

## ***'AW' and Transport Canberra and City Services Directorate*** **[2020] ACTOFOI 16 (20 June 2020)**

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

<b>Application Number</b>	AFOI-RR/20/10006
<b>Decision Reference</b>	[2020] ACTOFOI 16
<b>Applicant</b>	'AW'
<b>Respondent</b>	Transport Canberra and City Services Directorate
<b>Decision Date</b>	20 June 2020
<b>Catchwords</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – protection of an individual's right to privacy – agency's ability to obtain confidential information

### **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 Transport Canberra and City Services Directorate (TCCS), dated 28 January 2020.

### **Background of Ombudsman review**

3. On 11 December 2019, the applicant applied to TCCS for access to:  

The DAS report detailing the investigation into the incident involving your dog Oberon  
A copy of your recommendations to the Deputy Registrar
4. On 18 December 2019, the applicant revised the scope of the application to:  

The DAS report detailing the investigation into the incident involving your dog Oberon  
A copy of the recommendations made by Jol Taber to the Deputy Registrar

5. On 28 January 2020, TCCS identified one document falling within the scope of the access application, and made the decision to give the applicant partial access to this document.
6. In making its decision, TCCS found some of the information sought was contrary to the public interest to disclose because it 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)
  - an agency's ability to obtain confidential information.
7. On 7 February 2020, the applicant applied to the ACT Ombudsman for review of TCCS' decision under s 73 of the FOI Act.
8. On 27 March 2020, my Office wrote to the applicant, providing its preliminary view, being to confirm TCCS' decision, and invited the applicant to make further submissions or withdraw the review.
9. On 9 April 2020, the applicant provided further submissions.
10. On 7 May 2020, I provided my preliminary views about the respondent's decision to the parties in my draft consideration.
11. On 15 May 2020, TCCS advised our Office they did not wish to make further submissions, noting that my preliminary view was to confirm TCCS' original decision.
12. On 19 May 2020, the applicant provided further submissions.

## Scope of Ombudsman review

13. The documents that TCCS refused access to includes:
  - witness statement of individual A
  - witness statement of individual B
  - names and contact details of people involved in the Domestic Animal Services (DAS) investigation.
14. The applicant provided a copy of the witness statement of individual B to our Office, evidencing that they already have a copy of this information. Further, the applicant has refined the scope of the review, advising they do not seek access to names or contact details of people involved in the DAS investigation. This means the remaining information at issue in this review is the information contained in the witness statement of individual A.

15. The issue to be decided in this review is whether, on balance, the witness statement of individual A contains contrary to the public interest information.
16. In making my decision, I have had regard to:
- the applicant's access application, review application, and further submissions
  - the respondent's decision
  - the FOI Act, in particular ss 7, 16, 17, 35, 72, and Schedule 2
  - the HR Act
  - the *Information Privacy Act 2014* (IP Act)
  - the respondent's FOI processing file relating to the access application
  - an unedited copy of the information at issue
  - relevant case law, including *Alistair Coe and ACT Directorate*,<sup>1</sup> *Suskova and Council of the City of Gold Coast*,<sup>2</sup> and *AU and Transport Canberra and City Services*.<sup>3</sup>

## Relevant law

17. 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.
18. 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.
19. 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.
20. 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>1</sup> [\[2018\] ACTOFOI 4 \(5 September 2018\)](#).

<sup>2</sup> [\[2015\] QLCmr 31 \(27 November 2015\)](#).

<sup>3</sup> [\[2020\] ACTOFOI 11 \(25 March 2020\)](#).

21. 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.
22. 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.
23. 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

24. In its decision notice, TCCS states:

For an investigation to work effectively, cooperation between the directorate and the person being investigated is required. The release of such documents could reasonably be expected to reduce the frankness and candour of information sharing by a witness, resulting in reduced effectiveness of future investigations. It is expected by all parties involved that this kind of information is treated in a confidential manner.

The use of personal information is limited to the purpose for which it was collected. That is, the investigation of the complaint.

25. In the application for review, the applicant states:

The Investigator's report in the case includes numerous demonstrable errors of fact, some of which one can only conclude have been transposed from the redacted "witness statements".

The privacy and security of the "complainant" is not at stake as she is known to me ...

The death of the cat is not in dispute, and there is no apparent need or likelihood that any future "investigation" of this case will be required.

26. In response to receiving notice of this review, TCCS states:

... Transport Canberra and City Services contacted [the witness] ... [who] advised that [they] objected to the release of [their] personal information and the witness statement provided to DAS.

27. In response to receiving the Ombudsman's preliminary view, the applicant states:

These statements have been redacted in toto [sic] from the officer's report, and I believe they may include some errors of fact. Without the opportunity to challenge these errors of fact I am being denied natural justice. It is in the public interest to ensure that natural justice is delivered at all times.

Without the opportunity to validate and challenge the facts upon which the Control Order was issued I am unable to defend the charge.

28. In response to receiving the Ombudsman's draft consideration, the applicant states:

... The TCCS action in redacting full pages were convenient but not appropriate. The purported "facts" surrounding the matter should be retained. I have no objection to the redaction of those portions impinging on their privacy.

29. I have considered these submissions below.

## Considerations

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

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

31. Neither party to this 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 that information must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

### *Public interest test*

32. 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.

33. 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*

34. In submissions to this review, the applicant states:

Without the opportunity to validate and challenge the facts upon which the Control Order was issued I am unable to defend the charge.

35. Section 17(2) of the FOI Act lists 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.

36. Relevantly, the FOI Act provides that the reasons why the applicant is seeking access to the information is an irrelevant factor that the decision-maker will be unable to take into account.<sup>4</sup> Accordingly, I have not taken this factor into account.

37. 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*

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

39. In making its decision on the access application, TCCS identified Schedule 2.1(a)(viii) as a relevant factor favouring disclosure, being the release of the information that could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.

40. TCCS states:

I have considered the public interest in release of information about animal welfare and nuisance complaints and consider that information relating to the outcome of the investigations undertaken by this directorate are generally in the public interest.

41. I agree with TCCS that this factor is relevant, as disclosure of the information sought would reveal contextual background regarding the investigation which informed the decision by DAS, and attribute this factor moderate weight.

42. The applicant did not specifically identify any factors listed in Schedule 2, s 2.1(a), however, the applicant identified natural justice, also known as procedural fairness, as a reason why the information should be released – that is, disclosure of the information would assist the applicant to understand the factual basis that informed the decision to issue a Control Order.

43. I agree with the applicant that being provided with all available information in relation to a decision to issue a Control Order could reasonably be expected to provide the applicant with procedural fairness, and as a result, I consider the following two factors for disclosure are also relevant in this matter:

- contribute to the administration of justice generally, including procedural fairness (Schedule 2, s 2.1(a)(xiii))
- contribute to the administration of justice for a person (Schedule 2, s 2.1(a)(xiv)).

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<sup>4</sup> Section 17(2)(f) FOI Act.

44. To ensure procedural fairness is afforded, does not necessarily require the witness statement to be provided to the applicant. The information that TCCS intends on disclosing to the applicant includes specific references to the factors considered to be relevant by DAS in their recommendation to the Registrar. However, I still place moderate weight on the above two factors.
45. 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>5</sup> This concept is promoted through the objects of the FOI Act.<sup>6</sup>

*Factors favouring nondisclosure*

46. Of the factors favouring nondisclosure listed in Schedule 2, s 2.2(a), TCCS submitted that disclosure of the information at issue could reasonably be expected to prejudice:
- the protection of an individual's right to privacy or any other right under the HR Act<sup>7</sup>
  - the agency's ability to obtain confidential information.<sup>8</sup>
47. I have discussed these two factors below.

Prejudicing the protection of an individual's right to privacy

48. 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 HR Act.
49. Section 12(a) of the HR Act provides that everyone has the right 'not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily'. It does not provide a general right to privacy,<sup>9</sup> but can essentially be viewed as the right of an individual to preserve their personal sphere from interference from others.
50. The IP Act identifies the circumstances in which the disclosure of information may constitute a breach of an individual's privacy. An individual's personal information can only be disclosed in accordance with the Territory Privacy Principles listed in Schedule 1 of the IP Act.

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<sup>5</sup> [See s 17 of the FOI Act.](#)

<sup>6</sup> [See s 6\(b\) of the FOI Act.](#)

<sup>7</sup> Schedule 2, s 2.2(a)(ii) FOI Act.

<sup>8</sup> Schedule 2, s 2.2(a)(xii) FOI Act.

<sup>9</sup> [\[2018\] ACTOFOI 4 at \[43\].](#)

51. Personal information is defined in s 8 of the IP Act as:

(a) information or an opinion about an identified individual or an individual who is reasonably identifiable—

- (i) whether the information or opinion is true or not; and
- (ii) whether the information or opinion is recorded in a material form or not.

52. I have considered these submissions below.

53. TCCS applied this factor in refusing to release the witness statement in its entirety, and redacting other personal information throughout the documents in scope of the access application.

54. TCCS states:

The use of personal information is limited to the purpose for which it was collected. That is, the investigation of the complaint.

... Transport Canberra and City Services contacted [the witness] ... [who] advised that [they] objected to the release of [their] personal information and the witness statement provided to DAS.

55. The applicant states:

The privacy and security of the “complainant” is not at stake as [they are] known to me ...

56. The witness statement contains information consisting of asserted facts and opinions relating to the witness’ personal experiences, and I am satisfied this information, as well as the names and contact details of the witness, is personal information.

57. In considering whether the disclosure of this personal information could reasonably be expected to prejudice the protection of an individual’s right to privacy, I have taken into account that:

- the information is not well-known or publicly available
- the witness statement was provided in the course of a DAS investigation and was provided on a confidential basis
- the individual that made the witness statement does not wish the information to be released.

58. I acknowledge the applicant may know the identity of the witness and may be able to deduce some of the information contained in the witness statement. Where information is already known, the privacy interests of the witness identified somewhat reduces, but this does not negate the weight to be afforded to this factor favouring nondisclosure, as once the information is released, there is no restriction on its use, dissemination or republication, which would identify the witness to other parties.



59. I acknowledge the applicant's assertion that the information sought is factual information, rather than information that would impinge on the witness' privacy. But in relation to the witness statement, I consider that any factual information is so intertwined with the personal experiences and opinions of the witness that it would lose its meaning and context if the personal information were removed. Accordingly, I consider it appropriate to assess the entire witness statement as personal information.
60. I now turn to whether the release of the witness statement, in its entirety, would prejudice the privacy of the witness.
61. I consider the release of the witness statement would be a significant intrusion into the privacy of the witness, and accordingly, I am satisfied that disclosure of the information at issue could reasonably be expected to prejudice an individual's right to privacy, and attribute significant weight to this factor favouring nondisclosure.
62. I note that TCCS has inconsistently applied the redaction of private information (specifically witnesses' names). I consider that as some of the private information has already been made available to the applicant in TCCS' initial decision, there is no utility in redacting the remainder of the private information. However, should TCCS decide to publish this decision on their disclosure log, consideration needs to be given to redacting the private information in its entirety.

Prejudicing the agency's ability to obtain confidential information

63. A factor favouring non-disclosure under Schedule 2, s 2.2(a)(xii) of the FOI Act is that disclosure of the information could reasonably be expected to prejudice the agency's ability to obtain confidential information.

64. TCCS states:

For an investigation to work effectively, cooperation between the directorate and the person being investigated is required. The release of such documents could reasonably be expected to reduce the frankness and candour of information sharing by a witness, resulting in reduced effectiveness of future investigations. It is expected by all parties involved that this kind of information is treated in a confidential manner.

65. The applicant states:

There is no risk of prejudicing future investigations, as the matter has reached its conclusion. The cat's demise is common ground. It is not clear what "confidential information" might be sought or required in the future.

66. I consider that under the FOI Act, this factor favouring nondisclosure does not need to relate to obtaining further information in relation to a particular incident, but instead relates to whether releasing witness statements in general could reasonably be expected to dissuade people from making witness statements in the future. Therefore, prejudicing the agency's ability to obtain, potentially pertinent, confidential information in the future.
67. In considering whether the disclosure of this information could reasonably be expected to prejudice the agency's ability to obtain confidential information, I have taken into account that:
- There is no obligation placed upon Canberra residents to provide a witness statement to DAS, conversely, it is a voluntary decision made for the purpose of assisting DAS undertake an investigation.
  - The witness statement was provided in the course of an investigation and was provided on a confidential basis.
  - DAS is reliant on such statements to inform their investigations.
  - The individual that made the witness statement does not wish the information released.
68. In my view, disclosing a witness statement outside of the DAS investigation process, where there is no restriction on its use, dissemination or republication, could reasonably be expected to make witnesses reluctant to fully participate in future investigations and prejudice the future flow of confidential information to the investigators. This, in turn, could reasonably be expected to adversely impact DAS' ability to conduct effective investigations in accordance with government and community expectations.
69. Accordingly, I attribute significant weight to this factor favouring nondisclosure.

*Balancing the factors*

70. As I have identified public interest factors favouring disclosure and nondisclosure, I now have to consider the public interest balancing test as set out in s 17 of the FOI Act.
71. In this matter, I have identified that the factors which favour disclosure, outlined in Schedule 2, s 2.1(a)(viii), (xiii), and (xiv), apply and have attributed moderate weight to these factors.
72. On the other side, I have found that Schedule 2, s 2.2(a)(ii) and (xii) factors favour nondisclosure of the information at issue, and I have attributed significant weight to these factors.

73. I note that balancing public interest factors is not, however, simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being consider in the public interest. The decision-maker's task is to consider the relative importance and weight of each factor they have identified. The weight given to a factor will depend on the effect that disclosing the information would have on the public interest.
74. The FOI Act also has a pro-disclosure bias, 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'.<sup>10</sup>
75. I am satisfied that in relation to the information at issue, on balance, the public interest factors favouring nondisclosure outweigh the public interest factors favouring disclosure of the information at issue and the pro-disclosure bias of the FOI Act. This is because, for the reasons outlined above, I have placed significant weight on the nondisclosure factors, and consider disclosure could have a significant prejudicial impact in terms of privacy of the witness, and future DAS investigations.
76. I consider the decision by TCCS to provide partial access is the correct one. This outcome will prevent prejudice to the privacy of the witness, while meeting the objects of the FOI Act and providing the applicant with procedural fairness, by releasing the factors considered relevant by the decision maker when making the decision to issue a Control Order and Infringement Notice.

## Conclusion

77. Under s 82(2)(a), I confirm TCCS' decision to refuse access to the information at issue under s 35(1)(a) of the FOI Act.

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

**20 June 2020**

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<sup>10</sup> See: Explanatory Statement, [Freedom of Information Bill 2016](#) (ACT) 13.