

## 'CD' and Chief Minister, Treasury and Economic Development Directorate [2023] ACTOFOI 11 (27 June 2023)

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| <b>Application number:</b> | AFOI-RR/22/10035                                                                                                                                                                                                                                                                                                                                                                                                           |
| <b>Agency reference:</b>   | CMTEDD FOI 2022-229                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>Decision reference:</b> | [2023] ACTOFOI 11                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>Applicant:</b>          | 'CD'                                                                                                                                                                                                                                                                                                                                                                                                                       |
| <b>Respondent:</b>         | Chief Minister, Treasury and Economic Development Directorate                                                                                                                                                                                                                                                                                                                                                              |
| <b>Date:</b>               | 27 June 2023                                                                                                                                                                                                                                                                                                                                                                                                               |
| <b>Catchwords:</b>         | <i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – promote open discussion of public affairs and enhance the government's accountability – prejudice trade secrets, business affairs or research of an agency or person – prejudice the protection of an individual's right to privacy or other right under the Human Rights Act 2004 |

### Decision

1. I am a delegate of the Ombudsman for the purpose of s 82 of the *Freedom of Information Act 2016 (FOI Act)*.
2. For the reasons set out below, I have decided to **vary** the decision of the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) dated 29 August 2022 under s 82(2)(b) of the FOI Act.

### Background of Ombudsman review

3. On 30 July 2022, the applicant applied to CMTEDD for:

A list of all freedom of information application received in FY21-22 that has not been published on CMTEDD's disclosure log, the final decision for each and reasons why they were not published.

4. On 3 August 2022, CMTEDD wrote to the applicant to discuss their access application.

5. On 8 August 2022, CMTEDD asked the applicant if they would be willing to rescope the request because it was unlikely to be processed without rescoping.
6. On 10 August 2022, CMTEDD told the applicant their access application was suspended under s 34(4) of the FOI Act.
7. On 11 August 2022, the applicant asked CMTEDD:

Please explain how this can possibly be too broad. Do you not keep a list of applications you have received?
8. On 12 August 2022, CMTEDD sent the applicant a clarification request.<sup>1</sup>
9. On 14 August 2022, the applicant confirmed they were not seeking access to any specific application, and enquired why it would not be possible to process the request by removing personal information.
10. On 26 August 2022, the applicant contacted CMTEDD as they had not received a response.
11. On 29 August 2022, a CMTEDD information officer advised the applicant one document was identified containing information within the scope of the application and decided to give access to an edited copy of this document (**FOI application list**).<sup>2</sup>
12. On 8 December 2022, the applicant applied for Ombudsman review of CMTEDD's decision to refuse to give access to information deleted from the FOI application list.
13. On 10 February 2023, during informal resolution, CMTEDD agreed to give access to the FOI application list, with part of the information which appears in the 'information sought' column deleted.
14. On 14 June 2023, I provided my preliminary view to the parties in a draft consideration.
15. On 21 June 2023, CMTEDD accepted the draft consideration. The review applicant did not respond to the draft consideration.

## Information at issue

16. The information at issue in this Ombudsman review is limited to the information in the FOI application list to which CMTEDD refused access on the basis it is contrary to the public interest information.

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<sup>1</sup> Section 34(3) of the FOI Act.

<sup>2</sup> Section 35(1)(a),(c) and (2) of the FOI Act.

17. The FOI application list is a spreadsheet listing 245 access applications and the reference number, date received, information sought, release type and online publication status of each application.
18. The issue to be decided in this Ombudsman review is whether information in the FOI application list is 'contrary to the public interest information' for the purposes of the FOI Act.
19. In making my decision, I have had regard to:
  - the applicant's access application and review application
  - the respondent's decision of 29 August 2022 and further submissions
  - the FOI Act, in particular ss 6, 7, 16, 17, 28, 35, and Schedule 2
  - the respondent's FOI processing file relating to the access application
  - the *Human Rights Act 2004* (ACT) (**Human Rights Act**)
  - the *Information Privacy Act 2014* (ACT) (**Information Privacy Act**)
  - the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act
  - an unedited copy of the FOI application list.

## Relevant law

20. 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.<sup>3</sup>
21. 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.
22. 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.
23. 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.

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<sup>3</sup> Section 35(1)(c) of the FOI Act.

24. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest in accordance with ss 16(b) and 17.
25. Section 28 of the FOI Act requires agencies and Ministers to keep a record of access applications made to the agency or Minister (a **disclosure log**).
26. The disclosure log must include certain information for each access application made to the agency.<sup>4</sup> If an agency decides not to disclose government information, the disclosure log must also include a statement about review rights available.<sup>5</sup>
27. Section 34 of the FOI Act provides a respondent must take reasonable steps to identify all government information within the scope of the application. The respondent may, at any time, contact the applicant to clarify the scope of the application.<sup>6</sup>
28. The respondent may suspend an application if all reasonable steps have been taken to contact the applicant and either the respondent is unable to contact the applicant, or the applicant does not respond to the clarification request.<sup>7</sup>
29. Section 54 of the FOI Act lists the requirements for the decision notice to be given to the applicant if a decision is made to refuse to give access to government information. The decision notice must include:
  - a description of the information
  - a statement of reasons for the decision setting out –
    - the findings on any material questions of fact referring to the evidence or other material on which the findings were based; and
    - the relevant factors favouring disclosure; and
    - the relevant factors favouring nondisclosure; and
    - how the factors were balanced; and the harm to the public interest that can be reasonably expected to occur from disclosure.
30. Section 72 of the FOI Act provides the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

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<sup>4</sup> Section 28(2) of the FOI Act.

<sup>5</sup> Section 28(3) of the FOI Act.

<sup>6</sup> Section 34(3) of the FOI Act.

<sup>7</sup> Section 34(4) of the FOI Act.

## The parties' submissions

31. In the decision notice dated 29 August 2022, the CMTEDD information officer said:

I have decided to grant partial access to the document as I consider it to contain information that is contrary to the public interest under schedules 1 and 2 of the Act in addition to being contrary to section 28(6) Requirement for a Disclosure Log...

Many requests received by CMTEDD are for Access Canberra and relate to disputes, personal information and investigations. Additionally, CMTEDD FOI process WorkSafe ACT requests which often contain information pertaining to ongoing investigations or details of an injury to a worker.

When deciding on the publication status of a request the information is assessed against the public interest test as set out in section 17 of the Act and a determination is made by weighing the factors for and against nondisclosure by the Information Officer with particular regard to section 28(6). Should the Information Officer determine that the information is not in the public interest then the request and decision will not be published on the disclosure log and the applicant is informed of this along with any relevant third parties....

The Information Officer for each case has already made a decision on the release and publication of the initial request along with any associated documents including the notice of decision to the applicant, thus informing the applicant of both the decision and the publication status.

32. In the application for Ombudsman review, the applicant submitted:

The "public interest test" was not correctly applied. No s 2.2 factors were given. They quoted a section on information in the disclosure log rather than assess the information in the document they provided, they seem to have just denied all information in the "information sought" column, without reason.

33. These submissions are discussed in more detail below.

## Preliminary issue

34. CMTEDD sent the applicant a clarification request because they considered the scope of the application involved information CMTEDD is not required to publish on the disclosure log under s 28(6) of the FOI Act.

35. CMTEDD told the applicant:

A number of the applications are for personal information and/or commercial information. While section 28 of the [FOI Act] lays out the need for a disclosure log, section 28(6) specifically states:

A disclosure log must not include—

- (a) an access application for personal information; or
- (b) information about an applicant's business, commercial, financial or professional affairs, the publication of which would be unreasonable in the circumstances.

If you are seeking a specific case then you are more than welcome to let us know which case. Understand that the information is assessed against the public interest test as set out in section 17 of the Act and a determination is made by weighing the factors for and against nondisclosure by the Information Officer that the information. Should the Information Officer determine that the information is not in the public interest then the request and decision will not be published on the disclosure log.

36. In deciding an access application, if an information officer decides to refuse access to information because it is contrary to the public interest information, the request and decision must be published on the disclosure log—unless the application is for personal information or that information itself is contrary to the public interest information.<sup>8</sup>
37. An agency cannot refuse access to information simply because that information is not required to be published on the disclosure log. As set out below, it is appropriate to conduct a public interest test in relation to the information sought in deciding access.

## **Consideration**

38. CMTEDD decided part of the FOI application list contains information which would, on balance, be contrary to the public interest to disclose under the test set out in s 17 of the FOI Act.
39. I have reached the same conclusion, but I consider access should be given to additional information contained in the information sought column, because it would not be contrary to the public interest to disclose this information.

## **Public interest test**

40. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following 5 steps:<sup>9</sup>
- 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.

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<sup>8</sup> Section 24(1) of the FOI Act and section 28(2)(a) and (b).

<sup>9</sup> Section 17(1) of the FOI Act.

### **Pro-disclosure bias**

41. In addition to the non-exhaustive factors favouring disclosure listed in Schedule 2, s 2.1, the FOI Act is intended to be administered with a pro-disclosure bias and relevant discretions be exercised as far as possible in favour of disclosing government information.<sup>10</sup> This concept is promoted through the objects of the FOI Act.<sup>11</sup>

### **Factors favouring disclosure**

42. In deciding the access application, CMTEDD considered one factor favouring disclosure in the public interest, in addition to the pro-disclosure bias, but ultimately decided disclosure could not reasonably be expected to promote this factor.

### ***Promote open discussion of public affairs and enhance the government's accountability***

43. A factor favouring disclosure is where disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.<sup>12</sup>

44. The FOI application list contains information about access applications made to CMTEDD in the 2021–2022 financial year.

45. I consider information about access applications received by agencies and Ministers is a matter of public interest, as it involves the administration of a statutory scheme which gives people the right to access government information.

46. I consider release of the FOI application list would reveal information about CMTEDD's handling of access applications, which could inform open discussion about, and increase the transparency of, the FOI process.

47. I note information about access applications received by CMTEDD is made publicly available in the CMTEDD annual report.<sup>13</sup>

48. I consider release of the FOI application list would promote this public interest factor to a minor extent because disclosure would not reveal substantial detail about the actions of CMTEDD.

49. As the FOI application list is not a complete list of applications made to CMTEDD during that period I do not consider release would significantly contribute to the public's understanding of the FOI process.

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<sup>10</sup> Section 9 of the FOI Act.

<sup>11</sup> Section 6 of the FOI Act.

<sup>12</sup> Schedule 2, s 2.1(a)(i) of the FOI Act

<sup>13</sup> [CMTEDD Annual Report 2021-2022, page 183](#).

50. I afford minor weight to this factor.

**Factors favouring non-disclosure**

51. CMTEDD's decision notice did not identify which public interest factors favouring non-disclosure were relevant to the FOI application list.

52. I have identified two factors favouring non-disclosure in the public interest which I consider is relevant to the FOI application list.

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

53. A reasonable expectation disclosure of information could prejudice the trade secrets, business affairs or research of an agency or person weighs against disclosure in the FOI Act.<sup>14</sup> In this matter it is the business affairs aspect which is relevant rather than trade secrets or research.

54. I consider the contents of the information sought column includes the names of businesses and references to workplace incidents/injuries, possible regulatory activities or civil disputes involving those businesses.

55. I note this information is included in the FOI application list because an application has been made for this information under the FOI Act. It is possible the information about the businesses has not been substantiated or confirmed.

56. In some circumstances, I have identified publicly available information about the subject matter of the access applications.<sup>15</sup> I consider disclosure of parts of the FOI application list would only reveal an access application was made for information about these matters and the outcome.

57. I consider disclosure of this limited amount of information, without any other supporting or contextual information, is unlikely to seriously damage or inhibit a business from generating profit. I afford minor weight to this factor as it applies to this information.

58. In respect of information about the business affairs of third parties where information about the subject matter is not publicly available, I consider disclosure could reasonably be expected to negatively impact the reputation of the businesses and prejudice their ability to operative competitively.

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<sup>14</sup> Schedule 2, s 2.2(a)(xi) of the FOI Act.

<sup>15</sup> For example: [ACT Industrial Court fines Capitol Chilled Foods after forklift crushes worker's leg | The Canberra Times | Canberra, ACT.](#)



59. I afford significant weight to this factor as it applies to information about workplace incidents/injuries, possible regulatory activities or civil disputes involving those businesses which is not otherwise in the public domain.

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

60. A reasonable expectation disclosure could prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act is a factor favouring nondisclosure under the FOI Act.<sup>16</sup> In this matter, it is the consideration of the right to privacy which is relevant.

61. Section 12 of the Human Rights Act provides:

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.

62. The FOI application list contains the personal information of third parties, including full names, details about education or employment, vehicle registration, residential addresses, and details of complaints, accidents, and other incidents.

63. I note the FOI application list includes the full names of ACT government staff members. Having reviewed an unedited copy of the document I am satisfied these names have previously been made publicly available.<sup>17</sup> I do not consider this factor applies to this information.

64. In considering whether the disclosure of this information could reasonably be expected to prejudice the protection of an individual's right to privacy, relevant matters include any detriment disclosure may cause, the nature of the information, and the circumstances in which the information was collected.<sup>18</sup>

65. The Information Privacy Act contains the Territory Privacy Principles (**TPP**), which govern public sector agencies' collection, management, use and disclosure of personal information.

66. TPP 6.1 provides an agency must not use or disclose personal information about an individual collected for a particular purpose for another purpose (secondary purpose) without consent, or unless one of the exceptions in TPP 6.2 or 6.3 apply.

67. TPP 6.2 applies if:<sup>19</sup>

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<sup>16</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

<sup>17</sup> CMTEDD FOI disclosure log, [FOI reference: CMTEDDFOI 2021-319](#).

<sup>18</sup> [FOI Guidelines, Considering the Public Interest](#) at [9.3].

<sup>19</sup> Schedule 1, s 6.2(a) of the Information Privacy Act.

- (a) the individual would reasonably expect the public sector agency to use or disclose the information for the secondary purpose and the secondary purpose is—
    - (i) if the information is sensitive information—directly related to the primary purpose; or
    - (ii) if the information is not sensitive information—related to the primary purpose; or
68. I consider the information was collected by CMTEDD because an access application was made for personal information. I do not consider individuals would expect their personal information collected for this purpose to be disclosed for another purpose, particular noting disclosure log requirements not to publish such applications.<sup>20</sup>
69. I do not consider significant detriment would result from disclosure of the personal information in the FOI application list due to the limited personal information included, but in some circumstances it is possible detriment could result.
70. I consider disclosure of the personal information in the FOI application list could reasonably be expected to prejudice the protection of an individual’s right to privacy.
71. I attribute significant weight to this factor.

***Balancing the factors***

72. A decision notice for an access application must set out reasons for the decision, including findings on material questions of fact referring to evidence or other material on which the findings were based.<sup>21</sup>
73. In my view, CMTEDD’s decision does not identify the public interest factors favouring non-disclosure; nor how public interest factors were balanced.<sup>22</sup> The notice also does not sufficiently explain the harm to the public interest that may reasonably be expected to occur from disclosure.<sup>23</sup>
74. I do not consider CMTEDD provided sufficient information to support a decision the information in the information sought column is contrary to the public interest information.<sup>24</sup>
75. I have considered one factor favouring disclosure and two factors favouring non-disclosure, in addition to the pro-disclosure bias.

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<sup>20</sup> Section 28(6) of the FOI Act.

<sup>21</sup> Section 51(1) of the FOI Act. See also section 179 of the Legislation Act.

<sup>22</sup> Section 54(2)(b)(iii) and (iv) of the FOI Act.

<sup>23</sup> Section 54(2)(b)(v) of the FOI Act.

<sup>24</sup> Section 72 of the FOI Act.

76. I have given minor weight to the factor favouring disclosure, as release of the FOI application list would promote open discussion and enhance the government's accountability to a limited extent.<sup>25</sup>
77. I have given minor weight to the factor favouring non-disclosure under Schedule 2, s 2.2(a)(xi) of the FOI Act, as it relates to business information in the public domain.
78. I have given significant weight to this factor favouring non-disclosure as it relates to business information about workplace incidents / injuries, possible regulatory activities or civil disputes which is not in the public domain.<sup>26</sup>
79. I have given significant weight to the other factor favouring non-disclosure as it relates to the personal information of third parties (excluding ACT government staff); where disclosure could significantly prejudice the protection of an individual's right to privacy under the Human Rights Act as disclosure could amount to a breach of the TPPs.<sup>27</sup>
80. Balancing 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 they have identified. The weight given to a factor will depend on the effect that disclosing the information would have on the public interest.
81. 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.'<sup>28</sup>
82. I am satisfied, on balance, the public interest factors favouring non-disclosure of the personal information of third parties and business information which is not in the public domain, outweighs the public interest factors favouring disclosure of this information.

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<sup>25</sup> Schedule 2, s 2.1(a)(i) of the FOI Act.

<sup>26</sup> Schedule 2, s 2.2(a)(xi) of the FOI Act.

<sup>27</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

<sup>28</sup> [Explanatory Statement](#), Freedom of Information Bill 2016.

83. In relation to the remainder of the FOI application list, I am satisfied, on balance, the public interest favour favouring disclosure (including the pro-disclosure bias) outweighs the public interest factors favouring non-disclosure of this information.

## **Conclusion**

84. For the reasons set out above in this decision, I vary CMTEDD's decision of 29 August 2022 under s 82(2)(b) of the FOI Act to:

- refuse to give access to parts of the FOI application list relating to business information about workplace incidents / injuries, possible regulatory activities or civil disputes which is not in the public domain, and the personal information of third parties under s 35(1)(c) of the FOI Act, and
- give access to the remainder of the FOI application list.

**David Fintan**  
**Senior Assistant Ombudsman**  
**27 June 2023**