

Decision and reasons of Acting Senior Assistant Ombudsman

Application Number: AFOI-RR/22/10030

Applicant: 'DB'

Respondent: Community Services Directorate

Reference: FOI-HOU-21/68

Date: 12 July 2024

Decision reference: [2024] ACTOFOI 10

Catchwords: *Freedom of Information Act 2016* - whether disclosure of information is contrary to the public interest - information disclosure of which is prohibited under law - promote open discussion of public affairs and enhance the government's accountability - ensure effective oversight of expenditure of public funds - information is the personal information of the applicant - prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004* - prejudice the trade secrets, business affairs or research of an agency or person - prejudice an agency's ability to obtain confidential information.

Decision

1. For the purpose of s 82 of the *Freedom of Information Act 2016* (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. The applicant applied for Ombudsman review of the Community Services Directorate's (**CSD**) decision to refuse access to some of the information sought on the grounds it was contrary to the public interest information.
3. For the reasons set out below, I have decided to **vary** CSD's decision made progressively on 30 March 2022, 22 August 2022, and 13 October 2022 under s 82(2)(b) of the FOI Act.
4. The variation includes changes to some of the redactions made in the original decision to ensure consistency across the information at issue.
5. The practical effect will be to disclose more information than the original decision, but only to the extent information already disclosed in one section will be disclosed consistently across all the information at issue (mobile telephone number of a CSD contract manager, family names and telephone numbers of third-party contractors).
6. The variation also includes changes to the reasons for non-disclosure of some information – that is, in relation to some of the information originally identified by CSD as 'confidential text', I do not agree the information is confidential, but on balance I consider it is contrary to the public interest information.

7. I confirm the remainder of the original decision to refuse access to certain third-party personal information and information about costs not paid by the applicant. No new information is being disclosed to the applicant as a result.

Background to Ombudsman review

8. On 17 November 2021, the applicant applied to CSD for:

“...all information relating to myself and the property I rent from Housing at [address]...”

9. On 26 November 2021, CSD asked the applicant for additional time to decide the application and the applicant agreed to an extension to 16 March 2022.¹
10. On 2 February 2022, CSD requested a further extension of time from the applicant which the applicant refused.
11. On 1 March 2022, CSD asked the applicant for an extension of time proposing a staged release of the information, where the final stage would be provided by 1 July 2022. The applicant was taken to have agreed to this request because they did not respond to CSD to refuse the request.²
12. Due to the volume of information sought, CSD dealt with the application in 3 stages (2474 pages). On 30 March 2022, CSD decided stage 1 of the application (files 1-4) by deciding to:

¹ Section 41 of the [FOI Act](#).

² Section 41(3)(b) of the [FOI Act](#).

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- give access to 445 documents in full³
 - give access to 21 documents in part.⁴
13. On 22 August 2022, CSD decided stage 2 of the application (files 5-7) by deciding to:
- give access to 192 documents in full
 - give partial access to 35 documents, and
 - refuse access to one document.
14. On 13 October 2022, CSD decided stage 3 of the application (files 8-9 and 3 reports) by deciding to:
- give access to 153 documents in full;
 - give partial access to 33 documents; and
 - refuse access to 4 documents.
15. On 10 November 2022, the applicant applied for Ombudsman review of CSD's access decision.
16. On 6 June 2024, the Senior Assistant Ombudsman provided their preliminary views to the parties in a draft consideration.

³ On the table of contents (**TOC**) prepared by CSD, several documents are marked 'not released'. The documents marked 'not released' are outside the scope of the application or are duplicates of documents to which the applicant was granted access (e.g. TOC 1 ref 122 is marked 'not released – copy ref 111'. Access was granted to TOC 1 ref 111).

⁴ Several documents identified marked as 'partial access', where it appears full access was granted to part of the information, and the residual information was not released where it was a duplicate of information otherwise given to the applicant (e.g. TOC 1 ref 125-126. TOC 1 ref 125 is a copy of TOC 1 ref 115 – access granted; assume access granted to TOC 1 ref 126). These documents are included in the numbers for 'access granted' in the background above.

17. On 8 July 2024, CSD accepted the draft consideration but noted some of the information previously made available to the applicant was released in error.

Information at issue

18. The information at issue in this Ombudsman review is the information within 94 documents (377 pages) to which CSD refused access (**housing information**), comprising:

- the addresses of 2 different housing assistance properties unrelated to the applicant
- information about costs, fees and charges not paid by the applicant relevant to the maintenance of the property
- the group email address of a third-party contractor
- personal information of a third-party complainant
- personal information of third-party contractors
- personal information of other third-party tenants, and
- personal information of CSD staff members.

19. The key issue to be decided in this Ombudsman review is whether the housing information is contrary to the public interest information. In making my decision, I have had regard to:

- the applicant's access application dated 17 November 2021 and review application dated 10 November 2022
- CSD's staged decision made on 30 March 2023, 22 August 2022, and 13 October 2023
- the FOI Act, in particular ss 6, 7, 16, 35, 54, 72 and Schedule 2

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- the *Housing Assistance Act 2007*
- the *Human Rights Act 2004*
- the *Information Privacy Act 2014*
- the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act, and
- relevant case law, including:
 - ['CR' and Transport Canberra and City Services \[2023\] ACTOFOI 26 \(12 December 2023\)](#).

Relevant law

20. 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.⁵

21. 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.

22. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.⁶

⁵ Section 35 of the [FOI Act](#).

⁶ Section 35(1)(c) of the [FOI Act](#).

23. Schedule 1 of the FOI Act identifies categories of information which are taken to be contrary to the public interest to disclose, including information disclosure of which is prohibited under law.⁷
24. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.

The parties' submissions

25. The applicant has advised they are seeking information about themselves and the property in which they reside.

26. In deciding the application, CSD advised:

Some information identified within scope of your request relates to other Housing ACT properties, where this information would identify other Housing ACT properties or tenant's the information has been taken to be contrary to the public interest and not released as per Schedule 1 Section 1.3(5) ...⁸

Some of the documents on file contain information which has been considered personal information of staff members of either Housing ACT or Companies contracted to undertake maintenance or other works on behalf of Housing ACT... I considered the protection of an individual's privacy and information that may be protected under another law of the Territory. Where the information on file relates to the personal information and opinions of these staff members, I consider the release of this information would be a breach of their privacy. Therefore, I consider the disclosure of this information is contrary to the public interest under Schedule 2 section 2.2(a)(ii) ...⁹

Some information relating to the schedule of rates (cost amounts) for repairs/maintenance to a Housing ACT (HACT) property has been redacted.

⁷ Schedule 1, s 1.3 of the [FOI Act](#).

⁸ CSD Decision notice dated 13 October 2022.

⁹ CSD Decision notice dated 30 March 2022; 22 August 2022.

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This information is 'Confidential Text' pursuant to the business Agreements between the Commissioner for Social Housing (the Commissioner) and the Total Facilities Manager (TFM)...

The public interest factors favouring disclosure of this information are the enhancement of the Government's accountability and ensuring the effective oversight of the expenditure of public funds.

However, a factor favouring non-disclosure is that disclosing the information could prejudice the Government's ability to obtain confidential information from the TFM provider (Schedule 2, 2.2 (a)(xii)).

On balance, I consider that the disclosure of some of this information would cause more public harm than good, in that disclosure could constitute a breach of confidence in the Agreements between the Commissioner for Social Housing, and TFM providers. This could impede the flow of confidential information and result in action being taken against the Territory. By contrast, any gain to the community from the disclosure of the information would be minimal.

Therefore, I consider the disclosure of this information is contrary to the public interest under Schedule 2 section 2.2(a)(xii).

You will however note my decision to release information identified as Tenant Responsible Maintenance (TRM or TEN), as the cost of these repairs is passed on to the tenant, and you would be aware of the associated costs...

27. These submissions are discussed in more detail below.

Consideration

Information disclosure of which is prohibited under law – Schedule 1, s 1.3(5)

28. CSD decided to refuse access to information within one document (CSD reference: TOC 12 ref 1-4) on the ground it is contrary to the public interest information because it is protected information under s 28 of the *Housing Assistance Act 2007* (**Housing Assistance Act**).

29. Information that is protected information under s 28 of the Housing Assistance Act, other than information disclosed to a person to whom the information relates, is taken to be contrary to the public interest information under Schedule 1, s 1.3(5) of the FOI Act.¹⁰
30. Information is 'protected information' under s 28 of the Housing Assistance Act if it identifies an entity that is or has been a housing assistance recipient or former housing assistance recipient; or identifies land that is a housing assistance property as a housing assistance property.¹¹
31. I have reviewed the document described as 'CMUI05 – Complaints about/from a Person' (CSD reference: TOC 12 ref 1-4). I consider this document contains the addresses of two different housing assistance properties unrelated to the applicant which is protected information under s 28 of the Housing Assistance Act.
32. I confirm CSD's decision to refuse access to this protected information on the ground it is contrary to the public interest information under Schedule 1, s 1.3(5) of the FOI Act.

Public interest test

33. To determine whether disclosure of the remainder of the housing information is contrary to the public interest information, the FOI Act prescribes the following five steps:¹²

¹⁰ Section 35(1)(c) of the [FOI Act](#).

¹¹ Sections 28(1)(b) and (c) of the [Housing Assistance Act 2007 \(Housing Assistance Act\)](#).

¹² Section 17 of the [FOI Act](#).

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- 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
- 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
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure
- decide whether, on balance, disclosure of the information would be contrary to the public interest
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

Factors favouring disclosure

34. In the original decision, CSD identified 2 factors favouring disclosure of the information about the cost of repairs and maintenance of the housing assistance property. CSD did not identify any factors favouring disclosure of the remainder of the housing information.

Promote open discussion of public affairs and enhance the government's accountability - (Schedule 2, s 2.1(a)(i))

35. CSD identified release of information about the cost of repairs and maintenance of Housing ACT properties is in the public interest because it would enhance the government's accountability.

36. I accept disclosure of information about the costs paid to maintain and repair housing assistance properties would provide insight into the management of these properties by the ACT Government.

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37. I afford minor weight to this factor as it relates to the information about costs not paid by the tenant as release would not reveal any specific information about the actions taken by Housing ACT, policies or decision-making processes involving housing assistance properties.
38. I do not consider this factor is relevant to the remainder of the housing information.

Ensure effective oversight of expenditure of public funds (Schedule 2, s 2.1(a)(iv))

39. CSD identified release of information about the costs paid for repairs and maintenance of Housing ACT properties is in the public interest because it would reveal information about the expenditure of public funds.
40. I accept disclosure of information about costs paid by Housing ACT would reveal how much money the ACT Government has spent to maintain a housing assistance property.
41. I afford minor weight to this factor as it relates to the information about costs, as release of information about amounts paid in relation to a particular housing assistance property would not reveal detail about how expenditure decisions are made, the appropriateness of the expenditure or funding for housing assistance generally.
42. I do not consider this factor is relevant to the remainder of the housing information.

Information is the personal information of the applicant (Schedule 2, s 2.1(b)(i))

43. The applicant has submitted the information requested is their own personal information.
44. I accept this factor is relevant to one part of the housing information, concerning a complaint made by a third-party about the applicant (within TOC 12 ref 1-4).
45. I consider this information is the joint personal information of both the applicant and the third-party complainant. I note part of the complaint was disclosed to the applicant.
46. I attribute minor weight to this factor, as disclosure of the remainder of the complaint information would only reveal limited personal information of the applicant, which may already be known to the applicant.

Factors favouring non-disclosure

47. CSD identified 2 factors favouring non-disclosure of the housing information. I identified an additional factor favouring non-disclosure in relation to a group email address of a third-party contractor.

Prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act (Schedule 2, s 2.2(a)(ii))

48. In the decision notice, CSD explained the housing information contains the personal information of CSD staff and other third parties where release of this information would breach the privacy of those individuals.

49. A factor favouring non-disclosure is where release 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* (**Human Rights Act**).

50. Section 12 of the Human Rights Act provides:

Everyone has the right—

- (a) Not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) Not to have his or her reputation unlawfully attacked.

51. In the original decision, CSD identified the pronouns and telephone numbers of a third-party contractor as 'confidential text' pursuant to an agreement between the Commissioner of Social Housing and the Total Facilities Management provider.¹³

52. Having reviewed a public version of this agreement, I consider this information is not 'confidential text' for the purpose of that agreement. I do, however, consider this factor is relevant to the personal information of individuals who are not the applicant within the housing information.

53. However, I do not consider this factor applies to information which has been disclosed previously to the applicant by CSD, including:

- the mobile telephone number of a CSD contract manager
- family names of third-party contractors
- the telephone numbers of third-party contractors

¹³ [Total Facilities Management Services Agreement](#), Contract no 28556.210.

54. There is no reasonable basis to conclude release of information the applicant already has access to could result in prejudice to the protection of those individuals' rights under the Human Rights Act.
55. The *Information Privacy Act 2014* sets out how personal information is handled by public sector agencies and how the privacy of individuals is protected.
56. An individual's privacy is 'interfered with' if an act or practice breaches a Territory Privacy Principle (**TPP**) in relation to personal information about the individual.¹⁴
57. TPP 6 provides if an agency holds personal information about an individual that was collected for a particular purpose (primary purpose), the agency must not use or disclose the information for another purpose (secondary purpose) unless the individual consents or an exception in TPP 6.2 or TPP 6.3 applies.¹⁵
58. An agency may use or disclose non-sensitive personal information for a secondary purpose if the use or disclosure is related to the primary purpose, required or authorised by law or a permitted general situation exists.¹⁶

¹⁴ Section 11 of the [Information Privacy Act 2014 \(IP Act\)](#).

¹⁵ TPP 6.1 of the [IP Act](#).

¹⁶ TPP 6.2 of the [IP Act](#).

59. In relation to the personal information of other third-party tenants (information about tenancy prior to occupancy by applicant, incorrectly filed information), I consider disclosure of their personal information for a purpose which is not related to housing assistance to possibly be an unlawful interference with their privacy. I afford significant weight to this factor.
60. In relation to the personal information of third-party contractors, I consider disclosure of their personal information (names, pronouns, appointments, direct email address and telephone numbers) for a purpose which is not related to the performance of services for CSD to possibly be an unlawful interference with their privacy. I afford significant weight to this factor.
61. In relation to the personal information of CSD staff members (mobile telephone numbers), I consider disclosure of this information could be an arbitrary interference with their privacy. It is reasonable to expect release of this information could result in those staff members being contacted outside of work hours. I afford significant weight to this factor.
62. In relation to the personal information of a third-party complainant (name, address, and complaint details), I consider disclosure of their personal information for a purpose which is not related to complaint handling to possibly be an unlawful interference with their privacy. I afford significant weight to this factor.

Prejudice the trade secrets, business affairs or research of an agency or person (Schedule 2, s 2.2(a)(xi))

63. I have identified an additional factor favouring non-disclosure of a group email address used by a third-party contractor, where disclosure could prejudice the business affairs of the third-party contractor.
64. I consider some of the information identified by CSD as confidential text pursuant to an agreement between the Commissioner of Social Housing and the Total Facilities Management provider is not confidential text under the definition provided in the agreement.
65. CSD originally decided to refuse access to a group email address used by a third-party contractor on the grounds this information was confidential text and disclosure could prejudice CSD's ability to obtain confidential information (Schedule 2, s 2.2(a)(xii)).
66. I note the Total Facilities Management Services Agreement¹⁷ (**the agreement**) provides 'confidential text' includes information specified in Item 13 Schedule 1 of the agreement.
67. Item 13 of Schedule 1 of the agreement provides the following is confidential text:
- Item 6 Schedule 1 (Base Management Fee figure)
 - Item 7 Schedule 1 (Mobilisation Fee figure)
 - Item 10 Schedule 1 (individual names of specified personnel, if any)
 - Item 7.1.1(a) to (m) Schedule 2 (ICT systems)
 - Item 4.1 – 4.4 Schedule 4 (adjustment based on service budget)

¹⁷ [Total Facilities Management Services Agreement](#).

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- Item 5.1 Schedule 4 (innovation)
- Any individual pricing or rates break downs in Attachment 5 (schedule of rates)
- Clause 21.4 (insurance and liability).

68. I cannot identify the basis for determining the group email address of the third-party contractor is confidential text under the agreement. I note the group email address does not name any specified personnel.

69. I note the group email address used by the third-party contractor appears to be used for the limited purpose of communicating with CSD about job requests, and services rendered in the ACT. The group email address is not advertised by the third-party contractor on their website or otherwise made publicly available.

70. I consider the disclosure of a group email address of a third-party contractor who provides property maintenance or other services on behalf of Housing ACT may result in unsolicited contact to the email address from tenants or members of the public.

71. I consider disclosure of this email address could reasonably be expected to result in an increase in correspondence to this email address, such as from tenants seeking an update on job requests.

72. As it appears this email address is used for a dedicated purpose, an unexpected increase in correspondence outside of established public contact mechanisms is likely to impact on the ability of the third-party contractor to respond to CSD and deliver services in a timely and expected manner.

73. I afford minor weight to this factor, as I do not consider release of the group email address would prevent or significantly hinder the third-party contractor from operating, generating profit or maintaining competitiveness within the property services market.

***Prejudice an agency's ability to obtain confidential information
(Schedule 2, s 2.2(a)(xii))***

74. A factor favouring nondisclosure is where disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information.

75. As discussed above, CSD identified some of the housing information is 'confidential text' for the purpose of the agreement.

76. CSD decided to refuse access to the costs, fees and charges for property repair and maintenance services contained within the housing information which were not paid for by the tenant. I note CSD has chosen to disclose costs paid by the applicant in relation to the property, as this information is known to the applicant.

77. CSD also decided to refuse access to the names, pronouns, telephone numbers and a group email address of a third-party contractor on the grounds this information was confidential text and, on balance, contrary to the public interest information.

78. I agree information about repair and maintenance costs within the housing information is confidential text under the agreement (figures identified in Schedule 1 Item 13).

79. Additionally, I agree the individual names of specified personnel is confidential text under the agreement (Item 10 Schedule 1).
80. CSD explained if information identified as confidential text within the agreement was disclosed, this would breach provisions of the agreement which prohibit release of this information by the Commissioner.¹⁸ It is reasonable to expect if CSD did not comply with agreements protecting confidential information, entities may be unwilling or unable to provide CSD with confidential information.
81. I consider disclosure of the confidential information could reasonably be expected to prejudice CSD's ability to obtain confidential information. I afford significant weight to this factor in relation to the costs not paid by the applicant and the individual names of specified personnel.
82. I do not consider this factor applies to the remainder of the housing information.

Balancing the factors

83. Having identified public interest factors favouring disclosure and factors favouring non-disclosure, I must now consider the public interest balancing test set out in s 17 of the FOI Act.

¹⁸ [Total Facilities Management Services Agreement](#) cl 20.3 – Commissioner must not disclose Confidential Text.

84. In this matter, I identified 2 public interest factors favouring disclosure relevant to the information about costs paid for repair and maintenance of the housing assistance property and attributed minor weight to these factors. I identified one factor favouring non-disclosure of this information and attributed significant weight.
85. I identified one factor favouring disclosure of the complaint information and I attributed minor weight to this factor.
86. I identified no factors favouring disclosure of the remainder of the housing information but took into account the pro-disclosure bias in releasing this information.
87. In respect of the disclosure of a group email address of a third-party contractor, I identified one factor favouring non-disclosure and attributed minor weight to this factor.
88. I identified 2 public interest factors favouring non-disclosure of the remainder of the housing information and attributed significant weight to these factors.
89. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and non-disclosure, with the higher quantity being considered in the public interest.
90. The decision-maker's task is to consider the relative importance and weight of each factor identified. The weight given to a factor will depend on the effect that disclosing the information has on the public interest.

91. The FOI Act has a pro-disclosure bias,¹⁹ and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side. Rather, the scales are 'laden in favour of disclosure'.²⁰
92. In relation to the housing information, on balance, the public interest factors favouring non-disclosure outweigh the public interest factors favouring disclosure of this information.
93. I consider the public interest in refusing access to the housing information is greater than the public interest in giving access to this information, noting the significant weight I attributed to the factors favouring non-disclosure and the minor weight attributed to the factors favouring disclosure where relevant.

Conclusion

94. For the reasons set out above, I vary CSD's decision under s 82(2)(b) of the FOI Act.
95. Additional information contained within the housing information is to be released to the applicant, consistent with information already released and available to the applicant.

Georgia Ramsay

Acting Senior Assistant Ombudsman

12 July 2024

¹⁹ Section 17 of the [FOI Act](#).

²⁰ [Explanatory Statement, Freedom of Information Bill 2016](#).