

## **'BM' and Justice and Community Safety Directorate [2021] ACTOFOI 14 (23 November 2021)**

### **Decision and reasons for decision of Acting Senior Assistant Ombudsman Symone Andersen**

<b>Application number:</b>	AFOI-RR/21/10027
<b>Applicant:</b>	'BM'
<b>Respondent:</b>	Justice and Community Safety Directorate
<b>Date:</b>	23 November 2021
<b>Catchwords:</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – prejudice an agency's ability to obtain confidential information – prejudice the management function of an agency or the conduct of industrial relations by an agency – inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community – allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official – advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government – personal information of the applicant – an individual's right to privacy under the <i>Human Rights Act 2004</i>

### **Decision**

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**).
2. I have decided, under s 82(2)(a) of the FOI Act, to **confirm** the decision of the Justice and Community Services Directorate (**JACS**) dated 10 September 2021.

### **Background of Ombudsman review**

3. On 14 August 2021, the applicant applied to JACS for access to employment-related information.

4. On 10 September 2021, JACS' Information Officer decided to give full access to 22 documents, grant partial access to 4 documents and refuse access to 5 documents.
5. On 17 September 2021, the applicant applied for Ombudsman review under s 73 of the FOI Act.
6. On 21 October 2021, I provided the parties with my draft consideration. My draft consideration set out the reasons for my preliminary view, which was that JACS' decision should be confirmed. It also invited the parties to make additional submissions on the points it addressed.
7. On 21 October 2021, the applicant wrote to me to provide me with additional submissions and on 29 October 2021, JACS provided additional submissions noting that it agreed with the decision to confirm its decision but had comments with specific relevance to the reasons.

### **Information at issue**

8. The applicant sought review of JACS' decision to refuse access to information in documents 20, 26, 27 and 30 only.
9. The issue in this review was whether the decision to refuse access to that information was the correct and preferable decision, or whether the applicant should have been given access to the information were it not, in fact, contrary to the public interest information.
10. In making my decision, I had regard to:
  - The applicant's original access application and application for Ombudsman review, including submissions provided in response to my draft consideration,
  - JACS' decision,
  - JACS' submissions,
  - the FOI Act, in particular ss 7, 9, 17, 35, 72 and Schedule 2, ss 2.1 and 2.2,
  - the *Human Rights Act 2004* (ACT) (**Human Rights Act**), and
  - an unedited copy of the information at issue.

### **Relevant law**

11. Every person enjoys an enforceable right of access to government information.<sup>1</sup> However, the FOI Act creates an exception to this right by allowing for refusal of access to information that is 'contrary to the public interest information'.<sup>2</sup>
12. Contrary to the public interest information is defined in s 16 of the FOI Act as:  
  
information—

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<sup>1</sup> Section 7 of the FOI Act.

<sup>2</sup> Section 35(1)(c) of the FOI Act.

- (a) that is taken to be contrary to the public interest to disclose under schedule 1; or
  - (b) the disclosure of which would be contrary to the public interest under the test set out in section 17
13. Section 17 then sets out the test that must be applied to determine whether disclosure of information would be contrary to the public interest.
14. The party seeking to prevent disclosure of information bears the onus of establishing that information is contrary to the public interest information.<sup>3</sup>
15. Schedule 2 of the FOI Act lists public interest factors favouring disclosure and non-disclosure respectively, which a decision-maker must weigh to determine the public interest according to the balancing test in s 17.

### **The contentions of the parties**

16. JACS' decision notice said:

I have refused access to some material as the information was provided to management staff within JACS with the expectation of confidentiality from parties in connection with the management of workplace issues. Release of the information could be expected to deter individuals from providing similar information in the future. Furthermore, the disclosure of some of the information would be expected to prejudice the management functions of JACS, as management of these issues is ongoing.

17. On the other hand, the applicant's review application contends that the information should be disclosed to enable them to have visibility over the nature of matters raised and the way the matters have been and are being addressed by JACS.
18. The applicant provided more detail in submissions responding to my draft consideration. These were summarised by the applicant in the following terms:
- The directorate's failure to meet its duty of care by providing a culturally, physically, and psychologically safe workplace for me; and
  - The directorate's lack of procedural fairness and mismanagement of complaints processes which has resulted in unnecessary mental and physical harm.

which I will address in the context of weighing public interest factors favouring disclosure below.

### **Considerations**

19. I carefully considered unredacted copies of the documents containing the information at issue in this review.

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

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<sup>3</sup> Section 72 of the FOI Act.

20. Neither party to this Ombudsman review 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 at issue to be contrary to the public interest information disclosure, it must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

*Public interest test*

21. To determine whether access should have been refused to the information at issue, the FOI Act prescribes the following five steps:

- identify any factors 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 factors favouring non-disclosure that applies in relation to the information (a relevant factor favouring non-disclosure), including any factor mentioned in Schedule 2, s 2.2
- balance any relevant factors favouring disclosure against any relevant factors favouring non-disclosure
- decide whether, on balance, disclosure of the information would be contrary to the public interest, and
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

*Irrelevant factors*

22. I do not consider that any irrelevant factors listed in s 17(2) have arisen in the submissions of either party.

*Factors favouring disclosure*

23. The JACS' Information Officer decided that two public interest factors favouring disclosure were relevant. I identified two other factors which I consider to be relevant as well.

Inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community

24. A reasonable expectation that disclosure of information could inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community, weighs in favour of disclosure under the FOI Act.<sup>4</sup>

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<sup>4</sup> Schedule 2, s 2.1(a)(iii) of the FOI Act.

25. JACS' Information Officer decided that this factor was relevant, however in my draft consideration I indicated that I was not inclined to agree with that finding. This was because the information is about internal human-resources related issues within the governmental workforce rather than 'dealings with members of the community'. I said that, in my view, 'members of the community' should not be interpreted to mean government employees in their capacities as government employees. No party made submissions on this point. Therefore I decided that it was not applicable in this review.

Allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official

26. A reasonable expectation that disclosure of information could allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official favours disclosure under the FOI Act.<sup>5</sup>
27. In my draft consideration, I observed that the information at issue could reasonably be expected to promote this public interest factor. Indeed, I commented that disclosing the information at issue to the applicant would likely enable the applicant to inquire into the way JACS' administered the processes in question and the conduct of other parties providing information to JACS. I observed that, in a general sense, the mere fact that information could reasonably be expected to enable inquiry into possible deficiencies warrants much less weight than circumstances in which there is a clear deficiency and disclosure will enable inquiry that reveals this. I said that I would welcome submissions from the parties on this point.
28. In response to my draft consideration, the applicant submitted that:
- The reason I request access to the full original complaint which informed the directorate's decision... is that I am of the view that the complaints were vexatious.
29. I am still not satisfied that I should find that there has been any specific deficiency in the management of the complaint. Receiving a vexatious complaint is not deficient administration. The complainant may be a public official, but the disclosure of a complaint made by a public official about another which is dismissed and not acted upon does not, in this case, seem to me to be likely to serve the public interest.
30. In relation to Document 30, the applicant's response to my draft consideration essentially alleged that a JACS official committed to registering a risk management document on 8 July 2021 but that this did not happen until 21 July 2021. The applicant knows this because it is on the schedule of documents which JACS provided. I do not consider that disclosing the

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<sup>5</sup> Schedule 2, s 2.1(a)(v) of the FOI Act.

substance of Document 30 could reasonably be expected to further the public interest according to this line of argument because JACS has effectively confirmed that the risk management document was entered on 21 July 2021.

Advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government

31. A reasonable expectation that disclosure of information could advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government weighs in favour of disclosure under the FOI Act.<sup>6</sup>
32. The applicant's submission is essentially that the information at issue may contribute to enhanced fairness for her in her dealings with JACS.
33. I considered this submission carefully. Ultimately, I decided not to accept that the complaints themselves in documents 25-26 could reasonably be expected to advance the fair treatment of individuals in accordance with the law in their dealings with the government. On the contrary, disclosing the complaints could reasonably be expected to undermine the fair treatment of the complainant(s) involved.
34. Document 20 is a final report about mediation processes in which the applicant was involved. It was difficult for me to see how disclosing this report to the applicant could reasonably be expected to advance this public interest factor. The mediation was conducted by a private company. This private company's report on the mediation it ran did not seem likely to advance the applicant's fair treatment according to law in their dealings with JACS.
35. Document 30 is the risk management document entered on 21 July 2021, I do not consider that disclosing the information at issue it contains could reasonably be expected to promote this public interest factor. Insofar as it is relevant to fair treatment of the applicant it seems solely to relate to the issue about the date on which it was filed, and the applicant has this information already. I am not satisfied the remainder of the document advances the public interest further.

Personal information of the applicant

36. The FOI Act recognises a public interest in disclosing information to an applicant where the information is personal information of the applicant.<sup>7</sup>
37. The JACS' Information Officer identified this factor as relevant. I agree that much of the information at issue is personal information of the applicant.

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<sup>6</sup> Schedule 2, s 2.1(a)(vii) of the FOI Act.

<sup>7</sup> Schedule 2, s 2.1(b)(i) of the FOI Act.

### *Pro-disclosure bias*

38. The FOI Act also requires the adoption of a pro-disclosure bias when administering the Act. The bias reflects the importance of public access to government information for the proper working of representative democracy. This concept is promoted through the objects of the FOI Act.<sup>8</sup>

### *Factors favouring non-disclosure*

39. Three factors favouring non-disclosure are relevant in this review.

#### An individual's right to privacy

40. A reasonable expectation that disclosure could prejudice an individual's right to privacy under the Human Rights Act weighs against disclosure under the FOI Act.<sup>9</sup>

41. Section 12 of the Human Rights Act provides that:

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.

42. The JACS' Information Officer decided this factor was relevant. The reasons given in JACS' decision letter did not clearly explain how disclosing the information at issue could reasonably be expected to prejudice the right to privacy enjoyed by any individual under the Human Rights Act.

43. In my draft consideration, I said that I was not satisfied that disclosing the information in documents 20, 26, 27 and 30 could reasonably be expected to prejudice the right to privacy of any individual under the Human Rights Act. I observed that JACS' decision letter had not adequately explained *how* disclosing the information at issue could reasonably be expected to prejudice the right to privacy enjoyed under the Human Rights Act.

44. JACS provided submissions in response to my draft consideration which addressed this point:

#### Document 20

JACS submitted that Document 20 contains information revealed privately in the context of mediation.

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<sup>8</sup> Section 9 of the FOI Act.

<sup>9</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

### Documents 26 and 27

JACS submitted that Document 26 and Document 27 contain information about reported feelings and experiences included as part of confidential complaints.

### Document 30

JACS submitted that Document 30 contains confidential information about a private mediation session.

45. I am persuaded by JACS' submissions that the matters the documents relate to are of a genuinely private nature notwithstanding the fact that the persons whom they are about happened to be public servants. Accordingly, I consider I should afford this factor considerable weight.

### Prejudice an agency's ability to obtain confidential information

46. A reasonable expectation that disclosure of information could prejudice an agency's ability to obtain confidential information weighs against disclosure under the FOI Act.<sup>10</sup>
47. The JACS' Information Officer decided that this factor was applicable. My preliminary view was that it would be reasonable to expect that disclosing the information at issue would risk prejudice to JACS' ability to obtain confidential information in a real sense. My preliminary view was that I should afford this factor considerable weight.

48. The applicant submitted that:

Complaints I made... were shared... during a discussion... following mediation... I have not raised an issue with this, as part of submitting the complaint involves a commitment to stand by the allegations made and to provide the other party with a right to adequately respond to the allegations.

...

I am of the view that I have not been treated fairly throughout the complaints process... receiving unequal support, protections, and access to information...

49. The problem with the applicant's submission on this point is that it goes well beyond the scope of what I can consider in an FOI review. Simply, I accept that it is reasonable to expect that JACS' ability to obtain confidential information, in the form of workplace complaints or information provided in a confidential mediation context, would be prejudiced by the disclosure of the substance of those complaints. Accordingly, consistent with my draft consideration, I decided to afford this factor considerable weight.

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<sup>10</sup> Schedule 2, s 2.2(a)(xiii) of the FOI Act.



### Prejudice the management function of an agency

50. A reasonable expectation that disclosure of information could prejudice the management function of an agency weighs against disclosure under the FOI Act.<sup>11</sup>
51. The JACS' Information Officer decided that this factor was applicable because disclosing the information in documents 20, 26, 27 and 30 could reasonably be expected to prevent management at the agency from controlling the handling of the information provided and dealing with the information in a way that is procedurally fair.
52. In my draft consideration, I accepted that this factor was strongly applicable. For instance, even where the information is sought by the subject of a disclosure, it is also information about the person who made the disclosure.
53. Giving access to the information to the subject of the disclosure, who may be able to divulge it to any third person and so on, inherently risks detriment to the person making the disclosure in a way that is prejudicial to the ability of the agency to conduct its own autonomous management function. I decided to afford this factor considerable weight.

### *Balancing the factors*

54. Taking into account all the relevant factors I decided that the information at issue is contrary to the public interest to disclose.
55. The public interest may be promoted in a general sense by disclosure of the information enabling inquiry into possible deficiencies in the conduct or administration of JACS, enabling a person to access personal information about themselves and, in relation to Document 30, advancing the fair treatment of persons in their dealings with the government. However, the weight I am inclined to give to each factor in this review is low given their general rather than specific applicability.
56. Disclosing the information could, on the other hand, reasonably be expected to produce real prejudice vis-à-vis an agency's ability to obtain confidential information and perform its management function. I also ultimately accepted that it could prejudice an individual's right to privacy under the Human Rights Act. I afforded considerable weight to all the factors favouring non-disclosure.
57. Accordingly, I was inclined to accept that the onus under s 72 has been discharged by JACS and I decided that the information is contrary to the public interest to disclose.

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<sup>11</sup> Schedule 2, s 2.2(a)(xv) of the FOI Act.

## **Conclusion**

58. For these reasons, I decided to confirm JACS' decision under s 82(2)(a) of the FOI Act.

**Symone Andersen**

**Acting Senior Assistant Ombudsman**

**23 November 2021**