

***Community and Public Sector Union and Chief Minister, Treasury and Economic Development Directorate [2018] ACTOFOI 7
(14 November 2018)***

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

Application Number:	AFOI-RR/18/10018
Decision Reference:	[2018] ACTOFOI 7
Applicant:	Community and Public Sector Union
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Decision Date:	14 November 2018
Catchwords:	<i>Freedom of Information Act 2016</i> (ACT) – deciding access – whether disclosure of information is contrary to the public interest – prejudice to an ongoing investigation – reasonable steps taken to identify information

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016* (FOI Act).
2. Under s 82(1)(c) of the FOI Act, I set aside the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 3 August 2018, and substitute it with my decision that the incident report does not comprise contrary to the public interest information.
3. In coming to this view, I note that the Community and Public Sector Union (CPSU) is not seeking access to any personal information of the person to which the incident relates, or any personal information of any witnesses to the incident.

4. CMTEDD is now required to give the CPSU access to a copy of the incident report, edited under s 50 to delete any personal information of the person to which the incident relates, and any personal information of witnesses.

Scope and background of Ombudsman review

5. On 2 July 2018, the CPSU applied to CMTEDD for access to:
 - all RiskMan incident reports filed by Access Canberra employees for a particular requested time period
 - all WorkSafe ACT (Worksafe) and Access Canberra investigation reports into matters relating to the RiskMan reports filed by employees of Access Canberra, and
 - all emails between WorkSafe and Access Canberra in relation to RiskMan reports filed by Access Canberra employees.
6. On 3 August 2018, CMTEDD advised the applicant that it had identified six documents falling within the scope of the access application. CMTEDD decided to give the CPSU access to two documents in full and to the remaining four documents in part. In making its decision, CMTEDD relied on the following public interest considerations in the FOI Act:
 - prejudice to an ongoing investigation (Schedule 1, s 1.14(1)(a)), and
 - personal privacy (Schedule 2, s 2.2(a)(ii)).
7. On 7 August 2018, the applicant applied under s 73 of the FOI Act for Ombudsman review of CMTEDD's decision as it relates to a particular Worksafe investigation, incident #86908 (the incident).
8. On 7 August 2018, the Ombudsman's Office (the Office) asked CMTEDD to provide a copy of its file relating to the access application and the incident.
9. On 15 August 2018, Worksafe delivered a package of documents to the Office. That package contained the incident report and associated documents from the date of the incident (8 August 2017), and a package of Standard Operating Procedure documents and Work Method Statements. It did not, however, contain any documents relating to a WorkSafe investigation into the incident.
10. On 24 August 2018, the Ombudsman issued a direction to CMTEDD under s 80(2) of the FOI Act requiring it to conduct further searches for all documents and other information relating to the incident.

11. On 3 September 2018, CMTEDD advised that an investigation into the incident has not commenced, but submitted that disclosure could prejudice the outcome of a potential future investigation.
12. On 4 September 2018, CPSU queried whether there are other related documents, such as a response to the incident report.
13. On 11 September 2018, CMTEDD advised that there are no further relevant documents.
14. As a preliminary issue, while noting that the scope of an access application should be interpreted broadly,¹ I consider that the Standard Operating Procedure documents and Work Method Statements that WorkSafe has provided to the Office are outside the scope of the access application, as they relate to broader workplace methods and procedures and not to any particular incident. Information not relating to any particular incident could not reasonably be taken to be comprised within the scope of the access application.
15. On 11 September 2018, CPSU confirmed that it is not seeking access to the personal information of the person to which the incident relates, or of any witnesses to the incident.
16. I provided my preliminary views about CMTEDD's decision to the parties in my draft consideration dated 10 October 2018. The applicant did not respond to my draft consideration, CMTEDD responded with no comments.
17. Accordingly, the issues to be decided in this Ombudsman review are whether:
 - giving the CPSU access to the incident report would prejudice a WorkSafe investigation into the incident, and the incident report is therefore taken to be contrary to the public interest to disclose, as CMTEDD found, and
 - CMTEDD has taken reasonable steps to identify all the investigation information sought by CPSU, as it is required under s 34 of the FOI Act.
18. In making my decision, I have had regard to:
 - the CPSU's application for Ombudsman review
 - CMTEDD's decision

¹ An access application should be interpreted to include information or documents that can 'reasonably be taken to be comprised' within the applicant's access application. See: *Re Dr Terence Gould and Director-General of Health* [1985] AATA 63.

- the FOI Act, in particular ss 7, 16, 34, 35, 50, 72, 92 and Schedule 1
- the information at issue, being the incident report
- the submissions of the parties, and
- relevant case law, in particular *Abbot Point Bulkcoal Pty Ltd and Department of Environment and Science; Mackay Conservation Group Inc (Third Party)*.²

Relevant law

19. 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.
20. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information because it is contrary to the public interest information.
21. 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.
22. 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 the contrary to the public interest information has been deleted.
23. Section 72 of the FOI Act provides that a person seeking to prevent disclosure of government information has the onus of establishing that the information is contrary to the public interest information.
24. Information that is taken to be contrary to the public interest to disclose includes, under Schedule 1, s 1.14 (1)(a):

Information the disclosure of which would, or could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case.

² [2018] QICmr 26.

The contentions of the parties

25. CMTEDD found that the incident report contains information taken to be contrary to the public interest to disclose under Schedule 1, s 1.14(1)(a).

26. In its reasons for decision, CMTEDD said:

The information [CPSU has] requested forms part of the material being considered by WorkSafe ACT in the investigation of the incident 86908 ... release of the information at this time could prejudice the investigation of the matter in accordance with schedule 1, section 1.14(1)(a) of the Act.

27. CMTEDD submits:

[R]elease of information about this incident while it is subject to an ongoing investigation is reasonably likely to prejudice the investigation into a possible contravention of the *Work Health and Safety Act 2011*. In accordance with schedule 1.14(1)(a) of the *Freedom of Information Act 2016* this information should not be released.

Further supporting withholding this information from disclosure, CMTEDD submits that any action which may impact the WorkSafe Commissioner's ability to pursue convictions or sanctions against individuals or corporations if deemed appropriate are against the public interest as it will impact the public's confidence in the Regulator and may undermine the objectives of the Act.

28. While CMTEDD initially referred to an investigation into the incident as 'on-going', it subsequently acknowledged that an investigation had not commenced.³ CMTEDD submits an explanation from the WorkSafe Commissioner:

We use 'on-going' to describe an investigation that is not completed rather than as an indicator that is actively being progressed. *[sic]* At the time of the incident, WorkSafe ensured that an appropriate management response took place. I reiterate our concern at the release of information on this matter as the investigation has yet to be undertaken *[sic]* and the release of material could prejudice any outcome.

29. Therefore, according to CMTEDD's submissions, it is apparent that there are no records, such as letters, emails, case notes or similar, to evidence that WorkSafe has given any consideration or thought to conducting an investigation into the incident.

³ As I discussed above at [11].

Considerations

Contrary to the public interest information

30. For the incident report to be taken to be contrary to the public interest to disclose under Schedule 1, s 1.14(1)(a), as CMTEDD has found, disclosure of the incident report must reasonably be expected to prejudice a WorkSafe investigation.
31. The phrase ‘could reasonably be expected to’ was considered in the Queensland Information Commissioner case of *Abbot Point Bulkcoal Pty Ltd and Department of Environment and Science; Mackay Conservation Group Inc (Third Party)*, where it was considered that it is a:
 - call for a decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible or merely speculative, and expectations that are reasonably based: that is, expectations for the occurrence of which real and substantial grounds exist.⁴
32. In this case, CMTEDD contends that disclosure of the incident report could ‘prejudice the investigation into a possible contravention of the *Work Health and Safety Act 2011*.’ However, given the WorkSafe Commissioner’s acknowledgement that no investigation has commenced and the time that has passed from the date of the incident, I consider CMTEDD’s contentions of prejudice to an investigation to be ‘merely speculative’ of some future, indeterminate possibility.⁵
33. Further, in an Ombudsman review, it is the person seeking to prevent disclosure that bears the onus of establishing that the information being sought is contrary to the public interest information. In this case, I am not satisfied CMTEDD has discharged its onus of establishing that the incident report comprises contrary to the public interest information.

⁴ [2018] QICmr 26 at [18], citing *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at [62]-[63].

⁵ *Abbot Point Bulkcoal Pty Ltd and Department of Environment and Science; Mackay Conservation Group Inc (Third Party)* [2018] QICmr 26 at [18], citing *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at [62]-[63].

Adequacy of searches

34. As I discussed above,⁶ CPSU queries whether there are documents related to the incident that have not been identified by CMTEDD.
35. The FOI Act requires that the agency or Minister must take ‘reasonable steps’ to identify all the government information within the scope of the access application (s 34) before making a decision that it does not hold the information sought (s 35(1)(b)).⁷
36. The FOI Act is silent on what constitutes ‘reasonable steps’. The meaning of ‘reasonable’, in the context of searches for documents sought under FOI has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose.⁸
37. What amounts to reasonable steps may vary in different circumstances. It would, however, include a search of electronic records and a manual search of physical records, where applicable.⁹
38. In considering whether reasonable steps have been taken to identify all relevant information, some relevant factors include:
- the administrative arrangements of government
 - the agency structure
 - the agency’s functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - the agency’s practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s; and
 - the nature of the government activity the request relates to.¹⁰

⁶ At [12].

⁷ See: Explanatory Statement, Freedom of Information Bill 2016 (ACT) 23, citing *Nash and Queensland Police Service* [2012] QICmr 45 at [15]-[16].

⁸ Considered by the Administrative Appeal Tribunal in relation to s 24A of the *Freedom of Information Act 1982* (Cth) in the decision of *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2015] AATA 770 at [19], citing the earlier case of *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138 at [19].

⁹ See: Explanatory Statement, Freedom of Information Bill 2016 (ACT) 23.

¹⁰ *Ibid*; *Nash and Queensland Police Service* [2012] QICmr 45 at [14]-[16]; *PDE and the University of Queensland* [2009] QICmr 7 at [37].

39. In response to a statutory direction to conduct further searches under s 80, CMTEDD submits that it conducted additional searches, including requesting further information from the Work Safety Commissioner. It was then that the WorkSafe Commissioner informed CMTEDD that an investigation has not been conducted, therefore no investigation material has been created.
40. In response to further enquiries from the Office, CMTEDD submits that the WorkSafe Commissioner advises that there are 'no further documents or material in relation to this request that has not already been supplied'.
41. Given the agency structure and the nature and recent age of the information sought, I accept that the WorkSafe Commissioner would know whether there is a WorkSafe investigation, and accordingly, whether documents relating to an investigation would exist.
42. I am satisfied that there are no documents relating to an investigation, particularly as the WorkSafe Commissioner has advised there is no, and has not been any investigation.
43. Therefore, with consideration to the factors listed above at [38], I am satisfied that CMTEDD has taken reasonable steps to identify all of the government information within the scope of the access application, as it is required under s 34 of the FOI Act, and all relevant information has been provided by WorkSafe.

Conclusion

44. The incident report does not comprise contrary to the public interest information for the purposes of s 16 of the FOI Act.
45. I am satisfied that CMTEDD has taken reasonable steps to identify all government information within the scope of the CPSU's access application.
46. CMTEDD must now prepare a copy of the incident report, with the personal information of the person to which the incident relates, or any personal information of any witnesses to the incident deleted in accordance with s 50 of the FOI Act and provide the edited copy to the CPSU.

Paul Pfitzner
Senior Assistant Ombudsman
14 November 2018