

ACTFOI

From: ACTFOI
Sent: Friday, 20 January 2023 10:19 AM
To: Drumgold, Shane
Subject: Finalisation of our investigation of complaints about the handling of an FOI access application (our ref: 2022-715237; 2022-113209) [SEC=OFFICIAL]
Attachments: 1-19-2023_15-41-55.pdf

OFFICIAL

Dear Mr Drumgold,

Please find attached a letter from Erin [REDACTED], Director ACT Reportable Conduct and FOI, advising of the finalisation of our investigation of the complaints from Troy [REDACTED] and Peter [REDACTED].

Thank you for your assistance with this investigation.

Yours sincerely,

Jennifer [REDACTED] (she/her)
Assistant Director, ACT FOI
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Our reference: 2022-715237
2022-113209

20 January 2023

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

By email only: [REDACTED]@act.gov.au

Dear Mr Drumgold

ACT Ombudsman – finalisation of our investigation of the complaints from Troy [REDACTED] and Peter [REDACTED] – with comments and suggestions

Thank you for your response to our enquiries about these complaints. Having considered all the relevant information, we have decided to finalise our investigation of these complaints. Although we have decided to finalise this complaint, we consider it appropriate to make the following comments under s 15(4) of the *Ombudsman Act 1989*.

Mr [REDACTED] of the Australian Federal Police Association, and Mr [REDACTED], Executive General Manager of ACT Policing, lodged complaints with the Office of the ACT Ombudsman (the Office) about the Office of the Director of Public Prosecutions' (the DPP) handling of a Freedom of Information (FOI) access application (application).

As these two complaints related to the same application and raised similar issues, the Office decided to investigate the complaints together.

Background

- | | |
|-----------------|---|
| 5 December 2022 | The DPP received an application for access to a complaint made by the DPP about the conduct of police during the matter of R v Lehrmann. |
| 7 December 2022 | The relevant information was identified and released in full to the applicant. |
| 8 December 2022 | Mr [REDACTED] became aware of the release and emailed the DPP to raise his concerns about a lack of consultation. The DPP did not respond to Mr [REDACTED]. |
| 9 December 2022 | Mr [REDACTED] telephoned the DPP and spoke with a staff member but did not receive a response to his concerns. |

The DPP identified that errors in processing the application had occurred and appeared to re-make the decision so that access to personal information within the document released was redacted. A revised copy of the letter was sent to the applicant.

	Mr [REDACTED] complained to the Office about the DPP's handling of the application.
12 December 2022	The revised decision with redactions applied to the document was published on the DPP's FOI Disclosure Log. The Office notified the DPP of the complaint from Mr [REDACTED]
14 December 2022	Mr [REDACTED] complained the Office about the DPP's handling of the application.
15 December 2022	The Office notified the DPP of the complaint from Mr [REDACTED].
20 December 2022	The DPP provided a response to the notifications of the complaints.
10 January 2023	The Office provided a preliminary view to the DPP, with suggested actions.
12 January 2023	The DPP advised the Office it accepted the preliminary view.
13 January 2023	The DPP issued an apology to Mr [REDACTED].

Comments

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. 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, it appears a misunderstanding occurred where the information officer understood that you were happy for information to be released; however, 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.

Section 20 of the FOI Act provides that the principal officer of an agency may direct the information officer to release information. The communication between you and the information officer may be considered a direction to release information under this provision, and it was acted upon.

You acknowledged to our Office that your communication most likely caused the information officer to believe the letter could be released.

Consultation requirements

¹ Section 40 of the FOI Act.

² Section 6(f) of the FOI Act.

It is our view that the DPP did not comply 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.

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.

In our view, it was an error not to engage with Mr [REDACTED]. Whilst the information 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.

We appreciate the DPP has now issued an apology to Mr [REDACTED] regarding both the lack of consultation and engagement following the release of the information.

Identification of errors and re-making of the decision

You have acknowledged 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.

Conclusion

We appreciate the DPP's assistance with our investigation of these complaints and the DPP's acceptance of our preliminary view and the suggestions the Office made in our letter of 10 January 2023. Thank you for providing the Office with a copy of an apology issued to Mr [REDACTED] on 13 January 2023.

We appreciate the DPP's information officer has already received additional training relating to the processing of FOI application and note that the DPP has reviewed its FOI policies and procedures to address the errors identified throughout this process.

If you have any questions about these comments, please contact Jennifer [REDACTED], Assistant Director, on [REDACTED]. We are available to provide guidance on FOI matters at any stage if you or your staff have any questions. We have also published [Guidelines](#) on the FOI Act, which may be of interest.

Yours sincerely

[REDACTED]

Erin [REDACTED]
Director
ACT Reportable Conduct and FOI