

## ‘CB’ and Education Directorate [2023] ACTOFOI 9 (20 June 2023)

### Decision and reasons for decision of Senior Assistant Ombudsman

<b>Application number:</b>	AFOI-RR/22/10013
<b>Decision reference:</b>	[2023] ACTOFOI 9
<b>Applicant:</b>	‘CB’
<b>Respondent:</b>	Education Directorate
<b>Agency reference:</b>	FILE2022/5152
<b>Date:</b>	20 June 2023
<b>Catchwords:</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – legal professional privilege – personal information of the applicant – information could prejudice the protection of an individual's right to privacy – prejudice trade secrets, business affairs or research of an agency or person

### Decision

1. I am a delegate of the Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (FOI Act)*.
2. The applicant applied for Ombudsman review of the Education Directorate’s (**Education**) decision dated 5 July 2022 refusing access to part of the requested information.
3. For the reasons set out below, I have decided to **vary** Education’s decision under s 82(2)(b) of the FOI Act to give access to parts of the information sought by the applicant.

### Background of Ombudsman review

4. On 13 May 2022, the applicant applied under s 30 of the FOI Act for access to government information held by Education. The access application was for:

All records, including but not limited to emails, diary notes and files [sic] notes, relating to [the applicant] and [their] employment by the Directorate.

5. On the same day, Education wrote to the applicant to confirm the scope of the request.

The applicant agreed the application did not include records:

- released in response to previous access applications made by the applicant
  - related to school administrative matters, such as timetabling, class allocations, routine school activities, etc
  - related to pay, leave, superannuation, etc
  - sent to, or received from, the applicant.
6. On 15 June 2022, Education invited a third party to provide their views on whether certain information is contrary to the public interest information under s 38 of the FOI Act (which requires third party consultation).
  7. On 16 June 2022, the third party confirmed in writing to Education they did not object to the release of an edited copy of the information with personal information of staff and business contact information deleted.
  8. On 5 July 2022, Education's information officer informed the applicant that 57 documents had been identified within the scope of their request.
  9. Education decided to:
    - give full access to documents 1, 5, 8, 9, 11, 14, 16, 17, 44, 49, 51-55 and 57 (16 documents)
    - give partial access to documents 2-4, 6, 7, 10, 12, 13, 15 and 46 (10 documents),<sup>1</sup> and
    - refuse access in full to documents 18-43, 45, 47, 48, 50 and 56 (31 documents).
  10. On 22 July 2022, the applicant applied for Ombudsman review of Education's decision to give partial access to 10 documents and refuse access in full to 31 documents, effectively seeking access to all information not released by Education.
  11. On 10 August 2022, Education provided information relevant to the review to the Ombudsman, excluding documents 18-43, 45, 47, 48, 50 and 56 to which the applicant was refused access on the ground of legal professional privilege (**LPP**) under Schedule 1, s 1.2 of the FOI Act (**LPP claim documents**).

---

<sup>1</sup> Documents 2, 10, 12, 13, 15 and 46 (6 documents) were marked as partial release on the document schedule by Education because some information included in those documents had previously been provided to the applicant or were sent to Education by the applicant; and therefore, this information was deemed out of scope of the access application. These documents are not subject to this Ombudsman review.

12. On 23 August 2022, the Ombudsman asked Education for a copy of the LPP claim documents, and submissions about how the information in these documents would attract LPP for the purposes of Schedule 1, s 1.2 of the FOI Act.
13. On 29 September 2022, Education provided submissions to the Ombudsman.
14. On 8 November 2022, the Ombudsman enquired about obtaining a copy of the LPP claim documents. On the same day, Education asked for clarification about the request.
15. On 24 November 2022, the Acting Deputy Ombudsman issued a notice to Education under s 79 of the FOI Act requiring Education to provide a copy of the LPP claim documents to the Ombudsman.
16. On 1 December 2022 the ACT Government Solicitor wrote to the Ombudsman advising that Education was not in a position to comply with the s 79 notice on the ground the Ombudsman does not have the power to compel production of information claimed to be subject to LPP for the purposes of Ombudsman review under the FOI Act.
17. The FOI Act does not expressly identify any reasonable excuse or exception for non-compliance with a s 79 notice. The Ombudsman is entitled, in undertaking an Ombudsman review under the FOI Act, to full and free access, at reasonable times, to all relevant government information of the agency or Minister concerned.<sup>2</sup> I do not consider that the production of information in response to a notice to produce under s 79 of the FOI Act would prevent LPP subsequently being claimed in relation to the information.<sup>3</sup>
18. On 1 February 2023, following negotiations between the Ombudsman and the ACT Government Solicitor, representing Education, the LPP claim documents were provided to the Ombudsman for the purposes of this Ombudsman review.
19. On 6 April 2023, I provided my preliminary views to the parties in a draft consideration.

## Information at issue

20. The information at issue in this Ombudsman review is the information in documents 3, 4, 6, 7, 18-43, 45, 47, 48, 50 and 56 in relation to which the applicant was refused access under Education's decision of 5 July 2022 (**employment records**).
21. The issue to be decided in this Ombudsman review is whether the employment records are 'contrary to the public interest information' for the purposes of the FOI Act.

---

<sup>2</sup> Section 68 of the FOI Act.

<sup>3</sup> For example, see s 171 of the Legislation Act; s 122(5) of the Evidence Act.

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

- the applicant’s access application and review application
- the respondent’s decision of 5 July 2022 and further submissions
- the FOI Act, in particular ss 6, 7, 16, 17, 35, 50, 72, Schedule 1 and Schedule 2
- the respondent’s FOI processing file relating to the access application
- the *Human Rights Act 2004* (ACT) (**Human Rights Act**)
- the *Information Privacy Act 2014* (ACT) (**Information Privacy Act**)
- the *Evidence Act 2011* (ACT) (**Evidence Act**)
- the *Legislation Act 2001* (ACT) (**Legislation Act**)
- the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act
- relevant case law including:
  - *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; 213 CLR 543; 192 ALR 561; 77 ALJR 40 (7 November 2002)
  - *Esso Australia Resources v Commissioner of Taxation* [1999] HCA 67 (*Esso*)(21 December 1999)
  - *Commissioner of Taxation v PricewaterhouseCoopers* [2022] FCA 278
  - *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501
  - *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30
  - *AWB Ltd v Cole* [2006] FCA 571
  - *Waterford v the Commonwealth of Australia* (1987) 163 CLR 54
  - *Kenquist Nominees Pty Limited v Campbell (No 5)* [2018] FCA 853
  - *Mann v Carnell* (1999) 201 CLR 1, and
- an unedited copy of the information at issue.

## Relevant law

23. The *Freedom of Information Amendment Act 2023* (ACT) commenced on 23 May 2023. As the access application and review application were made prior to commencement of this amending Act, the [Freedom of Information Act 2016 \(ACT\) \(effective 1 January 2022 – 23 May 2023\)](#) is the relevant point-in-time version for the purpose of this review.

24. 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.<sup>4</sup>

---

<sup>4</sup> Section 35(1)(c) of the FOI Act.

25. The public interest test in s 17 sets out the process for balancing public interest factors favouring disclosure and nondisclosure, respectively. This balancing test must be used to determine whether disclosure would be contrary to the public interest.
26. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.<sup>5</sup>
27. 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.
28. Section 72 of the FOI Act provides the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.
29. Schedule 1 of the FOI Act sets out categories of information taken to be contrary to the public interest information for the purpose of the definition in s 16 of the FOI Act.
30. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.

## **The parties' submissions**

31. Education's decision notice dated 5 July 2022 said:

A number of records contain information that is contrary to the public interest to disclose because it is subject to legal professional privilege, as specified at Schedule 1, 1.2 of the FOI Act. This applies to Records 18 to 43, 45, 47, 48, 50 and 56. These records have been wholly withheld from the information released....

I place significant weight on the right to privacy of individuals and their right to have their personal information protected. I have decided that their right to privacy in relation to their personal information has a higher standing of public interest not to disclose, than the public interest in disclosing this information. Accordingly, the records are partially released with third party information deleted from the records being provided to you.

Similarly, information relating to business affairs of persons or organisations, has been deleted from the records, as I have decided that they have a right to have their business information protected and this outweighs the public interest that would arise from release of the information.

32. In the application for Ombudsman review, the applicant submitted:

I have cause to believe that the Directorate's "beliefs about my reasons for seeking access," have interfered with or at least played a part in that access that the Education Freedom of Information branch has granted to me. I believe that some of the documents that were not released on the

---

<sup>5</sup> Section 35(1)(c) of the FOI Act.

grounds of "public interest" may possibly be incriminating to the Education Directorate and may reveal their flawed handling of this matter.

Secondly, I believe that several of the documents that were not released on the grounds of "public interest" will, if names are removed, NOT jeopardise the public interest. These are documents about me and I have a right to access them....

Thirdly, these are records about ME held by my employer. I am entitled to access them. I am not requesting names of individuals, only to access what was said about me as an employee of the ACT Education Directorate and how the Directorate came to decisions about the handling of my case...

33. In response to the draft consideration, Education requested further consideration be given to the content of document 41, being a confidential communication made between a lawyer and their client for the dominant purpose of the lawyer providing legal advice to the client.
34. These submissions are discussed in more detail below.

## **Consideration**

35. Education refused access to parts of document 7 and all of documents 18-43, 45, 47, 48, 50 and 56 on the ground of LPP under Schedule 1, s 1.2 of the FOI Act.
36. Education also decided to refuse access to parts of documents 3, 4, 6 and 7 because disclosure of this information would, on balance, be contrary to the public interest.
37. My view on each of these categories of documents is set out below.

## **Legal professional privilege (or LPP)**

38. Information that would be privileged from production or admission into evidence in a legal proceeding on the ground of LPP is taken to be contrary to the public interest to disclose under the FOI Act (except in certain circumstances related to corruption and law enforcement that do not apply here).<sup>6</sup>
39. Education's further submissions of 29 September 2022 stated:

... the records concerned were relevant communications between a lawyer employed by the ACT Government Solicitor (ACTGS) and the Education Directorate (the Directorate) as the client. This was in relation to [a matter] against the Directorate. The communications between the Directorate and ACTGS were confidential in nature and for the dominant purpose of ACTGS providing legal advice or professional legal services to the Directorate, or for use in particular identified litigation, or prepared by the Directorate for the purpose of seeking legal advice or assistance from ACTGS. For these reasons, legal professional privilege applies.

40. Client legal privilege is protected by ss 118 and 119 of the Evidence Act, which provide:

### **118     Legal advice**

---

<sup>6</sup> See s 16 and Schedule 1, s 1.2 of the FOI Act. There is an exception in Schedule 1 for information that "identifies corruption or the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law". However, I am satisfied the exception does not apply here.

Evidence must not be presented if, on objection by a client, the court finds that presenting the evidence would result in disclosure of—

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or someone else;

for the dominant purpose of the lawyer, or 1 or more of the lawyers, providing legal advice to the client.

#### **119 Litigation**

Evidence must not be presented if, on objection by a client, the court finds that presenting the evidence would result in disclosure of—

- (a) a confidential communication between the client and someone else, or between a lawyer acting for the client and someone else, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

41. Client legal privilege may be lost if the client or party has acted in a way that is inconsistent with an objection to the presenting of evidence because it would result in disclosure of privileged information.<sup>7</sup>
42. Section 171 of the Legislation Act provides that an Act – which includes Schedule 1, s 1.2 of the FOI Act – must be interpreted to preserve the common law privilege in relation to client legal privilege (also known as legal professional privilege).
43. LPP operates as an immunity to resist the disclosure of information which would reveal communications between a client and their lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of services for legal proceedings.<sup>8</sup>
44. LPP extends to information which has been copied and provided to a legal advisor for the dominant purpose of obtaining legal advice; and information prepared by the client or the legal adviser from which the nature of the advice sought or given might be inferred.<sup>9</sup>

---

<sup>7</sup> Evidence Act, s 122.

<sup>8</sup> [Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission \[2002\] HCA 49](#); 213 CLR 543; 192 ALR 561; 77 ALJR 40 (7 November 2002) at [9] – [11]. See also [Esso Australia Resources v Commissioner of Taxation \[1999\] HCA 67](#) (Esso)(21 December 1999) at [61].

<sup>9</sup> [Commissioner of Taxation v PricewaterhouseCoopers \[2022\] FCA 278](#), [141]-[142] citing [Commissioner of Australian Federal Police v Propend Finance Pty Ltd \(1997\) 188 CLR 501](#); [Esso](#); [AWB Ltd v Cole \(No 5\) \(2006\) 155 FCR 30](#) ([AWB v Cole \(No. 5\)](#)); [AWB Ltd v Cole \[2006\] FCA 571](#).

45. In accordance with common law principles, for LPP to apply the following elements need to be met:<sup>10</sup>

- an independent legal practitioner and client relationship must exist
- the communication between a client and their legal adviser must have been made for the dominant purpose of giving or receiving legal advice, or for use in litigation (actual or anticipated)
- the communication must have been confidential, and
- LPP has not been waived by the client.

46. I have considered below whether each of these elements of LPP is satisfied in relation to the information in document 7 and the LPP claim documents for the purposes of Schedule 1, s 1.2 of the FOI Act.

### ***Lawyer-client relationship***

47. I accept Education's submission that an independent legal practitioner and client relationship existed, as the ACT Government Solicitor was acting as a legal adviser engaged by Education in their professional capacity about a particular matter.

### ***Dominant purpose***

48. Education sought legal advice and professional services from the ACT Government Solicitor regarding an employment matter and a related proceeding.

49. The information in document 7 and the LPP claim documents consist of email chains and attachments. Justice Thawley in *Kenquist Nominees* observed:<sup>11</sup>

- even in circumstances where the lead email was not made for the dominant purpose of obtaining or giving legal advice, it may nevertheless be appropriate to redact parts of the lead email or subsequent emails in the chain (including attachments) if the nature and content of a legally privileged communication might be inferred;
- if the dominant purpose of the communication was giving of legal advice, then it may be that the email chain will be privileged on the basis subsequent emails are regarded as copies of documents provided by the legal adviser with the advice in the lead email;
- if the dominant purpose of the communication being the lead email was the obtaining of legal advice from a legal adviser, then the email chain may also be privileged because that email chain is, in effect, a copy of communications provided to the lawyer for the dominant purpose of obtaining legal advice.

50. After reviewing these records, I consider some of the information contained within was created for the dominant purpose of giving or receiving legal advice or to receive professional legal services relating to a proceeding.

---

<sup>10</sup> [Waterford v the Commonwealth of Australia \(1987\) 163 CLR 54.](#)

<sup>11</sup> [Kenquist Nominees Pty Limited v Campbell \(No 5\) \[2018\] FCA 853](#) (*Kenquist Nominees*) at [19].

51. I accept Education's submission in respect of document 41, namely that parts of this document contain information which was communicated for the dominant purpose of giving legal advice.
52. However, I consider some of the information was created for a different primary purpose, including correspondence within Education and correspondence of an administrative nature.
53. I do not consider release of this information would reveal the nature or substance of legal advice provided to Education.
54. As this information was not made for the dominant purpose of giving or receiving legal advice, I do not consider Schedule 1, s 1.2 applies to documents 7, 23, 29, 31, 32, 34, 38 – 40, 42, 45 – 48, 56 and parts of documents 18 – 22, 24 – 28, 30, 33, 35 – 37, 41, 43 and 50.

### ***Confidential communications***

55. Information is provided on a 'confidential' basis if there is an express agreement the information will be kept confidential, or the surrounding circumstances indicate that there was an implied mutual understanding of confidentiality.
56. I consider the information in the LPP claim documents was communicated in confidence, as the information was marked with dissemination limiting markers to indicate its sensitivity and not widely circulated.

### ***Waiver of LPP***

57. LPP will not apply in circumstances where privilege has been waived, either expressly or impliedly, by the client.<sup>12</sup>
58. I note Education has disclosed content which appears in the subject line of each of the lead emails of the LPP claim documents, as this information was included in the schedule of documents for the access decision given to the applicant.
59. I also note Education has served the applicant some LPP claim documents. I consider Education has waived privilege in respect of this information. I do not consider Education has waived privilege over the remainder of the information in the LPP claim documents.
60. In summary, I consider information in the LPP claim documents is information that would be privileged from production or admission into evidence in a legal proceeding on the ground of LPP for the purposes of Schedule 1, s 1.2 of the FOI Act, with the exception of the information referred to in paragraphs 52 – 54, and 58 – 59 above.

---

<sup>12</sup> [Mann v Carnell \(1999\) 201 CLR 1](#) at [28]-[29].

### **Public interest test**

61. I now consider whether the remaining information – that is, the balance of information sought which is not taken to be contrary to the public interest to disclose under Schedule 1, s 1.2 of the FOI Act – is otherwise contrary to the public interest to disclose.
62. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following 5 steps:<sup>13</sup>
- 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 would be contrary to the public interest, allow access to the information subject to this Act.

### **Pro-disclosure bias**

63. In addition to the non-exhaustive factors favouring disclosure listed in Schedule 2, s 2.1, the FOI Act is intended to be administered with a pro-disclosure bias and relevant discretions be exercised as far as possible in favour of disclosing government information.<sup>14</sup> This concept is promoted through the objects of the FOI Act.<sup>15</sup>

### **Irrelevant factors**

64. In submissions to this Ombudsman review, the applicant explained why they were seeking the information.

---

<sup>13</sup> Section 17(1) of the FOI Act.

<sup>14</sup> Section 9 of the FOI Act.

<sup>15</sup> Section 6 of the FOI Act.

65. In conducting the public interest test, I did not have regard to any of the irrelevant factors which a decision-maker is prohibited from considering under s 17(2) of the FOI Act, including the applicant's identity, circumstances, or reason for seeking access to the information.<sup>16</sup>

#### **Factors favouring disclosure**

66. In deciding the access application, Education considered one factor favouring disclosure, in addition to the pro-disclosure bias, where the information is personal information of the person making the request.<sup>17</sup>

#### ***Information is the personal information of the person making the request***

67. I consider this factor applies to the information, as part of the requested information comprises information about the applicant whose identity is apparent due to the inclusion of their personal details.

68. I consider there is a significant public interest in being able to access an individual's own personal information. Having reviewed the information, I consider most of the personal information has been disclosed to the applicant.

69. I afford moderate weight to this factor as I consider the applicant was given access to their personal information, and some of the information at issue is not the personal information of the applicant.

#### **Factors favouring nondisclosure**

70. Education identified two factors favouring non-disclosure, where 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 Human Rights Act<sup>18</sup>
- prejudice trade secrets, business affairs or research of an agency or person.<sup>19</sup>

---

<sup>16</sup> Section 17(2)(f) of the FOI Act.

<sup>17</sup> Schedule 2.1(b)(i) of the FOI Act.

<sup>18</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

<sup>19</sup> Schedule 2, s 2.2(a)(xi) of the FOI Act.

***Prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act***

71. A reasonable expectation disclosure could prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act is a factor favouring nondisclosure under the FOI Act.<sup>20</sup> In this matter, it is the consideration of the right to privacy which is relevant.

72. Section 12 of the Human Rights Act provides:

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked

73. Education refused access to the personal information of third parties (names, email addresses, position descriptions, office locations, direct work phone numbers) which appear in parts of documents 3, 4, and 6. I have also identified the names of third parties in parts of document 7.

74. I have identified the information also identifies individuals who are or were officers of an agency. I do not consider this information is personal information in accordance with the definition set out in the FOI Act.<sup>21</sup>

75. In the decision notice, Education said significant weight was placed on this factor as they decided the third parties right to privacy in relation to their personal information has a higher standing of public interest not to disclose, than the public interest in disclosing this information.

76. The Information Privacy Act contains the Territory Privacy Principles (**TPP**), which govern public sector agencies' collection, management, use and disclosure of personal information.

77. TPP 6.1 provides an agency must not use or disclose personal information about an individual collected for a particular purpose for another purpose (secondary purpose) without consent, or unless one of the exceptions in TPP 6.2 or 6.3 apply.

78. TPP 6.2 applies in relation to the use or disclosure of personal information if:<sup>22</sup>

- (a) the individual would reasonably expect the public sector agency to use or disclose the information for the secondary purpose and the secondary purpose is—
  - (i) if the information is sensitive information—directly related to the primary purpose; or
  - (ii) if the information is not sensitive information—related to the primary purpose.

---

<sup>20</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

<sup>21</sup> FOI Act, Dictionary – meaning of personal information.

<sup>22</sup> Schedule 1, Part 1.3, s 6.2(a) of the [Information Privacy Act](#).

79. The third parties did not provide consent for their personal information to be provided to the applicant. I consider the personal information of the third parties is not otherwise publicly available or well-known. The personal information of the third parties is included in the information because of their employment and services being provided by the business to Education.
80. I do not consider in these circumstances an individual would reasonably expect their personal information to be used or disclosed for a secondary purpose unrelated to the performance of contractual relationship between Education and the business.
81. I consider disclosure of the personal information could reasonably be expected to prejudice the protection of an individual's right to privacy under the Human Rights Act as I do not believe disclosure of the personal information would be permitted under the Information Privacy Act. I attribute significant weight to this factor.

***Prejudice trade secrets, business affairs or research of an agency or person***

82. A reasonable expectation disclosure of information could prejudice the trade secrets, business affairs or research of an agency or person weighs against disclosure in the FOI Act.<sup>23</sup> In this matter it is the business affairs aspect which is relevant.
83. Education decided to refuse access to information about business affairs of persons or organisations from parts of documents 3, 4 and 6 as they have a right to have their business information protected and this outweighs the public interest what would arise from disclosure.
84. I have identified that this information has previously been made publicly available by the business, including its name, GPO box, fax number, email domain and website (**business information**). I consider the business has been identified in information to which the applicant was given access.
85. I do not consider this factor applies in relation to the information at issue.

***Balancing the factors***

86. In making this decision, I considered one factor favouring disclosure and two factors favouring nondisclosure in the public interest, in addition to the pro-disclosure bias.
87. I have given moderate weight to the factor favouring disclosure, as I do consider release of the information would give the applicant access to personal information which is already known and or has previously provided to the applicant.

---

<sup>23</sup> Schedule 2, s 2.2(a)(xi) of the FOI Act.

88. I have given significant weight to the factor favouring nondisclosure where disclosure could be reasonably expected to prejudice the protection of an individual's right to privacy.<sup>24</sup> I have decided one factor favouring nondisclosure does not apply in relation to the information.<sup>25</sup>
89. 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.
90. The decision-maker's task is to consider the relative importance and weight of each factor they have identified. The weight given to a factor will depend on the effect that disclosing the information would have on the public interest.
91. The FOI Act has a pro-disclosure bias, and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side, rather the scales are 'laden in favour of disclosure.'<sup>26</sup>
92. I am satisfied on balance, the public interest factors favouring non-disclosure of the personal information of third parties, outweighs the public interest factors favouring disclosure of this information.
93. As I have not identified any public interest factors favouring nondisclosure apply in relation to the business information, on balance, disclosure of the information is in the public interest.

## Conclusion

94. For the reasons set out above, I vary Education's decision under s 82(2)(b) of the FOI Act to:
- refuse to give access to information taken to be contrary to the public interest to disclose under Schedule 1, s 1.2 of the FOI Act (information subject to LPP) within documents 18 – 22, 24 – 28, 30, 33, 35-37, 41, 43 and 50 under s 35(1)(c) of the FOI Act, and
  - refuse to give access to parts of documents 3, 4 and 6, which contain the personal information of third parties under s 35(1)(c) of the FOI Act, and
  - give access to the remainder of the information sought.

**David Fintan**  
**Senior Assistant Ombudsman**  
**20 June 2023**

---

<sup>24</sup> Schedule 2, s 2.2(a)(ii) of the FOI Act.

<sup>25</sup> Schedule 2, s 2.2(a)(xi) of the FOI Act.

<sup>26</sup> [Explanatory Statement, Freedom of Information Bill 2016](#).