

'AK' and Education Directorate [2019] ACTOFOI 4 **(5 February 2019)**

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

Application Number: AFOI-RR/18/10025

Decision Reference: [2019] ACTOFOI 4

Applicant: 'AK'

Respondent: Education Directorate

Decision Date: 5 February 2019

Catchwords: *Freedom of Information Act 2016 (ACT)* – deciding access – whether disclosure of information is contrary to the public interest – prejudice to the fair treatment of an individual – prejudice to the right to privacy – prejudice to an agency's ability to obtain confidential information – prejudice to the management function of an agency.

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 the Education Directorate (the Directorate) of 28 June 2018.

Scope and background of Ombudsman review

3. The applicant was the complainant in a workplace code of conduct complaint investigation matter (the investigation).
4. On 15 May 2018, the applicant applied to the Directorate for access to the complaint investigation report (the investigation report), including the names of the participants in the investigation.
5. On 28 June 2018, the Directorate advised the applicant that it had identified 46 documents falling within scope of the access application. Those documents are the investigation report plus 45 attachments. The Directorate gave the applicant access to six documents in full, 10 documents in part and refused access to the remaining 30 documents. The Directorate decided that information it had refused in the 40 documents is contrary to the public interest information because:
 - the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct and disclosure of the information could prejudice the fair treatment of an individual (Schedule 2, s 2.2(b)(v)), and
 - disclosure of the information would:
 - i. prejudice the protection of an individual's right to privacy under the *Human Rights Act 2004* (Schedule 2, s 2.2(a)(ii))
 - ii. impede the administration of justice generally, including procedural fairness (Schedule 2, s 2.2(a)(iv))
 - iii. prejudice an agency's ability to obtain confidential information (Schedule 2, s 2.2(a)(xii)), and
 - iv. prejudice the management function of an agency or the conduct of industrial relations by an agency (Schedule 2, s 2.2(a)(xv)).
6. On 5 October 2018, the applicant sought Ombudsman review of the Directorate's decision under s 73 of the FOI Act. As the review application was out of time, the applicant also sought an extension of time to make the application. On 10 October 2018, the applicant was granted the extension sought under s 74(1)(b) of the FOI Act.
7. In the review application, the applicant indicates that he is not seeking access to the names of the other individuals contained in the documents. Accordingly, those names are outside the scope of this review.

8. We provided preliminary views about the Directorate's decision to the parties in a draft consideration dated 11 January 2019. The Directorate responded that it was satisfied with the draft consideration, and the applicant advised that he does not wish to make any further submissions.
9. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information sought, being the information in the forty documents that the Directorate refused access to, except for the names of other individuals, would be contrary to the public interest as the Directorate found.
10. In making my decision, I have had regard to:
 - the applicant's application for Ombudsman review
 - the Directorate's decision
 - the FOI Act, in particular ss 7, 16, 17, 35 and Schedule 2
 - the Directorate's FOI processing file relating to the access application, including an unedited copy of the information sought
 - relevant case law, in particular *Marshall and Department of Police*,¹ *8A3BPQ and Queensland Police Service*,² *Alistair Coe and Health Directorate*,³ *Taggart and Queensland Police Service*,⁴ and
 - the submissions of the parties.

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 as —
information—
 - (a) that is taken to be contrary to the public interest to disclose under schedule 1; or

¹ [2011] QICmr 4 (Marshall).

² [2014] QICmr 42 (8A3BPQ).

³ [2018] ACTOFOI 4 (Alistair Coe).

⁴ [2015] QICmr 16 (Taggart).

- (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 involves a process of balancing the public interest factors favouring disclosure against the public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
14. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information because it is contrary to the public interest information.
15. 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

16. In its reasons for decision, the Directorate said that the information sought comprises, or contains witness or personal statements, including supporting documentation gathered as part of the investigation, and documents pertaining to the referral of the investigation to the ACT Government's Professional Standards Unit (PSU).
17. In its reasons for decision, the Directorate considered that:
- ... the rights to privacy of individuals, the impact on the Directorate's ability to obtain confidential information with respect to matters such as this, and that the information relates to unsubstantiated allegations of misconduct are of particular importance ...
18. In his review application, the applicant said:
- Disclosure of the information will allow [the applicant] to understand and assess the manner in which his complaint was handled by the Directorate and the decision-making process engaged by the Directorate.
19. The Directorate submits:
- ... the documents did not provide evidence that there had been a determination of misconduct, they therefore related to alleged misconduct ... where conclusions had not been reached.
- ... the [investigation] matter was referred to the PSU for investigation and that investigation was conducted in accordance with the provisions of the ACT Public Sector Education and Training Directorate (Teaching Staff) Enterprise Agreement 2014-2018 ... No other policies, procedures or guidelines are referenced or are relevant, and the Enterprise Agreement is a publicly available document.

... release of information would make the parties involved more reluctant to participate freely and openly in investigations of this nature in the future, and that this would likely spread to others not immediately involved, thus hampering the Directorate's ability to conduct investigations.

... the management of personnel, would be impacted by the disclosure of information ... as it would be prejudicial to the Directorate to being able to obtain confidential information ...

Considerations

20. The information sought comprises the investigation report, including witness or personal statements, and documents pertaining to the referral of the investigation to the PSU.
21. Information provided to the applicant in response to his FOI access application can be summarised as the background of the complaint, an overview of the investigative process, a summary of each allegation made by the applicant and the investigator's conclusions.
22. I note, from my examination of the investigation report, that it was not the investigators role to determine whether misconduct had occurred. Rather, the focus of the investigation was on whether the behaviours complained of were supported by the evidence. Therefore, while I consider the report to be conclusive, I accept the Directorate's view that the documents do not provide evidence of misconduct, and the complainant's allegations were unsubstantiated.
23. For the Directorate to be able to rely on s 35(1)(c) to refuse access to the information sought, it must comprise contrary to the public interest information.

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

24. The Directorate does not contend that the information sought is taken to be contrary to the public interest to disclose under Schedule 1. Therefore, for the information sought to be contrary to the public interest information, disclosure of the information sought must, on balance, be contrary to the public interest under the test set out in s 17.

Public interest test

25. To determine whether information is, on balance, contrary to the public interest information, s 17(1) prescribes the following five steps:
 - (a) identify any factor favouring disclosure that applies in relation to the information (a *relevant factor favouring disclosure*), including any factor mentioned in schedule 2, section 2.1;
 - (b) identify any factor favouring nondisclosure that applies in relation to the information (a *relevant factor favouring nondisclosure*), including any factor mentioned in schedule 2, section 2.2;

- (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
- (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;
- (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.

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

Irrelevant factors

27. 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

28. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. Of the factors favouring disclosure listed in Schedule 2, the Directorate found five relevant in this case. Disclosure of the information sought could reasonably be expected to:

- allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official (Schedule 2, s 2.1(a)(v))
- 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 (Schedule 2, s 2.1(a)(vi))
- advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government (Schedule 2, s 2.1(a)(vii))
- contribute to the administration of justice for a person (Schedule 2, s 2.1(a)(xiv)), and
- reveal the reason for the government decision following receipt of the investigation report as well as any background or contextual information that informed the decision (Schedule 2, s 2.1(a)(viii)).

29. Given that the Directorate was not the subject of the investigation, and the complainant's allegations of misconduct were unsubstantiated, I am not satisfied that the information sought indicates defective conduct or administration, or misconduct, improper or unlawful conduct by an agency or public official; or that disclosure of the information sought would serve to advance the fair treatment, or contribute to the administration of justice for the applicant.

30. I do agree with the Directorate that disclosure of the information sought could reasonably be expected to reveal the reason for the government decision following receipt of the investigation report, as well as any background or contextual information that informed the decision.
31. The applicant submits that there are two further public interest factors favouring disclosure in this case. Disclosure could reasonably be expected to:
- inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community (Schedule 2, s 2.1(a)(iii)), and
 - reveal that the information was incorrect, out-of-date, misleading, gratuitous, unfairly subjective or irrelevant (Schedule 2, s 2.1(a)(ix)).
32. I accept the Directorate's contentions that the complaint investigation was conducted in accordance with the Enterprise Agreement, a publicly available document, and that there are no other relevant policies, procedures or guidelines. For this reason, I do not agree with the applicant that the disclosure in this case could reasonably inform the community of the government's operations, including the policies, guidelines and codes of conduct.
33. I also consider that there is nothing in the information sought to suggest that the information is incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant to the investigation. In regard to that issue generally, the Queensland Information Commissioner case of *Marshall* explains:
- ... information of this kind is by its very nature an individual's particular version of events, and will obviously be shaped by factors such as the individual's memory of relevant events and subjective impressions. This inherent subjectivity does not, however, mean that the resulting account or statement is necessarily incorrect or 'false and misleading'. It simply comprises a personal interpretation of relevant events, which an investigator must then balance against other (often competing) statements and other evidence in reaching a conclusion in a particular case.⁵
34. Therefore, there is only one relevant public interest factor favouring disclosure in this case, *disclosure would reveal the reason for the government decision as well as any background or contextual information that informed the decision.*
35. Revealing the reason for a government decision can serve to provide transparency and accountability to the decision making process. In complaint investigation processes,

⁵ At [18].

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

36. That issue was considered in the Queensland Information Commissioner case of *8A3BPQ*, where it was discussed that the Queensland Police Service (QPS) ‘must be transparent and accountable in how it deals with serious allegations of misconduct and disciplinary investigations’. However, in that case, the requirement for QPS to be accountable and transparent did not ‘oblige QPS to provide the applicant with access to its entire investigation file nor reveal all of the information it gathered in dealing with the investigation’.⁶
37. I consider that the discussions in *8A3BPQ* are relevant in this Ombudsman review.
38. In this Ombudsman review, the Directorate has provided the applicant with information relating to the complaint investigation processes, as well as advising him of the Enterprise Agreement under which it was conducted. This has informed him of the conclusions reached by the investigator and the recommended outcomes. I consider this sufficient to have provided the applicant with a sound understanding of how the investigation was conducted, and how the conclusions and recommendations were reached.
39. For this reason, I give the factor favouring disclosure only some weight in this case.

Factors favouring nondisclosure

40. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure. Of the factors favouring nondisclosure, the Directorate found that five are relevant in this case. Disclosure could reasonably be expected to prejudice:
 - the protection of an individual’s right to privacy under the *Human Rights Act 2004* (Human Rights Act) (Schedule 2, s 2.2(a)(ii))
 - the administration of justice generally, including procedural fairness (Schedule 2, s 2.2(a)(iv))
 - an agency’s ability to obtain confidential information (Schedule 2, s 2.2(a)(xii))
 - the fair treatment of an individual, being information about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct (Schedule 2, s 2.2(b)(v)), and

⁶ At [22] – [24].

- the management function of an agency or the conduct of industrial relations by an agency (Schedule 2, s 2.2(a)(xv)).
41. The Directorate's reasons for decision are silent on how disclosure would prejudice the administration of justice generally, including procedural fairness. The Directorate did, however, submit that providing the applicant with information given to them by other individuals, without those individuals having a right of reply or being able to view the information and evidence the applicant had provided in his own statements, would be contrary to procedural fairness principles. Given that the investigation report has been finalised, I am not, however, satisfied that the issue of procedural fairness in the investigation process is a relevant public interest factor in this Ombudsman review.
42. Accordingly, I consider that there are only four relevant public interest factors favouring nondisclosure in this case, disclosure prejudicing:
- the fair treatment of an individual, being information about unsubstantiated allegations
 - the protection of the right to privacy
 - an agency's ability to obtain confidential information, and
 - the management function of an agency.

Prejudice to the fair treatment of an individual

43. Given that the documents contain the complainant's allegations of misconduct and those allegations were found to be unsubstantiated, I accept that disclosing those allegations in official documents of the Directorate could reasonably prejudice the fair treatment of the subject of the complaint and other individuals who provided information to the investigation.

Prejudice to the right to privacy

44. In the ACT Ombudsman review case of *Alistair Coe*, the Ombudsman discussed that an individual's right to privacy can extend beyond the protection of the right to privacy provided by the Human Rights Act.⁷
45. The information sought includes personal information of witnesses who were interviewed or who provided evidence as part of the investigation. Although the applicant is no longer seeking access to the names of those witnesses, I consider that disclosure of the witness statements and their reported evidence in this case, even with the names redacted, could reasonably lead to the

⁷ At [43] – [44].

individuals being identified by reference to their opinions and their involvement in certain incidents.

46. I consider that would be a significant intrusion into the privacy of those individuals, who provided their statements and other evidence to the investigation in confidence.

Prejudice to the ability to obtain confidential information and to the management function of an agency

47. The Queensland Information Commissioner case of *Taggart* discusses:

Staff usually supply information to workplace investigators on the understanding that it will only be used for the investigation or any subsequent disciplinary action. It is reasonable to expect staff to cooperate with an investigative process ... truthfully, completely and promptly. However, in my view, disclosing this information outside of the investigation process where there can be no restriction on its use, dissemination or republication, could reasonably be expected to make staff reluctant to fully participate in future investigations and prejudice the future flow of information to investigators. This, in turn, could reasonably be expected to adversely impact [an agency's] ability to conduct workplace investigations and manage staff.⁸

48. I consider that the discussions in *Taggart* are relevant in this Ombudsman review, and that it is essential for the effective conduct of workplace investigations that witnesses to incidents are able to provide, in confidence, their account of events, truthfully, completely; and without apprehension or reluctance.

49. In this Ombudsman review, if the confidential information provided in the course of the workplace investigation was then disclosed in response to a Freedom of Information application, I am satisfied that would prejudice investigation processes by making parties, and witnesses in future complaint matters reluctant to cooperate with investigators.

50. For these reasons, I give the factors favouring nondisclosure, in particular prejudice to an agency's ability to obtain confidential information, and the management function of an agency, substantial weight in this case.

Balancing the factors

51. I am satisfied that, on balance, the public interest factors favouring nondisclosure outweigh the public interest factor favouring disclosure in this case. In particular, it is my view that there is a substantial public interest in protecting workplace complaint investigation processes.

⁸ At [21], citing *8A3BPQ* at [42].

Conclusion

52. The information sought is contrary to the public interest information for the purposes of s 16 of the FOI Act.
53. I confirm the Directorate's decision to refuse access to the information sought under s 35(1)(c) of the FOI Act.

Lee Katauskas
Acting Senior Assistant Ombudsman
5 February 2019