

***Construction Forestry Maritime Mining and Energy Union and Chief
Minister, Treasury and Economic Development Directorate [2023]
ACTOFOI 8 (26 May 2023)***

Decision and reasons for decision of Senior Assistant Ombudsman

Application number	AFOI-RR/21/10034
Agency reference:	CMTEDDFOI 2021-292
Decision reference:	[2023] ACTOFOI 8
Applicant:	CFMEU Construction and General Division
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Date:	26 May 2023
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is in the public interest – 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 – advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government – reveal the reason for a government decision and any background or contextual information that informed the decision – prejudice the protection of an individual’s right to privacy or any other right under the <i>Human Rights Act 2004</i> – prejudice trade secrets, business affairs or research of an agency or person – prejudice an agency’s ability to obtain confidential information

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016* (FOI Act).

2. For the reasons set out below I find the decision of Chief Minister, Treasury and Economic Development Directorate (CMTEDD), dated 19 November 2021 should be **varied** under s 82(2)(b) of the FOI Act.

Background of Ombudsman review

3. On 4 November 2021, the applicant made 11 requests to the respondent seeking access to:

CMTEDDFOI2021-292: "(1) Any records or documents produced or held by the Secure Local Jobs Branch dealing with or relating to WIZCON PTY LTD;

(2) Any correspondence between the Secure Local Jobs Branch or its employees and any employee or agent of WIZCON PTY LTD;

(3) Any other decisions, approvals or notices issued under the Government Procurement Act 2001 dealing with or in relation to WIZCON PTY LTD."

CMTEDDFOI2021-293: "(1) Any records or documents produced or held by the Secure Local Jobs Branch dealing with or relating to Belford Building and Construction Pty Ltd;

(2) Any correspondence between the Secure Local Jobs Branch or its employees and any employee or agent of Belford Building and Construction Pty Ltd;

(3) Any other decisions, approvals or notices issued under the Government Procurement Act 2001 dealing with or relating to Belford Building and Construction Pty Ltd."

CMTEDDFOI2021-294: "(1) Any records or documents produced or held by the Secure Local Jobs Branch dealing with or relating to Able Landscaping Pty Ltd;

(2) Any correspondence between the Secure Local Jobs Branch or its employees and any employee or agent of Able Landscaping Pty Ltd;

(3) Any other decisions, approvals or notices issued under the Government Procurement Act 2001 dealing with or in relation to Able Landscaping Pty Ltd."

CMTEDDFOI2021-295: "(1) Any records or documents produced or held by the Secure Local Jobs Branch dealing with or relating to Higgins Coatings Pty Ltd;

(2) Any correspondence between the Secure Local Jobs Branch or its employees and any employee or agent of Higgins Coatings Pty Ltd;

(3) Any other decisions, approvals or notices issued under the Government Procurement Act 2001 dealing with or in relation to Higgins Coatings Pty Ltd."

CMTEDDFOI2021-296: "(1) Any records or documents produced or held by the Secure Local Jobs Branch dealing with or relating to Locktons Traffic Solutions;

(2) Any correspondence between the Secure Local Jobs Branch or its employees and any employee or agent of Locktons Traffic Solutions;

(3) Any other decisions, approvals or notices issued under the Government Procurement Act 2001 dealing with or in relation to Locktons Traffic Solutions."

CMTEDDFOI2021-297: "(1) Any records or documents produced or held by the Secure Local Jobs Branch dealing with or relating to Olympic Fencing (NSW) Pty. Limited;

(2) Any correspondence between the Secure Local Jobs Branch or its employees and any employee or agent of Olympic Fencing (NSW) Pty. Limited;

(3) Any other decisions, approvals or notices issued under the Government Procurement Act 2001 dealing with or in relation to Olympic Fencing (NSW) Pty. Limited.

CMTEDDFOI2021-298: "(1) Any records or documents produced or held by the Secure Local Jobs Branch dealing with or relating to Canberra Contractors Pty Ltd;

(2) Any correspondence between the Secure Local Jobs Branch or its employees and any employee or agent of Canberra Contractors Pty Ltd;

(3) Any other decisions, approvals or notices issued under the Government Procurement Act 2001 dealing with or in relation to Canberra Contractors Pty Ltd."

CMTEDDFOI2021-299: "(1) Any records or documents produced or held by the Secure Local Jobs Branch dealing with or relating to BMD Constructions Pty Ltd;

(2) Any correspondence between the Secure Local Jobs Branch or its employees and any employee or agent of BMD Constructions Pty Ltd;

(3) Any other decisions, approvals or notices issued under the Government Procurement Act 2001 dealing with or in relation to BMD Constructions Pty Ltd.

CMTEDDFOI2021-300: "(1) Any records or documents produced or held by the Secure Local Jobs Branch dealing with or relating to GLO Electrical and Data Services Pty Ltd;

(2) Any correspondence between the Secure Local Jobs Branch or its employees and any employee or agent of GLO Electrical and Data Services Pty Ltd;

(3) Any other decisions, approvals or notices issued under the Government Procurement Act 2001 dealing with or in relation to GLO Electrical and Data Services Pty Ltd.

CMTEDDFOI2021-301: "(2) Any records or documents produced or held by the Secure Local Jobs Branch dealing with or relating to ABS Facade (ACT) Pty Ltd;

(2) Any correspondence between the Secure Local Jobs Branch or its employees and any employee or agent of ABS Facade (ACT) Pty Ltd;

(3) Any other decisions, approvals or notices issued under the Government Procurement Act 2001 dealing with or in relation to ABS Facade (ACT) Pty Ltd."

CMTEDDFOI2021-302: "(1) Any records or documents produced or held by the Secure Local Jobs Branch dealing with or relating to Fredon Security ACT Pty Ltd;

(2) Any correspondence between the Secure Local Jobs Branch or its employees and any employee or agent of Fredon Security ACT Pty Ltd;

(3) Any other decisions, approvals or notices issued under the Government Procurement Act 2001 dealing with or in relation to Fredon Security ACT Pty Ltd."

4. CMTEDD elected under s 43(2) of the FOI Act to consider all 11 applications as one application, as the requests were from the same applicant and closely related. This decision was appropriate in the circumstances.
5. On 19 November 2021, CMTEDD advised the applicant it had identified 11 files comprising 3553 pages within the scope of the access application and decided to refuse access to these files in their entirety on the ground that the 'the information would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the [FOI Act]'

6. On 6 December 2021, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
7. On 2 September 2022, I provided my preliminary views to the applicant and the respondent in a draft consideration, inviting further submissions from both parties.
8. On 15 September 2022, the applicant indicated they accepted my draft consideration, noting their agreement to exclude personal information from the request:
 - 1) where the third party indicates a concern about the release of that personal information; and
 - 2) insofar as the specific instances of personal information can be redacted or obscured in the relevant documents, and not to the extent that whole documents are withheld.
9. After receiving the draft consideration, CMTEDD consulted with relevant third parties (the 11 entities listed in each of the initial applications) under s 38(2) of the FOI Act.
10. On 16 November 2022, CMTEDD provided their formal response to the draft consideration, including responses from 6 of the 11 companies consulted under s 38(2). The other 5 did not respond to CMTEDD.

Information at issue

11. The information at issue in this Ombudsman review is the information contained in the 11 files to which the applicant was refused access under CMTEDD's decision of 19 November 2021.
12. The 11 files contain information about 11 entities in connection with the *Government Procurement (Secure Local Jobs) Code 2020* (the Secure Local Jobs Code) made under s 22M of the *Government Procurement Act 2001*.
13. In making my decision, I have had regard to:
 - the applicant's access applications and review application
 - the respondent's original decision
 - submissions made by both parties in response to my draft consideration
 - submissions made by third parties in consultation with CMTEDD after the draft consideration
 - the FOI Act, in particular ss 38(2) and 72, Schedule 1, s 1.14(e) and Schedule 2
 - an unedited copy of the information at issue

- publicly available information published by the ACT Government concerning the Secure Local Jobs Code and its operation, and
- relevant case law, including
 - *'BM' and Justice and Community Safety Directorate* [2021] ACTOFOI 14 (23 November 2021)
 - *Re Mangan and the Treasury* [2005] AATA 898.

Relevant law

14. Every person enjoys an enforceable right of access to government information.¹ This right is subject to provisions of the FOI Act which allow for access to be refused under certain circumstances where the information is deemed to be contrary to the public interest information.²
15. 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.
16. The public interest test in s 17 sets out the process for balancing public interest factors favouring disclosure and nondisclosure, respectively. This balancing test must be used to determine whether nondisclosure would be contrary to the public interest.
17. The FOI Act permits refusal of access to information where the information sought is 'contrary to the public interest information'.³
18. Schedule 1 of the FOI Act sets out categories of information taken to be "contrary to the public interest information" for the purposes of the definition in s 16, and s 1.14(e) deals specifically with information related to a matter that is currently before a court or tribunal.
19. Schedule 2 of the FOI Act sets out public interest factors to be balanced when conducting the s 17 test to determine the public interest.

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

³ Section 35(1)(c) of the FOI Act

20. Section 72 of the FOI Act puts the onus of establishing that information is contrary to the public interest information on the party seeking to prevent disclosure.

The parties' submissions

21. In the original decision the information officer at CMTEDD identified no factors favouring disclosure and two factors favouring nondisclosure. The officer decided:

I have decided to refuse access to all 11 (eleven) files in their entirety as I consider the information would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the Act.

22. The applicant's application for Ombudsman review contends that:

1. The Decision-maker has not dealt with any of the factors favouring disclosure of the documents sought. These were set out extensively in the initiating applications.
2. The decision-maker has inappropriately applied the non-disclosure factors insofar as they did not consider whether personal information could be redacted; and insofar as they did not consider whether the adverse effects of disclosure of an adverse finding by a regulatory body against a business would be either reasonable or unreasonable. Insofar as the wrongdoing has been positively determined by the SLJC, it is not clear on what grounds the wrongdoing is "alleged"; and this statement appears to indicate a misunderstanding of the role and function of the documents sought.

23. In response to the draft consideration, the applicant indicated their willingness to have personal information excluded from the information at issue in line with their submissions.

24. CMTEDD provided substantial submissions in response to the draft consideration, contending that the information at issue should be withheld from release entirely, noting:

Given the redactions required for removing personal information, in addition to the business information, it is unlikely that there would be enough information left to satisfy s50 (1)(b) of the Act.

Preliminary issue – scope

25. CMTEDD's decision to handle the 11 requests put in by the applicant as one request under s 43 of the FOI Act was reasonable in the circumstances and was the preferable decision given the similarity of the requests.
26. Factoring in the volume (3553 pages total) and diversity of the information found from CMTEDD's searches, I find it would have been appropriate for CMTEDD to exercise its power under s 34(3) of the FOI Act to contact the applicant to clarify or narrow the scope of the application.

27. The 11 requests considered as one by CMTEDD were broadly framed with no narrowing factors, such as a limited timeframe or any specifics around the nature of the contact between the Secure Local Jobs Board that the applicant was seeking further information on.
28. In light of the volume of information found in CMTEDD's searches and the multiple third parties where consultation was required, it may have been appropriate for CMTEDD to consider refusing the access application under s 44 of the FOI Act.

Considerations

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

29. In their response to CMTEDD's consultations after the draft consideration, Canberra Contractors Pty Ltd stated their objection to any material in their folio being released, due to their belief that disclosure could impact their ongoing legal matter with the applicant.
30. On this basis, they claimed that disclosure should not occur under Schedule 1, s 1.14(e) as it could prejudice these ongoing proceedings in the Federal Circuit and Family Court. These proceedings are a matter of public record.⁴
31. Having reviewed the information at issue in this folio, I agree it is relevant to these proceedings and has the potential to prejudice the proceedings by giving the applicant access to material not otherwise available via the proceedings.
32. My decision in regard to this folio is to confirm this aspect of the original decision and refuse access.

Public interest test

33. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:⁵
 - 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

⁴ See [Construction, Forestry, Maritime, Mining and Energy Union v Canberra Contractors \(CAG43/2021\)](#).

⁵ Section 17(1) of the FOI Act.

- 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 2.1
- 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

34. CMTEDD's initial decision letter to the applicant stated it had identified no factors favouring disclosure.
35. The applicant's applications to CMTEDD identified factors from Schedule 2 of the FOI Act they believed could be relevant considerations in this matter. The applicant noted this in their request for Ombudsman review (emphasis added):
 1. The Decision-maker has not dealt with any of the factors favouring disclosure of the documents sought. ***These were set out extensively in the initiating applications.***
36. Each of the original applications provided a list of factors the applicant believed could be relevant, with all offering at least 7 factors favouring disclosure.
37. The balancing test set out at s 17 of the FOI Act requires the decision maker to identify any factors favouring disclosure and nondisclosure that apply to the information and weigh them against each other.
38. On review, I identified 3 factors supportive of disclosure (see below) and put this to the parties in the draft consideration. CMTEDD's submissions in response to the draft consideration acknowledged the relevance of these factors but submitted they should be afforded little weight:

CMTEDD agrees there was oversight, and the disclosure of the information could or would reasonably be expected to inform the community of the government's operations, especially in regard to codes of conduct under the Secure Local Jobs Code. Disclosure could or would also reveal the reason for a government reason for its treatment of individuals engaging with Secure Local Jobs Branch as well as potentially advance fair treatment of individuals and entities.

However, balanced against the factors for nondisclosure these factors are weighted lightly.

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

39. The requests from the applicant relate to the Secure Local Jobs Branch and actions taken under the *Government Procurement Act 2001* (ACT) (Government Procurement Act).
40. The Secure Local Jobs Branch administers the Secure Local Jobs Code⁶, which was enacted via the *Government Procurement (Secure Local Jobs) Code 2020*, an instrument made under the Government Procurement Act.
41. A reasonable expectation that disclosure of information could contribute to informing the community of government operations, including the policies, guidelines and codes of conduct followed by government in its dealings with community members is a factor favouring disclosure under the FOI Act.⁷
42. The decision letter from CMTEDD indicates the information at issue includes:

‘...the names of individuals found to be non-compliant, details relevant to the nature of non-compliance, personal circumstances related to the non-compliance and audit findings.’
43. It is reasonable to expect that disclosure of the information at issue would help to inform the community as to how the Secure Local Jobs Branch administers the provisions of the Secure Local Jobs Code to determine compliance.
44. I find this factor relevant to information about findings of non-compliance or compliance activities, in that it deals with internal government processes with respect to compliance matters, and I afford it moderate weight.

Advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government

45. A reasonable expectation that disclosure of information could advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government is a factor favouring disclosure under the FOI Act.⁸
46. As the information at issue does include information pertaining to determinations of compliance from businesses regarding the Secure Local Jobs Code, it is reasonable to expect

⁶ [Secure Local Jobs - Procurement \(act.gov.au\)](https://www.act.gov.au/secure-local-jobs).

⁷ Schedule 2, s 2.1(a)(iii) of the FOI Act.

⁸ Schedule 2, s 2.1(a)(vii) of the FOI Act.

that disclosure could promote consistency in decision-making and in the treatment of entities engaging with the Secure Local Jobs Branch.

47. When considering this factor I have afforded it a medium weight concerning the discussions and correspondence between government and entities to determine compliance.
48. I find that disclosure of some of this information, excluding sensitive details withheld based on other factors, could be in the public interest in that it gives some insight into compliance activities, which could help to promote public confidence about compliance with the Secure Local Jobs Code, including proactive consideration of compliance related to work carried out with public funds.

Reveal the reason for a government decision and any background or contextual information that informed the decision

49. A reasonable expectation that disclosure could reveal the reason for a government decision and any background or contextual information informing the decision is a factor favouring disclosure under the FOI Act.⁹
50. The information at issue contains includes information about decisions concerning non-compliance matters and actions taken once the Branch found an entity to be non-compliant.
51. It also includes information concerning matters of alleged non-compliance where the Branch sought further information from entities to demonstrate compliance with the requirements of the Code.
52. In my view, it is reasonable to expect that disclosure could reveal the factors and reasons behind the decisions made concerning non-compliance with the Secure Local Jobs Code.

Factors favouring nondisclosure

53. In making the original decision, CMTEDD relied on two factors favouring nondisclosure. When responding to my draft consideration, CMTEDD noted a third factor it believes is also relevant for this matter.

Prejudice the protection of an individual's right to privacy or other rights under the Human Rights Act 2004

⁹ Schedule 2, s 2.1(a)(viii) of the FOI Act.

54. A reasonable expectation that disclosure could prejudice an individual's right to privacy under the *Human Rights Act 2004* (ACT) (**Human Rights Act**) is a factor against disclosure under the FOI Act.¹⁰
55. CMTEDD's decision letter noted (emphasis added):
- ...the material relevant to your request which **includes (but is not limited to)** the names of individuals found to be non-compliant, details relevant to the nature of the non-compliance, personal circumstances relevant to the non-compliance and audit findings.
56. Section 12 of the Human Rights Act provides that:
- Everyone has the right—
- (a) Not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
 - (b) Not to have his or her reputation unlawfully attacked.
57. CMTEDD decided this factor was relevant. The reasons provided in its decision letter do not explain how disclosing the information at issue could reasonably be expected to unlawfully or arbitrarily prejudice the right to privacy enjoyed by any individual under the Human Rights Act. It is important to detail how this right will be prejudiced by disclosure rather than merely asserting that disclosure could be prejudicial.
58. I find this matter to be similar to *'BM' and Justice and Community Safety Directorate* [2021] ACTOFOI 14, where it was raised as an issue that the decision letter 'had not adequately explained *how* disclosing the information at issue could reasonably be expected to prejudice the right to privacy enjoyed under the Human Rights Act'.¹¹
59. Section 12 of the Human Rights Act does not provide a general right to privacy, but rather the specific rights outlined above.¹² I note CMTEDD's decision letter acknowledges the information at issue is not entirely comprised of information that it believes could prejudice the right to privacy under the Human Rights Act in the bolded emphasis at paragraph [58] above.
60. No reasons have been provided as to why the presence of this information within the information at issue requires the entirety of the information to be withheld from release to the applicant.

¹⁰ Schedule 2, s 2.1(a)(ii) of the FOI Act.

¹¹ *'BM' and Justice and Community Safety Directorate* [2021] ACTOFOI 14 at p42-43

¹² [4. Ombudsman Guidelines - Considering the public interest | ACT Ombudsman](#)

61. Changes have been made to the Secure Local Jobs Code from 1 March 2022, bringing past performance into consideration for tender applications for future contract work. Businesses seeking to tender for ACT Government contracts will need to state current compliance with the Code and prior compliance with their commitments in their previous Labour, Relations, Workplace Training and Equity Plan.¹³
62. While these changes had not been made when the initial decision was made by CMTEDD, these changes are relevant for consideration of the potential prejudicial impact of disclosure of information concerning past compliance issues.
63. On review I have taken account of the fact that compliance issues are already publicly reported where infringement points have been imposed on a business' Secure Local Jobs Code Certificate for a period of time.¹⁴ In my assessment, this reduces the potential prejudicial impact of disclosure where non-compliance issues are concerned for the business as a whole, as these issues can become public knowledge by the operation of the Code under the changes.
64. In making my decision, I agree this factor applies in relation to some of the information at issue. For the personal information below concerning non-ACT government employees, I afford this factor significant weight and have accordingly redacted the information at issue to remove the following details:
- Family names of all company employees **below** Director level who had direct dealings with the Branch
 - Full names and contact details of any auditors engaged by the Branch in handling compliance checks
 - Full names of any employees who had no dealings with the Branch, such as names that only appeared on sign in sheets
 - Direct contact details outside of the company's public facing details such as phone numbers and email addresses
65. I find that disclosing the full names of employees at Director level is non-prejudicial as these individuals form the public face of the company and their employment at these senior levels of the company is easily verifiable from publicly available information.

¹³ [Secure Local Jobs - Procurement \(act.gov.au\)](#)

¹⁴ [Code Certified Entities - Procurement \(act.gov.au\)](#).

66. In balancing the public interest in disclosing the names and contact details of the above list where redactions have been applied, I find that these redactions reflect that the majority of those persons' names and contact details is contrary to the public interest to disclose.
67. I find no reasons why disclosure of those details would be in the public interest and there is potential prejudice to their right to privacy as disclosure could cause these individuals to be linked to any allegations of non-compliance despite these matters being business matters rather than non-compliance of individual staff members.
68. With respect to the personal information of employees of the Secure Local Jobs Branch or other ACT agencies, I have left full names unredacted but direct contact details and any internal mailbox details have been removed.
69. Members of the ACT public service are known in their work capacity and therefore there is little to no prejudice to their privacy in the disclosure of their names in their work capacity. By contrast, I consider that disclosure of their direct contact details and any internal agency mailboxes present in the information at issue would be prejudicial. Agencies have dedicated public facing points of contact for staff members I consider there is little to no public interest in disclosing direct contact details of individual staff, as disclosure could be prejudicial to the right to privacy including by exposing staff to potential harassment from aggrieved persons.

Prejudice trade secrets, business affairs or research of an agency or person

70. A reasonable expectation that disclosure of information could prejudice the trade secrets, business affairs or research of an agency or person is a factor against disclosure in the FOI Act.¹⁵ In this matter, business affairs rather than trade secrets or research is relevant.
71. CMTEDD's decision letter referred to *Re Mangan and the Treasury* [2005] AATA 898, which held business affairs to be 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.¹⁶
72. CMTEDD's position regarding this factor is that:

'I am satisfied that the release of information about the businesses could be expected to have an adverse effect of having a business' name, reputation or standing in the community damaged if they are associated with any alleged wrongdoing.'

¹⁵ Schedule 2, 2.2(a)(xi) of the FOI Act.

¹⁶ *Re Mangan and the Treasury* [2005] AATA 898

73. I agree that association with wrongdoing, alleged or actual, can be damaging for a business' reputation in the community. CMTEDD did not provide analysis on either the likelihood of adverse impacts occurring or on the level of harm that could be expected. The specific sections of the information at issue that would lead to harm if disclosed were not identified in the decision letter, nor was the likelihood of harm or the degree of harm that could be expected if the information were disclosed.
74. Given infringement points are published on the certificates of entities participating under the Secure Local Jobs Code, in my view this reduces any potential reputational harm that could occur from disclosure of the information at issue.
75. I also note the potential positive impacts for the reputation of the entities involved in compliance checks where the entity had provided the information requested to demonstrate compliance.
76. In assessing the public interest in disclosure of this information, I have assigned this factor a medium weight, resulting in the following information being redacted:
- any and all information related to the specific operations of the business such as financial information and numbers of employees
 - the names of any external companies that had been employed by these main companies as subcontractors
 - the contents of any documents provided as evidence of compliance, except for the title of the document indicating what it is such as internal policies, sign-on sheets, etc.
77. I find that the public interest in disclosing evidence provided by the businesses in response to compliance checks lies in demonstrating the existence of the requested records such as sign-in sheets rather than in the content of these documents. The public interest value in these documents lies in the business' record-keeping and compliance practices and procedures being sufficient to demonstrate compliance.
78. I consider release of this redacted material would be prejudicial to the business affairs of the companies involved, as it could reveal specific financial and logistical details of these companies that are not otherwise public knowledge. This in turn could give a competitive advantage to other businesses in the same field who have not had these details disclosed, both in future tenders and potentially in competing for employees.

Prejudice an agency's ability to obtain confidential information

79. A reasonable expectation that disclosure could prejudice an agency's ability to obtain confidential information is a factor against disclosure under the FOI Act.¹⁷
80. CMTEDD's additional submissions in response to the draft consideration raised this as a factor it believed was relevant in this instance, noting:
- The companies that have participated have done so trusting that the ACT Government will not release their details. This trust, if broken, would, or could, reasonably be expected to prejudice an agency's ability to obtain confidential information from private sector suppliers of goods and services to the ACT Government.
81. While I agree that release of specific operational details, such as financials and internal policies, could be damaging, I do not consider the potential impact to be as drastic as CMTEDD submits.
82. It is important to note the context in which this information has been provided to the Secure Local Jobs Board by the entities involved. This information has been requested by the Board to confirm compliance with the Secure Local Jobs Code. If entities were to decline to provide sufficient information in response to these requests, they could face consequences for their certification under the Code, affecting their ability to work with the ACT Government.
83. On this basis, I find that it is unlikely that businesses would decline to provide the Board with information if portions of the information at issue were disclosed, particularly in light of the significant sections of the material which otherwise deemed contrary to the public interest information as described above. I therefore afford this factor reasonably low weight in my decision.

Meeting the onus

84. Section 72 of the FOI Act places the onus of establishing that information is contrary to the public interest information on the person seeking to prevent disclosure of the information.¹⁸
85. My preliminary view was that CMTEDD had not met the onus of establishing that the information at issue is 'contrary to the public interest information'.
86. The decision letter from CMTEDD identified no factors favouring disclosure, even where a factor could have been relevant but given zero or little weight in the balancing exercise. While there is no legislative requirement for CMTEDD to consider the factors identified by the applicant as

¹⁷ Schedule 2, 2.2(a)(xii) of the FOI Act.

¹⁸ Section 72 of the FOI Act.

being relevant for the access application, the identification of no factors favouring disclosure as relevant, without addressing the factors listed to explain why CMTEDD believed they were not relevant, suggests CMTEDD did not give adequate consideration to factors favouring disclosure in this instance.

87. The information at issue is voluminous in nature, comprising of 3553 pages as a response to the 11 initial requests. The documents contain many duplicates, and the schedule of documents provided as part of the decision does not distinguish which of the 2 claimed factors favouring non-disclosure applies to which areas of the information regarding each request.
88. Having regard to the pro-disclosure bias requirements of the FOI Act, I find it would have been preferable for CMTEDD to consider redacting the specific personal information about which it had concerns and release the remainder of the information, if possible.
89. The FOI Act expressly provides for scenarios where the redaction of 'contrary to the public interest information' would be sufficiently large that the remainder would no longer be of assistance to the applicant (s 50(1)(b)). It was therefore open to CMTEDD to redact the information at issue, assess the remaining information, and consider under s 50(1)(b) whether disclosure of the remainder would not be practicable.¹⁹
90. CMTEDD's original decision claimed the factors favouring non-disclosure were sufficient to render the entirety of the information at issue as 'contrary to the public interest information' as a widespread determination, rather than isolating the specific sections in the documents which could be redacted.

Balancing the factors

91. In making this decision, I have considered 3 factors favouring disclosure and 3 factors favouring non-disclosure.
92. Balancing these public interest factors is not merely a tallying exercise, where the public interest is established solely by the number of applicable factors on either side. I considered the relative importance and weight each factor should be given. The weight given to the factors depends on the effect that disclosing the information would have on the public interest.
93. The FOI Act also has a pro-disclosure bias. The public interest test and weighing of factors is approached as scales 'laden in favour of disclosure'.²⁰

¹⁹ Section 50(1)(b) of the FOI Act.

Conclusion

94. Having regard to the above, my decision is that the decision of CMTEDD should be **varied** under s 82(2)(b) of the FOI Act in the following way:

- Access to information in the documents identified in the folio related to Canberra Contractors is refused.
- Access to information in the documents in the remaining 10 folios will be released in part, with contrary to the public interest information withheld in accordance with redactions made under s 50 of the FOI Act.

David Fintan

Senior Assistant Ombudsman

26 May 2023

²⁰ [Explanatory Statement, Freedom of Information Bill 2016.](#)