

Decision and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/24/10001
Applicant:	'CY'
Respondent:	Justice and Community Safety Directorate
Agency reference:	JACSFOI 2023/23613
Date:	28 May 2024
Decision reference:	[2024] ACTOFOI 7
Catchwords:	<i>Freedom of Information Act 2016</i> – deciding access – whether disclosure of information is contrary to the public interest – Information is personal information of the person making the request – Prejudice the protection of an individual's right to privacy or any other right under the <i>Human Rights Act 2004</i> – 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* (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. For the reasons set out below, the decision of the Justice and Community Safety Directorate (**JACS**) dated 3 January 2024 is confirmed under s 82(2)(a) of the FOI Act.

Background of Ombudsman review

3. On 14 November 2023, the applicant applied for access to:

... an Integrity report regarding a staff member that feels unsafe working while I was a A/CO2 of Remand. This Integrity report would have been issued within the last four weeks.
4. On 3 January 2024, JACS identified one document within the scope of the request and refused access.
5. On 6 January 2024, the applicant applied for Ombudsman review under s 73 of the FOI Act.
6. On 9 May 2024, I provided my draft consideration to the parties.
7. On 11 May 2024, the applicant indicated they do not accept my draft consideration, reiterating their original concerns with JACS' decision.
8. On 17 May 2024, the respondent indicated they accepted my draft consideration.

Information at issue

9. The information at issue is the integrity report concerning the applicant as referred to in the access application.
10. In making my decision, I have had regard to:
 - the applicant's review application
 - the respondent's decision
 - the ACT FOI guidelines
 - the FOI Act, in particular Schedule 2
 - the *Human Rights Act 2004* (**Human Rights Act**)

- the submissions of the applicant and the respondent, and
- relevant case law, including:
 - [‘BP’ and Justice and Community Safety Directorate \[2021\] ACTOFOI 19](#)
 - [‘CP’ and Canberra Health Services \[2023\] ACTOFOI 24.](#)

Relevant law

11. 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.¹
12. 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.
13. The public interest test in s 17 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.
14. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.
15. 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.²

¹ Section 35(1)(c) of the [FOI Act](#).

² Section 35(1)(c) of the [FOI Act](#).

The contentions of the parties

16. In its decision notice, the respondent said:

Redactions have been applied to information submitted to the ACTCS Integrity Unit (IU). The ACTCS Integrity Framework outlines that a report made to the IU is a method for detecting and dealing with misconduct within ACTCS. The IU investigates the validity of claims and makes recommendations to the relevant manager or the ACTCS Commissioner for action. The appropriate officer has the authority to investigate the claim further and undertake the appropriate course of action with the relevant employees.

The release of this information is not in the public interest as it can reasonably be expected to prejudice IU's processes for maintaining integrity and public safety within the ACTCS, including the appropriate management of staff related issues.

...

I note that the complaints reporting process is available to all ACTCS staff, however the information is obtained with the assurance that these reports will be kept confidential. Releasing this information can reasonably be expected to negatively affect the IU's ability to obtain confidential information and could reasonably be expected to reduce the effectiveness of this process in the future.

It is important to note that although reports are received and investigated by the IU, management of the concerns raised is handled by the relevant managers. A report will result in nil action if the allegations are unsubstantiated.

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

I wish to appeal this decision. As stated the following reasons for refusal are:

Schedule 1 s1.14(g) Schedule 2 s2.2(a)(ii), (xii) and (xv).

I believe that with a claim of bias against me, my character and my loyalty, that the privacy to the person who submitted the integrity report is less important than the malicious and defamatory claims against me.

The function of the agency is irrelevant in this case, I have the right to see the document pertaining to allegations of staff feeling unsafe because of me or alleged actions.

People should not be able to hide behind the anonymity of an Integrity report to say as they please with no accountability or proof.

When I find out the author and the content of what was alleged it will remain confidential, I will not share the name or information.

18. The applicant's assertion in their submissions that the information would not be shared cannot be taken to favour disclosure in a formal decision on an access application. Once information is disclosed it is then out of the hands of the agency holding the information and the applicant may do whatever they wish with the information.
19. In its submissions in response to this review, JACS confirmed it had reviewed files for the past 3 financial years regarding earlier FOI requests for integrity reports, stating:

No integrity reports have been released to applicants under FOI. I note that the only instance was in July 2021, where [an] applicant's own integrity reports were released back to [them].
20. In responding to my draft consideration, the applicant stated their belief that the original decision from JACS was not correct and they should be granted access to the information at issue in full, or access with the names of individuals removed.

Consideration

Information taken to be contrary to the public interest information

21. JACS' original decision noted one factor from Schedule 1 as relevant – that the information at issue is law enforcement or public safety information and the disclosure of such information is taken to be contrary to the public interest under the FOI Act.³

³ Schedule 1, s 1.14 of the [FOI Act](#).

22. The original decision from JACS noted Schedule 1, s 1.14(1)(g) as applicable regarding the information at issue, which refers to:
- (1) Information the disclosure of which would, or could reasonably be expected to—
- ...
- (g) prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety.
23. I disagree this factor is relevant to the information at issue. While the people involved work in a law enforcement capacity, being employed at ACT Corrections, the integrity report process is not necessarily a lawful method or procedure for protecting public safety for the purpose of Schedule 1, s 1.14.
24. At its core, this process is an employment and management process much like an internal complaint procedure in any other workplace.
25. The ACT FOI Guidelines take a broad view of what could be construed as a method or procedure for protecting public safety, including weapons licencing schemes or legislative procedures under the *Work Health and Safety Act 2011*.⁴ The concept of public safety is also to be construed broadly and can include aspects such as aircraft safety or safety in emergencies.
26. While I agree there is a slight concern for public safety if there is not a positive and secure workplace culture among corrections officers, I find this is not sufficient to elevate the integrity report process from an internal complaints process to a distinct procedure for protecting public safety for the purposes of Schedule 1, s 1.14(1)(g).

⁴ [ACT FOI Guideline 3 - Considering the public interest.](#)

Public interest test

27. To determine whether disclosure is contrary to the public interest, 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 2.2
- 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.

Factors favouring disclosure

Information is personal information of the person making the request (Schedule 2, s 2.1(b))

28. The original decision noted one factor in favour of disclosure in that the information at issue is personal information of the person making the request which favours disclosure under the FOI Act.

29. Personal information—⁵

- (a) means information or an opinion (including information forming part of a database), whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion; but
- (b) for an individual who is or has been an officer of an agency or staff member of a Minister, does not include information about—
 - (i) the individual's position or functions as an officer or staff member; or
 - (ii) things done by the individual in exercising functions as an officer or staff member.

30. I consider part of the integrity report concerning the applicant is personal information of the applicant as it includes information about the applicant where their identity is apparent.

31. I agree this factor is relevant, and I afford it a moderate weight in my decision.

Factors favouring nondisclosure

32. The original decision from JACS identified three factors favouring nondisclosure as relevant.

Prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act 2004 (Schedule 2, s 2.2(a)(ii))

33. A reasonable expectation that disclosure could prejudice an individual's right to privacy under the Human Rights Act weighs against disclosure under the FOI Act.

34. 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.

⁵ Dictionary, [FOI Act](#).

35. I agree this factor is relevant in this review, specifically in relation to the identity of the person making the integrity report and the identity of any other person referred to in the report.
36. I consider this could reasonably be expected to be an arbitrary prejudice to their right to privacy rather than an unlawful one.
37. The integrity report process is confidential which allows staff members to raise concerns anonymously. This is to give staff an avenue where these matters can be raised without being named to maintain working relationships in the event the concerns are deemed to not warrant further investigation.
38. Given the understanding among staff that no action will be taken if any allegations raised are unsubstantiated, it is then reasonable for those raising complaints and those whose names are included in the substance of complaints, to expect the privacy of the process to be maintained.
39. On this basis, I agree that to disclose the information at issue, and therefore the identity of any staff members it would reveal, could reasonably be expected to be an arbitrary interference with their right to privacy.
40. I afford this factor a moderate weight in my decision.

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

41. A reasonable expectation that disclosure could prejudice an agency's ability to obtain confidential information favours nondisclosure under the FOI Act.
42. I agree this factor is relevant for this matter. As I have detailed above, the integrity report process is designed to be confidential and this is expressed to staff members when they come forward to report issues.

43. The cohort of corrections officers is a small pool of employees who work in an environment where cohesion and trust among colleagues is essential to a functioning workplace. I consider the closeness of this environment means that disclosure of the report itself with identities removed would still represent a document where identities could be either totally deduced or inferred to a sufficient degree that redaction would be ineffective in preserving privacy.
44. Employees using the integrity report process are provided with assurances the information provided will be kept confidential. While this does not represent a blanket protection against disclosure under the FOI Act, it does raise consideration of the potential for disclosure to have a chilling effect on employee engagement with this process in the future.
45. There is also the potential for disclosure to have a chilling effect on employees who are not the reporting staff member, but are contacted at a preliminary inquiry stage, being willing to provide frank information when asked about the relevant issue.
46. In my view, the applicant's suggestion in response to my draft consideration – that they would be open to receiving access to the information at issue with the names of individuals removed – does not mitigate the relevance of this factor. As stated above, the size and closeness of the workplace makes it highly likely the applicant would be able to deduce the identity of individuals whose names were redacted based on their knowledge of their colleagues' mannerisms, schedules, expressions and other personal details.
47. I afford this factor a moderate weight in this decision.

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

48. A reasonable expectation that disclosure could prejudice the management function of an agency or the conduct of industrial relations by an agency favours nondisclosure under the FOI Act.
49. I agree this factor is relevant for this review, in terms of the management function of an agency rather than conduct of industrial relations.
50. The integrity report system is an avenue that allows ACT Corrective Services to manage actual or potential workplace issues at a level of formality where a report is made with appropriate inquiries following, but allows for a matter to be discontinued without disclosing the identity of the reporting person(s) if the issue is unsubstantiated.
51. It is therefore valuable for a confidential avenue to be maintained to allow for issues to be raised without requiring a more thorough investigation unless preliminary inquiries find a cause to do so.
52. A process at a lower degree of formality enables managers to investigate claims in the background without disrupting the everyday flow of the workplace and allows for staff to raise issues they may be uncertain warrant a full investigation. This also includes matters that may not yet be an issue but they want to flag for consideration if something more serious emerges in the future.
53. I consider that a corrections agency without a suitable reporting process in place would be compromised in its management function.⁶

⁶ ['BP' and Justice and Community Safety Directorate \[2021\] ACTOFOI 19.](#)

54. I afford this factor a moderate weight in my decision.

Balancing the factors

55. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and non-disclosure, 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 identified. The weight given to a factor will depend on the effect that disclosing the information has on the public interest.

56. 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'.⁷

57. In this instance, I have considered one factor favouring disclosure which I have afforded a moderate weight and three factors favouring nondisclosure, one of which I have afforded a low weight and the remaining two I have afforded a moderate weight.

58. On balance, I consider the factors favouring nondisclosure outweigh the factor favouring disclosure.

⁷ [Explanatory Statement, Freedom of Information Bill 2016.](#)

Conclusion

59. For these reasons, my decision is to **confirm** JACS' decision under s 82(2)(a) of the FOI Act.

David Fintan
Senior Assistant Ombudsman
28 May 2024