

'AU' and Transport Canberra and City Services [2020] ACTOFOI 11 **(25 March 2020)**

Decision and reasons for decision of Senior Assistant Ombudsman, Louise Macleod

Application Number	AFOI-RR/19/10037
Decision Reference	[2020] ACTOFOI 11
Applicant	'AU'
Respondent	Transport Canberra and City Services
Decision Date	25 March 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – protection of an individual's right to privacy or any other right under the <i>Human Rights Act 2004 (ACT)</i> – flow of information to a regulatory agency – agency's ability to obtain confidential information

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the ACT *Freedom of Information Act 2016* (FOI Act).
2. Under s 82(2)(a) of the FOI Act, I **confirm** the decision of Transport Canberra and City Services (TCCS), dated 31 October 2019, with respect to the information at issue in this review.

Background of Ombudsman review

3. On 12 September 2019, the applicant applied to the respondent for access to:
 - Any documents in relation to the enquiry in regards to the attack on our pets Rocky and Daisy
 - Any documents and Statements of reason concerning in the 'Internal Revue [sic]' by the Deputy Registrar, Registrar and DAS
 - Any document or reasons why it was deemed to get 'legal advice' before the 'Internal Revue's' decision was made overturning the original decision and can we have a statement of reason concerning this legal advice?
4. The respondent sought the applicant's agreement to extend the processing time on a number of occasions, with a final decision date of 31 October 2019 agreed to.
5. On 31 October 2019, the respondent advised the applicant it had identified 49 documents as falling within the scope of the access application. The respondent gave the applicant access to seven documents in full and 42 documents in part. In making its decision, the respondent relied on Schedule 2, ss 2.2(a)(ii), (ix) and (xii) of the FOI Act.
6. On 15 November 2019, the applicant contacted our Office to seek an extension of time to request Ombudsman review of the respondent's decision on the access application. Our Office agreed to extend the review period to 11 December 2019.
7. On 9 December 2019, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
8. On 28 February 2020, I provided my preliminary views about the respondent's decision to the parties in my draft consideration.
9. The respondent did not provide submissions in relation to my draft consideration.
10. On 3 March 2020, the applicant provided submissions in relation to my draft consideration. I have discussed these further below.

Scope of Ombudsman review

11. The information in this Ombudsman review relate to an investigation by Domestic Animal Services (DAS) into a dog attack.

12. The issue to be decided is whether giving the applicant access to the information at issue would be contrary to the public interest.
13. In making my draft consideration, I have had regard to:
 - the applicant's access application and review application to the Ombudsman
 - the applicant's submissions to my draft consideration
 - the respondent's decision
 - the FOI Act, in particular ss 6, 7, 16, 17, 35, 50, 72, and Schedule 2
 - the respondent's FOI processing file relating to the access application
 - the *Information Privacy Act 2014* (IP Act)
 - the *Human Rights Act 2004* (HR Act)
 - an unedited copy of the information at issue
 - relevant case law, in particular *Alistair Coe and ACT Directorate*,¹ *Matthews and Gold Coast City Council*,² and *Suskova and Council of the City of Gold Coast*.³

Relevant law

14. Section 7 of the FOI Act provides every person with 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.
15. 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.
16. 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.
17. Section 35(1)(c) of the FOI Act provides that 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.

¹ [2018] ACTOFOI 4 (5 September 2018).

² (Unreported, Queensland Information Commissioner, 23 June 2011).

³ [2015] QLCmr 31 (27 November 2015).

18. 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.
19. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.
20. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

The contentions of the parties

21. In its decision notice, the respondent said:

...it is not in the public interest to release personal information about this case beyond the parties to the attack...

The release of names and contact details of other parties to the attack and witnesses would prejudice their rights to privacy under the *Information Privacy Act* and the *Human Rights Act 2004*.

The documents contain witness statements and release of this information could prejudice the directorate's ability to obtain confidential information in the future...

22. In the application for Ombudsman review, the applicant said:

...all materials should be provided to enable a fuller understanding of decision making and grounds for possible further submissions...

23. In response to my draft consideration, the applicant provided further reasons for why they sought the information, as follows:

I believe we should be allowed to see:

- a. The referees for the dogs and their owners – if names and addresses are blacked out, that is fair but we still have a right to see these referees. As the viciousness of the original attack by the dogs in June 2019 was so severe and if we continue with action these should be made available to us.
- b. I believe we should also have total access to the dog (Dora) adoption papers from the RSPCA as to ascertain the previous address of the dogs and their owners to see if there had been prior problems with these dogs in their previous address. Again if we continue down the legal avenue we would like to know if these neighbours can be called as witnesses to the dogs' behaviour.
- c. We are entitled to know what this 'legal advice' was, as we were informed of by DAS in the phone call on Monday 2nd September 2019. If again, we go down the legal road this is imperative to know as on Friday 31st August the Registrar signed off and dated the 'Dangerous Dog Declarations'. So why, on Monday 2nd September – 3 days later, did we receive a phone call late in the afternoon to state that a decision would be made with the appeal late that week as the Registrar/DAS were seeking 'legal advice'. But, Tuesday 3rd September late in the afternoon a DAS Ranger was canvassing Wyles Place (where we live) and Joyner Place (where the dogs live) asking feeble and ineffectual questions about dangerous dogs. When the Ranger was approached by my husband asking questions for example – 'is this about the attack on our dogs' to which the Ranger shrugged his shoulders. My husband then asked, "why didn't you come to our house?" The Ranger quickly got in his car and quickly took off and didn't answer.

We were finally contacted very late on Wednesday 4th September that the neighbours and their dogs had won their appeal.

So – I ask what was this 'vital' legal advice? What are/were DAS hiding? Was it a throwaway line to placate us? I believe we have a right to know especially as they are supposed to be transparent and our animals were the ones at risk.

Considerations

24. I have carefully considered an unedited copy of the information at issue together with the information provided by the applicant and respondent.

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

25. Neither party to this Ombudsman review has suggested the information sought contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the information sought to be contrary to the public interest information, disclosure of the information sought must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

Public interest test

26. To determine whether disclosure of information is, on balance, contrary to the public interest, s 17(1) of the FOI Act 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.
27. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.

Irrelevant factors

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

Factors favouring disclosure

29. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.
30. The respondent considered that Schedule 2, s 2.1(a)(viii) of the FOI Act was a relevant factor favouring disclosure in this matter – that is, disclosure of the information at issue could reasonably be expected to reveal the reasons for a government decision, and any background or contextual information that informed the decision.
31. I agree with the respondent that this factor is relevant as the disclosure of this information would provide the applicant with insight into the information that was considered as part of DAS' initial decision to issue a Notice to Destroy, and the basis for which this decision was later amended to a Dangerous Dog Declaration.
32. Additionally, of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, I also consider s 2.1(a)(xiii) of the FOI Act is relevant – that is, disclosure of the information at issue could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.
33. Additionally, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of representative democracy.⁴ This concept is promoted through the objects of the FOI Act.⁵
34. Following review of the information at issue, I consider the factors favouring disclosure, as identified by the respondent and discussed above, are relevant in this review, and in the interests of enhancing transparency and accountability, I afford them significant weight.

Factors favouring nondisclosure

35. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure.
36. Of the factors favouring nondisclosure, the respondent considered the following factors relevant to the disclosure of the information at issue:
 - prejudice the protection of an individual's right to privacy or any other right under the HR Act⁶
 - prejudice the flow of information to a regulatory agency,⁷ and
 - prejudice the agency's ability to obtain confidential information.⁸

⁴ See s 17 of the FOI Act.

⁵ See s 6(b) of the FOI Act.

⁶ Schedule 2, s 2.2(a)(ii) of the FOI Act.

⁷ Schedule 2, s 2.2(a)(ix) of the FOI Act.

⁸ Schedule 2, s 2.2(a)(xii) of the FOI Act.

37. I have discussed each of these factors below.

Protection of an individual's right to privacy

38. A factor favouring nondisclosure under Schedule 2, s 2.2 of the FOI Act is that disclosure of the information at issue could reasonably be expected to prejudice the protection of an individual's right to privacy or any another right under the HR Act.
39. Section 12(a) of the HR 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 rather a right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily.⁹
40. As a result, when deciding whether Schedule 2, s 2.2(a)(ii) of the FOI Act is relevant to the information being considered, there is a need to consider whether disclosure could reasonably be expected to result in a breach of privacy legislation.
41. The IP Act identifies the circumstances in which the disclosure of information may constitute a breach of an individual's privacy. An individual's personal information must only be disclosed in accordance with the Territory Privacy Principles in Schedule 1 of the IP Act.
42. Personal information is defined in s 8 of the IP Act as:
- (a) means information or an opinion about an identified individual or an individual who is reasonably identifiable—
 - (i) whether the information or opinion is true or not; and
 - (ii) whether the information or opinion is recorded in a material form or not; but
 - (b) does not include personal health information about the individual.
43. The respondent applied this factor to parts of documents 1-25, 27, 31-32, 35-44, and 46-49.
44. In the respondent's decision notice, they contended that:
- The release of names and contact details of other parties to the attack and witnesses would prejudice their rights to privacy under the *Information Privacy Act* and the *Human Rights Act 2004*. Factors in favour of release can still be met while protecting the personal information of individuals involved. The protection of this information outweighs disclosure in this instance.
45. From my review of the information at issue, I am satisfied it contains personal information of individuals such as mobile telephone numbers, personal details and statements.

⁹ *Alistair Coe and ACT Health Directorate* [2018] ACTOFOI 4 (5 September 2018) [43].

46. In considering whether the disclosure of this information could reasonably be expected to prejudice the protection of an individual's right to privacy, I have considered that:
- the information redacted by the respondent is not well-known or publicly available, and
 - the information was provided to the respondent in the course of an investigation and was provided on a confidential basis.
47. Based on the reasons above, I am satisfied disclosure of the information at issue in documents 1-25, 27, 31-32, 35-44, and 46-49 could reasonably be expected to prejudice an individual's right to privacy or any other right under the HR Act. Therefore, I consider Schedule 2, s 2.2(a)(ii) of the FOI Act to be a relevant factor favouring nondisclosure in this matter.

Prejudice the flow of information to a regulatory agency

48. Schedule 2, s 2.2(a)(ix) of the FOI Act provides that information is contrary to the public interest if disclosure of the information at issue could reasonably be expected to prejudice the flow of information to the police or another law enforcement agency or regulatory agency.
49. The schedule to the respondent's decision notice indicated that some information in documents 11-12, 16-25, 32, 35, and 49 were redacted on this basis. However, the respondent's decision notice did not address this factor in detail, nor did it provide reasons for the application of this factor favouring nondisclosure.
50. It is apparent DAS is a regulatory agency for the purposes of the FOI Act. I also accept that the information at issue in documents 11-12, 16-25, 32, 35 and 49 comprise statements and evidence relating to the investigation, which were provided to DAS.
51. I accept that disclosure of the information at issue could reasonably be expected to prejudice the flow of information to the regulatory agency. The information at issue was provided voluntarily by individuals to the regulatory agency. Further, disclosure of the information could identify the individuals concerned and consequently, in future, individuals may be less likely to provide information.¹⁰
52. Therefore, for the reasons above, I accept that Schedule 2, s 2.2(a)(ix) of the FOI Act is a relevant factor favouring nondisclosure of the information at issue from documents 11-12, 16-25, 32, 35 and 49.

¹⁰ See, for example, *Matthews and Gold Coast City Council* (Unreported, Queensland Information Commissioner, 23 June 2011), *Suskova and Council of the City of Gold Coast* [2015] QICmr 31 (27 November 2015).

Prejudice the agency's ability to obtain confidential information

53. Schedule 2, s 2.2(a)(xii) of the FOI Act provides that if disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information then it is contrary to the public interest information.
54. In its decision notice, the respondent contends:
- For an investigation to work effectively, cooperation between the directorate and those parties to the incident is required. The release of such documents could reasonably be expected to prejudice the frankness and candour of a person being questioned or interviewed in relation to an incident. There are expectations that such information is treated in a confidential manner. For this reason, I have attributed significant weight to the possible prejudice that could occur to the Directorate's ability to obtain confidential information in future or to prejudice the flow of information to Domestic Animal Services as a regulatory agency.
 - I have also given significant weight to the public interest in protecting the investigation methods and activities so as not to impede the administration of justice generally. For these reasons, I have decided not to release any statements that have been provided as part of this investigation.
55. The respondent decided this factor applied to parts of documents 11-12, 16-25, 32, 35, and 49.
56. As discussed above, these documents comprise statements and evidence relating to the investigation, which were provided to DAS.
57. I accept the information at issue was provided in confidence to DAS to enable it to consider all relevant information during its investigation. Disclosure of the information at issue could reasonably be expected to discourage individuals from coming forward with relevant information in the future.
58. Therefore, I consider Schedule 2, s 2.2(a)(xii) of the FOI Act is a relevant factor favouring nondisclosure of the information at issue contained in documents 11-12, 16-25, 32, 35, and 49.

Balancing the factors

59. As I have identified public interest factors favouring disclosure,¹¹ and three relevant factors favouring nondisclosure,¹² I now have to consider the public interest balancing test as set out in s 17 of the FOI Act.
60. I have considered whether disclosure of the information at issue would further reveal the reason for a government decision and any background or contextual information that informed the decision and/or contributed to the administration of justice generally, including procedural fairness.

¹¹ See discussion at [29]-[33].

¹² See discussion at [34]-[57].

61. To ensure procedural fairness is afforded does not, however, necessarily require full details of the relevant investigation to be provided to the applicant.¹³ While it is not clear whether information was provided to the applicant during the investigation or whether the respondent's decision was explained to the applicant, this would be outside the scope of this review. I also note that part of the information disclosed to the applicant includes the 'Registrar review of decision of Deputy Registrar' file, which does provide a summary of the information taken into account by the Registrar, including the number of statements that were taken into account.
62. Given this, I consider that greater weight attaches to the factors favouring nondisclosure identified as relevant above. As discussed above, disclosure could potentially have significant impacts in terms of prejudicing individuals' right to privacy, including witnesses who have specifically asked that their information be kept confidential. It is also important for the functioning of DAS as a regulatory agency that they are able to obtain confidential information and the community is not reluctant to provide them with information to assist them in their investigations which are critical for community safety.
63. I am satisfied that, on balance, the public interest factors favouring nondisclosure outweigh the public interest factors favouring disclosure.

Conclusion

64. I confirm the respondent's decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

Louise Macleod
Senior Assistant Ombudsman

25 March 2020

¹³ *Suskova and Council of the City of Gold Coast* [2015] QICmr 31 (27 November 2015) [18].