

## ***'BZ' and Transport Canberra and City Services [2023] ACTOFOI 6*** **(24 February 2023)**

### **Decision and reasons for decision of Senior Assistant Ombudsman, David Fintan**

<b>Application number</b>	AFOI-RR/22/10025
<b>Decision Reference</b>	[2023] ACTOFOI 6
<b>Applicant</b>	'BZ'
<b>Respondent</b>	Transport Canberra and City Services
<b>Date</b>	24 February 2023
<b>Catchwords</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – promote open discussion of public affairs and enhance the government’s accountability – 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 – allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official – reveal or substantiate that an agency or public official has engaged in misconduct or negligent, improper or unlawful conduct or has acted maliciously or in bad faith – advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government - reveal the reason for a government decision and any background or contextual information that informed the decision – contribute to the administration of justice generally, including procedural fairness – personal information of the applicant – prejudice an agency’s ability to obtain confidential information – prejudice the management function of an agency or the conduct of industrial relations by an agency

## **Decision**

1. For the purpose of s 82 of the *Freedom of Information Act 2016* (ACT) (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. For the reasons set out below, I have decided to confirm Transport Canberra and City Services' (**TCCS**) decision dated 16 September 2022 under s 82(2)(a) of the FOI Act to refuse access to the requested information.

## **Background of Ombudsman review**

3. On 13 April 2022, the applicant applied to TCCS for access to information including:
  - 8) Attachments 3-19 to Investigation Report 2021 -39 prepared by [investigator] on 7th March 2022.
4. On 16 September 2022, the TCCS information officer decided to refuse access to 17 documents within part 8 of the access application under s 35(1)(c) of the FOI Act.
5. On 12 October 2022, the applicant applied for Ombudsman review of TCCS's decision on part 8 of the access application.
6. On 2 November 2022, TCCS provided further submissions in support of the access decision dated 16 September 2022.
7. On 20 January 2023, a delegate provided their preliminary view to the parties in a draft consideration.
8. On 23 January 2023, TCCS communicated its acceptance of the draft consideration.
9. The applicant did not provide a response to the draft consideration.

## **Information at issue**

10. The information at issue in this Ombudsman review is the information TCCS refused access to in its decision of 16 September 2022 – that is, the witness statements collated as part of a workplace investigation (**witness statements**).
11. The issue to be decided in this Ombudsman review is whether the witness statements are 'contrary to the public interest information' for the purposes of the FOI Act.

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

- the applicant's access application and review application
- the respondent's decision of 16 September 2022 and additional submissions to the ACT Ombudsman
- the FOI Act, in particular ss 6, 7, 16, 17, 35, 72 and Schedule 2
- the respondent's FOI processing file relating to the access application
- guidelines made by the ACT Ombudsman under s 66 of the FOI Act, including *ACT Ombudsman Guideline 4 – Considering the public interest*
- the Explanatory Statement to the Freedom of Information Bill 2016
- an unedited copy of the information at issue – that is, the witness statements
- guidelines to the misconduct process produced by the ACT Public Sector Standards Commissioner (**Misconduct Process Guidelines**)
- relevant case law including:
  - *Peter Brewer and Justice and Community Safety Directorate* [2022] ACTOFOI 8 (24 October 2022)
  - *'BP' and Justice and Community Safety Directorate* [2021] ACTFOI 19 (22 December 2021)
  - *Craig Dunlop and Teacher Quality Institute* [2021] ACTOFOI 16 (26 November 2021)
  - *'BM' and Justice and Community Safety Directorate* [2021] ACTOFOI 14 (23 November 2021), and
  - *'AE' and Health Directorate* [2018] ACTOFOI 9 (27 November 2018).

## **Relevant law**

13. 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.

14. 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.

15. 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.

16. Section 35(1)(c) of the FOI Act provides 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.
17. 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.
18. Section 72 of the FOI Act provides the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.
19. Schedule 1 of the FOI Act sets out categories of information taken to be contrary to the public interest information for the purpose of the definition in s 16 of the FOI Act.
20. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.

## **The parties' submissions**

21. In the decision notice dated 16 September 2022, TCCS said:

I am satisfied that, on balance, the public interest factors favouring nondisclosure, and particularly the substantial public interest in enabling TCCS to receive and access workplace complaints confidentially, outweigh the public interest factors favouring disclosure in this case.

22. In the application for Ombudsman review, the applicant submitted:

5. Further, the decision-maker places low weight on the issue of due process and natural justice...

7. The key factor favouring non-disclosure identified by the decision maker is that release of witness statements could make it more difficult for an agency to investigate misconduct. This does not properly appreciate the context in which the statements were collected.

8. As members of the ACTPS, the witnesses had obligations under their contracts of employment, and under relevant legislation to co-operate with investigators, and to provide accurate, truthful information into any misconduct, up to illegal activity that they witnessed.

9. Those members of the ACTPS do not necessarily have the right to determine whether their statements are to be confidential, to refuse to answer questions from an investigator or determine the manner in which their statements are to be used. As such, the release of these statements can have no impact on the future conduct of investigations by TCCS.

23. On 2 November 2022, TCCS provided further submissions to the ACT Ombudsman, stating:

While the applicant contends that ACTPS employees are required to "co-operate with investigators, and to provide accurate, truthful information into any misconduct, up to illegal activity that they witnessed"; this requirement does not in itself protect the management of agency workplace investigations, nor protect the agency's ability to meet its obligations relating to the investigation of misconduct.

These investigation processes significantly rely on the cooperation of witnesses, be it alerting the relevant bodies that a breach may have occurred, or the candour and timely flow of information in statements, interviews, or follow up questioning. It is reasonable to consider that the disclosure of witness statements could discourage employees from proactively engaging with human resource agencies where they are unsure if a breach has occurred, particularly over concerns of repercussion from co-workers and supervisors or senior employees. This outcome is likely to reduce the overall effectiveness of reporting and investigative frameworks.

24. These submissions are discussed in more detail below.

## **Considerations**

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

25. Neither party participating in this Ombudsman review suggested the witness statements are information which is taken to be contrary to the public interest under Schedule 1.

26. Therefore, the public interest test set out in s 17 of the FOI Act is the relevant consideration for whether the information is contrary to the public interest information.<sup>1</sup>

### **Public interest test**

27. The test set out in s 17 of the FOI Act prescribes the following steps:<sup>2</sup>

- identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in schedule 2, section 2.1;
- identify any factor favouring nondisclosure that applies in relation to the information (a relevant factor favouring nondisclosure), including any factor mentioned in schedule 2, section 2.2;
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
- decide whether, on balance, disclosure of the information would be contrary to the public interest;
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

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

---

<sup>1</sup> Explanatory Statement, Freedom of Information Bill 2016 (ACT).

<sup>2</sup> Section 17(1) of the FOI Act.

### **Irrelevant factors**

29. In conducting the public interest test, I did not consider any of the irrelevant factors a decision-maker is prohibited from considering under s 17(2) of the FOI Act, including the applicant's identity, circumstances, or reason for seeking access to the information.<sup>3</sup>

### **Factors favouring disclosure**

30. In deciding the access application, TCCS considered 3 factors favouring disclosure of the witness statements.<sup>4</sup>

31. In the application for Ombudsman review, the applicant included their views on the public interest in disclosing the information. The applicant submitted 5 additional factors favouring disclosure set out in Schedule 2 of the FOI Act were also relevant.<sup>5</sup>

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

32. A factor favouring disclosure is where disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.<sup>6</sup>

33. The applicant submitted that as the witness statements comprise decisions taken by a government agency, release of the information would enhance the government's accountability.

34. At the conclusion of the investigation, a report was prepared by the investigator and given to the misconduct delegate for their consideration as the decision-maker.<sup>7</sup>

35. I accept release of the witness statements could promote the public's understanding of the misconduct process and allow for discussion of the investigation.

36. However, I consider disclosure would promote this factor to a limited extent, as the witness statements would not reveal the findings of the investigator, or the decision-making process of the misconduct delegate.

37. I attribute minor weight to this factor.

---

<sup>3</sup> Section 17(2)(f) of the FOI Act.

<sup>4</sup> Schedule 2, ss 2.1(a)(vi); 2.1(a)(viii); and 2.1(a)(xiii) of the FOI Act.

<sup>5</sup> Schedule 2, ss 2.1(a)(i); 2.1(a)(iii); 2.1(a)(v); 2.1(a)(vii); and 2.1(b)(i) of the FOI Act.

<sup>6</sup> Schedule 2, s 2.1(a)(i) of the FOI Act.

<sup>7</sup> [Misconduct process guidelines](#), page 37.

***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 (Schedule 2, s 2.1(a)(iii))***

38. A factor favouring disclosure is where 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.<sup>8</sup>

39. In the application for Ombudsman review, the applicant submitted that as the witness statements comprise decisions and processes of government used in dealing with its employees and contractors, release of this information would enhance the public understanding of government processes.

40. In *Peter Brewer and Justice and Community Safety Directorate*, the ACT Ombudsman noted:<sup>9</sup>

There is a distinction, as outlined in *BM and Justice and Community Safety Directorate*,<sup>10</sup> between policies, guidelines and codes of conduct followed by government employees in their dealings with members of the community, and those followed internally within government agencies.

41. The witness statements were created as part of an administrative workplace investigation and concern an internal workplace relations matter involving government employees.

42. Release of this information could inform the community of some of the actions taken by the investigator to gather relevant information as part of the investigation, but as noted above, disclosure would reveal limited information about their consideration.

43. I attribute minor weight to this factor, as I consider disclosure could only inform the community about aspects of the misconduct processes in dealing with government employees.

***Allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official (Schedule 2, s 2.1(a)(v))***

44. A factor favouring disclosure is where disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official.<sup>11</sup>

---

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

<sup>9</sup> [2022] ACTOFOI 8 (24 October 2022) at [44].

<sup>10</sup> [2021] ACTOFOI 14 (23 November 2021) at [25].

<sup>11</sup> Schedule 2, s 2.1(a)(v) of the FOI Act.

45. In the application for Ombudsman review, the applicant submitted the information would allow or assist inquiry into possible deficiencies in the conduct of an agency or a number of public officials.
46. TCCS submitted the investigation for which the witness statements were obtained is now concluded.
47. The witness statements contain information relating to the alleged conduct of public officials which could reasonably be expected to allow or assist with the misconduct process, or any related appeals processes.
48. I attribute minor weight to this factor, as the investigation to which the witness statements relate is now completed, and any further assistance would be limited.<sup>12</sup>

***Reveal or substantiate that an agency or public official has engaged in misconduct or negligent, improper, or unlawful conduct or has acted maliciously or in bad faith (Schedule 2, s 2.1(a)(vi))***

49. A factor favouring disclosure is where disclosure of the information could reasonably be expected to reveal or substantiate that an agency or public official has engaged in misconduct or negligent, improper, or unlawful conduct or has acted maliciously or in bad faith.<sup>13</sup>
50. In further submissions in support of the access decision, TCCS states:
- ...witness statements alone cannot reveal or substantiate that an agency or public official has engaged in misconduct or negligent, improper, or unlawful conduct or has acted maliciously or in bad faith. A witness statement is a singular type of evidence, which does not stand alone in an investigation. It is through the analysis of all evidence collected during an investigation that a finding is made; in this instance, the investigation was conducted outside of the directorate.
51. The witness statements comprise information obtained by the investigator as part of an administrative workplace investigation and were included as attachments in the investigation report. As discussed above, the investigator does not determine whether misconduct has occurred, but may make findings on their assessment of the evidence obtained.
52. I consider release would reveal information the witnesses have provided about alleged conduct which was subsequently considered as part of the misconduct process.
53. I accept there is significant public interest in identifying misconduct. However, release would not reveal whether any possible allegations contained in the witness statements were substantiated.
54. I attribute moderate weight to this factor.

---

<sup>12</sup> [2021] ACTOFOI 16 (26 November 2021) at [64].

<sup>13</sup> Schedule 2, s 2.1(a)(vi) of the FOI Act.



***Advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government (Schedule 2, s 2.1(a)(vii))***

55. A factor favouring disclosure is that disclosure could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government.<sup>14</sup>

56. In *BP and Justice and Community Safety Directorate*, the Acting Senior Assistant Ombudsman observed:<sup>15</sup>

Without purporting to form any view or make any finding about whether JACS observed procedural fairness in the circumstances, I was not persuaded by this submission. The reason for this is that procedural fairness does not generally require the disclosure of original copies of adverse information to be disclosed to a person.

Rather, the right to be heard merely depends on a person being given the opportunity to respond to relevant material relied upon to exercise a power or make an adverse decision against them.

Upon receiving information, the recipient may in fact decide that no action is warranted in relation to it. The person to whom the information relates may not, in such circumstances, need to be given an opportunity to respond because there is no procedure being applied which needs to be rendered fair.

Similarly, an opportunity to respond to information does not automatically mean that a person has a right to see the information in its original form. The relevant question for the purposes of ensuring a person is given an opportunity to be heard is whether the substance of the information has been put to them in a manner that is fair and comprehensive.

It is nonetheless true that disclosing the information in original form would not diminish their fair treatment and so I decided to afford this factor some moderate weight, subject to my prior observations.

57. In further submissions in support of the access decision, TCCS submitted:

During an investigation process, a person subject to an investigation is required to be provided with sufficient information about the allegation and claims supporting these allegations to enable them to respond to claims of misconduct. It is the place of the body investigating to meet the natural justice and procedural fairness principles. The applicant has a pre-existing pathway to access this information, albeit in a different format, outside of the FOI Act.

58. In the Ombudsman review application, the applicant has submitted the information which was given by TCCS was inadequate and is no longer available.

59. TCCS submitted information contained in the witness statements was provided to the applicant in the form of a summary.

60. I consider release of the witness statements could contribute to the fair treatment of the applicant, for example for any relevant appeals process.

---

<sup>14</sup> Schedule 2, s 2.1(a)(vii) of the FOI Act.

<sup>15</sup> [2021] ACTFOI 19 (22 December 2021) [34]-[35].

61. However, it is agreed information about the matters raised in the witness statements was given to the applicant for the purpose of the workplace investigation which is now concluded. For this reason, I afford minor weight to this factor.

***Reveal the reason for a government decision and any background or contextual information that informed the decision (Schedule 2, s 2.1(a)(viii))***

62. A reasonable expectation disclosure of information could reveal the reason for a government decision and any background or contextual information that informed the decision favours disclosure under the FOI Act.<sup>16</sup>

63. I accept that disclosure of the witness statements could provide some background or contextual information which could have informed any decisions made by the misconduct delegate.

64. I consider release would only promote this factor to a limited extent, particularly as the witness statements do not reveal any information about findings made by the investigator or decisions made by the misconduct delegate. I afford minor weight to this factor.

***Contribute to the administration of justice generally, including procedural fairness (Schedule 2, s 2.1(a)(xiii))***

65. A reasonable expectation disclosure of information could contribute to the administration of justice, including procedural fairness, favours disclosure under the FOI Act.<sup>17</sup>

66. In the decision notice, TCCS stated:

In the context of a complaint made against a person, natural justice requires that the individual be provided with sufficient information to enable them to understand and respond to the complaint made against them. I have been advised that procedures are in place within TCCS to provide information about complaints to relevant parties during an investigation. As there are current mechanisms available for information to be released to relevant parties outside of FOI in a way which addresses natural justice, I have placed some, but not significant weight, on this factor.

67. In the application for Ombudsman review, the applicant stated:

...6. The applicant does not agree that TCCS has procedures in place that address natural justice. The information provided through the course of the investigation was inadequate, and this was made clear to TCCS at the time...even if those processes had been adequate, [the applicant] no longer has the ability to access them; and accordingly, is not being afforded due process and natural justice in relation to these complaints.

---

<sup>16</sup> Schedule 2, s 2.1(a)(viii) of the FOI Act.

<sup>17</sup> Schedule 2, s 2.1(a)(xiii) of the FOI Act.

68. As discussed above, I consider some of the information contained in the witness statements was provided to the applicant. Disclosure of the witness statements could give the applicant further opportunities to respond to allegations, for example for the purpose of any relevant appeals processes.

69. I afford minor weight to this factor, as it appears information was provided for the purpose of giving the applicant an opportunity to respond and the relevant investigation is now concluded.

***Personal information of the applicant (Schedule 2, s 2.1(b)(i))***

70. The FOI Act recognises a public interest in disclosing information to an applicant where the information is personal information of the applicant.<sup>18</sup>

71. I accept parts of the witness statements contain the personal information of the applicant.

72. I attribute minor weight to this factor, as information about the applicant was provided to the applicant in the form of a summary.

**Factors favouring non-disclosure**

73. In deciding the access application, TCCS considered 2 factors favouring non-disclosure of the witness statements.<sup>19</sup>

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

74. A reasonable expectation disclosure of information could prejudice an agency's ability to obtain confidential information weighs against disclosure under the FOI Act.<sup>20</sup>

75. I accept the applicant's submission that public servants have obligations to act lawfully and must notify certain people if they become aware of maladministration or corrupt or fraudulent conduct by a public servant.<sup>21</sup>

76. I also accept there are mechanisms to compel the production of certain information, for example, the Public Service Commissioner (**Commissioner**) may require a person to appear before the commissioner to give evidence in an investigation.<sup>22</sup> However, I do not accept release of the witness statements would not have an impact on TCCS's ability to obtain confidential information.

---

<sup>18</sup> Schedule 2, s 2.1(b)(i) of the FOI Act.

<sup>19</sup> Schedule 2, ss 2.2(a)(xii); and 2.2(a)(xv) of the FOI Act.

<sup>20</sup> Schedule 2, s 2.2(a)(xii) of the FOI Act.

<sup>21</sup> *Public Sector Management Act 1994* (ACT), s 9; see also [Public Sector Management \(ACT Public Sector\) Code of Conduct 2022 \(ACT\)](#), clause 62.

<sup>22</sup> *Public Sector Management Standards 2016* (ACT), s 110.

77. In the decision notice, TCCS stated:

Witnesses supply information to investigators on the understanding that it will only be used for the investigation or a decision on that investigation.

Disclosing witness statements outside the investigation process, where there can be no restriction on its use, could reasonably be expected to make staff reluctant to fully participate in future investigations. The flow of information from witnesses to investigators is a significant means to obtain sufficient information to determine if a breach of law has occurred.

78. In respect of a workplace investigation, the Misconduct Guidelines state:<sup>23</sup>

Managers, Investigators and Delegates must endeavour to maintain confidentiality throughout the complaint management process and investigation, including informing all parties of their obligation to keep details of the investigation confidential. Maintaining confidentiality:

- minimises the risk of harm to the parties of a complaint/allegation;
- reduces the opportunities for evidence to become contaminated; and
- minimises rumours being spread throughout the workplace.

However, maintaining confidentiality is different from ensuring anonymity in the process. It is unreasonable to expect a respondent to provide a response to allegations or information that is not detailed and thorough. Respondents will be informed of the case against them, which may include information from witness statements, to assist in their response. Witnesses should be advised of this before they provide any evidence...

All reasonable efforts will be made by the Investigator to seek out parties involved in the incidents to provide evidence to the process. Participation in the process and the provision of information by parties is voluntary.

79. Based on my examination of the witness statements, I am satisfied witnesses are made aware their statement may be disclosed to other persons, including the respondent, where relevant to the investigation, an appeal, or other associated process.

80. I consider there was an expectation the witness statements would be treated with confidentiality subject to the exception above, as the information was provided as part of the workplace investigation.

81. If staff were aware information they provide as part of a workplace investigation could be disclosed for a purpose unrelated to the investigation, I consider it is reasonably likely witnesses may choose not to voluntarily disclose confidential information to TCCS or independent investigators.<sup>24</sup>

82. If witnesses choose not to voluntarily disclose confidential information to TCCS for the purpose of investigating or referring complaints of misconduct, I consider the TCCS's ability to obtain relevant information would be significantly impacted.

---

<sup>23</sup> [Guidelines to the Misconduct Process \(act.gov.au\)](#), page 35-36.

<sup>24</sup> [2018] ACTOFOI 9 (27 November 2018) at [58].

83. I attribute significant weight to this factor, having regard to the strong public interest in ensuring all relevant confidential information is readily available to an agency for the purpose of workplace investigations.

***Prejudice the management function of an agency or the conduct of industrial relations by an agency (Schedule 2, s 2.2(a)(xv))***

84. A reasonable expectation that disclosure of information could prejudice the management function of an agency weighs against disclosure under the FOI Act.<sup>25</sup>

85. The management function of an agency includes activities such as recruitment, training, performance reviews, promotion, counselling, discipline, compensation and occupational health and safety. 'Conduct of industrial relations' includes an agency's management of employment-related obligations and any potential investigation of misconduct.

86. As discussed above, I consider release of the witness statements could impact on the receipt of confidential information by TCCS. I consider it is reasonably likely TCCS may be unable to act upon internal workplace conduct issues without the voluntary provision of confidential information.

87. I attribute significant weight to this factor, having regard to the significant public interest in maintaining the integrity of management activities, including the effective investigation of workplace conduct matters.

**Balancing the factors**

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

89. In this matter, I identified 8 public interest factors apply which favour disclosure of the witness statements. I attributed minor weight to 7 factors, being Schedule 2, ss 2.1(a)(i); 2.1(a)(iii); 2.1(a)(v); 2.1(a)(vii); 2.1(a)(viii); 2.1(a)(xiii); and 2.1(b)(i) of the FOI Act. I attribute moderate weight to one factor favouring disclosure being Schedule 2, s 2.1(vi) of the FOI Act.

90. I have identified 2 public interest factors apply which favour non-disclosure of the witness statements being Schedule 2, ss 2.2(a)(xii) and 2.2(a)(xv) of the FOI Act; and I attribute significant weight to these factors.

---

<sup>25</sup> Schedule 2, s 2.2(a)(xv) of the FOI Act.

91. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being considered 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.
92. The FOI Act 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>26</sup>
93. I am satisfied, on balance, the public interest factors favouring non-disclosure outweigh the public interest factors favouring disclosure of the witness statements. This is because I attribute overall significant weight to the 2 factors favouring non-disclosure, whereas I have attributed considerable, but less, weight to the 8 factors favouring disclosure (including the pro-disclosure bias in the FOI Act).

## **Conclusion**

94. For the reasons set out above in this decision, I **confirm** TCCS's decision under s 82(2)(a) of the FOI Act, to refuse access to the witness statements under s 35(1)(c) of the FOI Act.

**David Fintan**

**Senior Assistant Ombudsman**

**24 February 2023**

---

<sup>26</sup> [Explanatory Statement, Freedom of Information Bill 2016.](#)