

## ***Re.Group and Transport Canberra and City Services Directorate*** **[2020] ACTOFOI 13 (6 May 2020)**

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

<b>Application Number</b>	AFOI-RR/19/10038
<b>Decision Reference</b>	[2020] ACTOFOI 13
<b>Applicant</b>	Re.Group
<b>Respondent</b>	Transport Canberra and City Services Directorate
<b>Decision Date</b>	6 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 business affairs or research

### **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. For the reasons set out below, I **confirm** the decision of the Transport Canberra and City Services Directorate (**respondent**), dated 6 December 2019, under s 82(2)(a) of the FOI Act.

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

3. On 3 October 2019 an applicant (FOI applicant) applied to the respondent for access to:
  1. All briefings to the Minister for City Services regarding Mugga Lane Materials Recovery Facility created between 1 July 2018 and now.
  2. All briefings to the Minister for City Services regarding the Visy paper mill in Tumut created between 1 July 2018 and now.
  3. Any documents created between 1 July 2018 and now regarding ACT waste being sent overseas held by the executive team of TCCS or the Minister's Office.
  4. Any documents detailing the ACT's international waste arrangements, that is, arrangements for where waste is sent, and the companies contracted to process that waste.
  5. Any communications sent or received by the executive team of TCCS regarding the Visy paper mill at Tumut between 1 July 2018 and now regarding processing of ACT waste.

4. On 11 November 2019, the respondent consulted with the FOI applicant which resulted in the due date for a decision being extended to 14 November 2019.

#### Third party consultation

5. Prior to release of information which may be considered to 'reasonably be expected to be of concern' to a relevant third party, s 38 of the FOI Act provides for relevant third parties to be consulted.
6. 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, if the information 'concerns the trade secrets, business affairs, or research' of the third party. The Ombudsman considers there must also be a rational basis for the concern.<sup>1</sup>
7. The respondent identified Re.Group as a relevant third party on the basis that the information at issue concerned Re.Group's business and commercial affairs:
  - Re.Group is a development and management organisation structured to provide the recovery and recycling of resources from waste with a specific focus on recovery.
  - Re.Cycle is a division of Re.Group that owns and operates Material Recovery Facilities (MRFs) which process domestic and commercial recyclable material.<sup>2</sup>
8. On 15 November 2019, the respondent undertook third party consultation with Re.Group under s 38 of the FOI Act.
9. On 3 December 2019, Re.Group responded to the consultation objecting to any disclosure of the information at issue on the basis it would prejudice its business affairs and trade secrets.

#### Decision on access application

10. On or about 6 December 2019, the respondent advised the FOI applicant that it had identified 10 documents (48 pages) as falling within the scope of point 1 of the access application and that partial access to these documents was granted. This included partial release of the documents that Re.Group objected to being disclosed.

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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').

<sup>2</sup> Retrieved from the website of [Re.Group](#).

11. On 6 December 2019, the respondent advised Re.Group that while it had considered its objections, it had decided to partially release the information it was consulted on. The respondent explained that:

‘information which relates to Re.Group’s operational budget, hiring, business decisions and employee’s personal information was not found to be in the public interest and on that basis would not be released. However, in some instances, information identified as a concern to Re.Group was found to be, on balance, in the public interest to disclose.... The statement of reasons at Attachment A provides details’.
12. On 20 December 2019, Re.Group (applicant) sought Ombudsman review of the respondent’s decision under s 73 of the FOI Act, specifically its decision to grant access to information relating to:
  - the operation of the Hume MRF and business decisions made by Re.Group in relation to the hiring and roles of various employees
  - upgrades and maintenance and the purchasing of new equipment
  - Re.Group's operating budget, and
  - photographs attached to the ACT NOWaste correspondences.
13. On 8 April 2020, I provided my preliminary views about the respondent’s decision to the parties in my draft consideration. Neither party provided additional submissions in relation to this draft consideration.

## Information at issue

14. The applicant was consulted by the respondent regarding ‘briefing material to the Minister for City Services regarding Mugga Lane Materials Recovery Facility created between 1 July 2018 and 3 October 2019,’ which consists of emails and their attachments, memoranda and photographs.
15. The information at issue in this Ombudsman review are parts of this information that the respondent has decided to disclose, and the applicant continues to object to the release of, that is:
  - pages 1, 2, 12, 14, 19, 20, 29, 31, 33, 36, 37, 44, 45, 47, and
  - the photographs attached to the emailed correspondence at pages 5-11, 16-18, 20-24 and 40-44.<sup>3</sup>
16. 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.

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<sup>3</sup> Refer to Annexure 4 to the submissions made by Re.Group, dated 20 December 2019.

17. In making my decision, I have had regard to:

- the FOI applicant's access application
- third party consultation and objection material
- the applicant's review application
- the respondent's decision
- submissions provided by the applicant
- the FOI Act, in particular ss 16, 17, 35, 38, 72, and Schedule 2
- legislation including the Information Privacy Act 2014 (IPA)
- the respondent's FOI processing file relating to the access application
- an unedited copy of the information at issue, and
- relevant case law including *Remondis Australia Pty Ltd and Chief Minister, Treasury and Economic Development Directorate*,<sup>4</sup> *Cannon and Australian Quality Egg Farms Ltd*,<sup>5</sup> *CH32GI*,<sup>6</sup> *Glass Media Pty Ltd and Department of the Premier and Cabinet and Ors*,<sup>7</sup> *Canberra Metro Construction and Chief Minister, Treasury and Economic Development Directorate*.<sup>8</sup>

## Relevant law

18. 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.

19. 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.

20. 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.

21. 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 information.

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<sup>4</sup> [2019] ACTOFOI 17 ('*Remondis*').

<sup>5</sup> (1994) 1 QAR 491.

<sup>6</sup> [2012] QICmr 60.

<sup>7</sup> [2016] QICmr 30 ('*Glass Media*').

<sup>8</sup> [2019] ACTOFOI 8 ('*Canberra Metro Construction*').

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 contrary to the public interest information has been deleted.
23. 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.
24. 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

25. The applicant does not accept the respondent's view that disclosure of the information would, on balance, be in the public interest and has provided submissions in support of its case saying that disclosure would prejudice its business affairs and trade secrets.<sup>9</sup>
26. In their application for Ombudsman review, the applicant reiterated this view, stating that:

... some of the information being released is not in the public interest, as it is incomplete and therefore misleading, provides information on trade secrets, provides confidential information on business affairs, and used language that when applied out of context could give the public an ill-informed view....

27. The respondent explained the reasons for its decision to disclose the information at issue:

....I have considered that the ownership of waste and relationship with downstream processors are relevant to Re.Group's business affairs. However, I have also considered that information does not disclose Re.Group's commercial relationship with its contractors. I have also considered that the services provided by the ACT Government and its contractors is a matter of public interest as it directly relates to Government accountability and the expenditure of public funds.

I have also considered that a level of methodology to the processing of glass into sand has been released to the public by TCCS and Re.Group. I have considered that the objectives of the FOI Act are in favour of disclosure, and that this information is not dissimilar to that which has already been made publicly available. Information already available to the public includes descriptions and photographs of trommel, and glass sand. The variance in information from that already public is the management of contamination. I have considered that this information is written in a factual sense, and the issue of contamination of waste is typical of the nature of work. In this instance I have decided, on balance, that it is in the public interest to disclose this information....

## Considerations

28. I have carefully considered an unedited copy of the information at issue together with the information provided by the applicant and respondent.

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<sup>9</sup> See note above.

*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. Additionally, there is a step of ensuring that none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.

*Irrelevant factors*

32. In submissions to this Ombudsman review, the applicant contends that some of the information at issue should not be released on the grounds that it has the potential to mislead the public. Specifically, they raise concerns about use of specific language, such as the word 'contamination' in the documents, and state that :

TCCS should not disclose photographs attached to the ACT NOWaste correspondences on the grounds that they are providing an incomplete and therefore a misleading representation of Re.Group's ability to manage waste...

...[general disclosure of ACT NOWaste emails is] not an accurate reflection of the current operations of the Hume MRF. As such, we are of the view that this information has the ability to be taken out of context which would provide a misleading representation of the operations. We consider that this may cause damage to ReGroup's business and representation.<sup>10</sup>

33. Section 17(2) of the FOI Act lists the irrelevant factors that are not to be taken into account when deciding whether the disclosure of information would, on balance, be contrary to the public interest.

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<sup>10</sup> Letter Re.Group to ACT Ombudsman, dated 20 December 2019.

34. Relevantly, under s 17(2) of the FOI Act, consideration must not be given to whether access to the information could result in:

- a person misinterpreting or misunderstanding the information<sup>11</sup>
- confusion or unnecessary debate.<sup>12</sup>

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

*Factors favouring disclosure*

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

37. The respondent identified three factors which favour disclosure:

- promote open discussion of public affairs and enhance government accountability<sup>13</sup>
- contribute to positive and informed debate on important issues or matters of public interest<sup>14</sup>
- ensure effective oversight of expenditure of public funds.<sup>15</sup>

38. I agree with the respondent that these factors are relevant, because recycling and waste matters are clearly matters of public interest in the ACT.<sup>16</sup> As a result, I afford significant weight to these factors favouring disclosure.

39. I disagree with the applicant that the last factor listed above is not relevant. The applicant submits that effective oversight of expenditure of public funds should not include information 'relating to day to day product movements at the Hume MRFs' as the information does not 'give oversight of government expenditure'. The ACT Government is, however, accountable to the public about the manner in which it spends public funding, particularly where such funds have been 'made to commercial enterprises for the use by them in the prosecution of their private business concerns, even accepting that this expenditure may secure economic benefits to the state'.<sup>17</sup>

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<sup>11</sup> Section 17(2)(b) of the FOI Act.

<sup>12</sup> Section 17(2)(d) of the FOI Act.

<sup>13</sup> Schedule 2, 2.1(a)(i) of the FOI Act.

<sup>14</sup> Schedule 2, 2.1(a)(ii) of the FOI Act.

<sup>15</sup> Schedule 2, 2.1(a)(iv) of the FOI Act.

<sup>16</sup> For further reading refer to [The ACT Waste Management Strategy 2011-2025](#).

<sup>17</sup> *Glass Media Pty Ltd and Department of the Premier and Cabinet & Ors* [2016] QICmr 30 at [158].

40. Additionally, 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.<sup>18</sup> This concept is promoted through the objects of the FOI Act.

*Factors favouring nondisclosure*

41. I have carefully considered the public interest factors favouring nondisclosure of the information at issue.

42. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure.

43. In making its decision on the access application the respondent indicated they considered the following factors favouring nondisclosure relevant:

- prejudice trade secrets, business affairs or research of an agency or person<sup>19</sup>
- prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004*<sup>20</sup>
- impede the administration of justice generally, including procedural fairness<sup>21</sup>
- prejudice a deliberative process of government,<sup>22</sup>
- prejudice the competitive commercial activities of an agency.<sup>23</sup>

44. In terms of the remaining information at issue, the applicant has, however, contended only that disclosure would prejudice its trade secrets or business affairs. Accordingly, I have only discussed below whether I consider this factor is relevant to the information at issue.

*Trade secrets, business affairs or research*

45. 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 it is contrary to the public interest information.

46. The applicant does not contend that disclosure could reasonably be expected to prejudice its research, but states that it would prejudice its trade secrets and business affairs.

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<sup>18</sup> See s 17 of the FOI Act.

<sup>19</sup> Schedule 2, s2.2(a)(xi) of the FOI Act.

<sup>20</sup> Schedule 2, s2.2(a)(ii) of the FOI Act.

<sup>21</sup> Schedule 2, s2.2(a)(iv) of the FOI Act.

<sup>22</sup> Schedule 2, s2.2(a)(xvi) of the FOI Act

<sup>23</sup> Schedule 2, s2.2(a)(xiii) of the FOI Act

47. In CH32GI, the Queensland Right to Information Commissioner considered that the sensitivity of commercial information, such as pricing information, will depend on the factors in each case:

These key factors include: the nature and detail of the pricing information; whether it is current or merely historical; the nature and custom of the particular market; and a variety of other circumstances which may affect its sensitivity in any particular case.<sup>24</sup>

48. I agree with the Commissioner and on that basis, I will consider the applicant's contentions below with these factors in mind.

*Information regarding volumes sold (page 1, 2 and 14)*

49. The applicant submits that information referencing product volumes sold would 'prejudice its competitive activities, as well as trade secrets and business affairs.'

50. They contend that this is because:

- this information would allow a reader to evaluate the size and scale of the market
- the information is proprietary and confidential
- a competitor could use the information to form a view that may prejudice the competitive commercial activities of Re.Group, as well as its trade secrets and business affairs.

51. 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>25</sup> The applicant has not specified, or detailed how, the information at issue reveals anything particularly commercial and/or sensitive to the extent that the information should be considered a 'trade secret'. As the onus rests on the applicant to establish prejudice, and they have not demonstrated how the prejudice impacts their business, I do not consider this factor relevant here.

52. I will now proceed to consider below whether disclosure of the information referencing product volumes could reasonably be expected to prejudice the business affairs of the applicant.

53. The applicant argues that disclosure would allow a reader to evaluate the size and scale of the NOWaste market. I note this information is already publicly available through media reports and data contained within the National Waste Report and the National Waste Policy Action Plan.<sup>26</sup>

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<sup>24</sup> [2012] QICmr 60 at [50].

<sup>25</sup> For 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.

<sup>26</sup> National Waste Report, National Waste Policy Action Plan, see also discussion in *Remondis*.

54. The applicant's submissions do not expand any further about the specific operational and financial impact disclosure of this information would have on their business – that is, what competitive advantage the applicant gains from having this information, or conversely, any competitive loss that would occur from publicly releasing this information.
55. Consequently, I am not satisfied the applicant has discharged its onus under s 72 of the FOI Act to establish that the information regarding product volumes is contrary to the public interest to disclose.

*References to suppliers and commercial partners and equipment (pages 12, 19, 20, 31, 33 and 44)*

56. The applicant submits that disclosure of references to suppliers and commercial partners 'clearly prejudices business affairs and our competitive commercial activities'.
57. The applicant has not, however, provided any further details or specified what actual prejudice to its business affairs could reasonably be expected if this information is disclosed. As a result, I consider the applicant has not discharged its onus under s 72 of the FOI Act to establish that this is contrary to the public interest information.
58. The applicant further contends that disclosure of references to equipment used by the applicant 'will prejudice [their] business affairs and provide trade secrets to [their] competitors and suppliers.'
59. For the same reasons as discussed at [55], I do not consider disclosure of this information could reasonably be expected to prejudice the applicant's trade secret, business affairs or research, as provided for under Schedule 2, s 2.2(a)(xi) of the FOI Act.
60. I note the fact that the information sought relates to a particular period in time and may now be out of date, however, this fact does not automatically equate to the release of information being contrary to the public interest to disclose. As outlined in *Canberra Metro Construction*, when discussing certain factors for disclosure, information about operations at a particular point in time, could still well be relevant to public debate.<sup>27</sup>
61. It is always be open to the applicant to provide the original FOI applicant with more up to date photographs or release these on their website if they wish to reflect their current operations.

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<sup>27</sup> [2019] ACTOFOI 8 (5 June 2019).

62. I have no other evidence before me as to why disclosure could reasonably be expected to prejudice the applicant's business affairs. As a result, I do not consider disclosure of this information could reasonably be expected to prejudice the applicant's trade secret, business affairs or research, as provided for under Schedule 2, s 2.2(a)(xi) of the FOI Act.
63. As a result, the applicant has not discharged its onus under s 72 of the FOI Act to establish that disclosure of this information is contrary to the public interest.

*Balancing the factors*

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

**Conclusion**

65. For the reasons outlined above, under s 82(2)(a) of the FOI Act, I **confirm** the respondent's decision to give the FOI applicant partial access to the information at issue under s 35(1)(c) of the FOI Act.
66. The respondent is required to give the FOI applicant access to the information in accordance with the respondent's initial access decision.

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

**6 May 2020**