

ACTFOI

From: ACTFOI
Sent: Tuesday, 10 January 2023 3:06 PM
To: [REDACTED]@act.gov.au
Subject: Preliminary view on complaints about the handling of an FOI access application (our ref: 2022-715237; 2022-113209) [SEC=OFFICIAL]
Attachments: Preliminary view.PDF

OFFICIAL

Dear Mr Drumgold,

Thank you for your emails of 20 December 2022.

Please find attached a letter providing our preliminary view on the complaints from Troy [REDACTED] and Peter [REDACTED].

Yours sincerely,

Jennifer [REDACTED] (she/her)
Assistant Director, ACT FOI
ACT OMBUDSMAN

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Our reference: 2022-715237
2022-113209

10 January 2023

Mr Shane Drumgold SC
Director
Office of the Director of Public Prosecutions (ACT)

By email only [\[REDACTED\]@act.gov.au](mailto:[REDACTED]@act.gov.au)

Dear Mr Drumgold

ACT Ombudsman – preliminary view on complaints from Troy [REDACTED] and Peter [REDACTED]

Thank you for giving us information on 20 December 2022 to assist our investigation of the complaints received from Mr Troy [REDACTED] of the Australian Federal Police Association, and Mr Peter [REDACTED], Executive General Manager of ACT Policing, about the Office of the Director of Public Prosecutions' (**the DPP**) handling of a Freedom of Information (**FOI**) access application (**the application**).

As these two complaints relate to the same application and raise similar issues, our Office is investigating these complaints together.

In our assessment of the information provided, we identified some areas of concern. I am writing to outline our preliminary views for your consideration and comment.

Relevant information

We considered the information given to us by the DPP, Mr [REDACTED] and Mr [REDACTED] and the requirements of the:

- *Freedom of Information Act 2016 (ACT) (FOI Act)*, and
- *Ombudsman Guideline 3 – Dealing with access applications*.

Background

Our understanding of the chronology of events is as follows:

- | | |
|-----------------|--|
| 5 December 2022 | Mr Christopher Knaus, a journalist from <i>The Guardian</i> , applied to the DPP for access to '... a copy of any documented complaint made by the DPP about the conduct of police during the matter of R v Lehrmann, which was sent to ACT Policing in the months of October or November 2022.' |
| 7 December 2022 | The DPP's information officer, Ms Katie Cantwell, advised you of the application. You provided Ms Cantwell with a copy of a letter dated 1 November 2022 which fell within the scope of the application (the letter). |

You advised Ms Cantwell, via email, 'I am happy for it to go out.'

Ms Cantwell advised Mr Knaus via email that the application had been decided. In the decision letter, Ms Cantwell stated 'I have collated all documents held by my office which fall within the scope of your request. Please find attached a copy of the documents.' The 'documents' referred to in this letter mean the letter dated 1 November 2022.

8 December 2022

Mr Knaus contacted the ACT Policing media team seeking a response to several questions in relation to the letter.

Mr [REDACTED] emailed Ms Cantwell to raise his concerns about the DPP's lack of consultation with ACT Policing before deciding to release the letter. There was no response from the DPP to this email.

9 December 2022

Mr [REDACTED] telephoned the DPP and spoke with a staff member who undertook to locate the email sent on 8 December 2022 and respond. This did not occur.

The DPP identified that errors in processing the application had occurred. Ms Cantwell sought guidance from the Justice and Community Safety Directorate (**JACS**).

The DPP appears to have re-made the decision to now refuse access to some personal information contained in the letter, specifically the names of ACT Policing members, a witness and a staff member of the DPP.

A revised copy of the letter with redactions applied was sent to Mr Knaus, with a request that he limit circulation of the original, unredacted, letter. Mr Knaus advised '... I have not sent the unredacted document to anyone outside of my organisation. It has only been shared internally for the purposes of legal and editorial advice and I will advise those it was shared with not to circulate it any further.'

Mr [REDACTED] complained to our Office about the DPP's handling of the application.

12 December 2022

The revised decision and letter with redactions applied was published on the DPP's FOI Disclosure Log.

14 December 2022

Mr [REDACTED] complained to our Office about the DPP's handling of the application.

Reasons for our preliminary view

In reaching our preliminary view, we have identified several points at which errors occurred during the DPP's processing of the application.

Processing time

The application was received by the DPP on 5 December 2022 with a decision made and information released on 7 December 2022. From the information you provided to us, however, it appears that the application was processed within only 1 working day.

The FOI Act allows an agency up to 20 working days¹ to decide access. The DPP was aware of this timeframe, having sent Mr Knaus an acknowledgment of his application and advising that a decision was due on or before 10 January 2023.

Whilst the FOI Act states that access to government information should be facilitated promptly and at the lowest reasonable cost,² the time spent on this application indicates that the application may have been processed without proper consideration of the public interest test under s 17 of the FOI Act.

Internal communications

After identifying information falling within the scope of the application, Ms Cantwell emailed you to ask, 'Can I confirm that this is the letter you are happy for me to release under FOI to the guardian?' You replied via email 'I am happy for it to go out.'

It appears that Ms Cantwell understood your response to mean that the letter could be released, however you have advised our Office that your understanding was that the application would be processed in accordance with the requirements of the FOI Act, such as considering whether disclosure of the information would be in the public interest or whether consultation with third parties would be required.

Of relevance, s 20 of the FOI Act provides that the principal officer of an agency may direct the information officer to release information. Your email to Ms Cantwell may be considered a direction to release information under this provision, and it was acted upon.

You have acknowledged to our Office that your email most likely caused Ms Cantwell to believe the letter could be released.

Consultation requirements

It is our view that the DPP has not complied with s 38 of the FOI Act.

The FOI Act sets out a number of circumstances in which the agency processing an application (**respondent**) must consult with a third party prior to making a decision. Before releasing information, which may reasonably be expected to be of concern to a relevant third party, s 38 of the FOI Act provides that the respondent must take reasonable steps to consult with the third party.

Such consultation processes are important as they ensure that third parties have an opportunity to express any concerns they may have about the disclosure of the information – that is, to explain why the information may in fact be contrary to the public interest information for reasons not otherwise apparent. These processes are designed to ensure the decision-maker balances the interests of the applicant with the rights of the third party. A third party consulted under s 38 also has review rights in respect of a decision adverse to their interests.

Guidance on when information may reasonably be considered to be of concern to a third party is provided in *Ombudsman Guideline 3 – Dealing with access applications*. Relevantly, if the third party is a government agency, information may reasonably be expected to be of concern if it concerns the affairs of the agency. Consultation will be required unless the decision-maker is aware the agency is not concerned by the possible release or has agreed that formal consultation is not required.

¹ Section 40 of the FOI Act.

² Section 6(f) of the FOI Act.

By not consulting with ACT Policing, they were denied an opportunity to explain why the information may have been contrary to the public interest information and to apply for Ombudsman review of the decision prior to release. This would have been a more appropriate pathway to rectify any concerns about the decision.

Lack of response to ACT Policing's communication

Mr [REDACTED] has advised that he made several unsuccessful attempts to discuss his concerns with the DPP following the release of the letter. The information you provided to us supports this. You provided a copy of the email Mr [REDACTED] sent to the DPP on 8 December 2022, and copies of emails dated 9 December 2022 between Ms Cantwell, and Mr Anthony Williamson SC, Deputy Director of Public Prosecutions.

Ms Cantwell sought advice from Mr Williamson about how to manage the email from Mr [REDACTED], asking 'I have no doubt that they have already referred this to the Ombudsman to look into. Should be just await that process?' Mr Williamson's advice was that Ms Cantwell should not '... respond for now... they'll see the redacted version on the register soon. If the AFP make further requests its probably best to see what Shane wants to do given he was the original decision maker.'

In our view it was an error not to engage with Mr [REDACTED] at this point. Whilst the letter had already been released, this may have been an opportunity for the DPP to provide immediate redress to Mr [REDACTED] by way of acknowledgment and an apology. However, the DPP chose to not to respond or engage with Mr [REDACTED]'s reasonable attempts to discuss his concerns.

Identification of errors and re-making of the decision

In the information provided to us, you acknowledge errors in processing the application were identified and steps were taken to rectify those errors. In particular, the DPP identified personal information in the letter that it considered should have been redacted. It appears that in attempting to rectify these errors the DPP effectively 're-made' the decision. The FOI Act does not provide for agencies to re-make decisions, other than in the case where additional government information is identified at a later time, and an additional decision relating to that information may be made under s 35 of the FOI Act.

Given that the information had already been released in full, it may have been more appropriate for the DPP to take steps to formally prevent any further distribution of the information, such as by seeking an injunction, rather than relying on the undertaking of the applicant to ask colleagues that the information not be shared further.

We note that although the DPP had identified that an error had been made, and re-made the decision although there is no power to do so under the FOI Act, still no attempt was made to consider the public interest test under s 17 of the FOI Act, nor was any attempt made to consult with ACT Policing.

Preliminary view

Our preliminary view is that:

1. The DPP should issue an apology to Mr [REDACTED] for not consulting with the Australian Federal Police (**the AFP**) prior to deciding to grant access to information that may reasonably have been expected to be of concern to the AFP.

The DPP should also issue an apology to Mr [REDACTED] for not responding to Mr [REDACTED]'s attempts to communicate with DPP following the decision to grant access to the information.

2. The DPP should update its policies and procedures and provide thorough relevant training to all its staff (including the Director and senior staff) about the processing of FOI access applications and obligations under the FOI Act.

Your response

Could you please send your response to our preliminary view to [REDACTED] by **24 January 2023**.

Alternatively, if you think we have overlooked something or there is further information we should consider before making a final assessment, please contact me on ([REDACTED]) by **6 February 2023**.

Yours sincerely

Jennifer [REDACTED]
Assistant Director
ACT Reportable Conduct and FOI