

## ***'AT' and Canberra Health Services [2020] ACTOFOI 4 (29 January 2020)***

### **Decision and reasons for decision of Acting Senior Assistant Ombudsman, Cathy Milfull**

<b>Application Number</b>	AFOI-RR/19/10024
<b>Decision Reference</b>	[2020] ACTOFOI 4
<b>Applicant</b>	'AT'
<b>Respondent</b>	Canberra Health Services
<b>Decision Date</b>	29 January 2020
<b>Catchwords</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – prejudice the protection of an individual's right to privacy under the <i>Human Rights Act 2004</i> – prejudice the management function of an agency or the conduct of industrial relations by an agency

### **Decision**

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the ACT *Freedom of Information Act 2016 (FOI Act)*.
2. Under s 82(2)(b) of the FOI Act, I **vary** the decision of the Canberra Health Services (**respondent**), dated 2 September 2019.

### **Background of Ombudsman review**

3. On 5 August 2019, the applicant applied to the respondent for access to:

All documents, not limited to emails, including spreadsheets submitted in response to the request from the executive to document 'workload during the week' of all staff specialist neurologist working at the Canberra Hospital in or around July 2017.

This is departmental information. Personal information could be redacted if considered necessary. This information might be in the public interest.

4. On 2 September 2019, the respondent advised the applicant it had identified 18 documents as falling within the scope of the access application. The respondent gave the applicant access to:
  - eight documents in full
  - nine documents in part, and
  - refused access to one document.
5. In making its decision, the respondent relied on the disclosure of the information being prejudicial to:
  - the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004* (HR Act) (Schedule 2, s 2.2(a)(ii) of the FOI Act),
  - the management function of an agency or the conduct of industrial relations by an agency (Schedule 2, s 2.2(a)(xv) of the FOI Act).
6. On 2 September 2019, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
7. On 19 December 2019, preliminary views about the respondent's decision were provided to the parties in a draft consideration, dated 18 December 2019.
8. On 23 December 2019 and 17 January 2020, the applicant and respondent, respectively, provided additional submissions in response to the draft consideration.

## Scope of Ombudsman review

9. The information at issue in this Ombudsman review are:
  - an employee document (document 2), which the respondent refused to disclose, and
  - the parts of an additional nine documents that were redacted (documents 3, 5, 6, 10, 11, 12, 13, 17 and 18).
10. In making my decision, I have had regard to:
  - the applicant's access application and review application
  - the respondent's decision
  - the FOI Act, in particular ss 7, 16, 17, 28, 35(1)(c), 72 and Schedule 2
  - the HR Act
  - the *Information Privacy Act 2014* (IPA)
  - the respondent's FOI processing file relating to the access application
  - an unedited copy of the information at issue
  - relevant case law, including *'AE' and Health Directorate*<sup>1</sup> and
  - the submissions of the parties.

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<sup>1</sup> [2018] ACTOFOI 9.

## Relevant law

11. 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.
12. 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.
13. The public interest test set out in s 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
14. Section 28 of the FOI Act provides that an agency must keep of a record of access applications made to the agency in the form of a disclosure log. Section 28(6) of the FOI Act provides that a disclosure log must not include an access application for personal information or particular personal information about the applicant.
15. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information sought because the information being sought is contrary to the public interest information.
16. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information
17. 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

18. In the application for Ombudsman review, the applicant said:

Denial of this information is unreasonable because it is department information where I work. It also contains information related to myself. This information has been previously denied when requested informally and through freedom of information...

If this information cannot be published Online (sic) because it is contrary to the public interest, this information could be provided to the member of the department without it being disclosed to the general public.

19. In submissions to this Ombudsman review, the respondent contended:

With regard to the documents at folios 15-20 on the schedule of the CHS response these are the personal employment information of individual staff specialist doctors at the hospital. In [the applicant's] application he states that personal information could be redacted if deemed necessary. In deciding whether to provide access to the documents requested by the applicant, Canberra Health Services considered that releasing this information on the disclosure log would not be appropriate. This is not solely the personal information of the applicant, therefore it could not be considered a personal request of the applicant. This would be the only reason not to publish the response on the disclosure log. As the Act does not provide the ability not to publish this response on the disclosure log, I considered that the only option was to redact the personal information including the information of [the applicant].

The internal working arrangements of our specialist medical professionals as well as our other staff are the intricately linked with the operation of the department. A careful balance was struck between the disclosure of staff employment arrangements and the internal workings of the department. In making my decisions regarding the FOI access application, I gave due consideration to the public interest in the release of this information. It is my decision that the public interest in this documentation is minimal but what has been released is not contrary to the public interest.

## Considerations

20. I have reviewed an unedited copy of the information at issue together with the information provided by the applicant and respondent.

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

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 of the FOI Act.

*Public interest test*

22. To determine whether disclosure of information is, on balance, contrary to the public interest, s 17(1) of the FOI Act 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 a step of ensuring that none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.

*Irrelevant factors*

24. I have noted the irrelevant factors listed in s 17(2) of the FOI Act and I do not consider that any irrelevant factors arise in this Ombudsman review.

*Factors favouring disclosure*

25. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.

26. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, the respondent did not identify any factors favouring disclosure.

27. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, I consider that two factors may apply:

- promote open discussion and enhance government accountability, and
- ensure effective oversight of expenditure of public funds.

28. The public interest in accountability and open discussion arises, given this is a government health department which provides services to the community. Employment processes of the agency and impacts on service delivery have also been the subject of media scrutiny.<sup>2</sup> In the interests of enhancing transparency and accountability, I afford the above factors significant weight.

29. Further, where the information requested is that of the applicant, I note that Schedule 2, s 2.1(b)(i) of the FOI Act is also relevant, which provides that a factor favouring disclosure is that the information is the personal information of the person making the request.

30. Additionally, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of representative democracy.<sup>3</sup> This concept is promoted through the objects of the FOI Act.<sup>4</sup>

31. I note that in its decision notice the respondent has noted that the 'information contained in these documents is not about the service provided to the public'. It should be recognised that matters of public interest are distinct from matters that are of interest to the public.

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<sup>2</sup> See, for example, Canberra Times articles such as: [Damning report shows troubling level of bullying, unease in ACT Health, A 'right to know' is essential to public trust in government, Canberra Hospital staff stressed out](#) and [Allegations of physical intimidation, bullying at hospital](#).

<sup>3</sup> See s 17 of the FOI Act.

<sup>4</sup> See s 6(b) of the FOI Act.

*Factors favouring nondisclosure*

32. The respondent has identified two factors favouring nondisclosure, that disclosure could reasonably be expected to prejudice:
- the protection of an individual's right to privacy or any other right under the HR Act (Schedule 2.2 (a)(ii) of the FOI Act), and
  - the management function of an agency or the conduct of industrial relations by an agency (Schedule 2.2 (a)(xv) of the FOI Act).
33. I agree these factors are relevant as the information the respondent refused access to is generally about other individuals, including names, contact details, medical information and other personal information.
34. The respondent's decision notice, as well as its submissions to this review, appear to intertwine both of these factors. I discuss each in turn below.

Individual's right to privacy

35. A factor favouring nondisclosure under Schedule 2, s 2.2(a)(ii) of the FOI Act is that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the HR Act.
36. The HR Act does not, however, provide a general right to privacy. Rather, it provides the right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily.<sup>5</sup>
37. When deciding whether disclosure would result in unlawful or arbitrary interference with the relevant individual's privacy, it is relevant to consider whether disclosure could be reasonably expected to result in a breach of the IP Act.
38. The IP Act identifies the circumstances in which the disclosure of information may constitute a breach of an individual's privacy. An individual's personal information must only be disclosed in accordance with the Territory Privacy Principles (TPPs) in Schedule 1 of the IP Act.

*Document 2*

39. This document comprises timesheets and clinic hours of individuals employed by Canberra Health Services. It contains personal information about the applicant and other employees.

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<sup>5</sup> See s 12(a) of the HR Act.

40. The question under the FOI Act is not, however, simply whether the information is personal, but whether disclosure could reasonably be expected to prejudice the right to privacy of the relevant individuals.
41. The respondent did not explain in its decision notice why disclosure might have this impact, stating that the 'reason of individual privacy' outweighs the minimal public benefit in release.
42. They did, however, indicate in their submissions to this review that:

...[it] considered that releasing this information on the disclosure log would not be appropriate. This is not solely the personal information of the applicant, therefore it could not be considered a personal request of the applicant. This would be the only reason not to publish the response on the disclosure log. As the Act does not provide the ability not to publish this response on the disclosure log, I considered that the only option was to redact the personal information including the information of [the applicant].
43. It is unclear why the respondent is of the view that they do not have the ability not to publish a response on the disclosure log, where it is an access application for personal information. This is provided for under s 28(6) of the FOI Act.
44. The Ombudsman does not consider that this provision should be interpreted narrowly to cover access applications that are solely seeking personal information, or that are characterised as applications for personal information by the applicant. I consider the intention of this provision is to prevent personal information from being published on the disclosure log by providing agencies with the ability to redact personal information prior to publication. The intention is not to limit information being released to a person about themselves, which would be contrary to the objectives of the FOI Act.
45. Regardless, I do not consider this is a relevant consideration in terms of whether or not to grant access to the information, and whether it is contrary to the public interest information.
46. I do not accept that disclosure of the personal information of the applicant would prejudice the right to privacy – given that it is his own information, and he is likely to already be aware of this information.
47. I am also not satisfied the respondent has discharged its onus in demonstrating why disclosure of the information involving other employees could reasonably be expected to prejudice the right to privacy of the relevant individuals.
48. The disclosure of information about agency staff is not generally considered to prejudice the protection of the individual's right to privacy where the information is wholly related to the individual's routine day-to-day work activities.<sup>6</sup> Disclosure of information, which only reveals

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<sup>6</sup> ['AE' and Health Directorate \[2018\] ACTOFOI 9](#) at [49]-[51].

that the individual is performing their work duties, is considered to contribute to accountability and transparency of government action and decision-making.

49. I accept that employees need to be confident that information about their work performance is protected from intrusion and disclosure to the community at large. However, despite document 2 being labelled 'Performance and management framework for medical practitioners' the information included relates only to working hours and duties. It does not contain performance information, or information about salary or conditions negotiated with individual employees.
50. As a result, I consider this information could be given to the applicant to provide visibility of work arrangements in the relevant area of Canberra Health Services, with limited redactions only, without causing prejudice to individual employees, who are publically identified as specialists working for the Neurology Department.<sup>7</sup>
51. It is, however, suggested that information be redacted where it relates to the employee activities outside of their day-to-day activities at Canberra Health Services, as I consider this could be reasonably be expected to prejudice the right to privacy of the relevant information – that is, the columns of the spreadsheet which provide information about secondary employment and offsite teaching workloads.
52. In further submissions to the draft consideration, the applicant contended:

...it is worth evaluating if 'secondary employment arrangements' and 'off-site teaching load' of any staff specialists amounts to personal information/activities or is directly relevant to the workings and operations of the department. Therefore, disclosure of this information may not result in beach (sic) of an individual's privacy and might be relevant for service delivery and operations of a publicly funded government department and transparency regarding the expenditure of public funds.
53. I have considered the applicant's submissions, along with material provided relating to the obligations of staff to disclose, and request approval, for secondary employment arrangements and off-site teaching loads.
54. I have reviewed the information at issue further, and consider that information relating to secondary employment arrangements and off-site teaching loads are personal employment arrangements between staff specialists and the respondent, as the employer. I acknowledge that staff are required to disclose such information to their supervisors as part of the Enterprise Agreement. However, I do not agree that simply because this information is disclosed to their supervisor that it does not amount to personal information.

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<sup>7</sup> See <https://health.act.gov.au/hospitals-and-health-centres/canberra-hospital/wards-and-departments/medical-services#aclxrs>.



55. For the reasons above, Schedule 2, s 2.2(a)(ii) of the FOI Act is a relevant factor favouring nondisclosure of this information contained in document 2.

*Documents 3, 5-6, 10-13 and 17-18*

56. These documents are emails relating to the work performed by, and the workload of, various employees of Canberra Health Services.

57. I am not satisfied the respondent has discharged its onus in demonstrating why disclosure of this information could reasonably be expected to prejudice the right to privacy of the relevant individuals.

58. Based on the information before me, I am, not satisfied this factor is relevant in the context of:

- document 3 - except in regard to the first of two paragraphs, which were redacted appropriately by the respondent, which concerns the salary information of another employee
- documents 5, 10 and 11 which comprise email correspondence between the applicant himself, and another employee of Canberra Health Services.
- document 6, 12, 13, 17 or 18, redacted sections of which, do not comprise personal information, with the exception of personal email addresses which have been appropriately redacted, and any information about secondary employment and offsite teaching workloads as discussed above at [51] and clarified below.

59. In submissions to the draft consideration, the respondent further contended, with respect to documents 6, 12, 13, 17 and 18:

These are emails between individual staff and their direct supervisor discussing matter related to their own personal employment arrangements.

The release of these documents to other departmental employees, not involved in the emails, could reasonably be expected to cause unnecessary animosity between staff members. These emails would have been sent without the expectation that they would be distributed further.

60. The applicant also provided submissions to the draft consideration with respect to documents 17 and 18, as discussed at [52].

61. I have further reviewed the information and with respect to:

- document 6 (page 26) – I do not consider that access to the whole email dated 17 July 2017 and timestamped at 11:35PM should be refused. This email contains questions a staff member had regarding the template table. However, taking into account the respondent's submissions, I consider the sentences after the second question mark at point 2, the second and third sentences at point 3 after ...'mean.' should be redacted on the basis it contains personal information, being personal employment arrangements.

- document 12 (pages 34-35) – I do not agree with the respondent that the information contained in these pages disclose personal employment arrangements. From the information before me, the information on pages 34-35 are general discussions between colleagues.
- document 13 (page 36) – I do not consider that the whole email dated 27 July 2017 and timestamped at 12:25PM should be refused. This email contains general clarification points a staff member had regarding the template table, but does not disclose any personal employment arrangements.
- documents 17 and 18 (pages 51-60) – the information at issue included in these documents are duplicate emails dated 22 August 2017 and timestamped at 11:57AM contained on pages 51 and 56. I will deal with these together. I do not consider the whole email contains information relating a staff's personal employment arrangements, with the first paragraphs discussing the need for clarity. However, I consider that disclosure of the third paragraph, and paragraphs 5-7 could disclose personal employee arrangements and could reasonably be expected to prejudice an individual's right to privacy.

Prejudice management function of an agency or the conduct of industrial relations by an agency

62. Schedule 2, s 2.2(a)(xv) of the FOI Act provides that if disclosure of the information could reasonably be expected to prejudice the management function or the conduct of industrial relations by an agency, disclosure of that information is contrary to the public interest.
63. The respondent contends that disclosure of the information contained in the information at issue was refused release because:

The internal working arrangements of our specialist medical professionals as well as our other staff are the intricately linked with the operation of the department. A careful balance was struck between the disclosure of staff employment arrangements and the internal workings of the department.
64. I am not satisfied the respondent has discharged its onus in demonstrating why disclosure of the information at issue would prejudice its management functions – with no explanation provided as to the expected impacts on the management of health services by the Department of Neurology.

65. I also consider it relevant that:

- As noted above, documents 5, 10 and 11 comprise email correspondence between the applicant himself, and another employee of Canberra Health Services.
- The remaining documents provide information about the workplace activities of employees of the Department of Neurology – information which appears to be shared between the employees, and known to each other. As a result, it is unclear to me how disclosure of this information would negatively impact conduct of industrial relations by Canberra Health Services.
- The information being exchanged is largely factual information about workplace activities, as opposed to, for example, sensitive performance information or allegations of non-performance or inappropriate behaviour.

66. For these reasons, I do not consider this factor against disclosure relevant in this matter.

#### *Balancing the factors*

67. As I have identified public interest factors favouring disclosure, I now have to consider the public interest balancing test as set out in s 17 of the FOI Act.

68. I am satisfied that, on balance, based on the reasons above, the public interest factors favouring disclosure of the information at issue outweigh the public interest factors favouring nondisclosure.

69. As a result, with the exception of limited information specified below that I consider to be contrary to the public interest information, the information at issue should be released to the applicant.

### **Conclusion**

70. For the reasons set out above, I vary the respondent's decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

71. With respect to the information at issue, I vary the following aspects of the respondent's decision:

- document 2 – the information should be released other than columns of the spreadsheet containing information about secondary employment and offsite teaching workloads
- document 3 – the information should be released with the exception of the first paragraph redacted by the respondent
- document 6 – the information should be released with the exception of the sentences after the second question mark at point 2, the second and third sentences at point 3 after ...'mean.'
- document 5, 10, 11, 12 and 13 – the information should be released in full

- documents 17 and 18 – the information should be released with the exception of the personal email addresses redacted by the respondent, and information about secondary employment and offsite teaching workload, being paragraphs 3 and 5-7.

**Cathy Milfull**

**Acting Senior Assistant Ombudsman**

**29 January 2020**