

## **Vicki Dunne and Canberra Health Services [2019] ACTOFOI 19 (31 October 2019)**

### **Decision and reasons for decision of ACT Ombudsman, Michael Manthorpe PSM**

<b>Application Number:</b>	AFOI-RR/19/10021
<b>Decision Reference:</b>	[2019] ACTOFOI 19
<b>Applicant:</b>	Ms Vicki Dunne MLA
<b>Respondent:</b>	Canberra Health Services
<b>Decision Date:</b>	31 October 2019
<b>Catchwords:</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – prejudice an agency’s ability to obtain confidential information – prejudice the management function of an agency or the conduct of industrial relations by an agency

### **Decision**

1. Under s 82(2)(b) of the ACT *Freedom of Information Act 2016* (FOI Act), I **vary** the decision of the Canberra Health Services (CHS), dated 18 July 2019, with respect to the information at issue in this review, being email correspondence, reports and agendas.

### **Background of Ombudsman review**

2. On 30 May 2019, the applicant applied to the respondent for access to:  
I would like documents related to the Independent Culture Review Panel;
  - Correspondence between members of the Independent Health Culture Panel, the Minister for Health and Wellbeing and the CEO of Canberra Health Services and other senior officials in Canberra Health Services during the panel's existence and after the panel submitted its report. This also includes correspondence between the Minister, ACT Health and Canberra Health Services sparked by documents sent by members of the Independent Health Culture Panel to the Minister for Health and Wellbeing, ACT Health and Canberra Health Services.
  - Reports prepared for the CEO of Canberra Health Services and other senior officials in Canberra Health Services related to the findings of the Independent Panel and implementation of its recommendations.
  - Documents related to the involvement of Canberra Health Services in a preparation of a response to the report of the Independent Panel on Health Culture.

- Communications strategy for the release of the Interim and final report on health culture and communications strategy and associated correspondence.
  - Documents related to the initial meeting of the Culture Review Oversight Group on 28 March 2019 including agenda, minutes, notes, reports prepared for the meeting, action items and correspondence related to the work of the Oversight Group since 28 March 2019. This does not include purely administrative details such as time and venue of the meeting.
3. On 18 July 2019, the respondent advised the applicant it had identified 31 documents as falling within the scope of the access application. The respondent gave the applicant access to:
    - 5 documents in full, and
    - 26 documents in part.
  4. In making its decision, the respondent relied on Schedule 2, s 2.2(a)(ii), (xii) and (xv) of the FOI Act.
  5. On 6 August 2019, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
  6. On 10 October 2019, I provided my preliminary views about the respondent's decision to the parties in my draft consideration.
  7. On 17 October 2019, the respondent advised they accepted the draft consideration.
  8. The applicant did not provide submissions in relation to the draft consideration.

## Scope of Ombudsman review

9. In the applicant's application for Ombudsman review, they advised:

...I am not seeking the names of alleged bullies or other staff of Canberra Health Services or ACT Health.
10. Therefore, the information that remains at issue in this review is information that Canberra Health Services decided to redact from documents 1, 10, 12, 22 and 31.<sup>1</sup> These documents comprise emails between the respondent and the Independent Culture Review Panel.
11. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information at issue would be contrary to the public interest.
12. In making my draft consideration, I have had regard to:
  - the applicant's access application and review application to the Ombudsman
  - the respondent's decision
  - the FOI Act, in particular ss 7, 16, 35(1)(c), 50, 72 and Schedule 2
  - the respondent's FOI processing file relating to the access application
  - an unedited copy of the information at issue

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<sup>1</sup> Identified in the document schedule in the respondent's decision notice dated 18 July 2019.

- relevant case law, in particular *Taggart and Queensland Police Service*<sup>2</sup> and *8A3BPQ and Queensland Police Service*.<sup>3</sup>

## Relevant law

13. 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.
14. 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.
15. The public interest test set out in s 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.
16. Section 35(1)(c) of the FOI Act provides that 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.
17. 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.
18. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.
19. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

## The contentions of the parties

20. In its decision notice, the respondent said:

Although I consider the factors favouring disclosure to be relevant, they are significantly outweighed by the factors favouring non-disclosure, therefore on balance, the information identified is considered contrary to the public interest and I have decided not to disclose this information.

21. In their application for Ombudsman review, the applicant said:

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<sup>2</sup> [2015] QICmr 16.

<sup>3</sup> [2014] QICmr 42.

There is a great deal of public interest in the poor state of ACT public health culture and plans to reform it. Many Canberra Health Services employees and members of the community have raised concerns about bullying. It is in the public interest that the full details of documents related to plans to reform health culture be made available. It is also in the public interest that the areas of Canberra Health Services which have had the worst problems with poor health culture be published. Poor health culture has had an impact not only on staff in the ACT public health system but on the care of patients. Poor health culture has resulted in the loss or reduction of accreditation of various areas within the public health system and to the expenditure of additional public money to provide health services.

## Considerations

22. I have reviewed an unedited copy of the information at issue together with the information provided by the applicant and respondent.

*Information that is taken to be contrary to the public interest to disclose under Schedule 1*

23. Neither party to this Ombudsman review has suggested the information sought contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the information sought to be contrary to the public interest information, disclosure of the information sought must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

*Public interest test*

24. To determine whether disclosure of information is, on balance, contrary to the public interest, s 17(1) of the FOI Act prescribes the following five steps:
- (a) 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;
  - (b) 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;
  - (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
  - (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;
  - (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.
25. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.

*Irrelevant factors*

26. I have noted the irrelevant factors listed in s 17(2) of the FOI Act and I do not consider that any irrelevant factors arise in this Ombudsman review.

*Factors favouring disclosure*

27. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.
28. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, the respondent identified the following factors favouring disclosure of the information at issue:
  - to promote open discussion of public affairs and enhance the government's accountability,<sup>4</sup> and
  - to contribute to positive and informed debate on important issues or matters of public interest.<sup>5</sup>
29. Following review of the information at issue, I consider both these factors relevant in this review. I consider that disclosing the information at issue would contribute to open discussion and informed debate.
30. As noted above,<sup>6</sup> the applicant contends there is a great deal of public interest in these matters. No specific factors for disclosure have, however, been raised by the applicant.
31. While I note that a matter being of public interest does not equate it to being in the public interest, I consider the following factors favouring disclosure could, nevertheless, also be relevant:
  - ensure effective oversight of public funds,<sup>7</sup> and
  - reveal the reason for a government decision and any background or contextual decision that informed the decision.<sup>8</sup>
32. I am satisfied these are relevant considerations favouring disclosure in this review, and in the interests of enhancing transparency and accountability, I afford them significant weight.
33. In addition to the factors above, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of a representative democracy.<sup>9</sup> This concept is promoted through the objects of the FOI Act.<sup>10</sup>

*Factors favouring nondisclosure*

34. The respondent submits there are two factors favouring nondisclosure in this review, that disclosure could reasonably be expected to prejudice:
  - an agency's ability to obtain confidential information,<sup>11</sup> and

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<sup>4</sup> Schedule 2, s 2.1(a)(i) of the FOI Act.

<sup>5</sup> Schedule 2, s 2.1(a)(ii) of the FOI Act.

<sup>6</sup> Discussion at [21].

<sup>7</sup> Schedule 2, s 2.1(a)(iv) of the FOI Act.

<sup>8</sup> Schedule 2, s 2.1(a)(viii) of the FOI Act.

<sup>9</sup> Section 9 of the FOI Act.

<sup>10</sup> Section 6(b) of the FOI Act.

<sup>11</sup> Schedule 2, s 2.2(a)(xii) of the FOI Act.

- the management function of an agency or the conduct of industrial relations by an agency.<sup>12</sup>

35. The respondent's decision notice and submissions to this review appear to intertwine both of these factors. Nevertheless, I have discussed each of them in turn below.

Prejudice an agency's ability to obtain confidential information

36. Schedule 2, s 2.2(a)(xii) of the FOI Act provides that if disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information then it is contrary to the public interest information.

37. In submissions to this review, the respondent said it had decided not to disclose the information at issue because:

Confidentiality was integral to ensuring the integrity of the Review process. Staff were assured that submissions would remain with the independent panel and that confidence would be maintained.

The need for confidentiality has continued into the implementation phase being led by the ACT Health Directorate, in close collaboration with Canberra Health Services and Calvary Public Hospital.

38. I will address each document separately in relation to these factors favouring nondisclosure.

*Document 1*

39. This document contains information about areas of concern following the review. The respondent redacted two parts of the document as they decided disclosure of the information would prejudice the agency's ability to obtain confidential information.

40. In submissions to this review, the respondent contended:

...the public release of the details of these business units would be detrimental to the good work that has occurred to date and could reasonably be expected to negatively impact on the staff working within those areas...

41. From my examination, I consider disclosure of the sentence preceding the list would not have a detrimental impact on the agency's ability to obtain confidential information. This is because the sentence does not disclose the specific business units but rather it discloses the publicly known fact that some business units in the agency have poor workplace culture and/or ongoing issues with bullying and harassment.

42. The list, however, details the specific business units as areas of concern. I agree with the respondent that disclosure of this list would prejudice the agency's ability to obtain confidential information. The list was created following the independent review into the agency's workplace culture, as a result of voluntary submissions from staff from various business units within the agency.

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<sup>12</sup> Schedule 2, s 2.2(a)(xv) of the FOI Act.

43. It is clear from the respondent's submissions to this review that submissions were provided on the basis of confidentiality. Without these submissions, the independent review would not have the ability to collate a list and report on the areas of concern within the agency.
44. Disclosure of the list of business units could inherently identify the staff who provided submissions to the independent review, especially if the business unit is a small team. Therefore, I consider disclosure of the list of business units could reasonably be expected to inhibit the flow of confidential information from staff in relation to reviews into the workplace. Consequently, staff could reasonably become reluctant to participate and provide voluntary information in future reviews, if they believe their identity including the business unit they work in could be disclosed in response to an access application under the FOI Act.
45. I consider disclosure of the list in document 1 could reasonably be expected to prejudice the agency's ability to obtain confidential information.

*Document 10*

46. This document contains information about specific issues within a business unit. The respondent redacted part of the first sentence on the basis that disclosure of this information could reasonably be expected to prejudice the agency's ability to obtain confidential information and the management function of the agency or the industrial relations by the agency.
47. I have reviewed the information and I consider only disclosure of the specific business unit could reasonably be expected to prejudice the agency's ability to obtain confidential information. The issues identified are general issues identified in the final report<sup>13</sup> and therefore, I am not satisfied disclosure of the issues could reasonably be expected to prejudice the agency's ability to obtain confidential information.
48. For the same reasons discussed at [41]-[45], I consider Schedule 2, s 2.2(a)(xii) of the FOI Act to apply to the name of the business unit only.

*Document 12*

49. This document is an email to the Chief Executive Officer with an attachment comprising a letter from the Chair of the independent review panel.
50. The content of the letter is the same as that contained in document 10.
51. For the same reasons above,<sup>14</sup> I consider Schedule 2, s 2.2(a)(xii) of the FOI Act to apply to the name of the business unit only.

*Document 22*

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<sup>13</sup> <https://www.health.act.gov.au/sites/default/files/2019-03/Final%20Report%20Independent%20Review%20into%20Workplace%20Culture.pdf>.

<sup>14</sup> See discussion at [41Error! Reference source not found.]-[45].

52. This document is an email to members of the Cultural Review Oversight Group (CROG) attaching an agenda. The respondent has decided that Schedule 2, s 2.2(a)(xii) of the FOI Act applies wholly to the agenda.
53. With respect to this document, the respondent contended in submissions to this review:

The CROG must maintain the ability to hold frank and robust discussions regarding sensitive matters and holds the three public health service organisations to account. The terms of reference for the CROG [Culture Review Oversight Group] requires members to maintain strictest confidentiality at all times due to the nature of the information considered.
54. The agenda contains discussion items in general terms and does not disclose any specific information regarding, for example, individualised programs for implementation and business units.
55. From reviewing the agenda, I am not satisfied the respondent has discharged their onus<sup>15</sup> in regards to the relevance of this factor to the agenda, and therefore, I do not consider this to be a relevant factor favouring nondisclosure with respect to the agenda.

#### *Document 31*

56. This document comprises an email to the CEO of ACT Health attaching a meeting report. The meeting report outlines the agency's progress against the report's<sup>16</sup> recommendations.
57. I note the report and its recommendations are public.<sup>17</sup>
58. I am not satisfied the respondent has discharged their onus<sup>18</sup> in regards to the relevance of this factor to the whole meeting report, and therefore I do not consider this to be a relevant factor favouring nondisclosure with respect to the report.
59. I am satisfied, however, that Schedule 2, s 2.2(a)(xii) is a relevant factor favouring nondisclosure of the business unit named in the report.
60. For the same reasons above,<sup>19</sup> I consider Schedule 2, s 2.2(a)(xii) of the FOI Act to apply to the name of the business unit only contained in the report.

#### Prejudice the management function of an agency or the conduct of industrial relations by an agency

61. Schedule 2, s 2.2(a)(xv) of the FOI Act provides that if disclosure of the information could reasonably be expected to prejudice the management function or the conduct of industrial relations by an agency, disclosure of that information is contrary to the public interest.

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<sup>15</sup> See section 72 of the FOI Act.

<sup>16</sup> Report refers to <https://www.health.act.gov.au/sites/default/files/2019-03/Final%20Report%20Independent%20Review%20into%20Workplace%20Culture.pdf>.

<sup>17</sup> <https://www.health.act.gov.au/sites/default/files/2019-03/Final%20Report%20Independent%20Review%20into%20Workplace%20Culture.pdf>.

<sup>18</sup> See section 72 of the FOI Act.

<sup>19</sup> See discussion at [41]-[45].



62. The respondent contends that disclosure of any confidential information above would consequently prejudice the management function of the agency or the conduct of industrial relations by the agency.<sup>20</sup>
63. The respondent also contended disclosure of business units could inadvertently identify staff working in those areas who provided submissions to the panel.
64. The Queensland Information Commissioner case of *Taggart and Queensland Police Service*<sup>21</sup> discusses, in the context of workplace investigations:
- Staff usually supply information to workplace investigators on the understanding that it will only be used for the investigation or any subsequent disciplinary action. It is reasonable to expect staff to cooperate with an investigative process ... truthfully, completely and promptly. However, in my view, disclosing this information outside of the investigation process .... where there can be no restriction on its use, dissemination or republication, could reasonably be expected to make staff reluctant to fully participate in future investigations and prejudice the future flow of information to investigators. This, in turn, could reasonably be expected to adversely impact [an agency's] ability to conduct workplace investigations and manage staff.<sup>22</sup>
65. I consider the discussions in *Taggart* are relevant in this Ombudsman review, and that it is essential for the effective conduct of workplace investigations, including independent reviews into an agency's workplace, that participants are able to provide in confidence, their account of events, truthfully, completely, and without apprehension or reluctance.
66. In this review, I have considered the fact that submissions were provided to the panel voluntarily, on a confidential basis, with the understanding that it was to be used only by the independent panel to inform their report.<sup>23</sup>
67. Disclosure of this information could reasonably be expected to have a detrimental effect on future industrial relations reviews conducted by the agency as staff would be reluctant to provide and participate if they believe the information they provide could be disclosed.
68. I consider Schedule 2, s 2.2(a)(xv) to be a relevant factor favouring nondisclosure of the confidential information<sup>24</sup> as disclosure of such information could reasonably be expected to prejudice the management function or the conduct of industrial relations by an agency, and disclosure of that information is contrary to the public interest.

### *Balancing the factors*

69. As I have identified public interest factors favouring disclosure,<sup>25</sup> I now have to consider the public interest balancing test as set out in s 17 of the FOI Act.

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<sup>20</sup> Schedule 2, s 2.2(a)(xv) of the FOI Act.

<sup>21</sup> [2015] QICmr 16 (*Taggart*).

<sup>22</sup> At [21], citing *8A3BPQ and Queensland Police Service* [2014] QICmr 42 at [42].

<sup>23</sup> See [37].

<sup>24</sup> Discussed at [39]-[60].

<sup>25</sup> See discussion at [27]-[32].

70. In submissions to this review, the respondent contended:

...I gave due consideration to the public interest in the release of this information. It is my decision that the public interest in the release of this information is adequately served by the considerable amount of information made available by the ACT Government on the matter...

Commitments have also been made by the Ministers and the principle officers of organisations to publicly advise on the progress of the implementation of the review recommendations...

71. I have considered the information already available in the public domain and whether the public interest is served by disclosing the information at issue.

72. I am satisfied that, on balance, based on the reasons above, the public interest factors favouring disclosure outweigh the public interest factors favouring nondisclosure in this case.

In particular, it is my view that there is a substantial public interest protecting workplace culture investigation processes.

## Conclusion

73. I vary the respondent's decision to refuse access to the information at issue and consider:

- Documents 10, 12 and 31 – only disclosure of the business unit named, is on balance, contrary to the public interest to disclose under Schedule 2, s 2.2(a)(xii) and (xv) of the FOI Act.
- The remaining information at issue<sup>26</sup> is, on balance, not contrary to the public interest to disclose.

**Michael Manthorpe PSM**

**ACT Ombudsman**

**31 October 2019**

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<sup>26</sup> Being documents 1 and 22.