

Decision and reasons for decision of Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10007
Agency reference:	JACS2023/3321
Applicant:	“CL”
Respondent:	Justice and Community Safety Directorate
Date:	20 September 2023
Catchwords:	<i>Freedom of Information Act 2016</i> – refusing to deal with application – application expressed to relate to government information of a stated kind and government information of that kind is taken to be contrary to the public interest to disclose under schedule 1

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, I have decided under s 82(2)(a) of the FOI Act to **confirm** the decision of the Justice and Community Safety Directorate (**JACS**) dated 29 March 2023 not to deal with the application.¹

Background of Ombudsman review

3. On 11 January 2023, the applicant, a detainee at the Alexander Maconochie Centre (**AMC**), applied to JACS for access to information relating to a decision to transfer the applicant from lower security accommodation to higher security accommodation.
4. The access application was referred to ACT Corrective Services (**ACTCS**), which is a business unit within JACS, for action. For the purposes of this review, I will refer to JACS rather than ACTCS.

¹ Section 43(1)(e) allows a respondent – in this case, JACS – to refuse to deal with an access application if it ‘is expressed to relate to government information of a stated kind and government information of that kind is taken to be contrary to the public interest to disclose under schedule 1’.

5. JACS initially treated the access application as an informal request. On 2 February 2023, JACS advised the applicant:

Please be advised that ACT Corrective Services (ACTCS) records have been reviewed and it has been determined that the requested information cannot be disclosed in the interests of protecting the safety, security and good order of the Alexander Maconochie Centre (AMC) and the TRC.²
6. On 17 February 2023, the applicant applied for Ombudsman review of the decision by JACS.
7. On 28 February 2023, staff of the ACT Ombudsman (the **Office**) issued JACS with a notice under s 75 of the FOI Act, advising JACS that an application for review had been received by the Office.
8. After receiving the s 75 notice, JACS proceeded to make a formal decision on the access application. On 29 March 2023, the JACS information officer decided to refuse to deal with the access application under s 43(1)(e) of the FOI Act because the application sought access to a category of government information taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act.
9. Specifically, JACS identified the application sought access to law enforcement or public safety information, which is a category of information taken to be contrary to the public interest to disclose under Schedule 1, s 1.14 of the FOI Act.
10. On 30 March 2023, the applicant advised the Office they had received the formal decision and wished to proceed with Ombudsman review.
11. On 25 August 2023, the Senior Assistant Ombudsman provided their preliminary views to the parties in a draft consideration.
12. On 5 September 2023, JACS accepted the draft consideration. The applicant did not respond to the draft consideration.

Relevant law

13. Section 7 of the FOI Act gives 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.³

² 'TRC' is a reference to the Transitional Release Centre, which is lower security accommodation at AMC.

³ Section 35(1)(d) of the [FOI Act](#).

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. Section 35(1)(d) of the FOI Act provides an access application may be decided by refusing to deal with the application.
16. Section 43(1)(e) of the FOI Act provides a respondent may refuse to deal with an access application if 'the access application is expressed to relate to government information of a stated kind and government information of that kind is taken to be contrary to the public interest to disclose under schedule 1'.⁴
17. While this sounds complex, it essentially means that a respondent can refuse to deal with an application if it seeks access to information the respondent is not required to disclose.
18. Schedule 1 of the FOI Act identifies categories of information which are taken to be contrary to the public interest to disclose, including 'law enforcement or public safety information'.⁵
19. In this matter, the specific provision in Schedule 1 of the FOI Act upon which the respondent relied in refusing to deal with the application is s 1.14 (Law enforcement or public safety information), which lists various categories of information the disclosure of which would, or could reasonably be expected to cause prejudice to, or otherwise be inconsistent with, various law enforcement or public safety objectives.

Preliminary issue

20. As a preliminary issue, I have considered whether JACS consulted with the applicant before refusing to deal with the application, as required under s 46 of the FOI Act.
21. JACS was required to give the applicant a written notice about the intention to refuse and the ground for refusal, and give the applicant an opportunity to consult about their application before refusing to deal with the application.⁶ This did not occur.

⁴ Section 43(1)(e) of the [FOI Act](#).

⁵ Schedule 1, s 1.14 of the [FOI Act](#).

⁶ Section 46 of the [FOI Act](#).

22. I note JACS initially treated the access application as an informal request and refused the request. This initial refusal cited ‘... the interests of protecting the safety, security and good order of the Alexander Maconochie Centre...’ which indicates a consideration of a Schedule 2 factor favouring non-disclosure, that is, disclosure of the information could reasonably be expected to prejudice the security or good order of a correctional centre.⁷
23. The initial refusal, however, was not expressed as an intention to refuse, nor did it provide the applicant with the opportunity to consult about their application.
24. JACS acknowledges the applicant was not consulted in accordance with s 46(1) of the FOI Act. I note JACS has identified this instance as an exception to its usual processes and the notice of refusal was prepared to formalise the initial decision, after receiving notification of the Ombudsman review.
25. JACS has confirmed that all future decisions to refuse access will be made formally.

The parties’ submissions

26. JACS’ decision notice dated 29 March 2023 said:

I have determined that the information within the scope of the request is contrary to the public interest to disclose under Schedule 1 provisions of the Act. The incident referenced in your request is currently under investigation and release of this information would prejudice the investigation of a possible contravention of the law. I note the information was obtained confidentially, and its release can reasonably be expected to prejudice the effectiveness of methods for detecting and investigating possible contraventions of the law and impede the protection of public safety. As such, I have decided to refuse to deal with your application under section 55 of the Act.

27. The decision notice included extracts from the FOI Act, including s 43 (Refusing to deal with application – general) and s 55 (Content of notice – refusal to deal with application). I note that JACS referenced relying on s 55 in refusing to deal with the application. However, given the correct provision (s 43) was extracted in the decision notice, I do not consider this to be an issue in this review. JACS has confirmed that they were indeed relying on s 43.
28. In the application for Ombudsman review, the applicant submitted:

If the concern pertains to the welfare of a particular individual or individuals, this can be easily mitigated by redacting the information of any such issue.

⁷ Schedule 2, s 2.2(a)(vi) of the [FOI Act](#).

Issue in Ombudsman review

29. The information at issue is 6 pages related to the decision to transfer the applicant from lower security accommodation to higher security accommodation (**information at issue**).
30. The key issue to be decided in this Ombudsman review is whether the access application is expressed to relate to information of a stated kind and information of that kind is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act – specifically, law enforcement or public safety information taken to be contrary to the public interest to disclose under s 1.14 of Schedule 1 of the FOI Act.
31. In making my decision, I have had regard to:
- the applicant’s access application and review application
 - the respondent’s informal decision of 2 February 2023 and formal decision of 29 March 2023
 - an unedited copy of the information at issue
 - the FOI Act, in particulars 6, 7, 16, 35, 43 and Schedule 1, (effective 1 January 2022 – 23 May 2023)
 - the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act
 - relevant case law, including:
 - *‘BP’ and Justice and Community Safety Directorate* [2021] ACTOFOI 19 (22 December 2021), and
 - *‘CC’ and Integrity Commission* [2023] ACTOFOI 10 (22 June 2023).

Consideration

Law enforcement or public safety information

32. Added protections for law enforcement or public safety information included in FOI legislation are designed to protect against harm to law enforcement investigations or threats to public safety being caused by information being released at a time where it would, for example, deprive the relevant authorities of being able to take timely action against individuals or organisations identified as of concern.⁸

⁸ [Freedom of Information Guidelines \(Volume 4\) Considering the Public Interest.](#)

33. Schedule 1, s 1.14 of the FOI Act provides the disclosure of information is taken to be contrary to the public interest if it would, or could reasonably be expected to, affect law enforcement or public safety in any of the following ways:⁹

- prejudice the investigation of a contravention or possible contravention of the law in a particular case
- identify the existence or identity of a confidential source of information in relation to the enforcement or administration of the law
- endanger a person's life or physical safety
- result in a person being subject to a serious act of harassment or intimidation
- prejudice a person's fair trial or the impartial adjudication of a matter before a court or tribunal
- prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law
- prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety
- endanger the security of a building, structure or vehicle
- prejudice a system or procedure for the protection of people, property or the environment
- facilitate a person's escape from lawful custody, or
- prejudice the wellbeing of a cultural or natural resource or the habitat of animals or plants.

34. Schedule 1, s 1.14, however, does not apply to:¹⁰

- information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law
- information containing a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law
- a report on the degree of success achieved in a program adopted by an agency for dealing with a contravention or possible contravention of the law
- a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law or the law relating to corruption), or
- a report on a law enforcement investigation that has already been disclosed to the entity the subject of the investigation.

⁹ Schedule 1, s 1.14(1) of the [FOI Act](#).

¹⁰ Schedule 1, s 1.14(4) of the [FOI Act](#).

35. I do not consider that any of the exceptions outlined in Schedule 1, s 1.14 of the FOI Act apply to the information at issue.
36. Having regard to the information at issue, I agree it is comprised wholly of law enforcement or public safety information of the kind that is taken to be contrary to the public interest to release under s 1.14 of Schedule 1 of the FOI Act. I have taken into account that disclosing any further detail about the information at issue by itself could reasonably be expected to cause prejudice to, or otherwise be inconsistent with, one or more of the law enforcement or public safety objectives described in s 1.14 of Schedule 1 of the FOI Act.
37. While the applicant submitted that if there was concern for the welfare of any individuals named in the information at issue, their information could be removed, it is unnecessary to consider whether this would be practicable where the entirety of the information sought is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act.¹¹

Conclusion

38. For these reasons I confirm JACS' decision under s 82(2)(a) of the FOI Act to refuse to deal with the application pursuant to s 43(1)(e) of the FOI Act.

David Fintan
Senior Assistant Ombudsman
20 September 2023

¹¹ Section 16 of the [FOI Act](#).