

Decision and reasons for decision of Senior Assistant Ombudsman

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| Application number: | AFOI-RR/23/10004 |
| Decision reference: | [2023] ACTOFOI 14 |
| Applicant: | 'CF' |
| Respondent: | Icon Water |
| Date: | 28 July 2023 |
| Catchwords: | <i>Freedom of Information Act 2016 (ACT)</i> – whether disclosure of information is contrary to the public interest – promote open discussion of public affairs and enhance the government’s accountability – contribute to positive and informed debate on important issues or matters of public interest – inform the community of the government’s operations – prejudice a deliberative process of government – prejudice the economy of the Territory – prejudice the trade secrets, business affairs or research of an agency or person – prejudice the protection of an individual’s right to privacy or any other right under the <i>Human Rights Act 2004</i> |

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the ACT *Freedom of Information Act 2016 (FOI Act)*.
2. For the reasons set out below my decision is to set aside and substitute the decision of Icon Water dated 27 January 2023 under s 82(2)(c) of the FOI Act.

Background of Ombudsman review

3. On 19 December 2022, the applicant applied for access to:
 1. The definition adopted by Icon Water when making assessments under the WSCC Code, in particular when determining whether an increase in Equivalent Population (EP) has occurred.
 2. The source of this definition under ACT Legislation or National Building Codes.
 3. Internal correspondence within Icon Water discussing and/or determining this definition since 19/11/2022 (inclusive).

4. On 27 January 2023, Icon Water made a decision giving full access to one document within the scope of paragraphs 1 and 2 of the application, and refusing access to 10 documents within the scope of paragraph 3 of the application.
5. On 30 January 2023, the applicant sought Ombudsman review of Icon Water’s decision under s 73 of the FOI Act.
6. On 7 July 2023, I provided my preliminary views to the parties in a draft consideration.
7. On 10 July 2023 and 21 July 2023, the applicant and Icon Water respectively provided their responses to my draft consideration.

Information at issue

8. The information at issue is contained in the 10 documents to which Icon Water refused access, being internal correspondence of Icon Water staff discussing the method for determining Equivalent Population (EP) for the purpose of calculating a Class 2 Infrastructure Charge under clause 9 of the Water and Sewerage Capital Contribution Code (WSCC Code).¹
9. The information at issue does not include information in the 10 documents which is out of scope of the access request, including correspondence from third parties seeking clarification of the method for determining EP.
10. According to Icon Water:

[The WSCC Code] formalises arrangements for contributions that developers pay towards future water and sewerage infrastructure upgrades for Class 2 assets that are necessitated by increasing density in established suburbs...

Under the WSCC Code, the cost of water and sewerage infrastructure upgrades in established areas is shared between developers (when increasing housing density) and Icon Water.

Prior to the WSCC Code being introduced, there was a “last man standing rule” whereby the single developer that triggered an upgrade for Class 2 assets was required to pay the full cost of new water and sewerage infrastructure.²
11. Further, “EP is an industry measure of network flow or impact and takes into account different property uses.”³
12. The information at issue includes a series of comments on a draft proposal for how calculations should be made. As these are attached to a document that is within the scope of the application

¹ The Water and Sewerage Capital Contribution Code is approved by the Independent Competition and Regulatory Commission pursuant to the [Utilities \(Water and Sewerage Capital Contribution Code\) Approval 2017](#) made under s 58 of the [Utilities Act 2000](#).

² [Water and Sewerage Capital Contributions Code | Icon Water](#).

³ [faq3-capital-contributions-code-december-2017.pdf \(iconwater.com.au\)](#).

and they are 'internal correspondence within Icon Water discussing and/or determining this definition since 19/11/2022 (inclusive)', I consider these comments are within scope.

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

- the applicant's access application and review application
- Icon Water's decision
- the FOI Act, in particular Schedule 2, s 2.2(a)(xvi)
- the *Human Rights Act 2004* (ACT) (**Human Rights Act**)
- the ACT Ombudsman FOI Guidelines
- an unedited copy of the information at issue
- relevant case law, including:
 - *'CA' and Environment, Planning and Sustainable Development Directorate* [2023] ACTOFOI 7
 - *'BR' and Canberra Health Services* [2022] ACTOFOI 3
 - *Barling and Brisbane City Council* [2017] QICmr 47
 - *Queensland Newspapers Pty Ltd and Queensland Police Service* [2014] QICmr 5.

Relevant law

14. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.⁴ This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.⁵

15. 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

16. The public interest test in s 17 of the FOI Act sets out the process for balancing public interest factors favouring disclosure and nondisclosure respectively. This balancing test must be used to determine whether disclosure would be contrary to the public interest.

⁴ Section 7 of the FOI Act.

⁵ Section 35(1)(c) of the FOI Act.

17. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.⁶
18. Schedule 2 of the FOI Act sets out public interest factors to be balanced when conducting the s 17 test to determine the public interest.

The contentions of the parties

19. In its decision notice, Icon Water said:

I accept that the application of the WSCC Code is a matter of public interest. I note the relevant information relating to the WSCC Code that is currently publicly available including through the websites of Icon Water and the ICRC. I acknowledge that disclosure of the information would provide some benefits, primarily through promotion of open discussion and contribution to debate.

The documents requested comprise internal communications regarding current deliberations. I am satisfied that the release of the documents would be contrary to the public interest insofar as it would adversely impact on the effectiveness of current deliberations and the ability to undertake future collaborative activities to inform decision-making.

20. In the application for Ombudsman review, the applicant said:

It is very much within the public interest to know and understand what this definition is, as it is being used to determine whether thousands of dollars' worth of charges should be imposed on those seeking to build on their residential block. The fact that this information is not able to be gained in any other way, either by viewing publicly available documents or in direct communication with Icon assessing officers further elucidates why this release of correspondence and documentation requested under part 3 of the application should not have been refused.

21. After being notified of this review application Icon Water provided additional submissions in greater detail than the original decision letter, noting:

Icon Water contend that substantial weight should be afforded to the factors in favour of nondisclosure and, that on balance, these factors outweigh the factors in favouring disclosure.

22. The applicant indicated they accepted my draft consideration and had no further submissions to make.

⁶ Section 35(1)(c) of the FOI Act.

23. Icon Water requested an additional week to provide their submissions in response to my draft consideration. Subsequently Icon Water indicated acceptance of the draft consideration but requested that I reconsider the disclosure of staff members contact details as follows:

That personal information of Icon Water non-executive staff members (name, email and contact number, which may also include personal mobile number) to be redacted from the documents, including the personal information within the comment bubbles, as these details are not ordinarily available to the public and their disclosure would be contrary to the public interest on the basis that it would impact their right to privacy in circumstances where staff members' personal information (as opposed to executive staff's personal information) is not generally publicly available (and is also arguably out of scope of the request).

Icon Water acknowledges that some of its staff members do correspond with the public using their individual email addresses and phone numbers by election, on a one on one basis. However, it is more common for our staff members to use shared inboxes and centralised phone numbers to communicate with the public.

Icon Water accepts that its executive staff members' names could be disclosed, including the following: Ms Davina McCormick, Ms Joy Yau, Mr Gerard Brierley and Ms Alison Pratt.

Consideration

Information taken to be contrary to the public interest to disclose under Schedule 1

24. Neither party in this Ombudsman review suggested the information at issue contains information taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act.
25. Accordingly, in deciding whether the information at issue is contrary to the public interest information, I must consider if disclosing the information would, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

Public interest test

26. To determine whether disclosure is contrary to the public interest, s 17 of the FOI Act prescribes the following five steps:
- 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 2.1
 - 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

27. In its original decision and submissions to this review, Icon Water identified 3 factors favouring disclosure.

Promote open discussion of public affairs and enhance the government's accountability

(Sch 2, s.2.1(a)(i))

28. A factor favouring disclosure is that disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.⁷

29. The applicant submitted disclosure would be beneficial as the information at issue would assist in understanding how decisions are currently being made in relation to the WSCC Code.

30. I have reviewed the information at issue and note it includes information which describes (among other things):

- Icon Water's current approach to determining the definition of EP for the purpose of calculating a Class 2 Infrastructure Charge under the WSCC Code
- industry uncertainty about Icon Water's current approach
- different opinions of Icon Water staff as to the relative advantages and disadvantages of Icon Water's current approach, and
- potential alternative options, including their relative advantages and disadvantages, which Icon Water may or may not choose to adopt.

31. Icon Water submitted disclosure of this information would not promote open discussion in a meaningful way as the documents *'do not represent any finalised position or the position of Icon Water'*.

32. The fact the information at issue does not represent Icon Water's final position on the most appropriate method for determining EP for the purposes of calculating a Class 2 Infrastructure Charge under the WSCC Code does not, in my view, diminish the capacity for disclosure of the information to promote open discussion.

⁷ Schedule 2, s 2.1(a)(i) of the FOI Act.

33. I consider disclosure of information with the characteristics described above could reasonably be expected to promote open discussion of a matter of legitimate public interest, and enhance Icon Water's accountability. I afford moderate weight to this factor.

***Contribute to positive and informed debate on important issues or matters of public interest
(Sch 2, s.2.1(a)(ii))***

34. A factor favouring disclosure is that disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of public interest.⁸

35. The applicant and Icon Water provided background information on the operation of the WSCC Code in imposing capital contribution charges to avoid the "last man standing" issue by assessing the change in EP to determine whether a charge is necessary.

36. As explained above at paragraphs 9 and 10, this spreads the cost of infrastructure works across each development that contributed to the need for additional sewerage works to be undertaken in established suburbs.

37. I am satisfied the operation of Icon Water in being the body assessing and imposing charges pursuant to the WSCC Code is a matter of public interest to ensure these charges are being imposed appropriately and consistently.

38. As the information at issue concerns an incomplete process, I consider disclosure of the information could reasonably be expected to inform ongoing consideration of how the definition of EP should be applied for the purposes of calculating a Class 2 Infrastructure Charge under the WSCC Code.

39. My preliminary view is that this factor should be afforded medium weight.

***Inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community
(Sch 2, s.2.1(a)(iii))***

40. A factor favouring disclosure is that disclosure could reasonably be expected to inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community.⁹

⁸ Schedule 2, s 2.1(a)(ii) of the FOI Act.

⁹ Schedule 2, s 2.1(a)(iii) of the FOI Act.

41. I consider this factor is relevant. The processes and definitions used by Icon Water in administering the WSCC Code are relevant to the community, as it is reasonable for the community to expect clarity around whether proposed developments are likely to attract a charge or not.
42. It is important that government conducts its operations in a consistent manner and I consider disclosure of the information at issue can reasonably be expected to assist in informing the community as to how Icon Water handles the calculation and levying of charges under the WSCC Code. I afford this factor medium weight in this instance.

Factors favouring nondisclosure

43. In its original decision, Icon Water relied upon a single factor favouring non-disclosure. In subsequent submissions to this review, Icon Water identified a further 2 factors.

Prejudice a deliberative process of government (Schedule 2, s 2.2(a)(xvi))

44. A factor favouring nondisclosure is a reasonable expectation that disclosure of information could prejudice a deliberative process of government.¹⁰
45. Having reviewed the information at issue, I agree it reveals internal discussions of Icon Water concerning a deliberative process. The next issue is whether disclosure would prejudice this deliberative process.
46. Disclosure of the process' existence does not in and of itself prejudice the outcome of a deliberative process. The Queensland Information Commissioner noted the following in *Queensland Newspapers Pty Ltd and Queensland Police Service*:¹¹

... prejudice to a deliberative process can arise where releasing a document would cause disruptive public debate, reallocation of resources to deal with the disruption (resources which would otherwise be involved in finalising the deliberative process) and interference with the ability of an agency to objectively consider its options and reach a decision.

47. Icon Water's submissions to this review described the current process in the following terms:

a deliberative process for the purpose of determining additional guidance to assist Icon Water to determine the "net increase in EP" for any particular development in manner consistent with WSCC Code for the purpose of determining the amount of the capital contribution charge payable in any particular case.

¹⁰ Schedule 2, s 2.2(a)(xvi) of the FOI Act.

¹¹ [Queensland Newspapers Pty Ltd and Queensland Police Service \[2014\] QICmr 5 at 29](#)

48. Icon Water stated disclosure could be expected to prejudice the integrity of this process in the following ways:
- (a) limiting the extent and quality of the opinions and advice to the decision-maker in relation to the potential effect of various aspects of the proposed policy;
 - (b) undermining the final policy decision by disclosing information that could assist a person to design a development in manner that would avoid the charge.
49. The information at issue includes internal communications and deliberations and a draft memo concerning a potential position for Icon Water to pursue in relation to determining how EP is to be calculated.
50. I acknowledge some staff of Icon Water may be uncomfortable with the thought of their internal communications being disclosed, and may not have anticipated such disclosure at the time of contributing to internal discussions.
51. On the other hand, contributing to internal discussions and deliberations is a core function of public servants, and it should be widely known the FOI Act provides for a right of access to government information, with limited exemptions and an explicit pro-disclosure bias.
52. Having regard to the above, I am not persuaded that disclosure of the information at issue would necessarily result in staff of Icon Water refusing to participate in internal deliberative processes in the future. I also distinguish the potential for discomfort from the more serious notion of material prejudice to the deliberative process.
53. Icon Water's submissions note that the deliberative process in question is going towards producing guidance in determining a final position (bold emphasis added):
- The Exempt Documents essentially contain different views of individuals within Icon Water collected **to inform the preparation of a memorandum (which is still in draft) in the context of a deliberative process**. The documents do not represent any finalised position or the position of Icon Water.
54. Given this deliberative process will not result in a final policy decision, but rather ongoing work to inform a final position and decision on whether to make any changes to the WSCC Code, I consider it is premature to claim that disclosure could then undermine a final policy decision by enabling developers to avoid the imposition of a charge.

55. It is not evident on the information before me that disclosing information about the deliberative process would prejudice the deliberative process or any final decision, or could be reasonably expected to interfere with the ability of the government to objectively consider its options and reach a decision.¹²
56. Indeed, as noted above, it could reasonably be expected that disclosure of information about the deliberative process could promote open discussion and informed debate on the manner in which the WSSC Code is currently applied and whether and how it might be modified to achieve the desired policy outcomes.
57. I further note it is within Icon Water's scope and power to design and apply the WSSC Code in a way that captures developments that would otherwise seek to avoid charges. In my view the potential for charge avoidance exists whether the information at issue is disclosed or not and it therefore cannot be prejudicial. I accordingly afford this factor minimal weight.

Prejudice the economy of the Territory (Schedule 2, s 2.2(a)(viii))

58. A factor favouring nondisclosure is a reasonable expectation that disclosure could prejudice the economy of the Territory.¹³
59. Icon Water stated the following in their submissions:
- Ultimately, if the capital contribution charge does not effectively collect revenue from developers for developments that result in a net increase in EP (consistently with WSSC Code), the burden of funding capital upgrade may fall on the Territory.
60. As noted above at paragraph 50 the information at issue, by Icon Water's own submissions, refers to deliberations moving towards forming guidance that will be used in arriving at a finalised position.
61. It is reasonable for individuals and businesses designing developments to be able to have a degree of certainty about whether their proposal will attract a capital contribution charge. Some may elect to proceed with a particular design knowing it will attract a charge and some may elect to modify their design to have a smaller footprint to avoid a charge. This is no different to any other scheme related to property development where charges are levied based on whether certain criteria are met in the proposed development.

¹² [Barling and Brisbane City Council \[2017\] QICmr 47 \(15 September 2017\) at \[32\]](#).

¹³ Schedule 2, s 2.2(a)(viii) of the FOI Act.

62. Given disclosure of the information at issue would not disclose a finalised position, it is difficult to see how disclosure could allow developers to prepare plans so as to avoid charges.

I therefore afford this factor minimal weight.

Prejudice the trade secrets, business affairs or research of an agency or person

(Schedule 2, s 2.2(a)(xi))

63. A factor favouring nondisclosure is a reasonable expectation that disclosure could prejudice the trade secrets, business affairs or research of an agency or person.¹⁴ In this instance, only the business affairs limb of this factor is relevant. Neither party has alleged that trade secrets or research could be prejudiced and I accordingly do not consider either of them as relevant.

64. Icon Water's submissions on this factor stated the following:

Disclosure of this information publicly may enable developers/architects to design developments in a way to avoid the charge, notwithstanding that, in substance, the development is leading to a net increase in EP and may ultimately result in the need for development or augmentation of the network. This would prejudice Icon Water's business affairs because it would undermine the effectiveness of the charge to raise revenue sufficient to cover the relevant capital improvements required.

65. As stated above at paragraph 50, the information at issue does not contain a finalised position on how changes in EP will be assessed by Icon Water. I consider there is no reasonable expectation disclosure could prejudice Icon Water's business affairs in the manner predicted in these submissions as the information at issue does not provide a definition for developers to design around once it is disclosed.

66. I also note that any potential prejudice to Icon Water's business affairs if their hypothetical scenario came to pass would be tempered by the fact Icon Water has the capacity to amend their definition to address any charge-evading behaviour. I afford this factor no weight in this matter.

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))

67. A factor favouring nondisclosure is a reasonable expectation that disclosure could prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act.¹⁵

¹⁴ Schedule 2, s 2.2(a)(xi) of the FOI Act.

¹⁵ Schedule 2, s 2.2(a)(ii) of the FOI Act.

68. 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

69. Icon Water's additional submissions suggested that if the information at issue is to be disclosed, this factor would be relevant.

70. In order for this factor to be a consideration, I would need to be satisfied that disclosure of personal information of Icon Water employees (such as email addresses, full names and contact numbers) could reasonably be expected to prejudice the protection of the affected individuals' right to privacy under the Human Rights Act – that is, it would be an unlawful or arbitrary interference with their right to privacy.

71. I note that Icon Water staff regularly email members of the public from their work email addresses, including disclosing their direct work contact numbers in their signature blocks and using their full names when doing so.

72. As per the FOI Guidelines, disclosure will generally not be considered prejudicial to the right to privacy if the information disclosed is wholly related to the individual's day-to-day work activities. This is a position held to be true regardless of the seniority of any particular staff member.¹⁶

73. I recognise that in circumstances where members of the public are frustrated or confused about the handling of their matters by public servants, there can be some concern that disclosure of contact details could lead to harassment by aggrieved persons.

74. However, in this instance, I do not consider there is evidence to establish that this is likely to happen, and therefore the potential for disclosure to prejudice the right to privacy for any public servants is low and this factor should be afforded low weight accordingly.

75. Icon Water's response to my draft consideration noted that there are potentially personal mobile numbers and/or email addresses contained within the information at issue. I agree that disclosure of those specific details ought to be redacted as this information can be considered out of scope and this has also been agreed to by the applicant.

¹⁶ ACT Ombudsman FOI Guidelines [4.-Ombudsman-Guidelines-Considering-the-public-interest.pdf \(act.gov.au\)](https://www.act.gov.au/act-ombudsman/foi-guidelines/4-ombudsman-guidelines-considering-the-public-interest.pdf)

Balancing the factors

76. In making this decision, I considered 3 factors favouring disclosure and 4 factors favouring non-disclosure.
77. Balancing public interest factors is not merely a tallying exercise, where the public interest is established solely by the number of applicable factors on either side. I considered the relative importance and weight each factor should be given. The weight given to the factors depends on the effect that disclosing the information would have on the public interest.
78. The FOI Act also has a pro-disclosure bias. The public interest test and weighing of factors is approached as scales 'laden in favour of disclosure'.¹⁷
79. In this matter I have afforded the 3 factors favouring disclosure medium weight while affording one factor favouring nondisclosure low weight and 3 factors favouring nondisclosure minimal weight.
80. Finally, I note that in its original decision and submissions to this review, Icon Water identified 3 factors favouring disclosure, submitting:
- the weight to be afforded to the factors in favour of disclosure are tempered by the fact that a person who receives a capital contribution charge that they believe is excessive has a right to seek review before the ACT Civil and Administrative Tribunal under s 182 of the Utilities Act.
81. In my view, the presence of other review rights under a separate Act when a charge is levied has little or no bearing when considering whether disclosure of information is in the public interest under the FOI Act.

Conclusion

82. For these reasons, my decision is to set aside and substitute Icon Water's decision under s 82(2)(c) of the FOI Act.
83. The information at issue is to be released, with the exception of information deemed to be out of scope.

David Fintan
Senior Assistant Ombudsman
28 July 2023

¹⁷ [Explanatory Statement, Freedom of Information Bill 2016](#).