

Dr Tessa Cleradin and ACT Health Directorate [2020] ACTOFOI 27**(16 December 2020)****Decision and reasons for decision of**

Application Number	AFOI-RR/20/10051
Decision Reference	[2020] ACTOFOI 27
Applicant	Dr Tessa Cleradin
Respondent	ACT Health Directorate
Decision Date	16 December 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – promote open discussion of public affairs and enhance government’s accountability – advance the fair treatment of individuals in accordance with the law in their dealings with the government – individual’s right to privacy

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**).
2. Under s 82(2)(c) of the FOI Act, I set aside the decision of the ACT Health Directorate (Health) dated 20 October 2020.

Background of Ombudsman review

3. On 22 September 2020, the applicant applied to Health for access to information relating to the assessment panel for the Mental Health and Wellbeing Innovation Grant, including:
 - the names of the two other assessors and their affiliations
 - [a] record of the grant assessment paperwork – merit ranking and scores of the successful grant submissions
4. By 20 October 2020, Health had identified seven documents within the scope of the application. Health decided to give full access to two documents and partial access to five documents.
5. In making its decision Health relied on Schedule 2, s 2.2(a)(ii) of the FOI Act. Relevantly, Health refused access to information that it decided could reasonably be expected to prejudice an individual's right to privacy under the *Human Rights Act 2004* (ACT) (Human Rights Act). Some other information was redacted because it was out of scope and the applicant does not contend these redactions.
6. On 26 October 2020, the applicant applied for an Ombudsman review of Health's decision under s 73 of the FOI Act.
7. I provided the parties with my preliminary views in a draft consideration on 23 November 2020.
8. The applicant accepted the views I expressed in my draft consideration and the reasons I gave on 24 November 2020.
9. Health responded to my draft consideration on 7 December 2020 repeating its objections to the disclosure of the information at issue.

Information at issue

10. The information at issue in this review is information Health decided to redact from documents on the basis that it could reasonably be expected to prejudice an individual's right to privacy under the Human Rights Act. Specifically, the information includes the names of panel members and the sections of the Directorate they are employed in.
11. The issue to be decided by me is whether the information at issue is contrary to the public interest information.
12. In deciding this matter, I had regard to:

- the original access application
- Health's decision notice
- the applicant's application for Ombudsman review
- Health's submissions
- an unredacted copy of the information at issue
- the FOI Act, in particular Schedule 2, s 2.1(a)(ii), (vii) and (viii) and s 2.2(a)(ii), and
- section 12 of the Human Rights Act

Relevant law

13. The FOI Act gives every person an enforceable right of access to government information, subject to any provisions of the Act providing a basis on which access can be refused.¹

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
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 provided for in s 17 sets out a process for balancing public interest factors favouring disclosure and nondisclosure respectively. This balancing test must be used to determine whether disclosure would be contrary to the public interest.

16. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.²

17. Where a record contains some information that is contrary to the public interest, but information that it is in the public interest to disclose too, the contrary to the public interest information should be deleted, where practicable.³

18. The onus of establishing information should not be disclosed rests with the party seeking to prevent disclosure.⁴

19. Schedule 1 of the FOI Act sets out categories of information taken to be contrary to the public interest to disclose.

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

³ Section 50 of the FOI Act.

⁴ Section 72 of the FOI Act.

20. 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.

The contentions of the parties

21. In its decision notice, Health said:

The information that has been redacted is related to the assessment panel's personal details and external organisations' assessment information. This includes grant application information of organisations that were and were not recommended for funding, assessors' scoring and funding figures. On balance, I determined the information identified is contrary to the public interest and I have decided not to disclose this information.

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

By redacting the names of the grant assessor's (sic) my concern about conflict of interest (sic) remains unresolved.

23. In its response to my draft consideration, Health said:

... one of the factors that weighed heavily in its decision not to release the identity of panel members, is its duty of care towards its staff. ACTHD still considers this factor to be of specific relevance in this situation. Concern for staff welfare is paramount in ACTHD's consideration and ACTHD must take measures to protect staff from experiencing stress and anxiety in anticipating uncertainty in this circumstance. ACTHD did not outline the specific details or circumstances in its response to you due to confidentiality.

Additionally, I would like to note that the role of the panel members in the grants process was not to make any decision in relation to the grant funding, it was to provide input and advice for the delegate's consideration. The decision making rested with the delegate who was independent of the panel.

24. I discussed these submissions in greater detail in my considerations.

Considerations

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

25. Neither party to this Ombudsman review 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 at issue to be contrary to the public interest information disclosure, it must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

Public interest test

26. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:⁵

- 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 2.1;
- 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...

Irrelevant factors

27. I do not consider any irrelevant factors I am prohibited from considering arise in this review.⁶

Factors favouring disclosure

28. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.

29. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, Health submits that one factor was relevant to the information at issue, which I consider below.

⁵ Section 17(1) of the FOI Act.

⁶ Section 17(2) of the FOI Act.

Promote open discussion of public affairs and enhance the government's accountability.

30. Health submits this factor favouring disclosure, under Schedule 2, s 2.1(a)(ii) of the FOI Act, applied to the information at issue.
31. I reviewed the information at issue. I am satisfied this factor is relevant, as the transparency of a competitive grants process and the criteria applied to applicants for grants of tax payer money enhances government accountability. I give this factor considerable weight.

Advance the fair treatment of individuals in accordance with the law in their dealings with the government

32. While Health did not identify this factor in its decision, I consider the disclosure of the information at issue could advance the fair treatment of individuals in their dealings with the government, which is a factor favouring disclosure under Schedule 2, s 2.1(a)(vii) of the FOI Act.
33. I consider it is reasonable to expect the disclosure of information about the decision-maker assessing applications for public grants made through competitive processes would improve the transparency of government decisions, noting this could reveal any possible conflicts of interest that may exist.
34. For this reason, I consider disclosing the names of the panel members assessing grant applications, could reasonably be expected to promote this public interest factor and I afford it moderate weight in this review.

Pro-disclosure bias

35. Additionally, the FOI Act has an express pro-disclosure bias which reflects the importance of access to government information for the proper working of representative democracy.⁷ This is promoted in the objects of the FOI Act.⁸
36. For these reasons, my preliminary view is the information at issue could reasonably be expected to promote the objects of the FOI Act and two public interest factors.

⁷ Section 17 of the FOI Act.

⁸ Section 6(b) of the FOI Act.

Factors favouring nondisclosure

37. One factor favouring non-disclosure is relevant to the information at issue.

An individual's right to privacy

38. In its decision letter, Health identified this factor favouring non-disclosure, under Schedule 2, s 2.2(a)(ii) of the FOI Act, as having significant weight. The Human Rights Act does not provide a general right to privacy. It protects the right not to have one's privacy interfered with unlawfully or arbitrarily.

39. This means that in making my decision, I am required not simply to determine whether the information is 'personal information', but to consider whether it could reasonably be expected to prejudice the right to privacy in a way that is inconsistent with the Human Rights Act.

40. In *Taggart and Queensland Police Service*,⁹ the Queensland Information Commissioner observed that disclosing names and 'day-to-day work duties' of public servants could not reasonably be expected to prejudice an individual's right to privacy. In this case, the involvement of the individuals on the panel was not reflective of their day-to-day duties but it was still in their capacities as public employees, in a public workplace, deciding on what was to be done with public money in a competitive grants process. In essence, they were not acting as private citizens in a private place but as public servants when they made their recommendations. In the present case, I note Health's concern that the panel members will have their privacy interfered with and I address this in more detail at [45].

41. In *Re: Chief Executive Officer, Services Australia and Warren* (Warren's case),¹⁰ the Administrative Appeals Tribunal considered that disclosure of the names of Services Australia employees could constitute an unreasonable disclosure of information concerning the employees' personal affairs.

42. The extent to which Warren's case can assist my consideration in this matter is moderate. In that case, the employees whose names were permitted redaction were not those ultimately responsible for decision-making.¹¹ The panel members in this case share that characteristic

⁹ [2015] QICmr 16 at [17].

¹⁰ [2020] AATA 4557

¹¹ [2020] AATA 4557 at [127].

because their role was to make recommendations about which applications should receive funding to an independent delegate.

43. On the other hand, Warren's case can be distinguished from this matter. While the panel members were not the ultimate decision makers, they were staff members appointed for their expertise to provide input and advice to the delegate, which must plausibly have influenced the final decision with respect to at least some of the applications.
44. In Warren's case, the AAT also accepted it was reasonable to expect that Services Australia staff would be subject to personal criticism and harassment by members of the public, given evidence before the Tribunal of the high level of public scrutiny to the 'Robot Debt' program. The scrutiny in this case and the number of affected parties is not comparable and this bears on the objective probability of a person's privacy being subjected to interference.
45. Section 72 of the ACT FOI Act states that a person seeking to prevent disclosure of government information has the onus of establishing that the information is contrary to the public interest. This means Health must establish that any prejudice to individual privacy that can reasonably be expected, must outweigh the applicable public interest factors favouring disclosure.
46. In its submissions, Health claims that its decision was correct because it relied on evidence of a panel member's previous experience suffering intrusion of privacy after acting on another panel. I accept the conduct Health described constitutes interference with an individual's right to privacy. Moreover, I regret the relevant individual suffered that experience.
47. On the other hand, the phrase 'reasonably be expected' is an objective test, considered in *Cockroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd*.¹² In that case, Bowen CJ and Bowen J stated that:

... the words 'could reasonably be expected to prejudice... were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous... It is undesirable to attempt any paraphrase of these words.
48. This means that I am required to make an objective assessment of whether prejudice to the right to privacy can reasonably be expected. In doing so, the Act requires me to distinguish

¹² *Cockroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd* (1986) 64 ALR 97 at 106.

between the legitimate concerns the individual may hold and the objective question of whether any interference with their right to privacy in the manner described by Health could reasonably be expected. In my view, the past experience of the panel member and the other evidence does not support me to reasonably expect that disclosure of either panel member's name will lead to them having their privacy interfered with in this case. Given my view that, on the evidence, it is unreasonable to expect this interference to occur, my decision is not to afford this factor any weight.

Balancing the factors

49. Taking the factors I identified as relevant, I must now balance them to determine the public interest.
50. My decision is two public interest factors favouring disclosure and one public interest factor favouring nondisclosure are applicable.
51. Unlike Warren's case,¹³ the identities of the individual public servants was of material importance to the public interest. I gave considerable weight to the promotion of open discussion of public affairs and enhancement of government accountability. I also gave moderate weight to the advancement of fair treatment for an individual in accordance with the law in their dealings with the government.
52. On the other side, I gave no weight to any reasonable expectation that an individual's right to privacy could be prejudiced.
53. Given my decision that the public interest factor favouring nondisclosure was wrongly applied by Health, the onus imposed by s 72 of the FOI Act has not been discharged.

Conclusion

54. For these reasons, I decide to **set aside** Health's decision of 20 September 2020 to refuse access to the information at issue under s 35(1)(c) of the FOI Act. I **substitute** my decision, under s 82(2)(c) of the FOI Act, that Health should give the applicant access to:
 - the names of the panel members; and
 - information redacted in documents 2 and 7 which identify the sections of the Directorate the panel members are employed in.

¹³ [2020] AATA 4557 at [135].

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16 December 2020