

Decision and reasons of ACT Ombudsman

Application number:	AFOI-RR/24/80007
Applicant:	Jo Clay MLA
Respondent:	Suburban Land Agency
Participant:	[Third Party]
Respondent reference:	24/049998
Date:	16 April 2025
Decision reference:	[2025] ACTOFOI 5
Catchwords:	Freedom of Information Act 2016 – deciding access – whether information is contrary to the public interest information – 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 – ensure effective oversight of expenditure of public funds – prejudice intergovernmental relations – prejudice the competitive commercial activities of an agency – prejudice an agency’s ability to obtain confidential information.

Decision

1. The applicant applied for Ombudsman review of a decision made by the Suburban Land Agency (SLA) on 13 August 2024 to refuse to give access to information about deliverables associated with Contract SLA1658, titled “Urban Planning for North Canberra Land” because the information is “contrary to the public interest information”.

2. For the reasons set out below, I have decided to **confirm** the decision made by SLA under s 82(2)(a) of the FOI Act to refuse access to the information at issue.

Background to Ombudsman review

3. On 10 May 2024, the applicant applied to SLA for:

... all deliverables associated with Contract SLA1658, titled “Urban Planning for North Canberra Land.”
4. Contract SLA1658 is a consultancy entered into between SLA and Tait Network, between 20 October 2021 and 30 June 2022.¹ The purpose of this consultancy is to identify potential yields of a possible future land development.
5. On 13 August 2024, SLA identified 3 documents within the scope of the application and decided to refuse access to all 3 documents.
6. On 5 September 2024, the applicant applied for Ombudsman review of SLA’s decision.
7. On 25 September 2024, SLA provided information relevant to the review.
8. On 7 January 2025, an Australian Government agency asked to participate in this review as a third party under s 77 of the FOI Act (the third party).
9. On 8 January 2025, the delegate approved the third party’s request to participate in this review.
10. On 30 January 2025, the third party provided submissions relevant to the review.
11. On 19 March 2025, I provided my preliminary view to the parties in a draft consideration.
12. On 26 March 2025, SLA accepted the draft consideration.

¹ [Contract – SLA1658](#)

13. On 31 March 2025, the third party accepted the draft consideration.
14. The applicant did not provide any response to to the draft consideration.
15. The parties to the review did not provide any further submissions.

Preliminary issue – confidentiality of the third party

16. For reasons that are explained below, I consider release of even a small amount of the information at issue would have the effect of making public information that I consider to be "contrary to the public interest information".
17. I consider this extends also to the name of the third party, and for that reason I have decided to keep the name of the third party confidential in my decision.

Third party consultation

18. SLA advised that third party consultation was not undertaken prior to making the original access decision because they were relying on a Mutual Deed of Confidentiality (deed of confidentiality) between SLA and the third party.
19. The third party was advised of the review and it asked to participate, which was approved.

Information at issue

20. The information at issue in this Ombudsman review are 3 documents associated with Contract SLA1658, titled "Urban Planning for North Canberra Land."
21. The key issue to be decided in this Ombudsman review is whether the information at issue is "contrary to the public interest information".
22. In making my decision, I have had regard to:
 - the applicant's access application, Ombudsman review application and submissions

- the respondent's decision of 13 August 2024, additional submissions of 25 September 2024 and an unredacted copy of the information at issue
- the deed of confidentiality
- the third party's submissions
- the FOI Act, particularly ss 16, 17, 35, 50 and Schedule 2
- the Freedom of Information Guidelines (FOI Guidelines) made under s 66 of the FOI Act
- relevant case law including [‘BG’ and Education Directorate \[2021\] ACTFOI 06 \(15 June 2021\)](#).

Relevant law

23. 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.²
24. "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.
25. 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.
26. 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".

² [FOI Act](#) s 35(1)(c).

27. 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.
28. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.
29. Section 72 of the FOI Act provides in an Ombudsman review, a person seeking to prevent disclosure of government information has the onus of establishing the information is "contrary to the public interest information".

The submissions of the parties

30. In the decision notice, SLA said:

I have decided to refuse access to the three documents...

In applying the public interest test, I have determined that disclosure of the information could reasonably be expected to do the following:

- Schedule 2, 2.2(a)(x) – prejudice intergovernmental relations
- Schedule 2, 2.2(a)(xiii) – prejudice the competitive commercial activities of an agency.

The documents contain information relating to the potential yields of a possible land development site currently under consideration. There is a reasonable expectation that disclosure of this information would prejudice the commercial activities of the SLA. The Ombudsman Guidelines in relation to Schedule 2, 2.2(a)(xiii) provides that when the ACT Government engages or competes with commercial service providers in carrying out particular functions, to operate effectively, it is necessary that certain information relating to its functions is not disclosed. The SLA, established under the *City Renewal Authority and Suburban Land Agency Act 2017* (CRASLA Act), carries out a range of activities in a competitive commercial environment, including to 'buy and sell land on behalf of the Territory' (section 39(a) of the CRASLA Act). The disclosure of this information would reveal information about ongoing commercial negotiations which would impact on the SLA's ability to obtain the most profitable outcomes for the Territory.

Disclosure of the information could also be expected to prejudice intergovernmental relations by adversely affecting an ongoing intergovernmental confidential negotiation. The purpose of schedule 2, 2.2(a)(x) is to protect relationships between the Territory and other governments. This factor is relevant as disclosure could have the effect of revealing information to be provided or discussed in confidence.

I have given significant weight to the two factors favouring nondisclosure and detriment that could be caused by disclosing this information.

31. In submissions to this review, SLA provided a copy of a deed of confidentiality between SLA and the third party and explained in greater detail the reasons for giving significant weight to the two factors favouring nondisclosure.
32. SLA has submitted that I consider the deed of confidentiality and advised the deed of confidentiality was initiated by the third party 'in order to avoid potential reputational damage...' and that should reputational damage occur because of the release of the information at issue, current negotiations may be jeopardised.
33. SLA has further submitted that release of any parts of the information at issue would have the effect of confirming information about confidential negotiations.
34. In the Ombudsman review application, the applicant said:

While the factors favouring nondisclosure are justified on the basis that *"The documents contain information relating to the potential yields of a possible land development site currently under consideration. There is a reasonable expectation that disclosure of this information would prejudice the commercial activities of the SLA."* It is unlikely that every part of the deliverables of these contracts would contain such information.

There are many factors which would influence valuations of land for urban development. [Example site] is an example of a site that is subject to intergovernmental negotiations so that it can be developed for residential, commercial, community and recreation uses. Despite this [the current owner of the site has] published significant volumes of environmental and planning assessments which would affect valuations for this site...

In this context I believe that parts of the documents requested could reasonably be published with redactions.

35. Following joining as a participant, the third party submitted:

...[Document 1] contains commercially sensitive information...To the best of our knowledge, the documentation requested is **not** (and should not be) publicly available.

[The third party] **objects** to the release of Document 1 due to the commercial sensitivity of the information it contains, the disclosure of which would be likely to significantly prejudice current and future commercial engagements and transactions....It is [the third party's] view that the Deed of Confidentiality...applies to Document 1 and the information it contains. The confidentiality of that information should therefore be maintained.

36. These submissions are discussed in more detail below.

Consideration

37. The key issue to determine in this Ombudsman review is whether the information at issue is "contrary to the public interest information".

Public interest test

38. 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.

Factors favouring disclosure

39. The original decision from SLA identified 2 factors favouring disclosure. I consider an additional factor favouring disclosure also applies to the

information at issue.

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

40. In its original decision, SLA identified release of the information at issue could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.
41. I consider urban planning in the ACT may have considerable implications for members of the ACT community and is a matter of interest for the ACT community.
42. I accept disclosure of the information at issue is in the public interest because it would enhance the government's accountability and would provide insight into the decisions made by the government, and matters considered when developing land for use in the ACT.
43. I afford this factor moderate weight.

Ensure the effective oversight of expenditure of public funds (Schedule 2, s 2.1(a)(iv))

44. SLA identified as relevant disclosure of information could ensure the effective oversight of public funds.
45. I agree this factor is relevant in this review. Urban planning and development is a significant undertaking involving considerable financial cost. It is reasonable to expect that disclosure of the information at issue could assist in oversight of expenditure of public funds.
46. The information at issue, however, does not contain financial information. I consider that some of the information contained within the documents may assist in the public understanding the potential financial costs of urban planning and development but does not disclose actual financial information.

47. I afford this factor minor weight.

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

48. I have identified this as an additional factor favouring disclosure relevant to this review.

49. The development of land in the ACT is a significant matter and it is reasonable to expect that disclosure of the information at issue would carry some capacity to contribute to or inform debate on urban planning and development in the ACT.

50. I afford this factor moderate weight.

Factors favouring nondisclosure

51. SLA identified 2 factors favouring nondisclosure relevant to this review.

Prejudice intergovernmental relations (Schedule 2, s 2.2(a)(x))

52. SLA identified in its decision that disclosure of the information at issue could reasonably be expected to prejudice intergovernmental relations.

53. The purpose of this factor is to protect the relationships between the Territory and other governments. This factor may be relevant where disclosure would have the effect of revealing information provided to the Territory by another government in confidence.³

54. Having reviewed the information at issue, the deed of confidentiality executed by SLA and the third party and having regard to the submissions of SLA and the third party, I agree this factor is relevant in this review.

³ [‘BG’ and Education Directorate \[2021\] ACTFOI 06 \(15 June 2021\)](#)

55. Release of the information at issue may prejudice intergovernmental relations on the ground information was communicated on a confidential basis, as clearly indicated by the existence of the deed of confidentiality, and disclosure could reasonably be expected to:
- adversely affect ongoing intergovernmental relations, and
 - result in a loss of trust and cooperation between governments.
56. While there is a public interest in disclosure, including the reasons described above, there is also public value, and therefore a public interest, in governments being able to share information confidentially to allow for a greater level of frankness in advice and to support a willingness by governments to share information in the public interest.
57. I consider this to be the case particularly in relation to the urban planning and development, where another government may have a significant interest in urban planning and development.
58. Accordingly, I afford this factor significant weight.

Prejudice the competitive commercial activities of an agency (Schedule 2, s 2.2(a)(xiii))

59. SLA identified in its decision that disclosure of the information at issue could prejudice the competitive commercial activities of the SLA.
60. In its decision, SLA explained the information at issue contains information relating to the potential yields of a possible land development site, and there is a reasonable expectation that disclosure of this information would prejudice the commercial activities of the SLA.

61. I agree this factor is relevant in this review, and I am persuaded further by the reasoning provided by SLA in its decision:

The SLA... carries out a range of activities in a competitive commercial environment, including to 'buy and sell land on behalf of the Territory'.

62. Disclosure of the information at issue could reasonably be expected to prejudice the competitive commercial activities of the SLA and the public knowledge of negotiations currently underway, and not yet finalised, could jeopardise these negotiations.

63. I afford this factor significant weight.

Prejudice an agency's ability to obtain confidential information (Schedule 2, s 2.2(a)(xii))

64. I have identified this as an additional factor relevant to this Ombudsman review.

65. SLA and the third party entered into a deed of confidentiality, initiated by the third party. The deed of confidentiality was made in the context that either party may require access to confidential information of the other party in relation to the development of a specific parcel of land.

66. The definition of "confidential information" in the deed of confidentiality includes information, documents and data that:

- is designated in any way by the parties as confidential;
- which the recipient knows or ought to know is confidential; or
- evidence the existence of the proposed and/or actual discussions between the parties in relation to the land and the subject matter of those discussions (except as may be agreed in writing from time to time).

67. I note the third party does not consent to the release of the information at issue.
68. I accept disclosure of the information at issue could reasonably be expected to affect the ability of SLA to assure stakeholders that confidential information provided to SLA will remain confidential in accordance with the terms of any confidentiality agreements.
69. I attribute significant weight to this factor.

Balancing the factors

70. Having identified public interest factors favouring disclosure and public interest factors favouring nondisclosure, I now must consider the public interest balancing test set out in s 17 of the FOI Act.
71. In this matter, I have identified 3 public interest factors favouring disclosure and I attribute moderate weight to 2 factors and minor weight to one factor.
72. I have identified 3 public interest factors favouring nondisclosure and I attribute significant weight to all 3.
73. Balancing the 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 disclosing the information has on the public interest.
74. The FOI Act has a pro-disclosure bias, 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.'⁴

⁴ [Explanatory Statement, Freedom of Information Bill 2016](#)

75. The applicant has submitted that part of the information at issue could reasonably be released with redactions. I have considered this approach, and I find that on balance, the factors favouring nondisclosure outweigh the factors favouring disclosure of all of the information at issue.
76. I consider the information at issue is a mosaic and that release of even a small part would have the effect of disclosing much more information than simply what is on the face of the documents.

Conclusion

77. For the reasons set out above in this decision, I confirm the decision made by SLA under s 82(2)(a) that the information issue is, on balance, contrary to the public interest information.

Iain Anderson

ACT Ombudsman

16 April 2025