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

Decision and reasons for decision of
Senior Assistant Ombudsman, Paul Pfitzner

Application Number:	AFOI-RR/18/10021
Decision Reference:	[2018] ACTOFOI 8
Applicant:	'AD'
Respondent:	Health Directorate
Decision Date:	27 November 2018
Catchwords:	*Freedom of Information Act 2016* (ACT) – deciding access – whether disclosure of information is contrary to the public interest – reveal the reason for the government decision – right to privacy – prejudice the management function of an agency – prejudice an agency's ability to obtain confidential information

Decision

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

2. Under s 82(1)(a) of the FOI Act, I confirm the decision of the Health Directorate (ACT Health) of 17 August 2018.

Scope and background of Ombudsman review

3. The applicant is employed by ACT Health.

4. On 25 July 2018, the applicant applied to ACT Health for access to a copy of a workplace complaint investigation preliminary assessment report (the information sought), where the applicant was the subject of the complaint.

5. On 17 August 2018, ACT Health decided to refuse access to the information sought in full. In making its decision, ACT Health did not provide any reasons for its decision other than identifying the following public interest considerations:

    - prejudice the management functions of the agency (Schedule 2, s 2.2(a)(xv)), and
    - personal privacy (Schedule 2, s 2.2(a)(ii) of the FOI Act).

6. On 20 August 2018, the applicant applied for Ombudsman review of ACT Health's decision under s 73 of the FOI Act.

7. The applicant has requested that the contents of his application be held in confidence, and not be shared with ACT Health.

8. While an Ombudsman review is not conducted in secret, I have made this decision without disclosing the applicant's specific contentions, as requested by the applicant. This is because my decision is to confirm ACT Health's decision. Therefore, there is no prejudice to ACT Health in this matter that might otherwise have raised issues of procedural fairness.

9. ACT Health submits that the information sought is contrary to the public interest information (a decision under s 35(1)(c) of the FOI Act), and has acted to rectify the defect in its decision notice by providing its reasons for decision during the course of this Ombudsman review.

10. I provided my preliminary views about ACT Health's decision to the parties in my draft consideration dated 7 November 2018. Neither the applicant nor ACT Health provided any further comments or submissions in response to my draft consideration.

11. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information sought would be contrary to the public interest.

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

    - the applicant's application for Ombudsman review
    - ACT Health's decision
    - the FOI Act, in particular ss 7, 16, 17, 35 and Schedule 2

- the ACT Health's processing file relating to the access application, in particular an unedited copy of the information sought
- relevant case law, in particular *8A3BPQ and Queensland Police Service,*[1] *Alistair Coe and Health Directorate,*[2] and *Taggart and Queensland Police Service,*[3] and
- the submissions of the parties.

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.

14. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information because it is contrary to the public interest information.

15. Contrary to the public interest information is defined in s 16 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.

16. The public interest test set out in s 17 involves a process of balancing the public interest factors favouring disclosure against the public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.

17. The FOI Act defines 'personal information' as:

> 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.[4]

18. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

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1 [2014] QICmr 42 (*8A3BPQ*).

2 [2018] ACTOFOI 4.

3 [2015] QICmr 16 (*Taggart*).

4 See Dictionary to the FOI Act 'personal information'. This definition excludes some information of an officer of an agency, or a staff member of a Minister. However, the applicant has not raised that as an issue, and I am nevertheless satisfied that those exclusions are not relevant in this Ombudsman review.

The contentions of the parties

19. On 29 August 2018, ACT Health submitted:

> In the matter of the [applicant's] preliminary assessment, the allegation is the subject of a number of complex working relationships. It was concluded that it was best to resolve the matter through remedial action such as counselling and to encourage a harmonious working environment amongst staff. It was determined that the public interest would not be advanced by providing [the applicant] with the in-confidence preliminary assessment report when an investigation was found not to be warranted.

20. On 17 September 2018, ACT Health submitted:

> The release of the preliminary assessment report to [the applicant] could be expected to prejudice an agency's ability to obtain confidential information. It would also prejudice the management function of an agency and the conduct of industrial relations by the agency, given there were unsubstantiated allegations of misconduct. Disclosure of the information could prejudice the fair treatment of an individual.

21. ACT Health's submissions additionally set out its application of the public interest test in s 17. I discuss this below.[5]

Considerations

22. The information sought is a three-page preliminary assessment report of a complaint made against the applicant, conducted by an officer external to ACT Health (the assessor).

23. From my examination of the information sought, it is clear that the assessor undertook some preliminary inquiries; and, as ACT Health submits, was able to reach the conclusion that the complaint issue could be resolved through counselling and other remedial action.

24. For ACT Health to be able to rely on s 35(1)(c) to refuse access to the information sought, the information sought must comprise contrary to the public interest information.

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

25. ACT Health has not submitted that the information sought is taken to be contrary to the public interest to disclose under Schedule 1. 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.

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[5] ACT Health's public interest factors favouring disclosure are set out below at [29], and its factors favouring nondisclosure are set out below at [43].

Public interest test

26. To determine whether information is, on balance, contrary to the public interest information, s 17(1) prescribes the following five steps:

    (a) 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;

    (b) 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;

    (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;

    (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;

    (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.

27. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) are considered.

Irrelevant factors

28. I have noted the irrelevant factors listed is s 17(2) and I am satisfied that I have not considered any irrelevant factors in this case.

Factors favouring disclosure

29. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. Of the factors favouring disclosure listed in Schedule 2, ACT Health submits three are relevant in this case. Disclosure of the information sought could reasonably be expected to:

    - reveal the reason for the government decision following receipt of the report as well as any background or contextual information that informed the decision (Schedule 2, s 2.1(a)(viii))
    - contribute to the administration of justice generally, including procedural fairness (Schedule 2, s 2.1(a)(xiii)), and
    - impact on the protection of an individual's right to privacy, as the information sought is the personal information of the applicant (Schedule 2, s 2.1(b)(i)).

30. The applicant contends that other public interest factors favouring disclosure apply in this case. While, in accordance with the applicant's request, I will not reveal the substance of his public

interest arguments in this case, it is sufficient to say that his contentions relate to notions of agency misconduct, accountability, transparency, fairness and justice.

31. From my examination of the information sought, I am satisfied that the applicant was properly informed by the assessor of the preliminary assessment process, was given the opportunity to be heard, and was in fact heard. I am also satisfied that this particular complaint is not proceeding any further. For this reason, I am satisfied that disclosure of the information sought would not serve to contribute to the administration of justice, either generally or for the applicant, nor would it advance the public interest in revealing agency misconduct in this case.

32. I agree with ACT Health that the remaining two public interest factors favouring disclosure are relevant in this case.

Reveal reason for a government decision

33. Revealing the reason for a government decision is a factor favouring disclosure as it can serve to provide transparency to the decision making process.

34. In complaint processes, the principles of transparency and accountability do not, however, require everything relating to the complaint be disclosed.

35. This was considered in the Queensland Information Commissioner case of *8A3BPQ and Queensland Police Service,* where it was discussed that the Queensland Police Service (QPS) 'must be transparent and accountable in how it deals with serious allegations of misconduct and disciplinary investigations'. However, in that case, the requirement for QPS to be accountable and transparent did not 'oblige QPS to provide the applicant with access to its entire investigation file nor reveal all of the information it gathered in dealing with the investigation.'[6]

36. I consider that the discussions in *8A3BPQ* are relevant in this Ombudsman review.

37. In this case, and on the evidence before me, ACT Health has provided the applicant with information about the substance of the complaint and an explanation of the preliminary assessment process. It has also informed him of its conclusion that the best way to resolve the complaint was through remedial action, such as counselling, rather than proceeding to conduct a formal complaint investigation.

38. Notions of transparency and accountability do not oblige ACT Health to provide the applicant with all of the materials gathered as part of the preliminary assessment. I consider that the

6 [2014] QICmr 42 at [22] – [24].

information already provided to the applicant is sufficient to reveal the reasons for ACT Health's decision not to proceed to a formal investigation.

Personal information of the applicant

39. A factor favouring disclosure is that the information is personal information of the person making the access application.[7] As discussed above,[8] information is personal information where it is information or an opinion, about an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion.

40. From my examination of the information sought, it is clear that it contains both the personal information of the applicant, as the subject of the complaint, and personal information of the complainant and witnesses to the complaint incident.

41. In my view, the applicant's personal information is so intertwined with the personal information of the other individuals that the report would lose its meaning and context if the personal information of the other individuals were removed.

42. Therefore, the information sought comprises joint personal information, rather than being the sole personal information of the applicant. Factors favouring nondisclosure in the public interest on the basis that disclosure could prejudice an individual's right to privacy are thus also relevant here as discussed below.

Factors favouring nondisclosure

43. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure. Of the factors favouring nondisclosure, ACT Health submits that four are relevant in this case. Disclosure could reasonably be expected to prejudice:

    - the protection of an individual's right to privacy, namely the people providing information to the assessor in this case (Schedule 2, s 2.2(a)(ii))
    - an agency's ability to obtain confidential information (Schedule 2, s 2.2(a)(xii))
    - the management function of an agency or the conduct of industrial relations by an agency (Schedule 2, s 2.2(a)(vx)), and
    - the fair treatment of an individual, being information about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct (Schedule 2, s 2.2(b)(v)).

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7 Schedule 2, s 2.1(b)(i).

8 At [17].

44. I do not agree with ACT Health that prejudice to the fair treatment of an individual would be a public interest factor favouring nondisclosure in this case. This is because the applicant was the subject of the complaint and therefore is the only person at risk of unfair treatment as a result of any unsubstantiated allegations included in the information sought.

45. I agree with ACT Health that the other three public interest factors favouring nondisclosure are relevant to this case.

Personal privacy

46. As discussed above,[9] the information sought comprises the joint personal information of the applicant and other individuals, with the reasonable expectation of prejudice to an individual's right to privacy as a relevant factor against disclosure.[10]

47. In the ACT Ombudsman review case of *Alistair Coe and Health Directorate*,[11] the Ombudsman discussed that an individual's right to privacy extends beyond the protection of the right to privacy under the Human Rights Act, [12] and prejudice to a general right to privacy can be a public interest factor favouring nondisclosure.

48. The information sought in this Ombudsman review includes highly sensitive, personal statements of the complainant and witnesses, and I consider that the disclosure of personal information of this kind would be a significant intrusion into the privacy of these individuals, particularly in circumstances such as these where the information was provided confidentially.

49. Accordingly, I am satisfied that there is a substantial public interest in protecting the personal privacy of the complainant and witnesses involved in the complaint assessment process.

Management functions of an agency and the ability to obtain confidential information

50. ACT Health contends that disclosure of the information sought could reasonably be expected to prejudice the management function of an agency, and its ability to obtain confidential information.

9 At [40].

10 At [42].

11 [2018] ACTOFOI 4.

12 Being the 'right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and not to have one's reputation unlawfully attacked'. See: *Alistair Coe and Health Directorate* [2018] ACTOFOI 4 [43]—[44].

51. In this regard, ACT Health submits:

> Employee relations is an area that relies on the ability for staff to provide an honest elevation of a situation without the fear of reprisal. Release of the preliminary assessment report…would undermine the process of conducting a preliminary assessment.

52. This issue was considered in the Queensland Information Commissioner case of *Taggart and Queensland Police Service*, where it was discussed:

> Staff usually supply information to workplace investigators on the understanding that it will only be used for the investigation or any subsequent disciplinary action. It is reasonable to expect staff to cooperate with an investigative process…truthfully, completely and promptly. However, in my view, disclosing this information outside of the investigation process….where there can be no restriction on its use, dissemination or republication, could reasonably be expected to make staff reluctant to fully participate in future investigations and prejudice the future flow of information to investigators. This, in turn, could reasonably be expected to adversely impact [an agency's] ability to conduct workplace investigations and manage staff. [13]

53. I consider that the discussions in *Taggart* are relevant in this Ombudsman review.

54. I am satisfied that disclosure of the information sought could reasonably prejudice the ability of ACT Health to manage the assessment of workplace complaints, as disclosure in this case could reasonably be expected to inhibit the flow of confidential information from the complainant and witnesses involved in the process. Complainants and witnesses in future complaint matters could reasonably become reluctant to cooperate with a complaint assessment or investigation, if they believe that the information they provide could be disclosed in response to an access application under the FOI Act.

Balancing the factors

55. I am satisfied that, on balance, the public interest factors favouring nondisclosure, and particularly the substantial public interest in enabling ACT Health to receive and assess workplace complaints confidentially, outweigh the public interest factors favouring disclosure in this case.

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13 [2015] QICmr 16 at [21] citing *8A3BPQ* at [42].

Conclusion

56. The information sought is contrary to the public interest information for the purposes of s 16 of the FOI Act.

57. I confirm ACT Health's decision to refuse access to the information sought under s 35(1)(c) of the FOI Act.

Paul Pfitzner
Senior Assistant Ombudsman
27 November 2018