

Ms Daniella White and Canberra Health Services [2019] ACTOFOI 9 (5 June 2019)

Decision and reasons for decision of

Senior Assistant Ombudsman, Louise MacLeod

Application Number	AFOI-RR/19/10002
Decision Reference	[2019] ACTOFOI 9
Applicant	Ms Daniella White
Respondent	Canberra Health Services
Decision Date	5 June 2019
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – refuse access – whether disclosure of information is contrary to the public interest – protection of an individual’s right to privacy under the <i>Human Rights Act 2004</i> – whether disclosure of information would prejudice the business affairs of an agency or person – whether disclosure of information would impede the administration of justice

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016* (FOI Act).
2. Under s 82(1)(a) of the FOI Act, I confirm the decision of Canberra Health Services (ACT Health) of 5 December 2018.

Scope and background of Ombudsman review

3. On 17 October 2018, the FOI applicant, a journalist with The Canberra Times, applied to

ACT Health for the following information:

All correspondence from or between any clinical directors within Canberra Hospital and/or ACT Health executives, regarding the use of off site radiology providers/ delays in the making of any medical imaging reports - including but not limited to MRIs, CT scans and X rays/ adverse patient outcomes due to delays or use of offsite radiology reporting, between March 1 and April 28, 2018.

4. On 19 November 2018, ACT Health undertook third party consultation with a provider engaged by ACT Health to deliver off-site medical imaging services (the third party), under s 38 of the FOI Act in relation to four documents.¹
5. On 27 November 2018, the third party responded to ACT Health objecting to disclosure of the four documents, which comprise partially redacted emails between ACT Health employees.
6. On 5 December 2018, ACT Health advised the applicant it had identified a total of 13 documents within the scope of the access application. ACT Health gave the applicant access to one document in full and 12 documents in part.
7. In its decision, ACT Health considered that disclosing some of the information in the emails was contrary to the public interest information, and redacted that information on the grounds disclosure could:
 - prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004*²
 - impede the administration of justice generally, including procedural fairness³
 - prejudice trade secrets, business affairs or research of an agency or person⁴
 - prejudice the competitive commercial activities of an agency⁵
 - prejudice the management function of an agency or the conduct of industrial relations by an agency⁶
 - prejudice the fair treatment of an agency,⁷ and
 - reveal information the disclosure of which is prohibited by an Act of the Territory, in this case, the *Health Records (Privacy and Access) Act 1997*.⁸

¹ Section 38 provides that where disclosure of information applied for may reasonably be expected to be of concern to a relevant third party, the agency must take reasonable steps to consult with the relevant third party before deciding to give access to the information.

² Schedule 2, s 2.2(a)(ii).

³ Schedule 2, s 2.2(a)(iv).

⁴ Schedule 2, s 2.2(a)(xi).

⁵ Schedule 2, s 2.2(a)(xiii).

⁶ Schedule 2, s 2.2(a)(xv).

⁷ Schedule 2, s 2.2(a)(iv).

⁸ Schedule 2, s 2.2(b)(iv).

8. On 16 January 2019, the applicant sought Ombudsman review of ACT Health's decision under s 73 of the FOI Act. The applicant is seeking access to all of the documents in full, with the exception of any information that would identify patients.
9. I provided my preliminary views about ACT Health's decision to the parties in my draft consideration dated 3 May 2019. No submissions in reply were made by either party.
10. The issue to be decided in this Ombudsman review is whether giving the applicant access to redacted information in the emails, other than information that would identify patients, (the information sought) would be contrary to the public interest, as ACT Health contends.
11. 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, 72 and Schedule 2
 - ACT Health's FOI processing file relating to the access application, including an unedited copy of the information sought
 - the submissions of the parties
 - relevant case law, and
 - relevant legislation including the *Information Privacy Act 2014 (Privacy Act)*, *Health Records (Privacy and Access) Act 1997* and the *Human Rights Act 2004 (Human Rights Act)*.

Relevant law

12. 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.
13. 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.
14. 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.
15. The public interest test set out in s 17 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.

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

The contentions of the parties

17. In its response to the consultation, the third party submitted to ACT Health that if disclosed, the information would convey serious and unsubstantiated accusations of malpractice about its business and employees:

These Assertions are unsubstantiated and have never been raised with [the third party]. They are of course denied. [The third party] has concerns that it is not the reporting radiology provider relevant to the cases referred to in the [information sought].

18. In its decision, ACT Health found the information sought contained information contrary to the public interest to disclose:

The information, if released could reasonably be expected to prejudice the business affairs and competitive commercial activities of an agency. Some of the information contained in these folios is unsubstantiated allegations of negligence and incompetency, which, if released could prejudice the fair treatment of an agency. The release of the identified information would also prejudice the management function of an agency and procedural fairness. The above factors favouring non-disclosure far outweigh the factor identified to favour disclosure, on balance, the information identified is contrary to the public interest and I have decided not to disclose this information.

19. In her application for Ombudsman review, the applicant submitted that:

Deficiencies in the public health system are of inherent interest to the public and the concerns raised are made by senior doctors with expert opinions. The discussion often relates to the decision by management to outsource medical imaging, which has come under considerable public scrutiny and debate. As such, the views of the specialist doctors should not be dismissed as unsubstantiated claims. I ask that information redacted for the reasons of privacy is strictly related to the identity of a patient.

Considerations

20. I have examined an unedited copy of the information sought. It comprises of emails between ACT Health employees discussing the delivery of medical imaging services by ACT Health and off-site providers.

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

21. 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.

The public interest test

22. To determine whether disclosure of information is, on balance, contrary to the public interest, 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.
23. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) are considered.

Irrelevant factors

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

Factors favouring disclosure

25. 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 in Schedule 2, s 2.1, ACT Health found one factor relevant in this case, that disclosure would allow or assist inquiry into possible deficiencies in conduct or administration of any agency or public official.⁹
26. The applicant argues that ACT Health failed to consider a number of additional public interest factors favouring disclosure, and that disclosure would also:

⁹ Schedule 2, s 2.1 (a)(v).

- promote open discussion of public affairs and enhance the government's accountability¹⁰
 - contribute to positive and informed debate on important issues or matters of public interest¹¹
 - inform the community of the government's operations¹²
 - ensure effective oversight of expenditure of public funds¹³
 - allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official,¹⁴ and
 - reveal or substantiate that an agency or public official has engaged in misconduct or negligent, improper or unlawful conduct or has acted maliciously or in bad faith.¹⁵
27. The applicant argues the information sought is of inherent interest to the public as it concerns deficiencies in the public health system and a decision by ACT Health to outsource medical imaging, and related concerns which have been raised by 'senior doctors with expert opinions'.
28. The emails contain a number of comments about patient outcomes, and some of those comments contain allegations of possible incompetent and negligent conduct in the context of radiological investigations.
29. I agree with the applicant there is a public interest in information concerning possible deficiencies in the public health system.
30. I also agree with ACT Health that the information could reasonably prompt or assist with any inquiry into possible deficiencies. I do not, however, accept the information sought confirms that wrongdoing or improper handling has occurred.
31. From my examination, it is clear the allegations are being discussed briefly and informally, outside of any formal report or investigation. Although the allegations are being made by clinical staff, they are not sufficiently detailed or supported by evidence, so they might be relied upon to confirm wrongdoing or improper handling by any particular person or third party.
32. ACT Health has also confirmed the allegations have not been investigated or substantiated, and we understand the relevant provider has not been given the opportunity to comment on these allegations.
33. Therefore, the information before me is insufficient for me to conclude that disclosure of the information sought would serve to reveal or substantiate misconduct, or negligent, improper, or unlawful conduct.

¹⁰ Schedule 2, s 2.1 (a)(i).

¹¹ Schedule 2, s 2.1 (a)(ii).

¹² Schedule 2, s 2.1 (a)(iii).

¹³ Schedule 2, s 2.1 (a)(iv).

¹⁴ Schedule 2, s 2.1 (a)(v).

¹⁵ Schedule 2, s 2.1 (a)(vi).

34. I agree the other factors raised by the applicant are relevant, but for the reasons outlined above, including the unsubstantiated nature of any allegations raised, I afford them low weight.

Factors favouring nondisclosure

35. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure. Of those factors favouring nondisclosure, ACT Health decided that disclosing some of the information could reasonably be expected to:

- prejudice the management function of an agency or the conduct of industrial relations by an agency¹⁶
- prejudice the competitive commercial activities of an agency¹⁷
- prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act)¹⁸
- impede the administration of justice generally, including procedural fairness,¹⁹ and
- prejudice the trade secrets, business affairs or research of an agency or person.²⁰

36. ACT Health has not adequately explained, nor is it reasonably apparent, how disclosure of the information sought could possibly prejudice the management function or conduct of industrial relations by an agency, or the competitive commercial activities of an agency. Therefore, I do not agree these are relevant public interest factors.

37. I agree the other factors are relevant and I will now proceed to discuss each of them.

The right to privacy

38. In its decision, ACT Health decided to disclose the names and work email addresses of its employees. The mobile numbers and personal email addresses of employees, and the names of non-ACT Health employees, were, however, redacted. The applicant is seeking access to this information.

39. The Human Rights Act provides 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.²¹

¹⁶ Schedule 2, s 2.2 (a)(xv).

¹⁷ Schedule 2, s 2.2 (a)(xiii).

¹⁸ Schedule 2, s 2.2 (a)(ii).

¹⁹ Schedule 2, s 2.2(a)(iv).

²⁰ Schedule 2, s 2.2(a)(xi).

²¹ See s 12 of the Human Rights Act.

40. Neither the Human Rights Act nor the FOI Act defines 'privacy'. However, the meaning of 'interference with an individual's privacy' is defined in the Privacy Act as:
- (1) For this Act, an act or practice of a public sector agency is an interference with an individual's privacy if the act or practice breaches –
- (a) a TPP²² in relation to personal information about the individual; or
- (b) a TPP code that binds the agency in relation to personal information about the individual.²³
41. More broadly, interference with privacy has been viewed as the right of an individual to preserve their 'personal sphere' free from interference from others.²⁴
42. The concept of arbitrariness covers interferences with privacy that would be unreasonable having regard to the circumstances.²⁵
43. I consider that disclosing the mobile numbers and personal email addresses of ACT Health staff would unreasonably interfere with their privacy.
44. From my examination, the names of non-ACT Health staff are discussed in the context of possible employment with ACT Health, and I consider that disclosing their names in these circumstances would also unreasonably interfere with their privacy.
45. For these reasons, I afford significant weight to this factor favouring nondisclosure.

Business affairs

46. The emails contain a number of comments about adverse patient outcomes made by ACT Health clinical staff, which are not specifically attributed to any person or organisation. Some of those comments contain allegations of incompetent and negligent conduct in the delivery of off-site medical imaging services in relation to a number of specific cases.
47. During consultation, the third party submitted to ACT Health that the allegations were denied by their organisation and could in fact relate to another provider. As noted above, the third party also advised these allegations had not been raised with them, or investigated or substantiated in any way.
48. In its decision, ACT Health determined the documents contain information, which if released, could reasonably be expected to prejudice the business affairs of the third party.

²² TPP refers to Territory Privacy Principle.

²³ See s 11 of the Privacy Act.

²⁴ See *Balzary and Redland City Council; Tidbold (Third Party)* [2017] QICmr 41 at [28] paraphrasing the Australian Law Reform Commission's definition of the concept in *'For your information: Australian Privacy Law and Practice'* Australian Law Reform Commission Report No. 108 released 12 August 2008, at paragraph 1.56.

²⁵ See *Toonen v Australia* No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) at [6.4].

49. In submissions to this review, ACT Health said it had decided not to disclose information containing allegations that had not been substantiated because:

By releasing the information, it could reasonably be expected to have detrimental effects on the working relationship between the ACT Government and the third party, or similar organisations.

50. The term 'business affairs', in the context of FOI legislation, 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'.²⁶
51. I agree with ACT Health that disclosing the emails would have a detrimental impact on the third parties working relationship with the ACT government, and by implication, its business affairs. I also accept that disclosing the allegations could have a broader detrimental impact on the reputation of the third party and its ability to deliver medical imaging services.
52. From my examination, even if the comments specifically referring to the third party were redacted, disclosing the remaining comments concerning adverse patient outcomes, would regardless be attributed to the third party. Therefore, I consider that disclosing all of the comments has the potential to adversely affect the reputation of the third party.
53. For these reasons, I agree that disclosure could reasonably be expected to prejudice the third party's business affairs, and I afford this factor significant weight.

Impede the administration of justice

54. In its decision, ACT Health considered the information sought could, if disclosed, prejudice the administration of justice generally, including procedural fairness. It reiterated the allegations raised in the information sought were unsubstantiated. It did not, however, provide any further explanation.
55. The applicant argues the emails discuss a decision by ACT Health to outsource medical imaging services, an issue that has been scrutinised in media reports,²⁷ and that relevant views expressed by specialist doctors in those emails should not be dismissed as unsubstantiated claims.

²⁶ *Mangan and The Treasury* [2005] AATA 898, at [40], citing *Cockcroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd* (party joined) (1985) 12 ALD 462.

²⁷ See <https://www.canberratimes.com.au/national/act/revealed-senior-doctors-raise-alarm-over-radiology-practices-20181207-p50kw1.html> accessed 1 April 2019.

56. While I accept the views expressed by specialists should carry some weight were a formal investigation to proceed into whether misconduct occurred, I agree with ACT Health that given the unsubstantiated nature of the allegations, the release of the information sought could prejudice the administration of justice, and in particular procedural fairness for any provider or individual involved.
57. From the information before me, it is not clear whether there is any current or future investigation or inquiry in relation to the unsubstantiated allegations. Nevertheless, I consider that to avoid prejudice to procedural fairness, prior to disclosure, it would be appropriate for such matters to be considered by ACT Health, with the third party given the opportunity to comment on the allegations.

Balancing the factors

58. I am satisfied that, on balance, the public interest factors favouring nondisclosure outweigh the public interest factors favouring disclosure in this case.

Conclusion

59. Giving the applicant access to the information sought would, on balance, be contrary to the public interest. I confirm ACT Health's decision to refuse access under s 35(1)(c) of the FOI Act.

Louise MacLeod
Senior Assistant Ombudsman
5 June 2019