

**Decision and reasons of Acting Senior Assistant Ombudsman**

Application number:	AFOI-RR/23/10044
Applicant:	Village 25 Pty Ltd
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Third Party:	Downer EDI Works Pty Ltd
Respondent reference:	CMTEDDFOI 2023-216
Date:	26 July 2024
Decision reference:	[2024] ACTOFOI 13
Catchwords:	<i>Freedom of Information Act 2016</i> – deciding access – whether information is contrary to the public interest information – identifying information within scope of application – refuse to deal with application for information already available to applicant – inform the community of the government’s operations – reveal the reason for a government decision and any background or contextual information that informed that decision – contribute to the administration of justice generally, including procedural fairness – promote open discussion of public affairs and enhance the government’s accountability – contribute to positive and informed debate on important issues or matters of public interest – allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official

- reveal that the information was incorrect, out-of-date, misleading, gratuitous unfairly subjective or irrelevant - contribute to the protection of the environment and reveal environmental or health risks or measures relating to public health and safety - prejudice flow of information to the police or another law enforcement or regulatory agency and prejudice an agency's ability to obtain confidential information - prejudice trade secrets, business affairs or research of an agency or persons - impede protection of the environment.

## 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. The applicant applied for Ombudsman review of the Chief Minister, Treasury and Economic Development Directorate's (**CMTEDD**) decision to refuse access to part of the information sought.
3. For the reasons set out below, CMTEDD's decision dated 22 September 2023 should be **varied** under s 82(2)(b) of the FOI Act.
4. The practical effect of this variation would be to disclose some additional information in 3 documents, categorised as 'complaints response information' and 'environmental management plans'.

## Background to Ombudsman review

5. On 22 June 2023, the applicant applied to the Environment, Planning and Sustainable Development Directorate (**EPSDD**) for access to:

... documents relating to the operation of an asphalt process plant by Downer EDI Works Pty Ltd (Downer EDI) located at 76 Alderson Place, Hume ACT (Plant). The operation of the Plant is regulated by: consent 2010/16647 and authorisation 0176...

1. the documents referred to in the Approval as the detailed air quality assessment to be undertaken pursuant to the 25/02/2010 advice received from the Conservator of Flora and Fauna In relation to the proposal...
  2. any approved amendments to the Authorisation impacting upon or in any way altering conditions addressing air quality and air emissions;
  3. any reports, made since 1 January 2018 to date, to the Environment Protection Authority (EPA) dealing with environmental harm from air omissions...
  4. any records of air pollution related incidents from or on the Plant and provided to the EPA by Downer EDI... between the period 1 January 2018 to date;
  5. any records of air pollution/odour complaints provided to the EPA by Downer EDI... made since 1 January 2018 to date;
  6. the environment management plan (EMP) accepted by the EPA prior to the commissioning of the Plant, and any approved variations to that EMP...
  7. the results of quarterly and/or annual air monitoring of the Plant's emissions undertaken by Downer EDI as required by the Authorisation and submitted to the EPA... since 1 January 2018;
  8. all correspondence, if any between the period 1 January 2018 to date, between Downer EDI and the EPA In respect of compliance or non-compliance with conditions of the Authorisation relating to air emissions, air pollution or odour and changes to conditions of the Authorisation dealing with air emissions, air pollution or odour; and
  9. copies of any prevention notices or prohibition orders issued since 1 January 2018 dealing with air emissions, air pollution or odour and documents evidencing compliance with any such notices.
6. On 26 June 2023, CMTEDD accepted transfer of the access application under s 57 of the FOI Act.
7. The applicant agreed to two extensions of time for CMTEDD to decide the application.
8. On 22 September 2023, CMTEDD advised the applicant it had identified 63 documents within the scope of the application. All documents were within the scope of points 1 to 8 of the application. CMTEDD did not identify any information within the scope of point 9 of the application.

9. CMTEDD decided to grant full access to 2 documents, grant partial access to 41 documents, and refuse access to 20 documents.<sup>1</sup>
10. On 19 October 2023, the applicant applied for Ombudsman review of CMTEDD's access decision.
11. On 23 February 2024, Downer EDI Works Pty Ltd (**Downer**) requested to participate in this review as a third party under s 77 of the FOI Act.
12. On 7 March 2024, the delegate approved Downer's request to join as a third party to the review.
13. On 4 July 2024, the Senior Assistant Ombudsman provided his view to the parties in a draft consideration.

### **Third party consultation**

14. Prior to making its decision, CMTEDD undertook consultation with 12 relevant third parties. CMTEDD ultimately decided:
  - the information that may reasonably have been expected to be of concern to 5 third parties was out of scope, and
  - the personal information of 5 third parties, or employees of those third parties, was to be withheld.
15. One third party expressed no concern with the release of information relating to them.
16. The final third party was Downer, which has joined as a third party to this review.
17. I am satisfied that none of the remaining third parties consulted by CMTEDD are required to be consulted in relation this review.

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<sup>1</sup> 3 of these documents were identified as out of the scope of the application.

## **Preliminary issues**

### ***Scoping***

18. I have considered whether the information redacted by CMTEDD because it was considered out of scope was correctly identified as such.
19. CMTEDD identified 3 documents (Documents 48, 55 and 56) as out of scope. Document 48 is a consignment notice. Documents 55 and 56 are an email and the attachments to that email.
20. The applicant has not made submissions regarding these documents.
21. I have reviewed these documents, and I am satisfied they have been correctly identified as out of scope by CMTEDD.
22. In addition, I have identified that Document 54 has been incorrectly identified by CMTEDD in its schedule as refused access in full. Instead, I consider that this document is out of scope, resulting in a total of 4 documents identified as out of scope.

### ***Release status***

23. I have considered whether CMTEDD correctly identified release status in its schedule of documents.
24. I identified an instance where the release status of a document was incorrectly identified in the schedule by CMTEDD.
25. Document 6 was marked by CMTEDD as partial release due to the redaction of personal information. However, this document was in fact released in full and included no personal information.
26. I have identified the attachment to Document 13 has previously been provided to the applicant.

27. The attachment to Document 13 is a letter dated 13 October 2020 from Downer addressed to the then CEO of Village Building Co. Village Building Co is the trustee for the applicant, Village 25.

**Duplicates**

28. I note duplicate information throughout the information at issue has been marked as such in the PDF documents released to the applicant. I have reviewed this information and I am satisfied it has been marked as 'duplicate information' correctly.

29. I have reviewed the information and identified additional duplicates not identified as such in CMTEDD's original decision.

30. I have identified the attachments to Document 63 are duplicates of the attachments to Document 28. I agree the information redacted in the email that is Document 63 was correctly identified by CMTEDD as either out of scope, or as personal information.

31. The applicant has submitted, and I agree, the second attachment to Document 52, being a variation of an environmental authorisation, is a duplicate of Document 11, which was released to the applicant with only personal information redacted. To ensure consistency I have decided to release the second attachment to Document 52, with personal information redacted.

**Searches**

32. The applicant has identified a reference to a table or log of complaints within Document 30 and has requested confirmation this information exists, and release of this information in the event it does exist.

33. Document 30 is an email trail between Access Canberra and Downer, sent between 28 April 2023 and 11 May 2023, with the subject line 'Hume Odour Complaints and Stack Test Report.'
34. Following a request from the Office of the ACT Ombudsman, CMTEDD located and provided to the Office an email dated 11 May 2023, listing the dates and times 10 complaints were received. I will include this additional document in this review as Document 64.

***Information already available to the applicant***

35. The applicant has additionally submitted, in relation to Documents 49 and 59 (both documents being reviews of Environmental Authorisations), that these documents are required to be made public under s 59 of the [Environment Protection Act 1997](#) (**Environment Act**) and therefore should be disclosed.
36. Section 59 of the Environment Act states:
- (1) When a review under section 57 (1) or section 58 (1) is finished, the authority must prepare a notice—
    - (a) stating the outcome of the review; and
    - (b) indicating that a copy of the review is available for public inspection under section 19 (Inspection of documents).
  - (2) The notice is a notifiable instrument.
37. I have located online 2 notifiable instruments that state the outcome of each review.<sup>2</sup>
38. I note the notifiable instruments provide that copies of the documents are available for public inspection during business hours, at the office of the Environment Protection Authority.

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<sup>2</sup> The Notifiable Instrument for Document 49 is available [here](#); the Notifiable Instrument for Document 59 is available [here](#).

39. Section 82(4) of the FOI Act provides that the Ombudsman may exercise any function given under the FOI Act to the agency or Minister for making the decision.

40. Section 43(1)(d) of the FOI Act provides:

(1) A respondent may refuse to deal with an access application wholly or in part only if—

...

(d) the government information is already available to the applicant (see section 45); or

...

41. Sections 45(a) and (b) of the FOI Act provide:

For section 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

...

42. Given Documents 49 and 59 are available to the applicant for inspection, I am inclined to refuse to deal with this aspect of the review and exclude these documents from the scope of the review.

43. I have also identified that part of Document 51 is a Notifiable Instrument and publicly available.<sup>3</sup> I am also inclined to refuse to deal with this aspect of the review and exclude this information from the scope of the review, however the remainder of Document 51 remains within scope.

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<sup>3</sup> The Notifiable Instrument included in Document 51 is available [here](#).



## Information at issue

44. In its application for Ombudsman review, the applicant confirmed it does not seek review in relation to the redaction of personal information, and provided a schedule of documents to which they sought access.
45. I have carefully reviewed the information at issue to identify the personal information redacted by CMTEDD. I have identified 29 documents<sup>4</sup> that were released in part with only personal information redacted. These 29 documents are excluded from this review.
46. I have identified that Document 21, which CMTEDD marked as only having personal information redacted, also included additional redacted information which was not personal in nature.
47. The 4 documents identified as out of scope,<sup>5</sup> the 3 documents<sup>6</sup> released in full, the duplicate document,<sup>7</sup> the 2 documents already available to the applicant<sup>8</sup> and the redactions applied to personal information in the remaining documents are not subject to review.
48. In its application for review, the applicant has expressly identified 24 documents to which they request access. This excludes from review 3 further documents<sup>9</sup> - one to which CMTEDD refused access in part, and 2 to which CMTEDD refused access in full.

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<sup>4</sup> Documents 2-5, 7-9, 11, 12, 14-20, 22-31, 47, 57, and 62 had only personal information redacted.

<sup>5</sup> Documents 48 and 54-56 have been identified as out of scope.

<sup>6</sup> Documents 6, 42 and 43 were released in full.

<sup>7</sup> The attachments to Document 63 are duplicates of the attachments to Document 28.

<sup>8</sup> Documents 49 and 59 are already publicly available to the applicant.

<sup>9</sup> Documents 10, 50 and 60 were not identified as documents to which the applicant is seeking access.

49. The information at issue in this Ombudsman review is:

- the 12 documents to which CMTEDD refused access in full,
- the information within the 10 documents to which CMTEDD refused access in part (excluding the personal information redacted in these documents), and
- an additional document identified by CMTEDD as referenced above at paragraph [34].

50. This comes to a total of 23 documents. This total excludes duplicates and documents already available to the applicant by inspection.<sup>10</sup>

51. The documents relate to the development and approval, operation and environmental impact of the Downer asphalt plant located at Hume (**Hume Asphalt Plant**).

52. The information at issue includes:

- planning and development information (Document 1)
- complaints response information (Documents 13, 21 and 64)
- emissions testing reports and correspondence to the EPA (Documents 28, 32, 44-46)
- environmental management plans (Documents 34-41, 52)
- environmental authorisation information (Documents 52, 53, 61)
- contravention warning and notifiable instrument (Document 51), and
- EPA inspection information (Document 58).

53. The key issue to be decided in this Ombudsman review is whether the information to which CMTEDD refused access is 'contrary to the public interest information' for the purposes of the FOI Act.

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<sup>10</sup> Documents 1, 13, 21, 28, 32-41, 44-46, 51-53, 58, and 61; and an additional document identified by CMTEDD which I have labelled as Document 64, are subject to this review. Documents 49 and 59 are excluded from this review as explained above in paragraph [45]. Document 63 is excluded from this review as explained above in paragraph [30].

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

- the applicant's access application and review application
- the third party's request to join as an interested party to this review
- the respondent's decision of 22 September 2023
- the FOI Act, in particular ss 7, 16, 35 and Schedule 2, s 2.2
- the Environment Act
- the respondent's FOI processing file relating to the access application
- the submissions of the parties in response to the draft consideration
- the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act, and
- relevant case law, including:
  - [\*Canberra Metro Pty Ltd and Major Projects Canberra\* \[2020\] ACTOFOI 13](#)
  - [\*Setschnjak and Department of Justice and Attorney-General\* \(310604\) \(25 May 2012\)](#)
  - [\*'AH' and Chief Minister, Treasury and Economic Development Directorate\* \[2018\] ACTOFOI 12.](#)

#### **Relevant law**

55. 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.<sup>11</sup>

56. 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.

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<sup>11</sup> Section 35(1)(c) of the [FOI Act](#).

57. 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.
58. Section 35(1)(c) of the FOI Act provides 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.
59. Section 50 of the FOI Act applies if an access application is made for government information in a record containing contrary to the public interest information and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted.
60. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.

### **The contentions of the parties**

61. CMTEDD's decision notice dated 22 September 2023 said:

The release of this information can reasonably be expected to provide some background and context into the administration and decision-making process relating to the operation of an asphalt processing plant, and the handling of complaints from the community.

Factors favouring nondisclosure in the public interest:

... Schedule 2 section 2.2(a)(xi) allows for government information to be withheld from release if disclosure of the information could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person. I note that the disclosure of a large quantity of the documents in scope, could potentially cause damage to the business' reputation and impact the competitive commercial activities of the business. These materials contain information about their business and internal processes, procedures, risk management plans, and responses to compliance activities. This is a serious issue and I weight this provision substantially.

The Act provides under Schedule 2 section 2.2 (ix) that information can be withheld if disclosure could prejudice the flow of information to a regulatory entity.

Businesses working with Access Canberra have the right to expect that their business affairs will not be prejudiced by participating in regulatory activities in cooperation with a government agency. Businesses provide their information to government authorities and entities in good faith and if confidentiality is not maintained businesses may be prejudiced and be less willing to participate in future exercises. While a concern, I weight this provision moderately.

62. In its application for Ombudsman review, the applicant stated:

... the agency has failed to give proper weight to the inherent pro-disclosure bias in the operation of the Act...

Failure to consider all public interest factors favouring disclosure

An agency... must identify any factor favouring disclosure that applies in relation to the information, including any factor mentioned in Schedule 2, section 2.1 (s 17(1)(a) of the FOI Act).

The Notice of Decision only identifies three factors favouring disclosure in the public interest. It does not refer to other relevant matters set out in Schedule 2 section 2.1(a) of the FOI Act that must be taken into account in favour of disclosure...

...had the additional public interest factors been taken into account, the public interest would outweigh the factors against disclosure and that items (ii), (x) and (xi) should have been given strong weight having regard to the types of documents that have not been disclosed...

Misapplication of public interest factors against disclosure

... The production of documents does not *"prejudice the flow of information to the police or another law enforcement or regulatory agency"*. The protection of 'flow of information' is generally in the context of preserving the identify [sic] of informants... Although the Environment Protection Agency (**EPA**) is clearly a regulatory agency, the Applicant is required... to provide the information to the agency on a regular basis. In this sense the material is not voluntarily submitted. Therefore, there would be no prejudice incurred and the flow of information would not be stifled as it is a mandatory requirement.

The terms 'trade secret' and 'business affairs' have been held by courts to have limited definitions and cannot be used to withhold information that do not fall within the meaning. The case law indicates that a trade secret is not merely something that is confidential to a business; it must also be an asset of, and usable in, a particular trade... Further, the meaning of *"business affairs"* refers to matters concerning the business undertakings of the person, which is to be carried on in an organised way for the purpose of obtaining profit or gain... 'Research' has interpreted [sic] in the same context as 'business affairs' and disclosure of the research *"must be reasonably be expected to have an unreasonable adverse effect"* on business affairs for it to be withheld...

... The Environmental Authorisation is a public document and the public cannot determine whether the conditions within an authorisation have been complied with, or if it is achieving its intended purpose without access to the documents it is referring to... Environmental protection laws provide third-parties with rights to take action in respect of non-compliance with planning laws.

63. During the consultation process under s 38 of the FOI Act, Downer made extensive submissions to CMTEDD citing multiple factors as to why disclosure would be contrary to the public interest (partially extracted here):

***Trade secrets and business affairs***

... significant prejudice to Downer's business affairs and trade secrets arises in this case and a very high degree of weight should be given to it. Prejudice to Downer's business affairs and/or trade secrets arises in relation to the following:

- the 'Downer Standard' for testing - this is... an internal, Downer specific, methodology and process for conducting testing...
- Environmental Management Plans - these documents are not publicly available and define principles, processes, procedures, systems, tools and templates Downer engages in to manage its environmental impact...
- Community complaints received about the asphalt plant, instances of equipment failing testing and instance of testing being booked but not yet occurring - disclosing the content and quantum of community complaints received about the asphalt plant... could reasonably be expected to prejudice Downer's business affairs by damaging its reputation... and deterring potential customers from contracting with Downer...

***Impede the protection of the environment***

... The disclosure of the information would be reasonably expected to harm the working relationship between the EPA and Downer, and Downer is unlikely to voluntarily provide information of this type again in the future if a disclosure is made, which in turn may impede the protection of the environment in and around the asphalt plant.

***Ability of the Territory to obtain confidential information***

... businesses provide their information to government... on the understanding that this information will be kept confidential to the maximum extent permitted by law. This is because businesses are often asked by government to disclose confidential or sensitive information... if the confidentiality of that information is not maintained, businesses may be prejudiced and be less willing to participate or provide in full the information sought...

64. In its request to be joined as a third party to this review, Downer submitted:

Downer has an active an ongoing interest in the FOI request. The FOI request relates to Downer's asphalt plant in Hume, with the material sought containing commercially sensitive information...

65. In response to the draft consideration, the applicant made submissions detailing their belief that additional information should be disclosed beyond what was proposed. These submissions queried the level of consideration given to each document in the draft consideration and the weightings afforded to factors in the public interest test.

66. I have considered each of the documents at issue. I am satisfied that where a particular document, part of document or category of information is sufficiently distinct to warrant particular attention, this has been noted and considered accordingly.

67. The applicant's submissions queried the weightings afforded to the factors favouring disclosure and nondisclosure, at one point submitting the following:

'There is a lack of sufficient explanations as to the how the weight of the factor has been reduced to "moderate" when there is a lack of arguments against the factor favouring disclosure.'

68. The weighting afforded to factors is attributed to the relevance of that factor itself, given applicable case law precedent and how the factor applies to the information at issue. Weightings of factors favouring disclosure are not altered by the presence, or non-presence, of factors favouring nondisclosure.

69. Applicable factors are taken on their own merits, afforded a weighting and then balanced against each other as required by the FOI Act.

## **Consideration**

### **Public interest test**

70. 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 2.2
- 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.

71. In addition, there is an initial step of ensuring that none of the irrelevant factors listed at s 17(2) of the FOI Act are considered.

### **Irrelevant factors**

72. I have noted the irrelevant factors listed at s 17(2) of the FOI Act and I do not consider that any irrelevant factors arise in this Ombudsman review.

### **Factors favouring disclosure**

73. In their original decision, CMTEDD identified 3 factors favouring disclosure and placed substantial weight on these factors.



74. In their application for review, the applicant submitted an additional 6 factors favouring disclosure were also relevant.

***Inform the community of the government's operations (Schedule 2, s 2.1(a)(iii))***

75. CMTEDD identified that disclosure could reasonably be expected to inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community.

76. I agree this factor is relevant. Release of the information at issue could reasonably be expected to inform the community of the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community, for example in relation to how the EPA undertakes its functions as a regulatory agency. This would include the way in which the EPA detects, investigates and deals with issues of non-compliance with the Environment Act.

77. I note s 19 of the Environment Act allows for the public inspection of a range of documents which serve to inform the community of the government's operations in this area. I acknowledge, however, that most of the information at issue in this review is in addition to the range of documents listed in s 19 of the Environment Act.

78. I afford this factor a minor weight in my decision. While I consider there is considerable interest in the government's accountability in respect of the regulation of environmental matters, the information at issue relates to a single site, meaning that disclosure would promote this factor to a limited extent.

***Reveal the reason for a government decision and any background or contextual information that informed that decision (Schedule 2, s 2.1(a)(viii))***

79. CMTEDD identified as relevant a reasonable expectation disclosure of information could reveal the reason for a government decision and any background or contextual information that informed the decision favours disclosure under the FOI Act.
80. I accept that disclosure of the information at issue could provide some background or contextual information which could have informed any decisions made by the government in relation to the approval and oversight of the Hume Asphalt Plant.
81. I consider release would only promote this factor to some extent and I afford moderate weight to this factor, as I consider disclosure would reveal the reasons for decisions in respect of a single site.
82. The applicant has additionally submitted, in relation to Documents 49 and 59 (both documents being reviews of Environmental Authorisations), that these documents are required to be made public under s 59 of the Environment Act, and therefore should be disclosed.
83. Section 59 of the Environment Act states:
- (1) When a review under section 57 (1) or section 58 (1) is finished, the authority must prepare a notice—
    - (a) stating the outcome of the review; and
    - (b) indicating that a copy of the review is available for public inspection under section 19 (Inspection of documents).
  - (2) The notice is a notifiable instrument.

84. I have located 2 notifiable instruments that state the outcome of each review.<sup>12</sup> I note the notifiable instruments state that copies of the documents are available for public inspection during business hours, at the office of the EPA.

***Contribute to the administration of justice generally, including procedural fairness (Schedule 2, s 2.1(a)(xiii))***

85. CMTEDD identified as relevant a reasonable expectation disclosure of information could contribute to the administration of justice generally, including procedural fairness favours disclosure under the FOI Act.

86. CMTEDD did not expand on why they identified this factor as relevant, other than to note the release of the information could reasonably be expected to provide some background and context into the handling of complaints from the community.

87. I agree that affording procedural fairness is an important part of managing complaints. However, I am inclined to disagree this favour is relevant in this review.

88. The complaints have not been made about the applicant, rather, they have been made about the third party, or more particularly, the operation of the Hume Asphalt Plant. Disclosing complaint information to the applicant would not promote procedural fairness any more than has already been afforded Downer as the operator of the Hume Asphalt Plant.

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<sup>12</sup> The Notifiable Instrument for Document 49 is available [here](#); the Notifiable Instrument for Document 59 is available [here](#).

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

89. The applicant submitted that disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.
90. I agree this factor is relevant in this review to some extent.
91. I consider my observations above at paragraphs [77] - [84] are also relevant to this factor. I consider the approval and oversight of an operation such as the Hume Asphalt Plant, and the way in which the EPA detects, investigates and deals with issues of non-compliance with the Environment Act, are matters or affairs of public interest, and disclosure could enhance the accountability of government in relation to these matters.
92. However, I note the information at issue relates to a single site, meaning that disclosure would promote this factor to a limited extent.
93. I afford minor weight to this factor in my decision.

***Contribute to positive and informed debate on important issues or matters of public interest (Schedule 2, s 2.1(a)(ii))***

94. The applicant submitted that a relevant factor favouring disclosure is that disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of public interest.
95. I agree this factor is relevant in this review.
96. As I observed above at paragraphs [77] - [84], the approval and oversight of industrial operations, and the way in which the EPA detects, investigates and deals with issues of non-compliance is both an important issue and a matter of public interest.

97. The public in and around the ACT may be impacted by industrial operations and hold environmental concerns. The release of the information at issue would contribute to positive and informed debate on these matters of public interest.

98. I afford moderate weight to this factor in my decision.

***Allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official (Schedule 2, s 2.1(a)(v))***

99. The applicant submitted that a relevant factor favouring disclosure is that disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official.

100. The Office's FOI Guidelines provide examples of where this factor may be relevant, including where disclosure would:

- reveal allegations received about an agency, or
- explain the results of an investigation into conduct breaches by an ACT public servant.

101. I am inclined to disagree this factor is relevant.

102. The applicant has not articulated why it considers this factor is relevant to the information at issue. I have carefully reviewed the information at issue and cannot identify possible deficiencies in the conduct or administration of an agency or public official. Rather, the information at issue relates to the development and approval, operation and environmental impact of the Hume Asphalt Plant, and includes information about the regulation of the Plant and complaints made about the Plant.

***Reveal that the information was incorrect, out-of-date, misleading, gratuitous unfairly subjective or irrelevant (Schedule 2, s 2.1(a)(ix))***

103. The applicant submitted that a relevant factor favouring disclosure is that disclosure could reasonably be expected to reveal that the information was:

- A. incorrect, or
- B. out-of-date, or
- C. misleading, or
- D. gratuitous, or
- E. unfairly subjective, or
- F. irrelevant.

104. For this factor to apply, there would need to be evidence that one or more of the above elements apply to the information sought.

105. The applicant has not articulated why it considers this factor applies to the information at issue. The information at issue relates to the development and approval, operation and environmental impact of the Hume Asphalt Plant and includes complaint information.

106. There is nothing within the information at issue that suggests the information sought is in some way incorrect, out-of-date, misleading, gratuitous, unfairly subjective or irrelevant. I am inclined to disagree that this factor is relevant in this review.

***Contribute to the protection of the environment (Schedule 2, s 2.1(a)(x)) and reveal environmental or health risks or measures relating to public health and safety (Schedule 2, s 2.1(a)(xi))***

107. The applicant submitted 2 similar factors favouring disclosure apply, stating that disclosure could reasonably be expected to:

- contribute to the protection of the environment, and

- reveal environmental or health risks or measures relating to public health and safety.

108. Given the similarity of these factors I will address them together.

109. I agree that these factors are relevant. Disclosure of the information at issue could share environmental management information for a particular area, that is, the area in which the Hume Asphalt Plant is located, and explain the environmental risks associated with a particular activity - the operation of the Plant.

110. However, I note the information at issue relates to a single site, meaning that disclosure would promote these factors to a limited extent. I afford each of these factors moderate weight in my decision.

#### **Factors favouring nondisclosure**

111. CMTEDD identified 2 factors favouring nondisclosure relevant to this review, excluding the disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy under the Human Rights Act (Schedule 2, s 2.2(a)(ii) of the FOI Act). This factor is not being considered in this review as the applicant has agreed to exclude personal information from the scope of the review.

112. The third party, Downer, submitted 2 additional factors favouring nondisclosure are also relevant.

#### ***Prejudice flow of information to the police or another law enforcement or regulatory agency (Schedule 2, s 2.2(a)(ix)) and prejudice an agency's ability to obtain confidential information (Schedule 2, s 2.2(a)(xii))***

113. CMTEDD identified in its decision that disclosure of the information at issue could reasonably be expected to prejudice the flow of information to the police or another law enforcement or regulatory agency.

114. The Office's FOI Guidelines state this factor applies in situations where disclosure could reasonably be expected to discourage individuals from coming forward with relevant information and concerns, and/or negatively impact a 'free flow' of information to these agencies - either in relation to a particular case or generally.<sup>13</sup>
115. Downer additionally stated in its submissions to CMTEDD that disclosure of the information at issue could reasonably be expected to prejudice an agency's ability to obtain confidential information.
116. Due to the similar issues identified in this review, I will consider these 2 factors together. I agree that these factors are relevant.
117. The information at issue is essentially information provided to the EPA by Downer or complaints made to Access Canberra. Whilst I do not consider the release of the information at issue would prejudice the flow of complaints about similar matters to Access Canberra, I do consider that release of the information at issue would reasonably be expected to prejudice the free flow of information both from Downer itself, and other organisations planning, developing, building and running similar operations.
118. In assessing the potential for prejudice resulting from disclosure I find it is important to consider whether the information at issue was provided according to contractual or legal obligations, or if the information was voluntarily provided by Downer.
119. In its submission to CMTEDD, Downer noted that information had been provided to the EPA on a voluntary basis, above legal requirements.

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<sup>13</sup> [FOI Guideline 4 Considering the public interest](#), [8.9].



120. Downer also submitted that businesses provide information to government with the expectation that the information will be kept confidential to the maximum extent permitted by law.

121. I find this matter to be similar to the principles set out in *Canberra Metro Pty Ltd and Major Projects Canberra* [2020] ACTOFOI 13 which noted that there is a strong public interest in protecting the free flow of information to regulatory agencies<sup>14</sup>, which rely on receiving information from external sources to identify potential breaches of the law or regulatory schemes, or to best carry out their regulatory role.

122. I am inclined to agree with CMTEDD's assessment that there is a risk in organisations such as Downer being less forthcoming in providing information to the EPA voluntarily in the future, in relation to similar operations.

123. I do not, however, consider that it is likely there would be a significantly reduced level of cooperation with the EPA given the mandatory compliance framework set up under the Environment Act.

124. I afford this factor moderate weight in my decision.

***Prejudice trade secrets, business affairs or research of an agency or persons  
(Schedule 2, s 2.2(a)(xi))***

125. CMTEDD identified in its decision that disclosure of the information at issue could reasonably be expected to prejudice the trade secrets, business affairs and research of an agency or person favours nondisclosure under the FOI Act.

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<sup>14</sup> [Canberra Metro Pty Ltd and Major Projects Canberra \[2020\] ACTOFOI 13](#), citing the Queensland Information Commissioner in [Setschnjak and Department of Justice and Attorney-General \(25 May 2012\)](#).

126. Downer made detailed submissions to CMTEDD on this point, contending the information at issue includes references to internal methodologies and processes for conducting testing that is specific to Downer; and principles, processes, procedures, systems, tools and templates used by Downer to manage its environmental impact.

127. Downer also submitted that disclosure of information about complaints could prejudice its business affairs by way of reputational harm, stating:

‘the prejudice to Downer’s business affairs would be serious as people reviewing the complaints and testing failures may form the view that Downer has not complied with its licensing requirements.’

128. I am inclined to accept that disclosure of the information at issue could reasonably be expected to prejudice the business affairs of Downer, to the extent it might enable competitors to ascertain important elements of Downer’s business model and operations. I afford this factor moderate weight in my decision.

129. However, I am not persuaded that potential reputational damage arising from public scrutiny of Downer’s compliance with regulatory requirements is relevant to this particular factor, and afford minimal weight to considerations of potential reputational damage in my decision.

***Impede protection of the environment (Schedule 2, s 2.2(a)(vii))***

130. In its submissions to CMTEDD, Downer submitted that disclosure of the information at issue could reasonably be expected to impede the protection of the environment, stating the disclosure of information provided voluntarily to the EPA, particularly information in draft form, would be likely to result in Downer being less likely to share such information in the future and thus impede the protection of the environment around the Hume Asphalt Plant.

131. In its submissions, Downer relied on ['AH' and Chief Minister, Treasury and Economic Development Directorate \[2018\] ACTOFOI 12](#), in which the Senior Assistant Ombudsman accepted that a third party voluntarily provided draft documents to CMTEDD with an understanding of confidentiality.

132. I agree with the Senior Assistant Ombudsman's observation in that review:

Where a site owner or developer provides confidential environmental information to the EPA on a voluntary basis, without being under any obligation to do so, I am satisfied that disclosure of this information in response to an access application made under the FOI Act could reasonably be expected to dissuade developers in the future from providing similar information to the EPA.

I accept... disclosure of the information sought may impact the ability of the ACT government to develop cooperative working relationships with other organisations in the future. I am satisfied this could adversely affect the EPA's ability to carry out its environmental protection functions.<sup>15</sup>

133. I afford this factor significant weight in my decision.

### **Balancing the factors**

134. Having identified public interest factors favouring disclosure and factors favouring nondisclosure, I now must consider the public interest balancing test set out in s 17 of the FOI Act.

135. In this matter, I identified 6 public interest factors apply which favour disclosure of the information at issue, and I attribute moderate weight to 4 of these factors and minor weight to 2 factors.

136. On the other hand, I identified 4 public interest factors apply which favour nondisclosure of the information at issue, and I attribute moderate weight to 2 factors and significant weight to 2 factors.

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<sup>15</sup> ['AH' and Chief Minister, Treasury and Economic Development Directorate \[2018\] ACTOFOI 12](#) at [49-50].

137. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being considered in the public interest. The decision-maker's task is to consider the relative importance and weight of each factor identified. The weight given to a factor will depend on the effect that disclosing the information has on the public interest.

138. The FOI Act has a pro-disclosure bias,<sup>16</sup> and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side. Rather, the scales are 'laden in favour of disclosure'.<sup>17</sup>

139. My view is that in relation to most of the information at issue the public interest factors favouring nondisclosure outweigh the public interest factors favouring disclosure of the information at issue.

140. I do not, however, consider the public interest factors favouring nondisclosure outweigh the public interest factors favouring disclosure in relation to parts of the information categorised as 'complaints response information', that is, Documents 13 and 64. This is because the attachment to Document 13 has previously been provided to the applicant, and Document 64 includes a list of dates and times complaints were made to the EPA about the operation of the Hume Asphalt Plant, but does not include any specific detail about the complaints made.

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<sup>16</sup> Section 17 of the [FOI Act](#).

<sup>17</sup> [Explanatory Statement, Freedom of Information Bill 2016](#).

## **Conclusion**

141. For the reasons set out above, my decision is to **vary** CMTEDD's decision under s 82(2)(b) of the FOI Act in relation to sections of the 'complaints response information;' and one document categorised as an 'environmental management plan', to the extent that the attachment to Document 13 is disclosed in full; and the second attachment to Document 52, and Document 64 are disclosed to the applicant with personal information redacted.

142. My decision is to confirm the remainder of CMTEDD's decision the information at issue is contrary to the public interest information, and no further information should be disclosed.

**Georgia Ramsay**

**Acting Senior Assistant Ombudsman**

**26 July 2024**