

***'BN' and Chief Minister, Treasury and Economic Development Directorate***  
**[2021] ACTOFOI 15 (23 November 2021)**

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

<b>Application number:</b>	AFOI-RR/21/10023
<b>Applicant:</b>	'BN'
<b>Respondent:</b>	Chief Minister, Treasury and Economic Development 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 – contribute to the administration of justice generally, including procedural fairness – contribute to the administration of justice for a person – an individual's right to privacy under the <i>Human Rights Act 2004 (ACT)</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. Under s 82(2)(c) of the FOI Act, I have decided to **set aside** the decision of the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) dated 30 June 2021 and **substitute** a decision to refuse access to the information at issue.

## **Background of Ombudsman review**

3. On 11 May 2021, a person (**the original FOI applicant**), made an access application under the FOI Act. The application was made to CMTEDD and sought:  
  
Any complaints, or action requested, that have been directed at the occupiers of [address in Canberra] since 2019.
4. On 30 June 2021, CMTEDD's Information Officer decided to give partial access to 5 documents.

5. On 20 July 2021, a person (**the review applicant**) who was a relevant third party consulted in accordance with s 38 of the FOI Act applied for an Ombudsman review of CMTEDD's decision under s 73 of the FOI Act.
6. On 20 October 2021, the original FOI applicant made an application under s 77(2) of the FOI Act to participate in this review.
7. On 27 October 2021, a delegate of the ACT Ombudsman decided to allow the original FOI applicant to participate under s 77(3) of the FOI Act.
8. On 1 November 2021, I communicated my preliminary view to the parties in my draft consideration. The purpose of my draft consideration was to give each party an opportunity to make submissions on material issues before I finalised my decision.
9. On 2 November 2021, CMTEDD wrote to me to advise that it accepted the view set out in my draft consideration.
10. On 8 November 2021, the original FOI applicant wrote to me and included submissions which I considered carefully.
11. The review applicant provided information in response to my draft consideration, however their submissions did not address the points in my draft consideration or otherwise present any additional information for me to consider.

### Information at issue

12. The information at issue in this review is all the information that CMTEDD identified and decided on in its decision of 30 June 2021.
13. The issue to be decided is whether giving the original FOI applicant access to the information at issue would be contrary to the public interest. The review applicant sought Ombudsman review on the basis that they believed it would be.
14. In making my decision, I had regard to:
  - CMTEDD's decision notice issued to the original FOI applicant and decision notice issued to the review applicant
  - CMTEDD's submissions in support of its decision which I received after CMTEDD was notified about this Ombudsman review
  - the FOI Act, particularly ss 7, 9, 16, 17, 35, 72, and Schedule 2, ss 2.1 and 2.2, and
  - the *Human Rights Act 2004* (ACT) (**Human Rights Act**), particularly s 12.

## Relevant law

15. 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 access to be refused to information that is ‘contrary to the public interest information’.<sup>2</sup>
16. 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
17. Section 17 of the FOI Act sets out the test that must be used to balance public interest factors favouring disclosure and non-disclosure respectively. This test required me to:
- identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in Schedule 2, s 2.1
  - identify any factor 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 factor or factors favouring disclosure against any relevant factor or 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.
18. Any party seeking to prevent disclosure of government information bears the onus of establishing that information is contrary to the public interest information.<sup>3</sup>

## The contentions of the parties

19. CMTEDD’s decision notice to the FOI applicant said:

I consider that release of the information contained in the document may contribute to procedural fairness by allowing you to have a copy of the documents that fall within the scope of your request.

I consider that the protection of an individual’s right to privacy... is a significant factor as the parties involved have provided their personal information for the purposes of working with the ACT Government. This, in my opinion, outweighs the benefit which may be derived from releasing the personal information of the individuals involved in this matter.

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

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

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

As a result, I have decided that release of this information (addresses, mobile numbers, identifying details and names of individuals not employed by the ACT Public Service) could prejudice their right to privacy under the *Human Rights Act 2004*.

20. The review applicant submitted in their application for review that release of any 'sensitive and personal information' would place their safety at risk.
21. I address these submissions in my reasons below.

## **Considerations**

22. I carefully considered an unredacted copy of the information at issue.

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

23. I was satisfied that none of the information at issue was taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act.

### *Irrelevant factors*

24. In making my decision, I did not have regard to any of the irrelevant factors which a decision-maker is prohibited from considering under s 17(2) of the FOI Act.

### *Factors favouring disclosure*

25. Two factors favouring disclosure are relevant in this review.

### Contribute to the administration of justice generally, including procedural fairness

26. A reasonable expectation that disclosure of government information could contribute to the administration of justice generally, including procedural fairness, weighs in favour of disclosure under the FOI Act.

27. CMTEDD's Information Officer decided that this factor was relevant.

28. In my draft consideration, I disagreed with that finding. My reason for disagreeing was that:

On the information before me, I am not aware that any adverse action was taken based on any of the information at issue and it is not clear to me how disclosing information that is not the basis for any action can reasonably be expected to promote procedural fairness. In essence, it is not clear to me that there is any procedure that has been applied in relation to the original FOI applicant. Accordingly, I am not satisfied that there is necessarily any procedure to administer fairly to begin with.

29. When given the opportunity to respond to my draft consideration, CMTEDD advised that it did not wish to make submissions as it accepted my view.

30. However, the original FOI applicant responded to my draft consideration and provided additional material for my consideration.

Contribute to the administration of justice for a person

31. A reasonable expectation that disclosure of government information could contribute to the administration of justice for a person weighs in favour of disclosure under the FOI Act.<sup>4</sup>
32. This factor was not one which CMTEDD identified when making its decision but in considering the submissions of the original FOI applicant it seemed to me to be more relevant than the public interest factor promoting the administration of justice generally.
33. The original FOI applicant submitted information about proceedings in the ACT Civil and Administrative Tribunal (ACAT) in which they had been a party. It was difficult to determine precisely where this information fit in the making of my decision. This was in part because the other party in the ACAT proceeding may not be the review applicant. It seems there is an assumption by both the original FOI applicant and the review applicant that they know one another's identities.
34. Broadly, the applicant's submissions provided me with a logical argument for how disclosing the information at issue could reasonably be expected to promote the administration of justice. By disclosing complaints made to the ACT Government within the scope of the original FOI applicant's access application, the nature of any allegations made could be revealed to the applicant.
35. But as the original FOI applicant notes in their submissions, 'in all cases, no adverse results have been found.' Without confirming the identity of the review applicant, it is enough to say that the ACAT proceeding I was referred to related to parking, noise levels and video surveillance. Disclosing the information at issue, even if it was the case that it had been composed by the same person involved in the ACAT proceedings, would not actually contribute to the administration of justice because it would not establish that any of the ACAT's orders had been breached. Indeed, the original FOI applicant may refer to the schedule of documents and note that the documents containing the information at issue all date from before ACAT made the orders included in their submissions. Indeed, the ACAT orders note that the proceedings between the parties were finalised upon their issuance.
36. Accordingly, I decided that disclosing the information at issue could not reasonably be expected to contribute to the administration of justice for a person in any meaningful sense.

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

### Pro-disclosure bias

37. In addition, it is intended that the FOI Act be administered with a pro-disclosure bias.<sup>5</sup> The relevance of that in this matter is in the fact that I am not satisfied there is any relevant factor favouring disclosure. While that is the case, it is insufficient grounds for refusing access to the information at issue and I was still required to consider the steps outlined in s 17 of the FOI Act to determine whether the public interest would be better served by non-disclosure.

### *Factors favouring non-disclosure*

38. One factor favouring non-disclosure is relevant in this review.

### An individual's right to privacy

39. A reasonable expectation that disclosure of government information could prejudice an individual's right to privacy under the Human Rights Act favours non-disclosure under the FOI Act.<sup>6</sup>

40. Section 12 of the Human Rights Act provides:

Everyone has the right—

- (a) Not to have his or her privacy, family, home, or correspondence interfered with unlawfully or arbitrarily...

41. In my draft consideration, I expressed the view that the information at issue could reasonably be expected to prejudice a person's right to privacy by disclosing the contents of correspondence arbitrarily. Information of the nature of the information at issue is not typically disclosed in original form. While the FOI Act frequently enables the disclosure of information that may not typically be disclosed, the specific reference to arbitrariness in this factor is not replicated in other listed factors. In the present circumstances, it would prejudice the right to privacy under s 12 to, in effect, retrospectively undermine the review applicant's ability to correspond privately with the government about personal concerns and complaints.

42. The submissions made by the original FOI applicant focused on the reasons why the information at issue should be disclosed. They did not make any contention vis-à-vis the comments I made in my draft consideration about this factor.

43. Accordingly, I decided that disclosing the information at issue could reasonably be expected to prejudice an individual's right to privacy to a considerable extent.

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<sup>5</sup> Section 9 of the FOI Act.

<sup>6</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

### *Balancing the factors*

44. Disclosure of the information at issue could not reasonably be expected to contribute to the administration of justice generally, including procedural fairness or for a person. The value of the information at issue could only be to enable the original FOI applicant to try to establish the source of the complaints, which the original FOI applicant notes did not lead to any adverse finding or action.
45. On the other hand, when a member of the public makes a complaint to a government agency it is generally not in the public interest to disclose original copies of correspondence because this could reasonably be expected to prejudice the right to privacy under the Human Rights Act. In such circumstances, the way in which this prejudice may be expected to occur is by disclosure interfering with the person's correspondence or ability to correspond privately with the government on sensitive matters.
46. The right to privacy is not an absolute basis for non-disclosure under the FOI Act and it must be balanced against the public interest factors which favour disclosure. For instance, a member of the public's report of a pothole in a road may be in the public interest to disclose if the government fails to adequately address the pothole in a timely fashion and a road accident ensues. It may be that in that case all that is needed to prevent prejudice to the person's right to privacy is the redaction of their name and personal information. But in the present circumstances, for the reasons I discussed above, there is little public interest in the disclosure of the information at issue and as a result there is little to weigh against the protection of an individual's right to privacy under the Human Rights Act. Moreover, the correspondence is private as a whole and CMTEDD's decision to merely redact personal information to attempt to de-identify the document failed to prevent prejudice to the individual's right to correspond privately with the government. Accordingly, I decided that the information at issue is contrary to the public interest information under s 16(b) of the FOI Act.

### Antecedents

47. It is worth noting that s 35(1)(e) permits a respondent to refuse to confirm or deny that it holds information where:
- (i) the information is contrary to the public interest information; and
  - (ii) doing so would, or could reasonably be expected to—  
...  
(B) be an unreasonable limitation on a person's rights under the *Human Rights Act 2004*.

48. For the reasons I outlined in this notice, I consider that CMTEDD should probably have applied this provision. The information, in my view, is contrary to the public interest information and because the reason for my view is prejudice to individual privacy under the Human Rights Act, I consider that subsection (B) is satisfied.
49. However, CMTEDD did not apply the provision and the original FOI applicant is now aware that information exists within the scope of their application. For practical reasons, it is necessary to decide on the information at issue with the applicant already being aware of the existence of some information.

### **Conclusion**

50. For these reasons, under s **82(2)(c)** of the FOI Act, I decided to **set aside** CMTEDD's decision of 30 June 2021 and **substitute** my decision that all the information at issue is contrary to the public interest information in respect of which access should be refused.

**Symone Andersen**

**Acting Senior Assistant Ombudsman**

**23 November 2021**