

## Decision and reasons for decision of Senior Assistant Ombudsman

<b>Application number:</b>	AFOI-RR/22/10029
<b>Agency reference:</b>	22-055 (items 2 and 3); 22-088 and 22-089
<b>Applicant:</b>	“CN”
<b>Respondent:</b>	Transport Canberra and City Services
<b>Date:</b>	29 September 2023
<b>Catchwords:</b>	<i>Freedom of Information Act 2016</i> – refusing to deal with application – frivolous or vexatious application

### 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 Transport Canberra and City Services’ (**TCCS**) decision dated 4 October 2022 to refuse to deal with their access application on the ground it is vexatious.
3. For the reasons set out below, I have decided under s 82(2)(c) of the FOI Act to **set aside** TCCS’s decision and made a **substitute** decision the application is not vexatious.

### Background of Ombudsman review

4. This Ombudsman review concerns 3 separate access applications made by the applicant between April and June 2022, which TCCS considered as a single application under s 43(2) of the FOI Act, as set out below.
5. On 12 April 2022, the applicant applied to TCCS for access to information (**first application**).<sup>1</sup>

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<sup>1</sup> TCCS reference 22-055. Items 1, 7 and 8 of the first application are considered in [‘BZ’ and Transport Canberra and City Services \[2023\] ACTOFOI 6 \(24 February 2023\)](#). Item 6 of the first application is under consideration in Ombudsman review matter AFOI-RR/22/10037 (at the time of writing, this review matter is ongoing). The applicant did not seek review of the remainder of the first application.

6. Items 2 and 3 of the first application were for:
- 2) Any records or documents produced or held by Transport for Canberra City Services showing contact between [TCCS staff] relating to the allegations against or suspension of [the applicant] ...
  - 3) Any records or documents produced or held by Transport for Canberra City Services showing contact between [TCCS staff] relating to the allegations against or suspension of [the applicant] ...
7. On 15 June 2022, the applicant applied to TCCS for **(second application)**:<sup>2</sup>
- 1) Any records or documents produced or held by Transport for Canberra City Services showing contact between [TCCS staff] with the following references towards persons:
    - a. “Toad under the bridge” ...
    - b. “Mr Burns” ...
    - c. “Millennial” ...
    - d. “[expletive] Millennial” ...
8. On 15 June 2022, the applicant also applied for **(third application)**:<sup>3</sup>
- Any records or documents produced or held by Transport for Canberra City Services relating to complaints of inappropriate behaviour made by [TCCS employee] to [TCCS employee] and complaints of inappropriate behaviour made by [TCCS employee] towards [TCCS employee] ...
9. On 29 July 2022, the applicant agreed to exclude paper copies from the scope of items 2 and 3 of the first application; and clarified the scope of the third application includes both information about the applicant and the third party.
10. On 15 August 2022, the applicant clarified the scope of the third application as information which may have included the following specific wording:
- Misconduct
  - Harassment
  - Bullying
  - Intimidation
  - Professional reputation
  - Demeaning acronyms
  - Inappropriate behaviour.
11. On 12 September 2022, TCCS wrote to the applicant to advise their 3 applications would be considered as one application as they are related and made by the same applicant.<sup>4</sup>
12. TCCS told the applicant of the intention to refuse to deal with the application because the application is vexatious.<sup>5</sup> The period for consultation on the proposed refusal ended on 28 September 2022. TCCS did not receive a response from the applicant.

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<sup>2</sup> TCCS reference 22-088.

<sup>3</sup> TCCS reference 22-089.

<sup>4</sup> Section 43(2) of the [FOI Act](#).

<sup>5</sup> Section 46(1) of the [FOI Act](#).

13. On 4 October 2022, TCCS refused to deal with the access application because the application is vexatious.<sup>6</sup>
14. On 14 November 2022, the applicant applied for Ombudsman review of the access decision.
15. On 6 April 2023, the Ombudsman requested information from TCCS about the information provided to the applicant during the related misconduct investigation.
16. On 19 April 2023, TCCS provided additional information to the Ombudsman with the consent of the applicant for the purpose of this Ombudsman review.
17. On 27 July 2023, the Senior Assistant Ombudsman provided their preliminary views to the parties in a draft consideration.
18. On 21 August 2023, the applicant accepted the draft consideration.
19. On 31 August 2023, TCCS accepted the draft consideration.

### **Issue in Ombudsman review**

20. The key issue to be decided in this Ombudsman review is whether the application is vexatious for the purposes of the FOI Act.
21. In making my draft consideration, I have had regard to:
  - the applicant's access application and review application
  - the respondent's decision of 4 October 2022 and submissions of 19 April 2023
  - the FOI Act, in particular ss 6, 7, 35, 43, 46 and 55
  - guidelines made by the ACT Ombudsman under s 66 of the FOI Act (**FOI guidelines**)
  - relevant case law including:
    - [‘AR’ and Canberra Health Services \[2020\] ACTOFOI 3 \(21 January 2020\)](#).

### **Relevant Law**

22. 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.<sup>7</sup>
23. Section 35 of the FOI sets out how an access application may be decided by a respondent, including to refuse to deal with the application.<sup>8</sup>

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<sup>6</sup> Section 43(1)(b) of the [FOI Act](#).

<sup>7</sup> Section 35(1)(c) of the [FOI Act](#).

<sup>8</sup> Section 35(1)(d) of the [FOI Act](#).

24. Section 43(1)(b) provides a respondent may refuse to deal with an access application wholly or in part if the application is frivolous or vexatious.

## **The parties' submissions**

25. TCCS's decision notice dated 4 October 2022 said:

22-055, item 2:

I have considered that some of the information you are seeking access to relates to an investigation of misconduct. In reviewing your application, it has been identified that the persons you have listed in the application are witnesses to that investigation. I have considered that the names have previously been disclosed to you by TCCS during the investigation.

It is reasonable to consider that the application is targeting these employees based on their roles in the investigation. It is also reasonable to consider that an application to access information which is targeted at witnesses may impede the management of a human resources function, as it could distress the witnesses and discourage other employees from coming forward as witnesses.

I have also considered that your request is worded in a way that it seeks to confirm the existence of records, which are unfounded and insinuate that inappropriate behaviour has occurred without founding.

For the above reasons, I find the application to be vexatious and without merit, and it is unlikely that the determination of the application would advance the public interest.

22-055, item 3:

I have considered that some of the information you are seeking access to relates to an investigation of misconduct.

In reviewing your application, it has been identified that the persons you have listed in this part of your application are witnesses to that investigation or members of management with responsibilities to respond to concerns of misconduct. I have considered that the names have previously been disclosed to you by TCCS during the investigation.

It is reasonable to consider that the application is targeting these employees based on their roles in the investigation. It is also reasonable to consider that an application to access information which is targeted at witnesses may impede the management of a human resources function. For an investigation to work effectively, the flow of information between a witness and staff with management responsibilities requires confidence that the information will be treated with sensitivity. I have found that the determination an application which is targeted at witnesses could impede this function of TCCS as it could distress the witnesses and discourage other employees from coming forward as witnesses.

For the above reasons, I find the application to be vexatious and without merit, and it is unlikely that the handling the application would advance the public interest.

22-088:

I have considered that your request is worded so that it identifies specific staff. In reviewing your application, it has been identified that the persons you have listed in this part of your application are witnesses to an investigation or members of management with responsibilities to respond to concerns of misconduct.

I have also considered that your request is worded in a way that it seeks to confirm the existence of records, which are unfounded and insinuate that inappropriate behaviour has occurred without founding.

For the above reasons, I find the application to be vexatious and without merit, and it is unlikely that the determination of the application would advance the public interest.

22-089:

It is my understanding the application is seeking access to records relating to a witness and member of staff with responsibilities to respond to any concerns of misconduct.

It is also reasonable to consider that an application to access information which is targeted at witnesses and relevant members of management may impede the management of a human resources function. For an investigation to work effectively, the flow of information between a witness and staff with management responsibilities requires confidence that the information will be treated with sensitivity. I have found that handling an application which is targeted at witnesses could impede this function of TCCS as it could distress the witnesses and discourage other employees from coming forward as witnesses.

For the above reasons, I am proposing to find the application to be vexatious and without merit, and it is unlikely that the handling the application would advance the public interest.

26. In their application for Ombudsman review, the applicant said:

The delegate for the FOI requests has used the term "vexatious" in providing their decision to refuse the FOI request. It appears that the term vexatious would hinder the course of natural justice and should not be used by the delegate for the FOI request.

27. These submissions are discussed in more detail below.

## Consideration

28. TCCS decided to refuse to deal with the access application on the ground the application is vexatious.<sup>9</sup>

29. The term 'vexatious' is not defined in the FOI Act and should be given its ordinary meaning:<sup>10</sup>

Instituted without sufficient grounds and serving only to cause annoyance.

30. Determining whether an application is vexatious or not will depend on the content of the request, noting the standard required to conclude there is simply no merit in the application whatsoever is relatively high.<sup>11</sup>

31. To promote the objects and pro-disclosure bias of the FOI Act, this refusal reason should be used as a last resort because it has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act.<sup>12</sup>

32. Agencies should first make use of the steps available under the FOI Act to clarify the scope of an applicant's request, before deciding an application is vexatious based on the nature of the access request and information sought.<sup>13</sup>

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<sup>9</sup> Section 43(1)(b) of the [FOI Act](#).

<sup>10</sup> The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.

<sup>11</sup> [Explanatory Statement, Freedom of Information Bill 2016](#).

<sup>12</sup> [FOI Guidelines, Dealing with access applications, Part 8.6](#). See pages 44 – 45 for discussion of frivolous or vexatious access applications.

<sup>13</sup> Section 34(3) of the [FOI Act](#).

33. Consistent with the FOI guidelines, to determine whether an access application is vexatious, I have had regard to relevant circumstances including:<sup>14</sup>

- the number of access applications made by the applicant
- the subject matter and/or nature of the access applications made by the applicant
- the applicant's dealings with the respondent
- whether the applicant has previously received some or all of the information requested, either under the FOI Act or otherwise, and
- the purposes of the access applications and whether the access application is made for a purpose other than the seeking of access to information.

34. As noted above at [11], TCCS decided to process the first, second and third applications as one application.<sup>15</sup> I do not consider the volume of information requested, or number of access applications made by the applicant, supports the view that this application was made for a primary purpose other than to access information.

35. I do not consider the applicant has engaged in unreasonable behaviour in their dealings with TCCS (e.g. unreasonable persistence).<sup>16</sup> While relevant information may have previously been made available to the applicant by TCCS, it is open to the applicant to exercise their right of access under the FOI Act.<sup>17</sup> It is not apparent from the applicant's previous dealings with TCCS the application was made for a purpose other than to access information.

36. To remain consistent with the references in the original decision, I have dealt with each part of the application separately below.

#### **First application – TCCS reference 22-055**

37. The first application sought information showing contact between identified witnesses relating to the allegations against, or suspension of, the applicant.<sup>18</sup>

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<sup>14</sup> [FOI Guidelines, Dealing with access applications, Part 8.6](#). See pages 44 – 45 for discussion of frivolous or vexatious access applications.

<sup>15</sup> TCCS reference 22-055, items 2 and 3; 22-089 and 22-089.

<sup>16</sup> For further guidance on unreasonable behaviour see [Office of the Commonwealth Ombudsman's Unreasonable Complainant Conduct Factsheet](#).

<sup>17</sup> ['AR' and Canberra Health Services \[2020\] ACTOFOI 3 \(21 January 2020\)](#), [55].

<sup>18</sup> Item 2 of TCCS reference 22-055.

38. The first application also sought information showing contact between witnesses and employees with human resources responsibilities relating to the allegations against, or suspension of, the applicant.<sup>19</sup>
39. In submissions to the Ombudsman, TCCS said the first application seeks to identify the existence of records created by those parties during the investigation period which is unfounded, and it is reasonable to consider the application is worded to target those individuals.
40. TCCS also said dealing with the first application is likely to harm or impede the management of a human resource function as it could distress the witnesses and discourage other employees from coming forward.
41. Based on the nature of the application, I accept the information requested involves witnesses and other employees who participated in a misconduct investigation. I consider the scope of the application also involves the personal information of the applicant.
42. However, I am not satisfied the first application was made to target those individuals based on their role in the investigation. It seems clear the scope of the application was intended to capture any relevant information about allegations made against, or the suspension of, the applicant.
43. I do not consider the reference to specific witnesses, or information about whether those witnesses or other employees had contacted each other, is sufficient to conclude the application was made for an improper or vexatious purpose.
44. I am not satisfied the wording used in the first application insinuates without foundation that inappropriate behaviour has occurred. For example, the first application sought contact between witnesses and staff with human resources responsibilities. I consider the scope of this application could reasonably be expected to capture communications ordinarily involved in performance of human resource functions.
45. As the scope of the application is constrained to information relating to 'allegations against or suspension' of the applicant, I consider it is reasonably likely the application was made for the purpose of accessing information relevant to the misconduct investigation, or the applicant's personal information.

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<sup>19</sup> Item 3 of TCCS reference 22-055.

46. I note the applicant has previously received a disclosure document for the purpose of the misconduct investigation, which contained allegations about the applicant including witness extracts. However, the applicant did not receive a copy of the witness statements.<sup>20</sup>

47. In my view, the first application is not vexatious.

#### **Second application – TCCS reference 22-088**

48. The second application sought information showing contact between TCCS employees with the use of certain inappropriate references towards third parties.

49. In the decision notice, TCCS said the request is worded in such a way that it seeks to confirm the existence of records, which is unfounded, and insinuate inappropriate behaviour has occurred.

50. I note the TCCS employees which are named in the second application are witnesses participating in an investigation or staff members who have human resources management responsibilities. The second application does not seek information about the applicant, or the misconduct investigation specifically.

51. I consider the second application is expressed as a request for information which shows those individuals may have been aware of, or could have participated in, the use of inappropriate references by TCCS employees towards other people.

52. I consider the making of an application which insinuates identified individuals have engaged in inappropriate behaviour could have the effect of causing annoyance to those parties. However, as noted above at [44], it is possible the information sought could have been created for the purpose of a human resource function.

53. I am not satisfied the second application was made to target those individuals and cause annoyance because of their involvement in the misconduct process.

54. It is reasonable to assume from the content of the second application, the applicant is seeking information about the conduct of other employees. While this information may not directly relate to the misconduct investigation concerning the applicant, it may relate to the misconduct process generally.

55. In my view, the second application is not vexatious.

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<sup>20</sup> [BZ' and Transport Canberra and City Services \[2023\] ACTOFOI 6.](#)  
(24 February 2023)



### **Third application – TCCS reference 22-089**

56. The third application sought access to information relating to complaints of inappropriate behaviour made by a TCCS employee towards another TCCS employee and vice versa.
57. During the processing of the third application, the applicant confirmed with TCCS the scope of the information sought in the third application includes information relating to the applicant.
58. It is unclear what information within the scope of the third application could relate to the applicant, noting the subject matter of the third application concerns complaints made by third parties.
59. In the decision notice, TCCS said the third application is vexatious because the information sought relates to a witness, and staff with responsibilities to respond to any concerns of misconduct; and dealing with the application could impede these processes.
60. I accept the third application refers to a witness who participated in the misconduct investigation involving the applicant.
61. It is clear the applicant seeks information about complaints involving TCCS employees, and while not directly related to the applicant's own misconduct processes, it is reasonable to expect this information could involve the misconduct process generally.
62. It appears the application was made to access information about possible complaints and how these complaints were dealt with.
63. In my view, the third application is not vexatious.

### **Conclusion**

64. For the reasons set out above, I **set aside** the decision of TCCS dated 4 October 2022 under s 82(2)(c) of the FOI Act and make a **substitute** decision that TCCS must deal with the application in accordance with the FOI Act.

**Katrina Dwyer**

**Acting Senior Assistant Ombudsman**

**29 September 2023**