

Decisions and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10038
Applicant:	'CV'
Respondent:	Justice and Community Safety Directorate
Respondent reference:	2023/11366
Date:	14 March 2024
Decision reference:	[2024] ACTOFOI 3
Catchwords:	<i>Freedom of Information Act 2016 – reasonable steps to identify all government information within scope – whether disclosure of information is contrary to the public interest – prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety – prejudice a system or procedure for the protection of people, property or the environment – prejudice the protection of an individual's right to privacy or any other right under the <i>Human Rights Act 2004</i></i>

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.

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2. For the reasons set out below, the Justice and Community Safety Directorate's (**JACS**) decision of 7 September 2023 to refuse access to part of the information sought on the grounds that it is contrary to the public interest information should be **confirmed** under s 82(2)(a) of the FOI Act.

Background to Ombudsman review

3. On 31 July 2023, the applicant applied, on behalf of their spouse, to JACS for access to:

... information on behalf of [applicant's spouse]... who was incarcerated at the AMC from... until... during which time [applicant's parent-in-law] passed away at the Canberra Hospital (TCH).

I am seeking information regarding:

- the initial phone call from TCH to the AMC informing of [applicant's parent-in-law's condition]
- the request [applicant's spouse] submitted for transport and visitation at TCH
- the date of approval for the visit to TCH
- any other internal document relating to the matter.

4. On 7 September 2023, JACS advised the applicant it had identified 3 documents within the scope of the application. JACS decided to grant partial access to 2 documents and refuse access to one document.
5. On 11 September 2023, the applicant applied for Ombudsman review of JACS' decision.
6. On 4 March 2024, the Acting Senior Assistant Ombudsman provided her preliminary view to the parties in a draft consideration.
7. On 4 March 2024, the applicant provided their response to the draft consideration, including additional submissions in support of their view that the original decision was not correct.
8. On 8 March 2024, JACS indicated it accepted the draft consideration, making no further submissions.

Preliminary issue – identifying information within the scope of the application

9. As a preliminary issue, I have considered whether reasonable steps were taken to identify all information within the scope of the application, as required under s 34 of the FOI Act.
10. The applicant expressed to the ACT Ombudsman their concern that some information was missing and being withheld.
11. In response to the draft consideration, the applicant said:

... you made no mention of our main concern that documentation has been “destroyed” I would imagine certain timeframes would be put in place for when and how documentation is destroyed, yet there was no investigation into this.

We would really like that particular point investigated as I believe it may have contained very relevant information that demonstrated negligence at the AMC.
12. The FOI Act requires JACS to take 'reasonable steps' to identify all the government information within the scope of the application.¹
13. The FOI Act is silent on what constitutes 'reasonable steps', only providing guidance that backup systems do not have to be searched (but may be searched if appropriate).²
14. What amounts to reasonable steps may vary in different circumstances. It would, however, include at a minimum a search of electronic records and a manual search of physical records, where applicable.³
15. The ACT Ombudsman requested further information from JACS about the searches that were conducted and enquired as to whether additional information may exist.

¹ Section 34(1) of the [FOI Act](#).

² Section 34(2) of the [FOI Act](#).

³ [Explanatory Statement, Freedom of Information Bill 2016 \(ACT\)](#).

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16. JACS undertook additional searches and provided evidence of all searches that had been undertaken. As a result of the additional searches, JACS was able to locate a further 2 documents, both of which were released informally (in part) to the applicant. These 2 documents are not subject to this review.
17. In the course of responding to the ACT Ombudsman's request for further information, JACS also noted it had identified one document, which had been destroyed in error.
18. JACS provided the following response, which was shared with the applicant:

ACT Corrective Services (ACTCS) advises the completed 'Security Assessment and Removal Authority' document was destroyed in error after [the applicant's spouse] was released from custody.

I confirm that ACTCS has followed up with the relevant business unit to ensure that all records are kept in accordance with relevant legislation to avoid similar occurrences in the future.
19. I accept JACS' explanation that the document was destroyed in error, in which case it is unavailable and clearly cannot be assessed for the purposes of this review.
20. At the same time, I am concerned that the document was destroyed in error and propose to seek, outside of the scope of this review, further information from JACS in order to be assured that the cause of the error has been identified, and systems and procedures are in place to ensure it does not happen again.
21. I am otherwise satisfied that JACS has taken reasonable steps to identify all available information within the scope of the application for the purposes of this Ombudsman review.

Information at issue

22. The information at issue in this Ombudsman review is the information within the 2 documents to which JACS refused access in part, and the document to which JACS refused access in full in its decision of 7 September 2023.
23. The 2 documents JACS decided to refuse access to in part are case notes concerning the applicant's spouse and an email from an AMC case manager to the applicant's spouse (**documents 1 and 2**).
24. The document JACS decided to refuse access to in full is a Security Risk Assessment and Removal Authority (**document 3**).
25. The key issue to be decided in this Ombudsman review is whether the information JACS decided to refuse access to is 'contrary to the public interest information' for the purposes of the FOI Act.
26. In making my decision, I have had regard to:
 - the applicant's access application and review application
 - the respondent's decision of 7 September 2023
 - the FOI Act, in particular ss 7, 16, 35, Schedule 1, s 1.14 and Schedule 2, s 2.2
 - the respondent's FOI processing file relating to the access application
 - the additional information provided by the respondent, in particular their evidence of further searches
 - the submissions of the applicant in response to the draft consideration, and
 - the Freedom of Information Guidelines made under s 66 of the FOI Act.

Relevant law

27. 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
28. Section 16(1) of the FOI Act defines 'contrary to the public interest information' as follows:
 - (1) For this Act, 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.
29. 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.
30. 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.
31. 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.
32. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose.

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

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33. 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

34. JACS' decision of 7 September 2023, relied on Schedule 1, ss 1.14(1)(g) and (i) to refuse access to document 3 and Schedule 2, s 2.2(a)(ii) to refuse access to information in documents 1 and 2.

35. Schedule 1, ss 1.14(1)(g) and (i) apply to:

(1) Information the disclosure of which would, or could reasonably be expected to—

...

(g) prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety; or

...

(i) prejudice a system or procedure for the protection of people, property or the environment.

...

36. JACS' decision notice said:

The Security Assessment and Removal Authority (folio 4-9) is a detailed analysis of security risks and vulnerabilities when transferring detainees between locations. It is reasonable to believe that, should this information be released, it could be used to undermine the security, safety, and good order of the AMC.

37. Schedule 2, s 2.2(a)(ii) protects an individual's right to privacy under the *Human Rights Act 2004* (ACT) (**Human Rights Act**). This factor does not automatically mean that information is taken to be contrary to the public interest to disclose, but rather needs 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.

38. JACS' decision notice said:

I have decided to grant partial access to two documents with minor redactions made to the personal information of ACT Corrective Services Staff to protect their right to privacy under the *Human Rights Act 2004*. I note that these redactions do not significantly alter the substance of the material to be released. An important consideration is the protection of personal privacy of individuals, such as the identity of members of the public.

39. The applicant's application for Ombudsman review submitted:

We understand that names of guards etc, will need to be redacted. However these internal documents are important. If the 'protection of personal privacy of individuals' refers to [applicant's parent-in-law], then it is worth noting that [applicant's parent-in-law] is now deceased and [applicant's spouse is their child and next of kin. We therefore request there be no redactions in relation to [applicant's parent-in-law]].

40. These submissions are discussed in more detail below.

Consideration

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

41. JACS decided document 3, the Security Risk Assessment and Removal Authority, was taken to be contrary to the public interest to disclose under Schedule 1, ss 1.14(1)(g) and (i).
42. I agree with JACS' reasoning. The information contained within document 3 is, as explained by JACS in its decision notice, a detailed analysis of security risks and vulnerabilities when transferring detainees between locations.
43. I consider release of information which details how security and risk assessments are conducted (such as the information considered and strategies to mitigate escape risk) could reasonably be expected to impact adversely on ACT Corrective Services' ability to escort detainees safely, and the effectiveness of procedures in place for protecting members of the public and ACT Corrective Services staff.

Public interest test

44. The information that remains at issue to be considered under Schedule 2 is the information redacted in documents 1 and 2.

45. 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.

46. 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

47. 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

48. In their original decision, JACS identified one factor favouring disclosure.

49. Given the context in which the access application was made I do not consider any other factors favouring disclosure apply.

Information is personal information (Schedule 2, s 2.1(b))

50. JACS identified a factor favouring disclosure is the information is the personal information of the person making the request.⁵

51. The applicant submitted the information may be the personal information of a deceased person, and the person making the request for the information is an eligible family member of the deceased person.⁶

52. I have carefully reviewed the redacted information within documents 1 and 2. This information is the names, email addresses and direct telephone numbers of ACT Corrective Services staff. None of the redacted information is the personal information of the applicant or their spouse, or the personal information of the applicant's parent-in-law, who is deceased.

53. Based on this, I attribute no weight to this factor.

Factors favouring non-disclosure

54. One factor favouring non-disclosure is relevant in this review.

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

55. A reasonable expectation that disclosure could prejudice an individual's right to privacy under the Human Rights Act weighs against disclosure under the FOI Act.⁷

⁵ Schedule 2, s 2.1(b)(i) of the [FOI Act](#).

⁶ Schedule 2, s 2.1(b)(iii) of the [FOI Act](#).

⁷ [Human Rights Act](#); Schedule 2, s 2.2(a)(ii) of the [FOI Act](#).

56. Section 12 of the Human Rights Act provides:

Everyone has the right—

- (a) Not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) Not to have his or her reputation unlawfully attacked.

57. I agree this factor is relevant in this matter to the extent the names and direct telephone numbers of ACTCS staff are included in documents 1 and 2.

58. The disclosure of information about ACT government staff is not generally considered to prejudice the protection of an individual's right to privacy where the information is wholly related to the individual's routine day-to-day work activities.

59. For ACT government staff names to be withheld from disclosure on privacy grounds, I consider there needs to be additional reasons or special circumstances, such as where disclosure could:

- affect the personal safety of staff
- lead to harassment or intimidation of staff
- cause detriment to the family members of staff, or
- result in officers being targeted for abuse on the internet.

60. I consider there are special circumstances in the case of ACTCS staff.

61. I am satisfied that disclosure of this information could represent an arbitrary interference with a person's privacy under s 12 of the Human Rights Act.

62. I also note the applicant, in their application for Ombudsman review, indicated the names of ACTCS staff may need to be redacted.

63. I afford this factor significant weight.

Balancing the factors

64. Having identified a public interest factor favouring disclosure and a factor favouring non-disclosure, I now must consider the public interest balancing test set out in s 17 of the FOI Act.
65. In this matter, I identified 1 public interest factor applies to documents 1 and 2 which favour disclosure, and I attribute no weight to this factor.
66. On the other hand, I identified 1 public interest factor applies to documents 1 and 2 which favour non-disclosure of the information at issue, and I attribute significant weight to this factor.
67. 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.
68. The FOI Act has a pro-disclosure bias,⁸ 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'.⁹
69. On balance, the public interest factor favouring non-disclosure outweighs the public interest factor favouring disclosure of the information at issue.

⁸ Section 17 of the [FOI Act](#).

⁹ [Explanatory Statement, Freedom of Information Bill 2016](#).

Conclusion

70. For the reasons set out above, I **confirm** JACS' decision under s 82(2)(a) of the FOI Act.

David Fintan

Senior Assistant Ombudsman

14 March 2024