

Perpetual Corporate Trust and Chief Minister, Treasury and Economic Development Directorate [2018] ACTOFOI 10 (17 December 2018)

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

Application Number:	AFOI-RR/18/10024
Decision Reference:	[2018] ACTOFOI 10
Applicant:	Perpetual Corporate Trust Ltd
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Decision Date:	17 December 2018
Catchwords:	<i>Freedom of Information Act 2016</i> (ACT) – deciding access – whether disclosure of information is contrary to the public interest – whether disclosure is prohibited under another law

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016* (the FOI Act).
2. Under s 82(1)(a) of the FOI Act, I confirm the decision of Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 24 August 2018.

Scope and background of Ombudsman review

3. Perpetual Corporate Trust Ltd (the applicant) is a leaseholder of land in Parkes, ACT (the land).
4. On 2 August 2018, the applicant applied to CMTEDD for access to various documents relating to the value of the land.
5. On 24 August 2018, CMTEDD¹ advised the applicant that it had identified 11 documents falling within the scope of the access application.² It decided to give the applicant access to seven documents in full, two documents in part and refused access to the remaining two documents. In making its decision, CMTEDD decided that four documents contain information that is taken to be contrary to the public interest to disclose as disclosure is prohibited by a secrecy provision of a law (Schedule 1, s 1.3(6) of the FOI Act).
6. On 10 September 2018, the applicant applied for Ombudsman review of CMTEDD's decision under s 73 of the FOI Act.
7. The applicant seeks access to all of the information that CMTEDD found contrary to the public interest to disclose (the information sought).
8. I provided my preliminary views about CMTEDD's decision to the parties in my draft consideration dated 14 November 2018. Neither the applicant nor CMTEDD provided any further comments or submissions in response to my draft consideration.
9. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information sought would be contrary to the public interest, as CMTEDD found.
10. In making my draft consideration, I have had regard to:
 - the applicant's application for Ombudsman review
 - CMTEDD's decision
 - the FOI Act, in particular ss 7, 16, 35 and Schedule 1
 - the ACT *Taxation Administration Act 1999* (Tax Act), in particular ss 95, 96 and 97
 - an unedited copy of the information sought, and
 - the submissions of the parties.

¹ The decision was made by the Information Officer of the ACT Revenue Office of CMTEDD.

² Identified on CMTEDD's schedule of documents as documents/ref 1 to 11.

Relevant law

11. 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.
12. 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.
13. 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.
14. Information that is taken to be contrary to the public interest to disclose under Schedule 1 includes ‘any other information the disclosure of which is prohibited by a secrecy provision of a law’.³
15. A provision of a law is a secrecy provision for the purposes of the FOI Act if it —
 - (a) applies to information obtained in the exercise of a function under the law; and
 - (b) prohibits people mentioned in the provision from disclosing the information, whether the prohibition is absolute or subject to stated exceptions or qualifications.⁴
16. Section 95(2) of the Tax Act relevantly provides:

A person who is or has been a tax officer must not disclose any information obtained under or in relation to the administration of a tax law, except as permitted by this part.
17. Section 96(1) of the Tax Act provides:

The commissioner may disclose information obtained under or in relation to the administration of a tax law that does not and is not likely to

 - (a) directly or indirectly identify a particular taxpayer; or
 - (b) disclose matters about the personal affairs of a particular taxpayer.
18. ‘Taxpayer’ means a person who has been assessed as liable to pay an amount of tax, who has paid an amount of tax or who is liable or may be liable to pay tax.⁵

³ Schedule 1, s 1.3(6).

⁴ Schedule 1, s 1.3(7).

⁵ See Dictionary to the Tax Act.

19. Section 97 of the Tax Act relevantly provides:

A tax officer may disclose information obtained under or in relation to the administration of a tax law—

...

- (b) in connection with the the administration or execution of a tax law (including for the purpose of any legal proceeding arising out of a tax law or a report of any such proceeding)...

The contentions of the parties

20. In its reasons for decision, CMTEDD said:

Division 9.4 of the *Taxation Administration Act 1999* contains a secrecy provision as defined in schedule 1 s 1.3(6) and schedule 1 s1.3 (7) of the FOI Act.

Any information that falls within the meaning of ‘information obtained under or in relation to the administration of a tax law’ (“taxpayer information”) in section 95(2) of the *Taxation Administration Act 1999* is prohibited by law from disclosure. Sections 96 and 97 allow for disclosure of taxpayer information in certain circumstances, however, I am satisfied that none of these circumstances apply in this instance...

21. The applicant contends that s 97(b) of the Tax Act operates to permit the disclosure of the information sought:

- The disclosure of the documents would be in connection with the administration or execution of a tax law (including for the purpose of any legal proceeding arising out of a tax law or a report of any such proceeding).
- This is because the information sought was relied upon in making the Rates Assessment (which is made under a tax law) and that the Rates Assessment is presently subject to an objection process (which is also under a tax law).
- The documents refused in the decision are centrally relevant to the Rates Assessment, and it requires the documents to consider the valuation undertaken by the ACT Valuation Office as a part of the objection process.

22. The applicant also contends that disclosure ‘would be in the administration of the tax law because it would discharge, in relation to these documents, the Secretary’s obligation to afford procedural fairness in the administration of tax law.’

23. In response to the applicant's contentions, CMTEDD submits that the permitted disclosures under s 97(b) of the Tax Act are discretionary, and in refusing access to the information sought, CMTEDD had afforded greater weight to maintaining taxpayer confidentiality.
24. CMTEDD also outlined the objection process that would provide the applicant with an independent review of the valuation and a written statement of reasons, with an option to further appeal to the ACT Civil and Administrative Tribunal (ACAT). I note that those options remain open to the applicant.

Considerations

25. I have examined an unedited copy of information sought. It comprises the specific addresses, sale dates, sale prices, and other details of various pieces of land within the ACT, and its development prospects.

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

26. For the information sought to be taken to be contrary to the public interest to disclose under Schedule 1, s 1.3(6), as CMTEDD has found, disclosure of the information sought must be prohibited under the Tax Act.
27. It is not contested that the information sought was obtained under, or in relation to, the administration of a tax law. It is therefore prohibited from disclosure for the purposes of s 95(2) of the Tax Act, unless one of the permitted disclosures in ss 96 and 97 of the Tax Act applies.
28. I do not consider that s 96(1) of the Tax Act applies in this case, as the information sought relates to specific land and includes details such as addresses. Therefore, I am satisfied that disclosure of the information sought would likely directly or indirectly identify a particular taxpayer, or disclose matters about the personal affairs of a particular taxpayer.
29. Under s 97(b) of the Tax Act, a tax officer is permitted to disclose information in particular circumstances, including in connection with the administration or execution of a tax law.
30. CMTEDD submits that s 97 of the Tax Act is a discretionary provision, which it has declined to exercise as it considers that the secrecy provisions in s 95 carry greater weight.
31. I agree with CMTEDD that s 97 of the Tax Act is a discretionary provision. The decision of CMTEDD to not exercise its discretion is a decision under the Tax Act, not a decision under the FOI Act and is therefore not the subject of this review.

32. CMTEDD has decided not to exercise its discretion under s 97 of the Tax Act. Therefore, there is no permitted disclosure under s 97. As there is no permitted disclosure under s 96 or s 97 of the Tax Act, disclosure of the information sought is prohibited by the secrecy provisions of s 95(2), and is taken to be contrary to the public interest to disclose under Schedule 1, s 1.3 (6) of the FOI Act.

Conclusion

33. The information sought is contrary to the public interest information for the purposes of s 16 of the FOI Act.

34. I confirm CMTEDD's decision to refuse access to the information sought.

Paul Pfitzner

Senior Assistant Ombudsman

17 December 2018