

Decisions and reasons of Acting Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10021
Applicant:	'DD'
Respondent:	Education Directorate
Respondent reference:	2023/2439
Date:	15 July 2024
Decision reference:	[2024] ACTOFOI 12
Catchwords:	<i>Freedom of Information Act 2016</i> – reveal the reasons for a government decision and any background or contextual information that informed the decision – information is personal information – prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act – prejudice the business affairs of third parties – prejudice an agencies ability to obtain confidential information – prejudice the management function of an agency

Decision

1. The applicant applied for Ombudsman review of the Education Directorate's (**Education**) decision to refuse access to information about the applicant's employment on the ground it was contrary to the public interest information.
2. For the purpose of s 82 of the *Freedom of Information Act 2016* (**FOI Act**), I am a delegate of the ACT Ombudsman.

3. For the reasons set out below, I **vary** Education's decision under s 82(2)(b) of the FOI Act. I agree with Education's decision that, on balance, personal information of third parties (including identifying information and confidential complaint information) is contrary to the public interest information.
4. I have decided to give the applicant access to information I consider, on balance, is not contrary to the public interest information.

Background to Ombudsman review

5. On 4 March 2023, the applicant applied to Education for access to:
 - ... 1. Sign in and out sheets since 08 Sep 2022 of [applicant] that allegedly show inaccuracies of sign-in detailed by [Principal of school] in draft record of counselling dated 03 March 2023
 2. Documents (email or other records) authored for example by or address to [principal] or [staff member] or other staff members since 08 Sep 22 detailing when [applicant] has left work without notifying manager
 3. Documents... detailing when [applicant] did not complete assigned task and what duties were not completed.
 4. Copy of [applicant]'s signed position description
 5. Documents...detailing when and how [applicant] did not effectively prioritise workloads.
 6. Documents...detailing when and how [applicant] did not follow the direction of his manager on reasonable requests on the first instruction.
 7. Documents...detailing complaints received from members of [business] regarding failure of [applicant] to follow protocol for raising concerns with the team.
 8. Documents...detailing complaints received from members of the [school] team regarding intimidating behaviour by [applicant].
 9. Documents...detailing complaints...regarding argumentative conduct by [applicant] when directed to do tasks within the scope of the descriptions of your [position] duty statement.

10. Documents...detailing complaints received from [company] regarding argumentative behaviours by [applicant] during face-to-face discussion, inappropriate tone in email correspondence and jobs being raised through maintenance that should be addressed at a local level.
 11. Copy of the email that is allegedly referred to in the complaint by the [company] authored by [applicant] allegedly containing an inappropriate tone in the correspondence.
 12. Documents...detailing complaints from [teams] regarding argumentative behaviours during face-to-face discussion with [applicant], inappropriate tone in email correspondence and jobs being raised in maintenance that should be addressed at a local level.
 13. Documents...detailing complaints received from the parent community regarding confrontational conduct of [applicant] in the carpark before and after school.
 14. Documents...when [applicant] has shower before and after work.
 15. Documents...alleging when [applicant] compromising people's feelings of safety by confronting individuals that have raised concerns with his conduct through the appropriate channels.
6. On 28 April 2023, Education advised the applicant it had identified 20 records within the scope of the application. Education decided to grant full access to 11 records, partial access to 5 records and refuse access in full to 4 records.¹
 7. On 14 May 2023, the applicant applied for Ombudsman review of Education's access decision.
 8. On 18 June 2024, the Senior Assistant Ombudsman provided their preliminary view to the parties in a draft consideration.
 9. On 7 July 2024, the applicant provided submissions in response to the draft consideration regarding the release of document 13.
 10. On 15 July 2024, Education responded to the draft consideration and provided additional submissions regarding documents 2 and 6.

¹ In the schedule of documents provided by Education the decision on document 1 was recorded as 'partial access'. Document 1 contained an attachment which was irrelevant to the scope of the application. Access was granted in full to the information sought in document 1.

Information at issue

11. The information at issue in this Ombudsman review is the information Education decided to refuse access to in its decision of 28 April 2023 (**counselling records**) being:
 - 4 emails and one record of counselling (**documents 4, 13, 14, 16 and 18**) which Education refused access in part and
 - 4 emails (**documents 2, 6, 12 and 15**) Education decided to refuse access to in full.
12. The key issue to be decided in this Ombudsman review is whether the counselling records are 'contrary to the public interest information' for the purposes of the FOI Act.
13. In making my decision, I have had regard to:
 - the applicant's access application, review application and submissions of 7 July 2024
 - the respondent's decision of 28 April 2023
 - the FOI Act, in particular sections 7, 16, 17, 35, and Schedule 2
 - the respondent's FOI processing file relating to the access application
 - additional information provided by the respondent on 31 May 2023 and 15 July 2024
 - the Freedom of Information Guidelines made under s 66 of the FOI Act, and
 - relevant case law including ['CP' and Canberra Health Services \[2023\] ACTOFOI 24 \(27 November 2023\)](#).

Relevant law

14. Section 7 of the FOI Act gives every person 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.²
15. 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.
16. The public interest test set out in section 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
17. Section 35(1)(c) of the FOI Act provides an access application may be decided by refusing to give access to the information sought because the information being sought is contrary to the public interest information.
18. Section 50 of the FOI Act applies if an access application is made for government information in a record containing contrary to the public interest information and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted.
19. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.

The submissions of the parties

20. Education decided the counselling records were, on balance, contrary to the public interest information. Education's decision notice said:

² Section 35(1)(c) of the [Freedom of Information Act 2016 \(ACT\)](#).

"...I place significant weight on the right to privacy of individuals and their right to have their personal information protected. I have decided that their right to privacy in relation to their personal information has a higher standing of public interest not to disclose, than the public interest in disclosing this information. Accordingly, third party personal information has been deleted.

I have decided that external organisations are entitled to have information relating to their business affairs not disclosed if it would be prejudicial to their commercial interests, including their reputation. I have given this factor stronger weight than the public interest that would be served by disclosure of the information.

Information contained in some of the records was communicated to the Directorate with the expectation that it would be handled on an in-confidence basis, and I agree that it is confidential in nature. It would be detrimental to the Directorate's ability to obtain confidential information such as this if it were disclosed, and it would have a negative consequence for stakeholder and employee relationships. Therefore, I have decided that the factor favouring non-disclosure is more strongly weighted than the factor favouring disclosure in relation to this information.

Information that would be prejudicial to the management function of the Directorate if it were disclosed has been deleted because I have determined that the factor favouring non-disclosure has more weight than the factor favouring disclosure. This relates to the preparation of responses to employment matters. These routinely arise within the organisation, and it is appropriate that inputs from other personnel are considered in formulating the response to the issues raised. These processes form part of the management function and the individual responses are not indicative of the organisation's overall position on the matter. Therefore, I have decided that it is not in the public interest to disclose this information..."

21. In the review application, the applicant submitted they were not given access to evidence concerning a workplace issue and this prevents the exercise of procedural fairness. The applicant also advised they were aware of the identity of the complainant and therefore their privacy could not be prejudiced.

22. These submissions are discussed in more detail below.

Consideration

23. I have carefully reviewed an unredacted copy of the counselling records.

Public interest test

24. 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

25. In its original decision, Education identified one factor favouring disclosure that the counselling records include the personal information of the applicant.

26. The counselling records concern how a workplace issue concerning the applicant was addressed by Education. The applicant has submitted the information could reveal information which was used to support that decision.

Reveal the reasons for a government decision and any background or contextual information that informed the decision (Schedule 2, s 2.1(a)(viii))

27. A factor favouring disclosure in the public interest is where release could reasonably be expected to reveal the reasons for a government decision and any background or contextual information that informed the decision.
28. I agree the counselling records contain background and contextual information that may have informed Education's decision it was appropriate to initiate counselling of the applicant.
29. In response to the draft consideration, the applicant submitted the decision to refuse to give access to the personal information of the applicant contained in the counselling records is a violation of the hearing rule and would prevent procedural fairness in the misconduct process involving the applicant.
30. Generally, the hearing rule requires prior notice that a decision could be made affecting the person's interests, the disclosure of critical issues to be addressed and giving the person an opportunity to respond.³
31. The ACT Public Sector Infrastructure Services Enterprise Agreement 2023-2026 provides counselling of an employee may happen outside of the preliminary assessment and misconduct process.⁴ In cases where counselling is considered appropriate, the employee will be informed of what the discussion will be about and be invited to have a support person.
32. If the employee is informed the counselling will be formal, the manager or head of service must create a formal record of the counselling which must include details about the ways the employee's conduct needs to change or improve, timeframes for change or improvements and may include written directions about future expectations, standards, and behaviours.⁵

³ [Kioa v West \(1985\) 159 CLR 550](#), 563, quoting Mason J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360.

⁴ [ACT Public Sector Infrastructure Services Enterprise Agreement 2023-2026](#), [G3.1] page 136.

⁵ *Ibid* [G3.8] page 137.

33. The record of formal counselling must be provided to the employee and the employee given an opportunity to correct any inaccuracies and provide comments before signing the record. A signature by the employee reflects their agreement the record is accurate; if the employee chooses not to sign the record details of the offer and any reasons for refusal must be clearly noted.⁶
34. I consider if the counselling records were released, it would only reveal information obtained by the manager or supervisor of the applicant and does not detail how this information was assessed for the purpose of counselling the applicant.
35. Noting the relevant 'decision' in this instance occurred in the context of addressing workplace issues between employees and a formal record of counselling was provided, I do not consider there is a public interest in revealing background or contextual information which informed this decision.
36. I do not agree this factor is relevant to the counselling records and attribute no weight to this factor.

Information is personal information (Schedule 2, s 2.1(b)(i))

37. Education identified a factor favouring disclosure is that the information includes the personal information of the person making the request.
38. I note the personal information of the applicant within the counselling records is the joint personal information of the applicant and other parties (i.e. statements about the applicant made by third parties with reference to the applicant by name or position title).

⁶ Ibid [G.9] page 137.

39. While the applicant was not provided with a copy of the verbatim allegations, I consider the personal information about the applicant in counselling records is either known to the applicant or was previously provided to the applicant in a summarised form as part of the counselling process.

40. I attribute minor weight to this factor.

Factors favouring nondisclosure

41. In its original decision, Education identified 4 factors favouring nondisclosure.

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

42. A reasonable expectation disclosure could prejudice an individual's right to privacy under the *Human Rights Act 2004* (**Human Rights Act**) weighs against disclosure under the FOI Act.

43. 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.

44. Education identified this factor is relevant to personal information contained in documents 4, 6, 12, 14, 15, and 18 comprising full names, position title, email address, mobile number, signature, and statements made by identified third party individuals.

45. The *Information Privacy Act 2014* sets out how personal information is handled by public sector agencies and how the privacy of individuals is protected. An individual's privacy is 'interfered with' if an act or practice breaches a Territory Privacy Principle (**TPP**) in relation to personal information about the individual.⁷

⁷ Section 11 of the [Information Privacy Act 2014 \(ACT\)](#).

46. TPP 6 provides if an agency holds personal information about an individual that was collected for a particular purpose (primary purpose), the agency must not use or disclose the information for another purpose (secondary purpose) unless the individual consents or an exception in TPP 6.2 or TPP 6.3 applies.
47. An agency may use or disclose non-sensitive personal information for a secondary purpose if the use or disclosure is related to the primary purpose; required or authorised by law; or a permitted general situation exists.
48. I agree this factor is relevant to the personal information of third parties included in documents 4, 6, 12, 13, 15, and 18. I note the personal information of these individuals was provided to Education for a particular purpose, including service delivery, complaint handling and employment related matters.
49. I do not consider the individuals to whom the personal information relates have consented to the disclosure of this information to the applicant.
50. Having reviewed the contents of the email correspondence, I do not consider those individuals would expect Education to disclose their personal information to the applicant for a purpose unrelated to the applicant's employment (e.g. misconduct or underperformance process) where employees are obligated to maintain confidentiality.⁸
51. I consider disclosure of this personal information for a secondary purpose which is not related to the primary purpose of collection could amount to a breach of the TPPs and interfere with the protection of their right to privacy.
52. I afford significant weight to this factor.

Prejudice the business affairs of third parties (Schedule 2, s 2.2(a)(xi))

⁸ Section 9 of the [Public Sector Management Act 1994 \(ACT\)](#).

53. Education decided to refuse access to the position title of a third party where it appears in document 4 on the ground this information is contrary to the public interest.
54. A factor favouring nondisclosure is where release could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person.
55. In the original decision notice, Education said disclosure of this information would be prejudicial to an external organisation's commercial interests including their reputation.
56. I note the third-party external organisation was consulted about the potential release of this information and did not object to release of an edited document with personal information deleted.
57. I do not consider disclosure of the position title could have any negative impact on the reputation of the external organisation. I note the external organisation is otherwise identified in document 4.
58. In my view, this factor does not apply to the information at issue.

Prejudice an agencies ability to obtain confidential information (Schedule 2, s 2.2(a)(xii))

59. A factor favouring nondisclosure is disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information.
60. In the decision letter, Education identified information which was communicated with the expectation it would be handed on an in-confidence basis. I agree that this factor is relevant to the information contained in documents 12, 13 and 15.

61. Document 12 is an email record of an incident report and includes information about the incident and the individual who reported the incident. I agree this information was provided on a confidential basis, as the information was submitted via a reporting system which gives users a confidentiality notice when accessing the system.
62. Document 13 is an email from Education to a third-party contractor. Having reviewed the nature and contents of this email, I consider this information includes a reference to a mutual understanding the information should not be shared to individuals who are not recipients.
63. In response to the draft consideration, the applicant submits this factor should not apply to document 13 on the ground it was unreasonable for Education to agree to not provide this information to the applicant.
64. The applicant said the information is not legally privileged, and a contractor who makes allegations against a public servant cannot reasonably expect those allegations will not be shared. The applicant notes it is unclear how release would cause detriment to the sender of the email; and confidential information must be identified specifically and not in global terms.⁹
65. Having reviewed the contents of document 13, I consider the sender of the email provided information to the recipient of the email to advise of a communication issue with the applicant. I am satisfied the sender of the email communicated to the recipient of the email the information they did not want to be disclosed to the applicant; and the recipient of the email acknowledged this.

⁹ ['AFK' and Tertiary Education Quality and Standards Agency \(Freedom of information\) \[2023\] AICmr 115 \(20 November 2023\)](#), [29]–[30].

66. Document 15 is an email containing complaint information sent to the school principal. I consider this information was shared on a confidential basis as the email was sent by an employee to a specific individual who has managerial responsibilities for the purpose of raising a workplace conduct issue.
67. I consider release of information which was provided on a confidential basis would hinder Education's ability to enter future undertakings of confidentiality or provide assurances information will remain confidential. Consequently, disclosure could negatively impact Education's ability to obtain relevant information. There is a significant public interest in ensuring Education is not impeded from receiving confidential information relevant to their work health and safety obligations and employee management obligations.
68. I attribute significant weight to this factor as it applies to documents 12, 13 and 15.
69. I have considered whether this factor applies to documents 2 and 6. These emails were sent to more than one addressee, do not identify information contained in the emails which should not be shared, or contain references to confidentiality or non-dissemination.
70. In response to the draft consideration Education submitted it is unreasonable to rely on the absence of words such as confidential or complaint to decide some of the records were not confidential communications or a complaint.
71. Education noted one of the third parties who was consulted on the possible release of the information advised they did not want to become involved in a dispute between the applicant and the third-party entity, noting this was an issue for Education to manage.
72. The intention of the communications by the third party to the school was to raise a complaint by escalating an issue involving the applicant as it was impacting their ability to provide services to the school.

73. If complaints made by third parties about staff were disclosed to the person the complaint is about outside of a misconduct or complaint process, I accept this could impact Education's ability to receive relevant complaint information, including potentially confidential information.
74. While I agree the information in these records concerns a complaint made to the school, I consider release would have a minor impact on Education's ability to receive complaints or confidential information in circumstances where it is not clear there is an obligation or duty to keep the information confidential. I have decided to give minor weight to this factor as it applies to documents 2 and 6.

Prejudice the management function of an agency (Schedule 2, s 2.2(a)(xv))

75. A factor favouring nondisclosure is disclosure could be reasonably expected to prejudice the management function of an agency or the conduct of industrial relations by an agency.
76. Education decided to refuse access in full to document 15 and refuse access to part of document 16 on the ground the information is contrary to the public interest information. Document 15 is an email from an employee to the school principal and document 16 is an email from a Human Resources Director to the school principal.
77. In the decision notice, Education said the information relates to the preparation of responses to employment matters, where it is appropriate inputs from other staff are considered in formulating responses as part of the management function.

78. The management function of an agency includes activities such as recruitment, training, performance reviews, promotion, counselling, discipline, compensation and occupational health and safety.¹⁰
79. As set out in the ACT Public Sector Infrastructure Services Enterprise Agreement 2023-2026, managers may seek the assistance of an appropriate Human Resources advisor for the purpose of determining if there is a workplace issue and the most appropriate way to resolve it.¹¹
80. If information about workplace issues provided by an employee to staff with management functions was disclosed outside of the misconduct or underperformance process, I consider this could affect the willingness of staff to report workplace issues or provide relevant information.
81. If information about the preparation of a response or possible action to deal with workplace issues were disclosed outside of the formal or expected process, I consider this could affect the ability of managers to obtain relevant advice or guidance.
82. I consider release of the information within documents 15 and 16 would prejudice the ability of Education staff to address workplace conduct issues, as disclosure would inhibit managers from completing assessments and taking appropriate action.
83. I attribute significant weight to this factor, having regard to the significant public interest in maintaining the integrity of management activities, including the effective handling of workplace conduct issues.

¹⁰ ['CP' and Canberra Health Services \[2023\] ACTOFOI 24 \(27 November 2023\)](#) [42].

¹¹ [ACT Public Sector Infrastructure Services Enterprise Agreement 2023-2026 \(G2.5\)](#) page 135.

Balancing the factors

84. Having identified public interest factors favouring disclosure and factors favouring nondisclosure, I now must consider the public interest balancing test set out in s 17 of the FOI Act.
85. In this matter, I identified one public interest factor favouring disclosure of the counselling records and attributed minor weight to this factor. I do not consider the factor favouring disclosure where release could reveal the reasons for a government decision applies.
86. I identified 3 public interest factors favouring nondisclosure of the counselling records. I do not consider the factor favouring nondisclosure where release would prejudice the business affairs of a third party applies.
87. I consider the factor favouring nondisclosure where release would prejudice the ability of an agency to obtain confidential information applies to the information in documents 12, 13 and 15 and I attribute significant weight to this factor. I consider this factor also applies to documents 2 and 6 and afford minor weight.
88. In respect of the information within documents 4, 6, 12, 13, 15 and 18 I consider the factor favouring nondisclosure applies where release would prejudice the protection of an individual's right to privacy and attribute significant weight to this factor.
89. I consider the factor favouring nondisclosure where release would prejudice the management functions of an agency applies to the information within documents 15 and 16 and attribute significant weight to this factor.
90. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being considered in the public interest.

91. 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.
92. The FOI Act has a pro-disclosure bias,¹² 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'.¹³
93. I consider, on balance, the public interest factors favouring nondisclosure outweighs the public interest factor favouring disclosure of the information contained in documents 4, 6, 12, 13, 14, 15, 16 and 18.
94. However, I consider the public interest factor favouring disclosure (and considering the pro-disclosure bias) outweigh the public interest factors favouring nondisclosure of the information contained in documents 2 and 6.

Conclusion

95. For the reasons set out above in this decision, I vary Education's decision under s 82(2)(b) of the FOI Act.
96. The effect of my decision will be to give access to document 2 in full and give further access to document 6 (the only information to be deleted from document 6 is the full name of a third party).

Georgia Ramsay

Acting Senior Assistant Ombudsman

15 July 2024

¹² Section 17 of the [FOI Act](#).

¹³ [Explanatory Statement, Freedom of Information Bill 2016](#).

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