

## ***Department of Defence and Health Directorate [2019] ACTOFOI 11 (17 June 2019)***

### **Decision and reasons for decision of Senior Assistant Ombudsman, Louise MacLeod**

<b>Application Number:</b>	AFOI-RR/18/10032
<b>Decision Reference:</b>	[2019] ACTOFOI 11
<b>Applicant:</b>	Department of Defence
<b>Respondent:</b>	Health Directorate
<b>Decision Date:</b>	17 June 2019
<b>Catchwords:</b>	<i>Freedom of Information Act 2016 (ACT)</i> – third party review applicant – deciding access – whether information is already available – whether disclosure of information is contrary to the public interest – a system or procedure for the protection of people, property or the environment – intergovernmental relations

### **Decision**

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *ACT Freedom of Information Act 2016* (FOI Act).
2. Under s 82(1)(a) of the FOI Act, I confirm the decision of the Health Directorate (ACT Health) of 13 November 2018.

### **Background of Ombudsman review**

3. On 12 September 2018, an applicant (the FOI applicant) applied to ACT Health for:

[A]ny and all correspondence held or created by ACT Health between ACT Health and/or the chief health officer with the NSW and federal counterparts in relation to PFAS and/or PFOS and/or contamination of any water source or body of water in the Wreck Bay community... [between 27 June 2018 and 12 September 2018].

### Third party consultation

4. On 12 October 2018, ACT Health undertook third party consultation with the Commonwealth Department of Defence (Defence) under s 38 of the FOI Act in relation to 25 documents.<sup>1</sup>
5. Defence is undertaking site investigations and human health risk assessments of contamination associated with the historical use of aqueous film forming foam containing perfluoroalkyl and polyfluoroalkyl substances (PFAS) at Jervis Bay Range Facility and Her Majesty's Australian Ship Creswell.
6. On 24 October 2018, Defence responded to ACT Health objecting to disclosure of seven documents, which comprise emails and attachments setting out preliminary sampling data and summaries of the activities in relation to its investigation into PFAS contamination in the Jervis Bay area. Defence objected to disclosure on the basis:
  - the documents contained information that was provided to ACT Health in good faith that it would not be publicly distributed, and
  - the information contained preliminary data that may differ from the final verified data, which was to be released publicly by the end of 2018.

### Decision on access application

7. On 13 November 2018, ACT Health advised the FOI applicant that it had identified 36 documents falling within the scope of the access application. ACT Health decided to give the applicant access to one document in full, 25 documents in part, and refused access to the remaining ten documents.
8. This included the partial release of the seven documents that Defence objected to, which ACT Health decided to give access to, only redacting email addresses and phone numbers. ACT Health's decision states that it considered Defence's objections, however, no reasons are provided for its decision to grant partial access to the seven documents, nor does the decision address Defence's objections in any way.

### Application for Ombudsman review

9. On 11 December 2018 and under s 73 of the FOI Act, Defence applied for Ombudsman review of ACT Health's decision to give the FOI applicant access to these seven documents (the information at issue).

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<sup>1</sup> Section 38 provides that where disclosure of information applied for may reasonably be expected to be of concern to a relevant third party, the agency must take reasonable steps to consult with the relevant third party before deciding to give access to the information.

10. In its submissions to this review, Defence advised that, since ACT Health's decision on 13 November 2018, it has published an Interim Detailed Site Investigation Report and Interim Human Health Risk Assessment Report (Reports) on 5 December 2018. Defence contended that as the Reports have been published, the information at issue should be refused on the grounds it is already publically available.<sup>2</sup>
11. In addition, and in light of their view the information is publically available, Defence submitted to this review that disclosing the information at issue is likely to prejudice:
  - intergovernmental relations between the ACT Government and Defence (Schedule 2, s 2.2(a)(xi)), and
  - a system or procedure for the protection of people, property or the environment (Schedule 1, s 1.14(1)(i)).
12. On 28 May 2019, I provided my preliminary views about ACT Health's decision to the parties in my draft consideration.
13. On 5 June 2019, Defence advised that it no longer maintains any objection to the information at issue being released.
14. ACT Health did not provide any submissions in relation to my draft consideration.

### **Scope of Ombudsman review**

15. As a preliminary issue I have considered whether the information at issue is publically available to the applicant, and therefore whether the applicant's access application should be refused under s 43(1)(d), as Defence contended.
16. Under s 43(1)(d) of the FOI Act, an agency may refuse to deal with an access application wholly or in part where the government information is already available to the applicant.
17. The published Reports, prepared for Defence by consultancy firm GHD Pty Ltd (GHD), provide interim findings of the investigation of PFAS contamination at various sites and the impacts on human health. The Reports include final verified sampling results collected from the contamination sites and supporting commentary and analysis.
18. I have examined an unedited copy of the information at issue. It comprises emails between GHD and the Jervis Bay Range Facility Project Control Group (which includes Defence and ACT Health), and directly between Defence and ACT Health. The emails and attachments contain preliminary sampling data and summaries of the activities undertaken during the environmental investigation.

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<sup>2</sup> Under s 43(1)(d) of the FOI Act, an agency may refuse to deal with an access application wholly or in part where the government information is already available to the applicant.

19. From my examination, it is clear the information at issue is not the same as the information in the published Reports. The information at issue contains preliminary sampling results, and by comparison, the Reports contain the final verified sampling results and supporting analysis.
20. I do not accept Defence's view that the information at issue is already publically available.
21. Therefore, the only issue to be decided in this Ombudsman review is whether giving the FOI applicant access to the information at issue would be contrary to the public interest.
22. In making my decision, I have had regard to:
  - Defence's application for Ombudsman review
  - ACT Health's decision on the FOI applicant's access application
  - the FOI Act, in particular ss 7, 16, 17, 35, 38, 72, Schedule 1 and Schedule 2
  - ACT Health's FOI processing file relating to the access application, in particular an unedited copy of the information sought
  - relevant case law, in particular *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 3, *Queensland Newspapers and Department of Justice and Attorney-General; Carmody (Third Party)* [2016] QICmr 23 and *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 3
  - the *Environment Protection (Assessment of Site Contamination) Measure 1999*, in particular ss 5, 6 and 7, and
  - the submissions of the parties.

## Relevant law

23. 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.
24. Section 9 of the FOI Act expressly provides that it is the intention of the Legislative Assembly that the FOI Act be administered with a pro-disclosure bias and discretions given under the FOI Act should be exercised as far as possible in favour of disclosing government information.
25. Section 35(1) of the FOI Act provides that an access application may be decided, including by deciding to give access to the information (s 35(1)(a)) or by refusing to give access to the information sought because it is contrary to the public interest information (s 35(1)(c)).

26. 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.
27. 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.
28. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of the government information has the onus of establishing the information is contrary to the public interest information.

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

29. During the third party consultation, Defence submitted to ACT Health that disclosing the information at issue could have a substantial adverse effect on the proper and efficient conduct of the operations of the agency, and prejudice intergovernmental relations.
30. In its notice of decision to Defence, ACT Health said:
- I have applied the public interest test under section 17 of the Act and it is my determination that disclosure of the information captured in this consultation is not contrary to public interest. Therefore, my decision is to provide public access to this information.
31. In its application for Ombudsman review, Defence contended the release of the information at issue is likely to prejudice:
- intergovernmental relations between the ACT Government and Defence, and
  - a system or procedure for the protection of people, property or the environment.
32. Defence argued the release of the documents may directly or indirectly prejudice systems or procedures for protecting the environment by:
- undermining the community's confidence in the veracity of the results and findings of the detailed environmental investigation
  - undermining Defence's current social licence with the community to undertake the investigation
  - prejudicing regulatory decision making based on the information provided in the final reports arising from the detailed environmental investigation and because community

confidence on the information and data used in the decision making process is undermined, and

- negatively impacting on ACT Government and Defence relationships particularly as it relates to data and information sharing throughout any environmental investigation.

## Considerations

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

33. Defence contended the information at issue is contrary to the public interest to disclose under Schedule 1, s 1.14(1)(i).
34. For the information at issue to be taken to be contrary to the public interest under Schedule 1, s 1.14(1)(i), disclosure of the information must reasonably be expected to prejudice a system or procedure for the protection of people, property or the environment.
35. Schedule 1, s 1.14(1)(i) will apply if each of the following requirements are met:
  - there exists an identifiable system or procedure
  - it is a system or procedure for the protection of persons, property or the environment, and
  - disclosure of the information at issue could reasonably be expected to prejudice that system or procedure.
36. Defence is undertaking environmental investigations in accordance with the *National Environment Protection (Assessment of Site Contamination) Measure 1999* (NEPM). Section 5 of the NEPM relevantly provides:
  - (1) The purpose of the Measure is to establish a nationally consistent approach to the assessment of site contamination to ensure sound environmental management practices by the community which includes regulators, site assessors, environmental auditors, land owners, developers and industry.
  - (2) The desired environmental outcome for this Measure is to provide adequate protection of human health and the environment, where site contamination has occurred, through the development of an efficient and effective national approach to the assessment of site contamination.
37. I am satisfied there exists an identifiable procedure, that is, the environmental investigations including sampling, testing and assessment, for the protection of persons living and working in the Jervis Bay area, as well as the environment itself.
38. I note, however, that sections 6 and 7 of the NEPM provide for the availability of site contamination information and community engagement. According to these provisions,

‘all relevant information on site contamination should be accessible to the community’,<sup>3</sup> and ‘community engagement should start at an early stage of, and continue throughout, the process of assessment of site contamination’.<sup>4</sup>

39. The NEPM thus includes the express intention that relevant information is accessible to the community.<sup>5</sup> As a result, based on the information available to me, I am not satisfied the disclosure of the information at issue would reasonably be expected to prejudice the environmental investigations being undertaken.
40. Therefore, for the information sought to be contrary to the public interest information, disclosure of the information sought must, on balance, be contrary to the public interest under the test set out in s 17.

#### *Public interest test*

41. I will now apply the public interest test to consider the additional public interest factors raised by Defence during the course of this Ombudsman review.
42. 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.
43. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) are considered.

#### *Irrelevant factors*

44. In submissions to this Ombudsman review, Defence submitted that in disclosing the information at issue ‘...any amendments between the preliminary and final verified results are likely to be highlighted... [which] is likely to cause concern in the Jervis Bay and Wreck Bay communities and

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<sup>3</sup> s 6 of the NEPM

<sup>4</sup> s 7 of the NEPM

<sup>5</sup> ss 6 and 7 of the NEPM

undermine the confidence in the veracity of the results and findings of the detailed site investigation.’

45. From their submissions, it was apparent Defence were concerned that disclosing the information at issue, which contains preliminary results, could cause misunderstanding and lead to concern in the community about the conduct of its investigation.
46. Section 17(2) of the FOI Act lists irrelevant factors that are not to be taken into account when deciding whether disclosure of information would, on balance, be contrary to the public interest.
47. Relevantly, under s 17(2), consideration must not be given to whether:
  - access to the information could result in a person misinterpreting or misunderstanding the information,<sup>6</sup> and
  - access to the information could result in confusion or unnecessary debate.<sup>7</sup>
48. I have noted the irrelevant factors listed in s 17(2) and I am satisfied that I have not considered any irrelevant factors, including the possibility that disclosing the information at issue would result in misinterpretation, misunderstanding, confusion or unnecessary debate.

#### *Factors favouring disclosure*

49. Schedule 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.
50. Additionally, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of representative democracy.<sup>8</sup> This concept is promoted through the objects of the FOI Act.<sup>9</sup>
51. ACT Health’s decision did not address what factors favour disclosure in deciding to grant access to the information at issue. In submissions to this review, however, ACT Health have said:

I acknowledge that the public interest in the disclosure of the documents may now be diminished with the public release of the final sample documents. However, my access decision on the disclosure of the documents was made prior to the release of the final results, and in accordance with the public interest test under section 17 of the FOI Act.

It is my view that the documents should be disclosed.

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<sup>6</sup> s17(2)(b) of the FOI Act

<sup>7</sup> s17 (2)(d) of the FOI Act

<sup>8</sup> See s 17 of the FOI Act

<sup>9</sup> See s 6(b) of the FOI Act



52. I have considered the factors favouring disclosure in Schedule 2, s 2.1, and I consider three are relevant. Disclosure could reasonably be expected to:
- contribute to positive and informed debate on important issues or matters of public interest<sup>10</sup>
  - contribute to the protection of the environment,<sup>11</sup> and
  - reveal environmental or health risks or measures relating to public health and safety.<sup>12</sup>
53. The information at issue includes detailed preliminary data sampling results of PFAS contamination in the Jervis Bay area, and discussions about the safety of consuming fish caught in the Jervis Bay area, as well as the safety of consuming fruits and vegetables grown by residents of the Jervis Bay area.
54. In this case, I consider there is significant public interest in the PFAS investigation and management program, including preliminary findings and test results. I do not accept the public interest has been diminished due to release of final results.
55. I consider the release of the information at issue would contribute to positive and informed debate on a matter of public interest. Accordingly, I afford these factors significant weight in favour of disclosure.

*Factors favouring nondisclosure*

56. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure.
57. Of the factors favouring nondisclosure, ACT Health did not identify any in relation to the information at issue.
58. Defence submitted disclosure could reasonably be expected to prejudice intergovernmental relations.<sup>13</sup>

Intergovernmental relations

59. Defence argued the information at issue was provided to ACT Health in good faith that it would remain confidential, and that Defence 'may need to consider its approach to information sharing through its investigations if this information was to be released'.
60. The case of *Coe No. 1*<sup>14</sup> concerned ongoing negotiations between the ACT and Commonwealth governments over various matters. In that case, CMTEDDs contentions that disclosing

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<sup>10</sup> Schedule 2, s 2.1(a)(ii)

<sup>11</sup> Schedule 2, s 2.1(a)(x)

<sup>12</sup> Schedule 2, s2.1(a)(xi)

<sup>13</sup> Schedule 2, s 2.2(a)(x)

<sup>14</sup> *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 3 (*Coe No. 1*)

information about the negotiations, while the negotiations are underway, could reasonably prejudice the relationship between the two governments were accepted.

61. *Coe No. 1* cited the Queensland Information Commissioner case of *Queensland Newspapers*<sup>15</sup> that discussed the purpose of the intergovernmental relations public interest factor is to:

[G]ive weight to the public interest in protecting confidential communications between State and another government where disclosure would reasonably be expected to prejudice the relations between those two governments.<sup>16</sup>
62. As was set out in *Coe No. 3*<sup>17</sup>, I consider the clear purpose of the intergovernmental relations public interest factor is to protect the relationships between Australian governments, and the additional factor of protecting an agency's ability to obtain confidential information also relates to protecting these relationships.<sup>18</sup>
63. Accordingly, for disclosure of the information at issue to prejudice the relationship between the ACT and the Commonwealth, it must disclose the substance of confidential communications between the ACT and the Commonwealth governments.
64. In *Coe No. 1*, the applicant had sought access to communications between the Chief Minister and the Minister for Finance, and between senior CMTEDD and Finance officials relating to specific negotiations.<sup>19</sup> In that case, the Ombudsman was required to determine whether those communications were made in confidence, and whether disclosure could reasonably cause damage to the relationship.
65. From my examination of the information at issue, and from Defence's submissions, it is not apparent that the information was exchanged in confidence. As a result, I consider this case is distinguishable from *Coe No. 1*, which related to ongoing negotiations on a specific land matter between the ACT and the Commonwealth.
66. I accept that Defence may have expected this information to remain confidential. However, as a Commonwealth government department, Defence would have been aware that information shared with the ACT government may be subject to a Freedom of Information access application.
67. In my view, it is significant that ACT Health, in deciding to release the information at issue, did not consider the information could possibly prejudice intergovernmental relations. I must conclude then that ACT Health did not share Defence's view that disclosing the information at issue could possibly prejudice the relationship between the ACT and the Commonwealth.

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<sup>15</sup> *Queensland Newspapers and Department of Justice and Attorney-General; Carmody (Third Party)* [2016] QICmr 23 (*Queensland Newspapers*)

<sup>16</sup> *Queensland Newspapers* at [220]

<sup>17</sup> *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 3 (*Coe No. 3*)

<sup>18</sup> *Coe No. 3* at [32]

<sup>19</sup> *Coe No. 1* at [17]

68. I do not consider prejudice to intergovernmental relations to be a relevant public interest factor favouring nondisclosure in this case.
69. Defence has not discharged its onus under s 72 of the FOI Act to establish that the information is contrary to the public interest to disclose.

*Balancing the factors*

70. I am satisfied that, on balance, the public interest factors favouring disclosure outweigh the public interest factors favouring nondisclosure for all of the information sought.

## **Conclusion**

71. The information at issue is not contrary to the public interest information for the purposes of s 16 of the FOI Act.
72. I confirm ACT Health's decision to give the FOI applicant access to the information at issue.

Louise MacLeod  
Senior Assistant Ombudsman  
17 June 2019