

## ***'BP' and Justice and Community Safety Directorate ACTFOI 18 (22 December 2021)***

### **Decision and reasons for decision of Acting Senior Assistant Ombudsman Symone Andersen**

<b>Application number:</b>	AFOI-RR/21/10014
<b>Applicant:</b>	BP
<b>Respondent:</b>	Justice and Community Safety Directorate
<b>Date:</b>	22 December 2021
<b>Catchwords:</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – prejudice the 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 – advance the fair treatment of an individual in accordance with the law in their dealings with the government – prejudice the protection of an individual’s right to privacy – 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. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**).
2. Under s 82(2)(a) of the FOI Act, I **confirm** the decision of the Justice and Community Safety Directorate (**JACS**) dated 19 April 2021.

### **Background of Ombudsman review**

3. On 24 February 2021, the applicant applied to JACS for access to:

All documents, emails, reports and communications that relate to any integrity matters, investigations or complaints... in ACT Corrections or held by the Justice and Community Safety Directorate

4. On 19 April 2021, JACS' Information Officer decided to give full access to 3 documents and refused access to 12 documents.
5. On 20 April 2021, the applicant applied for ACT Ombudsman review under s 73 of the FOI Act.
6. On 11 October 2021, I provided the parties with my draft consideration. My draft consideration set out my preliminary view so that each party would be able to make final submissions before I made a formal decision. The preliminary view in my draft consideration was that I should confirm JACS' decision.
7. On 11 October 2021, JACS wrote to me to advise that it accepted my draft consideration and did not wish to make additional submissions.
8. On 4 November 2021, the applicant provided additional submissions which I took into account in making my decision.

### **Information at issue**

9. The information at issue in this review is all the information that JACS decided to refuse access to in its decision of 19 April 2021.
10. The issue to be decided is whether giving the applicant access to the information at issue would be contrary to the public interest.
11. In making my decision, I have had regard to:
  - the applicant's Ombudsman review application and submissions, including those provided in response to my draft consideration
  - JACS' decision letter
  - JACS' submissions to me regarding this review
  - an unedited copy of the information at issue
  - the FOI Act, in particular ss 6, 7, 9, 16, 72, Schedule 1 and Schedule 2
  - the *Human Rights Act 2004* (ACT), and
  - relevant case law, including *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs & Anor*.<sup>1</sup>

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<sup>1</sup> [2005] HCA 72.

## Relevant law

12. Every person enjoys an enforceable right of access to government information. However, the FOI Act creates an exception to this right by allowing for access to be refused to information that is 'contrary to the public interest information'.<sup>2</sup>
13. 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
14. Section 17 of the FOI Act sets out the test that must be used to balance public interest factors favouring disclosure and non-disclosure respectively. This test requires me to:
- identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in Schedule 2, s 2.1,
  - identify any factor favouring non-disclosure that applies in relation to the information at issue (a relevant factor favouring non-disclosure), including any factor mentioned in Schedule 2, s 2.2,
  - balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring non-disclosure,
  - 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.
15. Any party seeking to prevent disclosure of government information bears the onus of establishing that information is contrary to the public interest information.<sup>3</sup>

## The contentions of the parties

16. JACS' decision relied on Schedule 1, ss 1.14(1)(f) and (g) to refuse access to documents 12 and 13 and Schedule 2, s 2.2(a)(ii), (xii) and (xv) to refuse access to documents 4-11, 14 and 15.
17. Schedule 1, ss 1.14(1)(f) and (g) apply to:
- Information the disclosure of which would, or could reasonably be expected to—
- (f) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention of the law; or
  - (g) prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety

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<sup>2</sup> Section 7 of the FOI Act.

<sup>3</sup> Section 72 of the FOI Act.

18. JACS' decision notice said that:

[Schedule 1, ss 1.14(1)(f) and (g)] apply to communications between the Australian Federal Police (AFP) and ACTCS Intelligence and Integrity Unit (IIU) in two of the documents. The information was obtained confidentially, and the release of this information can reasonably be expected to prejudice the effectiveness of methods for detecting and investigating possible contraventions of the law, which would impede the protection of the public.

19. Schedule 2, s 2.2(a)(ii) protects an individual's right to privacy under the ACT *Human Rights Act 2004 (Human Rights Act)* against prejudice. Schedule 2, s 2.2(a)(xii) protects an agency's ability to obtain confidential information and Schedule 2, s 2.2(a)(xv) protects an agency's management function or conduct of industrial relations. These factors do not automatically mean that information is taken to be contrary to the public interest to disclose, but rather are Schedule 2 factors favouring non-disclosure which need to be considered according to the test set out in s 17 to determine whether, on balance, disclosure of the information is contrary to the public interest.

20. JACS' decision letter said:

I have determined that 12 of the documents within the scope of this request are not in the public interest to release...

The release of this information is not in the public interest as it can reasonably be expected to prejudice IIU's processes for maintaining integrity within the ACTCS and the appropriate management of staff related issues. The release of these reports can also be expected to negatively affect the IIU's ability to obtain confidential information and would reduce the effectiveness of this process.

21. The applicant's application for Ombudsman review submitted, relevantly, that:

There is no material evidence supplied by the Agency in relation to 1.14 on how any information contained in documents would prejudice how investigations are undertaken or maintained.

A reasonable person and member of the public has access to all manner of crime investigative documentaries, media coverage and case studies etc that outline every known investigative technique on the planet.

It is fanciful and dishonest for the Agency to state that disclosing any documents would jeopardise or disclose any process that is not already in the public domain.

22. The applicant also submitted:

The concern of the Agency relates to the identity of the person(s) supplying the information and maintaining confidentiality.

The Agency's reasoning above is clearly negated by removing the source.

If there is inaccurate communication between AFP and ACT Corrections Intelligence Unit that is not disclosed, then how as a member of the public do I become aware or correct this inaccuracy if it is not provided.

23. These submissions informed my considerations and I have addressed them in detail below. I have also included the applicant's contentions in response to my draft consideration in my discussion of the relevant factors below.

## **Considerations**

24. I carefully considered an unredacted copy of the information at issue.

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

25. JACS' Information Officer decided documents 12 and 13, which contain specific discussion of law enforcement intelligence, were taken to be contrary to the public interest to disclose under Schedule 1, ss 1.14(1)(f) and (g).

26. Having reviewed the information at issue, I agree with JACS' Information Officers' reasoning. Disclosing the information at issue in documents 12 and 13 could reasonably be expected to prejudice the management of integrity-related intelligence relating to corrections in the ACT. It follows therefore that disclosure could reasonably be expected to prejudice the effectiveness of the methods used by JACS to investigate possible contraventions of the law, thereby impeding the protection of the public. This was the view I set out in my draft consideration and the applicant made submissions on this point before I made my final decision.

27. In response to my draft consideration, the applicant submitted that, essentially, because the methods used to investigate may be known to exist, disclosing the information at issue could not reasonably be expected to prejudice them. I considered this submission carefully but decided that I disagreed with it. The public may be aware of general methods employed by law enforcement in managing intelligence. But that does not mean it would be logical to conclude that the substance of intelligence reports can inherently be disclosed to the public at large, merely because the methods used in managing it may be known. The substance of the information is still of a distinct character that is in itself sensitive, independent of the methods used to obtain, manage, or act upon it.

### *Irrelevant factors*

28. In making my decision, I did not have regard to any of the irrelevant factors which a decision-maker is prohibited from considering under s 17(2) of the FOI Act.

### *Factors favouring disclosure*

29. One factor favouring disclosure is relevant in this review.

### Advance the fair treatment of an individual

30. A reasonable expectation that disclosure could advance the fair treatment of individuals in accordance with the law in their dealings with the government weighs in favour of disclosure under the FOI Act.<sup>4</sup>
31. The applicant's submissions contend that:
- [N]ot providing [the information at issue] breaches natural justice provisions by not informing me of allegations without the opportunity to defend myself. It is unreasonable that another person defends myself and makes a determination on validity of an allegation without my involvement.
32. In my draft consideration, I requested that the parties provide me with additional information on this point.
33. The applicant submitted that:
- The three elements of natural justice of adequate notice, fair hearing and no bias were all absent in my matter and decisions made on the integrity reporting investigations.
34. 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.
35. 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.<sup>5</sup>
36. 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.
37. 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.<sup>6</sup>

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<sup>4</sup> Schedule 2, s 2.1(a)(vii) of the FOI Act.

<sup>5</sup> *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* [2005] HCA 72 at [29].

<sup>6</sup> *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* [2005] HCA 72 at [29].

38. 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.

#### Pro-disclosure bias

39. In addition, it is intended that the FOI Act be administered with a pro-disclosure bias.<sup>7</sup> Naturally, this was relevant in this matter because it necessitated there being a particularly sound basis for refusing access to the information at issue. In making my decision, I tried to exercise the discretions given to me as far as possible in favour of disclosing government information. Ultimately in this case I was nevertheless not satisfied that the information at issue should be disclosed. I decided that there were compelling reasons (which I detailed in this notice) for concluding that the public interest was best served by non-disclosure of the information at issue.

#### *Factors favouring non-disclosure*

40. Three factors favouring non-disclosure are relevant in this review.

#### An individual's right to privacy

41. A reasonable expectation that disclosure of information could prejudice an individual's right to privacy under the Human Rights Act favours non-disclosure.<sup>8</sup>

42. JACS decided that some of the information at issue could reasonably be expected to prejudice an individual's right to privacy under the Human Rights Act.

43. I appreciate that a person making or sharing an allegation about a colleague with management staff in their workplace may feel that it is a private matter. In some instances it may be. But there is a distinction between a person's privacy and a public official's confidential communications about workplace matters.

44. 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; or
- (b) not to have his or her reputation unlawfully attacked

45. In response to my draft consideration, the applicant submitted that his reputation had been unlawfully attacked. This submission was not helpful because the question is not whether the

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<sup>7</sup> Section 9 of the FOI Act.

<sup>8</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

information at issue could reasonably be expected to reveal that a person's right to privacy has been prejudiced. Because the factor is one which favours non-disclosure of government information, I was limited to considering only whether disclosing the information at issue could reasonably be expected to prejudice a person's right to privacy.

46. In making my decision, I had to consider not only whether the information includes 'personal information', but also whether it could reasonably be expected to prejudice the right to privacy in a way that is inconsistent with the Human Rights Act. It was not apparent to me that disclosing the information at issue could reasonably be expected to have this effect and as a result I decided not to afford this factor any weight.

#### Agency's ability to obtain confidential information

47. A reasonable expectation that disclosure could prejudice an agency's ability to obtain confidential information favours non-disclosure under the FOI Act.<sup>9</sup>
48. My preliminary view was that it was correct to decide that disclosing the information at issue could reasonably be expected to prejudice JACS' ability to obtain confidential information. It was reasonable to find that staff could be less inclined to make integrity-related reports in circumstances where corrections officers need to make judgments about information which may be of ambiguous value to the IIU.
49. In response, the applicant submitted that:

[A]ll integrity reports should mandate that evidence to support the report is contained within. This would completely eliminate the false and malicious reports and keep in place an integrity reporting process.

It significantly reduces the possibility that the current flawed process can be used to damage another person.

It is therefore completely invalid for JACS to state that their ability to obtain confidential information is affected because only false information would not be collected.

The contention that officers would be less inclined to make integrity-related reports in circumstances where corrections officers are required to make a judgment about information which may be of ambiguous value is exactly what should be in place. The key word being ambiguous because if an officer is in that position then clearly there is not enough evidence and the risk of breaching a colleague's human rights with incorrect information far outweighs the benefits.

50. The applicant also suggested that he knew the identity of a person who he believes made an allegation against him and described the allegation he believes was made. He informed me that this information was provided to him by JACS' staff. The applicant contends that for this reason the information is not confidential information. As I noted above, the substance of an allegation would often be disclosed to a person without an original copy of the allegation being provided

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<sup>9</sup> Schedule 2, s 2.2(a)(vii) of the FOI Act.



itself. I was not provided with clear, unambiguous facts about what the applicant was told and whether this was authorised. For present purposes, I accepted that disclosing the information in its original form could reasonably be expected to prejudice an agency's ability to obtain confidential information by weighing on the deliberations of persons considering making a disclosure when it is not obvious that one is required.

#### Management function of an agency

51. A reasonable expectation that disclosure could prejudice the management function of an agency favours non-disclosure under the FOI Act.<sup>10</sup>
52. JACS decided that this factor was applicable because disclosing the information in documents 4-11, 14 and 15 could reasonably be expected to prejudice the IIU's management function.
53. In my draft consideration, I expressed the view that maintaining a system for reporting integrity matters in a corrections context is inextricably linked to the management function of an agency. Indeed, a corrections agency without an integrity reporting process or one in which the mechanism is dysfunctional would be compromised in its management function. Accordingly, I expressed the view that I should accept JACS' determination that the information at issue in documents 4-11, 14 and 15 could reasonably be expected to prejudice its management function. This would occur through inhibition of its receipt and monitoring of integrity-related information. I indicated that I intended to afford this factor considerable weight.
54. The applicant's submissions did not provide much additional information on this point and as a result I decided to afford it considerable weight when I made my final decision.

#### *Balancing the factors*

55. I have balanced the factors I identified as being relevant. One public interest factor favoured disclosure to a modest degree. On the other hand, two public interest factors favoured non-disclosure to a considerable degree. Disclosing the information at issue could reasonably be expected to prejudice JACS' ability to obtain confidential information and its management function.
56. Balancing public interest factors does not merely mean quantifying the number of applicable factors. My decision reflected the considerable weight which in this case fell in favour of non-disclosure.

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<sup>10</sup> Schedule 2, s 2.2(a)(xv) of the FOI Act.

57. Notwithstanding the FOI Act's pro-disclosure bias, I have decided that JACS had discharged the onus imposed by s 72 and established that the information at issue was clearly contrary to the public interest to disclose.

## **Conclusion**

58. For these reasons, under s 82(2)(a) of the FOI Act, I have decided to confirm JACS' decision of 19 April 2021.

Symone Andersen  
Acting Senior Assistant Ombudsman  
22 December 2021