

## Decision and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/24/10005
Applicant:	'CZ'
Respondent:	ACT Education Directorate
Agency reference:	2023/23717
Date:	28 May 2024
Decision reference:	[2024] ACTOFOI 8
Catchwords:	<i>Freedom of Information Act 2016</i> – deciding access – whether disclosure of information is contrary to the public interest – 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 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 Education Directorate (**Education**) dated 30 January 2024 should be **confirmed** under s 82(2)(a) of the FOI Act.

## **Background of Ombudsman review**

3. On 14 November 2023, the applicant applied for access to:  

Copies of all alleged safety reports regarding the [FOI applicant]'s family for 2022.
4. On 30 January 2024, Education identified 12 documents within the scope of the request and refused access to all 12 documents.
5. On 31 January 2024, the applicant applied for Ombudsman review under s 73 of the FOI Act.
6. On 9 May 2024, I provided my draft consideration to the parties.
7. On 9 May 2024, Education accepted my draft consideration making no additional submissions.
8. On 9 May 2024, the applicant indicated they do not accept my draft consideration, making additional submissions that they should be able to access at least the dates of the reports.

## **Information at issue**

9. The information at issue is the workplace safety reports identified as being within the scope of the application.
10. 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 2
  - the *Human Rights Act 2004* (**Human Rights Act**)

- the submissions of both parties, and
- relevant case law, including:
  - *'BZ' and Transport Canberra and City Services* [2023] ACTOFOI 6
  - *'BM' and Justice and Community Safety Directorate* [2021] ACTOFOI 14.

## Relevant law

11. Section 7 of the FOI Act provides every person with an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.<sup>1</sup>
12. Contrary to the public interest information is defined in s 16 of the FOI Act as:
 

information—

  - (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.
13. 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.
14. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.
15. 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.<sup>2</sup>

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<sup>1</sup> Section 35(1)(c) of the [FOI Act](#).

<sup>2</sup> Section 35(1)(c) of the [FOI Act](#).

## **The contentions of the parties**

16. In the application for Ombudsman review, the applicant said:

'Allegations from [a school] and the ACT directorate have been made, allegations against the [FOI Applicant]'s family. The [FOI Applicant]'s family have never seen any proof...

...

'Therefore to avoid it in the future it is important for us to clearly identify for ourselves as adults, so we know not to repeat it.'

17. The original decision from the Education Directorate stated:

The records requested are workplace health and safety reports submitted by Directorate employees. Whilst the records refer to you or your family, fundamentally they are personal records of the employees, and you are not entitled to access their personal information.

18. The applicant made additional submissions noting that they would like to gain access to the dates of the reports at a minimum.

## **Consideration**

### ***Information disclosure of which is taken to be contrary to the public interest (Schedule 1)***

19. I agree with the original decision that the information at issue is not information that is taken to be contrary to the public interest to disclose under any of the categories listed in Schedule 1 to the FOI Act.

20. That is, the information at issue is not automatically taken to be contrary to the public interest information, and therefore it is necessary to consider the public interest test in s 17 of the FOI Act.

### **Public interest test**

21. To determine whether disclosure would, on balance, be 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**

#### ***Information is personal information of the person making the request***

#### ***(Schedule 2, s 2.1(b)(i))***

22. The original decision noted one factor in favour of disclosure, in that the information at issue is personal information of the person making the request which favours disclosure under the FOI Act.

23. The FOI Act provides personal information—<sup>3</sup>

- (a) means 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; but
- (b) for an individual who is or has been an officer of an agency or staff member of a Minister, does not include information about—
  - (i) the individual's position or functions as an officer or staff member; or
  - (ii) things done by the individual in exercising functions as an officer or staff member.

24. I consider the workplace safety reports contain information about the applicant which meets the definition of personal information as they include information about the applicant where their identity is apparent.

25. While the workplace safety reports contain some personal information of the applicant, it is important to note the same reports contain personal information of others, including employees of Education.

26. Moreover, it seems evident the primary purpose of the workplace safety reports is to support the health and safety of employees, including actions to mitigate risks to health and safety, and not to collect information about the applicant.

27. I agree this factor is relevant and, having regard to the above, I afford it moderate weight in my decision.

### **Factors favouring nondisclosure**

28. The original decision from Education identified one factor favouring nondisclosure as relevant.

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<sup>3</sup> Dictionary, [FOI Act](#).

***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))***

29. A reasonable expectation that disclosure could prejudice an individual's right to privacy under the Human Rights Act weighs against disclosure under the FOI Act.

30. 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.

31. I agree this factor is relevant in this review, specifically in relation to the identity of Education employees who make workplace safety reports.

32. I consider disclosure of the workplace safety reports could reasonably be expected to prejudice the protection of an employee's right to privacy in connection with the personal information in the workplace safety reports, by interfering arbitrarily in their right to privacy with respect to the information.

33. The arbitrariness arises, in my view, from the fact the predominant purpose of the workplace safety reports is to protect the health and safety of employees, and disclosure of the personal information for another purpose would have no connection with the predominant purpose.

34. In the original application, and later submissions to this review, the applicant notes they would be happy to receive the information at issue with the names of staff members removed.

35. The context of this request is important for determining what will represent a prejudice to privacy. Schools are a small environment where staff members

are known to students, parents and their colleagues. Any incident that occurs in a school environment will either already be known to the involved parties, or will easily be identifiable regardless of the presence of a name or not, rendering the protective effect of redactions moot.

36. Accordingly, despite the applicant's additional submissions in response to my draft consideration, stating they would like to access the dates of the reports, I consider this would not be sufficient to protect personal privacy. Disclosure of the dates involved would make it simple to identify the remainder of the information not disclosed.

37. I afford this factor significant weight in my decision.

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

38. I consider there is another factor favouring nondisclosure that is also relevant.

39. A reasonable expectation that disclosure could prejudice the management function of an agency or the conduct of industrial relations by an agency favours nondisclosure under the FOI Act.

40. I believe this factor is relevant for this review, in terms of the management function of an agency rather than conduct of industrial relations.

41. The management function of an agency includes activities such as recruitment, training, performance reviews, promotion, counselling, discipline, compensation and occupational health and safety.<sup>4</sup>

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<sup>4</sup> ['BZ' and Transport Canberra and City Services \[2023\] ACTOFOI 6](#).



42. It is important that all staff members within schools have an avenue available to them to report incidents that occur, potential risks and situations which they believe are currently presenting a safety concern or will present a safety concern if they are allowed to continue.

43. Education noted in the original decision that:

The information contained in the records was submitted on a confidential basis. This is clearly stated in the reporting system.

44. Issues raised in the workplace safety reports have been acted upon by the school and processes have been established for future contact between the applicant's family and school staff.

45. This has already been communicated to the applicant in previous discussions with school staff and by these contact restrictions.

46. On this basis, I consider the process is working as intended by allowing staff to raise concerns internally, and have appropriate actions taken in response to these concerns, while maintaining the confidentiality of the specifics of the reports made.

47. Previously a delegate for the ACT Ombudsman found that:

Giving access to the information to the person who is the subject of the disclosure, who may be able to divulge it to any third person and so on, inherently risks detriment to the person making the disclosure in a way that is prejudicial to the ability of the agency to conduct its own autonomous management function.<sup>5</sup>

48. I consider a similar risk of prejudice to the management function of the ACT Education Directorate is present in the potential disclosure of the information at issue in this review.

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<sup>5</sup> ['BM' and Justice and Community Safety Directorate \[2021\] ACTOFOI 14.](#)

49. I afford this factor a moderate weight in my decision.

### **Balancing the factors**

50. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and non-disclosure, with the higher quantity being considered in the public interest. The decision-maker's task is to consider the relative importance and weight of each factor identified. The weight given to a factor will depend on the effect that disclosing the information has on the public interest.

51. The FOI Act has a pro-disclosure bias, and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side. Rather, the scales are 'laden in favour of disclosure'.<sup>6</sup>

52. In this instance I have considered one factor favouring disclosure, which I have afforded medium weight, and two factors favouring nondisclosure, which I have afforded significant and moderate weight, respectively.

53. On balance, I consider the factors favouring nondisclosure outweigh the factor favouring disclosure.

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<sup>6</sup> [Explanatory Statement, Freedom of Information Bill 2016.](#)

## **Conclusion**

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

**David Fintan**  
**Senior Assistant Ombudsman**  
**28 May 2024**