



Decisions and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/24/10003
Applicant:	'DH'
Respondent:	Canberra Health Services
Third party:	Calvary Health Care ACT Ltd
Respondent reference:	CHSFOI23-24.23
Date:	4 November 2024
Decision reference:	[2024] ACTOFOI 18 (4 November 2024)
Catchwords:	<i>Freedom of Information Act 2016</i> – promote open discussion of public affairs and enhances government accountability – Inform the community of the government’s operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community – information is personal to the person making the request – prejudice trade secrets, business affairs or research of an agency or person – prejudice the protection of an individual’s right to privacy or any other right under the <i>Human Rights Act 2004</i>

Decision

1. For the purpose of s 82 of the *Freedom of Information Act 2016* (**FOI Act**), I am a delegate of the ACT Ombudsman.

2. For the reasons set out below, the decision of Canberra Health Services (**CHS**) dated 12 January 2024 is **confirmed** under s 82(2)(a) of the FOI Act.

Background to Ombudsman review

3. On 19 October 2023, the applicant applied to CHS for access to:

...an email trail from [named staff] and People and Culture of Calvary public hospital between the dates of 13 December 2022 and 17 December 2022 that have my name in them as they are about me. The email trail was part of Calvary Public Hospital which has been taken over by Canberra Health Services.
4. On 12 January 2024, CHS identified one document within the scope of the request and refused access.
5. On 12 January 2024, the applicant applied for Ombudsman review under s 73 of the FOI Act.
6. On 13 March 2024, Calvary Health Care ACT Ltd (**Calvary**) joined the Ombudsman review as a third party under s 77 of the FOI Act.
7. On 1 October 2024, the acting Senior Assistant Ombudsman provided the parties with their preliminary view set out in a draft consideration. The draft consideration included all matters that the Acting Senior Assistant Ombudsman relied on in forming their view and both parties were given an opportunity to provide a response.
8. On 3 October 2024, CHS accepted the draft consideration.
9. On 17 October 2024, the applicant accepted the draft consideration.

Information at issue

10. The information at issue in this review is an email trail between individuals (**'the emails'**) named in the access application and People and Culture of Calvary Public Hospital Bruce (**Calvary Public Hospital**).

11. Following the ACT Government's compulsory acquisition of the site of Calvary Public Hospital, on 3 July 2023 the hospital transitioned to CHS and is now known as North Canberra Hospital. CHS was entitled to access the emails after the transition.¹
12. In making my decision, I have had regard to:
 - the applicant's access application and review application
 - the respondent's decision of 12 January 2024
 - the ACT FOI guidelines, a notifiable instrument under s 66 of the FOI Act
 - the FOI Act, in particular Schedule 2
 - the respondent's FOI processing file relating to the application
 - the submissions of the parties, and
 - relevant case law, including [*Cockroft and Attorney-General's Department and Australian Iron Steel Pty Ltd \(1986\)* 64 ALR 97, 106.](#)

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.²
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.

¹ [Health Infrastructure Enabling Act 2023](#) s 12(1)(h). See also [Freedom of Information Act 2016 \(FOI Act\)](#) s 14 meaning of 'held'.

² Section 35(1)(c) of the FOI Act.

15. The public interest test in s 17 sets out the 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.
17. Schedule 2 of the FOI Act sets out public interest to be balanced when conducting the s 17 test to determine the public interest.³

The contentions of the parties

18. In its decision notice, CHS said:

The document is largely comprised of information that may prejudice the business affairs of a non-Government entity.

The document is also partially comprised of medical health records. Section 12 of the FOI Act specifies that the Act does not apply to information in a health record as defined by the Health Records (Privacy and Access) Act 1997 (the HR Act). Therefore, this information cannot be assessed under the FOI Act.

On balance, the factors favouring disclosure were outweighed by the factors favouring non-disclosure as the redacted information is comprised of business affairs of a non-Government entity. Therefore, I determined the information identified is contrary to the public interest and I have decided not to disclose this information.

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

I am not interested in the medical records and agree that they should not be included...all I am asking for is the conversations about me that saw it escalated to a suspension. The mention of the resident can be blacked out as they did for my other FOI from the investigation. I find it to be very underhanded that the HR people know what the email says and the person who it's about isn't allowed to know.

I was suspended from my job because of these people through vexatious complaints – they made 10 in total against me and not one was found to have any merit.

...I do want to know what was said that escalated my suspension – I was not afforded any procedural fairness and no preliminary assessment was undertaken.

³ Section 35(1)(c) of the FOI Act.

...I want to know the trust about the corruptness that I experienced in the workplace for exercising a workplace right.

...I hope the consideration of what they have done to me through vexatious allegations can be addressed and I get to see what was written about me – this is the only information I want – any mention or alluding to my name...'

20. Calvary, as a third party to this review, submitted:

The information recorded in Attachment A refers to and tends to disclose Calvary's internal processes and internal investigations at a time when it was responsible for the operation of the Public Hospital. This type of information is not ordinarily available in the public domain and Calvary considers it to be of a confidential nature.

The release of information in relation to ongoing internal investigations, particularly where the results of those investigations are unknown, could reasonably be expected to be harmful to the reputation of the Public Hospital at a time when it was operated by Calvary and to the reputation of Calvary and Calvary Group generally. As set out above, the Calvary Group continues to provide health services in the Australian Capital Territory. As such, Calvary's business affairs could be affected.

Further, the disclosure of the information the subject of the Access application could potentially prejudice the fair treatment of the Employee the subject of the investigation, or other persons referred to in the correspondence whose details appear in Attachment A. Such disclosure could also give rise to a risk of harm to the reputation of the persons referred to in the Attachment A.

Consideration

Public interest test

21. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following 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

22. The original decision from CHS identified two factors favouring disclosure as relevant to the emails.

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

23. In its original decision, CHS identified release of the emails would promote open discussion of public affairs and enhance the government's accountability but did not elaborate further.

24. At the time the emails were created, Calvary Public Hospital was not a government entity but delivered health services under a health service agreement with the ACT Government. The emails do not concern the public affairs of administration of hospitals by the government or providing health care services, but rather, an internal affair of employee conduct.

25. I note the emails partially comprise medical health records being a health record as defined by the *Health Records (Privacy and Access) Act 1997* (**Health Records Act**). The FOI Act does not apply to information in a health record.⁴ For this reason, personal information relating to the health, illness or disability of a person who has used a health service has been deleted from the emails as this information is information in a health record.

⁴ FOI Act s 12.

26. The emails do not contain any information about the exercise of CHS's functions or the health service agreement with Calvary. In my view release of the emails would not reveal information about government actions and therefore, disclosure would not promote the open discussion of government accountability.

27. I decide this factor does not apply to the emails.

Inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community (Schedule 2, s 2.1(a)(iii))

28. CHS identified this factor as being relevant in the original decision, but noted in submissions to the Ombudsman the information concerns the management functions of a non-government entity, and the information was only available to CHS following the transition.

29. As discussed above at [21]-[23], the information concerns the receipt of a complaint by Calvary about an employee. Disclosure of the emails would not inform the community about how CHS responds to complaints about staff or health services.

30. I consider this factor also does not apply to the emails.

The information is personal to the person making the request (Schedule 2, s 2.1 (b)(i))

31. In addition to the factors identified by CHS, I find Schedule 2, s 2.1 (b)(i) of the FOI Act is relevant as the emails contain the personal information of the person making the request.

32. In the FOI Act, personal information –⁵

⁵ FOI Act, Dictionary, meaning of 'personal information'.

- (a) means information or an opinion (including information forming part of a database), whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion; but (b) for an individual who is or has been an officer of an agency or staff member of a Minister, does not include information about –
 - (i) the individual's position or functions as an officer or staff member; or
 - (ii) things done by the individual in exercising functions as an officer or staff member.

33. I consider part of the emails contain the personal information of the applicant, as the emails include information about the applicant where their identity is apparent. The emails involve an employee raising initial concerns about the applicant's behaviour to their supervisor for a response. It is clear the emails contain some personal information of the applicant.

34. I note the applicant has advised some information about the investigation was provided to the applicant, but they did not receive all the information from the complaint.

35. I afford this factor medium weight in my decision. I note the emails also contain the personal information of others, including that of the individual who raised the concerns, and I shall discuss those considerations below.

Factors favouring non-disclosure

36. The original decision from CHS identified one factor favouring non-disclosure as relevant.

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

37. Where disclosure could reasonably be expected to prejudice the business affairs or research of an agency or person non-disclosure of that information is favoured.

38. In *Cockroft and Attorney-General's Department and Australian Iron Steel Pty Ltd*, the term 'business affairs' has been interpreted to mean:

The totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs.⁶

39. Calvary submitted disclosure of the emails would prejudice their business affairs because the information might relate to ongoing internal investigations and could reasonably be expected to be harmful to the reputation of Calvary.

40. In its ordinary business functions, Calvary provides health care services to the public. The requested emails, to some level, include information about the handling of a patient's care by an employee. The patient's health information is excluded from release under the Health Records Act. As such, I am only considering the residual information. That information reveals that after an incident, an internal complaint was made about an employee. The employee's conduct is not detailed in the emails.

41. The emails reveal some of Calvary's processes for their employees and also the initial response to a complaint. I consider the response to the initial complaint aligns with what the public may expect of a response from a human resources team within an organisation.

42. I am not satisfied disclosure of information about internal complaint handling processes would cause reputational harm to Calvary, thereby prejudicing business affairs. I consider it highly unlikely the disclosure would affect Calvary's reputation or the willingness of the public to pay for their services.

43. There is no information before me to suggest that the complaint was handled inappropriately, thereby damaging any reputation of Calvary. On

⁶ (1986) 64 ALR 97, 106.

13 March 2024, the Ombudsman requested further submissions as to how business affairs would be prejudiced by release of information. Calvary submitted that it continues to provide health services in the ACT and as such, Calvary's business affairs could be affected.

44. I consider release of the emails would disclose information about the processes of the administration and human resources of the business, rather than Calvary's business affairs in providing health care. There is no information before me to suggest reputational harm would be experienced by that release nor that the business affairs of Calvary would be prejudiced.

45. I give limited weight to this factor.

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

46. A factor which was not considered by CHS in their decision which I find to apply is Schedule 2, s 2.2 (a)(ii) of the FOI Act. This factor favours non-disclosure by stating that release of information would prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004 (Human Rights Act)*.

47. 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.

48. Having reviewed the emails, full names, position titles, email addresses, mobile numbers and signatures are present. I consider this information personal information of the individuals who are not the applicant.

49. In addition, there is information contained within the emails about the circumstances leading to the complaint that provides sufficient context to identify specific individuals.
50. 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 individual⁷.
51. 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 6.3 applies.
52. An agency may use or disclose non-sensitive personal information for a secondary purpose if the use or disclose is related to the primary purpose; required or authorised by law; or a permitted general situation exists.
53. Public sector agencies who engaged contracted service providers must ensure the contract contains provisions requiring the provider to comply with the TPPs.⁸
54. The personal information in the emails was obtained by Calvary for the primary purpose of management of its staff – in this particular instance, receiving a complaint about an employee. The information was subsequently held by CHS following the transition of the hospital.

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

⁸ [Information Privacy Act 2014](#) s 21.

55. I consider that the disclosure of the emails for a secondary purpose unrelated to the complaint or transition would not be reasonably expected by an individual who made a complaint to Calvary at the time they were employed by Calvary. Disclosure of the emails is not related to the primary purpose of the collection.
56. Having reviewed the contents of the emails, I do not consider those individuals would expect CHS to disclose their personal information to the applicant for a purpose unrelated to the applicant's employment (e.g. internal complaint handling).
57. I do not consider the individuals to whom the personal information relates have consented to the disclosure of this information to the applicant.
58. I consider disclosure of this personal information for a secondary purpose that 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.
59. I afford significant weight to this factor.

Balancing the factors

60. 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.
61. I consider the two public interest factors favouring disclosure identified by CHS in its decision do not apply. In this matter, I identified one public interest factor favouring disclosure – that the information is personal to the person making the request – does apply and I intend to attribute medium weight to this factor.

62. I considered two public interest factors favouring nondisclosure applied to the emails where I decided to give the factor prejudice business affairs minor weight and significant weight to the factor prejudice the protection of an individual's rights under the Human Rights Act.
63. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and non-disclosure, 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 identified; the weight given to a factor will depend on the effect that disclosing the information has on the public interest.
64. 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 put on each side. Rather, the scales are 'laden in favour of disclosure'.
65. On balance, I decide the public interest factors favouring nondisclosure outweigh the public interest factor favouring disclosure.

Conclusion

66. For these reasons, my decision is to **confirm** the decision under s 82(2)(a) of the FOI Act.

David Fintan
Senior Assistant Ombudsman
4 November 2024