

## ***Alistair Coe and Suburban Land Agency [2019] ACTOFOI 5*** **(25 February 2019)**

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

<b>Application Number:</b>	AFOI-RR/18/10020
<b>Decision Reference:</b>	[2019] ACTOFOI 5
<b>Applicant:</b>	Mr Alistair Coe MLA
<b>Respondent:</b>	Suburban Land Agency
<b>Decision Date:</b>	25 February 2019
<b>Catchwords:</b>	<i>Freedom of Information Act 2016 (ACT) – deciding access – whether disclosure of information is contrary to the public interest – Cabinet information – prejudice to business affairs – ability to obtain confidential information.</i>

### **Decision**

1. Under s 82(1)(a) of the ACT Freedom of Information Act 2016 (FOI Act), I confirm the decision of Suburban Land Agency (SLA) of 7 August 2018, as it relates to paragraphs [7], [15] and [18] of the brief. That information is taken to be contrary to the public interest to disclose under Schedule 1, s 1.6 of the FOI Act, as it is Cabinet information.
2. Under s 82(1)(c) of the FOI Act, I set aside the decision of SLA as it relates to the proposal, the minute and the remaining information contained in the brief, and substitute it with a decision that the information is not contrary to the public interest information.
3. SLA must give the applicant access to:
  - an unedited copy of the proposal and the minute, and
  - a copy of the brief, edited under s 50 of the FOI Act to delete paragraphs [7], [15] and [18] only.

## Scope and background of Ombudsman review

4. Casino Canberra (the casino) is owned by Aquis Entertainment Ltd (Aquis), a publicly listed company.<sup>1</sup>
5. Aquis were proposing a \$307 million upgrade to the casino complex.<sup>2</sup> The ACT Government has since announced that it does not support the Aquis proposal in its current form.<sup>3</sup>
6. On 17 May 2018, the applicant applied to SLA for access to correspondence and documents shared between the ACT Government and Aquis from 1 December 2013 to 31 December 2015 relating to land surrounding Glebe Park or the expansion of the casino.
7. On 10 July 2018, SLA consulted with Aquis under s 38 of the FOI Act<sup>4</sup> in relation to a redevelopment proposal lodged with the ACT government during August 2015. On 13 July 2018, Aquis responded by objecting to the disclosure of that proposal.
8. On 7 August 2018, SLA advised the applicant that it had identified 14 documents within the scope of the application.<sup>5</sup> SLA decided to give the applicant access to two documents in full,<sup>6</sup> 10 documents in part,<sup>7</sup> and refused access to one document.<sup>8</sup> SLA refused to deal with the remaining document on the basis that it is publicly available.<sup>9</sup>
9. In making its decision, SLA relied on information being Cabinet information (Schedule 1, s 1.6), and disclosure of information prejudicing:
  - the protection of an individual's right to privacy (Schedule 2, s 2.2(a)(ii))
  - trade secrets, business affairs or research of an agency or person (Schedule 2, s 2.2(a)(xi)), and
  - an agency's ability to obtain confidential information (Schedule 2, s 2.2(a)(xiii)).

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<sup>1</sup> ASX code AQS.

<sup>2</sup> This is according to Aquis. See: Aquis Entertainment, *Projects* <http://aquisentertainment.com/projects.html>. Accessed 16/1/19.

<sup>3</sup> See *Statement regarding the redevelopment of the Canberra Casino precinct* dated 12 December 2018: [https://www.cmtedd.act.gov.au/open\\_government/inform/act\\_government\\_media\\_releases/barr/2018/statement-regarding-the-redevelopment-of-the-canberra-casino-precinct](https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/barr/2018/statement-regarding-the-redevelopment-of-the-canberra-casino-precinct) accessed 17 January 2019.

<sup>4</sup> Section 38 provides that if an agency considers that the government information applied for is not contrary to the public interest information; but disclosure of the information may reasonably be expected to be of concern to a relevant third party, the agency must take reasonable steps to consult with the third party before deciding to give access to the information. The consultation was conducted by the Environment, Planning and Sustainable Development Directorate (EPSDD). EPSDD administers the FOI functions of SLA.

<sup>5</sup> SLA identified 15 documents on its Freedom of Information Request Schedule, however, one document is duplicated in the schedule (identified as the Aquis unsolicited bid at document ref 1.2 and 4.1).

<sup>6</sup> Documents 2 and 3.

<sup>7</sup> Documents 1, 1.1, 2.1, 3.1, 3.2, 3.3, 4, 5, 6 and 7.

<sup>8</sup> Document 1.2, Aquis unsolicited bid proposal.

<sup>9</sup> Document 4.2. A link to the publicly available information was provided to the applicant in the request schedule.

10. On 15 August 2018, the applicant sought Ombudsman review of SLA's decision under s 73 of the FOI Act.
11. On 14 September 2018, the casino made an application under s 77(2) of the FOI Act to participate in this Ombudsman review. On 20 September 2018, the delegate decided under s 77(3) to allow the casino to participate.
12. On 13 November 2018, following discussions with our Office, SLA provided the applicant with six documents in full that it had previously decided to release in part,<sup>10</sup> along with additional information in four documents.<sup>11</sup> Excluding the publicly available document, SLA has given the applicant access to eight documents in full,<sup>12</sup> four documents in part,<sup>13</sup> and has refused access to one document.<sup>14</sup>
13. I provided my preliminary views about SLA's decision to the parties in my draft consideration dated 29 January 2019.
14. In response, SLA maintained that paragraphs [19] - [22] of the brief are Cabinet information contrary to the public interest to disclose under Schedule 1, s 1.6.
15. The casino also responded, advising that it no longer maintains any objection to a copy of the proposal being released to the applicant, noting:
  - the ACT Government's decision not to progress Aquis' current development proposal, and
  - that Blue Whale Entertainment will acquire the interests of Aquis Canberra Holdings (which includes the casino), subject to regulatory approvals and an independent shareholder vote.<sup>15</sup>
16. The issue to be decided in this Ombudsman review is whether giving the applicant access to information in the remaining five documents at issue would be contrary to the public interest.<sup>16</sup>

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<sup>10</sup> Documents 1, 1.1, 2.1, 3.2, 5 and 7.

<sup>11</sup> Documents 3.1, 3.3, 4 and 6.

<sup>12</sup> Documents 1, 1.1, 2, 2.1, 3, 3.2, 5 and 7.

<sup>13</sup> Documents 3.1, 3.3, 4 and 6.

<sup>14</sup> Document 1.2.

<sup>15</sup> See ASX announcement dated 21 December 2018: <https://www.asx.com.au/asxpdf/20181221/pdf/441fljv3mviq7p.pdf>

<sup>16</sup> Documents 1.2, 3.1, 3.3, 4 and 6.

17. That information comprises:

- information contained in a Chief Minister, Treasury and Economic Development Directorate (CMTEDD) brief to the Chief Minister (the brief)<sup>17</sup>
- information contained in a CMTEDD minute to the Chief Minister (the minute),<sup>18</sup> and
- an Aquis unsolicited bid proposal (the proposal), which SLA consulted Aquis on and Aquis objected to being disclosed.<sup>19</sup>

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

- the applicant's application for Ombudsman review
- SLA's decision
- the FOI Act, in particular ss 7, 16, 17, 35, 72 and Schedules 1 and 2
- SLA FOI processing file, in particular an unedited copy each of the brief, minute and proposal
- relevant case law, and
- the submissions of the parties.

## Relevant law

19. Section 7 of the FOI Act provides every person with an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.

20. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information because it is contrary to the public interest information.

21. Contrary to the public interest information is defined in s 16 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>17</sup> Noting that the brief comprises of three of the five documents referred to above at [16]: Document 3.1 (the brief), document 3.3 (an attachment to the brief) and document 6 (a signed copy of the brief).

<sup>18</sup> Document 4.

<sup>19</sup> Document 1.2

22. Information that is taken to be contrary to the public interest to disclose under Schedule 1 includes s 1.6 Cabinet information –
- (1)
- (a) that has been submitted, or that a Minister proposes to submit to Cabinet for its consideration and that was brought into existence for that purpose; or
  - (b) that is an official record of Cabinet; or
  - (c) that is a copy of, or part of, or contains an extract from, information mentioned in paragraph (a) or (b); or
  - (d) the disclosure of which would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision).
23. The public interest test set out in s 17 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.
24. Section 72 of the FOI Act provides that it is the person seeking to prevent disclosure of government information that has the onus of establishing that the information is contrary to the public interest information.

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

25. In its reasons for decision, SLA said that the brief and the minute contain Cabinet information that is taken to be contrary to the public interest to disclose under Schedule 1, s 1.6.
26. In its reasons for decision, and in relation to information provided to the government by Aquis, SLA said:

I sought the views of a relevant third party on whether government information identified within the scope of your request contains contrary to the public interest information. The third party contested that release of the information as it relates to trade secrets and business affairs, a factor favouring non-disclosure in the public interest ...

Information identified as relevant to the request is subject to ongoing consideration under the Investment Proposal Guidelines for Investors 2014. This information was obtained from the Acquis [sic] in confidence. The release of this information is anticipated to prejudice the agency's ability to obtain confidential information, a factor favouring nondisclosure ...

In my deliberations, I have taken into account the level of information in the public realm, such as through community consultation and the media, and the controls in place to ensure the maintained confidence of business and investors when providing confidential information to the Government.

27. In his application for review, the applicant said:

The issue of the casino expansion and the relevance to the adjoining block of land makes this issue of high interest to the public. Not only has the Auditor General Inquired into issues regarding the acquisition of the adjoining block (Report No. 7 of 2016: Certain Land Development Agency Acquisitions) but the Public Accounts Committee is also looking into this report/issue (Report No. 7 of 2016: Certain Land Development Agency Acquisitions).

Regarding this acquisition and others, the Auditor General concluded:

Transparency, accountability and rigour have been lacking in the processes used by the Land Development Agency for acquiring the three sites and two associated businesses considered in this audit. Without these the integrity and probity of the acquisition processes cannot be demonstrated. Although the acquisitions were few, and comparatively small in financial value compared with many of the Land Development Agency's other transactions, given the significance of the findings an independent audit of other activities of the Land Development Agency seems prudent. Accordingly, the ACT Audit Office will consider conducting a broader audit on the Land Development Agency.

## Considerations

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

28. SLA decided that some of the information contained in the brief is Cabinet information that is taken to be contrary to the public interest to disclose under Schedule 1, s 1.6.
29. For information to be Cabinet information, a Minister must have submitted, or be proposing to submit, the information to Cabinet for its consideration, and the information must have been brought into existence for that purpose, or is a copy, part or extract of such information.
30. The brief was prepared to inform the Chief Minister of the 'next phase of negotiation with Aquis on their unsolicited proposal for redevelopment of Canberra Casino and surrounding precinct'.
31. SLA's decision does not explain how information in the brief falls within the Schedule 1 definition of Cabinet information. From my examination of an unedited copy of the brief, I do, however, consider it is reasonably apparent that the information at paragraphs [7], [15] and [18] comprises information that was submitted to, or proposed to be submitted to, Cabinet. Those paragraphs both discuss the Cabinet process, and identify issues for Cabinet consideration and deliberation.

32. Paragraphs [19] – [22] also mention Cabinet, but I am not satisfied that the information in those paragraphs was intended to be submitted to Cabinet, rather, I consider that those paragraphs merely serve to inform the Chief Minister about standard legislative change processes and related timeframes.
33. In its submissions to my draft consideration SLA contend that the discussion in paragraphs [19] – [22] contain Cabinet deliberations. I maintain that these paragraphs are limited to describing the legislative change process. I am not satisfied they reveal cabinet deliberations on the proposal itself, or that the SLA has sufficiently explained how it would do so. SLA has not discharged its onus in that regard.<sup>20</sup>

*The public interest test*

34. To determine whether disclosure of information is, on balance, contrary to the public interest, s 17(1) prescribes the following five steps:
- (a) identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in schedule 2, section 2.1;
  - (b) identify any factor favouring nondisclosure that applies in relation to the information (a relevant factor favouring nondisclosure), including any factor mentioned in schedule 2, section 2.2;
  - (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
  - (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;
  - (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.
35. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) are considered.

*Irrelevant factors*

36. I have noted the irrelevant factors listed in s 17(2) and I am satisfied that I have not considered those factors.

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<sup>20</sup> Under s 72 of the FOI Act.

*Factors favouring disclosure*

37. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.

38. Of those factors, SLA found three relevant in this case — disclosure could reasonably be expected to:

- promote open discussion of public affairs and enhance the government’s accountability<sup>21</sup>
- contribute to positive and informed debate on important issues or matters of public interest,<sup>22</sup> and
- reveal the reason for a government decision and any background or contextual information that informed the decision.<sup>23</sup>

39. I agree with SLA that these are the relevant public interest factors favouring disclosure in this case.

*Factors favouring nondisclosure*

40. SLA found that some of the information contained in documents at issue is the business information of Aquis, and disclosure would prejudice:

- the business affairs of Aquis,<sup>24</sup> and
- the agency’s ability to obtain confidential information.<sup>25</sup>

41. I agree that these are the relevant public interest factors favouring nondisclosure in this case.

Business affairs

42. The term ‘business affairs’, in the context of FOI legislation, has been interpreted to mean ‘the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs’.<sup>26</sup>

43. The minute is essentially a summary of the history and issues raised in terms of Aquis’ re-development proposal for the casino. SLA has now given the applicant access to all of the information the minute contains, with the exception of one single piece of financial information.

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

<sup>22</sup> Schedule 2, s 2.1 (a)(ii).

<sup>23</sup> Schedule 2, s 2.1 (a)(viii).

<sup>24</sup> Schedule 2, s 2.2 (a)(xi).

<sup>25</sup> Schedule 2, s 2.2 (a)(xii).

<sup>26</sup> *Mangan and The Treasury* [2005] AATA 898, at [40], citing *Cockcroft and Attorney-General’s Department and Australian Iron and Steel Pty Ltd (party joined)* (1985) 12 ALD 462.



Given the limited information remaining at issue in the minute, and its character, I am not satisfied that disclosure of that information could reasonably prejudice Aquis' business affairs.

44. The proposal contains a range of information relating to Aquis' proposed expansion of the casino. The brief discusses some of the information in the proposal. I accept that both the brief and the proposal contains Aquis' business information.
45. Those documents were prepared in 2015 and are now over three years old. In the intervening period, the government has disclosed details of Aquis' proposed casino expansion, including to the applicant in response to his FOI access application.
46. For example, information already disclosed to the applicant includes information relating to:
  - land acquisition of part Block 24, Section 65
  - changes to gaming legislation
  - electronic gaming machines
  - providing exclusivity of the existing casino licence for 30 years, and the certainty of regulatory reforms for a minimum period
  - tax changes with certainty over 30 years
  - management rights to expand the National Convention Centre, and
  - the construction of two new hotels.
47. Other information, such as the value of the project being in the range of \$300 million has been disclosed by Aquis, and much of Aquis' relevant corporate information has been published in Aquis Entertainment Ltd annual reports.<sup>27</sup>
48. While the proposal, which is essentially a project-specific pitch, contains some additional information beyond what I have set out above, that information is not, in my view, particularly detailed or significantly different to what has already been released.
49. On 12 December 2018, the ACT Government publicly announced that the Aquis proposal will not proceed in its current form, and Aquis has been invited to consider a smaller redevelopment.<sup>28</sup>  
Given the specific and limited focus of the proposal, I consider that little of the information it

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<sup>27</sup> Available from <http://aquisentertainment.com/reports.html>.

<sup>28</sup> ACT Government, *Statement regarding the redevelopment of the Canberra Casino precinct* [https://www.cmtedd.act.gov.au/open\\_government/inform/act\\_government\\_media\\_releases/barr/2018/statement-regarding-the-redevelopment-of-the-canberra-casino-precinct](https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/barr/2018/statement-regarding-the-redevelopment-of-the-canberra-casino-precinct). Accessed 17 January 2019.

See also, Canberra Times, *Canberra casino sent back to drawing board over expansion* <https://www.canberratimes.com.au/national/act/act-government-puts-a-stop-to-canberra-casino-expansion-20181212-p50lom.html>. Accessed 17 January 2019.

contains, if disclosed, would be relevant to a smaller redevelopment and hence ongoing discussions with the ACT Government.

50. I consider that the passage of time and the Government's decision not to proceed with the proposal has also diminished the sensitivity of the business information it contains, and I consider that it no longer has any commercial value.
51. Additionally, the casino no longer maintains its earlier objections to the release of the proposal, noting that it does not have the support of the Government, and that the casino is to be acquired from Aquis by another company.
52. Accordingly, I am not satisfied that disclosure of the proposal could reasonably be expected to prejudice Aquis' business affairs.

Agency's ability to obtain confidential information

53. In its decision, SLA said that the proposal had been obtained from Aquis in confidence, and that disclosing the proposal would inhibit the government's ability to obtain confidential information.
54. I accept that businesses undertaking development activities in the ACT may expect that any sensitive business information they provide to the Government will be held in confidence. However, businesses that provide information to government do so with the knowledge that government held information may be subject to an access application made under Freedom of Information legislation. Those who do business with government must also recognise that governments have to balance the commercial interests of businesses with the principles of openness and transparency, and that the weight of the public interest in protecting business information will depend on a variety of factors, including how commercially sensitive the information is, its age, its current relevance and the extent to which it has entered the public domain.
55. Where an agency decides to give access to historical business information, and there are no details regarding how disclosure under FOI could reasonably harm the business, I am not satisfied that this would reasonably cause the business, or others, to reduce the information that they provide to government in future.
56. For these reasons, I give only some weight to disclosure prejudicing an agency's ability to obtain confidential information as public interest factors favouring nondisclosure of the proposal and the brief.

*Balancing the factors*

57. I am satisfied that, on balance, the public interest factors favouring disclosure outweigh the public interest factors favouring nondisclosure in this case.

**Conclusion**

58. Paragraphs [7], [15] and [18] of the brief are contrary to the public interest information, as this information is taken to be contrary to the public interest to disclose under Schedule 1, s 1.6 of the FOI Act.

59. The remaining information at issue is not contrary to the public interest information.

**Michael Manthorpe PSM**  
ACT Ombudsman  
25 February 2019