

## ***Candice Burch and Transport Canberra and City Services [2020] ACTOFOI 7 (20 February 2020)***

### **Decision and reasons for decision of ACT Ombudsman, Michael Manthorpe PSM**

<b>Application Number</b>	AFOI-RR/19/10025
<b>Decision Reference</b>	[2020] ACTOFOI 7
<b>Applicant</b>	Ms Candice Burch MLA
<b>Respondent</b>	Transport Canberra and City Services
<b>Decision Date</b>	20 February 2020
<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 protection of an individual’s right to privacy or any other right under the <i>Human Rights Act 2004 (ACT)</i> – prejudice intergovernmental relations

### **Decision**

1. Under s 82(2)(b) of the FOI Act, I **vary** the decision of Transport Canberra and City Services (**respondent**), dated 27 August 2019.

### **Background and scope of Ombudsman review**

2. On 3 July 2019, the applicant applied to the respondent for access to:  

Any documents provided to the incoming Minister Chris Steel or to his office as part of the transfer of Transport Ministerial Responsibilities.
3. The applicant agreed to an extension of time to 23 August 2019.
4. On 27 August 2019, the respondent advised the applicant it had identified one document, including attachments, as falling within the scope of the access application. The respondent

gave the applicant access to the document in part. In making its decision, the respondent relied on Schedule 1, s 1.6, and Schedule 2, ss 2.2(a)(i), (a)(x), (a)(xi) and (xiii) of the FOI Act.

5. On 10 October 2019, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
6. On 22 October 2019, the respondent advised my Office that its position on some of the pages, initially released in part to the applicant, may have changed in the applicant's favour.
7. On 19 November 2019, the respondent provided the applicant with a revised decision notice, which included access to previously redacted information. In making its decision, the respondent relied on Schedule 1, s 1.6, and Schedule 2, ss 2.2(a)(i),(ii), (viii) and (x) in refusing to grant access to some of the information requested.
8. On 13 January 2020, preliminary views about the respondent's decision were provided to the parties in a draft consideration.
9. The applicant did not provide a response to the draft consideration.
10. On 21 January 2020, the respondent provided further submissions to the draft consideration.

#### Disclosure Log

11. I note in the draft consideration it was considered whether the respondent has met its obligations regarding its disclosure log.
12. Section 28 of the FOI Act requires agencies to keep a record of access applications made to the agency in the form of a disclosure log, except for access applications which are requesting access to personal information. This is to ensure that information obtained by a particular person in response to an access application is also available to the public more generally.
13. Information must be published on the disclosure log no earlier than three and no longer than 10 working days after the day the decision notice is given to the applicant.<sup>1</sup>
14. At the date of the draft consideration, my Office reviewed and noted that the respondent's disclosure log had not met these disclosure log obligations. At the time, it was apparent the respondent had not published any information in relation to this access application. This was

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<sup>1</sup> S 28(4) of the FOI Act.

despite the decision notice being given to the applicant on 28 August 2019, and the FOI Act requiring the information be published no later than 11 September 2019.

15. Section 74(1)(a)(i) of the FOI Act provides that an application for Ombudsman review must be made within 20 working days after the day notice of the decision was published on the disclosure log. By not publishing a decision on its disclosure log, an applicant may find themselves unsure whether they are within the time period in which they can apply for Ombudsman review. In the interests of good administrative practice and fairness, my Office saw no merit in refusing to accept the review application.
16. Following the draft consideration, the respondent acknowledged my Office's comments in relation to the disclosure log and in submissions to the draft consideration, the respondent advised it is working on bringing their disclosure log into compliance.
17. At the time of this decision, my Office has reviewed the respondent's disclosure log and acknowledge that it appears to be up to date.

## Information at issue

18. As discussed at [7], the respondent has released additional information to the applicant, therefore narrowing the scope of this Ombudsman review.
19. The information that remains at issue in this Ombudsman review is the remaining redacted information on pages 3, 4, 8, 9 and 50 of an incoming minister briefing prepared for Chris Steel MLA, Minister for Transport and City Services (the briefing).
20. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information at issue would be contrary to the public interest.
21. In making my decision, I have had regard to:
  - the applicant's access application and review application
  - the respondent's decision
  - the FOI Act, in particular ss 7, 17, 35, 50, 72, Schedule 1 and Schedule 2
  - the *Human Rights Act 2004* (HR Act)
  - the respondent's FOI processing file relating to the access application
  - an unedited copy of the information at issue
  - relevant case law including *Alistair Coe and ACT Health Directorate*.<sup>2</sup>

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<sup>2</sup> [2018] ACTOFOI 4 (5 September 2018).

## Relevant law

22. 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.
23. 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 the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17.
24. 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.
25. Section 35(1)(c) of the FOI Act provides that 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.
26. 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.
27. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.
28. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose.
29. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

## The contentions of the parties

30. In its original decision notice, the respondent found that:
  - some of the information sought is contrary to the public interest information under Schedule 1, s. 1.6, because it contains information prepared and brought into existence for Cabinet

- it would not be in the public interest to release documents which may impact the ability of the public service to provide frank and open advice
- the disclosure of some of the information sought could reasonably be expected to compromise the business affairs of the Territory and of third parties
- the disclosure of information relating to the Transport and Infrastructure Council meeting could reasonably be expected to prejudice intergovernmental relations.

31. Additionally, the respondent said:

... I have... removed direct phone numbers of third parties as not in the public interest to release and... email contact details...

... I considered whether there are other documents that fall within the scope of your request. As you will know, the Minister has access to any number of previous and ongoing briefings. It would not be reasonable or possible to decide as to what other briefing material the Minister may have used to inform himself about the operations of TCCS. To this end I have confined the scope of your request to the work that was specifically prepared for the Minister as his incoming brief.

32. More specific submissions made in relation to specific refusal reasons are discussed below.

33. In their application for Ombudsman review, the applicant said:

... the information officer did not give appropriate weighting to the factors favouring disclosure as outlined in Schedule 2.1(a) when justifying their decision to withhold the release of information contained within the Incoming Minister's Brief.

The role of the Opposition is to hold Government Ministers accountable for the decisions they make. As such, it is vitally important that this information be released to compare the advice provided by public servants to the final decision that was made by the Minister. The request for this decision to withhold information be overturned falls reasonably within Schedule 2.1(a) as outlined above, and the release of this information would greatly assist in the functioning of our democracy.

I would argue that this information would warrant release under Schedule 2.1(a) (i), (ii), (v), and (viii), particularly in the case where the information that was previously redacted may show that the Minister went against the advice of public servants.

34. Additionally, the applicant contended:

- the scope of the request was arbitrarily narrowed with consultation, particularly in relation to the additional briefs cited in the incoming Ministerial brief, which were not included in the review
- purely factual and descriptive information regarding the remaining works to be completed does not prejudice the collective responsibility of Cabinet under Schedule 2, s 2.2(a)(i), nor does it constitute Cabinet information under Schedule 1, s 1.6(1)(a) of the FOI Act
- the disclosure of the remaining works to be completed is purely factual information, and was released in a subsequent FOI request.

35. The applicant did not make any submissions in relation to the decision by the respondent to redact information on pages 65-67 of the document bundle on the basis that disclosure of the information could reasonably be expected to prejudice intergovernmental relations (Schedule 1, s 2.2(a)(x) of the FOI Act).

36. In its submissions to this review, the respondent said:

*Arbitrary narrowing of the scope of the original FOI request*

The scope was read narrowly but consistently to the purpose of the documents sought by Ms Burch. There was only one document that was provided to Minister Steel or his office as part of the transfer of Transport Ministerial responsibilities. This was the document that formed the basis of the FOI release.

In relation to page 6 and reference to a briefing document – this was an oversight. The brief has been identified and is currently being examined to determine the public interest and a decision will be provided to Ms Burch.

References to other briefs were removed because these referred to matters subject to Cabinet consideration or were to be considered by Cabinet.

... references to Major Projects Canberra briefings were... removed... These documents are not held by TCCS. At the time of the FOI request, Major Projects Canberra was being set up. It was not possible to transfer this part of the request to the new Agency as the FOI function had not been established.

37. Regarding the decision not to release some of the information requested because the information was considered to be Cabinet information (Schedule 1, s 1.6 of the FOI Act) or could reasonably be expected to prejudice the collective responsibility of Cabinet (Schedule 2, s 2.2(a)(i) of the FOI Act), the respondent removed some of the original redactions.

38. In submissions to the draft consideration, the respondent submitted that while they accepted the majority of the draft consideration, they held specific concerns regarding disclosure of information at page 9 (paragraphs 5-7). I discuss this below.

## Considerations

39. I have carefully considered an unedited copy of the information at issue together with the information provided by the applicant and respondent.

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

40. The respondent contends the information at issue on pages 8, 9 and 50 of the briefing is contrary to the public interest to disclose under Schedule 1, s 1.6 of the FOI Act.

41. For the information sought to be taken to be contrary to the public interest to disclose under Schedule 1, s 1.6 of the FOI Act, as the respondent has found, the information sought must be Cabinet information.

42. Under Schedule 1, s 1.6(1) of the FOI Act, Cabinet information is information:
- (a) that has been submitted, or that a Minister proposes to submit to Cabinet for its consideration and that was brought into existence for that purpose; or
  - (b) that is an official record of Cabinet; or
  - (c) that is a copy of, or part of, or contains an extract from, information mentioned in paragraph (a) or (b); or
  - (d) the disclosure of which would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision).
43. However Schedule 1, s 1.6(2) of the FOI Act contains a relevant exception, in that purely factual information is not contrary to the public interest to disclose where:
- it is included in information that has been submitted, or that a Minister proposes to submit to Cabinet, and that was brought into existence for that purpose (Schedule 1, s 1.6(2)(a) of the FOI Act)
  - disclosure would not disclose a deliberation or decision of Cabinet and the fact of the deliberation or decision has not been officially published (Schedule 1, s 1.6(2) of the FOI Act).
44. I have examined the redactions applied to pages 8, 9 and 50. The redacted information relates to funding the Woden Bus Depot project, the development of a fast rail plan, and the planned replacement of the MyWay ticketing system, respectively.
45. This information is not an official record of Cabinet<sup>3</sup>, nor does the respondent suggest that it has been submitted, or is proposed to be submitted to Cabinet for its consideration.<sup>4</sup>
46. In the absence of supporting evidence or submissions from the respondent, it is, however, also unclear, on the basis of the information I have available, how the redacted information is information that:
- was prepared and brought into existence for Consideration by Cabinet,<sup>5</sup> and/or
  - discloses a deliberation or decision of Cabinet<sup>6</sup>
47. As a result, I consider the respondent has not discharged its onus under s 72 of the FOI Act to sufficiently explain how disclosure of the redacted information would reveal Cabinet information. As a result, I consider the information redacted on pages 8, 9 and 50 is not contrary to the public interest to disclose under Schedule 1, s 1.6 of the FOI Act.

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<sup>3</sup> Schedule 1, s1.6(1)(a) of the FOI Act.

<sup>4</sup> Schedule 1, s1.6(1)(b) of the FOI Act.

<sup>5</sup> Schedule 1, s 1.6(1)(c) of the FOI Act.

<sup>6</sup> Schedule 1, s 1.6(1)(d) of the FOI Act.

48. Therefore, for the information sought to be contrary to the public interest information, disclosure of the information sought must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

*Public interest test*

49. To determine whether disclosure of information is, on balance, contrary to the public interest, s 17(1) of the FOI Act prescribes the following five steps:

- (a) 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;
- (b) 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;
- (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
- (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;
- (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.

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

*Irrelevant factors*

51. In submissions to this Ombudsman review, the applicant contends the decision not to release documents based on the public service's ability to provide frank and open advice to an incoming Minister is a direction contravention of s 17(2)(e) of the FOI Act.

52. In its submissions to this Ombudsman review, the respondent noted that this reasoning was an error, and agreed that this was an irrelevant consideration.

53. I have noted the irrelevant factors listed in s 17(2) of the FOI Act and I do not consider that any irrelevant factors arise in this Ombudsman review.

*Factors favouring disclosure*

54. Schedule 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.

55. The applicant has not submitted any factors favouring disclosure in relation to the information at issue on pages 3 and 4 of the brief.

56. I have reviewed the information at issue and cannot identify any specific factors favouring disclosure of the information on pages 3, 4 and paragraphs 5 and 7 of page 9.



57. However, with respect to the information on pages 8, 50 and paragraph 8 of page 9, I consider that disclosure could reasonably be expected to ensure effective oversight of expenditure of public funds (Schedule 2, s 2.1(a)(iv) of the FOI Act) and therefore, I afford this factor significant weight.
58. Additionally, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of representative democracy.<sup>7</sup> This concept is promoted through the objects of the FOI Act.<sup>8</sup>

*Factors favouring nondisclosure*

Prejudice the protection of an individual's right to privacy or any other right under the HR Act

59. The information at issue on pages 3 and 4 of the briefing are telephone numbers and email addresses of individuals who are not government employees.
60. Of the factors favouring nondisclosure listed in Schedule 2, s 2.2 of the FOI Act, I consider that Schedule 2, s 2.2(a) of the FOI Act may be relevant to the information sought as suggested by the respondent.
61. The information redacted is of a personal nature. The question to be considered is, however, whether disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the HR Act.
62. Some of the redacted information, such as the email addresses at dot points 6 and 7 on page 3 and dot point 10 on page 4,<sup>9</sup> is publicly available. As a result, I do not agree that disclosure could reasonably be expected to prejudice the protection of these individual's right to privacy or any other right under the HR Act.
63. I do, however, agree with the respondent that disclosure of the remaining telephone numbers could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the HR Act. This is because the telephone numbers are not well-known or publicly available. As I have not identified any factors favouring disclosure, I am satisfied that these residual telephone numbers are not in the public interest to disclose.

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<sup>7</sup> See s 17 of the FOI Act.

<sup>8</sup> See s 6(b) of the FOI Act.

<sup>9</sup> Under 'Stakeholder Contacts' on pages 3-4.

Prejudice the collective responsibility of Cabinet or the individual responsibility of members to the Assembly

64. As discussed above, I do not consider Schedule 1, s 1.6 of the FOI Act relevant to this review. Nevertheless, if the information redacted from pages 8, 9 and 50 is related to Cabinet processes, although outside of the scope of Schedule 1, s 1.6, it could still be relevant in the context of Schedule 2, s 2.2(a)(i) of the FOI Act, which I will now consider.
65. Schedule 2, s 2.2(a)(i) of the FOI Act provides that a factor for nondisclosure is if disclosure could reasonably be expected to prejudice the collective responsibility of Cabinet or the individual responsibility of members to the Assembly.
66. For the reasons discussed at [44]-[46], I consider the respondent has not discharged its onus under s 72 of the FOI Act to sufficiently explain how disclosure of the redacted information may prejudice the collective responsibility of Cabinet or the individual responsibility of members to the Assembly. As a result, I consider the information redacted on pages 8, 9 (paragraph 8) and 50 is not contrary to the public interest to disclose under Schedule 2, s 2.2(a)(i) of the FOI Act.

Prejudice intergovernmental relations

67. Schedule 2, s 2.2(x) of the FOI Act provides that a factor favouring nondisclosure is that disclosure of the information could reasonably be expected to prejudice intergovernmental relations.
68. In submissions to the draft consideration, the respondent contended with respect to page 9 (paragraphs 5-7):
- This information was provided to TCCS by the New South Wales (NSW) Government about its project. TCCS staff have advised that the information relates to a business case which has been prepared for consideration by NSW Government Cabinet. I am of the understanding that this has not been made public.
- In considering that this information is not currently available, and TCCS has not consulted with the NSW Government on its release, it is likely that this disclosure would prejudice intergovernmental relations.
69. The respondent's submissions indicate the information on page 9 (paragraphs 5-7) was communicated in confidence to the respondent.
70. I have further reviewed the information on page 9 and I am satisfied paragraphs 5-7 on page 9 comprise information that explores the NSW Government's options for faster rail. I am satisfied that disclosure of this information could cause NSW government to be hesitant in providing

information to the ACT government in future<sup>10</sup> and may result in a loss of cooperation between the governments.

71. Therefore, I consider that disclosure of the information on page 9, namely paragraphs 5-7, is contrary to the public interest as disclosure could reasonably be expected to prejudice intergovernmental relationships.

## Conclusion

72. For the reasons set out above, I vary the respondent's decision to refuse access to the information at issue under s 35(1)(d) of the FOI Act.

73. I confirm the following aspects of the respondent's decision:

- pages 3 and 4: the telephone numbers and/or email addresses at dot points 1-5, 8 and telephone number at dot point 6 should remain redacted.
- page 9: paragraphs 5-7 should remain redacted.

74. I consider the remaining information at issue is, however, on balance, not contrary to the public interest to disclose and therefore, should be released.

**Michael Manthorpe PSM**

**ACT Ombudsman**

**20 February 2020**

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<sup>10</sup> *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 3 (28 August 2018) [31].