

Decision and reasons for decision of Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10016
Applicant:	'CP'
Respondent:	Canberra Health Services
Agency reference:	CHSFOI 22-23.18
Date:	27 November 2023
Catchwords:	<i>Freedom of Information Act 2016</i> – deciding access – whether disclosure of information is contrary to the public interest – advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government – the information is personal information of the person making the request – prejudice the protection of an individual's right to privacy or any other right under the <i>Human Rights Act 2004</i> – prejudice the management function of an agency or the conduct of industrial relations by an agency

Decision

1. For the reasons set out below, I have decided to confirm the decision of Canberra Health Services (CHS) dated 21 December 2022 under s 82(2)(a) of the FOI Act.

Background of Ombudsman review

2. On 24 October 2022, the applicant applied for access to:

I request any email sent from, or to, CHS employees, Executive Director [name removed], Senior Director [name removed], Assistant Director of Nursing [name removed], including any email where these individuals receive, send or are Cced together or individually, since 1 August 2022 where the email has in the heading or body of the email, the name, [applicant first name], [applicant first and last name], [applicant full name] or ANMF.

3. After consultation with CHS, on 4 November 2023 the applicant agreed to refine the scope of their application to the following:

I request any email sent to or from Executive Director [name removed], Senior Director [name removed], Assistant Director of Nursing [name removed], containing 'CP', Union or ANMF in reference to me personally. This application covers the period 1 August 2022 to 23 October 2022.

The response may exclude the following:

- correspondence of Canberra Health Services Staff related to employment eg recruitment, rostering, workplace conditions
 - correspondence of Canberra Health Services/union meetings or business where I am not referred to
 - email where there are over 10 recipients in a single email in order to remove generic management communications
 - email where 'CP' received the correspondence, in chains where I am included to a point you may only include subsequent correspondence
 - email sent to non-government email addresses.
4. After consultation and revision of the scope, the revised due date for a decision on the access request was 28 December 2022.
 5. On 21 December 2022, CHS identified 11 documents within the scope of the FOI application. CHS decided to grant full access to 3 documents, partial access to 6 documents, and refuse access to 2 documents.
 6. On 30 March 2023, the applicant applied for Ombudsman review under s 73 of the FOI Act. At the same time, the applicant requested an extension of time to make this application under s 74(1)(b) of the FOI Act.
 7. On 3 April 2023, the delegate approved the request for an extension of time.
 8. On 27 October 2023, I provided my preliminary views to the parties in a draft consideration.
 9. On 31 October 2023, the respondent indicated they accepted my draft consideration.
 10. On 8 November 2023, the applicant provided their response to the draft consideration raising the same concerns as in their application for Ombudsman review.

Information at issue

11. The information at issue in this matter is the 8 documents to which CHS refused access in full or part. These documents are internal emails sent among CHS staff and emails sent from or received by the applicant as part of email chains.
12. In making this decision, I have had regard to:
 - the applicant's review application
 - the respondent's decision
 - additional submissions made by the applicant in lodging their request for review
 - additional submissions made by the respondent in response to the review

- the FOI Act, in particular Schedule 2, s 2.2(a)(ii) and (xv)
- the *Human Rights Act 2004* (**Human Rights Act**)
- an unedited copy of the information at issue
- the ACT Ombudsman FOI guidelines made under s 66 of the FOI Act
- relevant case law, including:
 - [*Gaspa and Department of Transport and Main Roads \(Unreported\)*](#)
[QIC 6 September 2023](#)
 - [*Applicant VEAL of 2002 and Minister for Immigration and Multicultural and Indigenous Affairs & Anor \[2005\] HCA 72*](#)
 - [*CFMEU and Chief Minister, Treasury and Economic Development Directorate \[2023\] ACTOFOI 8*](#)
 - [*'BZ' and Transport Canberra and City Services \[2023\] ACTOFOI 6*](#)

Relevant law

13. Section 7 of the FOI Act provides every person with 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
14. Section 16(1) of the FOI Act provides that information is contrary to the public interest information if—
 - (a) it is taken to be contrary to the public interest to disclose under schedule 1; or
 - (b) disclosing the information would, on balance, be contrary to the public interest under the test set out in section 17.
15. The public interest test in s 17 sets out the process for balancing public interest factors favouring disclosure and nondisclosure respectively. This balancing test must be used to determine whether disclosure would be contrary to the public interest.
16. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.³
17. Schedule 2 of the FOI Act sets out public interest factors to be balanced when conducting the s 17 test to determine the public interest.

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

³ Section 35(1)(c) of the FOI Act.

The contentions of the parties

18. In its decision notice, the respondent said:

On balance, the factors favouring disclosure are outweighed by the factor favouring non-disclosure as the information would not provide any government information pertinent to your request.

Therefore, I have determined the information identified is contrary to the public interest and would not advantage the public in disclosing this information.

19. In the application for Ombudsman review, the applicant noted their belief that the factors favouring nondisclosure were not correctly assessed by the decision maker.

Consideration

Public interest test

20. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:

- identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in schedule 2, section 2.1
- identify any factor favouring nondisclosure that applies in relation to the information (a relevant factor favouring nondisclosure), including any factor mentioned in schedule 2, section 2.2
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure
- decide whether, on balance, disclosure of the information would be contrary to the public interest
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

Factors favouring disclosure

21. CHS identified 2 factors favouring disclosure in its decision.

22. The decision did not provide any analysis of the identified factors favouring disclosure, merely stating reasons why sections of the information should either be withheld in full or part.

Advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government (Schedule 2, s 2.1(a)(vii))

23. A factor favouring disclosure 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.⁴
24. The disclosure of information documenting workplace interactions between the applicant and staff members at CHS, or CHS staff discussing their interactions with the applicant, may be reasonably likely to advance the fair treatment of the applicant in their dealings with the government.
25. At the same time, I agree with the observation made by the Queensland Information Commissioner in [Gapsa and Department of Transport and Main Roads \(311159\) 6 September 2013](#), in the context of assessing a similar public interest factor, that this public interest factor 'does not require a decision maker to ensure that an applicant is provided with sufficient information to enable that applicant to be subjectively satisfied that he or she received fair treatment'.⁵
26. I have also taken into account that there is no formal investigation or similar process on foot which would create an expectation of procedural fairness, or otherwise require the applicant to be afforded procedural fairness, in connection with the information at issue.
27. Accordingly, I afford this factor limited weight in this review.

The information is personal information of the person making the request (Schedule 2, s 2.1(b)(i))

28. A factor favouring disclosure is that the information is the personal information of the person making the request.⁶
29. Personal information is defined within the FOI Act as:⁷

information or an opinion (including information forming part of a database), whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion
30. Given the information at issue refers to the applicant by name throughout, I consider it is personal information for the purposes of the FOI Act. I note the information at issue includes personal information of some other individuals too.

⁴ Schedule 2, s 2.1(a)(vii) of the FOI Act.

⁵ *Gapsa and Department of Transport and Main Roads (Unreported)* QIC 6 September 2013, at [20].

⁶ Schedule 2, s 2.1(b)(i) of the FOI Act.

⁷ Dictionary of the FOI Act.

31. I am inclined to afford this factor moderate weight in this review, at least in relation to the sections of the information at issue which include personal information of the applicant.

Factors favouring nondisclosure

32. The original decision identified 2 factors favouring nondisclosure.

Prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act 2004 (Schedule 2, s 2.2(a)(ii))

33. A factor favouring nondisclosure is that disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act.⁸

34. Section 12 of the Human Rights Act provides:

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

35. Having reviewed the information at issue, I consider this factor to be relevant in this review, as the information refers not only to the applicant but also to several other CHS employees, making it also their personal information.

36. I must therefore consider whether disclosure could be reasonably expected to prejudice the particular CHS employees' right to privacy.

37. Disclosure of the information at issue would publicise what I consider to be sensitive communications and discussions from and about persons other than the applicant, as well as matters directly concerning the applicant.

38. Having reviewed the material, I do not consider it would be possible to separate material that relates to the applicant from material that relates to others, while maintaining the integrity and original meaning of the material, as opposed to isolated fragments without context.

39. On balance, I consider there is a reasonable expectation that disclosure could prejudice the right to privacy of other individuals within CHS under the Human Rights Act by presenting an arbitrary disclosure of their privacy.

40. I afford this factor moderate weight in this review.

⁸ Schedule 2, s 2.2(a)(ii) of the FOI Act.

Prejudice the management function of an agency or the conduct of industrial relations by an agency (Schedule 2, s 2.2(a)(xv))

41. A factor favouring nondisclosure is that disclosure could be reasonably expected to prejudice the management function of an agency or the conduct of industrial relations by an agency.⁹
42. The management function of an agency includes activities such as recruitment, training, performance reviews, promotion, counselling, discipline, compensation and occupational health and safety.¹⁰
43. An aspect of conducting these activities is providing an environment where staff members feel confident they can ask questions, provide feedback, and raise concerns with management, confident that they will be taken seriously, even if raised informally.
44. If a workplace issue reaches a certain level of seriousness, then formal processes may be triggered, leading to disclosure of information to involved parties to ensure procedural fairness.
45. I consider it is valuable to allow management to be able to receive feedback from staff and resolve matters at a more informal level, provided there is capacity for escalation where necessary.
46. Where the information at issue does touch upon material that could be reasonably expected to prejudice the management function of an agency, I consider this information relates not only to the applicant but to other individuals within CHS, whether they are personally raising concerns with management, or are the subject of these concerns.
47. Accordingly, I consider it reasonable to expect that disclosure could prejudice the willingness of staff and management to use this less formal stream of the management function of the agency.
48. For these reasons, I am inclined to afford this factor significant weight.

Balancing the factors

49. In making this decision I considered 2 factors favouring disclosure and 2 factors favouring nondisclosure.

⁹ Schedule 2, s 2.2(a)(xv) of the FOI Act.

¹⁰ 'BZ' and Transport Canberra and City Services [2023] ACTOFOI 6

50. Balancing public interest factors is not merely a tallying exercise, where the public interest is established solely by the number of applicable factors on either side. I considered the relative importance and weight each factor should be given. The weight given to the factors depends on the effect that disclosing the information would have on the public interest.
51. The FOI Act also has a pro-disclosure bias. The public interest test and weighing of factors is approached as scales 'laden in favour of disclosure'.¹¹
52. In this instance, I have afforded one factor favouring disclosure limited weight and the second factor favouring disclosure moderate weight. I have afforded one factor favouring nondisclosure moderate weight and the second factor significant weight.
53. While I have some concerns about CHS' original decision, specifically the lack of detailed reasons given to the applicant, ultimately I consider CHS' decision to be the correct and preferable outcome.

Conclusion

54. For these reasons, my decision is to **confirm** CHS' decision under s 82(2)(a) of the FOI Act.

David Fintan
Senior Assistant Ombudsman
27 November 2023

¹¹ [Explanatory Statement, Freedom of Information Bill 2016.](#)