

'AA' and Transport Canberra and City Services Directorate [2018] ACTOFOI 1 (20 July 2018)

**Decision and reasons for decision of
Senior Assistant Ombudsman, Paul Pfitzner**

Application Number:	AFOI-RR/18/30003
Decision Reference:	[2018] ACTOFOI 1
Applicant:	'AA'
Respondent:	Transport Canberra and City Services Directorate
Decision Date:	20 July 2018
Catchwords:	Freedom of Information — deciding access — where respondent decides under s 35(1)(e) to refuse to confirm or deny that the information is held by the respondent because the information is contrary to the public interest information and doing so would or could reasonably be expected to be an unreasonable limitation on a person's rights under the <i>Human Rights Act 2004</i> — right to privacy

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016* (the FOI Act).
2. Under s 82(1) of the FOI Act, I confirm the decision of the Transport Canberra and City Services Directorate (TCCSD) of 11 April 2018 to refuse to confirm or deny that it holds the information sought by the applicant.

Scope and background of Ombudsman review

3. The applicant is a freelance journalist.
4. On 13 March 2018, the applicant applied to TCCSD for access to documents relating to sexual harassment complaints made against a named individual and subsequent investigations.

5. On 11 April 2018, TCCSD advised the applicant that it had decided to refuse to confirm or deny the existence of the government information sought (the information sought). In making its decision, TCCSD relied on s 35(1)(e) of the FOI Act.
6. On 24 April 2018, the applicant sought Ombudsman review of TCCSD's decision under s 73 of the FOI Act.
7. I provided my preliminary views about TCCSD's decision to the parties in my draft consideration dated 8 June 2018.
8. On 5 July 2018, the applicant responded to my draft consideration with submissions. TCCSD did not provide me with further submissions.
9. The issue to be decided in this Ombudsman review is whether TCCSD is entitled to rely on s 35(1)(e) of the FOI Act to refuse to confirm or deny the existence of the information sought.
10. In making my decision, I have had regard to:
 - TCCSD's decision
 - the FOI Act, in particular ss 16, 17 and 35(1)(e), and schedules 1 and 2
 - the ACT *Human Rights Act 2004* (Human Rights Act), in particular s 12
 - the ACT *Information Privacy Act 2014* (Privacy Act), in particular ss 11 and 14
 - TCCSD's FOI processing file relating to the access application
 - the applicant's application for Ombudsman review, and
 - the applicant's submissions in response to my draft consideration.

Relevant law

11. Section 35(1) of the FOI Act relevantly provides:

Deciding access—how applications are decided

The respondent decides an access application for government information by deciding—

...

- (e) to refuse to confirm or deny that the information is held by the respondent because—
 - (i) the information is contrary to the public interest information; and
 - (ii) doing so would, or could reasonably be expected to—
 - (A) endanger the life or physical safety of a person; or
 - (B) be an unreasonable limitation on a person's rights under the *Human Rights Act 2004*; or
 - (C) significantly prejudice an ongoing criminal investigation.

12. Section 12 of the Human Rights Act provides:

Privacy and reputation

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.

13. Neither the FOI Act nor the Human Rights Act provide a definition of what constitutes an interference with an individual's privacy. However, the meaning of 'interference with individual's privacy' is defined in the Privacy Act as:

- (1) For this Act, an act or practice of a public sector agency is an interference with an individual's privacy if the act or practice breaches—
 - (a) a TPP in relation to personal information about the individual; or
 - (b) a TPP code that binds the agency in relation to personal information about the individual.¹

14. As explained in the Explanatory Statement to the Freedom of Information Bill 2016, in the circumstances set out in ss 35(1)(e)(ii)(A)-(C) of the FOI Act, an agency or Minister may refuse to confirm or deny the existence of certain information. The Explanatory Statement gives the example of where releasing the mere existence of information would show that a particular child has been in a particular care facility, or had been the subject of a report or investigation.² I note that this example fits somewhat with the circumstances of this Ombudsman review, as the applicant is essentially seeking access to an investigation report.

The contentions of the parties

15. In its reasons for decision, TCCSD said:

I have decided that the information, if it did exist, would be contrary to the public interest to disclose and doing so would, or could reasonably be expected to be an unreasonable limitation on a person's rights under the *Human Rights Act 2004*.

16. In her application for Ombudsman review, the applicant said:

I dispute the directorate's reasons for blocking this FOI request.

The decision maker cites they are refusing to confirm or deny the existence of the requested government information because it is contrary to the public interest and would be an unreasonable limitation on a person's rights under the Human Rights Act.

¹ Section 11 of the Privacy Act.

² Explanatory Statement, Freedom of Information Bill 2016 (ACT) 24.

That Act says: people have a right *not to have his or her reputation **unlawfully** attacked* [emphasis in original].

I wish to point out that as a journalist I am seeking to conduct legitimate investigative reporting in the public interest. I am not in the business of defaming people willy-nilly.

The Human Rights Act says there is a right to: freedom of expression (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

I contend that it is in the public interest to ensure there is proper scrutiny and transparency regarding the ACT government and departments handling of sexual harassment complaints.

...

I argue that it is in the public interest to ensure that the ... ACT Government are providing safe workplaces for female employees and sexual harassment complaints are properly investigated and perpetrators dealt with appropriately.

Considerations

17. As a preliminary consideration, I consider that TCCSD's decision notice does not meet the requirements of s 56 of the FOI Act, setting out what must be included in a notice refusing to confirm or deny existence of information. This is because the statement of reasons does not set out why the information sought, if it did exist, would be contrary to the public interest information, nor does it explain why confirming or denying the existing of the information sought would or could reasonably be expected to be an unreasonable limitation on a person's rights under the Human Rights Act.
18. However, this procedural defect does not alter the underlying decision. Further, I have had regard to TCCSD's FOI access application processing file. It is apparent that TCCSD considers that the information sought, if it did exist, would be contrary to the public interest information as it would be sensitive information about an individual, and that the unreasonable limitation on a person's rights relates to the protection of privacy and reputation.
19. For TCCSD to be able to rely on s 35(1)(e) to refuse to confirm or deny that the information sought exists, it must be satisfied the information sought, if it did exist, would be contrary to the public interest information, and confirming or denying its existence must be reasonably expected to either:
 - endanger the life or physical safety of a person; or
 - be an unreasonable limitation on a person's rights under the Human Rights Act; or
 - significantly prejudice an ongoing criminal investigation.

20. In response to my draft consideration, the applicant submits that there is just one question that my decision should be based on – ‘would disclosure be contrary to [the] right to privacy under section 12 of the Human Rights Act?’ While the right to privacy is a relevant public interest consideration in this case, that approach would conflate the two limbs of s 35(1)(e).
21. To be applicable, s 35(1)(e) first requires consideration of the broader public interest, and a balancing of relevant public interest factors. Public interest considerations are not limited to an individual’s right to privacy. Rather, the public interest test allows for consideration of any relevant public interest factors, as I explain further below.

Is the information contrary to the public interest information?

22. In relation to the first limb of s 35(1)(e), information is contrary to the public interest information if it is either listed in schedule 1 to the FOI Act (schedule 1 information) or, after applying the public interest test in s 17, disclosure of the information would, on balance, be contrary to the public interest.³

Schedule 1 information

23. Schedule 1 to the FOI Act provides a list of information that is taken to be contrary to the public interest to disclose. Schedule 1 does not list a public interest ground for information generally relating to privacy and reputation, such as ‘personal information’, although it does specifically list ‘sensitive information’.⁴

24. Sensitive information is defined in s 14 of Privacy Act as:

sensitive information, in relation to an individual, means personal information that is—

- (a) about the individual’s—
 - (i) racial or ethnic origin; or
 - (ii) political opinions; or
 - (iii) membership of a political association; or
 - (iv) religious beliefs or affiliations; or
 - (v) philosophical beliefs; or
 - (vi) membership of a professional or trade association; or
 - (vii) membership of a trade union; or
 - (viii) sexual orientation or practices; or
 - (ix) criminal record; or
- (b) genetic information about the individual; or

³ Section 16 of the FOI Act.

⁴ At sch 1.4.

- (c) biometric information about the individual that is to be used for the purpose of automated biometric verification or biometric identification; or
- (d) a biometric template that relates to the individual.

25. In this case, if the information sought, being documents relating to sexual harassment complaints, were to exist, it appears clear that the documents could include 'sensitive information', as referenced above. However, while documents relating to sexual harassment complaints might contain *some* sensitive information, in my view it could still be possible to release some information in response to an FOI access application without releasing the sensitive information. In reaching this view, I have had regard to s 50 of the FOI Act, which provides that where only some of the information is contrary to the public interest information, access should be given to an edited copy of the information where it is practicable to do so.

26. Accordingly, I am not satisfied that the information sought, if it existed, would *in its entirety* be contrary to the public interest information under schedule 1. Therefore, for the information sought, if it existed, to be contrary to the public interest information, disclosure of the information must, on balance, be contrary to the public interest under the test set out in s 17.

Public interest test

27. To determine whether information is, on balance, contrary to the public interest, s 17(1) 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.

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

Irrelevant factors

29. I have noted the irrelevant factors listed in s 17(2) and I am satisfied that I have not considered any irrelevant factors in this case.

Factors favouring disclosure

30. In her application for Ombudsman review, the applicant contends that 'it is in the public interest to ensure there is proper scrutiny and transparency regarding the ACT government and departments handling of sexual harassment complaints'. I agree with the applicant. In this case, if the information sought existed, I am satisfied that disclosure could reasonably be expected to advance the objects of the FOI Act.⁵ This is one public interest factor favouring disclosure in this case.
31. Schedule 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. Of the factors favouring disclosure listed in schedule 2.1, I consider that two are relevant in this Ombudsman review. If the information sought existed, I am satisfied disclosure of it could reasonably be expected to:
- promote open discussion of public affairs and enhance the government's accountability, and
 - reveal the reasons for a government decision and any background or contextual information that informed the decision.

Factors favouring nondisclosure

32. Schedule 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure. Of the factors favouring nondisclosure, I consider that three are relevant in this Ombudsman review. If the information sought existed, I am satisfied that disclosure could reasonably be expected to prejudice:
- an agency's ability to obtain confidential information, and
 - the management functions of an agency.
 - The information sought, if it were to exist, would also be about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct and disclosure of the information could prejudice the fair treatment of an individual.

⁵ Section 6(b) of the FOI Act.

33. As the list of factors in schedule 2 is non-exhaustive, other relevant public interest factors can be identified and considered. In this case, I consider that, if the information sought existed, an additional factor would favour nondisclosure, namely that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy.⁶

Balancing the factors

34. In this case, I am satisfied that, on balance, the public interest factors favouring nondisclosure outweigh the public interest factors in favour of disclosure. In particular, if the information sought existed, I consider that there would be a substantial public interest in protecting the privacy of the individuals involved, including any complainants, witnesses and subjects of a complaint.
35. Therefore the first limb of s 35(1)(e) is satisfied, that is, the information sought, if it existed would be contrary to the public interest information.

Would confirming or denying that the information exists be an unreasonable limitation on a person's rights under the Human Rights Act?

36. In relation to the second limb of s 35(1)(e), TCCSD decided that confirming or denying the information sought existed would, or could reasonably be expected to be an unreasonable limitation on a person's rights under the Human Rights Act. While not explained in its reasons, it is reasonably apparent that TCCSD has relied on the right not to have privacy interfered with unlawfully or arbitrarily, and not to have reputation unlawfully attacked (s 12 of the Human Rights Act).
37. The applicant contends that s 12 of the Human Rights Act protects against an *unlawful* attack on reputation. The applicant also explains that she is 'seeking to conduct legitimate investigative reporting in the public interest' and is 'not in the business of defaming people'.
38. However, s 12 of the Human Rights Act also protects against the unlawful or arbitrary interference with privacy.
39. The Privacy Act defines 'interference with an individual's privacy' as an act or practice that breaches a TPP.

⁶ This is a public interest factor identified by the Australian Information Commissioner, see: *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* at [6.22]. Although these Guidelines relate to the Commonwealth FOI Act, rather than specifically to the ACT context, I consider them to be a relevant source of information to assist in the identification of potential public interest factors.

40. TPP 6.1 and 6.2 essentially provide that where personal information of an individual has been collected for a primary purpose, the information must not be used or disclosed for a secondary purpose, without the individual's consent, or unless the use or disclosure is required or authorised by or under Australian law.
41. As I have already concluded that the information sought, were it to exist, would be contrary to the public interest information, disclosure of the information sought, were it to exist, would not be authorised by the FOI Act.
42. Section 35(1)(e) is intended to protect against an unreasonable interference with a person's rights. In this case, the applicant has no connection to any complaint that may have been made. I am satisfied that, if the information sought existed, a response which *confirmed* that a complaint had been made would be an unreasonable limitation on a person's right to privacy under the Human Rights Act for the purposes of s 35(1)(e)(ii)(B). I am also satisfied that a response *denying* that a complaint had been made could, by implication, lead to the inference that a complaint *had* been made in other cases where the existence of a complaint is neither confirmed nor denied.

Conclusion

43. TCCSD is entitled to rely on s 35(1)(e) of the FOI Act to refuse to confirm or deny the existence of the documents sought by the applicant because the information sought, if it did exist, would be contrary to the public interest information, and confirming or denying its existence could be reasonably expected to be an unreasonable limitation on a person's rights under the Human Rights Act.

Paul Pfitzner
Senior Assistant Ombudsman
20 July 2018