

Manteena Commercial Pty Ltd and Major Projects Canberra [2021] **ACTOFOI 9 (8 September 2021)**

Decision and reasons of Acting Senior Assistant Ombudsman Symone Andersen

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| Application number | AFOI-RR/21/10008 |
| Decision reference | [2021] ACTOFOI 9 |
| Applicant | Manteena Commercial Pty Ltd |
| Respondent | Major Projects Canberra |
| Decision date | 8 September 2021 |
| Catchwords | <i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – legal professional privilege – promote open discussion of public affairs and enhance government’s accountability – ensure effective oversight of expenditure of public funds – allow or assist inquiry into possible deficiency in the conduct or administration of an agency or public official – reveal the reason for a government decision and any background or contextual information that informed the decision – trade secrets, business affairs and research – competitive commercial activities of an agency |

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (ACT) (FOI Act)*. For the reasons set out in this notice, under s **82(2)(b)**, I **vary** the decision of Major Projects Canberra (**MPC**) dated 12 February 2021.

Background of Ombudsman review

2. On 18 November 2020, the applicant, Manteena Commercial Pty Ltd (**Manteena**) lodged an access application under s 30 of the FOI Act. The application sought access to:

In relation to the Campbell School Procurement...

- (a) The following final version documents relating to Manteena's expression of interest dated 27 August 2019, tender dated 23 January 2020 and best and final offer tender dated 5 May 2020:
 - (i) Correspondence... diary notes, file notes or other records of conversations... and minutes of meetings between any of the following final versions...
 - Major Projects Canberra and its staff including officers, employee, contractors and agents, including but not limited to members of the Tender Evaluation Team...
 - External organisations, consultants and contractors with which Major Projects Canberra and the ACT Education Directorate consulted or otherwise engaged;
 - (ii) Documents... including but not limited to briefs, de-briefs, evaluation reports, assessments, reviews, memoranda or the like prepared by the ACT Education Directorate and/or Major Projects Canberra
 - (b) Any documents... relating to the decision by... Major Projects Canberra to introduce the Best and Final Offer Request for Tender into the tender process.
 - (c) Any documents... relating to the recommendations of... Major Projects Canberra regarding the preferred tenderer...
3. I prepared a draft consideration outlining my preliminary view and provided this to the parties on 17 May 2021. My preliminary view was that the original decision should be varied.
 4. On 18 June 2021, MPC responded to my draft consideration. MPC agreed that the original decision should be varied but submitted that page 204 should be determined to be contrary to the public interest to disclose and that information in pages 437-441 is out of scope.
 5. MPC notified the competing tenderer of the review under s 76(2)(c) of the FOI Act. On 26 August 2021, the competing tenderer made submissions about the release of tender scores. On 2 September 2021 a notice under s 77 of the FOI Act was issued to the competing tenderer confirming a decision to allow them to participate in this review. Their submissions were considered accordingly.

Information at issue

6. The information at issue in this review is limited to information which the applicant contends MPC incorrectly decided to refuse access to. Most of the deletions made by MPC are not in contention.
7. This means the issue before me is whether the contentious deletions were decided correctly.
8. In reaching my final decision, I had regard to:
 - the applicant's application for Ombudsman review,

- MPC's decision letter,
- MPC's submissions in this review,
- the FOI Act, in particular Schedule 1, s 1.2 and Schedule 2, s 2.2(a)(xiii),
- section 12 of the *Human Rights Act 2004* (ACT) (Human Rights Act),
- section 118 of the *Evidence Act 2011* (ACT) (Evidence Act), and
- *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards Pty Ltd (Third Party)*.¹

Relevant law

9. Every person enjoys a right of access to government information.² However, the FOI Act permits refusal of access to information if disclosing the information would be contrary to the public interest.³
10. The onus of establishing that disclosure would be contrary to the public interest rests with the party seeking to prevent disclosure.⁴ In this case, that party is MPC.
11. 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 be contrary to the public interest under the test set out in section 17
12. Section 17 sets out a test for balancing public interest factors favouring disclosure and non-disclosure respectively. This balancing test must be used to determine whether disclosure would be contrary to the public interest.
13. Schedule 1 of the FOI Act lists categories of information that are taken to be contrary to the public interest to disclose, while Schedule 2 lists public interest factors that must be balanced to determine whether there is a basis for refusing access.

The contentions of the Parties

14. In MPC's decision notice, the Information Officer decided:

¹ (2002, L0004, 30 June 2003).

² Section 7 of the FOI Act.

³ Section 35(1)(c) of the FOI Act.

⁴ Section 72 of the FOI Act.

I... place significant weight on the rights of third party organisations to have their business affairs, trade secrets, and commercial interests protected, as well as the potential negative impact that could arise for MPC from the release of such information as those organisations may be less inclined to do business with MPC in the future. Therefore, I have decided to delete this information from the documents released to you.

Some records contain information that are working notes by individuals that were compiled as part of a panel decision process; however, they do not present the collective decision that was made by the panel. For example, the assessments by individual panel members of responses to the Request for Expression of Interest or Best and Final Offer processes, I have decided that these form part of the deliberative process that led to the panel's decision and that this outweighs the factor favouring disclosure for these records.

15. The applicant provided a list of deletions which it asserted were incorrectly decided on. These related to deletions made on the basis of Schedule 1, s 1.2 (legal professional privilege) and Schedule 2, s 2.2(a)(xiii) and, as MPC correctly identified in response to my draft consideration, Schedule 2, s 2.2(a)(xi).
16. MPC's response to my draft consideration reiterated the view that information deleted from page 204 should not be disclosed. MPC's position is:

[T]he disclosure of information in respect of the evaluative scores against the other competing tenderers could adversely affect the tenderers' business affairs through damage to its reputation. This may damage the third party's reputation publicly and within the industry. There may also be financial consequences for third parties as subcontractors may not want to be associated with that company if their reputation is tarnished or could affect them in the employment market.

The situation in respect of the business affairs of MPC (i.e. delivering infrastructure projects) is particularly pronounced in the current environment where the ACT is a small jurisdiction undertaking procurement activities within a strong market pipeline along the eastern seaboard. Releasing the evaluation scores of tenderers in the manner proposed in the draft consideration is likely to result in the ACT Government's procurement opportunities being perceived by national construction companies as less attractive compared to those opportunities in other jurisdictions. This may lead to less competition for infrastructure projects within the ACT and an increased risk of not achieving best value for money for the Territory (s 2.2(a)(xiii)) on major projects.

17. On 26 August 2021, the competing tenderer submitted that:
 - it would be concerned by release of the tender scores because of a lack of context

- the lack of context would mean that people may interpret the scoring of their tender as reflecting scoring of the company in some other respect, such as perceived quality
- an example of how this might happen could be the use of an example of a previous project which the assessors consider not to be well-selected or relevant, and
- the competing tenderer 'would need to carefully consider our participation in future Territory procurement processes'.

18. Consideration has been given to these submissions in the sections below.

Preliminary issue – scoping

19. MPC responded to my draft consideration by submitting that information in pages 437-441 is out of scope. The basis for this submission appears to be that information deleted from these pages relates to procurements at different schools. It interprets the application as being solely for information about the Campbell School Procurement.
20. The applicant agreed to this scope when contacted during the review, on the basis that the information does not relate to the Campbell School Procurement. Accordingly, the parties agree to the redaction of this information.

Considerations

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

21. MPC refused access to some of the information at issue on the basis that it was contrary to the public interest under Schedule 1, s 1.2 because it is information that would be privileged from production in a legal proceeding on the ground of legal professional privilege.
22. The applicant contended that information on pages 312, 313, 429, 430 and 499 (a duplicate of page 429) is information falling under Schedule 1, s 1.2 of the FOI Act.
23. To determine whether information would be privileged from production in a legal proceeding, I consulted s 118 of the Evidence Act, which states:

Evidence must not be presented, if, on objection by a client, the court finds that presenting the evidence would result in disclosure of–

- (a) A confidential communication made between the client and a lawyer; or
- (b) A confidential communication made between 2 or more lawyers acting for the client; or
- (c) The contents of confidential documents... prepared by the client, lawyer or someone else;

for the dominant purpose of the lawyer or 1 or more of the lawyers providing legal advice to the client.

24. The applicant submits that information redacted in the abovementioned pages is not a confidential communication of a nature included in s 118 and that the dominant purpose in each case was not the provision of legal advice.
25. In my draft consideration I said that I accept the applicant's submissions. The redacted information does not meet the requirements set out in s 118 of the Evidence Act. The communications do not appear to be, either, between a lawyer and client, or lawyers acting for the client nor does the dominant purpose appear to be, in any instance, legal advice. I note that the documents do not contain the dissemination limiting market (DLM), Sensitive: Legal and this lends weight to my conclusion that the information would not be privileged from production in a legal proceeding.
26. MPC did not make any submissions to contradict the view I expressed in my draft consideration. Accordingly, my decision is that access should now be given to the information that MPC decided to refuse access to on the basis of Schedule 1, s 1.2.

Public interest test

27. 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,
 - 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.

⁵ Section 17(1) of the FOI Act.

Irrelevant factors

28. Section 17(2) proscribes a number of considerations from being taken into account when deciding whether disclosure of information would be contrary to the public interest. In this review, MPC's response to the draft consideration submitted that:

A factor against the public interest to release this information is the maintenance of effective conduct of public affairs through free and frank expression of opinions. A tender evaluation panel should be free to openly discuss and deliberate on tender submissions and provide open, frank advice for the final recommendation. The information is used for internal business purposes to ensure value for money outcomes in a competitive environment, not designed to be a feedback mechanism for tenderers.

29. MPC cited the South Australian Ombudsman's determination in *Bill Cumpston and Department of Planning, Transport and Infrastructure* as authority in this regard.⁶

30. This authority and the line of reasoning it is said to support misses an important difference between the South Australian *Freedom of Information Act 1991* and the FOI Act of the ACT.

31. Section 3 of the South Australian legislation establishes that one of its objects is:

...conferring... a legally enforceable right to be given access to documents... subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy...

32. A finding that disclosure could 'inhibit frankness in the provision of advice from the public service' is an irrelevant factor under s 17(2)(e) of the FOI Act. Accordingly, I am not able to consider the impact that disclosure might have on the frankness and candour that panel members may or may not feel they are able to furnish their advice with. I have disregarded this consideration from my decision.

33. Additionally, the competing tenderer's submissions regarding the lack of context and potential for misinterpretation of the tender scores as reflective of a broader assessment of the company's work cannot be sustained under the FOI Act.

34. This is because s 17(2)(b) prevents me from considering whether the giving of access could result in misinterpretation or misunderstanding of the information. The Senior Assistant Ombudsman considered similar submissions in relation to business affairs in *Brindabella*

⁶ *Bill Cumpston and Department of Planning, Transport and Infrastructure* [2018] SAOmbFOI 12

Christian College and Education Directorate which were similarly in conflict with s 17(2)(b).⁷

In that case, the Senior Assistant Ombudsman observed that the reputational harm the business submitted may eventuate was dependent on the misinterpretation of misunderstanding of information. I consider this to be a parallel situation.

Factors favouring disclosure

35. Four factors favouring disclosure are relevant in this review. MPC's decision letter and the applicant's submissions are consistent with respect to these factors. I share the parties' position.

Disclosure log – public interest factors

36. In the course of the review, I noted that the information on page 204 relating to both Manteena and the competing tenderer's tender scores had been deemed to be 'unreasonable' to disclose on MPC's disclosure log under s 28(6).

37. I wrote to Manteena to clarify how disclosure could promote the public interest if information was to be provided only to Manteena and not published to the public at large. This was because I did not think it would be logical to find that the public interest in information would be advanced if the information was not actually disclosed to the public.

38. Manteena's response was:

Manteena's view is that we would be happy to have both parties weighted scores and comments released as it would appear to be material to the decision...

Manteena believe that disclosure is a necessary element as... public oversight of expenditure [cannot] be promoted if the information is not actually published.

39. I agree with this submission and I consider that the information at issue in this review is not 'unreasonable' to publish on the disclosure log except for the information which I accept is contrary to the public interest information.

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

⁷ *Brindabella Christian College and Education Directorate* [2020] ACTOFOI 23 at [27]-[31].

40. A reasonable expectation that information could promote open discussion of public affairs and enhance the government's accountability favours disclosure under the FOI Act.⁸

41. MPC's decision included finding that this is a relevant factor. I accept the position of the parties that it is a relevant factor in this review because the information at issue could enable members of the public to examine the fairness and efficacy of the tender process.

Ensure effective oversight of expenditure of public funds

42. A reasonable expectation that information could ensure effective oversight of expenditure of public funds favours disclosure under the FOI Act.⁹

43. MPC's decision included finding that this is a relevant factor. I accept the position of the parties that it is a relevant factor in this review because the information at issue could enable public scrutiny of the way public funds were managed in the tender process.

Allow or assist inquiry into possible deficiency in the conduct or administration of an agency or public official

44. A reasonable expectation that information could allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official favours disclosure under the FOI Act.¹⁰

45. MPC's decision included finding that this was a relevant factor. I accept the position of the parties that this is a relevant factor, because the information at issue could reasonably be expected to allow or assist inquiry into possible deficiencies in the tender process and the way that it was managed by MPC. Although I am not aware of any evidence of any deficiency in these circumstances, the factor promotes the general opportunity to inquire into 'possible' deficiencies. This reflects the public interest in scrutiny of public expenditure and transparency about the way public funds are managed. It is the general opportunity to inquire which is necessary for public detection of deficiency and ensuring the public that there is no deficiency is itself in the public interest.

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

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

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

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

46. A reasonable expectation that information could reveal the reason for a government decision and any background or contextual information that informed the decision favours disclosure under the FOI Act.¹¹
47. MPC's decision included a finding that this is a relevant factor. I accept the position of the parties that it is a relevant factor in this review, because the information at issue could reasonably be expected to reveal the reason why the ACT government decided the outcome of the tender process as it did and background and contextual information that informed the decision.

Factors favouring non-disclosure

48. Two factors favouring non-disclosure are relevant to this review.

Trade secrets, business affairs and research

49. A reasonable expectation that information could prejudice the trade secrets, business affairs and research of a person weighs against disclosure under the FOI Act.¹²
50. The term 'business affairs' means:
- the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs.¹³
51. Both MPC's submissions and those of the competing tenderer about the relevance of this factor refer both to MPC's business affairs and the business affairs of the competing tenderer.

MPC

52. MPC submits that disclosing the information at issue will affect 'the business affairs of MPC'. It is argued that 'the ACT Government's procurement opportunities [risk] being perceived by national construction companies as less attractive compared to those opportunities in other jurisdictions.'
53. The competing tenderer submitted that it would consider whether to participate in procurement processes in future if the tender scores on page 204 were released. However,

¹¹ Schedule 2, s 2.1(a)(viii) of the FOI Act.

¹² Schedule 2, s 2.2(a)(xi) of the FOI Act.

¹³ *Cockroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd* (1986) 64 ALR 97.

it is not clear that one company declining to participate in public works will prevent MPC from attracting quality tenders in future. Manteena's submission that its own information should be published on MPC's disclosure log means that I am presented with two different viewpoints from the two companies. I consider that Manteena's position is preferable, in light of the objects of the FOI Act.

54. It may or may not be that the ACT Government's procurement processes are transparent compared with other jurisdictions. The extent to which they are transparent is by design, legislated in the FOI Act and it is to this statute that I devote my attention.
55. Ultimately, I am not satisfied that private sector entities will in any large number decline to pursue commercially lucrative opportunities building public works because the ACT public has a right to observe transparently scored tender processes. Some individual companies may decide that public procurement processes are too onerous for any number of reasons. The publication of tender scores may be one such reason. Yet other companies may centre their operations on building public works. These are matters of business strategy which are best judged by responsible officers of individual companies. I am not however persuaded that there will be a shortage of businesses willing to submit tenders for the commercially lucrative opportunities offered in public procurement processes.

Competing tenderer

56. For the same reason, I do not accept that disclosing the competing tenderer's tender score can reasonably be expected to prejudice their business affairs.
57. I have noted that the information on page 204 is simply the tender scores. I am not satisfied that this information reveals enough about the competing tenderer (as opposed to their tender in this procurement) to conclude that it could reasonably be expected to prejudice their business affairs.
58. The competing tenderer made submissions, which I addressed above insofar as they relied on irrelevant factors.
59. Disregarding the irrelevant possibility that the tender scores may be misinterpreted or misunderstood, I do not accept that reputational harm could reasonably be expected to prejudice the competitor's business affairs flowing from the scores of a single tender process.

Competitive commercial activities of an agency

60. A reasonable expectation that information could prejudice the competitive commercial activities of an agency weighs against disclosure under the FOI Act.¹⁴

61. Information has a commercial value if:

- it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged (i.e. because it is important or essential to the profitability or viability of a continuing business operation, or a pending 'one-off' commercial transaction); or
- a genuine arms-length buyer is prepared to pay to obtain that information from that agency or person, such that the market value of the information would be destroyed or diminished if it could be obtained from a government agency which has possession of it.¹⁵

62. MPC redacted information on page 204 on the basis that it could reasonably be expected to prejudice MPC's competitive commercial activities. The information includes the name of the other party which submitted a tender and the scores each party's tender received. MPC's original decision was that disclosing this information could reasonably be expected to prejudice its competitive commercial activities *because* 'those organisations may be less inclined to do business with MPC in the future.' In my view, this is unreasonably speculative. I do not accept that the information is sufficiently sensitive that its disclosure could reasonably be expected to deter private sector entities from seeking commercially valuable opportunities.

63. The information MPC redacted on page 429 (duplicated on page 499) is commercially valuable because it compares the internal budgeting position of MPC with a tendered offer. I accept that disclosing this information could reasonably be expected to prejudice MPC's competitive commercial activities.

64. I considered the issue of whether the disclosure of the competing tenderer's tender scores on page 204 could reasonably be expected to prejudice MPC's business affairs above. For the same reasons I do not consider that it is applicable.

Balancing the factors

65. Taking all relevant factors, the FOI Act requires me to balance them and determine whether the public interest supports disclosure or not.

¹⁴ Schedule 2, s 2.2(a)(xiii) of the FOI Act.

¹⁵ *Wanless Wastecorp Pty Ltd and Caboolture Shire Council; JJ Richards Pty Ltd (Third Party)* (2002, L0004, 30 June 2003) at [45]-[46].

66. I consider that the two public interest factors favouring disclosure are generally applicable (promoting open discussion and enhancing government's accountability as well as allowing or assisting inquiry into possible deficiencies in public administration). I afford these factors medium weight. I consider that two public interest factors favouring disclosure (ensuring effective oversight of government funds and revealing the reason for a government decision) are specifically applicable. I afford these factors considerable weight. On the other hand, I decided to give considerable weight to the business affairs and competitive commercial activity factors vis-à-vis the information at issue on page 429. I was not persuaded that I should give weight to either factor with respect to information on page 204.
67. As I have noted information redacted in pages 437-441 is out of scope by agreement of the parties.
68. Balancing public interest factors is not merely quantifying the number of factors that apply. My decision must reflect consideration of the relative importance and weight of each factor. The weight given to factors depends on the effect that disclosing the information could reasonably be expected to have on the public interest.
69. The FOI Act has a pro-disclosure bias.¹⁶ The public interest test and weighing of factors is approached as scales 'laden in favour of disclosure.'¹⁷
70. In my view, the only information that MPC has shown is contrary to the public interest to disclose is that on page 429.

Conclusion

71. My decision is to **vary** MPC's decision, under s **82(2)(b)**.
72. The following information is contrary to the public interest information:
- information at issue on page 429 which could reasonably be expected to prejudice the competitive commercial activities of MPC
73. The remainder of the information at issue should be disclosed to the applicant.

Symone Andersen
Acting Senior Assistant Ombudsman
8 September 2021

¹⁶ Section 9 of the FOI Act.

¹⁷ [Explanatory Statement, Freedom of Information Bill 2016](#).