

Decision and reasons for decision of Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10024
Applicant:	'CQ'
Respondent:	ACT Education Directorate
Third Party:	Brindabella Christian Education Limited
Respondent reference:	FILE2023/1775
Date:	30 November 2023
Decision reference:	[2023] ACTOFOI 25
Catchwords:	<i>Freedom of Information Act 2016</i> – promote open discussion of public affairs and enhance the government's accountability – ensure effective oversight of expenditure of public funds – prejudice trade secrets, business affairs or research of an agency or person

Decision

1. The applicant applied for Ombudsman review of the Education Directorate (**Education**) decision to refuse access to information about student number projections at the Brindabella Christian College (**BCC**) (**enrolment projection document**).
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 have decided under s 82(2)(c) of the FOI Act to set aside Education's decision dated 29 March 2023 and make a substitute decision to give access to the enrolment projection document.

Background of Ombudsman review

4. On 16 February 2023, the applicant applied to Education for:

“...in regards Brindabella Christian College (BCC) and otherwise known as Brindabella Christian Education Limited (BCEL). All and any documents provided by BCC, BCEL or their legal representatives, to the Education Directorate or its representatives, containing student number projections at the school since 1 January 2018. I do not seek personal information of students or other persons...”
5. On 6 March 2023, Education consulted Brindabella Christian Education Limited (**BCEL**) having identified disclosure of the enrolment projection document could reasonably be expected to be of concern to BCEL.¹
6. On 14 March 2023, BCEL objected to the release of the information on the basis release of the information would prejudice the business affairs of BCEL.²
7. On 29 March 2023, Education decided to refuse to give access to the enrolment projection document because the information is contrary to the public interest information.³
8. On 8 May 2023, the applicant applied for Ombudsman review of Education’s decision.
9. On 11 August 2023, BCEL applied to the Ombudsman to participate in this review.⁴
10. On 31 October 2023, I provided my preliminary views to the parties in a draft consideration.
11. On 1 November 2023, the applicant accepted the draft consideration.
12. On 2 November 2023, Education accepted the draft consideration and provided submissions regarding the public interest test set out in the draft consideration.
13. On 14 November 2023, BCEL provided submissions to the Ombudsman objecting to the release of the enrolment projection document.

Scope of Ombudsman review

14. The key issue to be decided in this Ombudsman review is whether the enrolment projection document is contrary to the public interest information.

¹ Section 38 of the [Freedom of Information Act 2016 \(ACT\) \(FOI Act\)](#).

² Schedule 2, s 2.2(a)(xi) of the [FOI Act](#).

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

⁴ Section 77 of the [FOI Act](#).

15. In making my decision, I have had regard to:

- the applicant's access application and review application
- the respondent's decision of 29 March 2023 and further submissions
- the submissions of BCEL of 14 March 2023 and 14 November 2023
- the FOI Act, in particular ss 6, 7, 16, 17, 35, 72 and Schedule 2
- the respondent's FOI processing file relating to the access application
- the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act
- relevant law including the *Education Act 2004* (ACT) (**Education Act**) and the *Education Regulation 2005* (ACT) (**Education Regulation**).

Relevant law

16. 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.⁵
17. The FOI Act is to be administered with a pro-disclosure bias and discretions given under it exercised as far as possible in favour of disclosing government information.⁶
18. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.⁷
19. 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.*
20. The public interest test in s 17 sets out the process for identifying and 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.
21. Schedule 2 of the FOI Act sets out a non-exhaustive list of public interest factors to be balanced when conducting the s 17 test to determine the public interest.

⁵ Section 35 of the [FOI Act](#).

⁶ Section 9 of the [FOI Act](#).

⁷ Section 35(1)(c) of the [FOI Act](#).

The parties' submissions

22. Education decided to refuse access to the enrolment projection document because disclosure would, on balance, be contrary to the public interest.
23. Education decided no factors favouring disclosure of the enrolment projection document were directly relevant, but noted the pro-disclosure bias which favours disclosure of the information.
24. Education identified one factor favouring nondisclosure of the enrolment projection document, where disclosure could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person.
25. In the decision notice, Education said:

"...The information is commercially sensitive to BCEL and could be prejudicial to their business affairs if released, as it is a core component of business planning for the future of their enterprise;

It is not information that would ordinarily be in the public domain;

There is no business relationship between BCEL and the Directorate in relation to this information, rather the Directorate has an administrative/regulatory role that requires the information to be provided; and

It would likely result in public scrutiny for BCEL of an internal document that may have reputational consequences..."

26. In their review application, the applicant said:

The schools current and future ability to pay its debts and remain financially viable is a matter of significant public interest and concern following the conclusion of recent AAT proceedings which have brought into light solvency issues, poor financial management and inadequate governance as well as the accrual of significant debts. It's important to note 'financial viability' is also a condition to be an Approved Authority under the Education Act 2013 and a condition of Registration as a non-government school in the ACT.

BCEL has repeatedly failed to meet its mandatory annual financial reporting to both the ACNC and the Department of Education with the school once again red-flagged on the ACNC Charity Register due to overdue financials. Information related to and including student number projections (historically and presently) are relevant to the present issues of compliance and the schools financial position as a significant portion of the schools revenue is sourced on a per student basis from student numbers provided by the school bi-annually to the commonwealth and the territory. Student number projections have been requested on a number of past occasions by both regulators as a measure of future financial viability.

The accuracy of these numbers vs actual student census data historically can provide confidence, or otherwise, as to the accuracy of current student projections and revenue sources predicted.

A current lack of transparency leaves parents and staff, and prospective families and employees unable to assure themselves of the schools financial viability. The lack of transparency also means there is no accountability around how public funds have been, and are being, used by the school or how the Minister is assuring himself of their appropriate acquittal in the absence of 2021 audited financials and acquittal statement.

27. When Education consulted BCEL, as an interested third party, BCEL objected to the release of the enrolment projection document on the same basis set out by Education above at [25].

Considerations

Public interest test

28. To determine whether disclosure of information would, on balance, be contrary to the public interest the FOI Act prescribes the following steps:⁸

- identify any factor favouring disclosure that applies in relation to the information, including any factor mentioned in schedule 2, section 2.1
- identify any factor favouring nondisclosure that applies in relation to the information, 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, and
- unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.

Reasons for seeking access to the information

29. The applicant's identity, circumstances, or reason for seeking access to the information must not be taken into account when deciding whether disclosure of information would, on balance, be contrary to the public interest.⁹

⁸ Section 17 of the [FOI Act](#).

⁹ Section 17(2)(f) of the [FOI Act](#).

30. In response to my draft consideration, BCEL submitted the application is vexatious and involves an abuse of process as it appears the applicant's is seeking to establish BCEL is not financially viable and cause reputational harm to BCEL. BCEL submits the applicant has made numerous previous applications for information involving BCC which are costly for BCEL to respond to.
31. I have no evidence before me that the application involves an abuse of process.¹⁰ The application states the personal information of students or other persons is irrelevant to the scope of the request.¹¹
32. I accept the application is specific to information about BCC, however I do not consider there is sufficient evidence to demonstrate the application was made for a purpose other than to access information about student number projections.¹²
33. I have not taken into account the applicant's reasons for seeking access to the enrolment projection document for the purpose of the public interest test.

Factors favouring disclosure

Promote open discussion of public affairs and enhance the government's accountability (Schedule 2, s 2.1(a)(i))

34. In the draft consideration, I identified a factor favouring disclosure applying to the enrolment projection document is disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.¹³
35. In November 2018, the Minister for Education and Early Childhood Development directed the Registrar of Non-Government Schools to renew the registration of the BCC for the maximum period of five years until 31 December 2023.¹⁴
36. Before deciding whether the registration of a school should be renewed, the Minister must appoint a panel to report on the application and consider the panel's report on whether the school meets the criteria for registration renewal.¹⁵ The criteria for renewal of registration of a school includes that the school is financially viable.¹⁶

¹⁰ Section 43(4) of the [FOI Act](#).

¹¹ See ['CO' and ACT Health Directorate \[2023\] ACTFOI 23 \(31 October 2023\)](#) [47]-[51].

¹² See ['CN' and Transport Canberra and City Services \[2023\] ACTFOI 22 \(3 October 2023\)](#) [34]-[35].

¹³ Schedule 2, s 2.1(a)(i) of the [FOI Act](#).

¹⁴ Education FOI Disclosure log (EDU reference: EDU_2020_014) [Document 14](#), page 81.

¹⁵ Section 97 of the [Education Act](#).

¹⁶ Section 97(6)(g) of the [Education Act](#).

37. As part of the assessment of financial viability of the BCC in 2018, the panel considered information provided by BCEL including copies of current business plans detailing projected enrolments and the anticipated financial position for each relevant forward year.¹⁷
38. The enrolment projection document was obtained by Education for the purpose of the registration renewal process in 2018 and contains student numbers from 2008–2017 and estimated student numbers from 2018–2026.
39. In response to my draft consideration, Education submits the assessment of information should be undertaken objectively and release of the enrolment projection document in isolation of information about the renewal process or assessment of financial viability would not increase transparency.
40. Education also explained it was not clear how the registration of non-government schools in the ACT is a matter of public affairs where release of the enrolment projection document could reasonably be expected to promote open discussion.
41. I consider the registration of education providers is relevant to the availability of high quality and education for children and young people which is a matter of public affairs.¹⁸
42. I accept Education's position set out above that the enrolment projection document does not contain any information about the assessment of financial viability by the panel or information about the registration renewal process.
43. Disclosure of the enrolment projection document is not reasonably expected to promote open discussion of matters of public affairs as release would only reveal some of the information provided by BCC which was before the panel.
44. I have decided this factor does not apply to the enrolment projection document.

Ensure effective oversight of expenditure of public funds (Schedule 2, s 2.1(a)(iv))

45. In my draft consideration, I considered another factor favouring disclosure applied in relation to the enrolment projection document where disclosure could reasonably be expected to ensure effective oversight of expenditure of public funds.¹⁹
46. As noted above, I accept the enrolment projection document does not itself contain any information about the assessment of financial viability of BCC by the panel.

¹⁷ Education FOI Disclosure log (EDU reference: EDU_2020_014) [Document 15](#), page 28.

¹⁸ Section 7 of the [Education Act 2004 \(ACT\)](#).

¹⁹ Schedule 2, s 2.1(a)(iv) of the [FOI Act](#).

47. The enrolment projection document contains limited information which would be relevant to the calculation of government funding, or decisions to provide government funding to BCC (i.e. projected student numbers).
48. Disclosure of this information alone would not enable a person to scrutinise the funding of non-government schools by the ACT Government.
49. I do not consider release of the enrolment projection document could result in the effective oversight of expenditure of public funds and this factor does not to the enrolment projection document.

Factors favouring non-disclosure

Prejudice the trade secrets, business affairs or research of an agency or person (Schedule 2, s 2.2(a)(xi))

50. A factor favouring nondisclosure is that disclosure could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person.²⁰ In this matter, it is the business affairs aspect which is relevant rather than trade secrets or research.
51. The FOI Guidelines provide the sensitivity of business information is likely to depend on:²¹
 - the nature and detail of the information
 - whether it is current or merely historical
 - the nature and custom of the particular market.
52. In the original decision, Education said disclosure of the enrolment projection document would prejudice the business affairs of BCEL because the information is commercially sensitive as it is a core component of future business planning.
53. Education also said disclosure would prejudice the business affairs of BCEL because the information is not publicly available, is only held by Education for the purpose of regulation of non-government schools, and release would likely result in public scrutiny for BCEL that may have reputational consequences.
54. In response to the draft consideration BCEL explained the student figures in the enrolment projection document are concerned with BCC's business affairs, including how it is performing in the education market with regards to its competitors.

²⁰ Schedule 2, s 2.2(a)(xi) of the [FOI Act](#).

²¹ [FOI Guideline 4 – Considering the public interest](#), [9.12].

55. BCEL noted the release of the enrolment projection document in isolation may have a negative impact on BCC's future enrolments, as the improper and unqualified sharing of the information, devoid of its commercial context, poses a reputational risk to BCC.
56. BCEL accepted the figures in the enrolment projection document are not current but noted this information could be used to criticise BCC and due to the potential for reputational harm currency is not relevant.
57. Whether access to information could result in a person misinterpreting or misunderstanding the information is irrelevant and must not be taken into account for the purpose of the public interest test.²²
58. I accept the enrolment projection document contains information which relates to the business affairs of BCC, as enrolment of students is relevant to the amount of funding received from the ACT Government and Australian Government.
59. I accept the information is not ordinarily in the public domain or made available by competitors in the education services market and was provided to the panel for the registration renewal process.
60. The parties accept the information within the enrolment projection document is not current, noting the information is over 5 years old, and is unlikely to take account of major changes to the education services market since 2018, including the COVID-19 pandemic and regulation of non-government schools.²³
61. I note BCEL's financial statements are made publicly available on the Australian Charities and Not-for-profits Commission's Charity Register which provides information about the financial position of BCEL.²⁴
62. I do not consider release of the enrolment projection document is likely to cause harm to BCC of the kind described in Schedule 2, s 2.2(a)(xi) of the FOI Act, noting the information was submitted for registration renewal, which in turn was granted and the information is not current or relevant for any future renewal process.

²² Section 17(2)(b) of the [FOI Act](#).

²³ [Education Amendment Act 2022 \(ACT\)](#).

²⁴ [Brindabella Christian Education Limited, Financials and Documents, ACNC Charity Register](#).

63. While emphasising the enrolment projection document was originally provided on the assumption it would remain confidential and not be shared more broadly with the public, nothing in the further material provided by BLCE via its representative in response to the draft consideration establishes how disclosure of this information could cause prejudice to BCEL of the kind contemplated in Schedule 2, s 2.2(a)(xi) of the FOI Act.
64. Accordingly, I have decided to give this factor negligible weight for the purposes of this review, as I have no material evidence on which to be satisfied that disclosure of the information at issue could be reasonably expected to prejudice the business affairs of BCEL.

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

65. In response to the draft consideration BCEL submitted the enrolment projection document was provided to the panel on a confidential basis and submissions are not made public to protect the confidential and transparent exchange of information between BCEL and the panel.
66. BCEL explained the public interest is served by that confidential information being protected, because this promotes frank disclosure of information by those participating in the panel process.
67. I do not consider release of the enrolment projection document would have any material adverse impact on the ability of Education or the panel to receive confidential information from providers of education services. I note the registration standards provide that certain information is to be made available to the registrar on request.²⁵
68. I do not consider this factor applies to the enrolment projection document.

Prejudice a deliberative process of government (Schedule 2, s 2.2(a)(xvi))

69. As noted above at [65], BCEL submits disclosure of the enrolment projection document would prejudice the ability of the panel to made registration decisions as release would affect the provision of confidential information to the panel.
70. I note the Minister or panel may require an applicant to give further information reasonably needed to decide the application for registration. If the applicant does not comply with a requirement in the notice, the Minister may refuse to consider the application further.²⁶
71. I do not consider this factor applies to the enrolment projection document.

²⁵ Schedule 2, Part 2.1, s 2.4 of the [Education Regulations 2005 \(ACT\)](#).

²⁶ Section 90 and 91 of the [Education Act](#).

Balancing the factors

72. In this draft consideration, I considered 2 factors favouring disclosure and 3 factor favouring non-disclosure of the enrolment projection document.
73. I determined one factor favouring disclosure applies to the enrolment projection document and afforded negligible weight to this factor. I determined no factors favouring disclosure apply.
74. 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.
75. 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'.²⁷
76. I consider the enrolment projection document is not contrary to the public interest information having afforded one factor favouring non-disclosure negligible weight and taken into account the pro-disclosure bias in the FOI Act.

Conclusion

77. For these reasons I **set aside** Education's decision of 29 March 2023 under s 82(2)(c) of the FOI Act and make a **substitute** decision that the enrolment projection document is not contrary to the public interest information.
78. The applicant is to be given access to the enrolment projection document.

David Fintan
Senior Assistant Ombudsman
30 November 2023

²⁷ [Explanatory Statement, Freedom of Information Bill 2016.](#)