decision of 2 March 2023, but which could be used to identify the applicant, should be removed – that is, the volume and folio reference on the controlled activity order.

Conclusion

36. For these reasons my decision is to **vary** CMTEDD's decision under s 82(2)(b) of the FOI Act. The material should be released with additional redactions as described above.

David Fintan
Senior Assistant Ombudsman
25 August 2023

¹⁰ [Explanatory Statement, Freedom of Information Bill 2016](#).