Australian Capital Territory

Freedom of Information (Volume 4 - Considering the public interest) Guidelines 2020

Notifiable instrument NI2020-371

made under the

Freedom of Information Act 2016, s66 (Guidelines for Act)

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1 Name of instrument

This instrument is the *Freedom of Information (Volume 4 - Considering the public interest) Guidelines 2020*.

2 Commencement

This instrument commences on the day after notification.

3 Guidance material

I make the guidelines for the *Freedom of Information Act 2016* as set out in schedule 1 to this instrument.

Michael Manthorpe PSM
ACT Ombudsman
26 June 2020

ACT Ombudsman

OMBUDSMAN AN OFFICER OF THE ACT LEGISLATIVE ASSEMBLY

Freedom of Information Guidelines

CONSIDERING THE PUBLIC INTEREST

FEBRUARY 2020

Guideline Number. **4 of 6**

Disclaimer

Under s 66 of the *Freedom of Information Act 2016* (FOI Act), the ACT Ombudsman (Ombudsman) has the function of issuing guidelines about freedom of information ('FOI').

The information in this guideline is not legal advice and additional factors may be relevant in your specific circumstances. Any views expressed in this guideline are general in nature and the Ombudsman remains open to all arguments and evidence on a case by case basis. For detailed guidance, legal advice should be sought.

The FOI Act is amended from time to time and you should always read the relevant provisions of the FOI Act to check the current wording. All ACT legislation, including the FOI Act, is freely available online at: https://www.legislation.act.gov.au/.

Contents

1. Purpose

This guideline is designed to provide assistance to decision-makers when making an assessment under the *Freedom of Information Act 2016* (ACT) (FOI Act) as to whether government information is contrary to the public interest to disclose.

2. Introduction

The FOI Act provides every person with a right of access to government information, unless disclosure of such information is assessed as being contrary to the *public interest*. Where this is the case, a decision-maker can refuse to release the information.

This approach is consistent with the **pro-disclosure bias** with which the FOI Act is intended to be administered. At the same time, it recognises that it would not to be in the public interest for this right of access to be unlimited – with a balance required to be struck between competing interests for and against disclosure, and between furthering democratic objectives and protecting individual rights.

It reflects that it is still appropriate for access to some information to be restricted where necessary to protect the public interest – for example, to ensure the proper functioning of government, or where disclosure would have an unreasonably adverse effect on the private, or business, interests of individuals.

Under the FOI Act, decision-makers need to consider the public interest, taking into account the particular circumstances, when deciding whether or not to:

- publish open access information under the FOI Act—see *Guideline 1 of 6 Open Access Information*
- provide access to government information sought via an access application—see *Guideline 3 of 6 Dealing with access applications*.

Such assessments can be difficult, particularly where there are competing aspects of the public interest that need to be balanced when deciding where the public interest lies. As a result, this guideline provides guidance for decision-makers about how to make a public interest assessment taking into account:

- categories of information outlined in Schedule 1 of the FOI Act that **are taken to be** contrary to the public interest—see s 6 - Schedule 1 – information taken to be contrary to the public interest.
- factors **favouring disclosure** of information—including those set out in section 2.1 of Schedule 2 of the FOI Act, which must be taken to account when considering whether disclosure of other types of information would, **on balance**, be contrary to the public interest to disclose—see s 8 - Section 2.1, Schedule 2 – factors favouring disclosure in the public interest.
- factors **favouring nondisclosure** of information—including those that are set out in section 2.2 of Schedule 2 of the FOI Act, which must be taken to account when considering whether disclosure of other types of information would**, on balance**, be contrary to the public interest to disclose—see s 9 - Section 2.2, Schedule 2 – factors favouring nondisclosure in the public interest.

In addition, this guideline provides guidance on:

- the term 'public interest'—see s 3 What is the public interest?
- guiding principles that decision-makers should consider when making a public interest assessment—see s 4 Guiding principles.
- common terms used in one or both schedules—see s 5 Common terms and phrases.

3. What is the public interest?

The term *public interest* may be explained as the interest that best serves the advancement of the interest or welfare of the public.[1] It effectively encompasses any number of considerations that could impact the good order and functioning of the community, and the well-being of community members.

Such considerations will generally be common to all members of, or a substantial segment of, the community, as distinct from matters that concern private or personal interests.[2]

Consistent with the approach of the Office of the Australian Information Commissioner,[3] the Ombudsman considers a substantial section of the public could be bound by:

- geography (e.g. residents of a particular suburb of Canberra)
- a particular occupation (e.g. lawyers)
- a section of the community (e.g. Indigenous community members, persons with a disability).

Some public interest considerations can, however, benefit a specific individual, as well as the broader public.[4] For example, the protection of an individual's right to justice or privacy is an interest common to all members of the community.

Note:

- Matters of public interest are distinct from matters that are *of interest* to the public.[5]
- The fact that certain information is of great interest or significance to a particular person or group, does not necessarily mean it is the public interest to release it.

4. Guiding principles

In considering the public interest, agencies and Ministers should be guided by the following principles in the FOI Act:

- Decision-makers must provide access to information sought, unless disclosure of the information would be contrary to the public interest.
- When deciding on access to information, the decision-maker must exercise their discretion, as far as possible, in favour of disclosing the information.
- The onus is on the agencies and Ministers to establish the reasons why disclosure of the information is contrary to the public interest.
- Public interest assessments must be considered individually, based on the nature of the information at issue and the risks of disclosure at the time of decision.
- Decision-makers must consider any relevant competing interests to determine whether on balance the information should be released.
- The public interest is distinguishable from public curiosity in knowing something.[6]

[1] *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 [75].
[2] *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 [480].
[3] See 'Conditional exemptions' (Web page, 23 January 2020).
[4] See 'Public interest balancing test' (Web page, 21 October 2019).
[5] *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186 [188].
[6] See *DPP v Smith* [1991] 1 VR 63 [75].

5. Common terms and phrases

This section provides guidance on common terms used in Schedules 1 and 2 of the FOI Act, which impact the scope of the information that can be considered to fall within the listed categories of information.

All section numbers are references to sections of the FOI Act unless indicated otherwise. References to legislation refer to ACT legislation unless indicated otherwise.

5.1. Contribute to

The phrase 'contribute to' appears in a number of the factors for disclosure outlined in Schedule 2, s 2.1.[7] As the FOI Act does not define 'contribute to', it should be given its ordinary meaning which is: *to have a share in bringing about a result or to be partly responsible for something*.[8]

5.2. Impede

The term 'impede' appears in a number of the factors for nondisclosure outlined in Schedule 2, s 2.2.[9] As the FOI Act does not define 'impede', it should be given its ordinary meaning which is: *to retard in movement or progress by means of obstacles or hindrances; obstruct; hinder.*[10]

5.3. In the possession of

The phrase 'information in the possession of' appears in the following sections of Schedule 1:

- information in possession of a court or tribunal (section 1.1A)
- information in possession of auditor-general (section 1.5)
- information in possession of human rights commission (section 1.8)
- information in possession of ombudsman (section 1.12)

'Possession' is not limited to actual or physical possession.[11] Consequently, in applying these provisions decision-makers should not only consider information that is physically available on their agency's premises, but also information the agency or Minister has a right or power to access. This could include information stored by a third party on behalf of the agency or Minister.[12]

This ensures relevant information, which the third party may have passed onto another external party, such as a sub-contractor, is still within the scope of the access application. For example, information held by a company contracted by the agency to perform certain functions.[13]

[7] FOI Act Sch 2, ss 2.1(a)(ii), 2.1(a)(x) and 2.1(a)(xii)-(xvi).
[8] The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.
[9] FOI Act Sch 2, ss 2.2(a)(v) and (vii).
[10] The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.
[11] Information in an agency's physical custody that was inadvertently provided to an agency and was not intended to form part of the agency's records may not be 'in the possession of' the agency: see *Colonial Range Pty Ltd v Victorian Building Authority (Review and Regulation)* [2017] VCAT 1198 [172]-[174].
[12] *McLeod and Social Security Appeals Tribunal* [2014] AICmr 34 [20]; *Colonial Range Pty Ltd v Victorian Building Authority (Review and Regulation)* [2017] VCAT 1198 [86].
[13] For further information, see *Guideline Volume 3 of 6: Dealing with access applications* and s 100 of the FOI Act.

5.4. Prejudice

The term 'prejudice' appears in Schedule 1, s 1.14 and a number of the factors for nondisclosure outlined in Schedule 2, s 2.2.[14] As the FOI Act does not define 'prejudice', it should be given its ordinary meaning which is: *harm or injury that results or may result from some action or judgement.*[15]

This element requires decision-makers to assess the harm that would flow from the disclosure of the information. When applying a particular factor favouring nondisclosure, decision-makers should identify the specific adverse affect that could, or would be, expected, if disclosure occurred.

In making this assessment, decision-makers should consider not just the direct consequences following disclosure of the information, but also the indirect consequences that could reasonably occur.

- For example, where the information sought relates to an agency's criteria for assessing tenders, disclosure could indirectly impact the agency's financial interest in obtaining the best value for money through a competitive tendering process.[16]

5.5. 'Would or could reasonably be expected to'

The phrase 'would, or could reasonably be expected to' appears in the following sections of Schedule 1:

- Identities of people making disclosures (section 1.9)
- National, Territory or State security information (section 1.13)
- Law enforcement or public safety information (section 1.14)

This means the scope of these sections is limited to situations where there are real and substantial grounds for the expectation that some particular damage, prejudice or other adverse effect will flow from disclosure of the information under the FOI Act.[17]

Prior to making a decision to refuse access under these sections, decision-makers must make an assessment of the likelihood of a particular outcome occurring. This is an objective test, with decision-makers required to distinguish between what is merely possible, and what would, or could reasonably be expected, to occur.

As outlined by the Ombudsman in *Canberra Metro Construction and Chief Minister, Treasury and Economic Development Directorate,*[18] the words 'reasonably be expected' should be given their ordinary meaning and the expectation must be reasonably based, highly likely and not merely speculative, conjectural or hypothetical.[19]

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[14] FOI Act Sch 2, ss 2.2(a)(i)-(iii), (vi), (viii)-(xviii).
[15] The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.
[16] *Secretary, Department of Employment, Workplace Relations and Small Business v Staff Development & Training Centre Pty Ltd* (2001) 114 FCR 301.
[17] *Community and Public Sector Union and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 7 (14 November 2018) [31]; *Abbot Point Bulkcoal Pty Ltd and Department of Environment and Science; Mackay Conservation Group Inc (Third Party)* [2018] QICmr 26 [18].
[18] [2019] ACTOFOI 8 at [50] (5 June 2019).
[19] *Murphy and Treasury Department* (1995) 2 QAR 744 [44], citing *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 [160].

6. Schedule 1 – information taken to be contrary to the public interest

6.1. Overview

Information is **taken to be contrary to the public interest** to disclose if it falls within one of the categories listed in Schedule 1 of the FOI Act. This means that, subject to the exceptions outlined below, a decision can be made **not** to disclose information where it is considered to be included in a category listed in Schedule 1, without the need to weigh up any competing public interest factors for and against disclosure.

These provisions relate to categories of information which the government has deemed to be contrary to the public interest to disclose in all circumstances. This is because disclosure would typically always be contrary to the public interest.

Each of the Schedule 1 categories are discussed in detail below to assist decision-makers to determine when such categories may be relevant to a decision that they are required to make under the FOI Act. In addition, common terms used in Schedule 1 are described at s 5 Common terms and phrases.

Important:

- Agencies are reminded that s 10 specifies that the FOI Act is **not** intended to prevent or discourage agencies from publishing or giving access to government information. As a result, Schedule 1 does **not** prohibit them releasing types of information specified in this schedule where they choose to do so.

Exceptions

If the information under consideration identifies:

- corruption
- the commission of an offence by a public official, or
- that the scope of a law enforcement investigation has exceeded the limits imposed by law

Schedule 1 does **not** apply, and decision-makers must apply the public interest test in assessing whether or not to release the information (i.e. make an assessment considering the factors outlined in Schedule 2).

6.2. Section 1.1 – information disclosure of which would be contempt of court or Legislative Assembly

Background

The FOI Act provides protections for information which is the subject of orders made by certain courts and parliaments. This is consistent with laws of contempt and parliamentary privilege, which are designed to allow courts and parliaments to regulate their proceedings without interference or obstruction, and to make their own determinations about what information should be published and when.

Overview

Section 1.1 provides that disclosure of the information is taken to be contrary to the public interest if it would, apart from the FOI Act or any Crown immunity:

- be in contempt of court—see s 1.1(a)
- be contrary to an order made or direction given by a tribunal or other entity having power to take evidence on oath—see s 1.1(b), or
- infringe the privileges of the Legislative Assembly, a house of the Commonwealth parliament, the parliament of a State or the Legislative Assembly of the Northern Territory—see s 1.1(c).

That is, decision-makers must consider whether disclosure would result in any of the above listed outcomes, notwithstanding that there may be protection, provided for in s 103, from certain actions under the FOI Act[20] or under the protections afforded by the common law to the immunities of the Crown.

Contempt of court

Section 1.1(a) applies where there is a court order prohibiting the disclosure of the relevant information.

- For example, where a court order is in place which prohibits publication of evidence presented to the court, or disclosure of relevant documents to a third party.

Even where there is no court order, it **may**, however, still be in contempt of court to disclose information if it relates to a pending legal proceeding and the information could interfere with the administration of justice.[21] Consequently, even where a non-disclosure order is **not** in place, decision-makers should consider possible impacts of disclosure on current legal proceedings.

- For example, decision-makers should consider whether disclosure would influence a witness or jury, or prejudge the outcome of the proceedings.

The Ombudsman considers that such an influence would need to be expected to have an actual practical impact on the proceedings for s 1.1(a) to apply. This is consistent with the approach of the Queensland Information Commissioner who has found that contempt of court does not extend to cover:

- uncontentious information disclosed to potential witnesses that could not be said to influence them,[22] or
- disclosure that could cause negative media coverage where a trial was to held by a single magistrate[23]

Contrary to order or direction

Section 1.1(b) applies where disclosure of the information would be contrary to an order made, or direction given, by a tribunal, or other entity, having power to take evidence on oath.

- For example, where there is a tribunal order prohibiting disclosure of information, which could prejudice proceedings, or to protect the rights or reputation of individuals involved.[24]

'Tribunal' means any entity that is authorised to hear, receive and examine evidence (for example, the ACT Civil and Administrative Tribunal (ACAT)).[25]

Examples of other entities having power to take evidence on oath include:

- boards of inquiry under the *Inquiries Act 1991*
- commissions under the *Judicial Commissions Act 1994*
- royal commissions under the *Royal Commissions Act 1991*
- the ACT Ombudsman under s 16 of the *Ombudsman Act 1989* (Ombudsman Act)
- the ACT Integrity Commission established under the *Integrity Commission Act 2018*.

[20] FOI Act s 103.
[21] *Henderson and Department of Education* (Unreported, Queensland Information Commissioner, 22 July 1997) [23], cited in *Deery Hotels Pty Limited and Department of Justice and Attorney-General* [2012] QICmr 55 [22].
[22] *Hendersen and Department of Education* (Unreported, Queensland Information Commissioner, 22 July 1997) [24].
[23] *Sibelco Australia Ltd and Department of Natural Resources and Mines* (Unreported, Queensland Information Commissioner, 15 March 2013) [25].
[24] *Re KJ Aldred and Department of Prime Minister and Cabinet* [1989] AATA 148 [13].
[25] *Legislation Act 2003* (Cth) Dictionary, Part 1.

Infringe parliamentary privilege

Section 1.1(c) applies where disclosure of the information would be in contempt of:

- a house of the Commonwealth Parliament
- a State Parliament, or
- the Legislative Assembly of the ACT or the Northern Territory.

This would include disclosure of information protected by *parliamentary privilege*, which attaches to words spoken and acts done in the course of, or for the purpose of or incidental to, the transacting of business in parliament.[26]

For example, where disclosure would breach rules and orders that restrict publication or restrict publication without authority (that is, where to release a document would directly contravene Standing Orders).[27]

Section 1.1(c) would **not** generally apply to briefings prepared to assist Ministers in parliament.

Note:

- Decision-makers must, however, consider whether such privileges have been waived before applying s 1.1(c). It would **not**, for example, apply where this information has since been made available in the public arena.
- They should also take into account whether the standing orders of the relevant parliamentary body permit disclosure. For example, Legislative Assembly Standing Orders 241 and 243 identify circumstances in which information to which parliamentary privilege attaches may be disclosed.[28] If in doubt, the relevant parliamentary committee should be consulted.

6.3. Section 1.1A – information in possession of a court or tribunal

Background

The FOI Act only applies to information in the possession of courts or tribunals insofar as it relates to the management and administration of the court or tribunal's registry and office resources. It does **not** apply to information relating to the proceedings or decision of a court or a tribunal, or to the exercise of the court's judicial functions by an officer such as a registrar.

This reflects an understanding that it is in the public interest to maintain judicial independence, and ensure that holders of judicial office can exercise authority 'without fear or favour'.[29] It also ensures that applicants do not bypass appropriate legal processes for accessing documents through the FOI Act.

Overview

Section 1.1A provides that disclosure of information is taken to be contrary to the public interest if the information is in the possession of a court or tribunal **unless** it is of an administrative nature.

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[26] *Parliamentary Privileges Act 1987* (Cth) s 16(2). The parliamentary privileges of the Legislative Assembly are the same of those of the Commonwealth Parliament: see s 24 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). See also e.g. *Parliament of Queensland Act 2001* (Qld) s 9 and *Legislative Assembly (Powers and Privileges) Act 1992* (NT) s 6(2).

[27] ACT Legislative Assembly *Standing Orders and continuing resolutions of the Assembly* (22 August 2019), Order 243.

[28] ACT Legislative Assembly *Standing Orders and continuing resolutions of the Assembly* (22 August 2019).
See also e.g. s 13 of the *Parliamentary Privileges Act 1987* (Cth), House of Representatives Standing Order 242 and Senate Standing Order 37.

[29] *Kline v Official Secretary to the Governor General* [2013] HCA 52 [45].

The FOI Act defines a court to include:

- a registry or other office of a court or tribunal
- the staff of the registry or office.[30]

In *Kline v Official Secretary to the Governor General*,[31] the High Court of Australia considered the meaning of the phrase 'administrative nature' and noted that information of an administrative nature would include 'those documents relating to the management and administration of registry and office resources.'[32]

Note:

- Section 1.1A is likely to only be relevant to courts or tribunals, as this provision does not apply in relation to any other copy of information held or created by a court or tribunal which may be in the possession of another territory directorate or authority.
- Such information may also be considered contrary to the public interest to disclose under other sections of the FOI Act see—s 1.1 information disclosure of which would be in contempt of court and s 1.2 information subject to Legal Professional Privilege.
- For specific guidance on the phrase 'in possession of' see s 5 Common terms and phrases.

6.4. Section 1.1B – information in possession of integrity commission or inspector of the integrity commission

Background

The ACT Integrity Commission (Commission) has the power to investigate corruption in public administration and strengthen public confidence in government integrity.

The Inspector of the Integrity Commission (Inspector) undertakes the following functions:

- investigates and assesses complaints about the Commission and its staff
- makes recommendations to the Commission
- assesses and reports on the Commission's compliance with the *Integrity Commission Act 2018.*

Overview

Section 1.1B provides that disclosure of information is taken to be contrary to the public interest if the information is in the possession of the Commission or the Inspector **unless** it is of an administrative nature (e.g. management and administration of the Commission).

Note:

- Section 1.1B is likely to only be relevant to the Commission, as this provision does not apply in relation to any other copy of information held or created by the Commission which may be in the possession of another territory directorate or authority.
- For specific guidance on the phrase 'in possession of' see s 5 Common terms and phrases.

[30] FOI Act Sch 1, s 1.1A(2).
[31] [2013] HCA 52.
[32] Ibid [47].

6.5. Section 1.2 – information subject to legal professional privilege

Background

It is considered to be in the public interest that a client can make full and frank disclosure to their legal practitioner, who in turn can then fully advise them and represent them.[33] As a result, a person can rely on legal professional privilege (or client legal privilege) (LPP) to resist providing information, which would reveal confidential communications made in the context of a legal practitioner-client relationship.

Overview

Section 1.2 provides that disclosure of information is taken to be contrary to the public interest if the information would be privileged from production or admission into evidence in a legal proceeding on the ground of LPP.

LPP is not defined in the FOI Act, however, in accordance with common law principles, for LPP to apply:

- an independent legal practitioner and client **relationship** must exist
- the communication must have been made for the **purpose** of giving or receiving legal advice, or for use in litigation (actual or anticipated), and
- the advice must have been **confidential.**[34]

Each of these elements are discussed in detail below, as well as situations in which LPP will **not** apply because it has been waived or the communications were made for an improper purpose.

Note:

- LPP must be considered in the context of the particular facts of the case. As the Queensland Information Commissioner has noted, 'just because a certain document is subject to LPP in one case does not necessarily mean the same type of document will attract LPP in a different set of circumstances'.[35]
- The fact that a document is marked 'Legal-in-confidence' might be indicative that LPP may apply, however it is not determinative. Decision-makers must consider whether all of the elements of LPP apply, and whether the privilege has been waived.
- Where a document contains some information to which LPP attaches and other information that is not privileged, information officers should consider whether the privileged information can be redacted.
- Where s 1.2 is found **not** to apply (for example, because the information identifies corruption or the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law), s 2.2(b)(ii) may still be relevant as a factor against disclosure when applying the public interest test under s 17.

Legal practitioner-client relationship

To determine whether s 1.2 is applicable, decision-makers must first consider whether the information was created in the context of a legal practitioner-client relationship – that is, was the information sought from a legal practitioner in their professional capacity?[36]

[33] *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49 [35].
[34] *Waterford v Commonwealth of Australia* (1987) 163 CLR 54.
[35] 'Legal professional privilege' (Web page, 21 October 2019).
[36] *Ransley and Commissioner of Taxation (Freedom of information)* [2015] AATA 728 [13].

Note:

- It is not necessary for the legal practitioner to hold a practising certificate.[37]
- The legal advice can be provided by a legal practitioner who is an employee or contractor as long as the practitioner acts independently[38]—that is, they bring a disinterested mind to the subject matter of the legal advice, and do not let their personal loyalties, duties or interests influence the advice given.[39]

Purpose of creating the information

Once decision-makers have established that a legal-practitioner client relationship existed, they should then consider what the intended use (or uses) of the information was at the time it was created.[40]

This is because LPP only attaches to communications that are made for the **purpose** of:

- giving or obtaining legal advice, or
- preparing for, or use in, current or reasonably anticipated legal proceedings.[41]

It does not need to be the primary or substantial purpose, but the 'ruling, prevailing or most influential purpose'.[42] As the Queensland Information Commissioner has noted, this reflects the fact that legal advice can involve more than just advising the client about the law, and may also include advice about what can sensibly be done in the relevant legal context.[43]

Decision-makers should consider whether the advice was provided for a legal purpose—as opposed to another purpose, such as an administrative, financial, personal, commercial or public relations purpose.

Examples of documents likely to be covered by LPP include:

- legal advice provided regarding a particular case
- legal advice provided regarding possible legislative changes
- advice provided regarding prospects of success, or particular steps in litigation
- draft court documents prepared by the lawyer for the client's consideration
- summaries of specific legal advice, or other information that may enable a person to infer the nature of the advice sought or given.[44]

LPP may not attach to reports that only reference legal matters, but do not record actual communications with a legal adviser. General summaries of the law that are not client-specific and administrative communications with a lawyer may also not be privileged.

Similarly, non-legal documents copied to a legal adviser for their information, will not be subject to LPP simply because they were provided to a lawyer.[45] The test is whether disclosure would reveal a privileged communication.

[37] Ibid.
[38] *Taggart and Civil Aviation Safety Authority (Freedom of information)* [2016] AATA 327 [32].
[39] *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 [10].
[40] *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 366 [35]; *AWB Ltd v Cole* (2006) 232 ALR 743 67 [107].
[41] *Esso Australia Resources and Commissioner for Taxation* (1999) 201 CLR 49.
[42] *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 [416]; *AWB Ltd v Cole* (2006) 152 FCR 271 [105].
[43] *Jones and Queensland Police Service* [2015] QICmr 15 (26 June 2015) [30].
[44] *AWB Ltd v Cole* (2006) 152 FCR 271; *Mann v Carnell* (1999) 201 CLR 1 [16].
[45] *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 366.

The communication does **not**, however, have to be directly between a client and their legal practitioner. LPP may also attach to:

- communications between legal practitioners (e.g. memos, summaries)
- communications between a third party, such as a potential witness, and the legal practitioner or client (for example, a transcript of an interview between the lawyer and a witness for the purpose of preparing the evidence of the witness)[46]
- internal emails between officers of an agency, for example where those officers are discussing the practical implications of certain legal advice obtained[47].

Note:

- Legal proceedings are 'reasonably anticipated' if there is a real prospect of litigation, as distinct from a mere possibility.[48]

Confidential communication

The final element decision-makers must consider is whether or not the information was communicated in confidence. This is because LPP only applies to communications that are confidential.

Information is provided on a 'confidential' basis if there is an express agreement that the information will be kept confidential or the surrounding circumstances indicate that there was an implied mutual understanding of confidentiality, for example, that the information is marked 'confidential'.

Note:

- Emails between agency staff and in-house lawyers can generally be considered to be confidential where there is no evidence that such emails have been disclosed to an outside party.

Waiver

LPP will not apply if it has been expressly or impliedly waived by the client[49]—that is where:

- the client (or their legal practitioner with their authority) intentionally discloses the relevant communications, either to:
    - the public at large, or
    - a third party (unless disclosure occurs on the basis that the information be treated as confidential—that is, disclosure is limited and for a specific purpose).[50]
- the client acts in a manner that is inconsistent with maintaining the confidentiality of the communication[51]
    - For example, LPP may be lost where a client states in a media interview that they are relying on legal advice in a manner that discloses the substance of the advice.[52]

[46] Ibid; *Trade Practices Commission v Sterling* (1979) 36 FLR 244; *Carbone v National Crime Authority* (1994) 52 FCR 516.
[47] *AWB Ltd v Cole (No 5)* (2006) 234 ALR 651 at 665 [46].
[48] *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332 [341].
[49] *Mann v Carnell* (1999) 201 CLR 1 [29].
[50] Ibid [30].
[51] Ibid [28]; *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275 [45].
[52] *Ampolex Ltd v Perpetual Trustee Company (Canberra) Ltd* (1996) 137 ALR 28.

Note:

- The Ombudsman would not consider communication of privileged legal advice internally within an agency to amount to a waiver of LPP.
- Where confidential communications are accidentally disclosed, LPP still attaches if a reasonable person in the recipient's position would have realised the communication was mistakenly disclosed.[53]
- Just because a privileged document is copied, it does not follow that privilege has been lost. The question is whether LPP has been expressly or impliedly waived.[54]

Improper purpose exception

LLP will not apply if the relevant communications were made to further an illegal or improper purpose—that is, they were made in progressing a fraud or crime, and with knowledge that the proposed actions were contrary to the law. There would need to be evidence available to support such a claim for LPP not to apply.

6.6. Section 1.3 – information disclosure of which is prohibited under law

Background

The FOI Act is not intended to displace other laws which prohibit disclosure, and in some cases may be enforced by significant penalties. As a result, there are additional provisions in place to protect information which is collected under particular legislation. There are good reasons for this, for example, where there is need to protect a child or young person in care.

Overview

Section 1.3 provides that disclosure of the information is taken to be contrary to the public interest if it is prohibited by a secrecy provision or certain other laws.

The Act specifies certain provisions which are relevant here, and each are discussed in detail below:

- *Adoption Act 1993*, s 60
- *Children and Young People Act 2008*, s 844
- *Crimes (Child Sex Offenders) Act 2005*, s 133A
- *Crimes (Restorative Justices) Act 2004*, s 64
- *Housing Assistance Act 2007*, s 28

Section 1.3(6) does, however, also provide coverage for 'any other information the disclosure of which is prohibited by a secrecy provision of a law'. Section 1.3(7) then specifies that a secrecy provision is one which:

- applies to information obtained in the exercise of a function under the law
- prohibits people mentioned in the provision from disclosing the information, whether the prohibition is absolute or subject to stated exceptions or qualifications.

[53] *Unsworth v Tristar Steering and Suspension Australia Ltd* [2007] FCA 1081 [6]-[9].
[54] *Australian Proprietary Hospital Care v Duggan* (Unreported, Supreme Court of Victoria, 31 March 1999) [48] and [53]; *Spotless Group Ltd v Premier Building and Consulting Pty Ltd* [2006] VSCA 201.

Other secrecy provisions included in legislation that may be relevant here include:

- *Associations Incorporation Act 1991,* s 100
- *Discrimination Act 1991,* s 121
- *Health Act 1993,* s 125
- *Planning and Development Act 2007,* s 418
- *Public Trustee and Guardian Act 1985,* s 65A
- *Taxation Administration Act 1999,* s 95(2)—see case study example below.

Note:

- The Ombudsman takes the view that s 1.3(6) is **not** limited to secrecy laws in ACT legislation and extends to secrecy provisions in Commonwealth, State and Northern Territory legislation to the extent that those provisions would apply to information held by ACT agencies or Ministers.
- Decision-makers who identify applicable secrecy provisions need to carefully consider the relevant legislation when deciding whether or not to release the information – as the legislation is unlikely to include a blanket prohibition on disclosure, and may allow for disclosure in certain circumstances.
- The Ombudsman encourages agencies to consider releasing information, where possible, consistent with the pro-disclosure objectives of the FOI Act.
- It is not feasible for this guideline to provide detailed guidance regarding all relevant legislation in this space. Agencies are, however, welcome to seek further additions to these guidelines where particular secrecy provisions are found to regularly be relevant in the context of their decisions under the FOI Act.
- It is noted that where the relevant secrecy provision provides some discretion in terms of permitted disclosure, it will be outside of the scope of an FOI Ombudsman review for the Ombudsman to determine whether or not an appropriate decision has been made under the relevant legislation.[55]
- Where Schedule 1, s 1.3 is found **not** to apply, s 2.2(b)(iv) of Schedule 2 may still be relevant as a factor against disclosure when applying the public interest test under s 17.

Case study: *Perpetual Corporate Trust and Chief Minister, Treasury and Economic Development Directorate*[56]

The applicant sought access to documents relating to land valuation. The agency disclosed some documents but refused access to others stating that the information was taken to be contrary to the public interest to disclose as disclosure was prohibited by a secrecy provision of a law (s 95(2) of the *Taxation Administration Act 1999*) (Schedule 1, s 1.3(6) of the FOI Act).

The ACT Ombudsman found that s 95(2) of the *Taxation Administration Act 1999* was a relevant secrecy provision and disclosure of the information was prohibited unless permitted by s 96 or 97 of that Act. On the facts of the case, s 96(1) did not apply and the agency had declined to exercise its discretionary power under s 97 to disclose the information. Therefore, disclosure of the information sought was prohibited by the secrecy provision in s 95(2) and on that basis was information taken to be contrary to the public interest to disclose under Schedule 1, s 1.3 (6) of the FOI Act.

[55] *Perpetual Corporate Trust and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 10 (17 December 2018) [32].
[56] Ibid.

Adoption Act 1993

Decision-makers assessing information related to adoption for potential release should consider whether the information may be within the scope of s 60 of the *Adoption Act 1993.* This provision prohibits certain confidential records from being made available, or inspected, except as provided for in Part 5 of that Act.[57] Such records include the following:

- those in the possession, or under the control, of the Director-General or a private adoption agency relating to an adoption
- records of the court (other than an order or decision of the court) relating to proceedings on an application for an adoption order
- entries in the register of births relating to the birth of an adopted person, or a copy of, or extract from, such an entry.

Children and Young People Act 2008

Decision-makers assessing information which relates to children and young people should consider whether it is 'protected information' under s 844 of the *Children and Young People Act 2008* (CYP Act).

Information is 'protected information' if it is information about a person that is disclosed to, or obtained by, an information holder because the information holder is, or has been an information holder under the CYP Act.

Protected information includes the following 'sensitive information':

- care and protection report information
- care and protection appraisal information
- interstate care and protection information
- family group conference information
- contravention report information, and
- information prescribed by regulation.[58]

It is an offence under s 846 of the CYP Act for such information to be divulged except where:

- the information is protected information under the CYP Act and is divulged under the CYP Act or in the exercise of a function, as an information holder, under the CYP Act[59]
- the information is **not** sensitive information, and the information is divulged under another territory law or in the exercise of a function as an information holder under another territory law[60] or is divulged with the person's consent.[61]

Important:

- The secrecy provisions in the CYP Act cover disclosure of information about a young person, *to that young person.* This is unlike most other secrecy provisions that only prohibit the disclosure of information about an individual *to another person*.[62]

[57] *Adoption Act 1993* (ACT). E.g., Division 5.3 relating to a right of access to 'identifying information'.
[58] CYP Act s 845.
[59] CYP Act s 847(2).
[60] CYP Act s 848(2).
[61] CYP Act s 849.
[62] See, e.g., s 418 of the *Planning and Development Act 2007* (ACT); s 65A of the *Public Trustee and Guardian Act* (ACT); s 125 of the *Health Act 1993* (ACT).

- Under s 529L of the CYP Act, the Director-General must be satisfied on reasonable grounds that it is in a young person's best interests for protected information about them to be disclosed to them.

Crimes (Child Sex Offenders) Act 2005

Decision-makers assessing information which was obtained or created because of the exercise of a function under the *Crimes (Child Sex Offenders) Act 2005* (Crimes CSO Act) should consider whether it is within the scope of s 133A of this Act.

- For example, where the information includes details of a listed offender's motor vehicle or address.

This secrecy provision prohibits disclosure unless it occurs:

- under, or in relation to the exercise of a function under, the Crimes CSO Act or another territory law[63]
- with the person's consent,[64] or
- for law enforcement functions or activities (and then only to an entity prescribed by regulation).[65]

Crimes (Restorative Justice) Act 2004

Decision-makers assessing information which was obtained or created because of the exercise of a function under *Crimes (Restorative Justice) Act 2004* (Crimes RJ Act) should consider whether it is within the scope of s 64 of this Act.

This secrecy provision prohibits disclosure unless it occurs:

- under, or in relation to the exercise of a function under, the Crimes RJ Act or any other Act[66]
- with the consent of the person to whom the information relates.[67]

Such information could include:

- information obtained by a referring entity or the Director-General in assessing the eligibility of a victim, parent or offender for restorative justice
- information obtained by the convenor of a restorative justice conference in preparing for the conference
- a transcript (or other record) of what is said during a restorative justice conference that is kept by the convenor or the Director-General.

The following types of information are, however, specifically excluded from the application of s 64:

- information in a restorative justice agreement
- information disclosing who attended a restorative justice conference, or
- a written record of consent made under s 52(3) of the Act—that is, a written record of oral, or other consent, to a restorative justice agreement that is made on behalf of a participant who is not able to sign the agreement.[68]

Housing Assistance Act 2007

Decision-makers assessing information relating to housing assistance should consider whether it is 'protected information' within the meaning of s 28 of the *Housing Assistance Act 2007* (HA Act).

[63] Crimes (CSO) Act s 133A(3).
[64] Crimes (CSO) Act s 133A(4).
[65] Crimes (CSO) Acts 133A(5).
[66] The FOI Act is not considered to be another law under which protected information can be disclosed.
[67] Crimes RJ Act s 64(4).
[68] Crimes RJ Act s 64(1).

This provision provides that 'protected information' includes:

- information that identifies an applicant for housing assistance
- information that identifies a housing assistance recipient or former housing assistance recipient
- information that identifies a housing assistance property
- personal information about an applicant for housing assistance
- information prescribed by regulation

Note: at the time of publishing these guidelines, there are not currently any provisions in the HA Act prohibiting disclosure. Any information that is protected under the HA Act, in future, would be contrary to the public interest to disclose.

6.7. Section 1.4 – sensitive information

Background

The *Information Privacy Act 2014* (ACT) (IP Act) provides that certain types of 'personal information' are 'sensitive information'. These types of personal information are afforded a higher level of privacy protection, because inappropriate handling of this information is more likely to have adverse consequences for the relevant individual.

The FOI Act, unlike other jurisdictions, specifically recognises that the ACT Government collects and holds 'sensitive information' about individuals, which similarly requires additional protections to prevent unreasonable invasion of an individual's privacy.

Overview

Section 1.4 provides that disclosure of the information is taken to be contrary to the public interest if it would involve the unreasonable disclosure of sensitive information about any individual (including a deceased person). To come within the scope of s 1.4:

- the information must be **sensitive information**
- the disclosure must be **unreasonable**

These two elements are discussed below.

What is sensitive information?

The Dictionary to the FOI Act refers to s 14 of the IP Act which defines *sensitive information* as personal information that is:

(a) about the individual's—
(i) racial or ethnic origin; or
(ii) political opinions; or
(iii) membership of a political association; or
(iv) religious beliefs or affiliations; or
(v) philosophical beliefs; or
(vi) membership of a professional or trade association; or
(vii) membership of a trade union; or
(viii) sexual orientation or practices; or
(ix) criminal record; or
(b) genetic information about the individual; or
(c) biometric information about the individual that is to be used for the purpose of automated biometric verification or biometric identification; or
(d) a biometric template that relates to the individual.

Section 8 of the IP Act defines *personal information* as information or an opinion about an identified individual or an individual who is reasonably identifiable. It is not relevant whether the information, or opinion, is true or not; or whether it is recorded in a material form or not.

Examples of sensitive information could include:

- investigation reports into an offence, disclosure of which would reveal a person's criminal record[69]
- names and addresses of subscribers to a special-interest magazine which may reveal their religious beliefs
- signature block on an email disclosing an individual's membership to a professional body.

In considering whether an individual is *reasonably identifiable*, decision-makers should consider:

- the available range of information which may lead to the individual being identified (including information available to the public at large, a limited number of members of the public, or the FOI applicant)[70]
- the complexities and difficulties that would be involved in ascertaining the identity of the individual (including time and cost)[71]
- whether in the circumstances it would be impractical, or unlikely, for a reasonable member of the public to identify the individual.[72]

For example:

- aggregate information relating to the religion of refugees resettled in the ACT is sensitive information of the relevant individuals. If individuals are not reasonably identifiable from the aggregated information, it may, however, be reasonable to disclose the aggregate information.[73]
- Further, in *Jonathan Laird and Department of Defence,*[74] the Privacy Commissioner considered whether the disclosure of DNA analysis of human remains could reasonably identify the World War II HMAS Sydney crewmember, finding that it would be 'impractical for a reasonable member of the public' to do so.[75]

Note:

- The definition of personal information does **not** include 'personal health information' about an individual, which is defined in the *Health Records (Privacy and Access) Act 1997* (ACT). This Act includes separate provisions for requesting access, and making decisions, to disclose such sensitive health information.[76]

Would disclosure be unreasonable?

Decision-makers must make an individual assessment as to whether disclosure of the information under consideration would be unreasonable in the particular circumstances.

[69] *Wyeth and Queensland Police Service* [2015] QICmr 26.
[70] *Utopia Financial Services Pty Ltd and Australian Securities and Investments Commission (Freedom of information)* [2017] AATA 269 [228]-[238].
[71] *Jonathan Laird and Department of Defence* [2014] AICmr 144 [16]. See also *Alsop and Redland City Council* [2017] QICmr 27 [21].
[72] Ibid.
[73] *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 18; *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 19; and *Alex Cuthbertson and Department of Immigration and Border Protection* [2016] AICmr 20.
[74] [2014] AICmr 144.
[75] Ibid [17].
[76] For more information see *Guideline Volume 3 of 6 Dealing with access applications*.

In making their assessment, decision makers should consider:[77]

- the extent to which the sensitive information is well-known or publicly available[78]
- the nature of the sensitive information[79]
- the circumstances in which the sensitive information was obtained by the agency or Minister, and in particular whether it was obtained on a confidential basis[80]
- whether disclosure of the information would promote the objects of the FOI Act[81]
- any detriment that disclosure may cause to the person to whom the sensitive information relates[82]
- any opposition to disclosure of the sensitive information expressed or likely to be held by that person
- the fact that restrictions cannot be placed on the use or dissemination of information released under the FOI Act.[83]

Note:

- The Ombudsman takes the view that an FOI applicant's intended or likely use, or dissemination, of the sensitive information may be taken into account in determining whether disclosure would be unreasonable.[84] This is because the FOI Act is intended to be administered with a pro-disclosure bias.[85] Where there is evidence that the FOI applicant does not intend or is unlikely to widely disseminate the sensitive information, disclosure of the information may be less likely to be unreasonable.[86]
- Where an agency or Minister considers that some or all of the information is not contrary to the public interest information because it is **not** sensitive information, or because its disclosure would not be unreasonable, the relevant individual (or, if the person is deceased, an eligible family member) must be consulted—see *Guideline Volume 3 of 6: Dealing with access applications.*

6.8. Section 1.5 – information in possession of auditor-general

Background

The ACT Auditor-General is responsible for the audit of public sector agencies to provide independent assurance that public money is being efficiently and effectively spent.

The ACT Audit Office has broad powers under the *Auditor-General Act 1996* (ACT) (A-G Act) to obtain information in the course of conducting an audit.[87] To balance these wide powers, part 5A of the A-G Act restricts the release of information disclosed to, or obtained by, the ACT Auditor-General. These provisions are reflected in the FOI Act.

Overview

Section 1.5 provides that disclosure of the information is taken to be contrary to the public interest if it is:

- in the possession of the ACT Auditor-General
- has been obtained or generated in relation an audit under the A-G Act.

It does not matter whether the information is received, or was created, by the ACT Auditor-General.

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[77] *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437; *'FG' and National Archives of Australia* [2015] AICmr 26 [47]-[48].
[78] *WL1T8P and Queensland Police Service* [2014] QICmr 40 [44].
[79] *'AD' and Health Directorate* [2018] ACTOFOI 8 (27 November 2018) [48].
[80] Ibid; *'AB' and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 2 (23 August 2018) [52]; *Alistair Coe and ACT Health Directorate* [2018] ACTOFOI 4 (5 September 2018) [45].
[81] FOI Act s 6.

An *audit* within the meaning of the A-G Act can include the following:

- an audit of the annual financial statements of the Territory, directorates and territory authorities under the *Financial Management Act 1996* (ACT)
- an audit of the accounts and records in relation to any person, body or thing ascertained in accordance with the regulations
- a performance audit in relation to any person, body or thing ascertained in accordance with the regulations[88]
- an special financial audit of the accounts and records of a public sector company, or a joint venture or trust in which the Territory or a territory entity has a controlling interest[89]
- a performance audit into the operations of a directorate, territory entity or joint venture or trust in which the Territory or a territory entity has a controlling interest.[90]

Note:

- Audit-related information that is in the possession of the ACT Audit Office will generally be within the constructive possession of the Auditor-General, because its role is to assist the Auditor-General in conducting audits.[91]
- Section 1.5 is likely to be relevant to the ACT Audit Office only, as this provision does not apply in relation to any other copy of information held or created by the ACT Auditor-General which may be in the possession of another territory directorate or authority.[92]
- For specific guidance on the phrase 'in the possession of' see s 5 Common terms and phrases.

6.9. Section 1.6 – Cabinet information

Background

The ACT FOI Act, mirroring FOI exemption provisions in other jurisdictions, provides for Cabinet information to be taken to be contrary to the public interest and withheld from disclosure.

Essentially, the relevant provision asks decision-makers to consider whether disclosure would involve the disclosure of a deliberation or decision of Cabinet. The provision reflects the long-established convention of

[82] *Master Builders Association of the ACT and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 6 (2 November 2018) [44].
[83] *WL1T8P and Queensland Police Service* [2014] QICmr 40 [46].
[84] Ibid.
[85] FOI Act s 9. Section 17(2)(f) of the FOI Act does not apply when determining whether disclosure of the sensitive information would be 'unreasonable', as the public interest test set out in s 17 of the FOI Act does not apply to information that is taken to be contrary to the public interest to disclose under Schedule 1.
[86] *'FG' and National Archives of Australia* [2015] AICmr 26 [47]-[48]; *Marke v Department of Justice and Regulation* [2019] VCAT 479 [45]; *Victoria Police v Marke* (2008) 23 VR 223.
[87] ACT Audit Office.
[88] A-G Act s 10.
[89] A-G Act s 11.
[90] A-G Act ss 11B and 12.
[91] *Brett Goyne and Australian National Audit Office* [2015] AICmr 9, where documents in the possession of the Australian National Audit Office were in the 'constructive possession' of the Auditor-General.
[92] This is supported by the Explanatory Statement, *Freedom of Information Bill 2016* (ACT) 3, which relevantly provides: 'Given that the auditor-general is required to make a decision about the publication of information obtained from an agency under the *Auditor-General Act 1996* and the information held by the agency will be available from the agency directly it is not necessary for this information to be available from the auditor-general under the FOI scheme.'

collective ministerial responsibility, and the need to preserve the confidentiality of processes leading up to Cabinet decisions – allowing for full and frank discussion between Cabinet members, prior to a final decision being made.

Overview

Section 1.6 provides that disclosure of the information is taken to be contrary to the public interest if it is Cabinet information.

Cabinet information is defined in s 1.6(1) as information:

- that has been submitted, or that a Minister proposes to submit, to Cabinet for its consideration **and** that was brought into existence for that purpose[93]
- that is an official record of Cabinet,[94]
- that is a copy of, or part of , or contains an extract from information mentioned above,[95] or
- the disclosure of which would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision).[96]

unless as outlined in s 1.6(2):

- the information is *purely factual* **and**
- disclosure of the information would **not** involve the disclosure of a deliberation or decision of Cabinet **and**
- the fact of the deliberation or decision has **not** been officially published.

In addition, all information is considered to be Cabinet information where its disclosure would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision).[97]

Each of these elements and exemptions are discussed in detail below.

Note:

- The term 'Cabinet' in s 1.6 includes a Cabinet committee or subcommittee.[98]
- Agencies are encouraged not to assume that information is Cabinet information just because the relevant document contains information about prospective policy or legislative developments, and/or is marked 'cabinet-in-confidence'.
- Many documents which outline preliminary work and/or research in terms of a policy problem will also **not** be considered *cabinet information*. Decision-makers are encouraged to consider whether the information relates to the Cabinet process or 'thinking', or whether it is merely preparatory policy work and/or research—that is, factual information that does not reveal a deliberation of Cabinet.
- Whether disclosure of a document would involve disclosure of a deliberation of Cabinet is a question of fact to be decided in the circumstances of the particular case.
- Where agencies believe information sought falls within the scope of s 1.6, they should clearly explain **why**—i.e. which category of information applies and why the factual information exclusion is not relevant, consulting these guidelines as necessary.

[93] FOI Act Sch 1, 1.6(1)(a).
[94] Ibid Sch 1, s 1.6(1)(b).
[95] Ibid Sch 1 s 1.6(1)(c).
[96] Ibid Sch 1 s 1.6(1)(d).
[97] Ibid.
[98] Ibid Sch 1, s 1.6(3).

Information within scope of s 1.6(1)(a)

To come within the scope of s 1.6(1)(a), the information must have been submitted, or proposed to be submitted, to Cabinet for its consideration **and** been brought into existence for that purpose.

These two sub-elements are discussed below in detail.

Note:

- Such information will not come within scope where the *purely factual information exemption* applies—see discussion below.

Information submitted to Cabinet or proposed to be submitted to Cabinet

This includes information that:

- **was submitted** to a Cabinet committee or subcommittee—that is, information which was actually provided to the relevant committee, not simply for example:
  - given to the Cabinet Office in preparation for a Cabinet meeting[99]
  - submitted to informal meetings of ministers outside of Cabinet.
- a Minister **proposes to submit** to a Cabinet committee or subcommittee—that is, information that has been developed to be submitted to a Cabinet committee or subcommittee, but where this has not occurred at the time an access application or open access decision is being considered.

Information brought into existence for the purpose of cabinet consideration

This includes information that was created with the intention that it be 'considered' by a Cabinet committee or subcommittee. That is, the information was brought into existence to be given 'careful thought' by the Cabinet – as opposed to be just 'being present' in the Cabinet room. This includes both information created to inform Cabinet and/or to be discussed by Cabinet as part of a decision-making process.[100]

Whether the required intention existed is a question of fact to be determined by the decision-maker.

- The relevant intention would normally need to be that of the Minister. However, where there is an agency process for the preparation of information for a Minister to submit to Cabinet for consideration, information prepared in accordance with that process will have been brought into existence for the purpose of Cabinet consideration.[101]
- It is not, however, enough to satisfy 1.6 that the information was bought into existence by an officer because it might be considered by Cabinet at some time in the future.

Cabinet consideration does not need to be the **only** purpose for creating the information.

Provided that one of the reasons for bringing the information into existence was consideration by Cabinet, this will be sufficient.[102] Examples of such information are likely to include Cabinet submissions, or attachments to such submissions.

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[99] *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Brett Sanderson* [2015] AATA 361 [53].

[100] *Re Toomer and Department of Agriculture, Fisheries and Forestry* [2003] AATA 1301; *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Sanderson (Party Joined)* [2015] AATA 361 [54]-[56].

[101] *Stanway and Queensland Police Service* [2017] QICmr 22 [42].

[102] *Office of the Leader of the Opposition and Treasury Department* (Unreported, Queensland Information Commissioner, 7 July 2010) [45].

Decision-makers should assess what the intention was **at the time the information was created**.[103] Such an intention could be reflected by markings or notations on a record (for example, 'Cabinet Submission' or 'Cabinet-in Confidence'). Such markings will not, however, necessarily be conclusive—otherwise documents could simply be classified at a higher security level in order to avoid disclosure obligations.

Documents created **after** a cabinet process has finalised would not fit within this category, although a later copy of or extract may come within s 1.6(1)(c)—see the discussion below.

Note:

- Whether the information was actually considered by Cabinet is not a relevant consideration here.
- Information **not** brought into existence for this purpose, but later submitted to Cabinet will not fall into this category, but could still be considered Cabinet information on the basis that it would reveal a deliberation of Cabinet—see Information that would reveal any deliberation of Cabinet.

An official record of Cabinet – s 1.6(1)(b)

'Official record of Cabinet' is not defined in the FOI Act, but the Ombudsman considers this term to be inclusive of the following:

- Cabinet submissions
- Cabinet briefing notes
- Cabinet agendas
- Cabinet notebooks
- Cabinet minutes
- Cabinet decisions

This category does **not** include preliminary or working drafts of the above documents.

Note:

- Such information will not come in scope where the *purely factual information exemption* applies—see discussion below.

A copy of, or part of, or contains an extract from information mentioned above – s 1.6(1)(c)

This category of information is considered to cover exact copies, or extracts of, Cabinet submissions, a Cabinet briefing document and/or an official record of the Cabinet. This could include other agency briefings reporting on the outcome of a Cabinet decision and/or agency coordination comments. The extracts do **not** need to be exact quotes of the Cabinet record.

Note:

- Such information will not come in scope where the *purely factual information exemption* applies.
- Such information may be able to be redacted and the rest of the document be released – for example, it may be practicable to redact references to a Cabinet meeting date or reference number.

[103] *Hudson (OS agent for Fencray Ltd) and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123.

Purely factual information exemption

Even where information falls into the categories in ss 1.6(1)(a), (b) or (c), these provisions will not apply where the information is considered *purely factual information*.

This would include basic factual information – as opposed to:

- matters of argument[104]
- discussion of a matter which is the specific subject of a cabinet submission[105]
- advice, or
- a projection/prediction about future events.

The Queensland Information Commissioner described this distinction as follows:

> merely factual matter is generally to be distinguished from matter expressing the opinions and recommendations of individual Ministers on policy issues and policy options requiring Cabinet determination. Factual matter which merely provides the factual background, or informs Cabinet of relevant facts, so as to assist its deliberations on policy issues, will generally constitute "merely factual matter".[106]

Factual information is not defined in the FOI Act, but is considered to include factual statements, surveys, data, and statistical information. Examples could include:

- program statistics included in a Cabinet submission
- statistical information about the Canberra community
- the results of a scientific study
- surveys completed to seek community views on a particular issue
- factual background or technical information on a particular topic
- standard information regarding legislative change processes and related timeframes[107]

Factual information must be disclosed **unless** it would reveal a deliberation or decision of Cabinet – see *Information that would reveal any deliberation of Cabinet*.

Information that would reveal any deliberation of Cabinet

This includes information that would disclose matters that were **actively** discussed by Cabinet – as opposed to a report or submission that was simply received by Cabinet. As explained by Forgie DP in *Re Toomer*, the deliberations of Cabinet 'are its thinking processes, be they directed to gathering information, analysing information or discussing strategies'.[108]

Disclosure of the detail of the deliberation itself or the fact that this deliberation has taken place are both relevant here – regardless of whether or a not a decision was reached.[109] Generally, whether the information is prepared before or after a Cabinet meeting is not considered determinative.[110]

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[104] See *Wood: Secretary, Department of Prime Minister and Cabinet (Freedom of information)* [2015] AATA 845 (8 December 2015).
[105] *Alistair Coe and Suburban Land Agency* [2019] ACTFOI 5 (25 February 2019).
[106] *Hudson and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 [61].
[107] *Alistair Coe and Suburban Land Agency* [2019] ACTFOI 5 (25 February 2019) [33].
[108] *Re Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301.
[109] Ibid.
[110] Ibid; *North Queensland Conservation Council Incorporated and Queensland Treasury* [2016] QICmr 9 [25]-[26].

Section 1.6 would generally **not** cover a standalone report or submission received by Cabinet that can be disclosed without disclosure of the contextual information regarding Cabinet's discussions about this information or their decision on a related topic.[111]

Whether the information sought has already been disclosed and/or made publicly available will also be a relevant consideration in terms of whether or not disclosure would reveal a deliberation or decision of Cabinet.[112] Information that has already been made public will not be considered to 'disclose' a deliberation. Officers should consider whether relevant information has already been published to comply with open access requirements under the FOI Act.

Note:

- Mere acceptance of information by Cabinet is **not** considered sufficient to amount to a deliberation. Decision-makers must explain why a deliberation is revealed in such circumstances. It is **not** enough to simply state that the matter was before Cabinet.[113]

Has the deliberation or decision been officially published?

Schedule 1, s 1.6(2) limits the operation of the 'purely factual' exclusion, which will not apply where disclosure of the information:

- would involve the disclosure of a deliberation or decision of Cabinet, **and**
- the fact of the deliberation or decision has **not** been officially published.

This means that if the existence of a Cabinet deliberation or decision has already been officially published, then even if disclosure would reveal a deliberation of Cabinet any factual information may be required to be released.

The term *officially published* is not defined in the FOI Act. The Ombudsman considers this to refer to one of the following official disclosures:

- publication of a Cabinet decision on the website of the relevant ACT government agency or the ACT Government Open Government website
- an oral announcement by a Minister regarding a Cabinet deliberation or decision
- a press release by the Government or a Directorate
- publication of a formal report or consultation paper following a Cabinet decision.

Note:

- It would **not** include an announcement made in confidence to a limited audience.
- It may, however, include situations where the existence of the deliberation or decision has been publicly announced, even if the decision itself has not yet been disclosed.[114]

[111] *Re Birrell and the Department of Cabinet (Nos 1 and 2)* (1986) 1 VAR 230 [239] (deliberation encompasses 'more than the mere receipt of information in the Cabinet Room for digestion by Cabinet Ministers then or later').
[112] *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 6 (26 February 2019).
[113] *Re Porter and Department of Community Services and Health* (1998) 14 ALD 403.
[114] *Secretary, Department of Prime Minister and Cabinet and Secretary, Department of Infrastructure and Regional Development and Brett Sanderson* [2015] AATA 361 [77].

Case study: *Alistair Coe and Suburban Land Agency*[115]

The applicant sought access to correspondence and documents shared between the ACT Government and Aquis relating to land surrounding Glebe Park or the expansion of the casino. The agency disclosed some information, but refused access to other information stating that *inter alia*, disclosure of the information in a brief would disclose a deliberation or decision of Cabinet and the fact of the deliberation or decision has not been officially published (Schedule 1, s 1.6 of the FOI Act).

The Ombudsman set aside the agency's decision that some of the information was contrary to the public interest to disclose. The Ombudsman considered that some of the relevant paragraphs were limited to describing standard legislative change processes only, and the Ombudsman was not satisfied that they revealed Cabinet deliberations on the proposal itself.

The Ombudsman noted that the onus was on the agency to explain how Cabinet deliberations would be revealed, and that this had not been discharged.

Case study: *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate*[116]

The applicant sought access to a document related to the Canberra Technology Park. Access was refused on the ground that it was contrary to the public interest information. This decision was set aside by the Ombudsman.

The Ombudsman agreed with the original decision-maker that the information was Cabinet information. It was also not in dispute that the information sought was purely factual information.

The Ombudsman, however, disagreed that disclosure would disclosure a deliberation or decision of Cabinet. This was because the information sought was a standalone document that summarised the processes and results of consultation activities.

The Ombudsman accepted that Cabinet would be informed by the results of the consultation, but found that there was no information available to demonstrate that disclosure would disclosure a deliberation or decision of Cabinet. The Ombudsman also pointed out that the information, if disclosed, would not reveal in substance more information than was already publicly available.

6.10.Section 1.7 – examinations under Australian Crime Commission (ACT) Act 2003

Background

The *Australian Crime Commission (ACT) Act 2003* (ACT) (ACC Act) provides for the operation of the Australian Crime Commission (ACC) in the ACT. The ACC had broad information gathering powers, including powers to summon a person to appear as a witness to give evidence or to produce documents or other things. Information obtained is confidential in order to protect the integrity of the ACC's investigations and the safety and privacy of witnesses. It is also protected by the secrecy provision in s 46 of the ACC Act.

Overview

Section 1.7 provides that disclosure of information is taken to be contrary to the public interest if it was obtained through an examination conducted under s 20 of the ACC Act.

[115] [2019] ACTOFOI 5 (25 February 2019).
[116] [2019] ACTOFOI 6 (26 February 2019).

Section 20 of the ACC Act empowers the ACC to conduct examinations for the purpose of a 'special' ACC operation/investigation – that is:

- an ACC Territory intelligence operation or investigation which relates to serious or organised crime or crimes[117] and which include an offence or offences against an ACT law (irrespective of whether that offence or those offences have a federal aspect), and
- the board of the ACC has determined to be a 'special' operation/investigation.

Decision-makers should thus identify any information that was obtained through an ACC investigation and would be contrary to the public interest to release.

Note:

- The ACC merged with CrimTrac in 2016 to form the Australian Criminal Intelligence Commission.
- Information obtained through an examination conducted under s 20 of the ACC Act is also likely to be considered contrary to the public interest to disclose under s 1.3—see s 5.7 information disclosure of which is prohibited by law.

6.11. Section 1.8 – information in possession of human rights commission

Background

The ACT Human Rights Commission (HRC) is responsible for considering complaints made under Part 4 of the *Human Rights Commission Act 2005* (ACT) (HRC Act) and may also investigate other matters on its own initiative under s 48 of the HRC Act ('commission-initiated consideration'). In performing these functions, the HRC has certain powers to require a person to provide information, produce a document or other thing, or answer questions.

Information obtained or generated by the HRC in relation to a complaint or consideration is confidential in order to promote the resolution of complaints and protect the privacy of complainants and other persons. This information is protected by the secrecy provision in s 99 of the HRC Act.

Overview

Section 1.8 provides that disclosure of information is taken to be contrary to the public interest if is:

- in the **possession** of the HRC, and
- has been obtained or generated in relation to:
    - a complaint made under the HRC Act, or
    - a commission-initiated consideration under the HRC Act.

[117] Defined in the Dictionary to the *Australian Crime Commission (ACT) Act 2003* to include an offence that involves two or more offenders and substantial planning and organisation, ordinarily involves the use of sophisticated methods and techniques; is committed or ordinarily committed in conjunction with other offences of a like kind, and is an offence of a kind prescribed under the regulations or involves offences such as theft, fraud, tax evasion, money laundering, currency violations, illegal drug dealings, illegal gambling, extortion, violence, bribery or corruption, perverting the course of justice, bankruptcy and company violations, harbouring of criminals, forging of passports, firearms, armament dealings, cybercrime.

Note:

- Section 1.8 is likely to be relevant to the HRC only, as this provision does not apply in relation to any other copy of information held or created by the HRC which may be in the possession of another territory directorate or authority.
- Such information is also like to be considered contrary to the public interest under s 1.3—see s 5.7 information disclosure of which is prohibited by law.
- For specific guidance on the phrase 'in the possession of' see s 5 Common terms and phrases.

6.12. Section 1.9 – identities of people making disclosures

Background

The purpose of the *Public Interest Disclosure Act 2012* (ACT) (PID Act) is to facilitate the disclosure of information about:

- conduct of a person that could, if proved, be a criminal offence against an ACT law or give reasonable grounds for disciplinary action against the person, or
- action by an agency or agency official that amounts to maladministration that adversely affects a person's interests in a substantial and specific way, a substantial misuse of public funds, or a substantial and specific danger to public health or safety or the environment.[118]

The CYP Act also contains provisions that require, or enable, certain information to be reported to the Director-General, including:

- a belief or suspicion that a child or young person is being abused or neglected, or is at risk of abuse or neglect (a voluntary report)[119]
- a belief on reasonable grounds that a child or young person has experienced, or is experiencing, sexual abuse or non-accidental physical injury (a mandatory report)[120]
- a suspicion that a provision of the CYP Act is being, or has been, contravened (in a confidential report).[121]

Persons who provide information under these pieces of legislation expect that their identity, or information revealing their identity, will be appropriately protected. As a result, secrecy provisions in the PID Act and CYP Act restrict information being disclosed where it would identify a person who made a PID disclosure or report under the CYP Act.[122]

Overview

Section 1.9 provides that disclosure of information is taken to be contrary to the public interest if it would, or could reasonably be expected to, disclose the identity of a person who has made a disclosure under the PID Act or a mandatory, voluntary or confidential report under the CYP Act.

Decision-makers should consider the circumstances surrounding the receipt of the information as it is the **source** of the information that is relevant.

For s 1.9 to apply, there must also be a reasonable expectation that the information, if disclosed, will disclose the identity of the person who made the PID Act disclosure or mandatory, voluntary or confidential report under the CYP Act.

[118] PID Act ss 7 and 8.
[119] CYP Act s 354.
[120] CYP Act s 356.
[121] CYP Act s 876.
[122] PID Act s 44 and CYP Act s 846.

Decision-makers are encouraged to review the information at issue and consider the following:

- is the information a public interest disclosure under the PID Act or a mandatory, voluntary or confidential report under the CYP Act?
- is the identity of the person who provided the information readily apparent? Or could disclosure of the information reasonably be expected to lead to the identification of the person?

Note:

- When considering the application of s 1.9, decision-makers should consider the 'mosaic theory'. That is, whether the disclosure of the information in question will lead to it being linked to already available information and thus disclose the identity of the person who provided the information.[123] For example, where the information appears to be of limited or no use but can take on significance when combined with other items of information.
- In instances where the information sought is known only to a limited number of people, disclosure of the information is more likely to identify the person who made such a disclosure.
- Redacting the name of a source, but disclosing the content of the information, including any identifying features such as handwriting, or letterhead, could still identify the source of the information.[124]
- For specific guidance on the phrase 'would, or could reasonably be expected' see section 5 Common terms and phrases.

6.13. Section 1.10 – information relating to requests to cost election commitments

Background

Section 5 of the *Election Commitments Costing Act 2012* (ACT) (ECC Act) enables:

- the leader of a registered party with 1 or more Members of the Legislative Assembly (MLAs) (or another person nominated by the party) or
- an MLA who is not a member of a registered party

to ask the Director-General to cost the party or MLA's own election commitment.

The ECC Act then also restricts publication of such costings by the Director-General of the Chief Minister, Treasury and Economic Development Directorate, during the 'costing period' unless the disclosure is made:

- under the ECC Act or another Territory law
- in relation to the exercise of a function under the ECC Act or another territory law, or
- with the consent of the person who made the costing request.

Overview

Section 1.10 provides that disclosure of information is taken to be contrary to the public interest if it is information about requests to cost election commitments under s 5 of the ECC Act **unless** the costing period in which the request was made has ended.

[123] *Re Petroulias and Others v Commissioner of Taxation* [2006] AATA 333 [29]-[30]. See also *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [80]-[81]; *Francis and Australian Sports Anti-Doping Authority (Freedom of Information)* [2019] AATA 12 [177]-[178].

[124] '*HR' and Department of Immigration and Border Protection* [2015] AICmr 80 [13].

Costing period is defined in the dictionary to the ECC Act as a period:

- starting 1 week after the last sitting day of the Legislative Assembly before the election, and
- ending when the Chief Minister is elected on the first sitting day of the Legislative Assembly after the election.[125]

Note:

- If the access application is for information during the costings period, decision-makers should consider referring the applicant to the ECC Act to request disclosure under that Act.
  Alternatively, decision-makers may wish to negotiate with applicants to withdraw their access application until the costing period has ended.

6.14. Section 1.11 – information in electoral rolls and related documents

Background

Section 69 of the *Electoral Act 1992* (ACT) (Electoral Act) makes it an offence to disclose a copy of an electoral roll, or extract from or information contained on a roll, except where permitted by the Electoral Act.[126]
As electoral roll information includes personal information, the disclosure of electoral roll information other than in accordance with the Electoral Act may also be a breach of privacy under the IP Act.

Overview

Section 1.11 provides that disclosure of information is taken to be contrary to the public interest if it is contained in an electoral roll, or copy, extract or document used in keeping or derived from an electoral roll **unless** disclosure is made to a person to whom the information relates to.[127]

'Electoral roll' means the roll of electors kept under the Electoral Act or an extract of that roll.[128]

In considering whether s 1.11 applies, information officers should ask the following questions:

- is the information contained in an electoral roll, copy of a roll, document or copy of a document used in keeping a roll, or document derived from an electoral roll?
- is the information sought by a person other than the person to whom the information relates to?

Note:

- Such information is also like to be considered contrary to the public interest to disclose under s 1.3 see—s 5.7 information disclosure of which is prohibited by law.

6.15. Section 1.12 – information in possession of ombudsman

Background

The ACT Ombudsman undertakes a number of functions for the ACT community. These include:

- reviewing certain decisions made by an agency or Minister under the FOI Act ('ombudsman review')
- investigation of action taken by an agency under s 9 of the Ombudsman Act

[125] ECC Act, Dictionary.
[126] Electoral Act ss 65 and 121A.
[127] FOI Act, Schedule 1, s 1.11(1)(a)-(f) for the full list of 'related documents' to an electoral roll.
[128] FOI Act, Schedule 1, s 1.11(2).

- managing the ACT's Reportable Conduct Scheme under Division 2.2A of the Ombudsman Act.

Overview

Section 1.12 provides that disclosure of information is taken to be contrary to the public interest if it is:

- in the **possession** of the Ombudsman, and
- has been obtained or generated in relation to:
    - an ombudsman review
    - a s 9 investigation
    - management of the reportable conduct scheme.

Examples of documents within the scope of s 1.12 would include:

- FOI review applications and documents provided as part of the review process, including unredacted versions of the information requested in the original FOI application
- correspondence and documents provided in the course of an investigation
- notifications made to the Ombudsman under the Reportable Conduct Scheme.

Note:

- Section 1.12 is likely to be relevant to the Ombudsman only, as this provision does not apply in relation to any other copy of information held or created by the Ombudsman which may be in the possession of another territory directorate or authority.
- Such information is also like to be considered contrary to the public interest to disclose under s 1.3 see—s 5.7 information disclosure of which is prohibited by law.
- For specific guidance on the phrase 'in the possession of' see s 5 Common terms and phrases.

6.16. Section 1.13 – National, Territory or State security information

Background

The FOI Act, mirroring FOI exemption provisions in other jurisdictions, provides for certain security related information to be taken to be contrary to the public interest and withheld from disclosure.
Such protections are important to ensure the protection of security. It should, however, be recognised that freedom of information laws can also be critical in terms of ensuring that security organisations do not exceed their powers and maintaining public confidence in government performance.

Overview

Section 1.13 provides that disclosure of information is taken to be contrary to the public interest if it would, or could reasonably be expected to, damage the security of:

- the Commonwealth—see s 1.13(2) and discussion below.
- the Territory or a State—see s 1.13(3) discussion below.

Damage should be interpreted according to its ordinary meaning, and would include 'harm or injury'.[129]

Such damage could include:

- **tangible** damage—for example, financial damage, or
- **intangible** damage—for example, inhibiting the flow of confidential information relating to security threats.

[129] *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [63].

In making a decision about the possible harmful effects of disclosing information, consideration should be given to other sources of information, and how they might together form a 'mosaic'.[130] That is, while the information on its own may be harmless, when combined with other pieces of information, can generate a 'mosaic' that may harm the security of the Commonwealth, Territory or a State.

Note:

- Where s 1.13 applies and disclosure of the information could reasonably be expected to endanger the life or physical safety of a person, an agency or Minister may refuse to confirm or deny that they hold the information: see s 35(1)(e) and *Guideline Volume 3 of 6 Dealing with access applications*.

Security of the Commonwealth – s 1.13(2)

The security of the Commonwealth is defined under s 1.13(2) to include:

- matters relating to detecting, preventing or suppressing activities, whether within or outside Australia, that are subversive of, or hostile to, the interests of the Commonwealth or a country allied or associated with the Commonwealth[131] and
- the security of communications systems or cryptographic system of the Commonwealth or another country used for
    - the defence of the Commonwealth or a country allied or associated with the Commonwealth, or
    - the conduct of the international relations of the Commonwealth.[132]

For example, the release of information that reveals certain weaknesses in airport or airline security processes could cause damage to the security of the Commonwealth.

Security of the Territory or State – see s 1.13(3)

The security of the Territory of a State includes matters relating to detecting, preventing or suppressing activities within or outside the Territory or State, that are subversive of, or hostile to, the interests of the Territory of a State.

For example, the release of information relating to the Territory government's information security arrangements that could reasonably be expected to facilitate cyber threats may fall within the scope of s 1.13.

Note:

- The ordinary meaning of 'subvert' includes overturn, upset, or effect destruction or overthrow of. 'Hostile' means 'of an enemy', unfriendly or opposed.[133]
- Where security concerns are raised as part of a third party consultation process, agencies are encouraged to explain in their decision why they consider s 1.13 does not apply to the information being sought, including any expert advice that has been sought to confirm that there are no security implications.

[130] *Re McKnight and Australian Archives* [1992] AATA 225; *Prinn and Department of Defence (Freedom of Information)* [2016] AATA 445 [80]-[81]; *Francis and Australian Sports Anti-Doping Authority (Freedom of Information)* [2019] AATA 12 [177]-[178].
[131] FOI Act Sch 1, s 1.3(2)(a).
[132] FOI Act Sch 1, s 1.3(2)(b).
[133] *Farrell; Secretary, Department of Immigration and Border Protection (Freedom of Information)* [2017] AATA 409 [39].

Case study: *Canberra Metro Construction and Chief Minister, Treasury and Economic Development Directorate*[134]

A relevant third party sought review of the Chief Minister, Treasury and Economic Development Directorate's (CMTEDD) decision to disclose information relating to the electrical safety of the Canberra Light Rail. They objected to disclosure, including on the basis that it was contrary to the public interest information, because it would, or could reasonably be expected to, damage the security of the Commonwealth, the Territory or a State.

The Ombudsman found that disclosure of the information in issue was **not** contrary to the public interest, because the potential harm was not demonstrated to be reasonably based or highly likely. That is, there was no evidence to suggest that an attack on the light rail that could damage the security of the Commonwealth or Territory was anything more than a mere possibility.

The Ombudsman took into account further submissions provided by CMTEDD which outlined the consultation it had undertaken with various parts of ACT Government to assess the risk of disclosing the information in issue. Considerations included whether the project was included in the critical infrastructure list for the ACT. The Ombudsman also noted that the absence of security markers was not determinative in considering whether disclosing information would be expected to damage the security of the Territory.

6.17. Section 1.14 – law enforcement or public safety information

Background

Most FOI legislation includes added protections for law enforcement or public safety related information. These are designed to protect against harm to law enforcement investigations or threats to public safety being caused by information being released at a time where it would, for example, deprive the regulatory agency of some advantage in questioning, or being able to take timely action against individuals or organisations identified as of concern.

Overview

Section 1.14 provides that the disclosure of information is taken to be contrary to the public interest if it would, or could reasonably be expected to, affect law enforcement or public safety in any of the following ways:

- prejudice the investigation of a contravention or possible contravention of the law in a particular case
- identify the existence or identity of a confidential source of information in relation to the enforcement or administration of the law
- endanger a person's life or physical safety
- result in a person being subject to a serious act of harassment or intimidation
- prejudice a person's fair trial or the impartial adjudication of a matter before a court or tribunal
- prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law
- prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety
- endanger the security of a building, structure or vehicle
- prejudice a system or procedure for the protection of people, property or the environment
- facilitate a person's escape from lawful custody, or
- prejudice the wellbeing of a cultural or natural resource or the habitat of animals or plants.

[134] [2019] ACTOFOI 8 (5 June 2019).

Each of these possible outcomes, which are listed in s 1.14(1), are discussed in detail below.

Note:

- The 'law' includes both criminal and civil laws – that is, any Territory Act, subordinate law, other statutory instrument of a legislative nature, and the common law.[135] Relevant information should, however, have a connection with the criminal law or with processes of upholding/enforcing civil law.[136]
- For the purposes of s 1.14, 'law' also includes a 'law' of the Commonwealth, a State or a foreign country.[137] 'State' includes the Northern Territory.[138]
- For specific guidance on the phrase 'would, or could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

Section 1.14 also provides that the disclosure of information is taken to be contrary to the public interest if the information was:

- given in the course of an investigation of a contravention or possible contravention of the law if the information was given under compulsion under an Act that abrogated the privilege against self-incrimination[139]
    - Examples of potentially relevant legislation include:
        - *Environment Protection Act 1997* (ACT) s 150
        - *Gas Safety Act 2000* (ACT) s 58
        - *Legal Profession Act 2006* (ACT) s 523
        - *Tax Administration Act 1999* (ACT) s 87
- obtained, used or prepared for an investigation by an entity prescribed by regulation in the exercise of a function prescribed by regulation[140]
    - No entities or functions are currently prescribed.

Section 1.14 does **not**, however, apply to:

- information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law[141]
- information containing a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law[142]
- a report on the degree of success achieved in a program adopted by an agency for dealing with a contravention or possible contravention of the law[143]
- a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law or the law relating to corruption)[144]

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[135] *Legislation Act 2001* (ACT), Dictionary, Part 1, meaning of 'law'.
[136] *Re Gold and Australian Federal Police and National Crime Authority* [1994] AATA 382, citing Young CJ in *Accident Compensation Commission* v *Croom* (1991) 2 VR 322 [324].
[137] FOI Act Sch 1, s 1.14(5).
[138] *Legislation Act 2001* (ACT), Dictionary, Part 1, meaning of 'State'.
[139] FOI Act Sch 1, s 1.14(2).
[140] FOI Act Sch 1, s 1.14(3).
[141] Ibid Sch 1, s 1.14(4)(a). This exception only applies where there is an objective and authoritative finding that the scope of a law enforcement investigation has exceeded the limits imposed by law: *Isles and Queensland Police Service* [2017] QICmr 1 [21].
[142] Ibid Sch 1, s 1.14(4)(b).
[143] Ibid Sch 1, s 1.14(4)(c).
[144] Ibid Sch 1, s 1.14(4)(d).

- a report on a law enforcement investigation that has already been disclosed to the entity the subject of the investigation.[145]

Investigation of contravention of law – s 1.14(1)(a)

Section 1.14(1)(a) applies to information if its disclosure would or could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law. For example, it may apply to:[146]

- investigations of controlled activities under the *Planning and Development Act 2007* (ACT)
- investigations into breaches of the *Liquor Act 2010* (ACT), and
- misconduct investigations.

The words 'in a particular case' indicate that s 1.14(1)(a) only applies to current or ongoing investigations, not investigations that are merely a future, indeterminate possibility or investigations in general.[147] Section 1.14(1)(a) does **not** apply to closed investigations, as the disclosure of information cannot prejudice an investigation that has already finished.

Examples of situations where the disclosure of information may prejudice an investigation include where the disclosure of the information would enable the person subject to the investigation to construct defences, create alibis, tamper with evidence, or interfere with witnesses.[148] This could include witness statements, or other information that identifies suspects or victims.

Note:

- It is not enough for decision-makers to simply indicate that there is a current investigation on hand to which the information is relevant. It must be explained **why** prejudice is expected to result.

Identify confidential source – s 1.14(1)(b)

Section 1.14(1)(b) applies where the disclosure of information would, or could reasonably be expected to, identify the existence or identity of a confidential source of information in relation to the enforcement or administration of the law. For this provision to apply, the following three elements must be established:

- a person provided information on a confidential basis
- the information provided relates to the enforcement or administration of the law, and
- disclosure of the information would or could reasonably be expected to identify the existence or identity of the source.[149]

Information is provided on a 'confidential' basis if there is an express agreement that the identity of the person will be kept confidential or the surrounding circumstances indicate that there was an implied mutual understanding of confidentiality.[150] For example, where an agency provides an express assurance that the person's identity will be kept confidential, the person may be a confidential source.

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[145] Ibid Sch 1, s 1.14(4)(e).
[146] 'Law enforcement and public safety' (Web page, 21 October 2019)
[147] *Community and Public Sector Union and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 7 (14 November 2019) [32]; *Abbot Point Bulkcoal Pty Ltd and Department of Environment and Science; Mackay Conservation Group Inc (Third Party)* [2018] QICmr 26 [18]; *Parker and Australian Securities and Investments Commission (Freedom of Information)* [2016] AATA 767.
[148] *News Corporation v National Companies and Securities Commission* [1984] 5 FCR 88; *Swales and Department of Health* [2011] QICmr 5 [23].
[149] See also discussion in section 1.9 identities of people making disclosures
[150] *94HQWR and Queensland Police Service* [2014] QICmr 45 [18]-[21].

Factors that may be relevant in determining whether there was a mutual understanding of confidentiality include, for example:

- the nature and sensitivity of the information provided
- whether the person who provided the information requested their identity not be disclosed[151]
- the circumstances in which the information was provided (for example, through a 'tip-off' online system).[152]

Endanger life or physical safety – s 1.14(1)(c)

Section 1.14(1)(c) applies where the disclosure of information would, or could reasonably be expected to, endanger a person's life or physical safety.

This provision is confined to 'physical safety' and does not extend to psychological harm.[153]

For section 1.14(1)(c) to apply, the expectation of endangerment to life or physical safety must arise as a result of disclosure of the information, rather than from other circumstances.[154]

The past conduct of the applicant and nature of the information in question may be relevant in determining whether disclosure of the information could reasonably be expected to endanger a person's life or physical safety. For example, there may be a reasonable expectation of endangerment where the applicant who has a history of violence and who has previously acted aggressively towards agency staff requests access to information such as the identities of agency staff that he or she has dealt with.[155]

Note:

- When considering this factor, it is important decision-makers review all relevant evidence before them. It is not sufficient for decision-makers to automatically accept the views of the person claiming to be in danger.
- The equivalent exemption in the Commonwealth *Freedom of Information Act 1982* has been upheld in circumstances where the third party was a main prosecution witness during the applicant's criminal trial for which he was still in jail. The third party gave evidence that he had written threatening letters to her and her friends and that she was scared of him.[156]

Serious harassment or intimidation – s 1.14(1)(d)

Section 1.14(1)(d) applies where disclosure of the information would, or could reasonably be expected to, result in a person being subject to a serious act of harassment or intimidation. As the FOI Act does not define the words 'serious', 'harass' and 'intimidate', these terms should be given their ordinary meaning:[157]

- 'harass' means trouble, disturb or torment[158]
- 'intimidate' means induce fear or force a person to take or not take some action by inducing fear
- 'serious' means more than merely competitive, disparaging, unpleasant, irksome or annoying.

[151] *Anthony Mearrick and Australian Skills Quality Authority* [2016] AICmr 93.
[152] *NM and Department of Human Services (Freedom of Information)* [2017] AICmr 134.
[153] *Callejo and Department of Immigration and Citizenship* [2010] AATA 244 [195].
[154] *6ZJ3HG and Department of Environment and Heritage Protection; OY76VY (Third Party)* [2016] QICmr 8 [49].
[155] *'M' and WA Country Health Service – South West* [2012] WAICmr 8.
[156] *Re Ford and Child Support Registrar* [2006] AATA 283.
[157] *J6Q8CH and Department of Justice and Attorney-General* [2018] QICmr 49 [24]-[25].
[158] A reasonable expectation of a single act of serious harassment is sufficient; it is not necessary for there to be a reasonable expectation of persistent or repeated conduct: *Scott and South Burnett Regional Council* [2009] QICmr 25 [125].

For s 1.14(1)(d) to apply, the expectation of serious harassment or intimidation must arise as a result of disclosure of the information, rather than from other circumstances.[159]

The past conduct of the applicant and nature of the information in question may be relevant in determining whether disclosure of the information could reasonably be expected to result in a person being subject to a serious act of harassment or intimidation. For example, there may be a reasonable expectation of serious harassment or intimidation where the applicant has:

- previously threatened to harm, and acted in a hostile manner towards, agency staff[160]
- previously placed information released under the FOI Act on a website accompanied by offensive and abusive remarks about individuals,[161] or
- a history of making unsubstantiated complaints or threats of legal action and engaging in hostile communications with agency staff.[162]

The Ombudsman is of the view that this factor can be relevant even where only a single act of serious harassment or intimidation is expected to result from disclosure of the information.

Prejudice to a fair trial or impartial adjudication – s 1.14(1)(e)

Section 1.14(1)(e) applies where disclosure of the information would, or could reasonably be expected to, prejudice a person's fair trial or the impartial adjudication of a matter before a court or tribunal.

Circumstances where this provision may apply include where disclosure of the information may:

- reduce the effectiveness of a court or tribunal's power to make suppression or non-publication orders[163]
- reveal inadmissible information to potential jurors[164]
- reveal information that may enable a witness to alter his or her evidence, or undermine the witness' credibility by creating the perception he or she may have altered his or her evidence[165]
- prematurely reveal an aspect of a party's case that the party would not otherwise be required to disclose in preparation for the trial or adjudication.[166]

Prejudice to law enforcement methods or procedures – s 1.14(1)(f)

Section 1.14(1)(f) applies where disclosure of the information would, or could reasonably be expected to, prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law. The purpose of this provision is to maintain the integrity of law enforcement methods or procedures.

There must be an identifiable lawful method or procedure used to prevent, detect, investigate or deal with a contravention or possible contravention of the law.

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[159] *J6Q8CH and Department of Justice and Attorney-General* [2018] QICmr 49 [24]-[25]; *Watson v Office of Information Commissioner Qld & Ors* [2015] QCATA 95 [19].
[160] Ibid.
[161] *Mathews and Department of Transport and Main Roads* [2014] QICmr 37; *Mathews and Department of Transport and Main Roads* [2013] QICmr 22
[162] *Toogood and Cassowary Coast Regional Council* [2018] QICmr 13 [25]
[163] *Bradford and Australian Federal Police (Freedom of information)* [2016] AATA 775 [34].
[164] *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [136].
[165] *JCL v Victoria Police (General)* [2012] VCAT 1060 [55]-[56].
[166] *HU and Australian Federal Police* [2015] AICmr 83.

Section 1.14(1)(f) does **not** apply to unlawful methods or procedures, such as unauthorised telephone intercepts. It will also generally **not** apply to routine procedures or methods which are already known to the public or documents containing general information.

Section 1.14(1)(f) is more likely to apply to information that may reveal a secret or covert method or procedure, as the disclosure of information about an overt or well-known method or procedure will be unlikely to prejudice the method or procedure.

- For example, s 1.14(1)(f) may apply to information about police rostering which, if disclosed, could result in the use of the information to further criminal activity and subvert the proper operation of the law.[167]

Note:

- Section 1.14(1)(f) should be read in conjunction with ss 1.14(4)(b) and (c), which limit the application of s 1.14 in relation to information revealing programs for dealing with contraventions or possible contraventions of the law.

Prejudice to public safety methods or procedures – s 1.14(g)

Section 1.14(1)(g) applies where disclosure of the information would, or could reasonably be expected to, prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety.

'Public safety' should not be construed narrowly and is not confined to safety from violations of the law and breaches of the peace. It may extend, for example, to aircraft safety or safety in emergencies such as bushfires or floods.[168]

Examples of methods or procedures for protecting public safety may include, for example, weapons licencing schemes[169] or legislative procedures under the *Work Health and Safety Act 2011*.[170]

The Ombudsman is of the view that s 1.14(g) is not restricted to information that outlines methods or processes for protecting public safety, but extends to any information the disclosure of which could prejudice a public safety method or procedure.[171]

Endanger security of building, structure or vehicle – s 1.14(h)

Section 1.14(h) applies where disclosure of the information would, or could reasonably be expected to, endanger the security of a building, structure or vehicle.

For example, s 1.14(h) may apply where the information could reveal the best point to attempt to access a building unlawfully,[172] or otherwise reveal inadequacies in the security arrangements of a building, structure or vehicle.[173]

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[167] *Harris and Queensland Police Service* [2014] QICmr 10 [15], referring to *The Gold Coast Bulletin and Department of Police* (Unreported, Queensland Information Commissioner, 23 December 2010).
[168] *Apache Northwest Pty Ltd v Department of Mines and Petroleum (No 2)* [2011] WASC 283 [142]-[151]; *Re Parisi and Australian Federal Police and Queensland* [1987] AATA 395 [25]; *Hanes v Australian Health Practitioner Regulation Agency (Review and Regulation)* [2013] VCAT 1270 [48].
[169] *Stanway and Queensland Police Service (No 2)* [2018] QICmr 5.
[170] *Australian Workers' Union and Queensland Treasury; Ardent Leisure Limited (Third Party)* [2016] QICmr 28.
[171] *Canberra Metro Construction and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 8 (5 June 2019).
[172] *NK & DK and Pine Rivers Shire Council; Another (Third Party)* [2006] QICmr 18.
[173] *Queensland Newspapers Pty Ltd and Queensland Police Service; Third Parties* [2014] QICmr 27 [100].

System or procedure for protection of people, property or environment – s 1.14(i)

Section 1.14(i) applies where disclosure of the information would, or could reasonably be expected to, prejudice a system or procedure for the protection of people, property or the environment.

For example, s 1.14(i) may apply in circumstances where the disclosure of the information may:

- reveal methods for the monitoring or assessment of offenders that would enable an offender to modify their behaviour to avoid detection or achieve a favourable assessment[174]
- deter persons from providing information relevant to procedures under the *Mental Health Act 2015* designed to protect the safety of persons with a mental disorder or mental illness or the community,[175] or
- discourage persons from providing information to emergency services.[176]

Where the relevant information is, however, publicly available, or there is an express intention stated by the relevant organisation that this is the case, the information would be unlikely to be within the scope of s 1.14(i).[177]

Case study: *Department of Defence and Health Directorate*[178]

The applicant sought review of the agency's decision to disclose information relating to the applicant's site investigations and human health risk assessments of contamination.

The Ombudsman considered whether disclosure of the information would prejudice a system or procedure for the protection of people, property or the environment (Schedule 1, s 1.14(1)(i)).

The Ombudsman found that disclosure of the information was not contrary to the public interest because while the information did identify a system or procedure for the protection of people, property or the environment, the legislation under which the information was provided to the Health Directorate included an express intention that such information is accessible to the community.

Facilitate escape from lawful custody – s 1.14(j)

Section 1.14(j) applies where disclosure of the information would, or could reasonably be expected to, facilitate a person's escape from lawful custody. Lawful 'custody' could include:

- being remanded in custody under a territory law or a law of the Commonwealth or a State (including the Northern Territory), or
- being detained at a place under the *Mental Health Act 2015* (ACT).[179]

For example, s 1.14(1)(j) may apply where disclosure of the information would reveal weaknesses in prison security or police custody arrangements that may facilitate a person's escape from custody. It does not apply to information that would be generally known to persons in custody, such as information about general systems for moving prisoners within a prison.[180]

Prejudice cultural or natural resource or habitat – s 1.14(k)

Section 1.14(k) applies where disclosure of the information would, or could reasonably be expected to, prejudice the wellbeing of a cultural or natural resource or the habitat of animals or plants.

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[174] *Ross and Department of Justice and Attorney-General* [2017] QICmr 46 [15].
[175] *Z'Quessah Bosch v Office of the Information Commissioner & Anor* [2016] QCATA 191.
[176] *94NNEZ and Department of Community Safety* (310324) (29 November 2010).
[177] *Department of Defence and Health Directorate* [2019] ACTOFOI 11 (17 June 2019).
[178] Ibid.
[179] *Crimes (Sentence Administration) Act 2005* (ACT), s 80(3).
[180] *Prisoners' Legal Service Inc and Queensland Corrective Services Commission* [1997] QICmr 4.

The terms 'cultural or natural resource' and 'habitat' are not defined in the FOI Act. The *Heritage Act 2004* (ACT), however, indicates that a 'natural resource' is a resource that forms part of the natural environment, such as the native flora, native fauna, geological formations or any other naturally occurring element at a particular location,[181] whereas a 'cultural resource' is a resource created or modified by human action, or associated with human activity or a human event.[182]

The *Nature Conservation Act 2014* (ACT) defines 'habitat' as an area:

- occupied (continuously, periodically or occasionally) by an organism or group of organisms, or
- once occupied (continuously, periodically or occasionally) by an organism, or group of organisms, and into which organisms of that kind have the potential to be reintroduced.[183]

7. Schedule 2 – factors favouring disclosure or nondisclosure

7.1. Overview

If the information under consideration is **not** an identified class of information listed in Schedule 1, decision-makers will need to assess whether or not it is appropriate to release the information and apply the public interest test in s 17.

- Schedule 2, s 2.1 provides a non-exhaustive list of public interest factors **favouring disclosure** – that is factors that where relevant may add weight to a decision to grant access to government information
- Schedule 2, s 2.2 provides a non-exhaustive list of public interest factors **favouring nondisclosure** – that is factors that where relevant may add weight to a decision to refuse access to government information.

Each factor needs to be considered for each part of the information that it is relevant to, rather than the information as a whole.

Guidance on each of these factors to assist decision-makers with their assessment process is provided below—see:

- Section 8 - Section 2.1, Schedule 2 – factors favouring disclosure in the public interest
- Section 9 - Section 2.2, Schedule 2 – factors favouring nondisclosure in the public interest

In addition, common terms used in Schedule 2 when defining the scope of these categories under the FOI Act are described in s 5 Common terms and phrases.

[181] *Heritage Act 2004* s 10A.
[182] *Heritage Act 2004* s 10B.
[183] *Heritage Act 2004* Dictionary, definition of 'Habitat'. See also ss 11 and 13.

Note:

- Agencies are reminded that s 10 specifies that the FOI Act is **not** intended to prevent or discourage agencies from publishing or giving access to government information. As a result, Schedule 2 does **not** prohibit agencies from releasing information where one or more of the factors set out in s 2.2 are relevant where agencies choose to do so.
- The lists in Schedule 2 are not exhaustive, and other factors may be relevant when making a decision. Decision-makers should, however, make sure that they do not take into account any factors identified as irrelevant factors under the FOI Act.
- Explaining **why** and **how** each factor applies to each part of the information will assist both the decision-maker in balancing the factors and the public in understanding how the decision was made.
- For additional guidance on applying s 17, see *Guideline 3 of 6 Dealing with access applications.* Additional guidance on how to balance competing public interest considerations is also provided below—see Balancing the public interest.

8. Schedule 2, section 2.1 – factors favouring disclosure in the public interest

8.1. Overview

The first step in applying the public interest test is to identify any factors favouring disclosure that apply in relation to the information.

A list of the most 'commonly applicable relevant factors'[184] is included in s 2.1 of Schedule 2 of the FOI Act, and these factors are explained below. This list is not, however, exhaustive and a decision-maker will need to identify and consider all factors that may be relevant to the public interest, including factors not listed in Schedule 2.

As there is limited case law available regarding such pro-disclosure factors, examples of scenarios where such factors have been considered relevant in Ombudsman FOI reviews have been provided. It is anticipated that this section of the guideline will expand over time.

Note:

- Decision-makers are encouraged to clearly identify which factors favouring disclosure apply and the weight given to each factor (e.g. low, significant), beyond the pro-disclosure bias of the FOI Act.
- This will be important, particularly where a third party is involved who objects to release, so that they can understand how the decision-maker has balanced factors favouring disclosure and factors favouring nondisclosure.
- It is noted that some of these factors are likely to overlap and more than one may apply in relation to a particular case.

8.2. Section 2.1(a)(i) – promote open discussion and accountability

A factor favouring disclosure under s 2.1(a)(i) is that disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.

[184] Explanatory Statement, *Freedom of Information Bill 2016* (ACT) 13.

For example, this could include where disclosure would:

- increase public knowledge and understanding of government processes
- enhance accountability regarding government funding decisions
- enhance transparency regarding government appointments

Scenarios where this factor has been considered relevant in Ombudsman review decisions include where the application sought access to:

- sexual harassment complaints and subsequent investigations
- documents relating to land negotiations between the ACT and the Commonwealth governments
- the results of a governance scan of ACT Health completed by a consultancy firm
- documents regarding the expansion of Canberra casino
- community consultation conducted by the ACT government
- documents related to the Canberra Light Rail project safety audit and inspections
- emails about a third party provider engaged by ACT Health to provide medical imaging services.

8.3. Section 2.1(a)(ii) – contribute to positive and informed debate

A factor favouring disclosure under s 2.1(a)(ii) is that disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of public interest.

For example, this could include where disclosure would:

- provide information which critically assesses a new government project or policy proposal
- provide contextual information regarding a government decision-making process

Scenarios where this factor has been considered relevant in Ombudsman review decisions include where the application sought access to:

- documents relating to land negotiations between the ACT and the Commonwealth governments
- briefing notes prepared for the Select Committee on Estimates
- documents regarding the expansion of Canberra casino
- community consultation conducted by the ACT government
- documents related to the Canberra Light Rail project safety audit and inspections
- emails about a third party provider engaged by ACT Health to provide medical imaging services
- information relating to contamination in the Jervis Bay area and human health risk assessments

Note:

- The Ombudsman considers that this factor may apply even where the information sought relates to a particular period in time and may now be out of date—see discussion of the relevance of interim project reports in *Canberra Metro Construction and Chief Minister, Treasury and Economic Development Directorate*.[185]
- The Ombudsman considers that the public interest in preliminary test results being disclosed is not necessarily diminished by the release of the final results.[186]

[185] [2019] ACTOFOI 8 (5 June 2019).
[186] *Department of Defence and Health Directorate* [2019] ACTOFOI 11 (17 June 2019) [54].

8.4. Section 2.1(a)(iii) – inform the community of government operations

A factor favouring disclosure under s 2.1(a)(iii) is that disclosure could reasonably be expected to 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.

For example, this could include where disclosure would

- inform the community in relation to how a regulatory agency undertakes its functions.

Scenarios where this factor has been considered relevant in Ombudsman review decisions include where the application sought access to:

- emails about a third party provider engaged by ACT Health to provide medical imaging services

8.5. Section 2.1(a)(iv) – oversight of expenditure of public funds

A factor favouring disclosure under s 2.1(a)(iv) is that disclosure could reasonably be expected to ensure effective oversight of expenditure of public funds.

For example, this could include where disclosure would:

- outline how public funds have been spent
- explain how tender processes were carried out

Scenarios where this factor has been considered relevant in Ombudsman review decisions include where the application sought access to:

- the results of a governance scan of ACT Health completed by a consultancy firm
- documents related to the Canberra Light Rail project safety audit and inspections
- emails about a third party provider engaged by ACT Health to provide medical imaging services

8.6. Section 2.1(a)(v) – assist inquiry in deficiencies of conduct or administration

A factor favouring disclosure under s 2.1(a)(v) is that disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official.

For example, this could include where disclosure would:

- reveal allegations received about an agency
- explain the results of an investigation into conduct breaches by an ACT public servant

Scenarios where this factor has been considered relevant in Ombudsman review decisions include where the application sought access to:

- emails about a third party provider engaged by ACT Health to provide medical imaging services

8.7. Section 2.1(a)(vi) – reveal improper conduct

A factor favouring disclosure under s 2.1(a)(vi) is that disclosure could reasonably be expected to reveal or substantiate that an agency or public official has engaged in misconduct or negligent, improper or unlawful conduct or has acted maliciously or in bad faith.

For example, this could include where disclosure would:

- reveal dealings between an agency employee and a member of the public that were improper
- demonstrate a serious failure of a public servant to comply with agency policies

This factor has not yet been considered relevant in any Ombudsman review decisions. It is considered that there would, however, need to be some evidence that an agency or public official had engaged in such conduct, or acted in such a way, for this to apply.

8.8. Section 2.1(a)(vii) – advance fair treatment of individuals

A factor favouring disclosure under s 2.1(a)(vii) is that disclosure could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government.

This factor has not yet been considered relevant in any Ombudsman review decisions.

The Queensland Information Commissioner has, however, noted, in the context of their similar public interest factor, that there is no requirement for a decision-maker to ensure that the applicant be *subjectively* satisfied that he or she received fair treatment in order for this to apply.[187]

8.9. Section 2.1(a)(viii) – reveal reason for government decision

A factor favouring disclosure under s 2.1(a)(viii) is that disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.

Revealing the reason for a government decision can serve to provide transparency and accountability to the decision-making process.

Scenarios where this factor has been considered relevant in Ombudsman review decisions include where the application sought access to:

- sexual harassment complaints and subsequent investigations
- documents relating to land negotiations between the ACT and the Commonwealth governments
- the results of a governance scan of ACT Health completed by a consultancy firm
- investigations reports
- access to agency documents about the applicant and her tenancy
- information relating to the nomination of a third party for honorary appointment
- documents regarding the expansion of Canberra casino

[187] *Gapsa and Department of Transport and Main Roads* (Unreported, Queensland Information Commissioner, 6 September 2013) [20].

Note:

- In some circumstances, the principles of transparency and accountability may not require full disclosure of all materials. This was discussed in the Ombudsman FOI review case of *AK and the Education Directorate.*[188]
- The Ombudsman found that the applicant was provided with sufficient information relating to the complaint investigation process, which outlined how the investigation was conducted, and how the conclusions and recommendations were reached. As a result, the principles of transparency and accountability were given less weight in this review.

8.10.Section 2.1(a)(ix) – reveal incorrect information

A factor favouring disclosure under s 2.2(a)(ix) is that disclosure could reasonably be expected to reveal that the information was incorrect, out-of-date, misleading, gratuitous, unfairly subjective or irrelevant.

This factor has not yet been considered relevant in any Ombudsman review decisions. It is considered that there would, however, need to be some evidence that the information sought was in some way incorrect, out-of-date, misleading, gratuitous, unfairly subjective or irrelevant for this factor to apply.

8.11. Section 2.1(a)(x) – contribute to protection of the environment

A factor favouring disclosure under s 2.1(a)(x) is that disclosure could reasonably be expected to contribute to the protection of the environment.

For example, this could include where disclosure would:

- provide environmental management information for a particular area
- explain the environmental risks associated with a particular activity or proposal

Scenarios where this factor has been considered relevant in Ombudsman review decisions include where the application sought access to:

- information relating to contamination in the Jervis Bay area and human health risk assessments
- a draft site audit report and draft environmental management plan

8.12. Section 2.1(a)(xi) – reveal environmental or health risks

A factor favouring disclosure under s 2.1(a)(xi) is that disclosure could reasonably be expected to reveal environmental or health risks or measures relating to public health and safety.

For example, this could include where disclosure would:

- provide environmental management information for a particular area
- explain the health risks associated with a particular activity or proposal
- contribute to improvements in food safety or health policy arrangements
- improve public safety by identifying community behaviour of concern.

[188] [2019] ACTOFOI 4 (5 February 2019) [35]-[38].

Scenarios where this factor has been considered relevant in Ombudsman review decisions include where the application sought access to:

- information relating to contamination in the Jervis Bay area and human health risk assessments
- a draft site audit report and draft environmental management plan.

Note:

- The Ombudsman is of the view that this factor could still be relevant even where information disclosed is several years old, but reveals potential environmental or health risks, or risks relevant at that time.

8.13. Section 2.1(a)(xii) – contribute to maintenance of peace and order

A factor favouring disclosure under s 2.1(a)(xii) is that disclosure could reasonably be expected to contribute to the maintenance of peace and order.

For example, this could include where disclosure would:

- explain arrangements in place to promote community safety

This factor has not yet been considered relevant in any Ombudsman review decisions.

Note:

- The Queensland Information Commissioner has, however, noted, in the context of their similar public interest factor, that it was **not** relevant in a case where an applicant was seeking access to various documents relating to weapons licensing and a domestic dispute involving the applicant. It was noted that the information, if available, was already available to the relevant law enforcement agencies, and there was no information available to identify how disclosing it to the applicant would further contribute to peace and good order.[189]

8.14. Section 2.1(a)(xiii) – contribute to the administration of justice

A factor favouring disclosure under s 2.1(a)(xiii) is that disclosure could reasonably be expected to contribute to the administration of justice generally, including procedural fairness.

For example, this could include where disclosure would:

- enhance community confidence in the justice system
- enhance accountability in terms of the administration of justice
- ensure an applicant is given the opportunity to respond to allegations made against them.

One scenario where this factor has been considered relevant in an Ombudsman review decision includes where the application sought access to a complaint investigation preliminary assessment report. In this case, as the applicant had been given the opportunity to be heard and the complaint was not proceeding further, the Ombudsman considered that disclosure of the information sought would not contribute to the administration of justice, either generally or for the applicant.[190]

[189] *3FG6LI and Queensland Police Service* [2014] QICmr 32.
[190] See 'AK' and Education Directorate [2019] ACTOFOI 4 (5 February 2019).

8.15. Section 2.1(a)(xiv) – contribute to administration of justice for a person

A factor favouring disclosure under s 2.1(a)(xiv) is that disclosure could reasonably be expected to contribute to the administration of justice for a person.

For example, this could include where disclosure would:

- assist the applicant to identify a cause of action

A scenario where this factor has been considered relevant in an Ombudsman review decision includes:

- access to CCTV footage for an incident at the Alexander Maconochie Centre[191]

8.16. Section 2.1(a)(xv) – contribute to the enforcement of criminal law

A factor favouring disclosure under s 2.1(a)(xv) is that disclosure could reasonably be expected to contribute to the enforcement of the criminal law.

For example, this could include where disclosure would:

- reveal substantiated claims regarding an individual

This factor has not yet been considered relevant in any Ombudsman review decisions.

8.17. Section 2.1(a)(xvi) – contribute to innovation and facilitate research

A factor favouring disclosure under s 2.1(a)(xvi) is that disclosure could reasonably be expected to contribute to innovation and the facilitation of research.

For example, this could include where disclosure would:

- reveal results or discussions that would prompt further research
- better inform the community regarding current analysis of a particular research topic

This factor has not yet been considered relevant in any Ombudsman review decisions.

Note:

- It is noted that the Queensland Information Commissioner gave low weight to this type of factor in a case where the relevant research was not yet completed and relatively inconclusive.[192]
- For specific guidance on the term 'contribute' see s 5 Common terms and phrases.

8.18. Section 2.1(b) – information is personal information of the applicant

A factor favouring disclosure under s 2.2(b) is that the information is personal information of:

- the person making the request
- a child, and the information is to be given to the child's parent or guardian and disclosure is reasonably considered to be in the best interests of the child, or

[191] (AMC): *'AC' and Justice and Community Safety Directorate* [2018] ACTOFOI 5 (10 October 2018).
[192] *Abbot and Marohasy and Central Queensland University* [2017] QICmr 54.

- a deceased person, and the person making the request for the information is an eligible family member of the deceased person (see s 2.2(b)(iii) – could impact a deceased person's privacy).

For example, this could include where an applicant is seeking:

- copies of applications made by them to an agency
- reports about them held by an agency
- allegations made about them to an agency

Scenarios where this factor has been considered relevant in Ombudsman review decisions include where the application sought access to:

- a complaint investigation preliminary assessment report

Note:

- Where the information relates to a child, for the public interest test to apply and this factor to be considered relevant, the information would need not to be within scope of s 844 of the CYP Act and deemed to be contrary to public interest information—see discussion at s 6.5 Section 1.3 information which is prohibited from disclosure by law

9. Schedule 2, section 2.2 – factors favouring nondisclosure in the public interest

9.1. Overview

The second step in applying the public interest test is to identify any factors favouring nondisclosure that apply in relation to the information.

A list of the most 'commonly applicable relevant factors'[193] is included in s 2.2 of Schedule 2 of the FOI Act, and these factors are explained below. This list is not, however, exhaustive and a decision-maker will need to identify and consider all factors that may be relevant to the public interest, including factors not listed in Schedule 2.

Note:

- Decision-makers are encouraged to clearly identify which factors favouring nondisclosure apply and the weight given to each factor (e.g. low, significant). This will be critical, particularly where access is not granted, so that the applicant can understand how the decision-maker has balanced factors favouring disclosure and factors favouring nondisclosure.

9.2. Section 2.2(a)(i) – prejudice collective responsibility of Cabinet or of members to the Assembly

A factor favouring nondisclosure under s 2.2(a)(i) is that disclosure *could reasonably be expected to prejudice* the collective responsibility of Cabinet or the individual responsibility of members to the Assembly.

[193] Explanatory Statement, *Freedom of Information Bill 2016* (ACT) 13.

Background

The convention of the 'collective responsibility of Cabinet' is an important element of the Australian system of government.[194] It means that Ministers are collectively responsible for any decision made by Cabinet and are expected to give public support to Cabinet decisions, even if the Minister opposed it within Cabinet. As a result, Cabinet deliberations are confidential so that members of Cabinet can freely exchange differing views and at the same time Cabinet can present a united front in relation to any decision made.[195]

The 'individual responsibility of members to the Assembly' means members are required to answer to the Assembly for their conduct, and in particular Ministers are required to answer to the Assembly in relation to the administration of their directorates.[196]

Overview

Section 1.6 provides that disclosure of the information is taken to be contrary to the public interest if it is Cabinet information—see discussion at s 1.6 Cabinet information.

There may, however, be information related to Cabinet processes, which is outside the scope of section 1.6, but disclosure of which may prejudice:

- the collective responsibility of Cabinet, or
- the individual responsibility of members to the Assembly.

Examples

This could include where disclosure:

- would reveal a Minister's personal views in relation to a Cabinet decision.[197]

Note:

- For specific guidance on the phrase 'could reasonably be expected to' and the term prejudice see s 5 Common terms and phrases.

9.3. Section 2.2(a)(ii) – prejudice the individual's right to privacy or any other right

A factor favouring nondisclosure under s 2.2(a)(ii) is that disclosure *could reasonably be expected* to *prejudice* the protection of an individual's right to privacy or any other right under *Human Rights Act 2004* (HR Act).

[194] *Commonwealth v Northern Land Council* [1993] HCA 24; 176 CLR 604 [615].
[195] Ibid [628].
[196] *FAI Insurances Ltd v Winneke* [1982] HCA 26; 151 CLR 342 [364].
[197] *Commonwealth v Northern Land Council* [1993] HCA 24; 176 CLR 604 [627]; *Commonwealth of Australia v Construction, Forestry, Mining & Energy Union* [2000] FCA 453; 98 FCR 31 [43]; *Toomer and Department of Agriculture, Fisheries and Forestry* [2003] AATA 1301 [145]; *Department of State Development v Pisoni* [2017] SADC 34 [9].

Note:

- If this factor applies, it may be necessary to consult the affected individual before deciding to give access to this information (see s 38) – see *Guideline Volume 3 of 6 Dealing with access applications*.
- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

Overview

Section 1.4 provides that disclosure of the information is taken to be contrary to the public interest if it would involve the unreasonable disclosure of *sensitive* information about any individual (including a deceased person)—see discussion at s 1.4 Sensitive information.

There may, however, be other *personal i*nformation out of scope of s 1.4, disclosure of which may, nevertheless, prejudice an individual's right to privacy—or other rights—under the HR Act.

These rights are discussed below in more detail, with more specific guidance provided in terms of the right to privacy.

Note:

- Where the information being considered is personal information of child, s 2.2(b)(i) may also be a relevant factor against disclosure.

Right to privacy

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.[198]

As a result, when deciding whether s 2.2(a)(ii) is relevant to the information being considered, decision-makers need to consider whether disclosure could reasonably be expected to result in a breach of privacy legislation.

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 (TPPs) in Schedule 1 of the IP Act.

- For example, TPP 6 provides that an agency must not use or disclose personal information about an individual that was collected for a particular purpose for another purpose without consent, or unless one of the exceptions in TPP 6.2 or 6.3 apply.[199]

Further guidance regarding privacy legislation applicable in the ACT is available on the Office of the Australian Information Commissioner's website.

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

[199] The exceptions in TPP 6.2 and 6.3 include where disclosure is for a directly related purpose (in the case of sensitive information) or related purpose (for personal information); where it is required or authorised by or under law or a court or tribunal order; where a 'permitted general situation' exists (IP Act, s 19); or where the information is reasonably necessary for 1 or more enforcement-related activities conducted by, or on behalf of, an enforcement body.

Note:

- Only 'individuals'—that is, natural (non-deceased) persons—have a right to privacy.[200]
- Where the information being considered is personal information of a deceased person, s 2.2(b)(iii) may also be a relevant factor against disclosure.
- The definition of personal information does **not** include personal health information about an individual, which is defined under the *Health Records (Privacy and Access) Act 1997* (ACT). This Act includes separate provisions for requesting access, and making decisions, to disclose such sensitive health information.[201]
- In *Alistair Coe and Health Directorate*[202] *and Master Builders Association of the ACT and Chief Minister, Treasury and Economic Development Directorate*,[203] the Ombudsman has, however, taken the view that in some circumstances, prejudice to a *general* right to privacy can be a public interest factor favouring nondisclosure. This will depend on the facts of the situation such as consideration of what information is already available to the applicant.

Balancing privacy considerations and the pro-disclosure bias

There is generally a very strong public interest in protecting an individual's right to privacy, but depending on the circumstances the extent of the prejudice expected to result from disclosure can be diminished.

In considering whether the disclosure of information could reasonably be expected to prejudice the protection of an individual's right to privacy, matters for the information officer to consider include:[204]

- the extent to which the information is well-known or publicly available[205]
- the nature of the information[206]
- the circumstances in which the agency or Minister collected the information, and in particular whether it was provided on a confidential basis[207]
- any detriment that disclosure may cause to the person to whom the information relates[208]
- any opposition to disclosure of the information expressed or likely to be held by that person
- the fact that restrictions cannot be placed on the use or dissemination of information released under the FOI Act[209]

[200] *Legislation Act 2001*, Dictionary, Part 1, definition of 'individual'.
[201] For more information see *Guideline 3 of 6 Dealing with access applications*.
[202] [2018] ACTOFOI 4 (5 September 2018) [44].
[203] [2018] ACTOFOI 6 (2 November 2018) [42].
[204] *'FG' and National Archives of Australia* [2015] AICmr 26 [47]-[48].
[205] *WL1T8P and Queensland Police Service* [2014] QICmr 40 [44].
[206] *'AD' and Health Directorate* [2018] ACTOFOI 8 (27 November 2018) [48].
[207] Ibid; *'AB' and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 2 (23 August 2018) [52]. See also *Alistair Coe and ACT Health Directorate* [2018] ACTOFOI 4 (5 September 2018) [45].
[208] *Master Builders Association of the ACT and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 6 (2 November 2018) [44]. See also section 5 Common terms and phrases in relation to the meaning of 'prejudice'.
[209] *WL1T8P and Queensland Police Service* [2014] QICmr 40 [46].

The Ombudsman has considered s 2.2(a)(ii) relevant in the context of possible disclosure of the details of:

- an informant who provided information about a medical condition alleged to affect the applicant's ability to drive[210]
- detainees involved in an incident at the AMC and their personal information[211]
- the names of witnesses and statements given as part of a workplace code of conduct complaint investigation.[212]

This factor was, however, given little weight in terms of disclosure of an individual's name where the person involved was not acting in a personal or private capacity, but rather representing his firm in business dealings with the ACT Government.[213] A similar approach was taken in the case of *Dentsu X and Chief Minister, Treasury and Economic Development Directorate*.[214] See also should the names of agency staff be disclosed below.

Assessing joint personal-information

In the case of *'AD' and Health Directorate,*[215] the Ombudsman considered what approach to take where the information sought comprises joint information, rather than the sole personal information of the applicant. The Ombudsman found that in this case the applicant's personal information was so intertwined with the personal information of the other individuals that the report would lose its meaning and the context if the personal information of other individuals were removed.[216]

A similar approach was taken in the case of *'AE' and Health Directorate*.[217]

Can I take into account evidence of likely use for information?

The Ombudsman considers that an applicant's intended or likely use or dissemination of the information may be taken into account for the limited purpose of determining whether disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy. This is because the FOI Act is intended to be administered with a pro-disclosure bias.[218]

Section 17(2)(f) provides that decision-makers must not take into account an applicant's reason for seeking access to the information. This should therefore not be interpreted as requiring decision-makers to assume disclosure of the information will be to the 'world at large'. Where there is evidence that the applicant does not intend or is unlikely to widely disseminate the information, disclosure of the information may be less likely to prejudice the protection of an individual's right to privacy.[219]

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[210] *'AB' and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 2 (23 August 2018).
[211] *'AC' and Justice and Community Safety Directorate* [2018] ACTOFOI 5 (10 October 2018).
[212] *'AK' and Education Directorate* [2019] ACTOFOI 4 (5 February 2019).
[213] *Alistair Coe and ACT Health Directorate* [2018] ACTOFOI 4 (5 September 2018).
[214] [2019] ACTOFOI 7 (24 April 2019).
[215] [2018] ACTOFOI 8 (27 November 2018).
[216] Ibid [41].
[217] [2018] ACTOFOI 9 (27 November 2018).
[218] FOI Act, s 9.
[219] *'FG' and National Archives of Australia* [2015] AICmr 26 [47]-[48]; *Marke v Department of Justice and Regulation* [2019] VCAT 479 [45]; *Victoria Police v Marke* (2008) 23 VR 223.

Should the names of agency staff be disclosed?

The disclosure of information about agency or Ministerial staff will **not** generally be considered to prejudice the protection of the individual's right to privacy where the information is wholly related to the individual's routine day-to-day work activities.[220]

The definition of 'personal information' in the Dictionary to the FOI Act provides that for an individual who is or has been an officer of an agency or staff member of a Minister, personal information does **not include** information about the individual's position or functions as an officer or staff member, or things done by the individual in exercising functions as an officer or staff member. Disclosure of information that will only reveal that the individual is performing their work duties, is considered to contribute to accountability and transparency of government action and decision-making.

For public servant names to be withheld from disclosure on privacy grounds, the Ombudsman considers that:

- the information would need to be **not** wholly related to routine day-to-day work activities – for example, information about:
  - workplace complaints or investigations[221]
  - recruitment processes or performance reviews[222]
  - reasonable personal use of staff emails, devices or ICT resources[223]
  - reasons for personal leave
  - job applications and/or resumes.
- or there needs to be some additional reasons or **special circumstances** – for example, where disclosure could:
  - affect the personal safety of officers
  - lead to harassment or intimidation of officers
  - cause detriment to the family members of an officer
  - result in officers being targeted for abuse on the internet.

Note:

- The Ombudsman considers that alongside a public servant's name, it would not be unreasonable to release their position and work contact details (for example, work phone number and email address). It is, however, reasonable to redact more personal details such as dates and places of birth, signatures, personal email addresses and personal mobile telephone numbers.[224]
- Whether work mobile telephone numbers should be released is likely to depend on the circumstances—for example, whether the number is commonly released externally and/or included in the signature block of the officer.
- There is no blanket rule that the names of junior public servants can be withheld from disclosure. The commentary above applies to public servants at all levels.

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[220] *'AE' and Health Directorate* [2018] ACTOFOI 9 (27 November 2019) [49]-[51]; *G8KPL2 and Department of Health* [2013] QICmr 15 [30] and *Dentsu X and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 7 (24 April 2019) [38].

[221] *Hof and Rockhampton Regional Council* [2015] QICmr 8 at [49].

[222] *'BA' and Merit Protection Commissioner* [2014] AICmr 9 at [87].

[223] *Queensland Newspapers Pty Ltd and Ipswich City Council; Third Party* [2015] QICmr 12 [31]. In the ACT, agency staff may be permitted to make 'reasonable personal use' of agency ICT resources: see for example the *ACT Government Acceptable Use Policy*.

[224] *Daniella White and Canberra Health Services* [2019] ACTOFOI 9 (5 June 2019).

Other rights under HR Act

Parts 3 and 3A of the HR Act recognise various rights summarised as follows:

- the right to recognition as a person and equality before the law (s 8)
- the right to life (s 9)
- protection from torture and cruel, inhuman or degrading treatment (s 10)
- protection of the family and children (s 11)
- the right to not have privacy, family, home or correspondence unlawfully or arbitrarily interfered with or reputation unlawfully attacked (s 12)
- the right to freedom of movement (s 13)
- the right to freedom of thought, conscience, religion and belief (s 14)
- the right of peaceful assembly and freedom of association (s 15)
- the right to hold opinions without interference and freedom of expression (s 16)
- the right to take part in public life (s 17)
- the right to liberty and security of person (s 18)
- the right to humane treatment when deprived of liberty (s 19)
- rights surrounding the treatment of children in the criminal process (s 20)
- the right to a fair trial (s 21)
- the right to be presumed innocent until proved guilty according to law (s 22)
- the right to compensation for wrongful conviction (s 23)
- the right not to be tried or punished more than once (s 24)
- the right not to be held guilty of a criminal offence in circumstances where the conduct was not a criminal offence at the time it was engaged in (s 25)
- the right to freedom from forced work (slavery or servitude, forced or compulsory labour) (s 26)
- cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities (s 27), and
- the right to education (s 27A).

The ACT HRC has a collection of factsheets available on their website on each of the rights under the HR Act which may provide useful guidance for decision makers when assessing whether disclosure *could reasonably be expected* to *prejudice* one of these rights.

Note:
- The Ombudsman will add to these guidelines specific guidance on particular rights where our guidance is sought or issues are raised in FOI review applications.
- Where disclosure may prejudice the protection of the above rights, other factors favouring non
- disclosure may also be relevant. For example, circumstances in which the disclosure of information may prejudice the protection of the right to a fair hearing and the cultural rights of Aboriginal and Torres Strait Islander peoples may overlap with s 2.2(a)(v) and s 2.2(a)(xviii) respectively.[225]

9.4. Section 2.2(a)(iii) – prejudice security, law enforcement or public safety

A factor favouring nondisclosure under s 2.2(a)(iii) is that disclosure could reasonably be expected to prejudice security, law enforcement or public safety.

[225] FOI Act Sch 2, ss 2.2(a)(v) and (xviii).

Overview

Section 1.13 of Schedule 2 provides that disclosure of the information is taken to be contrary to the public interest if disclosure would or could reasonably be expected to damage the security of the Commonwealth, the Territory or a State—see discussion at s 1.13 National, Territory or State security information.

Section 2.2(a)(iii) may be relevant where the information relates to 'security' more generally, rather than the security of the Commonwealth, the Territory or a State. It may extend, for example, to circumstances where disclosure of the information would reveal inadequacies in an agency or third party's security arrangements.[226]

What does law enforcement include?

'Law enforcement' includes the enforcement of any Act, subordinate law, statutory instrument or the common law.[227] For this factor to apply, the information should, however, have a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law.[228] This extends to agencies administering legislative schemes and requirements, monitoring compliance and investigating breaches.

Balancing security considerations and the pro-disclosure bias

When considering this factor, decision-makers should consider not only what the prejudice may be from disclosure of the information but also whether disclosure, in combination with information already available to the applicant, would cause harm.

Note:

- 'Public safety' is confined to 'physical safety' and does not extend to psychological harm.[229] For further guidance—see endanger life or physical safety – s 1.14(1)(c).
- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice', see s 5 Common terms and phrases.

9.5. Section 2.2(a)(iv) – impede the administration of justice generally

A factor favouring nondisclosure under s 2.2(a)(iv) is that disclosure could reasonably be expected to impede the administration of justice generally, including procedural fairness. This reflects that there is a public interest in promoting the administration of justice free from prejudice and interference.[230]

'Procedural fairness' means acting fairly in making a decision. It relates to the process by which a decision is reached, rather than the substance of the decision, and traditionally involves two requirements: a fair hearing and the absence of bias.[231]

[226] *Queensland Newspapers Pty Ltd and Queensland Police Service; Third Parties* [2014] QICmr 27 [100].
[227] *Legislation Act 2001* Dictionary, Part 1, definition of 'law'.
[228] *Re Gold and Australian Federal Police and National Crime Authority* [1994] AATA 382, citing Young CJ in *Accident Compensation Commission v Croom* (1991) 2 VR 322 324.
[229] *Callejo and Department of Immigration and Citizenship* [2010] AATA 244 [195].
[230] *Luck and Department of Human Services* [2010] AATA 6 [38].
[231] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [2003] HCA 2 [25].

Examples

Circumstances where the disclosure of information could reasonably be expected to impede the administration of justice include where disclosure may:

- prejudice procedural fairness by revealing unsubstantiated allegations before a formal investigation has been able to proceed[232]
- reveal information exchanged on a 'without prejudice' basis in a dispute resolution process[233]
- undermine working relations between law enforcement bodies.[234]

Note:

- For specific guidance on the phrase 'could reasonably be expected to' and the term 'impede' see s 5 Common terms and phrases.

9.6. Section 2.2(a)(v) – impede the administration of justice for a person

A factor favouring nondisclosure under s 2.2(a)(v) is that disclosure could reasonably be expected to impede the administration of justice for a particular person, rather than the administration of justice generally.

Overview

Section 1.14(1)(e) of Schedule 1 provides that disclosure of the information is taken to be contrary to the public interest if it would, or could, reasonably be expected to prejudice a person's fair trial or the impartial adjudication of a matter before a court or tribunal—see discussion at Prejudice to a fair trial or impartial adjudication – s 1.14(1)(e). This factor may, however, apply more broadly.

Examples

This could include where disclosure of the information would damage a party's position in a proceeding.[235]

Note:

- It may be possible for a party's position in a proceeding to be obstructed or hindered by disclosure of a document without necessarily affecting the impartial adjudication of the matter by the court or tribunal.
- For specific guidance on the phrase 'could reasonably be expected to' and the term 'impede' see s 5 Common terms or phrases.

9.7. Section 2.2(a)(vi) – prejudice the security or good order of a correctional centre

A factor favouring nondisclosure under s 2.2(a)(vi) is that disclosure could reasonably be expected to prejudice the security or good order of a correctional centre. This reflects that there may be a public interest harm in disclosing information that has been brought into existence specifically to ensure that a correctional centre operates effectively.

Overview

In the ACT, this may be relevant in the context of information relating to the AMC or the Bimberi Youth Justice Centre (BYJC).

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[232] *Daniella White and Canberra Health Services* [2019] ACTOFOI 9 (5 June 2019).
[233] *Zacka and Fraser Coast Regional Council; BGM Projects Pty Ltd (Third Party) & Ors* [2019] QICmr 2 [39].
[234] *'LJ' and Department of Immigration and Border Protection* [2017] AICmr 46 [91]-[92] and [114]-[115].
[235] *'AC' and Department of Health and Aging* [2013] AICmr 50 [74].

Decision-makers are encouraged not to simply assume this factor is relevant where assessing information about the AMC or the BYJC—noting there is a public interest in transparency of AMC and BYJC operations where appropriate, given the vulnerability of individuals detained in these centres.

Decision-makers should consider whether disclosure would actually adversely impact the security or good order at the centre—for example, by prejudicing procedures for protecting public safety at the prison.

Note:
- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

Examples

This could be a relevant factor where, for example, disclosure of CCTV footage taken in a correctional centre is sought and disclosure could have broader security implications;[236] or disclosure of a telephone recording could reveal information about prison security.[237]

9.8. Section 2.2(a)(vii) – impede the protection of the environment

A factor favouring nondisclosure under s 2.2(a)(vii) is that disclosure could reasonably be expected to impede the protection of the environment. This reflects that there may be a public interest harm in disclosing information that has been brought into existence specifically to ensure that the environment in the ACT is protected, and environmental degradation is prevented.

Overview

The Environmental Protection Authority (EPA) is responsible for environmental protection functions in the ACT and consequently, may produce information of relevance to this factor. However, s 2.2(a)(vii) is not limited to EPA-related activities.

Note:
- For specific guidance on the phrase 'could reasonably be expected to' and the term 'impede' see s 5 Common terms and phrases.

Examples

This could be a relevant factor where disclosure of information could adversely impact an agency's functions in regulating the protection of the environment—as was found to be the case in the Ombudsman FOI review case discussed below.

Case study: *'AH' and Chief Minister, Treasury and Economic Development*[238]

The applicant sought access to a draft site audit report and a draft environment management plan relating to land in Fyshwick.

The Ombudsman found the documents were provided to the EPA voluntarily and disclosure of these draft documents would *inter alia* adversely impact the EPA's ability to carry out its environmental protection functions.

[236] *Beale and the Department of Community Safety* (Unreported, QLD Information Commissioner, 11 May 2012).
[237] *Q20RYB and Department of Justice and Attorney-General* [2014] QICmr 2.
[238] [2018] ACTOFOI 12.

This was because it would impact the ability of the EPA to develop cooperative working relationships with other organisations in future.

9.9. Section 2.2(a)(viii) – prejudice the economy of the Territory

A factor favouring nondisclosure under s 2.2(a)(viii) is that disclosure could reasonably be expected to prejudice the economy of the Territory. This reflects that agencies and ministers need to be able to keep certain information confidential in order to carry out and manage the Territory's economic policy.

Overview

The FOI Act is silent on what constitutes the economy of the Territory. The Ombudsman's view is, however, that in considering the Territory's economic policy, it is relevant to consider the guidance on economic indicators for the ACT as provided by the ACT Treasury. They include economic growth, labour market, prices and housing market.[239]

Note:

- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

Examples

Circumstances in which the disclosure of information could reasonably be expected to prejudice the economy of the Territory may include where disclosure may:

- place the Territory at a disadvantage in negotiating with private sector entities on a commercial basis[240]
- prevent the Territory from obtaining commercial and investment advice in future without concern of broader disclosure[241] or
- affect the public's perception of, and confidence in, certain entities or an industry.[242]

The Ombudsman considered this factor in the case discussed below.

Case study: *Google Australia Pty Ltd and Wing Aviation Pty Ltd and Environment, Planning and Sustainable Development Directorate*[243]

A third party objected to release of a fauna study report which related to 'Project Wing', a trial commercial drone delivery service in the ACT, *inter alia* on the ground that disclosure would prejudice the economy of the Territory.

The third party claimed disclosure would prejudice the Territory's economy by impacting the diversity of the economy and due to the potential loss of Wing's influence in growing the technology sector in the ACT.

The Ombudsman was not, however, satisfied that disclosing the report could reasonably be expected to prevent future commercial and investment advice flowing to the ACT Government from Wing or other investors.

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[239] 'Economic Indicators for the ACT' (Webpage, 21 October 2019).

[240] *Northern Queensland Conservation Inc and Queensland Territory* [2016] QICmr 21 [60]-[61]; *Murphy v Broken Hill City Council* [2015] NSWCATAD 135 [61].

[241] Ibid [59] and [61].

[242] *Washington and Australian Prudential Regulation Authority* [2011] AICmr 11 [15]-[17].

[243] [2019] ACTOFOI 13 (25 July 2019).

9.10. Section 2.2(a)(ix) – prejudice the flow of information to law enforcement or regulatory agency

A factor favouring nondisclosure under s 2.2(a)(ix) is that disclosure could reasonably be expected to prejudice the flow of information to the police or another law enforcement agency or regulatory agency.

This reflects that law enforcement and regulatory agencies often rely on the public to alert them to breaches of the law or regulatory schemes. That is, the efficient and effective use of the resources of such agencies is facilitated by them being able to obtain information from various members of the community and receive 'as much cooperation as possible'.[244]

Overview

The disclosure of certain categories of information relating to law enforcement is taken to be contrary to the public interest—see s 1.14 law enforcement or public safety information. The focus of s 2.2(a)(ix) is, however, on the *flow of information* to the police and other law enforcement or regulatory agencies. That is, situations where disclosure could reasonably be expected to:

- discourage individuals from coming forward with relevant information and concerns, and/or
- negatively impact a 'free flow' of information to these agencies – either in relation to a particular case or generally.

Decision-makers should consider whether the information:

- relates to the police or another law enforcement or regulatory agency?
- was provided as a result of contractual or legal obligations or if the information was voluntarily provided by the third party?
- if disclosed would discourage such individuals or entities from providing further reports to the agency in future?

Note:

- It does not need to be demonstrate that any prejudice to the flow of information would also prejudice the relevant agency's ability to effectively discharge its enforcement functions.[245]
- The Queensland Information Commissioner rejected an argument that only a 'person making a false complaint' would be 'dissuaded from making a complaint' to a law enforcement agency because it would be publicly released.[246] The Ombudsman agrees with this approach.
- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

Examples

This factor could be relevant where the information being considered for disclosure includes:

- the details of allegations or complaints made to such agencies, including unsubstantiated allegations
- the identity of complainants or witnesses[247]

[244] *Marshall and the Department of Police* [2011] QICmr 4. Note however that where a person has a mandatory obligation to provide the relevant information to the agency, it cannot be said that disclosure could reasonably be expected to prejudice the flow of information to any significant extent: see *Australian Workers' Union and Queensland Treasury; Ardent Leisure Limited (Third Party)* [2016] QICmr 28 [58].
[245] *P6Y4SX and Department of Police* (Unreported, Queensland Information Commissioner, 31 January 2012).
[246] *WL1T8P and Queensland Police Service* [2014] QICmr 40 (16 October 2014).
[247] *Alsop and Redland City Council* [2017] QICmr 27 [34].

- investigation documents
- witness statements.

Note:
- The Ombudsman considered this factor in *Canberra Metro Construction and Chief Minister, Treasury and Economic Development Directorate,*[248] but found it not to be relevant. In making this assessment, the Ombudsman took into account that the relevant documents were provided due to contractual and legal obligations—that is, not on a voluntary basis.

9.11. Section 2.2(a)(x) – prejudice intergovernmental relations

A factor favouring nondisclosure under s 2.2(a)(x) is that disclosure could reasonably be expected to prejudice intergovernmental relations. The disclosure of information may prejudice intergovernmental relations due to the nature of the information or the circumstances in which the information was received by the ACT government.

Overview

'Intergovernmental relations' refers to the working relationship between the ACT Government and the government of the Commonwealth, a State or Territory, or a foreign country. This working relationship includes the interactions between the agencies and Ministers of different governments.[249]

Decision-makers should consider whether:

- the information being considered was communicated in confidence?
- disclosure would reasonably cause damage to the relationship?

Note:
- Normally, intergovernmental relations will not be prejudiced by the disclosure of information that could reasonably be expected to lead to a falling out between individuals working within different governments, even if there may be some loss of cooperation between the individuals.[250]
- If this factor applies, it may be necessary to consult the affected government before deciding to give access to this information.[251] For more information, see *Guideline 3 of 6 Dealing with access applications*.
- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

Examples

Types of information that may prejudice intergovernmental relations if disclosed may include information that:

- contains criticism of another government, agency or Minister,[252] or
- reveals ACT government policy proposals that may upset another government.[253]

[248] [2019] ACTOFOI 8 (5 June 2019).
[249] *Greenpeace Australia Pacific and Queensland Treasury; Northern Australia Infrastructure Facility (Third Party)* [2018] QICmr 9 [48].
[250] *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607 [616].
[251] FOI Act, s 38.
[252] *Arnold (on behalf of Australians for Animals) v Queensland* (1987) 73 ALR 607 [616].
[253] Ibid.

The disclosure of information may also prejudice intergovernmental relations where the information was provided to the ACT government on a confidential basis[254] and disclosure may:

- adversely affect ongoing intergovernmental negotiations[255]
- cause another government to be hesitant about providing information to the ACT government in future,[256] or
- result in a loss of trust and cooperation between governments.[257]

Note:

- The Ombudsman considered this factor in *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate*[258] but found it not to be relevant. In making this assessment, the Ombudsman took into account that the information at issue consisted only of ACT government briefing notes, as opposed to confidential communications between governments.
- In *Department of Defence and Health Directorate,*[259] the Ombudsman again found this factor not to be relevant because it was not apparent that the information was exchanged in confidence. The Ombudsman also placed weight on the fact that ACT Health did not share the Department of Defence's concerns that the information could possibly prejudice intergovernmental relations.

9.12. Section 2.2(a)(xi) – prejudice trade secrets, business affairs or research

A factor favouring nondisclosure under s 2.2(a)(xi) is that disclosure could reasonably be expected to prejudice trade secrets, business affairs or research of any agency or person. These provisions are designed to protect the trade secrets, business interests and research of third parties, and ensure that the FOI Act is not used to obtain commercial information about competitors, distorting the proper functioning of markets. They also reflect the fact that the ACT Government frequently deals with private third parties on a daily basis, and such third parties should not be adversely affected by the operation of the FOI Act.[260]

Overview

'Person' for the purposes of this factor includes a corporation as well as an individual.[261] Each of the other terms included in s 2.2(a)(ix) are explained below in more detail.

When considering whether this factor applies, decision-makers may want to consider:

- the extent to which the information is well-known or publicly available?
    - if it is common knowledge, disclosure is unlikely to prejudice business interests
- the extent of measures taken to guard the sensitivity of the information?
- what negative implications might there be for the third party if the information were disclosed?

[254] For guidance on the circumstances on which information is provided on a 'confidential' basis, see discussion at s 1.14 Identify a confidential source.
[255] Alistair Coe and Chief Minister, Treasury and Economic Development Directorate [2018] ACTOFOI 3 (28 August 2018) [32].
[256] Ibid [31].
[257] Ibid [31]. In this decision, the ACT Ombudsman considered that professional public servants from the ACT and Commonwealth governments would not lose trust in each other, or cease co-operation, as all public servants undertake their work in the knowledge that government held information may be sought and disclosed through FOI processes.
[258] [2019] ACTOFOI 3 (29 January 2019).
[259] [2019] ACTOFOI 11 (17 June 2019).
[260] *Re Kimberley Diamond Company NL and Department for Resources Development and Anor* [2000] WAICmr 51 [93].
[261] *Legislation Act 2001* s 160(1).

The Ombudsman also considers that there is a stronger public interest in disclosing information where it sheds light on a business relationship between an entity and a government agency, as opposed to information that is obtained by a government agency due to an administrative or regulatory process (e.g. tax collection, licence applications).

Note:

- If this factor applies, it is necessary to consult the affected third party before deciding to give access to the information.[262] For more information, see Guideline 3 of 6 Dealing with access applications.
- If the decision-maker has decided that the information will not be disclosed, then the third party does not, however, need to be consulted.
- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

Trade secrets

'Trade secrets' are formulas, patterns, devices or compilations of information which give an advantage over competitors who do not know or use them.[263]

A trade secret may be prejudiced where the disclosure of the information in question will destroy or diminish the commercial value of the information.[264]

Note:

- In determining whether information has commercial value, the Ombudsman has taken into account whether it describes a particular methodology or any proprietary processes.[265]
- The Ombudsman has also identified that the passing of time may diminish the sensitivity of business information to the point where it no longer has any commercial value.[266]

Business affairs

'Business affairs' means 'the totality of the money-making affairs' of an agency or person as distinct from 'private or internal affairs'.[267]

The Ombudsman considers that the disclosure of information may prejudice business affairs where it would cause reputational harm[268] or increase competitive pressures.[269] Competitive pressures may be increased by the disclosure of commercially sensitive information, such as pricing information.
The sensitivity of business information is likely to depend on:

- the nature and detail of the information
- whether it is current or merely historical
- the nature and custom of the particular market

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[262] FOI Act, s 38.
[263] *CH32GI and Department of Justice and Attorney-General* [2012] QICmr 60 [67].
[264] *TerraCom Limited and Department of Environment and Science; Lock the Gate Alliance Limited (Third Party) (No 2)* [2018] QICmr 53 at [73].
[265] *'AF' and Community Services Directorate* [2018] ACTOFOI 11 (17 December 2018) [57].
[266] *Alistair Coe and Suburban Land Agency* [2019] ACTOFOI 5 (25 February 2019) [50].
[267] *Alistair Coe and ACT Health Directorate* [2018] ACTOFOI 4 (5 September 2018) [48].
[268] *N31ZEO and Department of Justice and Attorney-General; Queensland Newspapers Pty Ltd (Third Party)* [2013] QICmr 36 [54].
[269] *Alistair Coe and ACT Health Directorate* [2018] ACTOFOI 4 (5 September 2018) [49].

- any other circumstances which may affect its sensitivity in any particular case.[270]

Research

'Research' refers to an inquiry or investigation into a subject. It is not limited to academic research, but may extend, for example, to market research.[271]

Circumstances in which the research of an agency or person may be prejudiced by the disclosure of information may include where disclosure would:

- allow others to publish papers before the agency or person conducting the research,[272] or
- compromise the effectiveness or integrity of the research by revealing its purpose, conduct or results.[273]

Examples

Circumstances in which the Ombudsman has found this factor to be relevant include where the information included:

- unsubstantiated allegations about the ability of a third party to deliver medical imaging services[274]
- detailed costing information that would enable a competitor to identify the price of individual advertising items and compare rates[275]
- specific advice concerning a business' commercial operations, including risk mitigation strategies based on information provided by the business that is considered to be commercially sensitive.[276]

Note:

- Agencies are reminded that the person seeking to prevent disclosure of government information bears the onus of establishing that the information is contrary to the public interest information.[277]

9.13. Section 2.2(a)(xii) – prejudice an agency's ability to obtain confidential information

A factor favouring nondisclosure under s 2.2(a)(xii) is that disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information.

Overview

Section 1.14(1)(b) provides that disclosure of the information is taken to be contrary to the public interest if it would, or could, reasonably be expected to identify a confidential source.

[270] *CH32GI and Department of Justice and Attorney-General* [2012] QICmr 60 [50], cited in *Dentsu X and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 7 (24 April 2019) [43] and *Alistair Coe and Suburban Land Agency* [2019] ACTOFOI 5 (25 February 2019) [50].
[271] *Bright v Eurobodalla Shire Council* [2018] NSWCATAD 287 [74].
[272] *Abbot and Marohasy and Central Queensland University* [2017] QICmr 54 [82].
[273] *Bright v Eurobodalla Shire Council* [2018] NSWCATAD 287 at [74].
[274] *Daniella White and Canberra Health Services* [2019] ACTOFOI 9 (5 June 2019).
[275] *Dentsu X and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 7 (24 April 2019) [46]. Release of costing related information was also discussed in detail in *Alistair Coe and ACT Health Directorate* [2018] ACTOFOI 4 (5 September 2018).
[276] *Google Australia Pty Ltd and Wing Aviation Pty Ltd and Environment, Planning and Sustainable Development Directorate* [2019] ACTOFOI 13 (24 August 2019).
[277] FOI Act, s 72.

This factor, however, applies more broadly and is likely to be particularly relevant where:

- the information that is sought is of a confidential nature **and**
- it was obtained in confidence.

Note:

- The Ombudsman has recognised that governments have to balance the commercial interests of business with the principles of openness and transparency. The weight of the public interest in protecting business information will depend on a number of factors including 'how commercially sensitive the information is, its age, its current relevance and the extent to which it has entered the public domain'.[278]
- Agencies are reminded that the person seeking to prevent disclosure of government information bears the onus of establishing that the information is contrary to the public interest information.[279]
- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

Information of a confidential nature

Information is of a confidential nature if it is secret or only known to a limited group.[280] The passage of time may mean that information that was once confidential may no longer be confidential as, for example, it may have become publicly available.

Agencies should note that a 'confidential' (or similar) marker does not automatically make the information confidential for the purposes of this factor favouring nondisclosure.[281] Agencies are still required to make an independent assessment of the claim of confidential information.

Obtained in confidence

When considering this issue, it is not essential that there is an express agreement of confidentiality. Agencies need to determine if the information was communicated and received under an express or implied understanding that the information would be kept confidential.[282] This can be determined from:

- the nature of the relationship between the parties
- the nature and sensitivity of the information
- the purpose for which the information was communicated to the relevant agency, and
- the nature and extent of any detriment to the interests of the agency or the information supplier that a disclosure would cause.

The Ombudsman also considers it relevant whether there was an obligation to provide the information.[283]

Note:

- The confidential information can be obtained from any source, including individuals or businesses.

[278] *Alistair Coe and Suburban Land Agency* [2019] ACTOFOI 5 (25 February 2019).
[279] FOI Act, s 72.
[280] *Francis and Australian Sports Anti-Doping Authority (Freedom of Information)* [2019] AATA 12 [104].
[281] *Glascott v Victoria Police (Review and Regulation)* [2014] VCAT 615 [51], citing *Re Barnes and Commissioner for Corporate* (1985) 1 VAR 16 [18].
[282] *Re Maher and Attorney-General's Department* [1985] AATA 180.
[283] *Australian Workers' Union and Queensland Treasury; Ardent Leisure Limited (Third Party)* [2016] QICmr 28 [58]

Prejudice the agency's ability to obtain confidential information in future

Agencies must establish that disclosure of the information could reasonably be expected to prejudice the agency's ability to obtain confidential information in the future. It is not sufficient for agencies to make broad claims of prejudice. To support their claim, agencies need to establish a factual basis and not make mere assertions speculating as to the possible consequences of disclosure.

Note:

- Agencies should **not** focus on whether the particular person who provided the information could reasonably be expected to refuse to supply such information in the future.[284] That is, the identity of the discloser of the confidential information is not the focus of this factor favouring nondisclosure. Rather, they should consider whether disclosure could reasonably be expected to harm the future supply of such confidential information from other sources available or likely to be available to the agency.[285]

Examples

The Ombudsman has considered this factor relevant in relation to information provided in confidence in the context of workplace investigations.[286]

9.14. Section 2.2(a)(xiii) – prejudice the competitive commercial activities of an agency

A factor favouring nondisclosure under s 2.2(a)(xiii) is that disclosure could reasonably be expected to prejudice the competitive commercial activities of an agency. This reflects the fact that when the ACT Government engages or competes with commercial service providers in carrying out particular functions, to operate effectively, it is necessary that certain information relating to its functions is not disclosed.

Overview

For this factor to apply, it must be established that the relevant agency is carrying out certain activities in a competitive commercial environment.[287] These activities might include revenue generating activities, procurement processes or activities relating to the agency's property interests.

Note:

- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

[284] *Rindos and The University of Western Australia* (unreported, Office of the Information Commissioner WA, 10 July 1995) [30].

[285] See, for example, *Greenpeace Australia Pacific and Queensland Treasury; Northern Australia Infrastructure Facility (Third Party)* [2018] QICmr 9 in which the Queensland Information Commissioner relied on the equivalent provision of the Queensland *Right to Information Act 2009* to find that disclosure of information from EFIC and NAIF to Queensland Treasury (QT) in circumstances where it was communicated subject to a mutual understanding of confidence "could also reasonably be expected to prejudice QT's ability to obtain confidential information in the future, by undermining confidence in QT's ability to observe agreements as to confidentiality" (at [49]), and went on to say: "It is, … in my view reasonable to expect that QT's ability to obtain confidential information – from sources generally – may be impaired or prejudiced, were it to disclose the information in issue … ."

[286] *'AK' and Education Directorate* [2019] ACTOFOI 4 (5 February 2019); *'AD' and Health Directorate* [2018] ACTOFOI 8 (27 November 2018) and *'AE' and Health Directorate* [2018] ACTOFOI 9 (27 November 2018).

[287] *Seven Network (Operations) Limited and the Board of Trustees of the State Public Sector Superannuation Scheme* [2015] QICmr 33.

Examples

An agency's competitive commercial activities could reasonably be expected to be prejudiced by the disclosure of information that may:

- confer an advantage on competitors[288]
- diminish the agency's bargaining power or ability to negotiate competitive commercial terms.[289]

9.15. Section 2.2(a)(xiv) – prejudice the conduct of considerations, investigations, audits or reviews by the ombudsman, auditor-general or human rights commission

A factor favouring nondisclosure under s 2.2(a)(xiv) is that disclosure *could reasonably be expected to prejudice* the conduct of considerations, investigations, audits or reviews by the ombudsman, auditor-general or human rights commission.

Overview

Sections 1.5, 1.8 and 1.12 provide that information in the possession of:

- the ACT HRC relating to a consideration,
- the ACT Ombudsman relating to a review or investigation, or
- the ACT Auditor-General relating to an audit.

is taken to be contrary to the public interest.

This factor applies more broadly to any information the disclosure of which could prejudice the conduct of considerations, investigations, audits or reviews by these organisations.

Examples

This factor could apply to information in documents in the possession of an agency that relate to an investigation that is being conducted by the Ombudsman, where disclosure of the information may limit the effectiveness of any recommendations made by the Ombudsman.[290]

Note:

- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

9.16. Section 2.2(a)(xv) – prejudice management function or conduct of industrial relations by an agency

A factor favouring nondisclosure under s 2.2(a)(xv) is that disclosure could reasonably be expected to prejudice the management function of an agency or the conduct of industrial relations by an agency.

Overview

The 'management function' of an agency may include activities such as recruitment, training, performance reviews, promotion, counselling, discipline, compensation and occupational health and safety.

[288] *Australian Broadcasting Corporation and Townsville City Council; Adani Mining Pty Ltd (Third Party) & Ors* [2019] QICmr 7 [88]; *Mineralogy and North Queensland Bulk Ports Corporation Limited* [2012] QICmr 49.

[289] *Redlands2030 Inc and Redland City Council; RIC Toondah Pty Ltd (Third Party); Minister for Economic Development Queensland (Fourth Party); Walker Group Holdings Pty Ltd (Fifth Party); Walker Toondah Harbour Pty Ltd (Sixth Party)* [2018] QICmr 46 [108].

[290] *Q Squash Ltd and Department of Local Government, Planning and Recreation; Fraser* [2008] QICmr 15.

The 'conduct of industrial relations' refers to an agency's management of employment-related entitlements and obligations.

Examples

Information the disclosure of which could reasonably be expected to prejudice the management function of an agency or the conduct of industrial relations by an agency may include information:

- provided on a confidential basis as part of a recruitment, training or performance review process where disclosure of the information may inhibit the agency's ability to recruit or provide training or feedback to staff in future[291]
- supplied as part of an agency workplace investigation, where disclosure of the information may make complainants or witnesses reluctant to fully participate in future investigations[292]
- provided by staff on a confidential basis as part of an agency survey or ballot,[293] or
- that could reasonably be expected to cause an industrial dispute.[294]

Note:

- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice', see s 5 Common terms and phrases.

9.17. Section 2.2(a)(xvi) – prejudice a deliberative process of government

A factor favouring nondisclosure under s 2.2(a)(xvi) is that disclosure could reasonably be expected to prejudice a deliberative process of government.

This reflects the need to protect information outlining deliberative processes to ensure that the government can:

- make informed decisions, taking into account a wide range of information, and
- maintain confidentiality where required – particularly in the context of ongoing negotiations prior to a decision being made.[295]

A balance needs to be struck between ensuring that the government may function effectively and efficiently, and providing access to information to ensure increase public participation in, and scrutiny of, government activities.[296]

Overview

This public interest factor favouring nondisclosure might apply in circumstances where deliberative processes are involved, and an information officer has **not** already assessed the information as contrary to the public interest because it is 'Cabinet information'—see s 1.6 – Cabinet information**.**

'Deliberative process' is not defined in the FOI Act. As a result, additional guidance is provided to decision-makers below on how to interpret this factor.

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[291] *Paul Kaszyckyj and Australian Taxation Office (No 2)* [2017] AICmr 110; *'OB' and Australian Building and Construction Commission* [2018] AICmr 25; *Paul Cleary and Special Broadcasting Service* [2016] AICmr 2.

[292] *'AE' and Health Directorate* [2018] ACTOFOI 9 (27 November 2018) [56]-[58]; *'AD' and Health Directorate* [2018] ACTOFOI 8 (27 November 2018) [52]-[54]; *'AK' and Education Directorate* [2019] ACTOFOI 4 (5 February 2019) [47]-[49]; *Taggart and Queensland Police Service* [2015] QICmr 16 [21]; *De Tarle and Australian Securities and Investments Commission (Freedom of information)* [2016] AATA 230 [42].

[293] *'C' and Department of Agriculture, Fisheries and Forestry* [2013] AICmr 8.

[294] *Australian Broadcasting Corporation and Department of Child Safety, Youth and Women* [2018] QICmr 47 [119].

[295] *North Queensland Conservation Council Inc and Queensland Treasury* [2016] QICmr 21 [73].

[296] *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 [69].

Decision-makers are encouraged to consider:

- what are the deliberative processes involved in the functions of the particular agency or Minister to which the information sought is said to relate
- whether the information reveals how the matters at issue were considered or evaluated, or whether the information is purely factual in nature or relates to administrative, incidental or procedural matters
- what, if any, prejudice might arise from disclosure.

Note:

- Not every document generated by the policy area of an agency should be assumed to be 'deliberative'. Decision-makers need to consider which specific information, if any, could be contrary to the public interest to disclose on the grounds that it would **prejudice** a deliberative process of government.
- This will be a question of fact to be decided in the circumstances of the particular case. Where agencies believe information sought falls within the scope of s 2.2(a)(xvi), they should clearly explain **why**.
- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

What is a deliberative process?

A deliberative process is considered to be a 'thinking process' of government.[297] Consequently, information is likely to fall within the scope of this provision where it comprises:

- an opinion, advice or recommendation prepared for consideration within an agency or by a Minister (i.e. not for some private person or organisation), or
- records of deliberations or consultation processes being undertaken to inform the decision-making process of an agency or a Minister. [298]

Information officers are encouraged to consider whether the information outlines a process of weighing up, or evaluating, competing arguments about a particular issue, proposal or course of action.

Generally, in order for this factor to apply, the information should relate to a decision that is being considered by an agency or a Minister and have been prepared as a basis for intended deliberations.

Note:

- The Ombudsman considers that information that is purely factual would not fall within the scope of this provision, **unless** it is too embedded or intertwined with the deliberative content that it is not practical for other deliberative material to be redacted prior to disclosure.[299] See the discussion of 'purely factual information' in Purely factual information.
- The Ombudsman also considers that information which is merely administrative, incidental or procedural would also generally be outside of the scope of s 2.2(a)(xvi).

[297] *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 [28]-[30], cited in *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 3 (29 January 2019) [38].
[298] See discussion of the meaning of 'deliberative matter' in *MacTiernan and Secretary, Department of Infrastructure and Regional Development* [2016] AATA 506 [93], and 'deliberative processes' in *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 [58].
[299] *Dreyfus and Secretary Attorney-General's Department (Freedom of information)* [2015] AATA 962 [18].

When will disclosure prejudice a deliberative process of government?

For s 2.2(a)(xvi) to apply, it is not enough for the information to disclose a deliberative process of government; it must be reasonably expected to *prejudice* such a process – that is, some sort of harm to deliberations could occur if the information was disclosed.

In order to establish prejudice, it will generally **not** be sufficient to establish that disclosure could reasonably be expected to:

- reveal a step in procedures by which an organisation handles an FOI application[300]
- cause disruptive public debate.[301]

For prejudice to occur, the above would also need to interfere with the ability of an agency to objectively consider its options and reach a decision.[302] Alternatively, prejudice may also occur where disclosure would:

- result in unacceptable pressures or harassment that would have the potential to inhibit an agency decision-maker, or
- prejudice the integrity of the decision-making process.

Relevant considerations when considering whether prejudice could reasonably be expected to occur may include:

- whether the information sought is already publicly known[303] and/or the deliberations include public consultation which has commenced
- the stage of the deliberations[304]
- whether a final decision has been reached[305]
- whether there are any ongoing negotiations occurring.[306]

Note:

- It is not enough for agencies to establish that a final decision has not yet been reached and a matter is 'ongoing'. They must explain why disclosure would result in *prejudice* to the process.[307]
- When considering possible prejudice, decision-makers should also pay particular attention to the list of irrelevant factors that should be not taken into account when applying the public interest test – see Irrelevant factors.

[300] *Re JE Waterford and Department of Treasury (No 2)* [1984] AATA 67 [59].
[301] Unless the level of disruption would be so significant as to require reallocation of resources to deal with the disruption where the resources would otherwise be involved in finalising the deliberative process: see *Queensland Newspapers Pty Ltd and Queensland Public Service* [2014] QICmr 5 [29].
[302] *Queensland Newspapers Pty Ltd and Queensland Public Service* [2014] QICmr 5.
[303] *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 3 (23 January 2019) [43].
[304] *Pallara Action Group Inc and Brisbane City Council* (Unreported, Queensland Information Commissioner, 21 September 2012) [43].
[305] *North Queensland Conservation Council Inc and Queensland Treasury* [2016] QICmr 21 [76].
[306] Ibid [78].
[307] *Barling and Brisbane City Council* [2017] QICmr 47 [32].

Examples

This factor could be relevant where the information for disclosure includes:

- a policy options paper or feasibility study
- a record of consultations regarding a new policy proposal
- minutes of a meeting where the benefits and the disadvantages of a selecting a particular course of action in response to a policy problem under consideration were discussed
- draft implementation plans which outline possible rollout options for new arrangements or technologies
- a review of a policy problem that contains possible mitigation strategies and options
- investigation reports that set out possible further actions required.

Note:

- Final decisions reached at the end of a deliberative processes would **not** generally be covered by this provision.

9.18. Section 2.2(a)(xvii) – prejudice the effectiveness of testing or auditing procedures

A factor favouring nondisclosure under s 2.2(a)(xvii) is that disclosure could reasonably be expected to prejudice the effectiveness of testing or auditing procedures.

Overview

In order for this factor to apply, there must be an identifiable testing or auditing procedure, such as a sampling method, examination process, risk assessment matrix, analysis tool or investigation technique.

Examples

Examples of circumstances in which the disclosure of information could reasonably be expected to prejudice the effectiveness of testing or auditing procedures include where disclosure may:

- facilitate cheating by a person being tested or audited[308]
- reveal a method of assessment so as to enable a person to manipulate his or her test results or pre-prepare an answer, for example in psychometric testing or risk assessments[309]
- assist a person to prepare for a test or audit, compromising the integrity of the testing or auditing procedure[310]
- reveal a pattern, or an absence of a pattern, that could undermine a testing regime,[311] or
- reveal a sampling method so as to enable a person being audited to avoid scrutiny during an audit.[312]

Note:

- For specific guidance on the phrase 'could reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrases.

[308] *HI and Civil Aviation Safety Authority* [2015] AICmr 69.
[309] *Re Crawley and Centrelink* [2006] AATA 572; *Spillane v Department of Family and Community Services (NSW)* [2014] NSWCATAD 169 [44]-[46].
[310] *JA and Office of the Gene Technology Regulator* [2016] AICmr 45.
[311] *Francis and Australian Sports Anti-Doping Authority (Freedom of information)* [2019] AATA 12 [177]-[178].
[312] *Besser and Department of Infrastructure and Transport* [2013] AICmr 19.

9.19. Section 2.2(a)(xviii) – prejudice the conservation of any place or object of natural, cultural or heritage value or reveal Aboriginal or Torres Strait Islander traditional knowledge

A factor favouring nondisclosure under s 2.2(a)(xviii) is that disclosure could reasonably be expected to prejudice the conservation of any place or object of natural, cultural or heritage value, or reveal any information relating to Aboriginal or Torres Strait Islander traditional knowledge.

Prejudice the conservation of any place or object of natural, cultural or heritage value

The FOI Act does not define the terms 'conservation', 'natural', 'cultural' or 'heritage'.

The *Heritage Act 2004* (ACT) indicates that these terms may be understood as follows:[313]

- 'conservation' includes 'preservation, protection, maintenance, restoration and reconstruction'[314]
- 'natural' refers to something that forms part of the natural environment, such as the native flora, native fauna, geological formations or any other naturally occurring element at a particular location[315]
- 'cultural' refers to something created or modified by human action, or associated with human activity or a human event[316]
- 'heritage value' means a place or object has:[317]
    - importance to the course or pattern of the ACT's cultural or natural history
    - uncommon, rare or endangered aspects of the ACT's cultural or natural history
    - potential to yield important information that will contribute to an understanding of the ACT's cultural or natural history
    - importance in demonstrating the principal characteristics of a class of cultural or natural places or objects
    - importance in exhibiting particular aesthetic characteristics valued by the ACT community or a cultural group in the ACT
    - importance in demonstrating a high degree of creative or technical achievement for a particular period
    - a strong or special association with the ACT community, or a cultural group in the ACT for social, cultural or spiritual reasons, or
    - a special association with the life or work of a person, or people, important to the history of the ACT.

Note:

- See also Prejudice cultural or natural resource or habitat, which provides that information the disclosure of which would, or could reasonably be expected to, prejudice the wellbeing of a cultural or natural resource or the habitat of animals or plants is taken to be contrary to the public interest to disclose.

[313] *Heritage Act 2004* (ACT), s 8 of the also defines 'object' as 'a natural or manufactured object, but does not include a building or any other man-made structure' and defines 'place' to include 'a site, precinct or parcel of land; a building or structure, or part of a building or structure; the curtilage, or setting, of a building or structure, or part of a building or structure; and an object or feature historically associated with, and located at, the place'.
[314] Ibid, Dictionary, definition of 'conservation'.
[315] Ibid s 10A. See also the definition of 'nature' in s 9 of the *Nature Conservation Act 2014* (ACT).
[316] Ibid s 10B.
[317] Ibid s 10.

Reveal information relating to Aboriginal or Torres Strait Islander traditional knowledge

'Aboriginal or Torres Strait Islander' is not defined in the FOI Act. The *Aboriginal and Torres Strait Islander Elected Body Act 2008* (ACT) provides that such a person is a person who:

- is a descendant of an Aboriginal person or a Torres Strait Islander person
- identifies as an Aboriginal person or a Torres Strait Islander person, and
- is accepted as an Aboriginal person or a Torres Strait Islander person by an Aboriginal community or Torres Strait Islander community.

'Traditional knowledge' may include knowledge such as customs, laws, expressions of cultural values, beliefs, and knowledge relating to land and ecosystem management. The United Nations Declaration on the Rights of Indigenous Peoples provides that indigenous peoples have the right to maintain, control, protect and develop their traditional knowledge.

Note:
- For specific guidance on the phrase 'could, or would reasonably be expected to' and the term 'prejudice' see s 5 Common terms and phrase.

9.20. Section 2.2(b)(i) – not in the best interests of the child

A factor favouring nondisclosure under s 2.2(b)(i) is that:

- the information is personal information of a child, and
- the disclosure of the information is reasonably considered not to be in the best interests of the child.

This factor reflects that while the FOI Act allows for parents to make an access application on behalf of a child, it does not automatically follow that it is in the best interests of the child to disclose information to the parent.

To determine whether disclosure would be contrary to a child's best interests, decision-makers may refer to the CYP Act.[318]

Determining what a child's best interests are for the purpose of deciding an access application can be a complex process. Information officers should have regard to:

- any views expressed by the child
- if the child has capacity to make a mature judgement as to what might be in their best interests
- the nature of the child's relationship with each parent, and in particular with the parent making the access application
- the relationship between the child and the agency holding the information
- the possibility that disclosure might harm the child.

The best interests of the child is multi-faceted and incorporates the wellbeing of the child, factors which will affect the future of the child, the happiness of the child, and matters relevant to the child's immediate welfare and healthy development.[319]

[318] CYP Act, s 9.
[319] *AZ4Z4W and the Department of Communities, Child Safety and Disability Services* [2014] QICmr 26.

9.21. Section 2.2(b)(ii) – privileged on the ground of legal professional privilege

A factor favouring nondisclosure under s 2.2(b)(ii) is that the information would be privileged from production in a legal proceeding on the ground of legal professional privilege.

Section 1.2 provides that disclosure of the information is taken to be contrary to the public interest if its disclosure would be privileged from production or admission into evidence in a legal proceeding on the grounds of LPP. If information falls within the exceptions outlined in Schedule 1, then decision-makers will, however, need to consider the public interest test in s 17 in disclosing the information.

For guidance see s 6.2 - section 1.2 information subject to legal professional privilege.

9.22. Section 2.2(b)(iii) – could impact a deceased person's privacy

A factor favouring nondisclosure under s 2.2(b)(iii) is that the information:

- is personal information of a deceased person **and**
- the person making the request is an eligible family member of the deceased person **and**
- the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive.

This factor recognises that eligible family matters of a deceased person may make an access application but puts protections in place to ensure that the deceased person's privacy would not be impacted if they were alive. Decision-makers are required to balance the public interest in the confidentiality of personal information against the public interest in the right of the requester to access the information.

An *eligible family member* is defined in Schedule 2, s 2.3 as:

- a domestic partner of the deceased person, or if not available
- an adult child, or if not available
- an adult sibling

Or, if none of the above persons are reasonably available and the deceased person:

- was **not** an Aboriginal or Torres Strait Islander person – the next nearest adult relative who is reasonably available
- was an Aboriginal or Torres Strait Islander person – an appropriate person according to tradition or custom who is reasonably available

Section 2.3(2) also specifies that a person is **not** reasonably available if they:

- do not exist
- cannot be reasonably contacted, or
- are unable or unwilling to act as the eligible family member.

Agencies will need to make enquiries and consult, as appropriate, to satisfy themselves that disclosure of the deceased person's personal information to the eligible family member would not have an impact on the deceased person's privacy if they were alive.

This process may include consideration of:

- nature of the information being requested
- whether the information can be obtained from other sources
- the circumstances of the relationship between the applicant and the deceased
- any evidence of the applicant's involvement in, or knowledge of, the topic of the information
- whether the deceased would have consented to the release of the information to the applicant when living, and
- any legal arrangements in place (e.g. grant of probate, will).

9.23. Section 2.2(b)(iv) – disclosure is prohibited by an Act of the Territory, a State or the Commonwealth

A factor favouring nondisclosure under s 2.2(b)(iv) is that the information is information disclosure of which is prohibited by an Act of the Territory, the State or the Commonwealth.

Section 1.3 – information disclosure of which is prohibited under lawprovides that the disclosure of information is contrary to the public interest if the information falls within one of the categories outlined in s 1.3 or the information is covered by a secrecy provision. Where s 1.3 does not apply, decision-makers may need to consider s 2.2(b)(iv).

For guidance see s 6.3 - section 1.3 information disclosure of which is prohibited by law.

9.24.Section 2.2(b)(v) – the information could prejudice the fair treatment of an individual

A factor favouring nondisclosure under s 2.2(b)(v) is that:

- the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct, and
- disclosure could prejudice the fair treatment of an individual.

It is considered likely that there will be considerable overlap between this factor and s 2.2(a)(iv) and s 2.2(a)(v).

The Ombudsman's view is that the public interest weighs strongly against disclosure where the information includes **unsubstantiated** allegations about an individual.

Allegations are considered to be unsubstantiated where they have not been the subject of court proceedings, or proceeding by a relevant tribunal or regulatory body.

While not specifically stated in the legislation, the Ombudsman considers that this factor would only be relevant where it could **reasonably** be expected that disclosure could prejudice the fair treatment of an individual.

The Queensland Information Commissioner considered a similar factor relevant in a case where a copy of a Queensland Police Service report was sought which concerned a fraud complaint made by the applicant's late husband.[320] The report included unsubstantiated allegations against individuals.

[320] *Troiani and Queensland Police Service* (Unreported, Queensland Information Commissioner, 21 August 2012).

In a separate case, the Commissioner noted that although the information in issue included unsubstantiated allegations, it could not be said that increased regulatory or compliance activity by government agencies, acting within the law, would *prejudice the fair treatment of an individual*.[321]

Note:

- For specific guidance on the term prejudice, see s 5 Common terms and phrases.
- The Queensland Information Commissioner considered a similar factor relevant in a case where a copy of a Queensland Police Service report was sought which concerned a fraud complaint made by the applicant's late husband.[322] The report included unsubstantiated allegations against individuals.
- In a separate case, the Commissioner noted that although the information in issue included unsubstantiated allegations, it could not be said that increased regulatory or compliance activity by government agencies, acting within the law, would *prejudice the fair treatment of an individual*.[323]

10. Irrelevant factors

The FOI Act also sets out factors that are irrelevant and must not be taken into account under the public interest test.[324]

A decision-maker must disregard irrelevant factors that would undermine the integrity of the test.[325]

Section 17(2) lists the factors that must not be taken into account when deciding whether information is contrary to the public interest:

- access to the information could result in embarrassment to the government, or cause a loss of confidence in the government
- access to the information could result in a person misinterpreting or misunderstanding the information
- the author of the information was (or is) of high seniority in an agency
- access to the information could result in confusion or unnecessary debate
- access to the information could inhibit frankness in the provision of advice from the public service, and
- the applicant's identity, circumstances, or reason for seeking access to the information.

This list is non-exhaustive and there may be other factors that are identified as irrelevant to the test.

When drafting a decision notice, it is recommended that the decision-maker state that they have not considered any of the irrelevant considerations set out in s 17(2). Similarly, where an applicant raises a concern in their submission that is irrelevant to the public interest, a decision-maker should explain why this issue was not considered in their decision-making. For more guidance see *Guideline 3 of 6 Dealing with access applications*.

[321] *N31ZEO and Department of Justice and Attorney-General; Queensland Newspapers Pty Ltd* (100101) 8 November 2013.
[322] *Troiani and Queensland Police Service* (21 August 2012).
[323] *N31ZEO and Department of Justice and Attorney-General; Queensland Newspapers Pty Ltd* (100101) 8 November 2013.
[324] FOI Act s 17(2).
[325] Ibid and Explanatory Statement, *Freedom of Information Bill 2016* (ACT) 14.

Note:

- In *Canberra Metro Construction and Chief Minister, Treasury and Economic Development Directorate*,[326] the Ombudsman discussed irrelevant factors that were raised in the submissions to review. Although Canberra Metro Construction expressed concern that disclosing the information would be misleading and result in misunderstanding, dissuading contractors from communicating issues at an early stage, the Ombudsman emphasised that ss 17(2)(b) and (e) prevented consideration of this concern.

11. Balancing the public interest

After identifying all of the relevant public interest factors, a decision-maker must balance the factors favouring disclosure against the factors favouring non-disclosure. That is, taking into account all the information available to them, they must consider whether or not the community is best served by disclosure or nondisclosure of the information sought.[327]

Pro-disclosure bias

The FOI Act operates with an express pro-disclosure bias.[328] That is, when deciding whether or not access should be given to government held information, the agency or Minister must exercise the discretion, as far as possible, in favour of disclosing the information.

While this step of the public interest test is characterised as an act of balancing, this balancing must be undertaken in the context of the objects of the FOI Act and its pro-disclosure bias. As iterated in the Explanatory Memorandum, the public interest test is *not* approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side. Instead, the FOI Act makes it clear that the 'scales begin laden in favour of disclosure'.[329] That is, the application of the public interest test begins from the premise that it is in the public interest to disclose the information. In the absence of a demonstrable harm to the public interest occurring from the release of the information, information must be released.[330]

Weighing the factors

Decision-makers should be aware that simply identifying one or even several factors favouring nondisclosure is not sufficient justification not to disclose the information. The FOI Act requires decision-makers to consider if disclosure of the information is 'on balance, contrary to the public interest'.

As it is a balancing test, decision-makers need to clearly identify and provide reasons for the weight given to key factors. It is the Ombudsman's expectation that agencies clearly identify the prejudice to the public interest from disclosing the information and demonstrate how that outweighs the public interest in disclosure.

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[326] [2019] ACTOFOI 8 (5 June 2019).
[327] Explanatory Statement, *Freedom of Information Bill 2016* (ACT) 13.
[328] FOI Act s 9.
[329] Explanatory Statement, *Freedom of Information Bill 2016* (ACT) 13.
[330] In *McKinnon v Secretary, Department of Treas*ury [2006] HCA 45; (2006) 228 CLR 423 [19] Gleeson CJ and Kirby J in considering the Commonwealth FOI Act said the balancing must be undertaken in the context of the objects of the FOI Act and 'the matter of disclosure or nondisclosure is not approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on one side or the other...'.

Importantly, balancing is not a case of counting the number of relevant factors favouring disclosure versus nondisclosure. The weight given to any relevant factor will depend on consideration of the particular circumstances, as they exist at the time of the decision.[331]

The decision-maker's task is to consider the relative importance and weight of each factor that they have identified. The weight given to a factor will depend on the effect that disclosing the information would have on the public interest.

One factor that favours disclosure may outweigh two factors favouring nondisclosure, depending on the weight given to the factors by the decision-maker. The factors favouring nondisclosure must also outweigh the pro-disclosure bias. An understanding of ACT and other Australian FOI decisions will assist decision-makers in understanding how different factors apply and might be weighted.

After weighing and balancing the relevant factors favouring disclosure and nondisclosure, a decision-maker must decide whether, on balance, disclosure of the information would be contrary to the public interest. This decision should logically flow from the decision-maker's consideration of the relevant factors and their reasoning behind the weight given to each factor.

Where the public interest factors are finely balanced, it may be possible to reasonably consider that the information could be either contrary or not contrary to the public interest information. In these circumstances, s 9 of the FOI Act requires the decision-maker to exercise their discretion in favour of releasing the information.[332]

[331] Explanatory Statement, *Freedom of Information Bill 2016* (ACT) 13.
[332] FOI Act s 7(1) and the Explanatory Statement, *Freedom of Information Bill 2016* (ACT) 14.