

***Master Builders Association of the ACT and Chief Minister,
Treasury and Economic Development Directorate [2018]
ACTOFOI 6 (2 November 2018)***

**Decision and reasons for decision of
Senior Assistant Ombudsman, Paul Pfitzner**

Application Number:	AFOI-RR/18/10022
Decision Reference:	[2018] ACTOFOI 6
Applicant:	Master Builders Association of the ACT
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Decision Date:	2 November 2018
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – third party review applicant – deciding access – whether disclosure of information is contrary to the public interest – right to privacy

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. Under s 82(1)(a) of the FOI Act, I confirm the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 20 July 2018.

Scope and background of Ombudsman review

3. On 31 May 2018, an applicant (the FOI applicant) applied to CMTEDD for:
[D]ocuments relating to Skills Canberra's *Women in Trades* policy, grants program and grants selection panel for the period from 1 March 2018 to [31 May 2018] ...
4. In that application, the FOI Applicant detailed specific documents relating to the policy, including reference to the 'application by the Master Builders Association ACT Branch'.
5. On 25 June 2018, CMTEDD undertook third party consultation with the Master Builders Association of the ACT (MBA) under s 38 of the FOI Act in relation to 52 pages of documents.¹
6. On 16 July 2018, MBA responded to CMTEDD objecting to disclosure of all 52 pages of documents on the basis that the documents included trade secrets, business affairs and research of MBA,² and also on the basis that they contain personal information.³
7. On 20 July 2018, CMTEDD advised the FOI Applicant that it had identified 40 documents falling within the scope of the access application. CMTEDD decided to give the FOI applicant access to 19 documents in full, 16 documents in part and refused access to the remaining five documents. In making its decision, CMTEDD relied on disclosure prejudicing:
 - the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004* (Schedule 2, s 2.2(a)(ii)), and
 - trade secrets, business affairs or research of an agency or person (Schedule 2, s 2.2(a)(xi)).
8. On 21 August 2018 and under s 73 of the FOI Act, MBA applied for Ombudsman review of CMTEDD's decision to give the FOI applicant access to a partial sentence in a letter of support (the letter) contained in MBA's submission to the ACT Women in Trades Grant Program. MBA considers that disclosure of the partial sentence would be contrary to the public interest as it would identify the capacity in which the author of the letter (the author) has written, and which would likely enable the author's identity to be determined.

¹ Section 38 provides that where disclosure of information applied for may reasonably be expected to be of concern to a relevant third party, the agency must take reasonable steps to consult with the relevant third party before deciding to give access to the information.

² A public interest factor favouring nondisclosure in Schedule 2, at s 2.2(a)(xi).

³ A public interest factor favouring nondisclosure in Schedule 2, at s 2.2(a)(ii).

9. I provided my preliminary views about CMTEDD's decision to the parties in my draft consideration dated 22 October 2018. CMTEDD accepted my draft consideration.⁴ MBA did not respond.
10. The issue to be decided in this Ombudsman review is whether giving the FOI applicant access to the partial sentence (the information at issue) would be contrary to the public interest, as MBA contends.
11. In making my draft consideration, I have had regard to:
 - MBA's application for Ombudsman review
 - CMTEDD's decision on the FOI applicant's access application
 - the FOI Act, in particular ss 6, 7, 9, 16, 17, 35, 72 and Schedule 2
 - the *Human Rights Act 2004* (Human Rights Act), in particular s 12
 - CMTEDD's FOI processing file relating to the access application, in particular an unedited copy of the letter
 - relevant case law, in particular an earlier decision of the ACT Ombudsman in *Alistair Coe and Health Directorate*,⁵ and
 - the submissions of the parties.

Relevant law

12. 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.
13. Section 9 of the FOI Act expressly provides that it is the intention of the Legislative Assembly that the FOI Act be administered with a pro-disclosure bias and discretions given under the FOI Act should be exercised as far as possible in favour of disclosing government information.
14. Section 35(1) of the FOI Act provides for how an access application can be decided, including by deciding to give access to the information (s 35(1)(a)) or by refusing to give access to the information because it is contrary to the public interest information (s 35(1)(c)).

⁴ On 22 October 2018.

⁵ [2018] ACTOFOI 4.

15. Contrary to the public interest information is defined in s 16 as —
information—
- (a) that is taken to be contrary to the public interest to disclose under schedule 1; or
 - (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 set out in s 17 involves a process of balancing the public interest factors favouring disclosure against the public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
17. The FOI Act defines ‘personal information’ as:
information or an opinion (including information forming part of a database), whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.⁶
18. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of the government information has the onus of establishing the information is contrary to the public interest information.
19. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest. It contains an explicit recognition of the public interest in protecting human rights, including the right to privacy.⁷

The contentions of the parties

20. In response to CMTEDD’s consultation notice, MBA had submitted:

The Documents include letters of recommendation and/or support from industry stakeholders and it may not be appropriate for these letters to be released to the public.

....

The release of the Documents would prejudice the protection of an individual’s right to privacy under the *Human Rights Act 2004*. The Documents contain detailed personal information, including but not limited to qualifications and work experience, of key MBA personnel and former apprentices. This information was provided for the purposes of the Women in Trade grant application process and no

⁶ See Dictionary to the FOI Act. The definition of ‘personal information’ excludes some information of an officer of an agency, or a staff member of a Minister.

⁷ FOI Act Schedule 2, s 2.2(a)(ii). See also, Explanatory Statement, Freedom of Information Bill 2016 (ACT) 6.

authorization has been provided by staff for that information to be promulgated outside of the ACT Government.

21. In its application for review, MBA said:

[T]he author of a particular document is identified in the opening paragraph, despite the signature line and letterhead being redacted pursuant to Schedule 2 s 2(a)(ii) of the Act. Any identifying features on that letter should be removed pursuant to s 2 (a)(ii) of the Act.

Considerations

22. During the course of this Ombudsman review, CMTEDD submitted that it had previously contacted the FOI applicant and sought agreement to remove the information at issue, but the FOI applicant did not agree to that proposal. Therefore, it is clear the FOI applicant seeks access to the information at issue, and a decision refusing access to the information at issue would be adverse to the FOI applicant.
23. MBA is seeking to prevent disclosure of the information at issue, on the basis it would enable the identification of an MBA employee. The information at issue does not include the employee's name, although it would indicate their role within the organisation, from which their name may be able to be determined.
24. CMTEDD has decided that releasing the names of MBA employees would be contrary to the public interest. However, it did not find the information at issue, which identified the capacity in which the person authored the letter, to be contrary to the public interest to disclose.
25. In this Ombudsman review, MBA, as the party objecting to disclosure, bears the onus of establishing that the information at issue would be contrary to the public interest to disclose.⁸

⁸ FOI Act s 72. Noting that contrary to the public interest information is information that is contrary to the public interest to disclose (ss 16(a)-(b)).

26. As discussed above,⁹ the information at issue is a part sentence of the letter that if disclosed, according to MBA, would identify an MBA employee. The letter comprises:

To whom it may concern,

[The information at issue], I fully support the submission by the organisation for Women in Trades Grant Program.

I have been involved with MBA ACT for the past 10 years. In that time I have observed the increase in recruitment and training of women in construction by the organisation. A statistic that I am proud to attest is MBA training 50% of female apprentices in the Certificate III in Carpentry in the ACT.

This is resulted from the high level of support of MBA trainers, ongoing contact and placement with suitable employers by the MBA Field Officers and educating MBA Host Employers of the many benefits a female can bring to the workplace.

My involvement in the program would be to mentor and coach aspiring females to enter the industry and join MBA through employment opportunities. I am able to speak first hand of my own experiences of the industry and provide advice on how to overcome obstacles and challenges that are presented.

27. I now need to consider the tests in the FOI Act to decide whether the information at issue is contrary to the public interest information.

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

28. MBA does not contend that the information at issue is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the information at issue to be contrary to the public interest information, disclosure of the information at issue must, on balance, be contrary to the public interest under the test set out in s 17.

Public interest test

29. To determine whether information is, on balance, contrary to the public interest to disclose, 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;

⁹ At [8].

- (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.

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

Irrelevant factors

31. I have noted the irrelevant factors listed in s 17(2) and am satisfied that I have not considered any irrelevant factors in this case.

Factors favouring disclosure

32. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. Of the factors favouring disclosure listed in Schedule 2, s 2.1, CMTEDD found that two are relevant to the FOI applicant's access application. CMTEDD found disclosure could reasonably be expected to:

- 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,¹⁰ and
- reveal the reason for a government decision and any background or contextual information that informed the decision.¹¹

33. Given the scope of this Ombudsman review is limited to only the information at issue, and not the broader 40 documents that fell within the scope of the original access application, I consider that neither of the public interest factors favouring disclosure identified by CMTEDD apply in this Ombudsman review.

34. However, 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.¹² This concept is promoted through the objects of the FOI Act.¹³

¹⁰ Schedule 2, s 2.1(a)(iii).

¹¹ Schedule 2, s 2.1(a)(viii).

¹² See s 9 of the FOI Act.

¹³ See s 6(b) of the FOI Act.

35. Although not a factor identified by CMTEDD, I give some weight to disclosure promoting the objects of the FOI Act as a public interest factor favouring disclosure in this case.
36. In particular, I consider that disclosure in this case would facilitate and promote, and at the lowest reasonable cost, the disclosure of the maximum amount of government information.¹⁴

Factors favouring nondisclosure

37. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure.
38. The MBA's submissions do not specifically address the information at issue. Rather, in response to our Office's request for submissions addressing the public interest harm that could reasonably be expected to occur from disclosure of the information at issue, MBA submitted a copy of its response to CMTEDD's request for third party consultation. As I discussed above,¹⁵ MBA's response concerns all 52 pages of documents that MBA was consulted on, not merely the information at issue.
39. However, on a fair reading of MBA's application for review and its request consultation response, I consider that MBA contends that the information at issue is the personal information of the author of the letter, and disclosure of the information could reasonably be expected to prejudice the author's right to privacy.
40. Of the public interest factors favouring nondisclosure contained in Schedule 2, s 2.2, I consider that one is relevant in this case. Disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act.¹⁶
41. In the ACT Ombudsman review case of *Alistair Coe and Health Directorate*,¹⁷ the Ombudsman discussed that an individual's right to privacy extends beyond the protection of the right to privacy under the Human Rights Act,¹⁸ and prejudice to a general right to privacy can be a public interest factor in favour of nondisclosure.

¹⁴ The lowest reasonable cost objective of the FOI Act, s 6(f).

¹⁵ At [5].

¹⁶ Schedule 2, s 2.2(a)(ii).

¹⁷ [2018] ACTOFOI 4.

¹⁸ Being the 'right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and not to have one's reputation unlawfully attacked'. See: *Alistair Coe and Health Directorate* [2018] ACTOFOI 4 [43]—[44].

42. Therefore, in this Ombudsman review, I take the broader approach to the public interest harm of prejudice to an individual's right to privacy.
43. The FOI Act does not define prejudice. The Macquarie Dictionary definition of prejudice requires:
- disadvantage resulting from some judgement or action of another, and
 - resulting injury or detriment.¹⁹
44. In this Ombudsman review, MBA has not explained what disadvantage, injury or detriment, if any, could reasonably be expected to occur from associating the views expressed in the letter with the author, particularly considering in writing the letter they have associated themselves with the MBA. Further, it is not apparent to me that disclosure could reasonably be expected to result in any disadvantage, injury or detriment. Accordingly, I am satisfied that MBA has not discharged its onus in this regard.
45. For these reasons, I give the protection from prejudice of the author's right to privacy little weight as a public interest factor favouring nondisclosure in this case.

Balancing the factors

46. The public interest test requires that information be disclosed unless disclosure of the information would, on balance, be contrary to the public interest. Therefore, the question in this case is not whether it is in the public interest to disclose the information at issue. Rather, whether giving the FOI applicant access to the information at issue *would be contrary* to the public interest.
47. Further, given the express pro-disclosure bias in the FOI Act, this balancing exercise does not begin with the scales in equilibrium, but pre-weighted in favour of disclosure.²⁰ In the absence of any demonstrable harm to the public interest occurring from the release of the information, the information should be released.²¹
48. In this case, although there is only limited benefit to the public interest in giving access to the information at issue, I am satisfied that there is no demonstrable harm to the public interest in giving the FOI applicant access. Therefore, considering the express pro-disclosure bias and the

¹⁹ Macquarie Dictionary, fourth edition.

²⁰ *McKinnon v Secretary, Department of Treasury* [2006] HA 45; (2006) 228 CLR 423 at [19] per Kirby J.

²¹ Explanatory Statement, Freedom of Information Bill 2016 (ACT) 13. See also FOI Act s 17(1)(e).

objects of the FOI Act, I am satisfied that, on balance, disclosure of the information at issue would not be contrary to the public interest.

Conclusion

49. The information at issue is not contrary to the public interest information for the purposes of s 16 of the FOI Act.

50. I confirm CMTEDD's decision to give the FOI applicant access to the information at issue.

Paul Pfitzner
Senior Assistant Ombudsman
2 November 2018