

## ***Re.Group and Transport Canberra and City Services [2020] ACTOFOI 15 (11 May 2020)***

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

<b>Application Number</b>	AFOI-RR/20/10001
<b>Decision Reference</b>	[2020] ACTOFOI 15
<b>Applicant</b>	Re.Group
<b>Respondent</b>	Transport Canberra and City Services
<b>Decision Date</b>	11 May 2020
<b>Catchwords</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – trade secrets or business affairs of an agency or person – protection of an individual’s right to privacy or any other right under the <i>Human Rights Act 2004 (ACT)</i>

### **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, Transport Canberra and City Services (TCCS), dated 16 December 2019, with respect to the information at issue in this review.

### **Background and scope of Ombudsman review**

3. On 23 October 2019, an applicant (the FOI applicant) applied to TCCS for access to:
  - The Operational Management Plan as referred to in the Remondis contract (period 2012 - 2014) for the operation of the Material Recovery Facility in Hume; and
  - The Operational Management Plan in the current contract relating to the operation of the Material Recovery Facility in Hume (Re.Group).

4. TCCS identified eight documents within the scope of the access application. These documents were in relation to ‘the Operational Management Plan in the current contract relating to the operation of the Material Recovery Facility in Hume (Re.Group)’ (the MRF).
5. TCCS advised that it could not locate any documents in relation to the ‘the Operational Management Plan as referred to in the Remondis contract (period 2012-2014) for the operation of the Material Recovery Facility in Hume.’

#### Third party consultation

6. Prior to release of information which ‘may reasonably be expected to be of concern’ to a relevant third party, s 38 of the FOI Act provides that relevant third parties must be consulted.
7. Section 38(3)(c) of the FOI Act provides that disclosure of government information may reasonably be expected to be of concern to a third party, in this case a company, if the information ‘concerns the trade secrets, business affairs, or research’ of that third party. The Ombudsman considers there must also be a rational basis for the concern.<sup>1</sup>
8. On 12 November 2019, TCCS undertook third party consultation with Re.Group, which it identified as a relevant third party, under s 38 of the FOI Act.
9. On 3 December 2019, Re.Group objected to the disclosure of all eight documents in their entirety, contending the information was, on balance, contrary to the public interest because:
  - these operational management plans form part of a contract which contain confidentiality provisions.
  - some of the information relates to the know-how and proprietary information of Re.Group.
  - disclosing the information would prejudice Re.Group’s business competitiveness for other operations.

#### Decision on access application

10. On 16 December 2019, the FOI applicant agreed to an extension of time for a decision to be made on this access application until 20 December 2019. Despite this extension, TCCS made its decision on 16 December 2019.

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<sup>1</sup> *Remondis Australia Pty Ltd and Chief Minister, Treasury and Economic Development Directorate [2019] ACTOFOI 17 at [19] (‘Remondis’).*

11. On 16 December 2019, TCCS advised Re.Group that while it had considered Re.Group's objections to the release of any information from the eight documents, it had decided to partially release some of this information as TCCS considered releasing this information to be in the public interest to disclose.

#### Application for Ombudsman review

12. On 24 December 2019, Re.Group sought Ombudsman review of TCCS' decision under s 73 of the FOI Act to partially release information relating to the operation and management of the Material Recovery Facility in Hume (the information at issue). Due to a technical error, the Office did not receive this application for review until 7 January 2020, at which time, the review was commenced.
13. On 22 April 2020, I provided my preliminary views about the respondent's decision to the parties in my draft consideration.
14. Neither Re.Group nor TCCS provided further submissions in relation to my draft consideration.

#### **Information at Issue**

15. Re.Group was consulted by TCCS regarding the following eight documents that relate to Re.Group's operation of the MRF:
  - Quality Assurance Manual Hume MRF
  - Transport Management Plan
  - Visual Amenity Plan
  - Workplace Health & Safety Plan Hume MRF
  - Asbestos Management Plan
  - Asset and Maintenance Management Plan
  - Emergency Management Plan
  - Industrial relations Management Plan.
16. The information at issue in this Ombudsman review are sections of the above documents that TCCS has decided to disclose, which Re.Group asserts would not be in the public interest to disclose.
17. 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.

18. In making my draft consideration, I have had regard to:
- the FOI applicant's access application
  - third party consultation and objection material
  - Re.Group's review application and the submissions made
  - TCCS' decision
  - the FOI Act, in particular ss 16, 17, 35, 38, 72, and Schedule 2
  - legislation including the *Information Privacy Act 2014* (IP Act) and the *Human Rights Act 2004* (HR Act)
  - TCCS' FOI processing file relating to the access application
  - an unedited copy of the information at issue
  - relevant case law including; *Remondis Australia Pty Ltd and Chief Minister*,<sup>2</sup> *Cannon and Australian Quality Egg Farms Ltd*,<sup>3</sup> and *Mangan and the Treasury*.<sup>4</sup>

## 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. 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.
21. The public interest test set out in s 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
22. 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.
23. Section 38 of the FOI Act requires the respondent, TCCS, to consult with a third party if they consider the information at issue 'may reasonably be expected to be of concern to a person or another entity'.

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<sup>2</sup> [2019] ACTOFOI 17.

<sup>3</sup> (1994) 1 QAR 491.

<sup>4</sup> [2005] AATA 898.

24. 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 information.
25. 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

26. In its decision notice, TCCS said:

As the documents have been found to contain information which is, on balance, in the public interest to disclose, I am unable to agree with the view that the documents should be withheld in their entirety.

...

Information which relates to Re.Group employee's personal information has not been found in the public interest to disclose.

...

However, in some instances, information identified as a concern to Re.Group was found to be, on balance, in the public interest.

27. In its application for Ombudsman review, the Re.Group said:

We believe that the information which TCCS proposes to release relating to Re.Group will prejudice our trade secrets and business affairs and does not meet the criteria favouring disclosure under the FOI Act.

## Considerations

28. I have carefully considered an unedited copy of the information at issue, together with the information provided by Re.Group and TCCS.

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

29. 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 sought to be contrary to the public interest information, 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*

30. 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.

31. 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*

32. I have noted all irrelevant factors in s 17(2) of the FOI Act and I am satisfied that I have not considered any.

*Factors favouring disclosure*

33. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.

34. TCCS identified three factors which favour disclosure:

- promote open discussion of public affairs and enhance government accountability<sup>5</sup>
- contribute to positive and informed debate on important issues or matters of public interest<sup>6</sup>
- ensure effective oversight of expenditure of public funds.<sup>7</sup>

35. Re.Group has submitted that information about the day-to-day movements at the MRF at Hume would not enhance government accountability, or provide oversight of government expenditure.

36. I have considered these submissions and do not agree with the Re.Group's contentions. I consider that information about waste management services provided by the ACT Government and its contractors directly relates to government accountability and expenditure of public funds. I also consider disclosure would promote open discussion and informed debate about waste management in the ACT, which I accept is an issue of public interest in the community.

36. For these reasons, I am satisfied the above listed factors are relevant considerations favouring disclosure in this case and give them considerable weight. I note the FOI Act also has an express pro-

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<sup>5</sup> Schedule 2, 2.1 (a)(i) of the FOI Act.

<sup>6</sup> Schedule 2, 2.1 (a)(ii) of the FOI Act.

<sup>7</sup> Schedule 2, 2.1 (a)(iv) of the FOI Act.

disclosure bias, reflecting the importance of public access to government information for the proper working of representative democracy.<sup>8</sup>

*Factors favouring nondisclosure*

37. As stated above, Re.Group contends some of the information that is subject to this review is, on balance, contrary to the public interest under Schedule 2 of the FOI Act because disclosure would prejudice:

- trade secrets and business affairs (Schedule 2, s 2.2(a)(xi) of the FOI Act)
- the competitive commercial activities of an agency (Schedule 2, s 2.2(a)(xiii) of the FOI Act).

38. I have discussed the relevance of these factors to this case below.

Trade secrets or business affairs of an agency or a person

39. Schedule 2, s 2.2(a)(xi) of the FOI Act provides that if disclosure of information could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person then the information is considered to be contrary to the public interest to release.

40. The term 'business affairs', in the context of FOI legislation, has been interpreted to mean 'the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.<sup>9</sup>

41. Re.Group contends the disclosure of Key Performance Indicators (KPI) targets would prejudice its business affairs as it would disclose the operational limits of the MRF.

42. In my view, KPIs reveal organisational performance targets to complete work rather than confirm operational performance limits. An organisation may choose to modify KPI targets in one business area in order to improve its output in another area. Further, the targets appear to be expressed as percentages, so I am not satisfied the information at issue, if disclosed would in fact identify operational performance limits.

43. Re.Group has also submitted that disclosing a reference to the draft NSW protocol for managing asbestos in recyclable waste would prejudice its business affairs as it discloses the 'level of regulation under which we are assuming to operate under'.

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<sup>8</sup> See s 17 of the FOI Act.

<sup>9</sup> *Mangan and The Treasury [2005] AATA 898*, at [40], citing *Cockcroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd (party joined) (1985) 12 ALD 462*.

44. In response, TCCS said this information:

...acknowledges legislative or contractual requirements and states Re.Group's commitment to these. It is a standard requirement for businesses contracted to the ACT Government to adhere to all relevant legislation in force at the time the contract is in term.

45. While I acknowledge the information refers to draft standards, rather than current legislation, Re.Group appears to have made a commitment to operate under these standards. Further, the draft standards are publicly available and are referred to on the applicant's website.<sup>10</sup>

46. For these reasons, I agree with TCCS' contention that simply acknowledging requirements or standards, and expressing a commitment to abide by these is not prejudicial to the applicant's business affairs.

47. Re.Group further submitted that disclosure of particular steps and procedural activities contained in its manuals and plans will prejudice its business affairs and "know-how".

48. To be considered a trade secret, there must be a formula, pattern, device or compilation of information which will give advantage over competitors who do not know or use that information.<sup>11</sup>

49. From my review of the information at issue, it appears the information is general in nature, and does not reveal specific information developed by the Re.Group that would give competitors an advantage, if disclosed.

50. I am not satisfied this information contains operational "know-how", or trade secrets, the disclosure of which could reasonably be expected to prejudice Re.Group's business affairs and commercial activities.

51. Accordingly, for the reasons listed above, I am not satisfied that disclosure of the information at issue would prejudice the business affairs of Re.Group.

#### Protection of an individual's right to privacy

52. A factor favouring nondisclosure under Schedule 2, s 2.2(a)(ii) of the FOI Act is 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 Human Rights Act 2004 (HR Act).

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<sup>10</sup> See [www.re-group.com/services/](http://www.re-group.com/services/) accessed on 1 April 2020.

<sup>11</sup> For an explanation of the characteristics of 'trade secrets' *Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491 at [42-49] in the context of commercial value.

53. TCCS advised our Office that it seeks to disclose the names of two employees, but not the name of a third employee.
54. Re.Group has submitted that disclosing the names of any of its employees is not appropriate for privacy reasons.
55. The HR Act does not provide a general right to privacy. Rather, it provides the right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily,<sup>12</sup> and not to have one's reputation unlawfully attacked.<sup>13</sup>
56. I have considered the information at issue and it appears the names and position details of the two employees that TCCS is seeking to disclose is publicly available. The employees are identified as members of Re.Group's leadership team on its website.<sup>14</sup>
57. Further, these names are not raised in the context of any sensitive or personal information, but rather as the members of the leadership team who approved, or are otherwise responsible for, the documents.
58. Re.Group has not satisfactorily established how the disclosure of the information would unlawfully or arbitrarily interference with the individuals' privacy.
59. Accordingly, for the reasons listed above, I am not satisfied the names and position titles of the two employees identified should not be disclosed for privacy reasons.

#### *Balancing the factors*

60. As I have not identified any public interest factors favouring nondisclosure, I am satisfied that giving the FOI applicant access to the information at issue would not be contrary to the public interest.

## **Conclusion**

61. For the reasons set out above, I consider the decision of the respondent, TCCS, made on 16 December 2019 to give access to the information 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.

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<sup>12</sup> See s 12(a) of the HR Act.

<sup>13</sup> See *Balzary and Redland City Council; Tidbold (Third Party) [2017] QICmr 41* at [28] paraphrasing the Australian Law Reform Commission's definition of the concept in 'For your information: Australian Privacy Law and Practice' Australian Law Reform Commission Report No. 108 released 12 August 2008, at paragraph 1.56.

<sup>14</sup> See <http://www.re-group.com/about/>, accessed 22 January 2020.

**Louise Macleod**  
**Senior Assistant Ombudsman**

**11 May 2020**