

Decision and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/24/80005
Applicant:	Public Transport Association of Canberra Inc.
Respondent:	Transport Canberra and City Services
Participant:	National Capital Authority
Respondent reference:	24-077
Date:	4 April 2025
Decision reference:	[2025] ACTOFOI 4
Catchwords:	Freedom of Information Act 2016 – deciding access – whether information is contrary to the public interest information – promote open discussion of public affairs and enhance the government’s accountability – contribute to positive and informed debate on important issues or matters of public interest – ensure effective oversight of expenditure of public funds – contribute to the protection of the environment – reveal environmental or health risks or measures relating to public health and safety – prejudice intergovernmental relations – prejudice a deliberative process of government – prejudice an agency’s ability to obtain confidential information.

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.

2. The applicant applied for Ombudsman review of the Transport Canberra and City Services (TCCS) decision of 7 August 2024 to refuse access to reports associated with 3 different contracts about planning upgrades to the Parkes Way traffic corridor.
3. For the reasons set out below, I have decided to **set aside** the decision made by TCCS under s 82(2)(c) of the FOI Act and make a **substitute** decision to grant full access to the information sought as this information is not contrary to the public interest information.

Background to Ombudsman review

4. On 20 May 2024, the applicant applied to TCCS for:

...all the deliverables associated with the following three contracts:

<https://www.tenders.act.gov.au/contract/view?id=192941>
<https://www.tenders.act.gov.au/contract/view?id=194540>
<https://www.tenders.act.gov.au/contract/view?id=192437>.
5. The applicant agreed to an extension of time until 7 August 2024.¹
6. On 7 August 2024, TCCS decided to refuse access to all 33 documents in full. On the same day the applicant applied for Ombudsman review of the decision.
7. On 9 August 2024, the Office of the ACT Ombudsman (the Office) notified TCCS of the review and requested the following:
 - unredacted copies of the information at issue
 - copies of any correspondence between the parties
 - information about consultation undertaken internally or externally including a copy of any relevant agreement between TCCS and the National Capital Authority (NCA).

¹ [Freedom of Information Act 2016 \(ACT\)](#) (FOI Act) s 41.

8. On 23 September 2024, the Office received the information from TCCS including submissions in support of the original decision.
9. On 24 October 2024, NCA applied to participate in this Ombudsman review.²
10. On 5 November 2024, the delegate agreed to allow NCA to participate in this Ombudsman review.³
11. On 27 February 2025, the acting Senior Assistant Ombudsman provided their preliminary view to the parties in a draft consideration.
12. On 3 March 2025, NCA accepted the draft consideration.
13. On 21 March 2025, the applicant also accepted the draft consideration.
14. On 1 April 2025, TCCS advised that they support full release of the information at issue, addressing each document in a table, and acknowledged that the relevant third parties did not object to release.
15. The parties to the review did not provide any further submissions.

Third party consultation

16. Prior to making my decision, in addition to consulting with NCA, the ACT Ombudsman consulted the following third parties:
 - Calibre (now a member of Egis Consulting Pty Ltd) and
 - SMEC.
17. Egis advised it has no concern regarding the release of the relevant report to the applicant.
18. SMEC did not object release of the material to the applicant.
19. Neither of these third parties wished to participate or provide submissions to the review.

² FOI Act s 77(2).

³ FOI Act s 77(3).

Information at issue

20. The information at issue in this Ombudsman review is:

- the *Parkes Way Flood Study* (documents 1-21) which assesses the local stormwater network, in relation to the study to improve Canberra's East-West transport corridor (Parkes Way), prepared by Calibre Professional Services Pty Ltd (Calibre)⁴
- the *Parkes Way / Southwest Corridors Traffic Modelling and Options Analysis* (documents 22-30), which is a freight corridor assessment related to the deliverables completed under the Traffic Modelling and Options Report for Parkes Way, Southwest Corridors and Molonglo Valley Development, prepared by SMEC,⁵ and
- the *Infrastructure Study – Parkes Way: Improving Canberra's East/West Central Connector Project* report (documents 31-33), prepared by KBR ('Infrastructure Study').⁶

21. As TCCS did not propose to release the information at issue, the authors of the documents were not consulted during the processing of the access application.⁷

22. The information at issue relates to 3 separate public tender contracts which are publicly available.

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

- the applicant's access application and review application
- the respondent's decision of 7 August 2024 and additional submissions
- the FOI Act, particularly ss 7, 16, 17, 35, 72 and Schedule 2

⁴ [Tenders ACT, Contract - 38561-NCT-120.](#)

⁵ [Tenders ACT, Contract - 38561-NCT-130.](#)

⁶ [Tenders ACT, Contract - 38561-NCT-110.](#)

⁷ FOI Act s 38.

- the Freedom of Information Guidelines (FOI Guidelines) made under s 66 of the FOI Act, and
- relevant case law, including:
 - *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [\[2019\] ACTOFOI 3](#)
 - *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [\[2016\] AATA 506](#) (19 July 2016)
 - *Re Jane Suzanne Arnold On Behalf of Australians of Animals v Queensland; the Australian National Parks and Wildlife Service* [\[1987\] FCA 148](#) (13 May 1987)
 - *Re JE Waterford and Department of Treasury (No 2)* [\[1984\] AATA 67](#) (14 March 1984)
 - *'CA' and Environment, Planning and Sustainable Development Directorate* [\[2023\] ACTOFOI 7](#) (22 March 2023).

Relevant law

24. 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.⁸

25. 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.

26. 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

⁸ FOI Act s 35(1)(c).

factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.

27. Schedule 2 of the FOI Act sets out a non-exhaustive list of public interest factors which must be considered, where relevant, when determining the public interest.

28. 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.

29. Section 72 of the FOI Act provides in an Ombudsman review, a person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

The submissions of the parties

30. In the decision notice, TCCS said:

... I have identified information that is likely to promote a positive and informed debate on important issues or matters of public interest. As the report has been procured by government, disclosure contributes to an effective oversight of expenditure of public funds. Further, I acknowledge that disclosure may promote open discussion of public affairs and enhance government's accountability generally.

The reports subject to your access application have been procured to explore the pre-feasibility and concept for the broader purpose of informing the drafting of a corridor plan. The reports explore multiple subjects such as technical, economic, financial, environmental, procurement and service considerations. By nature, the reports are deliberative and consideration of its contents or associated works are ongoing.

I consider that the relevant corridor plans are in still in draft. Disclosure of the reports whilst they are still the subject of a deliberative processes of government, is likely to prejudice the government's ability to fully consider the information, recommendations or make further enquiries on feasibility (schedule 2.2(a)(xvi)).

Due to the stage of the project to which these reports relate, I have not found sufficient information to indicate that the reports have been brought into existence for the purpose of a cabinet decision. However, it is possible that the information within the reports, or the reports themselves, may be utilised to inform a future government decision, reaffirming the deliberative nature of the information.

I further consider the deliberations within the reports are not solely within TCCS, but also involve the National Capital Authority (NCA). Currently, there is agreement between TCCS and the NCA that the reports are treated as sensitive and the sharing of reports with persons outside of these areas has only been undertaken under confidentiality agreements. I consider that it is reasonable that the disclosure of the information within these records, in particular whilst deliberative, are likely to prejudice intergovernmental relations...

31. TCCS' submissions received on 23 September 2024 confirmed there is no written agreement between NCA and TCCS about the non-disclosure of the information at issue stating:

... internal advice from the relevant business area contained advice that the reports are sensitive to the National Capital Authority (NCA). This is due to the Parkes Way and some of the stormwater assets residing on National land. The agreement not to make the reports available to the public are predominantly verbal, however the directorate continues to operate in line with this agreement in practice...

32. In summary, the main submissions of TCCS are:

- release would breach a verbal agreement with NCA that the reports are not shared, and
- as the deliberative process is ongoing, release could affect the ability of the government to consider and finalise the relevant plans.

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

...The blanket refusal to release this diverse range of technical documentation is needlessly heavy-handed application of these non-disclosure factors, and in our view does not outweigh the benefits of disclosure outlined in Schedule 2.1(a)(i), Schedule 2.1(a)(ii), Schedule 2.1(a)(iv), Schedule 2.1(a)(x) and Schedule 2.1(a)(xi).

34. The applicant did not provide further submission in relation to the review.

35. These submissions are discussed in more detail below.

Consideration

36. The key issue to be decided in this Ombudsman review is whether the information at issue is contrary to the public interest information.

Public interest test

37. 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.

Factors favouring disclosure

38. TCCS identified 3 factors favouring disclosure of the information at issue and afforded moderate weight to these factors.

39. In their Ombudsman review application, the applicant identified 2 other factors favouring disclosure of the information at issue.

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

40. The information at issue relates to 3 separate contracts for planning a major infrastructure project in the ACT.

41. The Parkes Way upgrade could potentially have significant implications on traffic and passenger movement throughout the ACT given it is an arterial road.
42. I accept the disclosure of information about cost estimates and planning of this project is in the public interest because it would enhance the government's accountability.
43. In addition, disclosure of the information at issue would provide insight into the management of the project and the options being considered by TCCS, promoting open discussion of transport planning.
44. While the scale of the project and its potential impact on travel in the region is significant, the information at issue itself would not reveal detailed information about TCCS's assessment of the information or the status of the project, only that TCCS has procured this information.
45. I attribute moderate weight to this factor.

Contribute to positive and informed debate on important issues or matters of public interest - Schedule 2, s 2.1(a)(ii)

46. The planning and implementation of efficient, safe and reliable transport infrastructure is a matter of public interest.
47. Outcomes from this project are to feed into water catchment and flood management, emergency services responses and future development planning, and guide priorities for future stormwater augmentation investigations. As such it may impact on the environment and natural reserves around that area as well the ACT community.
48. I accept this factor is relevant here as the public in and around the ACT may be impacted by industrial operations and hold environmental concerns. For

example, the planned upgrade could result in potential delays or disruptions due to construction on a major transport corridor.

49. Noting the detailed information about potential concerns contained in the information at issue, I attribute significant weight to this factor.

Ensure effective oversight of expenditure of public funds – Schedule 2, s 2.1(a)(iv)

50. Although TCCS did not identify any relevant consideration regarding this factor, I consider it is relevant here as documents 1-29 contain financial figures indicating the estimated cost of the project. I did not identify any financial information in documents 30-33.

51. I accept that disclosure of the information about costs would reveal how much money the ACT Government intends to spend on the mentioned infrastructure projects.

52. There has been a \$5 million commitment, involving not only the ACT's finances but also money provided by the Commonwealth to investigate the future improvement of Parkes Way.⁹ I also note the value of the contracts themselves for aspects of the planning of the project exceed \$1.5 million.¹⁰

53. I consider disclosure of the information at issue would enable the public to scrutinise whether the planning phase of the project reflects value for money spent.¹¹

54. I afford moderate weight to this factor.

⁹ Transport Canberra and City Services, Infrastructure Projects, [Parkes Way Upgrade](#).

¹⁰ [Contract - 38561-NCT-120](#) (current amount \$190,055); [Contract - 38561-NCT-130](#) (current amount \$ 1,224,201.75); [Contract - 38561-NCT-110](#) (current amount \$257,529).

¹¹ [Government Procurement Act 2001](#) (ACT) s 8.

Contribute to the protection of the environment – Schedule 2, s 2.1(a)(x); Reveal environmental or health risks or measures relating to public health and safety – Schedule 2, s 2.1(a)(xi)

55. Given the similarity of these factors in the context of this Ombudsman review, I will address them together.
56. I accept these factors are relevant here as the information at issue includes a flood modelling study and the location of stormwater assets for the purpose of planning construction and the upgrade of the traffic corridor.
57. The information at issue provides a detailed description of the relevant work area, including rivers, water catchments within the high-density and low-density business and residential areas. Further, the information at issue presents options and other considerations relevant to the protection of the environment in response to potential risks.
58. Disclosure would reveal environmental management information for a particular area and explain the environmental risks associated with a particular activity being the upgrade of Parkes Way, the East-West Central Corridor.
59. I afford significant weight to each of these factors, noting the importance of achieving the desired project outcome while not harming the environment or causing unacceptable risk to public safety.

Factors favouring nondisclosure

60. TCCS identified 2 factors favouring non-disclosure of the information at issue. I have considered an additional factor favouring nondisclosure below.

Prejudice intergovernmental relations – Schedule 2, s 2.2(x)

61. A factor favouring nondisclosure of information is where release could reasonably be expected to prejudice intergovernmental relations.

62. The FOI Guidelines state prejudice to intergovernmental relations may occur where disclosure may:
- adversely affect ongoing intergovernmental negotiations
 - cause another government to be hesitant about providing information to the ACT government in future, or
 - result in a loss of trust and cooperation between governments.¹²
63. The clear purpose of the intergovernmental relations public interest factor is to protect the relationships between Australian governments, and the additional factor of protecting an agency's ability to obtain confidential information, in these circumstances, also relates to protecting these relationships.¹³
64. TCCS stated in the decision and their submissions that information within the information at issue was provided to them by NCA in good faith that the information would remain confidential. I note there is no formal agreement between NCA and TCCS in relation to the non-disclosure of the information at issue, or particular information within the information at issue.
65. In this case, TCCS did not explain what kind of relationship exists between TCCS and NCA apart from stating that Parkes Way and some of the stormwater assets reside on national land; and the sharing of the information at issue has only occurred under confidentiality agreements.
66. NCA is responsible for managing development and renewal projects located on national land, including construction of public infrastructure and therefore agreement or approval from NCA is likely required for the Parkes Way upgrade.

¹² [Freedom of Information \(Volume 4 - Considering the Public Interest\) Guidelines 2023](#) at [8.10].

¹³ [Alistair Coe and Chief Minister, Treasury and Economic Development Directorate \[2019\] ACTOFOI 3 \(29 January 2019\)](#) at [32].

67. NCA is not a party to the commercial contracts TCCS had with the third parties involved in the project. However, the *Parkes Way Flood Study* contains information that NCA participated in consultation with TCCS and provided some feedback on the draft reports prepared by Calibre.
68. NCA did not participate in consultation between TCCS and SMEC, and their relevance to the relationship between the TCCS and the third parties is not clear.
69. TCCS did not describe the likelihood or any example of adverse consequences that may occur should the information at issue be released. I consider the potential damage occurring from the disclosure of information from NCA that TCCS has verbally committed to not releasing 'must be considered in the light of the facts of each case'.¹⁴
70. In considering a similar provision under the *Freedom of Information Act 1982* (Cth) former Senior Tribunal Member CR Walsh said:¹⁵
- The potential damage need not be quantified, but the effect on relations arising from the disclosure must be adverse.
71. I am not satisfied TCCS has provided sufficient information to support a conclusion disclosure of the information at issue would damage the ability of TCCS and NCA to negotiate or work cooperatively with each other to complete this stage of the project.
72. I do not consider this factor applies to the information at issue.
73. In the draft consideration, the acting Senior Assistant Ombudsman invited TCCS and NCA to provide submissions on this point, and they did not make any further comments.

¹⁴ *Re Jane Suzanne Arnold On Behalf of Australians of Animals v Queensland; the Australian National Parks and Wildlife Service* [1987] FCA 148 (13 May 1987) at [32].

¹⁵ *MacTiernan and Secretary, Department of Infrastructure and Regional Development (Freedom of Information)* [2016] AATA 506 (19 July 2016) at [56].

Prejudice a deliberative process of government – Schedule 2, s 2.2 (xvi)

74. A factor favouring nondisclosure is where disclosure could reasonably be expected to prejudice a deliberative process of government.
75. A deliberative process involves the weighing up or evaluation of arguments or considerations related to a process that is being undertaken within government to consider whether and how to make or implement a decision.¹⁶
76. TCCS have submitted the information at issue was procured to allow the Territory to explore options, including technical, economic, financial, environmental, procurement and service considerations in the pre-feasibility and concept stage of the Parkes Way upgrading planning process.
77. In the original decision, TCCS explained disclosure of the information at issue while still in a draft form and subject to consideration could prejudice the government's ability to fully consider the information, recommendations or make further enquiries on feasibility.
78. TCCS noted disclosure of the information at issue at this early stage is likely to prejudice the Territory's deliberative process, including future cabinet submissions, deliberations between NCA and the ACT, and potential future procurements.
79. I accept TCCS' position that the information at issue was procured for the purpose of assisting the ACT to consider options for the Parkes Way upgrade and this process is ongoing. However, release of information concerning an ongoing process does not alone amount to having a prejudicial effect on that process.¹⁷

¹⁶ *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 (14 March 1984) at [58].

¹⁷ 'CA' and Environment, Planning and Sustainable Development Directorate [2023] ACTOFOI 7 (22 March 2023) at [44] – [54].

80. I note the information at issue is technical in nature and contains detailed analysis and modelling of the existing infrastructure, advice about potential improvements and possible risks (e.g. flood maps). I have also considered in respect of the Infrastructure Study there is a notice indicating the report is based on publicly available datasets.

81. While I agree the information at issue may require further assessment or finalisation (noting the assertion the documents are still in a draft form) it is not apparent how release of the information at this stage would hinder, prevent or adversely affect TCCS' ability to deliberate on the project. Rather disclosure could result in valuable feedback on the proposed options.

82. Further, I am not satisfied that release of the information at issue in circumstances where the relevant contracts have commenced, and 2 contracts have expired already, would prevent TCCS from considering whether to procure additional expert advice or analysis for the pre-feasibility stage.

83. I do not consider this factor applies to the information at issue.

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

84. A factor favouring nondisclosure is where disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information.

85. TCCS mentioned as the documents were provided in good faith by NCA with understanding that they should not be made publicly available I have considered whether release of documents would prejudice the ability of TCCS to obtain confidential information of this kind in the future.

86. I note the Infrastructure Study contract summary states there is no confidential text identified as part of the agreement.¹⁸
87. The Parkes Way Flood Study and the Parkes Way / Southwest Corridors Traffic Modelling and Options Analysis contract summaries state confidential text is identified as part of the agreement being information concerning price components.¹⁹ Further, the documents themselves are marked as confidential and do not appear to otherwise be publicly available.
88. As discussed above at [64], while TCCS maintains release of the information at issue would prejudice the relationship between TCCS and NCA, I do not consider there is a formal agreement in place obligating TCCS to keep the information at issue confidential and information about the likelihood NCA would cease to provide information has not been provided.
89. I am not satisfied in these circumstances that disclosure of reports prepared by third parties would have any detrimental impact on the ability of TCCS to obtain relevant information from NCA or procure further relevant confidential advice.
90. I do not consider this factor applies to the information at issue.

Balancing the factors

91. 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.
92. In this matter, I identified 5 public interest factors favouring disclosure. I attribute moderate weight to 2 factors favouring disclosure and significant weight to 3 factors favouring disclosure.

¹⁸ Tenders ACT, [Contract - 38561-NCT-110](#).

¹⁹ Tenders ACT, [Contract - 38561-NCT-120](#) and [Contract - 38561-NCT-130](#).

93. I considered 3 public interest factors favouring nondisclosure and find they are not relevant to the information at issue.
94. 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.
95. The weight given to a factor will depend on the effect disclosing the information has on the public interest.
96. The FOI Act has a pro-disclosure bias,²⁰ 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'.²¹
97. As I do not consider any factors favouring nondisclosure apply, I find disclosure of the information at issue would be in the public interest.

Conclusion

98. For the reasons set out above, under s 82(2)(c) of the FOI Act, I set aside the decision made by TCCS that the information at issue is contrary to the public Interest information.
99. I make a substitute decision to give access to the information at issue in full.

David Fintan

Senior Assistant Ombudsman

Defence, Investigations, ACT & Legal

²⁰ FOI Act s 17.

²¹ [Explanatory Statement, Freedom of Information Bill 2016.](#)