

'BT' and Education Directorate [2022] ACTOFOI 7 (10 October 2022)

Decision and reasons for decision of Senior Assistant Ombudsman, David Fintan

Application Number	AFOI-RR/22/10011
Decision Reference	[2022] ACTOFOI 7
Applicant	'BT'
Respondent	Education Directorate
Decision Date	10 October 2022
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – whether information is personal information of a child to be given to the child's parent or guardian – disclosure of information is reasonably considered to be in the best interests of the child – whether disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the <i>Human Rights Act 2004 (ACT)</i>

Decision

1. For the purposes of s 82 of the *Freedom of Information Act 2016 (FOI Act)*, I am a delegate of the ACT Ombudsman.
2. Under s 82(2)(a) of the FOI Act, I **confirm** the decision of the Education Directorate (Education) dated 13 April 2022.

Background of Ombudsman review

1. On 15 March 2022, the applicant applied under s 30 of the FOI Act to Education for access to the following information:
 1. Incident reports relating to... [the applicant's children]

2. [A] decision to not inform [the applicant] of the incidents involving [the applicant's child]
 3. [The] beratement of... [the applicant's child] on... [their] first day at the school, including any records held... about this matter
 4. Reports by... [the applicant's child] ... about bullying... [they were] experiencing
 5. [The applicant's] discussion... with [a staff member] on 10 March 2022
 6. [The applicant's] discussion with [a staff member] on 9 March 2022.
2. On 21 March 2022, Education provided the applicant with an incident report, under Education's Access to Student Records policy framework.
 3. On 21 March 2022, the applicant clarified the scope of the request as follows:
 1. Documentation pertaining to... [a] decision to not inform parents of the incident of strangulation involving [a student]
 2. Documentation pertaining to... [the] beratement of... [a student] on... [their] first day at the school, including any records held... about this matter
 3. Documentation or notes pertaining to reports made by... [a student] ... about bullying... [they were] experiencing...
 4. Documentation or notes pertaining to the discussion... with [the FOI applicant] on 10 March 2022
 5. Documentation or notes pertaining to the discussion initiated by... [the FOI applicant] ... on 9 March 2022 revealing incident of assault
 6. ... documented assessment of... [a student's] capacity to correctly use capital letters at a preliminary... grade level and decision to introduce this elementary topic into class curriculum.
 4. On 13 April 2022, Education identified 5 documents as falling within the scope of points 4 and 5 of the access application. Education did not identify any records falling within the scope of points 1, 2, 3 or 6 of the request.
 5. Education decided to:
 - give full access to 3 documents (documents 2, 4 and 5), and
 - give partial access to 2 documents (documents 1 and 3).
 6. On 21 April 2022, the applicant applied for Ombudsman review of Education's decision to refuse access to parts of documents 1 and 3.
 7. On 20 August 2022, I provided my preliminary views about the respondent's decision to the parties in a draft consideration.
 8. On 13 September 2022, Education advised it agreed with my draft consideration and did not provide any further submissions. The applicant did not provide submissions in relation to my draft consideration.

Information at issue

9. The information at issue in this Ombudsman review is the information in documents 1 and 3 to which the applicant was refused access.
10. Document 1 is an email sent internally within Education. Document 3 is a copy of the handwritten notes of an Education staff member.
11. In Education's original decision, redactions were applied to part of one sentence in document 1, and two sentences in document 3. The majority of the information contained in documents 1 and 3 was released to the applicant.
12. The issue to be decided in this Ombudsman review is whether the information at issue is '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 and review application
 - the respondent's decision
 - the FOI Act, in particular ss 6, 7, 16, 17, 35, 50, 72 and Schedule 2
 - the *Human Rights Act 2004* (ACT)
 - the respondent's FOI processing file relating to the access application
 - an unedited copy of the information at issue, and
 - relevant case law, including '*AD*' and *Health Directorate*.¹

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.
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.

¹ [2018] ACTOFOI 8 (27 November 2018).

16. 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. Where necessary, this test requires me to:
 - 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 would be contrary to the public interest, allow access to the information.
17. 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.
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. 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.
20. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose.
21. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

The parties' submissions

22. In its original decision notice, Education identified one factor favouring disclosure – the information is the personal information of a child, and the disclosure of the information to the child's parent may reasonably considered to be in the best interests of the child.²

² Schedule 2, s 2.1(b)(ii) of the FOI Act.

23. Education identified one factor favouring nondisclosure of the information at issue – disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004* (ACT)³ (Human Rights Act).

24. The Education decision notice said:

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, that the public interest in disclosing this information. Accordingly, the personal information of third parties had been deleted from the information being provided to you.

25. In the application for Ombudsman review, the applicant submitted:

I do not agree with the determination that the records were partially released with deletions applied in accordance with Section 50 of the FOI Act, contain information that would, on balance, be contrary to the public interest to disclose in accordance with the public interest test set out in Section 17 of the FOI Act.

I am confident upon review of said decision that you will identify that some of the information that was redacted was not personal information.

26. These submissions are discussed in more detail below.

Considerations

27. I have carefully considered 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

28. 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.

Irrelevant factors

29. In submissions to this Ombudsman review, the applicant explained why they were seeking the information at issue.

30. In making my decision, I did not have regard to any of the irrelevant factors which a decision-maker is prohibited from considering under s 17(2) of the FOI Act, including the applicant's identity, circumstances, or reason for seeking access to the information.⁴

³ Schedule 2, s 2.2(a)(ii) of the FOI Act.

⁴ Section 17(2)(f) of the FOI Act.

Factors favouring disclosure

31. In deciding the access application, Education identified one factor favouring disclosure.

Information is personal information of a child, and the disclosure of the information to the child's parent is reasonably considered to be in the child's best interest

32. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, Education considered that the information identified in scope of the access application was the personal information of a child, the information was to be given to the child's parent, and the disclosure of the information to the child's parent was in the best interests of the child.⁵

33. I consider that whilst this factor may apply to most of the information identified in scope of the access application, my view is that this factor does not apply to the specific information at issue in this Ombudsman review.

34. A careful consideration of the information at issue indicates to me that the redacted information is not the personal information of a child, nor does it reference any action taken in relation to a child. It follows, therefore, that my view is this factor favouring disclosure does not apply to the information at issue.

Pro-disclosure bias

35. In addition to the factors favouring disclosure listed in Schedule 2, s. 2.1, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of representative democracy.⁶ This concept is promoted through the objects of the FOI Act.⁷

Factors favouring nondisclosure

36. Of the factors favouring nondisclosure listed in Schedule 2, s 2.2, I agree with Education's identification of one factor favouring nondisclosure.

Information could prejudice the protection of an individual's right to privacy

37. A reasonable expectation that disclosure could prejudice an individual's right to privacy under the Human Rights Act weighs against disclosure under the FOI Act.⁸

⁵ Schedule 2, s 2.1(b)(ii) of the FOI Act.

⁶ Section 17 of the FOI Act.

⁷ Section 6(b) of the FOI Act.

⁸ Schedule 2, s 2.2(a)(ii) of the FOI Act.

38. 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.

39. Education decided this factor was relevant in its decision. The applicant, in their submissions in support of their application for review, disputed this factor was relevant.

40. In its submissions to this review, Education submitted, in relation to document 1, that the information at issue was a staff member's personal information, the staff member had a right to not have their private affairs interfered with, and disclosure of the information at issue may be detrimental to the staff member.

41. In relation to document 3, Education submitted:

...the handwritten notes indicate that there may have been safety concerns for staff and referenced [a staff member]... the identification of a particular individual in these notes clearly indicates that there were some concerns for this person... This is personal information of the [staff member] and... they have a right to privacy in relation to this matter.

42. In considering whether the disclosure of information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act, matters to consider include the nature of the information and the circumstances in which the information was provided, particularly whether it was provided on a confidential basis.⁹

43. I am persuaded by the submissions from Education. I consider the information at issue in this Ombudsman review is comprised solely of sensitive, personal statements. I consider the disclosure of personal information of this kind would be a significant intrusion into the privacy of the individuals involved, particularly in circumstances where the information was provided in confidence.

44. I attribute significant weight to this factor.

Balancing the factors

45. Considering the pro-disclosure bias of the FOI Act, and because I have identified one public interest factor favouring nondisclosure, I am now required to consider the public interest balancing test as set out in s 17 of the FOI Act.

⁹ 'AD' and Health Directorate [2018] ACTOFOI 8 (27 November 2018).

46. In this matter, I have identified no public interest factors apply, which favour disclosure of the information at issue. It follows, therefore, that I cannot attribute any weight to factors favouring disclosure.
47. On the other hand, I have identified one public interest factor applies, which favours nondisclosure of the information at issue, being Schedule 2, s 2.2(a)(ii), and I have attributed significant weight to this factor.
48. 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. The decision-maker's task is to consider the relative importance and weight of each factor they have identified. The weight given to a factor will depend on the effect that disclosing the information would have on the public interest.
49. The FOI Act has a pro-disclosure bias, and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side, rather the scales are 'laden in favour of disclosure'.¹⁰
50. I am satisfied that in relation to the information at issue, on balance, the public interest factors favouring nondisclosure outweigh the pro-disclosure bias of the FOI Act. This is because I have attributed significant weight to the factor favouring nondisclosure, factored against the pro-disclosure bias in the FOI Act.

Conclusion

51. For the reasons set out above, under s 82(2)(a) of the FOI Act, I **confirm** the decision of Education of 13 April 2022, to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

David Fintan
Senior Assistant Ombudsman

10 October 2022

¹⁰ [Explanatory Statement, Freedom of Information Bill 2016.](#)