

Decision and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/24/10012
Applicant:	'DA'
Respondent:	ACT Human Rights Commission
Date:	21 June 2024
Decision reference:	[2024] ACTOFOI 9
Catchwords:	<i>Freedom of Information Act 2016</i> – deciding access – whether information is contrary to the public interest information – information taken to be contrary to the public interest to disclose under schedule 1 – information in the possession of human rights commission – information disclosure of which is prohibited under law

Decision

1. For the purpose of s 82 of the *Freedom of Information Act 2016* (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. For the reasons set out below, the decision of the ACT Human Rights Commission (**HRC**) dated 4 March 2024 is **confirmed** under s 82(2)(a) of the FOI Act.
3. I consider this is the correct and preferable decision as the information at issue is comprised entirely of information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act.

Background to Ombudsman review

4. On 19 January 2024, the applicant applied for access to:
 - a copy of [FOI Applicant's] documents (relating to [FOI Applicant]) as a full-fee private patient at the NCPH [National Capital Private Hospital] which were provided by the NCPH to the HRC in its consideration of the complaint [FOI Applicant] lodged on 27 August 2021.
 - The documents... are referred to in the HRC's correspondence to [FOI Applicant] dated 17 & 18 November 2021... This includes a copy of [FOI Applicant's] full relevant clinical records held by the NCPH, and subsequent documents obtained relating to [FOI Applicant's] inpatient services, medical treatment, and care during the period at NCPH between 20/01/2020, 29/01/2020-26/02/2020 and 14-15/03/2020. In particular:
 - ...a copy [of FOI Applicant's] full relevant clinical NCPH records...
 - ...any documented information previously provided to [FOI Applicant] by the NCPH in response to the concerns raised in [FOI Applicant's] complaint (ie in response to [FOI Applicant's] related written requests to the NCPH between August 2020 and August 2021)..
5. On 4 March 2024, HRC identified 71 documents within the scope of the request and refused access to all of them.
6. On 6 April 2024, the applicant applied for Ombudsman review under s 73 of the FOI Act.
7. On 17 May 2024, I provided my draft consideration to the parties.
8. On 17 May 2024, the HRC accepted my draft consideration, making no additional submissions.
9. On 24 May 2024, the applicant provided their response to my draft consideration including further submissions.

Information at issue

10. The information at issue is the information in the 71 documents identified by HRC in relation to the applicant.
11. In making my decision, I have had regard to:
 - the applicant's review application
 - the respondent's decision
 - the ACT FOI guidelines
 - the FOI Act, in particular Schedule 1
 - the submissions of both parties, prior to and in response to my draft consideration
 - relevant case law, including:
 - *'CS' and Chief Minister, Treasury and Economic Development Directorate* [2023] ACTOFOI 27
 - *'CC' and Integrity Commission* [2023] ACTOFOI 10.

Relevant law

12. Section 7 of the FOI Act gives every person an enforceable right of access to government information.¹ This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.²
13. The FOI Act permits refusal of access to information where the information sought is 'contrary to the public interest information'.
14. Contrary to the public interest information is defined in s 16 of the FOI Act as:
information—

¹ Section 7 of the [FOI Act](#).

² Section 35(1)(c) of the [FOI Act](#).

- (a) that is taken to be contrary to the public interest to disclose under schedule 1; or
- (b) the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17.

15. Schedule 1 of the FOI Act identifies categories of information which are taken to be contrary to the public interest to disclose, and therefore 'contrary to the public interest information' for the purposes of s 16(a) of the FOI Act.³

The contentions of the parties

16. In the application for Ombudsman review, the applicant provided detailed submissions about their belief the information at issue should have been given to them in the original decision.
17. The applicant's response to the draft consideration reiterated their original concerns with how the public interest is assessed and their belief that factors external to the FOI Act should be considered in determining the public interest.
18. The original decision from the HRC stated:

The FOI Act provides, in Schedule 1.8, that information in the possession of the HRC that has been obtained or generated in relation to a complaint under section 48 of the HRC Act is taken to be contrary to the public interest information.

...

It is highly important to the integrity of the Commission's complaints-handling role that people have assurance about the confidentiality of information they provide in relation to a complaint. This confidentiality facilitates the conduct of the complaints process by the HRC.

Consideration

19. If information is identified as being within one of the categories set out in Schedule 1, it is taken to be contrary to the public interest to disclose.

³ Section 35(1)(c) of the [FOI Act](#).

20. In this review, for the reasons outlined below, I consider the information at issue meets 2 of the categories set out in Schedule 1.
21. For completeness, I note if information is taken to be contrary to the public interest to disclose under Schedule 1, it is unnecessary to consider the public interest test in s 17 of the FOI Act by assessing the factors favouring disclosure or nondisclosure in Schedule 2.

Information in the possession of human rights commission (Schedule 1, s 1.8)

22. Schedule 1, s 1.8 of the FOI Act specifies the following category of information is taken to be contrary to the public interest to disclose:

Information in the possession of the human rights commission that has been obtained or generated in relation to—

- (a) a commission-initiated consideration under the *Human Rights Commission Act 2005*, section 48; or
- (b) a complaint made under the *Human Rights Commission Act 2005*, part 4.
23. I am satisfied the information at issue is information in the possession of HRC that HRC obtained or generated in relation to a complaint under Part 4 of the *Human Rights Commission Act 2005* (HRC Act). This is evident from the applicant's access request, which describes the information sought by reference to the applicant's complaint made to HRC.

Information disclosure of which is prohibited under law (Schedule 1, s 1.3)

24. Schedule 1, s 1.3 of the FOI Act specifies (in part) that the following category of information is taken to be contrary to the public interest to disclose:

...

- (6) Any other information the disclosure of which is prohibited by a secrecy provision of a law.

- (7) In this section:
- secrecy provision**—a provision of a law is a secrecy provision if it—
- (a) applies to information obtained in the exercise of a function under the law; and
 - (b) prohibits people mentioned in the provision from disclosing the information, **whether the prohibition is absolute or subject to stated exceptions or qualifications.** [my emphasis]

25. Section 99 of the HRC Act relevantly provides:

- (1) In this section:
- ...
- divulge** includes communicate.
- person to whom this section applies** means a person who—
- (a) is or has been—
 - (i) a commissioner; or
 - (ii) a person present at conciliation; or
 - (iii) a member of the staff of the commission; or
 - (b) exercises, or has exercised, a function under this Act.
- protected information** means information about a person that is disclosed to, or obtained by, a person to whom this section applies because of the exercise of a function under this Act by the person or someone else.
- (2) A person to whom this section applies commits an offence if—
- (a) the person—
 - (i) makes a record of protected information about someone else; and
 - (ii) is reckless about whether the information is protected information about someone else; or

- (b) the person—
 - (i) does something that divulges protected information about someone else; and
 - (ii) is reckless about whether—
 - (A) the information is protected information about someone else; and
 - (B) doing the thing would result in the information being divulged to someone else.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

- (3) Subsection (2) does not apply if the record is made, or the information is divulged—
 - (a) under this Act or another territory law; or
 - (b) in relation to the exercise of a function, as a person to whom this section applies, under this Act or another territory law.
- (4) Subsection (2) does not apply to the divulging of protected information about someone with the person's consent.

...

- 26. I consider s 99 of the HRC Act to be a 'secrecy provision' for the purposes of Schedule 1, ss 1.3(6) and (7) of the FOI Act, in that it prohibits HRC staff from disclosing 'protected information', which includes information of the kind contained in the information at issue.
- 27. Moreover, having regard to the definition of 'secrecy provision' in Schedule 1, s 1.3(7)(b) of the FOI Act, I consider the exclusion in s 99(4) of the HRC Act – which says the prohibition in s 99(2) of the HRC Act does apply to the divulging of information with consent – does not change that conclusion.
- 28. Accordingly, I am also satisfied the information at issue is information taken to be contrary to the public interest to disclose under Schedule 1, s 1.3(6).

Observation about interaction of the FOI Act with health records

29. My conclusion that the information at issue meets 2 of the categories of information identified in Schedule 1 to the FOI Act – and therefore is taken to be contrary to the public interest to disclose – is sufficient for me to decide this review.

30. However, I wish to make a small but important observation about the interaction of the FOI Act with health records, noting that much if not all of the information sought by the applicant consists of information originally held by the National Capital Private Hospital (the NCPH), which the NCPH gave to HRC in the context of the applicant's complaint to HRC.

31. In brief, s 12 of the FOI Act makes clear that access to health records is not intended to be covered by the FOI Act. Section 12 provides:

This Act **does not apply to information in a health record** under the *Health Records (Privacy and Access) Act 1997*.

32. The expression 'health record' is defined in the Dictionary to the *Health Records (Privacy and Access) Act 1997* as follows:

health record means any record, or any part of a record—

- (a) held by a health service provider and containing personal information; or
- (b) containing personal health information.

33. While it is unnecessary for me, in deciding this review, to be satisfied that all of the information at issue is a 'health record' under the *Health Records (Privacy and Access) Act 1997*, and therefore outside the application of the FOI Act, I think it is relevant to observe that there are avenues other than the FOI Act through which a person may seek access to personal health information.

Conclusion

34. The information at issue in this matter is comprised entirely of information that is taken to be contrary to the public interest to disclose under Schedule 1, ss 1.3(6) and 1.8 of the FOI Act.
35. For these reasons, my decision is to **confirm** HRC's decision under s 82(2)(a) of the FOI Act.

David Fintan

Senior Assistant Ombudsman

21 June 2024