

Decision and reasons of ACT Ombudsman

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| Application number: | AFOI-RR/24/80008 |
| Applicant: | 'DS' |
| Respondent: | Education Directorate |
| Respondent reference: | EDU_2024_025 |
| Date: | 25 September 2025 |
| Decision reference: | [2025] ACTOFOI 17 |
| Catchwords: | Freedom of Information Act 2016 – conduct of considerations by the Human Rights Commission – identifying information within scope of application – deciding access – whether information is contrary to the public interest information – promote open discussion of public affairs and enhance the government's accountability – contribute to positive and informed debate on important issues or matters of public interest – prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act 2004 – prejudice the management function of an agency – prejudice the conduct of considerations, investigations, audits or reviews by the Ombudsman, Auditor-General, Integrity Commission, Integrity Commission Inspector or Human Rights Commission. |

Decision

1. The applicant applied for Ombudsman review of the decision made by the Education Directorate (Education) to refuse access to information about an incident occurring at Mount Rogers Primary School involving a child being confined in a bike storage cage.
2. The applicant agreed to exclude from the scope of this review information which was provided to the Human Rights Commission, and the personal information of students and non-government employees.
3. I have decided to **set aside** Education's decision under s 82(2)(c) of the *Freedom of Information Act 2016* (ACT) (FOI Act) in relation to the remainder of the information sought.
4. I make a **substitute** decision to give access to information that is, on balance, not contrary to the public interest information; and refuse access to information about the wellbeing of a staff member and the mobile number of a staff member which is, on balance, contrary to the public interest information.

Background to Ombudsman review

5. On 30 July 2024, the applicant applied to Education for access to:

Records relating to two incidents at Mount Rogers Primary School, specifically:

1. *The confinement of a student in a bike storage case in May 2024*
 2. *A student left the school unnoticed and was found by a member of the public between May and July 2024.*
6. On 10 September 2024, Education decided part 2 of the application by giving access to one record and partial access to 15 records.¹

¹ [Education FOI Disclosure log](#) (EDU_2024_025).

7. Education decided to refuse access to the information within the scope of part 1 of the application (bike cage incident) because in their view it was contrary to the public interest information.
8. On 19 September 2024, the applicant applied for Ombudsman review of the decision on part 1 of their application.
9. On 20 September 2024, the Office of the ACT Ombudsman (the Office) notified Education of the receipt of an application for Ombudsman review and sought information relevant to the review including a copy of the information Education refused access to.
10. On 30 September 2024, the applicant confirmed they were not seeking sensitive personal information (such as names of non-government employees and their contact details).
11. On 1 October 2024, Education advised a copy of the information within the scope of the request was not available. Education expressed their view it was appropriate in the circumstances to conservatively treat all records relating to the bike cage incident because of a Human Rights Commission (the Commission) Commission-initiated consideration which commenced on 31 July 2024 (the day after the access application was submitted).
12. On 4 October 2024, the Office asked Education to confirm if searches for the information identified for part 1 of the application were conducted. On the same day, Education confirmed searches for this information were not conducted because it had decided all of this information would be contrary to the public interest information in these circumstances.
13. On 23 October 2024, the Office directed Education to conduct a further search for information under section 80(2) of the FOI Act.

14. On 24 October 2024, Education requested an extension until 15 November 2024 to provide the information about the bike cage incident to the Office.
15. On 18 November 2024, Education provided the Office with a copy of the information within part 1 of the application. Education confirmed only part of the information relevant to the bike cage incident was provided to the Human Rights Commission.
16. On 10 December 2024, the Office wrote to the applicant to confirm if the applicant was seeking review of material Education had confirmed was now in the possession of the Commission (attachment to document 3, document 4, attachment to document 6, attachment to document 10, document 15 and document 16).
17. On the same day, the applicant agreed to remove this information from the scope of this review. The Office wrote to Education to confirm if the residual information could be provided to the applicant informally to resolve the review.
18. On 11 December 2024, Education advised as the Commission had not finalised the matter with a report, further information about the incident may be sought and therefore their position on release had not changed. At this time, the Office ceased informal resolution activities.
19. On 8 August 2025, I provided the parties with my draft consideration setting out my preliminary views.
20. On 11 August 2025, the applicant accepted the draft consideration.

21. On 28 August 2025, Education provided a response to the draft consideration. Education identified information within the information at issue falling outside of the scope of the application (information unrelated to the incident and information created after the FOI access application was submitted); and additional information which may identify students (which the applicant confirmed they were not seeking access to).
22. Education also submitted additional parts of the information at issue was about the wellbeing of a staff member, and that the mobile number of a staff member is also contrary to the public interest information.

Preliminary issues

Conduct of considerations by the Human Rights Commission

23. In submissions to the Office, Education raised difficulties around the timing of the access application in this matter, where the application was made a day before a Commission-initiated consideration commenced.
24. In submissions to the Office, Education said:

As noted in the decision letter, access to the information sought was refused in accordance with s35(1)(c) because I decided that disclosure of the information requested was contrary to the public interest. In reaching this decision, I considered the following:

The Human Rights Commission is undertaking a review of the matter as a Commission Initiated Consideration. The review by HRC was requested by the Minister for Education and Youth Affairs on 31 July and agreed by HRC on the same day.

None of the information in scope of the request would be 'taken to be contrary to the public interest' unless there was legal advice. Schedule 1, 1.8 would not apply because the review had not commenced when the request was received; therefore, no information would have been in the possession of the human rights commission at that time. In the application of the public interest test, Schedule 2, 2.2(a)(xiv) would be relevant because the HRC review was being undertaken at the same time as the FOI request was being processed.

In order for the HRC to properly conduct its review, very significant weight would be given to this as a factor favouring non-disclosure.

In addition, I decided it would be appropriate to conservatively treat all records applicable to the matter, as the HRC may have required the Directorate to provide additional information as the review progressed, which negated the release of any information within scope. Consequently, the factor favouring non-disclosure would have greater weight than factors favouring disclosure, with the end result being that the information would not be released because it would be contrary to the public interest.

In my view, it is only through a very small difference in timing that the information sought would have fallen under Schedule 1, 1.8 and the approach taken has the same outcome.

25. At the time the application was made information within the scope of part 1 had not yet been requested by the Commission. I note at the time the decision was made Education had received a request from the Commission for information about the incident (dated 2 August 2024).
26. Despite the Commission consideration commencing after the application was received, the relevant date was not the date the application was made but the date of the decision on the application.
27. If information within the scope of part 1 was in fact obtained by the Commission before the decision was made Education could have relied on Schedule 1, s 1.8 of the FOI Act (information in the possession of the Commission) to refuse access to this information; or to refuse to deal with the application because it would have been expressed as a request for information taken to be contrary to the public interest to disclose under Schedule 1.²
28. I do not agree with Education's position that because any information could have potentially been obtained by the Commission, disclosure of all of the information about the incident could reasonably be expected to be prejudicial to the conduct of the consideration by the Commission.

² [Freedom of Information Act 2016 \(ACT\) \(FOI Act\)](#) s 43(1)(e).

29. I particularly do not agree that Education could reasonably come to this view when it had not even searched for the information and identified what information was actually held.
30. Education should have identified the information in scope and considered the effect disclosure of even part of that information could have on the conduct of the consideration by the Commission, noting the purpose of a consideration set out below at [81].
31. In conducting my review, I have had the benefit of the passage of time. This allows me to consider what information actually came into the possession of the Commission, and whether any residual information is likely to prejudice the conduct of a Commission-initiated consideration at this time.
32. The applicant ultimately agreed to exclude the information now in possession of the Commission from the scope of this review. This further simplifies my consideration.
33. Further, it may be the case that by the time the Office finalises a review, a relevant investigation is no longer ongoing, and disclosure of relevant material would no longer prejudice that investigation. This may enable me to make a decision that was not open to the original decision-maker.

Identifying information within scope of application

34. During the course of this review, Education advised it did not conduct searches for information within the scope of part 1 of the application because in its view all information within the scope of the request was contrary to the public interest information.

35. In *'DJ' and Infrastructure Canberra*, in considering another decision involving the public interest test, the Senior Assistant Ombudsman expressed:³

I consider information officers are required to examine the information in scope to ensure all relevant factors favouring disclosure and favouring nondisclosure are identified and assessed; and to support the decision-makers findings on whether the information is contrary to the public interest information.

While it may be apparent from the nature of the information sought whether certain sensitivities arise, agencies should identify and collate information as part of the search and decision-making process.

36. I consider Education was required to search for and take steps to identify all information within the scope of the request. It is not sufficient to conclude all information relating to the incident would prejudice the conduct of the Commission consideration (or be obtained by the Commission) without first identifying and assessing what information was actually within the scope of the application.

Information at issue

37. The information at issue in this Ombudsman review is information about an incident occurring at the Mount Rogers Primary School, being handwritten notes and correspondence between staff ('incident records').

38. As noted above the applicant is not contesting part of the decision and therefore the incident records do not include information obtained by the Commission in relation to the Commission-initiated consideration or the personal information of non-government employees.

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

- the FOI access application dated 30 July 2024
- the applicant's Ombudsman review application dated 19 September 2024

³ ['DJ' and Infrastructure Canberra \[2025\] ACTOFOI 3](#) at [30]-[33].

- Education's decision of 10 September 2024 and FOI processing file
- submissions provided by Education dated 1 October 2024, 4 October 2024, 24 October 2024, 18 November 2024 and 11 December 2024
- Education's response to my draft consideration, provided 28 August 2025
- the FOI Act, particularly ss 16, 17, 35 and Schedule 2
- the *Human Rights Act 2004* (ACT) (Human Rights Act)
- the *Human Rights Commission Act 2005* (ACT) (HRC Act)
- the Freedom of Information Guidelines (FOI Guidelines) made under s 66 of the FOI Act
- relevant case law including:
 - ['DJ' and Infrastructure Canberra \[2025\] ACTOFOI 3](#) (1 April 2025), and
 - [Q Squash Ltd and Department of Local Government, Sport and Recreation; Fraser](#) (third party) (210231, 30 June 2008).

Relevant law

40. 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.⁴

41. Section 35(1)(c) of the FOI Act provides 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.

⁴ FOI Act s 35(1)(c).

42. 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.
43. The public interest test set out in s 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
44. Schedule 2 of the FOI Act sets out a non-exhaustive list of public interest factors which must be considered, where relevant, when determining the public interest.
45. Section 72 of the FOI Act provides in an Ombudsman review, a person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

The submissions of the parties

46. In the decision notice, Education stated:

As you are aware, the ACT Human Rights Commission (ACTHRC) is undertaking a review of the incident referred to in point 1 of your request. Release of any information that may be prejudicial to the conduct of the ACTHRC's review would not be in the public interest. If the public interest test was to be applied to information falling within point 1 of your request, the factor favouring non-disclosure, which is that 'disclosure could reasonably be expected to prejudice the conduct of considerations, investigations, audits or reviews by the ombudsman, auditor-general, integrity commission, integrity commission inspector or human rights commission' (Schedule 2, 2.2(a)(xiv)), would be given very significant weight when compared to the factors favouring disclosure and the information would not be released.

Consequently, in accordance with section 35(1)(c) of the FOI Act, I have decided to refuse to give access to the information because it is contrary to the public interest information.

47. In their Ombudsman review application, the applicant said:

Firstly, the Human Rights Commission should be able to conduct its review without being swayed or hampered by any material that is already in the public domain, including stories published in The Canberra Times. There have been other cases where the commission examined issues that had already been aired publicly (for instance, the report on a complaint regarding provision of a service for a child or young person by Brindabella Christian College.) The commission commenced its review at the request of the Education Minister, after I had made this FOI request.

My understanding is the commission will use the findings from this case to make recommendations to create systemic reform. It is not intended to be a punitive process. Therefore, releasing this information should not hamper the work the commission is currently doing.

Secondly, if the Commission has already gathered material for its investigation, then it would have to hand much of the material that would fall underneath this FOI application. This information will eventually be in the public domain when the Commission hands down its findings. Releasing this information will not change the quality or quantity of evidence that is available to it in order to do its work.

Thirdly, the substance of this matter, relating to use of restrictive practices in education settings, is firmly in the public interest as it reveals a type of practice that needs to be carefully monitored. The use of restrictive practices is generally considered the last option for dealing with non-compliant behaviour. The communication surrounding this incident may shed light on how this particular incident was handled at the time and help the public's understanding of what and how decisions were made.

Again, in this particular case there is no reason that the Commission will be unable to do its work without bias or any other obstruction as a result of the release of this information. Because it was requested prior to the commencement of the commission's review, the material would not surface any of the commission's own correspondence or work. Therefore, disclosure of this information would not be against the public interest.

Consideration

48. I have assessed the submissions of the parties and an unredacted copy of the incident records.

49. The key issue for me to decide is whether the incident records are, on balance, contrary to the public interest information.

Public interest test

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

51. Education identified 2 factors favouring disclosure of the incident records.

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

52. A factor favouring disclosure of information is where disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.

53. Education expressed transparency about the incident and the actions taken as a result are important for the accountability of the government and public officials, given that Mount Rogers Primary School is an ACT public school, and the staff involved in the incident include government employees.

54. I agree this factor applies to the incident records which detail staff members recollection of the incident, the way staff reported and responded to the incident and the management of students and their employees.

55. Release of the incident records would reveal discussions and information about compliance with legal requirements and work health and safety obligations.

56. I afford significant weight to this factor.

Contribute to positive and informed debate on important issues or matters of public interest - Schedule 2, 2.1(a)(ii)

57. A factor favouring disclosure is where release could reasonably be expected to contribute to positive and informed debate on important issues or matters of public interest.

58. Education identified matters relating to child safety, particularly in schools, are important matters of public interest which I accept.

59. Release of the incident records would reveal concerns about the actions of the people involved, and the appropriateness of the action taken.

60. I consider disclosure of the incident records could contribute to positive and informed debate about the supervision of students in the school environment by staff and student wellbeing.

61. I afford significant weight to this factor.

Factors favouring nondisclosure

62. Education referred to 2 factors favouring nondisclosure of the incident records. I have identified an additional factor favouring nondisclosure of part of the incident records.

Prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act 2004 - Schedule 2, s 2.2(a)(ii) and prejudice the management function of an agency - Schedule 2, s 2.2(a)(xv)

63. A factor favouring nondisclosure of information is where disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy under the Human Rights Act.
64. Everyone has the right not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily.⁵
65. Disclosure of information which could reasonably be expected to prejudice the management functions of an agency is also a factor favouring nondisclosure.
66. As discussed above, the applicant is not seeking review of the decision to refuse access to sensitive personal information (names of non-employees and their contact details). For this reason, the personal information of students and other third parties is outside the scope of this review.
67. I consider these factors apply to parts of documents 1, 5, 8, 11, and 14 which contain references to the personal information of a staff member, being information about their wellbeing.
68. While this personal information is included in the incident records because it was raised following the incident and in discussions about interactions involving the staff member generally, I consider this information was either disclosed by the staff member to their supervisor to discuss their wellbeing or discussed by staff in carrying out their obligations to manage staff wellbeing.

⁵ *Human Rights Act 2004* (ACT) s 12.

69. In this context, I consider this personal information was disclosed or obtained for a specific purpose where the staff member would not expect that information to be used or disclosed for any other purpose.
70. As this information is not directly related to the incident and also includes information unrelated to their employment, I consider disclosure of this personal information would be an arbitrary interference with their privacy.
71. Further, I consider release of this personal information could reasonably be expected to result in staff being uncomfortable or unwilling to disclose information about their wellbeing if this information was not managed in confidence or in an expected manner. Employers may not have the ability to offer or provide support to staff if those employees felt they did not have appropriate avenue to discuss their wellbeing concerns.
72. I attribute significant weight to these factors as it relates to this specific personal information, noting the prejudicial effects discussed could have a significant impact on staff wellbeing.
73. Education also identified document 14 contains the mobile number of another staff member. This staff member shared their mobile number with another staff member to give them the ability to contact them while they were not at work.
74. I consider disclosure of their mobile number without their consent and for an unrelated purpose could amount to an unlawful or arbitrary interference with their right to privacy. I give significant weight to this factor in respect of the disclosure of the mobile number of a staff member.

75. I do not consider release of the remainder of the personal information of staff would prejudice the protection of their right to privacy, as the remainder of their personal information relates to actions taken in the course of their employment as a staff member.

76. Additionally, I do not consider release of the remainder of the incident records would prejudice the management functions of Education noting their ordinary operations in relation to public schools and their obligation to report and respond to student safety concerns.

77. I do not consider these factors apply to the remainder of the incident records.

Prejudice the conduct of considerations, investigations, audits or reviews by the Ombudsman, Auditor-General, Integrity Commission, Integrity Commission Inspector or Human Rights Commission - Schedule 2, 2.2(a)(xiv)

78. A factor favouring nondisclosure of information applies if disclosure could reasonably be expected to prejudice the conduct of considerations, investigations, audits or reviews by the Ombudsman, Auditor-General, Integrity Commission, Integrity Commission Inspector or Human Rights Commission. In this matter, it is the conduct of considerations by the Human Rights Commission which is relevant.

79. The Commission may on its own initiative, consider (by a Commission-initiated consideration) an act or service or conduct that appears to the Commission to be an act, service or conduct about which a person could make, but has not made, a complaint under the HRC Act; or any other matter related to the Commission's functions.⁶

⁶ [Human Rights Commission Act 2005 \(ACT\)](#) (HRC Act) s 48(1). Note, under s 48(2), the Commission can conduct Commission-initiated consideration of certain complaints if the person who made the complaint could not have made the complaint under s 43(1)(a) - (d); and the Commission does not approve the person under s 43(1)(e) to make the complaint for the aggrieved person. Under s 48(3), the Commission may also conduct

80. A person may complain to the Commission about a service for children and young people if the service is not being provided appropriately; or the provider of the service has acted inconsistently with generally accepted standards of service delivery; the child safe standards;⁷ or any other standards; or the service is not being provided.⁸

81. A consideration of a complaint has the following main purposes:⁹

- to allow the Commission to decide whether the complaint is a complaint that can be made under the HRC Act and whether the complainant is a person who may make a complaint
- to provide information that may be used to help conciliation of the complaint
- to work out whether the conduct complained about was engaged in in the way complained about and, however it was engaged in, whether there is adequate ground for the Commission to report.

82. The Commission may issue written notices requiring a person to provide information, documents or other things relevant to a consideration of a complaint and may take possession of such material for the period necessary for the consideration.¹⁰

83. I note the Commission does not need to give a final report to close a Commission-initiated consideration,¹¹ but may prepare a report and give it to anyone the Commission considers appropriate.

Commission-initiated consideration if the complainant has withdrawn the complaint and if the Commission is satisfied that it is in the public interest.

⁷ HRC Act s 94V; [Human Rights Commission Regulation 2023 \(ACT\)](#) Part 3.

⁸ HRC Act s 40A.

⁹ HRC Act s 69(a)-(c).

¹⁰ HRC Act 73(2); s 76.

¹¹ HRC Act s 80(3).

84. However, the Commission must not include an adverse comment in relation to a person in a Commission-initiated report unless the Commission has given the person a reasonable opportunity to respond to the proposed comment.¹²
85. In this matter, Education decided release of any information that may be prejudicial to the conduct of the Commission's consideration would not be in the public interest.
86. In certain circumstances, release of information about an incident involving an alleged failure to appropriately provide services to children prior to the conclusion of a Commission consideration could reduce the effectiveness of a conciliation process or the independent assessment of the matter and the preparation of comments or recommendations to address the matter.¹³
87. Although the incident records relate to the incident considered by the Commission, I have no evidence before me that release of this information would impact the Commission's ability to conduct their consideration, nor any of their functions in relation to a consideration. This particular information was ultimately not sought by the Commission.
88. Further, noting the passage of time since the Commission's consideration was initiated, it is likely the Commission has since obtained all relevant information and concluded their activities.
89. I do not consider this factor applies to the incident records.

¹² HRC Act s 84.

¹³ [*Q Squash Ltd and Department of Local Government, Planning, Sport and Recreation; Fraser \(third party\) \(210231\) 30 June 2008*](#) at [33]-[61].

Balancing the factors

90. 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.
91. In this matter, I identified 2 public interest factors favouring disclosure of the incident records and attribute significant weight to these factors.
92. I considered 3 public interest factors favouring nondisclosure of the incident records.
93. I find 2 public interest factors favouring nondisclosure apply to the personal information of staff member concerning their wellbeing within the incident records and attribute significant weight to this factor in respect of this information. I find one public interest factor applies to the mobile number of a staff member and attribute significant weight to this factor in relation to this information.
94. I find these 3 public interest factors do not apply to the residual information in the incident records.
95. 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 identified. The weight given to a factor will depend on the effect disclosing the information has on the public interest.

96. The FOI Act has a pro-disclosure bias,¹⁴ 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'.¹⁵

Conclusion

97. On balance, the public interest factors favouring nondisclosure of the personal information of staff members (wellbeing information, mobile number) outweighs the public interest factors favouring disclosure of this information.

98. As I did not identify any factors favouring nondisclosure apply to the remainder of the incident records, I have decided it would be in the public interest to disclose this information.

Decision

99. For the reasons set out above in this decision, I set aside Education's decision under s 82(2)(c) of the FOI Act.

100. I make a substitute decision to refuse access to the personal information of staff members from parts of documents 1, 5, 8, 11, and 14 and to give access to the remainder of the incident records.

Iain Anderson

ACT Ombudsman

25 September 2025

¹⁴ FOI Act s 9.

¹⁵ [Explanatory Statement, Freedom of Information Bill 2016](#).