

Decision and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/25/80007
Applicant:	'DO'
Respondent:	Justice and Community Safety Directorate
Respondent reference:	2025/119316
Date:	1 September 2025
Decision reference:	[2025] ACTOFOI 12
Catchwords:	Freedom of Information Act 2016 - deciding access - whether information is contrary to the public interest information - information subject to Legal Professional Privilege - information is personal information of the person making the request - reveal the reason for a government decision and any background or contextual information that informed the decision - prejudice the protection of an individual's right to privacy or any other right under the <i>Human Rights Act 2004</i> - prejudice the management function of an agency.

Decision

1. The applicant applied for Ombudsman review of the primary access decision made by the Justice and Community Safety Directorate (JACS) on 17 January 2025 giving full access to 4 documents and partial access to 2 documents.
2. The applicant sought review of the decision not to give access to documents within the scope in full.
3. The scope of this review includes only 2 documents which were released in part.

4. For the purpose of s 82 of the *Freedom of Information Act 2016 (FOI Act)*, I am a delegate of the ACT Ombudsman.
5. My decision is to **vary the decision** under s 82(2)(b) of the FOI Act giving access to more information as it is not contrary to the public interest information.

Background to Ombudsman review

6. On 5 December 2024, the applicant applied to JACS for access to the following:
 - ... a copy of the Provisional Improvement Notice issued in relation to the incident at Fyshwick Fire Station on 17 September 2024, and all documentation and correspondence relating to said Notice.
7. The respondent conducted searches and located 6 documents within the scope of the request.
8. On 17 January 2025, the respondent decided to grant access to 4 documents in full and 2 documents in part.
9. On 3 February 2025, the applicant requested an Ombudsman review of the decision on the ground that the respondent '...has refused access to information or parts of information that was requested.'
10. On 6 August 2025 I sent a draft consideration with my preliminary view to the parties.
11. On 13 August 2025 both parties accepted my draft consideration and did not provide further submissions.

Information at issue

12. The information at issue in this review is the 2 documents partially released to the applicant within the scope of the request.¹

¹ Documents 1 and 2.

13. Document 1 is an email attaching a Provisional Improvement Notice (PIN) issued under s 90 of the *Work Health and Safety Act 2011* (ACT) (WHS Act), in relation to an incident at Fyshwick Fire Station on 17 September 2024.²
14. Document 2 is an email chain attaching legal advice requested in relation to the PIN.³
15. The key issue to be decided in this Ombudsman review is whether the information at issue is contrary to the public interest information.
16. In making my decision, I have had regard to:
 - the applicant’s access application and review application
 - the respondent’s decision of 17 January 2025
 - submissions from the respondent in relation to the Ombudsman review
 - the FOI Act, in particular Schedule 1 and 2
 - the ACT FOI guidelines issued under s 66 of the FOI Act
 - *Work Health and Safety Act 2011* (ACT) (WHS Act)
 - *Information Privacy Act 2004* (ACT) (Information Privacy Act)
 - *Human Rights Act 2004* (ACT) (Human Rights Act)
 - *Evidence Act 2011* (ACT) (Evidence Act)
 - Relevant case law, including:
 - *Waterford v the Commonwealth of Australia* [\(1987\) 163](#) CLR 54
 - *'AIQ' and Department of Home Affairs (Freedom of information)* [\[2024\] AICmr 61](#) (22 March 2024)
 - *Mann v Carnell* [\(1999\) 201](#) CLR 1.

² Pages 1-4 of the information at issue.

³ Pages 5-15 of the information at issue.

Relevant law

17. 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
18. 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.
19. Schedule 1 of the FOI Act sets out categories of information taken to be contrary to the public interest to disclose.
20. 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.
21. 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.
22. 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.
23. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.

⁴ Section 35(1)(c) of the [Freedom of Information Act 2016 \(ACT\)](#) (FOI Act).

The submissions of the parties

24. In the decision notice, JACS decided to refuse access to part of document 2 based on schedule 1, s 1.2 of the FOI Act – that the information is subject to legal professional privilege (LPP).
25. JACS also refused access to part of documents 1 and 2 on the basis that release of part of the information contained within the PIN could reasonably be expected to prejudice the management function of an agency or the conduct of industrial relations by an agency (schedule 2, s 2.2(a)(xv)); and that release of part of the information contained within document 2, specifically the mobile telephone number of a staff member, could reasonably be expected to prejudice the protection of an individual's right to privacy or any other rights under the Human Rights Act (schedule 2, s 2.2(a)(ii)).
26. JACS relied on one factor favouring disclosure, being that the information is the personal information of the applicant (schedule 2, s 2.1(b)(i)).
27. In additional submissions to the Ombudsman JACS stated:
 1. On 19 September 2024, a Health and Safety Representative (HSR) under the Work Health and Safety Act 2011 (WHS Act) issued a PIN to Wayne Phillips, ACT Emergency Services Agency (ESA) Commissioner, and Richard Glenn, JACS Director-General in regard to an incident at the Fyshwick Fire Station that occurred on 17 September 2024.
 2. Section 97 of the WHS Act requires that the person to whom a PIN is issued must, as soon as possible, display a copy of the PIN in a prominent place at or near the workplace that is affected by the PIN.
 3. Legal advice provided to ESA and People and Workplace Strategy (PWS) by your office confirmed the PIN must be complied with unless it is cancelled by the HSR or a request for review is made to Worksafe.
 4. PWS and Interim Chief Officer, [...] met with HSR and UFU, and agreed on actions to resolve the issues outlined in the PIN. HSR agreed to the actions and withdrew the PIN on 26 September 2024.
 5. As stated above, a PIN is intended to be displayed in the affected work area and, should be written in a way that will deal with the contravention and prevent further occurrences of the incident.

6. The PIN included details of the incident including unverified quotes and personal information. Notably, the PIN stated [...] was under investigation and was on leave which is personal information.
7. While the wording of the PIN was not a factor in the withdrawal, PWS noted that the wording was concerning as there were around 16 witnesses to the incident and the work environment was already tense following enterprise bargaining. The public display of this information as written, would have exacerbated existing/ongoing HR issues.
8. In exercising the public interest test under the FOI Act, it was deemed that the release of this information would prejudice JACS/ESA's management function by inflaming interpersonal conflict and undermining the remediating actions undertaken by management and HRS/UFU.
9. I note the release of information under FOI is unconditional and the further dissemination of this information is also of concern.

28. In their application for Ombudsman review, the applicant stated:

The organisation provided a redacted copy of the Provisional Improvement Notice (PIN) even though the entire PIN is required to be displayed in the affected workplace. It never was, which is why I made the FOI request. The organisation also redacted a large portion of the documentation that refers to me.

Consideration

29. I have carefully reviewed an unredacted copy of documents 1 and 2.

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

30. JACS decided that the email chain and attached legal advice from the ACT Government Solicitor is contrary to the public interest information as it falls under schedule 1, s 1.2 of the FOI Act (information subject to Legal Professional Privilege).

31. Information that would be privileged from production or admission into evidence in a legal proceeding on the ground of LPP is taken to be contrary to the public interest information under the FOI Act.⁵

⁵ Schedule 1, s 1.2 of the FOI Act.

32. LPP operates as an immunity to resist the disclosure of information which would reveal communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of services for legal proceedings.
33. In accordance with common law principles, for LPP to apply the following elements need to be met:⁶
- an independent legal adviser and client relationship must exist
 - the communication between a client and their legal adviser must have been made for the dominant purpose of giving or receiving legal advice, or for use in litigation (actual or anticipated)
 - the communication must have been confidential, and
 - LPP has not been waived by the client.
34. Also, under s 118 of the Evidence Act it is prohibited to present evidence when objected by a client if it would amount of disclosure of protected confidential communications between lawyers and their clients.

Legal adviser-client relationship

35. I consider information within document 2 clearly demonstrates that legal services, namely, the ACT Government Solicitor, was engaged by JACS and the ACT Emergency Services Agency (ESA) to provide advice to ACT Fire and Rescue (ACTF&R) and acted in their professional capacity on this particular matter.

Dominant purpose

36. I am satisfied that part of document consists of legal advice in relation to the PIN.

⁶ *Waterford v the Commonwealth of Australia* (1987) 163 CLR 54.

37. Document 2 is an email chain communication between employees of JACS and ACTF&R and a legal practitioner who provided legal advice regarding the necessary actions and steps in relation to the PIN issued under the WHS Act.

Confidential Communications

38. The information within document 2 was provided on a confidential basis, and the relevant email chain was marked: 'official: sensitive-legal privilege'.

39. The advice was addressed to two recipients: the Chief Human Resources Officer for JACS and the Commissioner of the ESA. Access to the advice was limited to a small number of staff.

Waiver of LPP

40. LPP will not apply in circumstances where privilege has been waived, either expressly or impliedly, by the client.⁷ Waiver may be expressed or implied, where the conduct is inconsistent with the maintenance of confidentiality.

41. I do not consider JACS has expressly or impliedly waived privilege.

42. I agree with JACS that part of document 2 contains information subject to LPP, and access to this material should be refused. However, I consider not all material redacted by the respondent consists of legal advice.

43. Some information on page 7 is a reference that advice was sought and has been provided, and the advice includes guidance on the next steps to be taken. This information mentions the existence of legal advice only but does not reveal its substance.⁸ As such this Information does not attract LPP and in can be released.

⁷ *Mann v Carnell* (1999) 201 CLR 1 at [28]–[29].

⁸ *'AIQ' and Department of Home Affairs (Freedom of information)* [2024] AICmr 61 (22 March 2024) at [36].

Public interest test

44. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:

- identify any factor(s) 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(s) 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(s) favouring disclosure against any relevant factor(s) 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.

Factors favouring disclosure

45. JACS identified in its decision one factor favouring disclosure relevant to this matter. In reviewing the information at issue, I have identified an additional factor favouring disclosure.

Information is personal information of the person making the request— Schedule 2, s 2.1(b)(i)

46. In its decision, JACS relied on one factor favouring disclosure - being that the information is personal information of the applicant as stated in Schedule 2, s 2.1(b)(i) of the FOI Act.

47. I agree that the PIN includes personal information of the applicant, however I note the PIN also includes the personal information of other parties (i.e. statements about the applicant made by third parties).
48. I consider the personal information about the applicant in the PIN is either known to the applicant or was previously provided to the applicant as part of a subsequent preliminary assessment process.
49. I attribute moderate weight to this factor.

Reveal the reason for a government decision and any background or contextual information that informed the decision—Schedule 2, s 2.1(a)(viii)

50. An additional factor favouring disclosure is that disclosure could reasonably be expected to reveal the reason for a government decision and background or contextual information that informed the decision.
51. I consider that this factor is relevant here because the information at issue concerns an incident following which the WHS regulator issued a PIN including recommendations to protect the safety of employees in the workplace.
52. I afford this factor moderate weight as the information at issue, particularly the PIN, reveals information about the reasons the WHS regulator took action, and what the WHS regular recommended, which is a matter of interest for the public.

Factors favouring nondisclosure

53. JACS identified in its decision 2 factors favouring nondisclosure relevant to this matter.

Prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act 2004—Schedule 2, s 2.2(a)(ii)

54. A factor favouring nondisclosure is that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act.

55. The following elements can be considered in deciding whether disclosure of personal information would be contrary to the public interest. They include:

- the nature, age and current relevance of the information
- whether the information is well known or available from other public sources
- any detriment that disclosure may cause to the person to whom the information relates
- any opposition to disclosure expressed or likely to be held by that person
- the circumstances of an agency's collection and use of the information
- whether disclosure of the information might advance the public interest in government transparency and integrity
- the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act.

56. Section 12(a) of the Human Rights Act provides that everyone has the right 'not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily'. It does not provide a general right to privacy but can essentially be viewed as the right of an individual to preserve their personal sphere from interference from others.

57. JACS' decision redacted the mobile phone number of a staff member on page 6 of the document 2 to protect their right to privacy.

58. I consider that document 1 also includes the personal information of individuals other than the applicant, including names, position titles and information about the circumstances leading to the issuing of the PIN that provides sufficient context to identify specific individuals.

59. The Information Privacy Act sets out how personal information is handled by public sector agencies and how the privacy of individuals is protected. An individual's

privacy is 'interfered with' if an act or practice breaches a Territory Privacy Principle (TPP) in relation to personal information about the individual.⁹

60. TPP 6 provides if an agency holds personal information about an individual that was collated for a particular purpose (primary purpose), the agency must not use or disclose the information for another purpose (secondary purpose) unless the individual consents or an exception in TPP 6.2 or 6.3 applies.
61. An agency may use or disclose non-sensitive personal information for a secondary purpose if the use or disclosure is related to the primary purpose; required or authorised by law; or a permitted general situation exists.
62. The personal information in the information at issue was obtained by ACTF&R for the primary purpose of management of its staff – in this instance, ensuring the safety of its staff.
63. I consider the disclosure of the information at issue for a secondary purpose would not be reasonably expected by the individuals who provided their personal information.
64. I afford significant weight to this factor.

Prejudice the management function of an agency—Schedule 2, s 2.2(a)(xv)

65. A factor favouring nondisclosure is when disclosure could reasonably be expected to prejudice the management function of an agency or the conduct of industrial relations by an agency.
66. The management function of an agency includes activities such as recruitment, training, performance reviews, promotion, counselling, discipline, compensation and occupational health and safety.

⁹ Section 11 of the [Information Privacy Act 2014 \(ACT\)](#) (IP Act).

67. The PIN was issued under s 90 of the WHS Act as a response to a contravention of the law or regulation and was required to be displayed on a workplace where the contravention occurred in accordance with s 97 of the WHS Act.

68. I note, however, that the PIN was not displayed.

69. Section 97 of the WHS Act states:

Display of provisional improvement notice

- 1) A person to whom a provisional improvement notice is issued must as soon as practicable display a copy of the notice in a prominent place at or near the workplace, or part of the workplace, at which work is being carried out that is affected by the notice.

70. The PIN contains a description of the incident and actions the management must undertake to protect the employees from risks to their health and safety, including recommendations in relation to the applicant.

71. JACS redacted parts of the PIN, namely, the description of the incident and a list of necessary employees' protective measures explaining that the release would:

undermine the Directorates ability to remedy future occurrences of occupational work health and safety matters and prejudice JACS/ESA's management function by inflaming interpersonal conflict and undermining the remediating actions undertaken by management and HRS/UFU' .

72. JACS further explained:

'the wording was concerning as there were around 16 witnesses to the incident and the work environment was already tense following enterprise bargaining. The public display of this information as written, would have exacerbated existing/ongoing HR issues.'

73. In submissions to the Office, JACS provided further information stating that the PIN was cancelled on 26 September 2024 and following the cancellation did not have to be displayed.

74. In assessing the weight, I afford this factor, I must consider the nature of the incident that led to the PIN being issued. I acknowledge that the incident occurred in the workplace, in the presence, sight or hearing of at least 16 witnesses.

75. I also note there was a requirement under the WHS Act for the PIN to be displayed at the workplace, however the PIN was not displayed.
76. As a general observation, I note s 10 of the FOI Act provides that the FOI Act is not intended to prevent or discourage the publishing or giving of access to government information otherwise than under the FOI Act. In that context, I encourage agencies to explore options to provide access to information informally or otherwise outside of the FOI process, where it is appropriate to do so. This includes in circumstances where there may have been an expectation that the information should have been made available, to the applicant or generally.
77. I am not satisfied, however, that the nature of the incident and the requirement for the PIN to be displayed at the workplace, means that the release of the information at issue would significantly prejudice the management function of an agency or the conduct of industrial relations by an agency.
78. The specifics of the incident are known to a significant number of people within the workplace even though the PIN was not displayed at the workplace as required by the WHS Act.
79. I consider if specific details about workplace incidents were disclosed outside of the formal or expected process, this would not affect the ability of managers and other officials to obtain relevant advice or guidance.
80. I do not consider release of the PIN in full would prejudice the ability of ACTF&R to address workplace issues as disclosure would not inhibit managers from taking appropriate action in the future.
81. As a result of the incident, and as set out in the PIN, steps were taken to address the incident and ensure the health and safety of employees. The matter is finalised, and management have already taken all necessary appropriate actions in relation to the incident.

82. I attribute small weight to this factor, having regard to the public interest in maintaining the integrity of management activities, including the effective handling of workplace conduct issues.

Balancing the factors

83. Having identified public interest factors favouring disclosure and factors favouring nondisclosure, I now must consider the public interest balancing test set out in s 17 of the FOI Act.

84. In this matter, I considered 2 factors favouring disclosure and 2 factors favouring nondisclosure.

85. I consider 2 factors favouring disclosure apply and I give moderate weight to both factors.

86. I consider 2 factors favouring nondisclosure apply and I give significant weight to one factor and moderate weight to the other factor.

87. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being considered in the public interest.

88. 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.

89. Section 72 of the FOI Act requires the decision-maker to establish that the information is contrary to the public interest information however, in this decision the respondent did not satisfy this requirement.

90. The FOI Act has a pro-disclosure bias,¹⁰ and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium,

¹⁰ Section 17 of the [FOI Act](#).

waiting for arguments to be put on each side. Rather, the scales are 'laden in favour of disclosure'.¹¹

91. My view is, on balance, the factors favouring disclosure outweigh the factors favouring nondisclosure, in documents 1 and 2 in relation to personal information and specific details about the workplace incident in the PIN.
92. Release of this information would reveal the reason for a government decision and any background or contextual information that informed the decision as it stated all details of the incident, and all necessary preventative measures the management must undertake to protect employees in such a case.

Conclusion

93. For the reasons set out above, I vary the respondent's decision under s 82(2)(b) of the FOI Act.
94. The effect of my decision will be to release document 1 in full, and document 2 in part redacting only material protected by LPP and a mobile phone number of a staff member.

Katrina Dwyer

Senior Assistant Ombudsman

1 September 2025

¹¹ [Explanatory Statement, Freedom of Information Bill 2016.](#)