

Decision and reasons for decision of Senior Assistant Ombudsman

Application number:	AFOI-RR/22/10037
Applicant:	'CR'
Respondent:	Transport Canberra and City Services
Respondent reference:	22-055 (part 6)
Date:	12 December 2023
Decision reference:	[2023] ACTOFOI 26
Catchwords:	<i>Freedom of Information Act 2016</i> – promote open discussion of public affairs and enhance the government’s accountability – inform the community of the government’s operations – 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 that decision – information is the personal information of the applicant – 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 – prejudice trade secrets, business affairs or research of an agency or persons

Decision

1. The applicant applied for Ombudsman review of Transport Canberra and City Services Directorate's (TCCS) decision to refuse access to part of the information sought on the grounds that it was contrary to the public interest information.
2. For the purpose of s 82 of the *Freedom of Information Act 2016* (FOI Act), I am a delegate of the ACT Ombudsman.
3. For the reasons set out below, I have decided under s 82(2)(b) of the FOI Act to vary TCCS' decision of 24 November 2022.
4. The variation is confined to changes to some of the redactions made in the original decision (to ensure consistency across the information at issue), and the provision of the applicant's personal information.
5. The practical effect will be to disclose more information than the original decision, but only to the extent that information already disclosed in one section of the information at issue will be disclosed consistently across all the information at issue, and personal information already available to the applicant will be disclosed.
6. No new information is being disclosed to the applicant as a result.
7. I consider the original decision was fundamentally correct in how the balance of the public interest was decided, however the inconsistencies in the original redactions within the information at issue require that the original decision be varied rather than confirmed.

Background to Ombudsman review

8. On 12 April 2022, the applicant applied to TCCS for access to information including:
 - 6) Any records or documents produced or held by Transport for Canberra City Services showing contact between [TCCS staff] relating to a previous investigation of [the applicant], including but not limited to:
 - a. emails between any/all of the following persons: [TCCS staff], between 1st March 2020 and 30th August 2020 in relation to a previous investigation of [the applicant];
 - b. chat logs (including Jabber and/or Microsoft teams) between any/all of the following persons: [TCCS staff], between 1st March 2020 and 30th August 2020 in relation to a previous investigation of [the FOI applicant];
 - c. Internal diary notes (including paper or electronic diaries and Microsoft calendar entries) of any/all of the following persons: [TCCS staff], between 1st March 2020 and 30th August 2020 in relation to a previous investigation of [the applicant];

9. On 29 July 2022, the applicant agreed to amend the scope of section c to exclude paper diary notes. The applicant also agreed to several extensions of time for TCCS to decide the application.
10. In a notice of decision dated 24 November 2022, TCCS advised the applicant it had identified 21 documents within the scope of the application. An additional document was identified but was determined to be out of scope. TCCS decided to grant full access to 10 documents and partial access to 11 documents.
11. On 19 December 2022, the applicant applied for Ombudsman review of TCCS' access decision.
12. On 27 November 2023, I provided my preliminary views to the parties in a draft consideration.
13. On 27 November 2023, the respondent accepted the draft consideration.
14. On 4 December 2023, the applicant accepted the draft consideration.

Preliminary issues

15. As a preliminary issue, I have identified that document 13 was marked by TCCS on the Freedom of Information Request Schedule as 'partial access,' however no information has been redacted from the document. I have carefully reviewed document 13 and cannot identify any information that I consider should be redacted. TCCS have confirmed that document 13 was released in full. I am excluding this document from this review.
16. As a second preliminary issue, I have considered whether the additional document identified by TCCS as out of scope was correctly identified as out of scope.
17. In the decision letter, TCCS stated:

It was noted that during the time period of the search, a RED complaint was received but did not advance to an investigation. The enterprise agreement differentiates between preliminary assessments and investigations. As such, the RED complaint has been determined to be out of scope.¹
18. The 'enterprise agreement' referred to in the decision letter is the ACT Public Sector Technical and Other Professional Enterprise Agreement 2018-2021² (**enterprise agreement**). I have reviewed the relevant sections of the enterprise agreement, and I agree that there is a differentiation between preliminary assessments and investigations.³

¹ A RED complaint is a complaint made under the [Respect, Equity and Diversity framework](#).

² [Technical and Other Professional enterprise Agreement 2018-2021 \(act.gov.au\)](#).

³ See sections H2 – Preliminary Assessment and H9 – Investigations of the [Technical and Other Professional enterprise Agreement 2018-2021 \(act.gov.au\)](#).

Information at issue

19. The information at issue in this Ombudsman review is the information within 11 documents TCCS decided to refuse access to in its decision of 24 November 2022, that is, documents 1, 8-12 and 16-20. Documents 1, 8-12 and 18-20 are emails. Document 16 is a completed 'Professional Standards Unit Investigation Request' form, and document 17 is an internal briefing recommending an investigation into potential misconduct. All documents relate to an investigation into potential misconduct by the applicant.
20. I have carefully reviewed the information at issue. The information redacted in documents 1, 8-12, 16, 18 and 19 is the names of third parties who are not TCCS staff, and direct mobile telephone numbers of third parties and TCCS staff.
21. In addition to the names of third parties and direct mobile telephone numbers, the following information is redacted in document 17 (**investigation briefing**):
 - positions, telephone numbers and email addresses of third parties who are not TCCS staff
 - the name of a former TCCS staff member
 - a statement made by a third party about the complaint
 - the name, position, telephone number and email address of the informant, and
 - details within an attachment to the investigation briefing – a request for approval to enter into an agreement of services, including a proposed contract, the tenders put forward by several entities and the names of those entities, the findings of the evaluation team and the decision made by the delegate with signatures (**tender information**).
22. The information redacted in document 20 identifies another person (not the applicant) subject to allegations of potential misconduct.
23. It may be useful to categorise the information at issue as the information that relates solely to the investigation into potential misconduct (**investigation information**) and the tender information.
24. The key issue to be decided in this Ombudsman review is whether the information TCCS decided to refuse access to is 'contrary to the public interest information' for the purposes of the FOI Act.

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

- the applicant's access application and review application
- the respondent's decision of 24 November 2022 and further submissions
- the FOI Act, in particular ss 7, 16, 35 and Schedule 2, s 2.1 and s 2.2
- the *Human Rights Act 2004* (Human Rights Act)
- the respondent's FOI processing file relating to the access application
- the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act, and
- relevant case law, including:
 - [*BP and Justice and Community Safety Directorate \[2021\] ACTOFOI 19 \(22 December 2021\)*](#)
 - [*Francis and Australian Sports Anti-Doping Authority \(Freedom of information\) \[2019\] AATA 12.*](#)

Relevant law

26. 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.⁴

27. Section 16(1) of the FOI Act provides that information is contrary to the public interest information if—

- (a) it is taken to be contrary to the public interest to disclose under schedule 1; or
- (b) disclosing the information would, on balance, be contrary to the public interest under the test set out in section 17.

28. 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.

29. 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.

⁴ Section 35(1)(c) of the [FOI Act](#).

30. 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 the contrary to the public interest information has been deleted.
31. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.

The contentions of the parties

32. In their access application, the applicant stated:
 1. As they comprise decisions taken by a government agency, release of this information would enhance the government's accountability in line with Schedule 2, 2.1(a)(i);
 2. As they comprise decisions and processes of the government used in dealing with its employees and contractors, release of this information would enhance the public understanding of government processes in line with Schedule 2, 2.1(a)(iii);
 3. The information would allow or assist inquiry into possible deficiencies in the conduct of an agency or a number of public officials in line with Schedule 2, 2.1(a)(v);
 4. The information would 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 in line with Schedule 2, 2.1(a)(vi);
 5. The information would advance the fair treatment of individuals – specifically [the applicant] – in accordance with the law in their dealings with the government in line with Schedule 2, 2.1(a)(vii);
 6. This information would reveal the reason for one or more government decisions and any background or contextual information that informed the decision in line with Schedule 2, 2.1(a)(viii);
 7. All or some of the information requested is personal information relating to [the applicant] within the meaning of Schedule 2, 2.1(b)(i).

33. TCCS' decision notice dated 24 November 2022 said:

Personal Information

In reviewing the relevant records, personal information relating to third parties has been identified. I have found this information is not readily available to the public and has not otherwise been disclosed by TCCS. I find the protection of an individual's right to privacy under the *Human Rights Act 2004* carries significant weight.

Agency's ability to obtain confidential information and prejudice the management function of an agency

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 a significant weight on this factor.

... I have identified that disclosure of the information within witness statements could reasonably be expected to prejudice the management function of an agency, and its ability to obtain confidential information. 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.

Disclosing this type of information could reasonably be expected to adversely impact an agency's ability to conduct workplace investigations and manage staff. As such, I have placed significant weight on this factor.

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

Prejudice trade secrets, business affairs or research of an agency or person

The records have captured documents relating to a tender process. The information consists of tender submissions and pricing and comparison of the submissions of three separate tenders. I have considered the commercial information contained in the documents. The documents consist of commercial information which if disclosed could be used by competitors and prejudice business affairs.

The disclosure of this information could be expected to prejudice the future supply of information to TCCS for this purpose. Receiving information from tenders who specialise in this field requires a level of trust that the information will be used as indicated and that individuals will not be exposed to adverse outcomes if the information is not protected. In this case, the release of any commercial information at this time would be damaging for the reasons I have discussed and outweighs the release in this instance.

34. In their application for Ombudsman review, the applicant included submissions made to the Office in a separate application for Ombudsman review. Not all of these submissions were relevant to this particular review, however the applicant contends that TCCS failed to properly consider the factors at Schedule 2, 2.1(a)(i), 2.1(a)(iii), 2.1(a)(v), 2.1(a)(viii) and 2.1(b)(i) of the FOI Act. 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. As the applicant has now left TCCS, 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.
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.

10. Further, it is not within the purview of TCCS to "determine" whether or not a breach of law has occurred. They are not equipped to make these determinations, and certainly not equipped to commence prosecution or other law enforcement activities.
 11. If illegal conduct or a breach of law is suspected, TCCS has an obligation to notify the appropriate authorities, and provide them with the evidence on which they have formed that suspicion - including unedited and unredacted copies of any witness statements. It is not appropriate for TCCS to determine that witness statements of this kind should not be released to other agencies or the public.
 12. The management of staff by TCCS is clearly important, but the argument by the decision-maker is essentially that due process and natural justice should be dispensed with if they interfere with that objective. This cannot be in accord with either their obligations under the Public Sector Management Act, or the Freedom of Information Act.
29. The applicant did not make any further submissions relevant to this review.
30. In further submissions to the Office, TCCS said:
- In reviewing the information within the scope of part 6 of application 22-055, I considered that some of the applicant's views on public interest were not relevant to part 6 of the application...
- ... the absence of retention of information by the applicant, which has been provided previously by the government outside of FOI, does not substantiate the claim that the information has not been provided, nor that the applicant cannot obtain copies of previously released information through pre-existing pathways. It is not in the purview of the FOI Act to circumnavigate these processes.
31. These submissions are discussed in more detail below.

Consideration

Public interest test

32. 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.

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

Irrelevant factors

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

Factors favouring disclosure

35. In their original decision, TCCS identified five factors favouring disclosure. I consider two additional factors identified by the applicant in their access application are also relevant.

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

The investigation information

36. I consider this factor is relevant. Release of the investigation information could promote the public's understanding of the misconduct process and allow for discussion of the investigation.

37. TCCS have granted the applicant partial access to the documents at issue. The nature of the investigation information TCCS decided to refuse access to is limited to the categories set out above at [19], [20] and [21].

38. I consider disclosure of the investigation information as whole promotes this factor. However, as the disclosure of the redacted information at issue would not reveal any additional information beyond what has already been released that would assist in understanding the misconduct process, I attribute no weight.

The tender information

39. I consider this factor is also relevant as release of the tender information could promote the public's understanding of the tender process and allow for discussion of that process.

40. The nature of the tender information TCCS decided to refuse access to includes information relevant to the decision-making process. I consider disclosure would promote this factor to a limited extent.

41. Taking into consideration the tender information already released, I attribute minor weight to this factor in respect of the redacted tender information.

Inform the community of the government's operations (Schedule 2, s 2.1(a)(iii))

42. The applicant submitted that 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.

43. I consider this factor is relevant.

The investigation information

44. Release of the investigation information could inform the community of, for example, the codes of conduct followed by the government in its dealings with members of the community and third-party providers.

45. As noted above, TCCS has already granted the applicant partial access to the documents at issue. The nature of the investigation information TCCS decided to refuse access to is limited to the categories set out above at [17], [18] and [19].

46. I consider disclosure of the investigation information as a whole promotes this factor. However, as the disclosure of the redacted information at issue would not reveal any additional information beyond what has already been released that would inform the community of the government's operations, I attribute no weight.

The tender information

47. I consider this factor is also relevant as release of the tender information could inform the community of policies followed by the government regarding the tender process.

48. The nature of the tender information TCCS decided to refuse access to includes information relevant to the decision-making process. I consider disclosure would promote this factor to a limited extent.

49. Taking into consideration the tender information already released, I attribute minor weight to this factor in respect of the redacted tender information.

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))

The investigation information

50. The investigation information contains information relating to the alleged conduct of public officials which explains the results of an investigation into conduct by an ACT public servant.
51. As noted above, TCCS have already granted the applicant partial access to the documents at issue. The nature of the investigation information TCCS decided to refuse access to is limited to the categories set out above at [17], [18] and [19].
52. I consider disclosure of the investigation information as a whole promotes this factor. However, as the disclosure of the redacted information at issue would not reveal any additional information beyond what has already been released that would explain the results of the investigation and noting that the investigation is now completed and any further assistance would be limited, I attribute no weight.

The tender information

53. I have carefully reviewed the tender information. I cannot identify any information in the redacted information at issue relating to the alleged conduct of public officials which would reasonably be expected to allow or assist inquiry into alleged misconduct. I do not consider this factor applies to the tender information.

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))

54. TCCS submitted:

... the requested information 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. The requested information relates to internal correspondence between staff who, as part of their roles, contributed to the management of a human resource function.

The investigation information

55. The investigation information comprises information shared with relevant public officials, and information obtained by the investigator as part of an administrative workplace investigation. In this instance, the applicant sought information about an investigation into the applicant.

56. I consider disclosure of the investigation information as a whole promotes this factor. However, I note that:

- Document 21 was released to the applicant in full and states 'the investigation has now been concluded, and it has been determined that no misconduct has been found...'.⁵
- Document 20 contains information stating allegations have been raised against another person (who is not the applicant) which has been partially released to the applicant already.

57. I do not consider the redacted information at issue 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, I attribute no weight.

The tender information

58. I have carefully reviewed the tender information. I cannot identify any information in the redacted information at issue that may 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. I do not consider this factor applies to the tender information.

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))

The investigation information

59. In their application for Ombudsman review, the applicant stated the information given to them by TCCS was inadequate and no longer available.

60. TCCS agreed the factor was relevant but submitted the applicant had a pre-existing pathway to access information relating to the investigation process, albeit in a different format, outside of the FOI Act.

61. While the redacted information at issue includes a statement made by a third party about the complaint, I note that in *BP and Justice and Community Safety Directorate*,⁵ the Acting Senior Assistant Ombudsman observed:

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.

⁵ [\[2021\] ACTOFOI 19 \(22 December 2021\)](#) [34]-[37].

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.

62. I accept that release of the investigation information would only promote this factor to a limited extent and afford minor weight to this factor.

The tender information

63. I do not consider this factor applies to the tender information as the release of the redacted information at issue could not reasonably be expected to 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 that decision (Schedule 2, s 2.1(a)(viii))

The investigation information

64. TCCS identified as relevant 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.
65. I accept that disclosure of the investigation information could provide some background or contextual information which could have informed any decisions made by the misconduct delegate.
66. I consider disclosure of the investigation information as a whole promotes this factor. The redacted information at issue includes a statement made by a third party about the complaint. While information regarding the nature of the allegation and the reasons behind the finding of no misconduct have already been released to the applicant, the redacted information comprises further information obtained as part of the administrative workplace investigation.
67. I attribute minor weight to this factor in relation to the investigation information.

The tender information

68. I also accept that disclosure of the tender information could reasonably be expected to reveal the reason for TCCS' decision whether or not to enter into an arrangement for the provision of services.
69. I attribute minor weight to this factor in relation to the tender information.

Information is the personal information of the applicant (Schedule 2, s 2.1(b)(i))

70. In their access application, the applicant submitted that this factor was relevant, as all or some of the information requested was the personal information of the applicant.

The investigation information

71. This factor may apply where an applicant is seeking, for example, reports about them held by an agency or allegations made about them to an agency. I consider release of the investigation information would only promote this factor to a limited extent, that is where the information is the personal information of the applicant, and not the personal information of other people and attribute this factor minor weight.

The tender information

72. I have identified that one of the signatures redacted within the tender information belongs to the applicant. As this is the personal information of the applicant and I consider this factor applies to that part of the tender information. I attribute this factor moderate weight.

Factors favouring non-disclosure

73. I consider there are 4 factors favouring non-disclosure relevant in this review.

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

74. Section 12 of the Human Rights Act provides:

Everyone has the right—

1. Not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
2. Not to have his or her reputation unlawfully attacked.

75. I agree this factor is relevant in this matter to the extent that the following information is included in the redacted investigation information at issue:

- the names of third party individuals and former TCCS staff
- direct mobile telephone numbers of TCCS staff
- contact details and position titles of third party individuals
- the name, position and contact details of the informant, and
- an allegation made against a named TCCS staff member.

76. I find disclosure of this information could represent an arbitrary interference with a person's privacy under s 12 of the Human Rights Act.

77. Disclosure of information regarding an allegation made against a named TCCS staff member could also potentially prejudice the fair treatment of an individual in line with Schedule 2, s 2.2(b)(v) of the FOI Act. I consider the information may contain unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct of particular individuals.

78. I afford this factor significant weight.

79. I do not consider this factor applies to the tender information.

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

80. This Office's FOI Guidelines define confidential information as information of a confidential nature which was obtained in confidence.⁶ It must then be established there is a factual basis to believe that disclosure would be reasonably expected to prejudice the agency's ability to obtain this confidential information in the future.

81. Confidential information has been defined in the context of FOI as information which is secret or only known to a limited group as laid out in *Francis and Australian Sports Anti-Doping Authority*⁷ (Freedom of information) [2019] AATA 12:

For the information to have the quality of confidentiality it must be secret or only known to a limited group. Information that is common knowledge or in the public domain will not have the quality of confidentiality.

82. While the above case is in the context of the Commonwealth FOI regime, the definition has been accepted in the context of the ACT FOI scheme.

⁶ [FOI Guideline 4 Considering the public interest](#), [9.13].

⁷ [\(Freedom of information\) \[2019\] AATA 12](#).

83. Disclosing the redacted investigation information at issue could reasonably be expected to prejudice TCCS' ability to obtain confidential information. In particular, staff and third parties may be less inclined to make allegations of misconduct.
84. Information provided for the investigation was provided on a confidential basis with the expectation it would be kept confidential within a limited group of people for a limited purpose.
85. I afford this factor significant weight.
86. I do not consider this factor applies to the tender information.

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

87. In '*BP' and Justice and Community Safety Directorate*,⁸ the Acting Senior Assistant Ombudsman observed:

... maintaining a system for reporting integrity matters... is inextricably linked to the management function of an agency.

88. I agree with the Acting Senior Assistant Ombudsman's view and consider it relevant to this review. My initial view is that disclosure of the redacted investigation information at issue could reasonably be expected to prejudice both the TCCS' management function and conduct of industrial relations, through inhibiting the receipt of and monitoring of allegations of misconduct, and thereby also prejudicing the ability to act upon matters of internal integrity. Disclosure of the information may make complainants or witnesses reluctant to fully participate in future investigations.
89. I afford this factor significant weight.
90. I do not consider this factor applies to the tender information.

Prejudice trade secrets, business affairs or research of an agency or persons (Schedule 2, s 2.2(a)(xi))

91. I am inclined to accept that disclosure of the commercial information included in the tender information could reasonably be expected to prejudice the business affairs of each of the tenderers identified within the tender information. Information considered within the findings of the evaluation team and the decision-making process, including the price offered by each

⁸ [2021] ACTOFOI 19 (22 December 2021), [53].

tenderer, could reasonably be expected to prejudice their business affairs by potentially enabling competitors to ascertain important elements of their business models and operations.

92. I afford this factor significant weight.

93. I do not consider this factor applies to the investigation information.

Balancing the factors

94. 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.

95. In forming my decision, I considered the nature of the information TCCS decided to refuse access to and whether the disclosure of the redacted information at issue should be given weight when considering the factors favouring disclosure.

96. In this matter, I identified 7 public interest factors relevant to the investigation information which favour disclosure of the information at issue, and I attribute minor weight to 3 of these factors.

97. I identified 4 of these public interest factors also apply to the tender information which favour disclosure of the information at issue, and I attribute minor weight to 3 factors, and moderate weight to the remaining factor.

98. On the other hand, I identified 3 public interest factors apply to the investigation information which favour non-disclosure of the information at issue, and I attribute significant weight to these factors.

99. I identified 1 public interest factor applies to the tender information which favour non-disclosure of the information at issue, and I attribute significant weight to that factor.

100. 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.

101. The FOI Act has a pro-disclosure bias,⁹ 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'.¹⁰

102. In relation to the information at issue (both the investigation information and the tender information) on balance, the public interest factors favouring non-disclosure outweigh the public interest factors favouring disclosure of the information at issue. I consider significant weight applies to the 4 factors favouring non-disclosure, whereas I consider minor or moderate weight applies to the 5 factors¹¹ I identified as favouring disclosure.

Conclusion

103. For the reasons set out above, TCCS' decision is varied under s 82(2)(b) of the FOI Act.

104. Additional information contained within document 17 (the investigation briefing) is to be released to the applicant, consistent with information already released and available to the applicant (including the applicant's personal information).

105. No new information is being disclosed as a result.

David Fintan
Senior Assistant Ombudsman
12 December 2023

⁹ Section 17 of the [FOI Act](#).

¹⁰ [Explanatory Statement, Freedom of Information Bill 2016](#).

¹¹ That is, Schedule 2, ss 2.1(a)(i), 2.1(a)(iii), 2.1(a)(vii), 2.1(a)(viii) and 2.1(b)(i) of the [FOI Act](#).