

'CC' and Integrity Commission [2023] ACTOFOI 10 (22 June 2023)

Decision and reasons for decision of Senior Assistant Ombudsman

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| Application number: | AFOI-RR/23/10017 |
| Decision reference: | [2023] ACTOFOI 10 |
| Applicant: | 'CC' |
| Respondent: | Integrity Commission |
| Date: | 22 June 2023 |
| Catchwords: | <i>Freedom of Information Act 2016</i> (ACT) – refusing to deal with application – application expressed to relate to information in the possession of Integrity Commission |

Decision

1. I am a delegate of the Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016* (FOI Act).
2. For the reasons set out below, I have decided under s 82(2)(a) of the FOI Act to **confirm** the Integrity Commission's decision of 11 April 2023 refusing to deal with the application pursuant to s 43(1)(e) of the FOI Act.¹

Background of Ombudsman review

3. On 23 March 2023, the applicant applied to the Integrity Commission for access to:

all records create [sic] during this assessment and including all notes, minutes etc by the assessment panel.
4. On 11 April 2023, the Integrity Commission decided to refuse to deal with the application under s 43(1)(e) of the FOI Act because it sought access to a category of government information taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act.

¹ Section 43(1)(e) allows a respondent—in this case, the Integrity Commission—to refuse to deal with an access application if it 'is expressed to relate to government information of a stated kind and government information of that kind is taken to be contrary to the public interest to disclose under schedule 1'.

5. Specifically, the Integrity Commission identified the application sought access to information in the possession of the Integrity Commission (not of an administrative in nature), which is a category of information taken to be contrary to the public interest to disclose under Schedule 1, s 1.1B of the FOI Act.
6. On 12 April 2023, the applicant applied for Ombudsman review of the Integrity Commission's decision to refuse to deal with the application.
7. On 2 June 2023, the Acting Senior Assistant Ombudsman provided their preliminary views to the parties in a draft consideration.
8. On 5 June 2023, the Integrity Commission accepted the draft consideration. The review applicant did not respond to the draft consideration.

Relevant law

9. 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.²
10. 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.
11. Section 35(1)(d) of the FOI Act provides an access application may be decided by refusing to deal with the application.
12. Section 43(1)(e) of the FOI Act provides that a respondent may refuse to deal with an access application if 'the access application is expressed to relate to government information of a stated kind and government information of that kind is taken to be contrary to the public interest to disclose under schedule 1'.³ While this sounds complex, the gist is that a respondent can refuse to deal with an application if it seeks access to information the respondent is not required to disclose.

² Section 35(1)(d) of the [FOI Act](#).

³ Section 43(1)(e) of the [FOI Act](#).

13. Schedule 1 of the FOI Act identifies categories of information which are taken to be contrary to the public interest to disclose, including 'information in the possession of the Integrity Commission ... unless the information is administrative in nature' (Schedule 1, s 1.1B).

Preliminary issue

14. As a preliminary issue, I have considered whether the Integrity Commission consulted with the applicant before refusing to deal with the application, as required under s 46 of the FOI Act.

15. The Integrity Commission was required to give the applicant a written notice about the intention to refuse, the ground for refusal and give the applicant an opportunity to consult about their application before refusing to deal with the application.⁴

16. The Integrity Commission acknowledges the applicant was not consulted in accordance with s 46(1) of the FOI Act and this should have occurred. I note the Integrity Commission attempted to contact the applicant by phone before deciding the application.

17. The Integrity Commission has confirmed it has updated its internal FOI procedure to include information about consulting applicants in writing before deciding to refuse an application.

The parties' submissions

18. In the decision notice dated 11 April 2023, the Integrity Commission information officer said:

The kind of information you have requested from the Commission is not administrative in nature. Therefore, it falls within clause 1.1B of Schedule 1 and is contrary to the public interest to disclose. In accordance with s 43(1)(e), the Commission therefore refuses to deal with your access application.

19. In the application for Ombudsman review, the applicant submitted:

There is nothing that could be possibly against the public interest here. They are also my personal records and I am further legally entitled to recorded [sic] them as part of the privacy act.

20. In further submissions, the Integrity Commission information officer said:

The nature of the material sought was directly captured by section 43(1)(e) of the FOI Act because it related directly to the investigative function undertaken by the assessment branch of the Commission...

⁴ Section 46 of the [FOI Act](#).

Issue in Ombudsman review

21. The key issue to be decided in this Ombudsman review is whether the access application is expressed to relate to information in the possession of the Integrity Commission being information that is not administrative in nature.
22. In making my decision, I have had regard to:
 - the applicant's access application and review application
 - the respondent's decision of 11 April 2023 and further submission of 18 April 2023
 - the FOI Act, in particular s 6, 7, 16, 35, 43 and Schedule 1 (effective 1 January 2022 – 23 May 2023)
 - the *Integrity Commission Act 2018* (**Integrity Commission Act**)
 - the *Information Privacy Act 2014* (**the Information Privacy Act**)
 - the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act.

Consideration

23. It is not in dispute that the access application is a request for access to information in the possession of the Integrity Commission.
24. I have also considered whether the information to which access is sought is 'administrative in nature' because such information is expressly excluded from Schedule 1, s 1.1B of the FOI Act, and therefore would not be taken to be contrary to the public interest to disclose.
25. I have received information from the applicant and the Integrity Commission about the context in which the access application was made.
26. Having regard to this information, I consider it reasonable to conclude the 'assessment' referred to in the access application is related to the performance of the Integrity Commission's functions under the Integrity Commission Act.
27. I do not consider it reasonable to characterise such information as administrative in nature because it relates to the performance of the Integrity Commission's functions, and the exercise of its powers, under the Integrity Commission Act.
28. The applicant made submissions that they were entitled to receive the requested information because the information is their own personal information, and the applicant is entitled to the records under the Information Privacy Act.

29. Territory Privacy Principle 12.1, set out in Schedule 1 of the Information Privacy Act, provides public sector agencies must, on request by the person, give access to personal information.⁵
30. However, if the agency is required or authorised to refuse access under the FOI Act or another law in force in the ACT, then despite TPP 12.1 the agency is not required to give access to the extent the agency is required or authorised to refuse to give access.
31. While the applicant made submissions that it would not be contrary to the public interest to disclose the information to which access is sought, it is unnecessary to consider the public interest test in s 17 of the FOI Act where the information sought is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act.⁶

Conclusion

32. For these reasons, I confirm the Integrity Commission's decision under s 82(2)(a) of the FOI Act to refuse to deal with the application pursuant to s 43(1)(e) of the FOI Act.

David Fintan

Senior Assistant Ombudsman

22 June 2023

⁵ [Information Privacy Act, Schedule 1, Part 1.5, TPP 12.1.](#)

⁶ [FOI Act, s 16 – what is contrary to the public interest information?.](#)