

Canberra Metro Pty Ltd and Major Projects Canberra [2020] ACTOFOI 13 (6 May 2010)

Decision and reasons for decision of Senior Assistant Ombudsman, Louise Macleod

Application Number	AFOI-RR/20/10002
Decision Reference	[2020] ACTOFOI 13
Applicant	Canberra Metro Pty Ltd
Respondent	Major Projects Canberra
Decision Date	6 May 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – security, law enforcement or public safety – the flow of information to a regulatory agency – trade secrets, business affairs or research of an agency.

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(2)(a) of the FOI Act, I **confirm** the decision of the respondent, Major Projects Canberra (MPC), dated 3 December 2019, with respect to the information at issue in this review.

Background of Ombudsman review

3. On 8 October 2019 an applicant (FOI applicant) applied to MPC for access to:

All the inspection reports on all utility services handed over to the Government for the Light Rail Stage 1 project, from the beginning of construction to date. Additionally, any correspondence between the inspectors and TCCS, including any minutes of meetings or documents regarding these inspection reports.

4. On 21 October 2019 the FOI applicant refined the scope of their access application to:

All certification of Light Rail Stage 1 undertaken by the ACT Utilities Regulator.

5. By agreement between the FOI applicant and MPC, the standard access application decision time was extended to 22 November 2019.

Third party consultation

6. Section 38 of the FOI Act provides for a consultation process where the release of information 'may reasonably be expected to be of concern to a relevant third party'.

7. MPC undertook third party consultation by notifying the following parties:

- ACT Earthing Pty Ltd was notified on 8 November 2019, who replied on 15 November 2019 stating it did not object to the release of the information.
- APP Corporation Pty Ltd was notified on 11 November 2019, who did not provide a response.
- Specialist Electrical Engineering Group (SEEG) Holdings Pty Ltd was notified on 11 November 2019, who replied on 11 November 2019 stating it did not object to the release of the information.
- Canberra Metro Pty Ltd (Canberra Metro) was notified on 12 November 2019, who replied on 15 November 2019, objecting to the disclosure of documents 1-22, on the grounds that disclosure of this information would be contrary to the public interest because it would prejudice:
 - the protection of an individual's right to privacy (Schedule 2, s2.2(a)(ii))
 - security, law enforcement or public safety (Schedule 2, s 2.2(a)(iii))
 - the flow of information to a regulatory agency (Schedule 2, s2.2(a)(ix))
 - trade secrets, business affairs or research of an agency. (Schedule 2, s2.2(a)(xi)).

8. Canberra Metro was contracted by the ACT Government for the design, construction, operations, maintenance and financing of Stage 1 of Canberra's light rail system.

Decision on access application

9. On 3 December 2019, MPC advised Canberra Metro that it had identified 23 documents falling within the scope of the access application, and proposed to:

- give the FOI applicant partial access to 18 documents (documents 1-14, 19-21 and 23)

- refuse access to five documents (documents 15-18 and 22).
10. In making its decision, MPC found some of the information sought to be contrary to the public interest because the release of the information could reasonably be expected to prejudice:
- the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004* (HR Act) (Schedule 2, s2.2(a)(ii))
 - trade secrets, business affairs or research of an agency or person (Schedule 2, s2.2(a)(ix)).

Application for Ombudsman review

11. On 8 January 2020, Canberra Metro sought Ombudsman review of MPC's decision under s 73 of the FOI Act as it relates to their intention to provide the FOI Applicant with partial access to documents 1-14, 19-21 and 23.
12. On 28 February 2020, the Ombudsman's Office provided its preliminary view to Canberra Metro stating it is likely the ACT Ombudsman's delegate would confirm MPC's decision, and provided the opportunity for Canberra Metro to make further submissions.
13. On 6 March 2020, Canberra Metro notified the Ombudsman Office they were not making any further submissions, but wished to proceed with the Ombudsman review.
14. On 15 April 2020, the Ombudsman's Office provided its Draft Consideration to the parties, stating it is likely the ACT Ombudsman's delegate would confirm MPC's decision, and provided the opportunity for the parties to make further submissions.
15. On 29 April 2020, Canberra Metro notified the Ombudsman's Office they were not making any submissions in response to the Draft Consideration.
16. On 29 April 2020, MPC notified the Ombudsman's Office they were not making any submissions in response to the Draft Consideration, but noted the Draft Consideration confirmed their initial decision.

Scope of Ombudsman review

17. The information at issue in this Ombudsman review is the parts of documents 1-14, 19-21 and 23 that MPC is intending to disclose to the FOI applicant.

18. These documents relate to the construction of the Canberra Light Rail and can be categorised as follows:

- a number of Electrical Installation Accredited Audit Reports
- correspondence between MPC and the Independent Certifier regarding the identification, traceability and close out of defects identified by SEEG dated between 30 June 2017 and 22 November 2018.

19. The 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.

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

- the applicant's access application and review application
- the respondent's decision
- the FOI Act, in particular ss 7, 16, 17, 35, 72, and Schedule 2
- the respondent's FOI processing file relating to the access application
- an unedited copy of the information at issue
- legislation, including the HR Act
- relevant case law, including; *Canberra Metro Construction and Chief Minister, Treasury and Economic Development Directorate*¹, *Attorney-General's Department v Cockcroft*,² *Setschnijak and Department of Justice and Attorney-General*,³ and *Stewart and Sunwater Limited*⁴.

Relevant law

21. 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.

22. 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.

¹ [2019] ACTOFOI 8.

² (1986) 64 ALR 97 (Cockcroft) in relation to s 43(1)(c)(ii) of the *Freedom of Information Act 1982* (Cth).

³ (25 May 2012) [at 24].

⁴ [2012] QICmr 70 at [83] – cited in *Google Australia Pty Ltd and Wing Aviation Pty Ltd and Environment, Planning and Sustainable Development Directorate* [2019] ACTOFOI 14 at [81].

23. The public interest test set out in s 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
24. 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 being sought is contrary to the public interest.
25. Section 50 of the FOI Act applies if an access application is made for government information in a record containing contrary to the public interest information and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted.
26. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest.
27. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

The contentions of the parties

28. In its decision notice to the applicant, MPC stated:

I am cognisant that release of information under the Act may impact the future flow of information as individuals may be concerned that information they provide will be released more widely than they had initially intended it to be. I am not satisfied release of information contained in these documents could be reasonably expected to prejudice the flow of information to the police or other law enforcement or regulatory agency, or the agency's ability to obtain confidential information.

I am satisfied that some of the methods, approaches and calculations contained within Electrical Inspection Reports are sensitive business information. This information was compiled as part of Canberra Metro's design and commissioning of the light rail system. Accordingly, I consider release of the information would prejudice the business affairs of Canberra Metro.

...individuals are entitled to expect the personal information they have supplied as part of this process will be dealt with in a manner that protects their privacy. Considering the type of information to be withheld from release, I am satisfied that the factors in favour of release can still be met while protecting the personal information of the individuals involved ... Noting the pro-disclosure intent of the Act, I am satisfied that redacting only the information that I believe is not in the public interest to release accordance with section 50(2) of the Act will ensure the intent of the Act is met ...

29. In the application for Ombudsman review, Canberra Metro stated:

There are no public interest considerations in favour of disclosure of the Redacted Documents.

... disclosure could reasonably be expected to prejudice the flow of information to a regulatory agency

The information disclosed in the Redacted Document includes documents prepared by various parties on a confidential basis with the expectation that the information would remain in confidence.

The Redacted Document contains references to critical points in the CLR Projects infrastructure and their location. Disclosure of this information would increase the risk of security threats by giving malevolent actors an increased opportunity to sabotage critical infrastructure. Therefore, disclosure would increase the likelihood or prejudices the prevention of, preparedness against, response to or recovery from a public emergency...

30. I have considered these submissions below.

Considerations

31. I have carefully considered an unedited copy of the information at issue together with the information provided by Canberra Metro and MPC.

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

32. Neither party to this Ombudsman review has suggested the information sought contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the information not to be disclosed, disclosure of the information sought must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

Public interest test

33. To determine whether disclosure of information is, on balance, contrary to the public interest, s 17(1) of the FOI Act 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.

34. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.

Irrelevant factors

35. Canberra Metro states that disclosing the information at issue may result in a misunderstanding of the information, specifically that:

Most of the information in the documents could only be readily comprehensible by those with technical expertise and knowledge of the CLR Project.

The disclosure of this interim correspondence is not only unhelpful (in that it only reveals part of the picture) but it may have an adverse effect on candid correspondence passing between contractors and regulators on major infrastructure projects.

36. Under ss 17(2)(b) and (e) of the FOI Act, the fact that access to information could result in a person misinterpreting or misunderstanding the information is an irrelevant factor that the decision-maker will be unable to take into account. Accordingly, I have not taken this factor into account.
37. I note the other irrelevant factors listed in s 17(2) of the FOI Act and I am satisfied no other irrelevant factors arise in this review.

Factors favouring disclosure

38. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.
39. MPC did not specify which factors favouring disclosure they considered relevant when making their decision, simply stating that overall the weight of the factors in favour of disclosure outweighed the factors in favour of nondisclosure.
40. To apply the public interest test correctly under s 17 of the FOI Act, I note that decision-makers must identify any factors favouring disclosure, which must then be balanced against any identified factors favouring nondisclosure.
41. Canberra Metro states:
- In our view, none of the factors identified in section 2.1 can reasonably be applied to the [Major Projects] Information. The information is specific to the CLR Project and technical in nature, relating to certification undertaken by the ACT Utilities Regulator. Most of the information in the documents could only be readily comprehensible by those with technical expertise and knowledge of the CLR Project.
42. I disagree with Canberra Metro's assertion that 'none of the factors identified in section 2.1 can reasonable be applied'. I consider the release of the information at issue could reasonably be expected to:
- promote open discussion of public affairs and enhance the government's accountability (Schedule 2, 2.1(a)(i))

- contribute to positive and informed debate on important issues or matters of public interest (Schedule 2, 2.1(a)(ii))
 - reveal environmental or health risks or measures relating to public health and safety (Schedule 2, 2.1(a)(xi)).
43. The information at issue contains correspondence detailing actions relating to the electrical works of the Canberra Light Rail, which were required to be completed to comply with the requisite standards. I consider that releasing this information can reasonably be expected to assure the public that public health and safety measures, such as the electrical works component of the Canberra Light Rail, were completed according to requisite standards, and that actions that fell short of that standard were identified and completed to ensure compliance.
44. The information at issue contains a number of Electrical Installation Accredited Audit Reports (Audit Reports) relating to the construction of the Canberra Light Rail. I consider that releasing this information can reasonably be expected to provide assurance to the public that public health and safety measures, such as the electrical works component of the Canberra Light Rail, were accredited and met the requisite standards.
45. I also consider that the information at issue, relating to Audit Reports and ensuing electrical works, which was carried out in accordance with the requisite standards, could reasonably promote open discussion of public affairs and enhance the government's accountability by providing transparency about compliance processes. I also consider this information could reasonably contribute to positive and informed debate on the construction of the Canberra Light Rail, in particular, as construction moves into Stage 2A and Stage 2B.⁵
46. 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.⁶ This concept is promoted through the objects of the FOI Act,⁷ and so, I have applied considerable weight to these pro-disclosure factors.

⁵ <https://www.transport.act.gov.au/about-us/public-transport-options/light-rail/light-rail-network/Light-Rail-Network-Expansion> accessed on 6 May 2020.

⁶ See s 17 of the FOI Act.

⁷ See s 6(b) of the FOI Act.

Factors favouring nondisclosure

47. Of the factors favouring nondisclosure listed in Schedule 2, s 2.2(a), Canberra Metro originally identified four factors favouring nondisclosure, finding that disclosure of the information at issue could reasonably be expected to prejudice:

- the protection of an individual's right to privacy (Schedule 2, s2.2(a)(ii))
- security, law enforcement or public safety (Schedule 2, s 2.2(a)(iii))
- the flow of information to a regulatory agency (Schedule 2, s 2.2(a)(ix))
- trade secrets, business affairs or research of an agency. (Schedule 2, s 2.2(a)(xi)).

48. In its submission to the review, Canberra Metro indicated that three of the above factors continued to be relevant in relation to the remaining information at issue – with MPC having already redacted personal information from the documents to be released to the applicant, where it considered that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the HR Act.

49. I have discussed below in detail these three factors favouring nondisclosure.

Prejudice security, law enforcement or public safety

50. A factor favouring nondisclosure under Schedule 2, s 2.2(a)(iii) of the FOI Act is that disclosure of the information could reasonably be expected to prejudice security, law enforcement or public safety.

51. Canberra Metro states:

The Redacted Document contains references to critical points in the CLR Projects infrastructure and their location. Disclosure of this information would increase the risk of security threats by giving malevolent actors an increased opportunity to sabotage critical infrastructure. Therefore, disclosure would increase the likelihood or prejudices the prevention of, preparedness against, response to or recovery from a public emergency...

It is apparent from MPC's decision that the ACT Government does not share Canberra Metro's concerns about the potential security risks associated with releasing the information at issue.

53. MPC states:

The Reports outline the results of SEEG's audit of the Light Rail Project including the equipment audited, any identified defects, the documents reviewed and relevant comments. Any drawings, maps and photos had already been redacted by [Major Projects]. As a result, it is unclear how disclosure of any defects identified or the equipment audited could have a prejudicial impact.

54. The Ombudsman previously in *Canberra Metro Construction and Chief Minister, Treasury and Economic Development Directorate* (Canberra Metro Construction)⁸ considered the phrase 'reasonably be expected' and noted that it is an objective test, which was considered in *Attorney-General's Department v Cockcroft*⁹:

... the words 'could reasonably be expected to prejudice the future supply of information' were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous ... It is preferable to confine the inquiry to whether the expectation claimed was reasonably based.

55. Accordingly, the Ombudsman considers the words 'could reasonably be expected' should be given their ordinary meaning and the expectation must be reasonably based, likely and not merely speculative, conjectural or hypothetical.

56. In *Canberra Metro Construction*,¹⁰ which I consider to be relevant to the circumstances in this review, the Ombudsman took into account advice provided by the agency that:

... a majority of infrastructure of the light rail project could be seen by walking along the route. In addition, it was noted that whilst the information did provide details which could be used with people with relevant expertise to disrupt the Canberra Light Rail system, this would be only one of several ways that harm to the Light Rail system could occur. Moreover, it was noted that if an individual did want to disrupt or damage the Canberra Light Rail system, targeting electrical components is less likely than other methods of disruption...

57. I acknowledge Canberra Metro's concern for public safety, however, the submissions Canberra Metro has made in this review, in my view, do not demonstrate that the risk to the security of the Commonwealth or the Territory is reasonably based, likely, and not merely speculative, conjectural or hypothetical.

58. For the reason's discussed above, I consider the release of this information Based on the information before me, I am not satisfied that s 2.2(a)(iii) is a relevant factor for nondisclosure.

59. For the reason's discussed above, I am not satisfied that release of this information would prejudice the trade secrets, business affairs or research of Canberra Metro.

Prejudice the flow of information to a regulatory agency

⁸ [2019] ACTOFOI 8 at [88].

⁹ [1986] 64 ALR 97 per Bowen CJ and Beaumont J at [39] cited in *IJG and Department of Health (25 August 2010)* at [17].

¹⁰ [2019] ACTOFOI 8 at [57].

60. A factor favouring non-disclosure under Schedule 2, s 2.2(a)(ix) of the FOI Act is that disclosure of the information could reasonably be expected to prejudice the flow of information to the police or another law enforcement or regulatory agency.

61. Canberra Metro states:

In particular, the [Major Projects] Information contains correspondence between various parties regarding the identification, traceability and close out of electrical defects. What this discloses is a temporal disconformity with the relevant contractual documents and standards. It does not reveal the work being undertaken to rectify any alleged deficiencies in the works or otherwise to ensure the overall safety of the light rail networks electrical works. The disclosure of this interim correspondence is not only unhelpful (in that it reveals only part of the picture) but it may also have an adverse effect on candid correspondence passing between contractors and regulators on major infrastructure projects.

62. MPC states:

The flow of information to the regulatory agency and the agency's ability to obtain confidential information are essential for the operation of government. I am cognisant that release of information under the Act may impact the future flow of information as individuals may be concerned that information they provide will be released more widely than they had initially intended it to be.

I am not satisfied release of information contained in these documents could be reasonably expected to prejudice the flow of information to the police or other law enforcement or regulatory agency, or the agency's ability to obtain confidential information.

63. I acknowledge Canberra Metro's concern that release of this information may adversely affect correspondence between contractors and regulators, which could inhibit the flow of information to MPC in the future.

64. I note that it is also generally recognised that there is a strong public interest in protecting the free flow of information to regulatory agencies,¹¹ who often rely on the public to alert them to breaches of the law or regulatory schemes.

65. However, given this factor favouring nondisclosure reflects Parliament's intention to prevent harm to an agency, I consider if MPC, as the relevant agency, does not consider itself to be prejudiced by the release of the information at issue, then there is a high threshold for Canberra Metro to establish that the disclosure of this information would, in fact, prejudice the flow of information to MPC.

66. For the reason's discussed above, I consider the release of this information may have some impact on the future flow of information to Major Projects, however, I attribute minimal weight to this nondisclosure factor.

Prejudice trade secrets, business affairs or research of an agency

¹¹ [Setschniak and Department of Justice and Attorney-General \(25 May 2012\)](#) at [24].

67. A factor favouring non-disclosure under Schedule 2, s 2.2(a)(xi) of the FOI Act is that disclosure of the information could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person.

68. In determining whether, on balance, disclosure of information could reasonably be expected to prejudice trade secrets, business affairs or research, there is a requirement:

...that the particular prejudice or adverse effect... could reasonably be expected to flow from disclosure. This phrase requires an expectation that is reasonably based... it is not enough to simply assert that disclosure will result in some kind of adverse consequence.¹²

69. MPC has redacted some of the information at issue, stating:

I am satisfied that some of the methods, approaches and calculations contained within Electrical Inspection Reports are sensitive business information. This information was compiled as part of Canberra Metro's design and commissioning of the light rail system. Accordingly, I consider release of the information would prejudice the business affairs of Canberra Metro.

70. Canberra Metro states the remaining information should also be redacted because:

The information disclosed in the Redacted Document includes documents prepared by various parties on a confidential basis with the expectation that the information would remain in confidence. This is a consideration against public disclosure under section 2.2(a)(xi) of Schedule 2 of the FOI Act.

Some of this information was prepared by others in circumstances where it was not intended to be widely disseminated.

71. In relation to the remaining information at issue, MPC states:

Reports and the ACT Earthing Report—these reports are required to be completed by the ACT Utilities Technical Regulator (UTR). I accept these Reports contain information provided by [Metro] to the UTR. However, as these reports are required by law, the level of cooperation with the UTR is expected to remain the same given the mandatory compliance framework set up under the *Utilities (Technical Regulation) Act 2014* (ACT) and the applicable penalties. I consider it is in [Metro's] best interests to provide such information to ensure it meets its contractual and legal obligations under the relevant legislation.

Correspondence—the information is about a list of defects as identified by SEEG, with emails between Transport Canberra, the Independent Certifier's office and [Metro]. The content of these emails appear to be general in nature with nothing indicating that such correspondence was exchanged in confidence.

72. It is unclear in Canberra Metro's submissions how the provision of information could reasonably be expected to prejudice its trade secrets, business affairs or research. MPC has already redacted the information which it considered would prejudice the business affairs of Canberra Metro. While Canberra Metro has stated that some information was exchanged in confidence, it has not provided any relevant agreements or confidentiality deeds, nor demonstrated how release of this information would prejudice to its trade secrets, business affairs, or research.

¹² *Stewart and SunWater Limited [2012] QICmr 70* at [83] – cited in *Google Australia Pty Ltd and Wing Aviation Pty Ltd and Environment, Planning and Sustainable Development Directorate [2019] ACTOFOI 14* at [81].

73. For the reasons discussed above, I am not satisfied that release of this information would prejudice the trade secrets, business affairs, or research of Canberra Metro.

Balancing the factors

74. As I have identified public interest factors favouring disclosure and factors favouring nondisclosure, I am now required to consider the public interest balancing test as set out in s 17 of the FOI Act.

75. In this matter, I have identified the following three public interest factors apply, which favour disclosure of the information, being Schedule 2, ss 2.1(a)(viii), (xiii), and (xiv), and I have attributed considerable weight to these factors.

76. On the other side, I have identified the following one contrary to the public interest factor applies, which favour nondisclosure of the information, being Schedule 2, s 2.2(a)(ix), and I have attributed minimal weight to this factor.

77. I note that 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 consider 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.

78. The FOI Act also 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'.¹³

79. I am satisfied that in relation to the information at issue, on balance, the public interest factors favouring disclosure outweigh the public interest factor favouring nondisclosure of the information at issue. This is because, I have attributed minimal weight to the one factor favouring nondisclosure, whereas I have attributed considerable weight to the three factors favouring disclosure, and factored in the pro-disclosure bias in the FOI Act.

80. Therefore, on balance, I consider the public interest factors favouring disclosure outweigh the public interest factors favouring nondisclosure.

¹³ [Explanatory Statement, Freedom of Information Bill 2016.](#)

Conclusion

81. For the reasons set out above, I consider that the decision of the respondent, MPC, of 3 December 2019 to give access to the information at issue under s 35(1)(a) of the FOI Act should be **confirmed** under s 82(2)(a) of the FOI Act, with respect to the information at issue in this review.

Louise Macleod
Senior Assistant Ombudsman
6 May 2020