

'AI' and University of Canberra [2019] ACTOFOI 2 **(25 January 2019)**

Decision and reasons for decision of Acting Senior Assistant Ombudsman, Lee Katauskas

Application Number:	AFOI-RR/18/10027
Decision Reference:	[2019] ACTOFOI 2
Applicant:	'AI'
Respondent:	University of Canberra
Third party:	'AJ'
Decision Date:	25 January 2019
Catchwords:	<i>Freedom of Information Act 2016 (ACT) — deciding access — whether the application involves an abuse of process — whether disclosure of information is contrary to the public interest — the protection of an individual's right to privacy — attack on reputation</i>

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)(c) of the FOI Act, I set aside the decision of the University of Canberra (the University) of 20 September 2018, as it relates to the names of the referees on a Honorary Appointments Proposal Form (the appointments form). I substitute my decision that the names of the referees are not contrary to the public interest information.
3. The University must now give the applicant the names of the referees.
4. As I consider that the names of the referees constitutes personal information, those names should not be published by the University of Canberra, either on its disclosure log or otherwise.

Scope and background of Ombudsman review

5. On 27 August 2018, the applicant applied to the University for access to information relating to the nomination of the third party for honorary appointment as an Adjunct Professor.
6. On 20 September 2018, the University advised the applicant by letter that a decision had been made. It provided the applicant with a three page attachment to the letter, listing three documents by number, title, decision and reason for decision.
7. As a preliminary issue, the letter of 20 September 2018 and the attachment to the letter do not properly identify how the access application has been decided, nor do they comply with the contents of notice requirements of Division 5.5 of the FOI Act.¹
8. While this is a procedural defect, I consider it reasonably apparent that the University has decided under s 35(1)(c) of the FOI Act to refuse to give access to information in each of the three documents, because the information is contrary to the public interest information.
9. In making its decision, the University relied on disclosure:
 - prejudicing the protection of an individual's right to privacy under the *Human Rights Act 2004* (Schedule 2, s 2.2(a)(ii))
 - prejudicing the business affairs of an agency or person (Schedule 2, s 2.2(a)(xi))
 - prejudicing an agency's ability to obtain confidential information (Schedule 2, s 2.2(a)(xii)), and
 - being irrelevant to the general public.
10. On 11 October 2018, the applicant applied for Ombudsman review of the University's decision under s 73 of the FOI Act.
11. On 18 October 2018, the third party made an application under s 77(2) of the FOI Act to participate in this Ombudsman review. On 19 October 2018, the delegate decided under s 77(3) to allow the third party to participate.
12. On 2 November 2018, the applicant narrowed the scope of his review application, seeking access only to the names of the referees on the appointments form.

¹ Specifically, the letter and the attachment do not comply with s 54 of the FOI Act, which sets out information that must be included in a decision notice where access to government information has been refused on the basis that it is taken to be contrary to the public interest to disclose.

13. On 5 November 2018, our Office advised the University that the applicant had narrowed the scope of his application and requested that it consult with the referees to ascertain whether they objected to their names being disclosed.
14. On 5 November 2018, our Office advised the third party of the narrowed scope and asked whether he had any objections to the names of the referees being disclosed.
15. On 9 November 2018, the University responded by providing written confirmation from both referees that they do not object to their names being disclosed.
16. On 20 November 2018, the third party relevantly responded by objecting to the names of the referees being disclosed.
17. We provided preliminary views about the University's decision to the parties in a draft consideration dated 19 December 2018. In response, the applicant agreed with the draft consideration, the University accepted the draft consideration, and the third party submitted that the Ombudsman should make a decision under s 35(1)(d) refusing to deal with the applicant's review application on the basis that the application constitutes an abuse of process.
18. Accordingly, the issues to be decided in this Ombudsman review are:
 - whether the application involves an abuse of process, as the third party contends, and
 - whether giving the applicant access to the names of the referees would be contrary to the public interest.
19. In making my decision, I have had regard to:
 - the parts of the applicant's application for Ombudsman review where he says 'I would like to know who the referees are' and 'it is in the public interest to know this'
 - the University's decision
 - the FOI Act, in particular ss 7, 16, 17, 35, 43 and schedule 2
 - the ACT *Human Rights Act 2004* (Human Rights Act), in particular s 12
 - the University's FOI processing file, including an unedited copy of the appointments form, and
 - the submissions of the parties.

Relevant law

20. 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.
21. Section 35(1) of the FOI Act relevantly 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 (s 35(1)(c)), or by refusing to deal with the application (s 35(1)(d)).
22. 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.
23. Under s 43(1)(c), a respondent may refuse to deal with an access application, wholly or in part if the application involves an abuse of process. Abuse of process includes:
 - (a) harassment or intimidation of a person; and
 - (b) an unreasonable request for personal information about a person.
24. The FOI Act relevantly 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.²
25. 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.

² See the definition of 'personal information' in the Dictionary of the FOI Act.

The contentions of the parties

26. In its decision, the University said:

The public interest would be harmed by the knowledge that personal information relating to individuals was unlawfully released under freedom of information law.

27. The applicant contends that it is in the public interest to disclose the referee information and understand the process by which the third party was appointed.

28. The third party submitted that he vigorously opposes the release of his personal information and the application generally. He is concerned that the referee information, if released, 'will be used or relied upon ... to publicly humiliate and denigrate' him.

29. The third party further submitted that the applicant has 'relentlessly pursued' him, and that he 'makes this application to persistently disturb or torment' him, it 'is in [these particular circumstances and] context that the application for information about the [third party's] position as adjunct professor is to be considered. The access application was made in the midst of [the applicant's] crusade', and it 'is pertinent that [the applicant] has said nothing about his anterior relationship with [the third party]'.

Considerations

Refusing to deal – abuse of process

30. For me to vary the University's decision to decide to refuse to deal with the application under s 35(1)(d), on the basis that the application involves an abuse of process, I must be satisfied the application involves the harassment or intimidation of a person, or the unreasonable request for personal information about a person, or another form of abuse of process.

31. The third party contends that the applicant's access application was made in the midst of his 'crusade' against him due to their previous fractious workplace relationship. He alleges that the application was made to 'persistently disturb or torment' him.

32. In this case, the applicant is, however, only seeking access to the names of two referees and those referees have consented to their names being disclosed. In these circumstances, I consider it unlikely that disclosing that information could reasonably result in the harm that the third party contends. I also accept the applicant's position that he is seeking to understand the University's appointment process, and I consider that disclosure of the names in this case might reasonably serve that aim, albeit likely only to a small extent.

33. For these reasons, I am not satisfied that the third party has established that disclosing the names of the referees could reasonably serve to harass or intimidate him, or that the request for information is unreasonable. I consider that the applicant's application does not involve an abuse of process.

Contrary to the public interest information

34. For the University to be able to rely on s 35(1)(c) to refuse access to the names of the referees, those names must comprise contrary to the public interest information.

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

35. No suggestion has been made that the names of the referees are information taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for that information to be contrary to the public interest information, disclosure of the information must, on balance, be contrary to the public interest under the test set out in s 17.

The public interest test

36. 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.

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

Irrelevant factors

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

Factors favouring disclosure

39. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. In relation to both the honorary appointments form, in which the referee information is located, and the associated letter of offer, the University identified that disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.³
40. I consider that this factor also applies to disclosing only the names of the referees.
41. In its reasons for decision, the University described the information in all three documents as being 'irrelevant to the general public'. This is not a relevant factor to determining whether, on balance, disclosure would be contrary to the public interest, but it does accord with the University not identifying any other factors favouring disclosure.
42. In addition, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of a representative democracy.⁴ This concept is promoted through the objects of the FOI Act.⁵
43. I am satisfied that these are the relevant considerations favouring disclosure in this case.

Factors favouring nondisclosure

44. The University found that releasing an unedited copy of the appointments form could:
- prejudice the protection of an individual's right to privacy under the Human Rights Act⁶
 - prejudice the business affairs of an agency or person,⁷ and
 - prejudice an agency's ability to obtain confidential information.⁸
45. The third party submits that he has a right not to have his reputation unlawfully attacked, a right provided under the Human Rights Act.
46. Given that the applicant has reduced the scope of the application to only the names of the referees, and the University has obtained the consent of the referees to disclose their names,

³ Schedule 2, s 2.1(a)(viii).

⁴ See s 9 of the FOI Act.

⁵ See s 6(b) of the FOI Act.

⁶ Schedule 2, s 2.2(a)(ii).

⁷ Schedule 2, s 2.2(a)(xi).

⁸ Schedule 2, s 2.2(a)(xii).

I am not satisfied that prejudice to business affairs and prejudice to an agency's ability to obtain confidential information remain relevant considerations in this Ombudsman review.

47. The remaining relevant factor in this case is where disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act.⁹

Right to privacy and reputation – s 12 of the Human Rights Act

48. The Human Rights Act protects against:
- the unlawful or arbitrary interference with privacy,¹⁰ and
 - the unlawful attack on reputation.¹¹

Unlawful or arbitrary interference with privacy

49. In its decision, the University said that 'the public would be harmed by the knowledge that personal information was unlawfully released under FOI law'.
50. That view is misconceived. Disclosure of information under FOI is not an unlawful release of information. Obtaining access to information under the FOI Act is an express lawful right of every person.¹²
51. I have, however, considered whether releasing personal information about the referees could reasonably be expected to prejudice the protection of their privacy. As the two referees have advised the University that they consent to their names being released, I do not consider that disclosure can impact the protection of their privacy. I am not satisfied this is a public interest factor favouring nondisclosure in this case.

Unlawful attack on reputation

52. In his application to participate in this review, the third party said that information about him would be used to publicly humiliate and denigrate him.
53. In response to the draft consideration, the third party said that the applicant is in relentless pursuit of him, and he provided details of the actions that the applicant had taken to complain

⁹ Schedule 2, s 2.2(a)(ii).

¹⁰ Section 12(a).

¹¹ Section 12(b).

¹² See s 7 of the FOI Act.

about him. The third party argues that it 'is in this context that the application for information about the [third party's] position as adjunct professor is to be considered'.

54. I acknowledge, given the third party's concerns, that this could be a public interest factor favouring nondisclosure of the names of the referees. I also consider it apparent that the applicant does not agree with the University's decision to make the honorary appointment. I do not, however, agree with the third party that disclosing the names of the referees could reasonably assist the applicant to 'pursue' him. Particularly, given the referees' express consent. Rather, I consider, as the applicant contends, that disclosing the names of the referees in this case will likely allow him to better understand the honorary appointment process.

55. For these reasons, I give this factor little weight.

Balancing the factors

56. As I have given little weight to the potential impact on the third party's reputation, and I have not identified any other public interest factors favouring nondisclosure, I am satisfied that, on balance, giving access to the names of the referees would not be contrary to the public interest.

Conclusions

57. The applicant's application does not involve an abuse of process.

58. The names of the referees is not contrary to the public interest information for the purposes of s 16 of the FOI Act.

Lee Katauskas
Acting Senior Assistant Ombudsman
25 January 2019