

## Decision and reasons for decision of Senior Assistant Ombudsman

<b>Application number:</b>	AFOI-RR/23/10028
<b>Applicant:</b>	'CS'
<b>Respondent:</b>	Chief Minister, Treasury and Economic Development Directorate
<b>Agency reference:</b>	CMTEDDFOI 2022-147
<b>Date:</b>	18 December 2023
<b>Decision reference:</b>	[2023] ACTOFOI 27
<b>Catchwords:</b>	<i>Freedom of Information Act 2016</i> – refusing to deal with application – information disclosure of which is prohibited by law

### Decision

1. This matter concerns Ombudsman review of a decision of the Chief Minister, Treasury and Economic Development Directorate's (CMTEDD) refusing to deal with an application on the ground it was expressed to relate to government information of a stated kind and government information of that kind is taken to be contrary to the public interest to disclose under Schedule 1 of the *Freedom of Information Act 2016* (FOI Act).
2. For the purpose of s 82 of the FOI Act, I am a delegate of the ACT Ombudsman.
3. For the reasons set out below, on Ombudsman review, I confirm the decision of CMTEDD dated 9 June 2023 under s 82(2)(a) of the FOI Act.

### Background of Ombudsman review

4. On 27 April 2023, the applicant applied for access to:
  - i. Copies of all internal correspondence from 1 March 2023, and 30 April 2023, between the WWVP and RAT teams<sup>1</sup> relating to your Working With Vulnerable People renewal application. Particularly including all correspondence relating to the decision to seek information from the entity, the AEU ACT Branch.
  - ii. All correspondence and notes (telephone and/or face-to-face interactions) between WWVP/RAT team members and representatives of the AEU ACT Branch occurring between 1 March 2023 and 30 April 2023.

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<sup>1</sup> Working With Vulnerable People (WWVP) and Risk Assessment Team (RAT).

5. On 24 May 2023, CMTEDD notified the applicant of its intention to refuse to deal with the access application under ss 35(1)(d) and 43(1)(e) of the FOI Act because the application was expressed to relate to government information of a stated kind and government information of that kind that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act.<sup>2</sup>
6. Specifically, CMTEDD concluded that the information sought is:
  - information the disclosure of which is prohibited by a secrecy provision (Sch 1, s 1.3(6) of the FOI Act, on the ground disclosure of the information is prohibited by s 65 of the [Working with Vulnerable People \(Background Checking\) Act 2011](#) (WWVP Act)), and
  - information the disclosure of which would, or could reasonably be expected to, prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (Sch 1, s 1.14(1)(f) of the FOI Act).
7. On 4 June 2023, the applicant responded to this notice, putting forward submissions that the grounds relied upon in the notice were incorrect and the application should be processed.
8. On 9 June 2023, CMTEDD informed the applicant it had decided to refuse to deal with the application pursuant to ss 35(1)(d) and 43(1)(e) of the FOI Act.
9. On 28 June 2023, the applicant applied for Ombudsman review under s 73 of the FOI Act.
10. On 7 December 2023, I provided my preliminary view to the parties in a draft consideration.
11. On 9 December 2023, the applicant provided their response to the draft consideration, making additional submissions in support of their view that the application should be processed.
12. On 11 December 2023, the respondent indicated it accepted my draft consideration, making no additional submissions.

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<sup>2</sup> Section 43(1)(e) of the FOI Act.

## Scope of Ombudsman review

13. The key issue to be determined in this review is whether the information sought by the applicant is information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act, such that the applicant's access application should be refused under ss 35(1)(d) and 43(1)(e) of the FOI Act.
14. In making my draft consideration, I have had regard to:
- the applicant's review application
  - the respondent's decision
  - additional submissions made by the applicant in lodging their request for review
  - additional submissions made by the respondent in response to the review
  - additional submissions made by the applicant in response to my draft consideration
  - the FOI Act, in particular Schedule 1, s 1.3(6), s 46 and s 35(1)(d)
  - the ACT Ombudsman FOI guidelines
  - relevant case law, including:
    - *'CO' and ACT Health Directorate'* [2023] ACTOFOI 23 (31 October 2023)
    - *'CL' and Justice and Community Safety Directorate'* [2023] ACTOFOI 19 (21 September 2023).

## Relevant law

15. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.<sup>3</sup> This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.<sup>4</sup>

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<sup>3</sup> Section 7 of the FOI Act.

<sup>4</sup> Section 35(1)(c) of the FOI Act.

16. Section 16(1) of the FOI Act provides that information is contrary to the public interest information if—
- (a) it is taken to be contrary to the public interest to disclose under schedule 1; or
  - (b) disclosing the information would, on balance, be contrary to the public interest under the test set out in section 17.
17. Section 35 of the FOI Act provides how an access application may be decided, including by refusing to deal with the application (emphasis added):<sup>5</sup>
- (1) The respondent decides an access application for government information by deciding—
    - (a) to give access to the information; or
    - (b) that the information is not held by the respondent; or
    - (c) to refuse to give access to the information because the information is contrary to the public interest information; or
    - (d) **to refuse to deal with the application (see section 43)**; or
    - (e) to refuse to confirm or deny that the information is held by the respondent because—
      - (i) the information is contrary to the public interest information; and
      - (ii) doing so would, or could reasonably be expected to—
        - (A) endanger the life or physical safety of a person; or
        - (B) be an unreasonable limitation on a person’s rights under the Human Rights Act 2004; or
        - (C) significantly prejudice an ongoing criminal investigation.
  - (2) An access application may be decided in more than 1 way.
18. Section 43(1)(e) of the FOI Act provides that a respondent – in this case, CMTEDD – may refuse to deal with an access application as follows:<sup>6</sup>

#### **43 Refusing to deal with application—general**

- (1) A respondent may refuse to deal with an access application wholly or in part only if—
  - ...
  - (e) the access application is expressed to relate to government information of a stated kind and government information of that kind is taken to be contrary to the public interest to disclose under schedule 1; or
  - ...

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<sup>5</sup> Section 35 of the FOI Act.

<sup>6</sup> Section 35 of the FOI Act.

19. Section 46(1) of the FOI Act imposes a requirement on agencies to consult with the applicant before refusing to deal with an access application on the ground of s 43(1)(e):
- (1) Before refusing to deal with an access application on a ground mentioned in section 43 (1) (a), (b), (c), (e) or (f), the respondent must—
    - (a) tell the applicant, in writing, of—
      - (i) the intention to refuse to deal with the application; and
      - (ii) the ground for refusal; and
      - (iii) the period for consultation on the proposed refusal (the consultation period); and
    - (b) give the applicant—
      - (i) a reasonable opportunity to consult with the respondent and to provide any additional information relevant to the application during the consultation period; and
      - (ii) any information that may assist the applicant make an application in a form that would remove the ground for refusal.

## The contentions of the parties

20. In its decision notice, the respondent said:

I note that my office received a response from you on 4 June 2023, in which you confirmed your views with the reasoning to refuse access.

I am satisfied that my office has made all reasonable attempts to assist you in making an application that would remove the grounds for refusal.

I have also considered the points you have made within your response of 4 June 2023 and am of the view that the information within scope of your request is contrary to the public interest under Schedule 1 of the Act.

21. In the application for Ombudsman review, the applicant made detailed submissions concerning the Schedule 1 factors referred to in CMTEDD's decision notice (extracted below):

CMTEDD relied on the following grounds under the FOI Act, schedule 1, to assert that my access application was expressed to relate to government information of a kind that is taken to be contrary to the public interest to disclose. For the following reasons, I do not agree that these grounds justify a decision to refuse to deal with my access application.

...

As the ACT Ombudsman highlights in their Freedom of Information Guidelines: Considering the Public Interest ('Ombudsman Guidelines'), page 18, CMTEDD does not appear to have considered that:

- the WWVP Act, section 65, does not provide a blanket prohibition on disclosure and expressly allows disclosure in circumstances where the information is about a person with the person's consent; and
- the pro-disclosure objectives of the FOI Act favour CMTEDD considering my access application and making redactions as necessary to exclude information from release where disclosure is not in the public interest.

...

For reasons similar to those I have outlined regarding section 1.14(1)(f), CMTEDD does not have grounds to refuse to deal with my access application under the FOI Act, schedule 1, section 1.14(1)(g) because:

- my application was not expressed to an identifiable lawful method or procedure for protecting public safety;
- any lawful method or procedure for protecting public safety is unlikely to be prejudiced because it is already known as a result of publication in the WWVP Act or risk assessment guidelines;
- any information provided by another agency to Access Canberra that might attract section 1.14(1)(g) can be redacted from information disclosed in response to my access application; and
- Access Canberra may have exceeded its lawful authority in processing my WWVP registration application, putting the information beyond section 1.14(1)(g) due to section 1.14(4)(a).

## Consideration

### Was the procedure set out in section 46 of the FOI Act followed correctly?

22. As a preliminary matter, I have considered whether CMTEDD met the consultation requirements in s 46 of the FOI Act.
23. The requirements for a consultation under s 46 of the FOI Act are that the respondent must tell the applicant, in writing, of the intention to refuse, the grounds for refusal, and the period for consultation to occur.
24. The respondent must also give the applicant both a reasonable opportunity to consult with the agency and provide relevant information (s 46(1)(b)(i)), and any information that would assist the applicant to make the application in a form that would remove the ground for refusal (s 46(1)(b)(ii)).
25. Having reviewed the contents of CMTEDD's notice of 24 May 2023 detailing CMTEDD's intention to refuse the access application, I am satisfied it met the minimum requirements of s 46 of the FOI Act.
26. However, I consider CMTEDD's notice could have provided clearer information to the applicant. For example, the notice implied that the applicant could amend the application – that is, by noting the time allowed for an amended application was 10 working days – but it could have explained this more clearly.

27. Generally speaking, I consider it would be preferable for respondent agencies to provide a clear explanation of what would assist the applicant to amend their application to be suitable, even if the likelihood of an amended application removing the ground for the intended refusal is considered low.

**Is the information at issue information of a kind that is taken to be contrary to the public interest to disclose under Schedule 1?**

28. In the original decision CMTEDD noted 2 provisions of Schedule 1 of the FOI Act as applicable to this matter for the purposes of s 43(1)(e) of the FOI Act.

***Information the disclosure of which is prohibited by law (Sch 1, s 1.3)***

29. The WWVP Act is not expressly named in Sch 1, s 1.3 of the FOI Act, and therefore in this case s 1.3(6) applies, which states:

(6) Any other information the disclosure of which is prohibited by a secrecy provision of a law.

30. Schedule 1, s 1.3(7) of the Act provides that [my emphasis]:

(7) In this section:

***secrecy provision***—a provision of a law is a ***secrecy provision*** if it—

- (a) applies to information obtained in the exercise of a function under the law; and
- (b) prohibits people mentioned in the provision from disclosing the information, **whether the prohibition is absolute or subject to stated exceptions or qualifications.**

31. The applicable secrecy provision in this instance is s 65 of the WWVP Act, which relevantly provides:

**65 Offences—use or divulge protected information**

...

(2) A person to whom this section applies commits an offence if—

- (a) the person does something that divulges information; and
- (b) the information is protected information about someone else; and
- (c) the person is reckless about whether—
  - (i) the information is protected information about someone else; and
  - (ii) doing the thing would result in the information being divulged to someone else.

(3) Subsections (1) and (2) do not apply if the information is used or divulged—

- (a) under this Act or another territory law; or

- (b) in relation to the exercise of a function, as a person to whom this section applies, under this Act or another territory law; or
  - (c) in a court proceeding.
- (4) Subsections (1) and (2) do not apply to the using or divulging of protected information about a person with the person's consent.

*Note The defendant has an evidential burden in relation to the matters mentioned in ss (3) and (4) (see Criminal Code, s 58).*

- (5) A person to whom this section applies need not divulge protected information to a court, or produce a document containing protected information to a court, unless it is necessary to do so for this Act or another law applying in the territory.
- (6) In this section:

...

**protected information** means information about a person that is disclosed to, or obtained by, a person to whom this section applies because of the exercise of a function under this Act by the person or someone else.

**Examples—protected information**

1 information obtained by the commissioner in conducting a risk assessment for a person

2 information disclosed by the commissioner in seeking information or advice from an entity about a registered person

32. I am satisfied that s 65(2) of the WWVP Act is a secrecy provision for the purposes of Sch 1, s 1.3(7) of the FOI Act because the effect of that provision is to prohibit the disclosure of protected information – that is, by making it an offence to divulge the protected information.
33. While ss 65(3) and (4) of the WWVP Act identify some circumstances in which the offence in s 65(2) does not apply, the definition of 'secrecy provision' in Sch 1, s 1.3(7)(b) of the FOI Act expressly provides that the definition applies in relation to a prohibition on disclosure 'whether the prohibition is absolute or subject to stated exceptions or qualifications'.
34. Given the information at issue contains information about a person that was obtained for the purposes of a risk assessment in a WWVP renewal process, I am also satisfied it meets the definition of protected information for the purpose of s 65 of the WWVP Act.
35. In response to my draft consideration, the applicant made further submissions (partially extracted below) outlining their contention that the secrecy provision in s 65 of the WWVP Act does not apply in this instance because they had provided their consent for CMTEDD to disclose their personal information.



...

The WWVP Act, section 65(4) operates such that it is the person about whom the protected information relates (the 'relevant person') that may consent to the using or divulging of protected information. It is unnecessary to obtain consent of the third party from whom CMTEDD obtained the information. The consequence of the relevant person having consented to the using or divulging of protected information under section 65(4) is that disclosure of protected information ceases to be prohibited by section 65(2) within the consent provided by the relevant person.

I consent to CMTEDD divulging to me any protected information that CMTEDD would otherwise be prohibited from divulging due to the WWVP Act, section 65(2), in order to provide me the documents I seek in my access application.

...

36. I have considered the applicant's further submissions on this point very carefully and I have 2 points to make in response.
37. First, while the applicant has provided their consent to the disclosure of information about themselves, the information at issue is also information 'about' at least one other person, insofar as it discloses the views of another person about the applicant. In this regard, I consider 'about' should be given its ordinary meaning, being 'of; concerning; in regard to' (*The Macquarie Dictionary*, Revised Third Edition (2002)), and it is possible for information to be about more than one person.
38. I appreciate that it might be argued that the purpose of the secrecy provision in s 65 of the WWVP Act is solely to protect the interests of persons seeking registration under the WWVP Act and about whom information is obtained for the purposes of a risk assessment.
39. The Explanatory Statement to the Working With Vulnerable People (Background Checking) Bill 2010 includes statements consistent with the view that a primary purposes of the secrecy provision is to protect persons seeking registration. For example, in relation to clause 58 of the Bill (which corresponds to s 65 in the current WWVP Act), it states:

Information obtained about a person for the purpose of conducting a risk assessment will generally be protected personal information that in some cases will not have been proven in a court or other decision making body. Inappropriate disclosure may have consequences for the person in terms of

their privacy, reputation, right to presumption of innocence, right to a fair trial and subsequently, their employment prospects or standing in the community.

40. However, s 65 is not expressed to apply exclusively to information about an applicant for registration under the WWVP Act, but it is expressed to apply to information about a person. Indeed, one of the 2 examples given at the end of the definition in s 65(6) makes clear that information disclosed in seeking information about a registered person can be protected information.
41. Moreover, I consider it is reasonably arguable that s 65 is also intended to protect against the disclosure of information about persons who provide information about registered persons under the WWVP Act because there is a legitimate public interest in ensuring persons in the former category are able to provide frank information about a registered person.
42. Second, even if I am wrong on this point – that is, if the exception in s 65(4) of the WWVP Act to the general prohibition against divulging protected information requires **only** the consent of the person being the registered person to which the information relates – the effect of Sch 1, s 1.3(7)(b) of the FOI Act is that s 65 of the WWVP Act is taken to be a secrecy provision for the purposes of Sch 1, s 1.3 ‘whether the prohibition [in s 65] is absolute or subject to stated exceptions or qualifications’.
43. Put another way, the fact that s 65(4) includes an exception allowing for use or disclosure of protected information with consent does not change the fact it is a secrecy provision for the purposes of Sch 1, s 1.3 of the FOI Act.
44. For these reasons, I am satisfied that the information at issue is information of a kind that is taken to be contrary to the public interest to disclose under Sch 1, s 1.3 for the purposes of s 43(1)(e) of the FOI Act.

***Law enforcement or public safety information (Sch 1, s 1.14(1)(f))***

45. Having regard to my findings above, I do not need to determine if Sch 1, s 1.14(1)(f) also applies in this case; however, for completeness I have done so.

46. The original decision also found that disclosure of the information at issue 'would be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law' for the purposes of Sch 1, s 1.14(f) of the FOI Act.
47. Staff of the ACT Ombudsman have discussed the information at issue and the methods used to gather it with the relevant line areas within Access Canberra, and confirmed that all information was obtained with consent, and therefore there is no evidence that any other methods could be revealed or disclosed as a result of disclosure.
48. For these reasons, I am satisfied s 1.14(f) does not apply to the information at issue.

## **Conclusion**

49. For these reasons, my decision is to **confirm** CMTEDD's decision under s 82(2)(a) of the FOI Act.

**David Fintan**  
**Senior Assistant Ombudsman**  
**18 December 2023**