

**'AL' and Transport Canberra and City Services Directorate [2019]****ACTOFOI 15 (6 September 2019)****Decision and reasons for decision of Senior Assistant Ombudsman, Louise Macleod**

<b>Application Number:</b>	AFOI-RR/19/10010
<b>Decision Reference:</b>	[2019] ACTOFOI 15
<b>Applicant:</b>	'AL'
<b>Respondent:</b>	Transport Canberra and City Services Directorate
<b>Decision Date:</b>	6 September 2019
<b>Catchwords:</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – prejudice the protection of an individual's right to privacy under the <i>Human Rights Act 2004</i> – <i>Information Privacy Act 2014</i> – sensitive 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(1)(c) of the FOI Act, I set aside the decision of Transport Canberra and City Services Directorate (TCCS) of 27 March 2019.

**Background and scope of Ombudsman review**

3. On 7 July 2017, the applicant was a passenger on an ACTION bus that was involved in a traffic accident, in which a second vehicle was at fault. The applicant is seeking information about this second vehicle in order to lodge a personal injury claim under the *Road Transport (Third Party Insurance) Act 2008* (Third Party Insurance Act).
4. On 18 February 2019, through his solicitor, the applicant applied to TCCS for access to:

A copy of the incident report and CCTV footage of the incident that occurred on an ACTION bus on 7 July 2017 at approximately 8.30am to 9.30 am travelling along Grover Crescent, McKellar, city bound.

5. On 27 March 2019, TCCS advised the applicant it had identified seven documents, and CCTV footage, as falling within the scope of the access application. TCCS decided to give the applicant access to seven documents in part, and invited the applicant to make arrangements to view the CCTV footage at the TCCS office.
6. Parts of the documents were redacted on the basis the information was contrary to the public interest information. This included the registration number of the second vehicle.
7. The decision notice suggests that TCCS made this decision on the basis that disclosure of this information could reasonably be expected to prejudice the protection of an individual's right to privacy under the *Human Rights Act 2004* (Human Rights Act).
8. As a preliminary issue, it is, however, noted that TCCS also suggested in its decision record that this factor involves an assessment of whether the information is sensitive. This is not, however, the case.
9. Sensitive information is taken to be public interest information under Schedule 1, 1.4 where disclosure would be unreasonable. This is not, however, considered relevant here as the redacted information does not meet the definition of sensitive information provided for in s 14 of the *Information Privacy Act 2014* (the Information Privacy Act), which is utilised in the FOI Act dictionary.
10. It is clear that TCCS also took into account the Information Privacy Act in making their decision. As a further preliminary issue, I note that, while this legislation is relevant in identifying circumstances in which the disclosure of information may constitute a breach of an individual's privacy, it is not in itself a reason for refusal of access to information under the FOI Act as is suggested in the schedule provided with the decision notice.
11. On 12 April 2019, the applicant applied for Ombudsman review of the TCCS decision under s 73 of the FOI Act.
12. On 24 August 2019, I provided my preliminary views about the TCCS decision to the parties in my draft consideration. The applicant submitted that they agreed with my draft consideration. TCCS did not provide any submissions.
13. As part of this review, the applicant is not seeking access to any personal information, aside from the registration number of the second vehicle. Personal information, other than the registration number, is therefore outside the scope of this review.
14. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information sought, would be contrary to the public interest.

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

- the TCCS decision
- the FOI Act, in particular ss 7, 16, 17, 35 and Schedule 2
- the Human Rights Act, in particular s 12
- the Information Privacy Act, in particular ss 6, 8 and Schedule 1
- the TCCS FOI processing file relating to the access application
- an unedited copy of the information sought
- relevant case law, in particular *'AC' and Justice and Community Safety Directorate*,<sup>1</sup> *Willsford and Brisbane City Council*,<sup>2</sup> *P06DKS and Queensland Police Service*,<sup>3</sup> *Q and Department of Human Services*,<sup>4</sup> and *Alistair Coe and ACT Health Directorate*<sup>5</sup>
- the applicant's application for Ombudsman review.

## Relevant law

16. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.<sup>6</sup> This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.
17. 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.<sup>7</sup>
18. Contrary to the public interest information is defined in s 16 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 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.

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<sup>1</sup> [2018] ACTOFOI 5 (10 October 2018).

<sup>2</sup> (1996) QAR 368.

<sup>3</sup> [2018] QICmr 29 (15 June 2018).

<sup>4</sup> [2012] AICmr 30.

<sup>5</sup> [2018] ACTOFOI 4 (5 September 2018) (*Coe no. 2*).

<sup>6</sup> Section 7 of the FOI Act.

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

## The contentions of the parties

20. In its decision notice, TCCS said:

The footage and information identified as relevant to your request contain information that I consider to be, on balance, contrary to the public interest to disclose under the test set out in section 17 of the Act... the factors I considered relevant in relation to favouring non-disclosure is where information might prejudice the protection of an individual's right to privacy or be sensitive information.

I have decided people's names, contact details, including vehicle registration numbers should not be released where it would amount to a release of personal information because the release could identify an individual and would prejudice their right to privacy.

21. TCCS also verbally submitted to this review that the applicant is able to request a police report containing the information sought from ACT Policing. I am aware the applicant has submitted a request, but has experienced a delay in receiving the report. This is, however, outside of the scope of this review.

22. In the application for Ombudsman review, the applicant's solicitor said:

The registration number of the vehicle at fault is the piece of information we require in order to lodge a personal injury claim on behalf of [the applicant]... It would be appreciated if the crash report could be reissued without the registration number of the vehicle at fault being redacted. The only information we can obtain from a public search on this registration number is the CTP insurer which is what we require. Public searches do not provide any personal detail of the owner of a vehicle.

## Considerations

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

23. TCCS does not indicate that the information sought is taken to be contrary to the public interest to disclose under schedule 1. 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.

*Public interest test*

24. To determine whether disclosure of information is, on balance, contrary to the public interest, s 17(1) 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.

25. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) are considered.

*Irrelevant factors*

26. I have noted the irrelevant factors listed in s 17(2) and I am satisfied that I have not considered any irrelevant factors in this case.

*Factors favouring disclosure*

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

28. TCCS has indicated that two factors are relevant here:

- disclosure would, or could reasonably be expected to, reveal the reason for a government decision and any background or contextual information that informed the decision (Schedule 2, s2.1(a)(viii))
- the information is the personal information of the person making the request (Schedule 2, 2.1(b)(i))

29. In my view, neither of these factors are, however, relevant in terms of the remaining information at issue.

30. Of the factors favouring disclosure listed in schedule 2.1, I consider that only one is relevant in this Ombudsman review. Disclosure could reasonably be expected to contribute to the administration of justice for a person.<sup>8</sup>

31. The applicant submits that he wishes to pursue a personal injury claim under the Third Party Insurance Act. He further submits that in order to do so, he requires the vehicle registration number of the vehicle at fault.

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<sup>8</sup> Schedule 2, s 2.1(xiv) of the FOI Act.

32. The public interest in disclosing information that could contribute to legal proceedings was considered in *'AC' and Justice and Community Safety Directorate*,<sup>9</sup> in which the Senior Assistant Ombudsman took into account the findings of the Queensland Information Commissioner in *Willsford and Brisbane City Council*.<sup>10</sup>
33. In *Willsford*, the Commissioner said:
- it should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if the applicant can demonstrate that –
- (a) loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be available under the law
  - (b) the applicant has a reasonable basis for seeking to pursue the remedy, and
  - (c) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.<sup>11</sup>
34. I consider the Commissioner's observations in *Willsford* are relevant to this Ombudsman review. I also, however, recognise that, as the Australian Information Commissioner considered in *Q and Department of Human Services*, 'access to documents through FOI is not intended to replace the discovery process in courts and tribunals, which supervise the provision of documents to parties in matters before them'.<sup>12</sup>
35. In this particular case, however, without access to the registration number at issue, the applicant is unable to conduct a search to ascertain which insurer to serve notice upon to commence a claim for damages for personal injury.
36. As the Queensland Information Commissioner took into account in the similar case of *P06DKS and Queensland Police Service*<sup>13</sup>, refusing disclosure could thus deny the applicant the opportunity to pursue a remedy against the relevant insurer. Consequently, I consider that disclosure could contribute to the administration of justice for the applicant.
37. While I understand the information at issue has been requested from ACT Policing, they have advised of a lengthy delay and I consider it the public interest to encourage the speedy resolution of any relevant personal injury claims.
38. As a result, I accept the submissions of the applicant, and give significant weight to the public interest factor favouring disclosure.

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<sup>9</sup> [2018] ACTOFOI 5 (10 October 2018), at [38].

<sup>10</sup> (1996) QAR 368.

<sup>11</sup> *Willsford*, (n 10) at [17].

<sup>12</sup> [2012] AICmr 30.

<sup>13</sup> [2018] QICmr 29 (15 June 2018).

39. Additionally, I note 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>14</sup> This concept is promoted through the objects of the FOI Act.<sup>15</sup>

*Factors favouring nondisclosure*

40. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure.
41. As discussed above, of those factors, TCCS considered it a relevant factor that disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy under the Human Rights Act.<sup>16</sup>
42. If the information at issue included the full registration details of an individual, it would certainly comprise of personal information, as it would identify a person as the owner of the relevant vehicle, and this factor would be relevant.
43. In this case, only the vehicle registration number is at issue. This factor is still, however, potentially relevant given the vehicle registration number is the number of a registered owner of the vehicle - that is, there is a connection between the information and the individual.
44. The Human Rights Act, however, does not provide a general right to privacy. Rather, it provides the right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily.<sup>17</sup>
45. When deciding whether disclosure would result in unlawful or arbitrary interference with the relevant individual's privacy, it is, however, relevant to consider whether disclosure could be reasonably expected to result in a breach of the Information Privacy Act.
46. In making this assessment, I must consider whether the vehicle registration is personal information. Section 8 of the Information Privacy Act defines person information as 'information or an opinion about an identified individual or an individual who is reasonably identified'.
47. On its own, a vehicle registration does not identify the relevant individual. The question arises, however, of whether the individual is reasonably identifiable.
48. Taking into account the guidelines issued by the Office of the Australian Information Commissioner, in making this assessment, I consider the following to be relevant:

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<sup>14</sup> Section 17 of the FOI Act.

<sup>15</sup> Section 6(b) of the FOI Act.

<sup>16</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

<sup>17</sup> *Coe no. 2*, (n 5) at [43].

- the nature and amount of information
  - who will hold and have access to the information, and
  - the other information that is available, and the practicability of using that information to identify the individual.
49. As outlined above, the information at issue in this review is now only the vehicle registration number of the second vehicle.
50. I accept that a law enforcement agency, with access to a database of vehicle registration numbers, may be able to identify the registered owner of a particular vehicle. A member of the public, such as the applicant would, however, be less likely to be able to identify the registered owner.<sup>18</sup>
51. I have conducted a public search of the vehicle registration number using Access Canberra.<sup>19</sup> I was able to identify the make, model and colour of the vehicle, whether it is currently registered, and the compulsory third party insurance provider.
52. I do not consider this information would cause the individual to be reasonably identifiable. As a result, I do not consider it to be personal information
53. For this reason, I place no weight on the public interest factor favouring nondisclosure of the vehicle registration number.

#### *Balancing the factors*

54. I am satisfied that, on balance, the public interest factors favouring disclosure outweigh the public interest factors favouring nondisclosure for the information sought.

### **Conclusion**

55. I set aside ACT Health's decision to refuse access under s 35(1)(c) of the FOI Act to the registration number of the second vehicle, and substitute it with my decision that the vehicle registration number is not contrary to the public interest information.

**Louise Macleod**  
**Senior Assistant Ombudsman**  
**6 September 2019**

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<sup>18</sup> See, for example, guidelines issued by the Office of the Australian Information Commissioner: <https://oaic.gov.au/privacy/guidance-and-advice/what-is-personal-information/#checklist-for-determining-whether-information-is-personal-information>

<sup>19</sup> <https://rego.act.gov.au/regosoawicket/public/reg/FindRegistrationPage?2>