

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

<b>Application number:</b>	AFOI-RR/20/10036
<b>Applicant:</b>	AZ
<b>Respondent:</b>	Transport Canberra and City Services
<b>Date:</b>	25 September 2020
<b>Catchwords:</b>	Freedom of Information Act 2016 (ACT) – deciding access- whether disclosure is contrary to the public interest - individual’s right to privacy – administration of justice for a person

### 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. For the reasons set out below, I decided that the decision of Transport Canberra and City Services (TCCS), dated 15 July 2020, should be varied under s 82(2)(b) of the FOI Act.

### Background of Ombudsman review

3. On 20 May 2020, the applicant applied to TCCS for access to information about an alleged dog attack, including information about dogs allegedly involved and the identity of their owner.
4. On 15 July 2020, TCCS advised the applicant it had identified ten documents within the scope of the access application. TCCS gave the applicant full access to three documents and partial access to the remaining seven documents. In making its decision, TCCS relied on ss 17, 50 and Schedule 2, s 2.2(a)(ii) of the FOI Act.

5. On 24 July 2020, the applicant sought Ombudsman review of the TCCS' decision under s 73 of the FOI Act. After obtaining additional information from the applicant, the Ombudsman commenced this review on 31 July 2020.
6. On 10 September 2020, I provided my preliminary views about TCCS' decision to each party in my draft consideration.
7. Neither party provided any additional submissions in response to my draft consideration. On 21 September 2020, TCCS wrote to me to inform me that it accepted the views I put forth in my draft consideration.

### Information at issue

8. The information at issue in this review is information the applicant was refused access to by virtue of TCCS deciding to give partial rather than full access to seven documents.
9. The issue to be decided by me is whether giving the applicant access to the information at issue would be contrary to the public interest.
10. In making my decision, I had regard to:
  - the applicant's access application and review application
  - TCCS' decision letter
  - the FOI Act, in particular ss 17, 50 and Schedule 2, s 2.1(a)(xiv) and 2.2(a)(ii)
  - the *Human Rights Act 2004* (ACT) (the Human Rights Act)
  - TCCS' FOI processing file relating to the access application
  - an unedited copy of the information at issue.

### Relevant law

11. 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.
12. 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.
13. The public interest test set out in s 17 of the FOI Act requires a balancing of public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether disclosure would be contrary to the public interest.
  14. 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.
  15. 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.
  16. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, in determining the public interest.

## The contentions of the parties

17. In its decision notice, TCCS said:

Given the personal and sensitive information contained in those documents, I have found that its disclosure, on balance, is contrary to the public interest and the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004* is paramount.

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

The redaction in documents of the name of dog owner and the street address defeats one of the purposes of the registration of animals, that is, to identify ownership or registration of dogs, so that other persons may be able to confirm and/or identify ownership and relevant address should an appropriate and lawful need arise to make such a request for the information.

...

Given that the purpose of the said Act [*Domestic Animals Act 2000* (ACT)] is to 'provide for the 'identification and registration of certain animals and the duties of owners, carers and keepers and for other purposes', and that one of those purposes include providing an entitlement to claim compensation to persons injured as a result of a dog attack, to redact the name and address of the registered keeper and/or owner of the dog on documents runs counter to that purpose.'

19. These submissions are discussed in more detail below.

## Considerations

20. I carefully considered an unedited copy of the information at issue together with the information provided by the applicant and TCCS.

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

21. 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*

22. 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.

23. In addition, there is the initial step of ensuring none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.

*Irrelevant factors*

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

*Factors favouring disclosure*

25. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.

26. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, I consider that one factor is relevant.

Reveal the reason for a government decision

27. In its decision letter, TCCS identified Schedule 2, s 2.1(viii) as a factor favouring disclosure. Schedule 2, s 2.1(viii) provides that where information could reasonably be expected to ‘reveal the reason for a government decision and any background or contextual information that informed that decision’, that factor will favour disclosure.
28. I reviewed the information at issue and was not satisfied this factor is relevant. The reasons for government decisions relating to the dogs are not based on the name or address of an individual. The disclosure of the information at issue, as distinct from the documents generally, would not provide more background or contextual information about any such decision.

Contribute to the administration of justice for a person

29. Schedule 2, s 2.1(xiv) provides that information that could reasonably be expected to contribute to the administration of justice for a person should be weighed against other factors which support the disclosure of information.
30. In submissions during this Ombudsman review, the applicant contended that:
- Given that the purpose of the said Act is to ‘provide for the identification and registration of certain animals and the duties of owners, carers and keepers and for other purposes’, and that one of those purposes include providing an entitlement to claim compensation to persons injured as a result of a dog attack, to redact the name and address of the registered keeper and/or the owner of the dog on documents runs counter to that purpose. Indeed, where the name and address of the owner is contained in the original request, it is further submitted that it is not in the interests of justice for the redactions to be maintained

31. In their submissions, TCCS advised:

Further, sections 55 and 55A of the Domestic Animals Act provide for the ability of a person who has been attacked or harassed by a dog to seek information about the ownership of the suspected dogs from the Registrar appointed under the Domestic Animals Act. The Registrar may then seek to exercise their discretion as to whether the request should be agreed to based on the circumstances known to the Registrar. It is not the function of an Information Officer under the Freedom of Information Act to

circumvent the obligations or stand in the shoes of the Registrar appointed under the Domestic Animals Act.

32. I reviewed the information at issue and notwithstanding TCCS' submission, I agree that disclosure could reasonably be expected to assist a person to consider their options for seeking compensation. This is the sole factor favouring disclosure in this review.
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.<sup>1</sup> This concept is promoted through the objects of the FOI Act.<sup>2</sup>
34. Accordingly, I am satisfied disclosure of the information sought could reasonably be expected to promote the objects of the FOI Act and one factor favouring disclosure.

*Factors favouring nondisclosure*

35. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure.

An individual's right to privacy under the Human Rights Act

36. In its decision letter, TCCS identified this factor, in Schedule 2, s 2.2(a)(ii) of the FOI Act, as a factor favouring non-disclosure. This factor provides that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act.
37. The Human Rights Act does not provide a general right to privacy. It protects the right not to have one's privacy interfered with unlawfully or arbitrarily.<sup>3</sup>
38. This means that in making my decision, I am required not simply to determine whether the information is 'personal information', but to consider whether it could reasonably be expected to prejudice the right to privacy in a way that is inconsistent with the Human Rights Act.
39. I decided, in this context, disclosing a private citizen's name and address could reasonably be expected to prejudice their right to privacy under the Human Rights Act, as it could reveal their identity and place of residence to others in the community.

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<sup>1</sup> Section 17 of the FOI Act.

<sup>2</sup> Section 6(b) of the FOI Act.

<sup>3</sup> Section 12 of the Human Rights Act.

40. However, TCCS' also decided to redact the names of dogs. I do not consider this to be information that could reasonably be expected to prejudice a person's right to privacy under the Human Rights Act, as the person is not identifiable to the community at large by their dogs' names.

*Balancing the factors*

41. Having identified public interest factors favouring disclosure and nondisclosure, I then considered the public interest balancing test as set out in s 17 of the FOI Act.

42. In this matter, I identified one factor favouring disclosure, outlined in Schedule 2, s 2.1(a)(xiv). I also identified one factor favouring nondisclosure, outlined in Schedule 2, s 2.2(a)(ii).

43. I noted that balancing public interest factors is not simply a case of quantifying the number of relevant factors favouring disclosure and nondisclosure with the higher quantity representing the public interest. I was required to determine how much weight to afford to each factor. The weight I gave each factor reflected my judgement about the effect that disclosing the information could reasonably be expected to have.

44. I also had to observe a pro-disclosure bias, required under the FOI Act.<sup>4</sup> 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'.<sup>5</sup>

45. With respect to the name and private address of the dogs' owner, the information at issue identifies a member of the community and their private residence and this information could be available publicly if it is disclosed. As discussed above, I decided the disclosure of this information could significantly prejudice an individual's right to privacy under the Human Rights Act.

46. However, I decided the names of the dogs is not personal information about the individual. For this reason, I do not place any weight on this factor favouring non-disclosure, in respect of that information.

47. While I agree that disclosure of this information could assist the applicant seeking advice about possible compensation, I consider I should afford this factor moderate rather than significant weight as there are alternative mechanisms for the applicant to obtain the same information

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<sup>4</sup> Section 9 of the FOI Act.

<sup>5</sup> Explanatory Statement, [Freedom of Information Bill 2016](#) (ACT).

that would not lead to personal information being published in an unrestricted form. As noted at paragraph 31, one such mechanism is s 55A of the *Domestic Animals Act 2000*, which can allow information to be obtained for the purpose of seeking compensation in relation to injuries sustained in a dog attack.<sup>6</sup>

48. Notwithstanding the pro-disclosure bias required by the Act,<sup>7</sup> I decided that although disclosure of the individual's name and address could reasonably be expected to contribute to the administration of justice for the applicant, it could reasonably be expected to prejudice the individual's right to privacy to an extent that justifies placing overriding weight on individual privacy.

## Conclusion

49. I decided to vary TCCS' decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act. TCCS was correct to redact the name and address of the individual and this information should remain redacted. The applicant should be given access to the names of the dogs.

**Louise Macleod**  
**Senior Assistant Ombudsman**

25 September 2020

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<sup>6</sup> Section 55 and s 55A of the *Domestic Animals Act 2000* (ACT).

<sup>7</sup> Section 9 of the FOI Act.