

## ***Alistair Coe and Chief Minister, Treasury and Economic Development Directorate [2019] ACTOFOI 10 (7 June 2019)***

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

<b>Application Number:</b>	AFOI-RR/19/10001
<b>Decision Reference:</b>	[2019] ACTOFOI 10
<b>Applicant:</b>	Mr Alistair Coe MLA
<b>Respondent:</b>	Chief Minister, Treasury and Economic Development Directorate
<b>Decision Date:</b>	7 June 2019
<b>Catchwords:</b>	<i>Freedom of Information Act 2016</i> (ACT) – deciding access – whether disclosure of information is prohibited by a secrecy provision of a law – whether disclosure of information is prohibited.

### **Decision**

1. Under s 82(1)(c) of the ACT *Freedom of Information Act 2016* (FOI Act), I set aside the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 19 December 2018 and substitute it with my decision that access be refused under s 35(1)(c) of the FOI Act on the basis it is contrary to the public interest information.

### **Scope and background of Ombudsman review**

2. On 6 December 2018, Mr Alistair Coe MLA (the applicant) applied to CMTEDD for access to documents relating to the lease of a block of land requesting ‘documents between the agency and the Canberra Tradesmen’s Union Club Limited about the lease of Block 6, Section 72 Dickson (3 Rosevear Street, Dickson)’.

3. On 19 December 2018, CMTEDD decided to refuse to deal with the application under s 43(1)(e) of the FOI Act, as it considered the information sought to be contrary to the public interest to disclose on the basis that its disclosure was prohibited by a secrecy provision of a law (Schedule 1, s 1.3(6) of the FOI Act).
4. CMTEDD advised the applicant that all information identified within the scope of his access application was held within the ACT Revenue Office, and that information was prohibited from disclosure by a secrecy law in the *Taxation Administration Act 1999* (Tax Act).
5. On 8 January 2019, the applicant applied for Ombudsman review of CMTEDD's decision under s 73 of the FOI Act.
6. The applicant seeks access to all of the information that CMTEDD found contrary to the public interest to disclose, which comprises of a contract of sale, land transfer, rates notices, and conveyance lodgement forms (the information sought).
7. The applicant also contends that CMTEDD should have located additional documents in relation to his access application.
8. As a preliminary issue, I have considered CMTEDD's decision to refuse to deal with the access application under s 43(1)(e) and whether the consultation requirements in s 46 of the FOI Act were met.
9. Under s 46 of the FOI Act, if a respondent refuses to deal with an access application on the grounds in s 43(1)(e), they must advise the applicant and provide them with a reasonable opportunity to consult with the respondent and provide any relevant information.
10. In the course of this Ombudsman review, CMTEDD confirmed that no consultation had been undertaken with the applicant as required.
11. Despite this procedural defect, it is apparent, as I discuss in more detail below, that CMTEDD had concluded that the information sought was contrary to the public interest information.
12. On 9 May 2019, I provided my preliminary views to the parties in my draft consideration. Neither party provided any further submissions in response.

13. The issues to be decided in this Ombudsman review are whether:

- CMTEDD has taken reasonable steps to identify all government information within the scope of the access application, and
- giving the applicant access to the information sought would be contrary to the public interest, as CMTEDD has found.

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

- the applicant's application for Ombudsman review
- CMTEDD's decision
- the FOI Act, in particular ss 7, 16, 34, 35, 43, 46 and Schedule 1
- the ACT Tax Act, in particular ss 95, 96 and 97,
- relevant case law, and
- an unedited copy of the information sought.

## Relevant law

15. 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.

16. Section 34 of the FOI Act provides that an agency deciding an access application must take reasonable steps to identify all government information within the scope of the application.

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

18. 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 the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17.

19. Information that is taken to be contrary to the public interest to disclose under Schedule 1 includes 'any other information the disclosure of which is prohibited by a secrecy provision of a law'.<sup>1</sup>

20. A provision of a law is a secrecy provision for the purposes of the FOI Act if it –

- (a) applies to information obtained in the exercise of a function under the law; and

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<sup>1</sup> Schedule 1, s 1.3(6).

- (b) prohibits people mentioned in the provision from disclosing the information, whether the prohibition is absolute or subject to stated exceptions or qualifications.<sup>2</sup>

21. Section 95(2) of the Tax Act relevantly provides:

A person who is or has been a tax officer must not disclose any information obtained under or in relation to the administration of a tax law, except as permitted by this part.

22. Section 96(1) of the Tax Act provides:

The commissioner may disclose information obtained under or in relation to the administration of a tax law that does not and is not likely to:

- (a) directly or indirectly identify a particular taxpayer; or
- (b) disclose matters about the personal affairs of a particular taxpayer.

23. 'Taxpayer' means a person who has been assessed as liable to pay an amount of tax, who has paid an amount of tax or who is liable or may be liable to pay tax.<sup>5</sup>

24. Section 97 of the Tax Act provides that a tax officer may disclose information obtained under or in relation to the administration of a tax law in particular identified circumstances.

## The contentions of the parties

25. In his application for Ombudsman review, the applicant contends that:

... documents held by CMTEDD will also serve to provide transparency and accountability about the transaction and subsequent lease. I have attached a copy of an answer to a Question Taken on Notice on 26 October 2017 in which the Chief Minister provides information on the payment of the rates and other charges associated with the property and discusses the terms of the lease. This further provides evidence that the documents would not compromise secrecy provisions given information about the payments are already in the public domain.

26. The applicant also contends that there should be additional documents in relation to his access application:

... it is reasonable to expect that CMTEDD would have additional documents or records outside the Revenue Office which fall under the scope of my request; however there is no mention of other documents in the decision letter.

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<sup>2</sup> Schedule 1, s 1.3(7).

27. In the course of this Ombudsman review, CMTEDD submitted that:

... CMTEDD coordinated searches across the relevant business areas for documents within the scope of the request. Documents relevant to the request were only located in the ACT Revenue Office.

On consideration of the documents, I made a decision under section 43(1)(e) the Act that the release of the documents identified as being within the scope of the request was considered to be against the public interest in accordance with schedule 1 of the Act (Sch 1.3(6) – Any other information the disclosure of which is prohibited by a secrecy provision of a law).

The nature of the request for access was such that any documents within scope would identify a taxpayer with respect to information held by the ACT Revenue Office – which is obtained under, or in relation to, the administration of a tax law. Secrecy provisions apply under Division 9.4 of the Taxation Administration Act 1999 (TAA) to such information. The permitted disclosure of information under sections 96 and 97 of the TAA is also discretionary.

On receipt of the request for a review a second documents search was coordinated. This search resulted in no further documents (other than the documents which were deemed to be against the public interest) being found. The search included searches of hard and soft copy documents.

## Considerations

28. I have examined an unedited copy of the information sought. It comprises:

- conveyance and transfer documentation and a contract of sale for Block 6, collected by the ACT Revenue Office for the purpose of assessing stamp duty and confirming transfer of ownership
- notice of stamp duty assessment issued under the *Duties Act 1999*, and
- rates notices issued by the ACT Revenue Office under the *Rates Act 2004*.

### Identifying information within the scope of the access application

29. The FOI Act requires that the agency or Minister must take ‘reasonable steps’ to identify all the government information within the scope of the access application.<sup>3</sup>

30. When considering whether reasonable steps have been taken to identify all relevant

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<sup>3</sup>Section 34 of the FOI Act.

information, relevant factors to consider are the:

- administrative arrangements of government
- agency structure, functions and responsibilities
- agency's practices and procedures
- other factors such as the age of the request, and the government activity.<sup>4</sup>

31. What amounts to reasonable steps may vary in different circumstances. It would, however, include a search of electronic records and a manual search of physical records, where applicable.<sup>5</sup>

32. In their decision, CMTEDD advised that:

- the only information within the scope of the applicant's access application had been located in the ACT Revenue Office, and
- they undertook a comprehensive search for information, which included hard and soft copy of documents on two separate occasions, and no other documents were found.

33. I acknowledge the applicant's expectation that other information may exist elsewhere in CMTEDD and that it is reasonable to expect that additional documents or records would fall within the scope of the request that are held outside of the ACT Revenue Office. CMTEDD's search and enquiry process does, however, appear to have been sufficiently targeted and appropriate, having regard to the circumstances and their portfolio responsibilities.

34. As a result, based on the information before me, I am satisfied that CMTEDD has taken all reasonable steps to locate the information within the scope of the access application. I accept that if there was other information outside of the Revenue Office, CMTEDD would also be aware of it.

35. I note that an agency's ability to effectively identify the information it holds is dependent on the quality and efficiency of its document management system and processes. A review or audit of those systems and processes is, however, outside the scope of an Ombudsman FOI review.

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

36. CMTEDD found the information sought was of a kind that should be taken to be contrary to the public interest to disclose under Schedule 1 and, for this reason, refused to deal with the access application.

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<sup>4</sup> See *Nash and Queensland Police Service* [2012] QICmr 45 at [14]-[16]; *PDE and the University of Queensland* [2009] QICmr 7 at [37].

<sup>5</sup> See: Explanatory Statement, Freedom of Information Bill 2016 (ACT) 23.

37. When questioned about compliance with consultation requirements under the FOI Act in the course of this Ombudsman review, CMTEDD advised they had intended to make a decision under s 35(1)(c) of the FOI Act (which does not require consultation with the applicant), on the basis the release of the information would be contrary to the public interest under Schedule 1, s 1.3(6) of the FOI Act.
38. For the information sought to be taken to be contrary to the public interest to disclose under Schedule 1, s 1.3(6), disclosure of the information sought must be prohibited by a secrecy provision of a law (in this case, the Tax Act).
39. On my examination of the information sought, I am satisfied that it comprises documents obtained under or in relation to the administration of a tax law, specifically the *Duties Act 1999* and the *Rates Act 2004*. This information is therefore prohibited from disclosure for the purposes of s 95(2) of the Tax Act, unless a permitted disclosure in ss 96 and 97 of the Tax Act applies.
40. I will now consider whether the permitted disclosures in the Tax Act apply.

#### The application of section 96 – permitted disclosure of a general nature

41. Under s 96 of the Tax Act, information obtained under, or in relation to, the administration of a tax law may be disclosed if the information is not likely to directly or indirectly identify a taxpayer or disclose the personal affairs of a taxpayer.
42. The information sought contains transfer and rates documentation with clear identifying features, which would make it possible to identify specific taxpayers. As a result, I am satisfied that disclosure would identify a particular taxpayer and their financial affairs. On that basis, I am satisfied the permitted disclosure under s 96 does not apply in this case.

#### The application of section 97 – other permitted disclosures

43. Section 97 of the Tax Act is a discretionary provision, which allows disclosure in particular circumstances.
44. CMTEDD declined to exercise its discretion in this particular case, therefore, a permitted disclosure under s 97 does not apply.
45. I note that CMTEDD's decision in this regard, is a decision under the Tax Act, not the FOI Act and therefore, not within scope of this review.

46. For the reasons outlined above, I am satisfied that a secrecy provision in s 95 of the Tax Act applies to the information sought, and that no relevant permitted disclosures apply. Therefore, I consider that the information sought is contrary to the public interest under Schedule 1, s 1.3(6) of the FOI Act.

## **Conclusion**

47. CMTEDD's decision to refuse access under s 43(1)(e) of the FOI Act should be set aside and substituted with a decision under s 35(1)(c) to refuse to give access to the information sought on the basis it is contrary to the public interest information.

**Michael Manthorpe PSM**  
**ACT Ombudsman**  
**7 June 2019**