ACT Ombudsman

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'AP' and Transport Canberra and City Services

[2020] ACTOFOI 9 (20 March 2020)

Decision and reasons for decision of Senior Assistant Ombudsman, Louise Macleod

Application number:	AFOI-RR/19/10032
Applicant:	'AP'
Respondent:	Transport Canberra and City Services Directorate
Decision Date:	20 March 2020
Catchwords	*Freedom of Information Act 2016 (ACT) – deciding access – whether disclosure of information is contrary to the public interest – prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law – information given in the course of an investigation of a contravention or possible contravention of the law if the information was given under compulsion under an Act that abrogated the privilege against self-incrimination – prejudice trade secrets, business affairs or research of an agency or person – prejudice the flow of information to the police or another law enforcement or regulatory agency – prejudice security, law enforcement or public safety*

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. For the reasons set out below, I **set aside and substitute** the decision of the Transport Canberra and City Services Directorate (**respondent**), dated 27 September 2019, under s 82(2)(c) of the FOI Act.

Background of Ombudsman review

3. On 10 February 2019, the applicant applied to the respondent for access to:

> …two documents relating to a complaint … made against a veterinarian in March of 2018. These documents are 1. Clinical notes and 2. A laboratory report that were submitted by the veterinarian to the ACT Veterinary Practitioners Board approximately mid-year 2018.

4. The respondent requested a number of extensions of time to process the access application, with the applicant agreeing to a final decision date of 27 September 2019.

5. On 27 September 2019, the respondent advised the applicant that it had identified two documents as falling within the scope of the access application. The respondent gave the applicant access to one document in full (the laboratory report) and refused access to one document in full (the clinical notes). In making its decision, the respondent relied on Schedule 2, s 2.2(a) of the FOI Act.

6. On 31 October 2019, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.

7. On 16 November 2019, all required information was received to proceed with this review application.

8. On 17 January 2020, preliminary views about the respondent's decision were provided to the parties in a draft consideration.

9. On 21 January 2020, the applicant advised that she accepted the draft decision.

10. On 2 March 2020, the respondent provided further submissions to the draft consideration.

11. On 4 March 2020, the respondent also provided additional information from a relevant third party for Ombudsman consideration.

Information at issue

12. The information at issue in this Ombudsman review are the clinical notes of the veterinarian.

13. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information at issue would be contrary to the public interest.

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

- the applicant's access application and review application to the Ombudsman
- the respondent's decision
- the FOI Act, in particular ss 7, 14, 16, 17, 35, 72, Schedule 1 and Schedule 2
- the *Veterinary Surgeons (Standards Statement) Approval 2018 (No 1)*
- the *Veterinary Surgeons Regulation 2015*
- the *Veterinary Surgeons Act 2015*

- the respondent's FOI processing file relating to the access application
- an unedited copy of the information at issue, and
- relevant case law, including *Breen and Williams*,[1] *Attorney-General's Department v Cockcroft,*[2] *Re T and Department of Health,*[3] *Pyneboard Pty Ltd v Trade Practices Commissioner,*[4] *Potter v Minahan,*[5] *Murphy and Treasury Department,*[6] and *Re B and Brisbane North Regional Health Authority.*[7]

Relevant law

15. 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.

16. Government information is defined in s 14 of the FOI Act and includes information held by an agency.

17. 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.

18. 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.

19. 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.

20. 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.

21. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose.

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

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[1] [1996] HCA 57.
[2] (1986) 64 ALR 97.
[3] (1994) 1 QAR 386.
[4] (1983) 152 CLR 328.
[5] (1908) 7 CLR 277.
[6] (1995) QAR 744.
[7] (1994) 1 QAR 279.

The contentions of the parties

23. The respondent did not provide a formal response in relation to the applicant's submissions in the Ombudsman review application and advised they wished to rely on their decision notice.

24. In its decision notice, the respondent said:

> Having weighed the factors supporting public interest release and those against, I consider that the release of the clinical notes do not favour the public interest. While disclosure would facilitate the objects of the FOI Act by providing [the applicant] with access to information held by TCCS and the Board, this does not outweigh the legal principles that support [the veterinarian's] common law right to control the dealing of his clinical notes.

25. The respondent also referred to *Breen v Williams*[8] and decided it was relevant, as the veterinarian owns and has the right to control the clinical notes that are being sought.

26. In response to the draft consideration, the respondent provided additional submissions arguing that the information at issue was contrary to the public interest to release on the basis of Schedule 1, s 1.14 of the FOI Act. In the alternative, they also raised additional factors against disclosure that they considered relevant. These submissions are considered in detail below.

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

> The decision does not take proper account of the Legislative Assembly's intention that the legislation be administered with a "pro-disclosure bias". The reliance on the Board's decision of 17 October 2018 is inconsistent with the Board's agreement that there were valid reasons for reopening the case if legally possible. The reliance on *Breen v Williams* appears inappropriate given the existence of the FOI Act, which exempts the records of doctors, but not those of veterinarians. Further, my request relates to a complaint against [the veterinarian] that [they] failed to "advise and treat the patient with reasonable skill and care".
>
> Finally, I do not accept that an on balance decision can be made in favour of non-disclosure based on "prejudice of trade secrets, business affairs or research". No trade secrets or research were involved and accordingly the only ground could be damage to [the veterinarian's] business affairs. The release of the notes could only be detrimental to [the veterinarian] if they were either plainly of very poor quality, or they contained derogatory comments about me, or the notes contained untruthful assertions inserted by [the veterinarian] after my complaint was lodged in an effort to create a false impression of his treatment of Rogan. As my original complaint was about [the veterinarian's] conduct, the existence of any one of, or perhaps all, of these possibilities surely argues for the release of the clinical notes.

Considerations

28. I have carefully considered 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

29. In its response to the draft consideration, the respondent contended that the information at issue is contrary to the public interest to disclose under Schedule 1 of the FOI Act.

30. I have reviewed the information at issue and I am satisfied that it does not identify corruption, an offence, or misuse of power in a law enforcement investigation. As a result, Schedule 1

[8] [1996] HCA 57.

provisions may be relevant to the information at issue. Consequently, I will now proceed to consider whether the information at issue is contrary to the public interest information to disclose under Schedule 1 of the FOI Act.

Prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law

31. The respondent contends the information at issue is contrary to the public interest information on the grounds that it is information, the disclosure of which would, or could reasonably prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law.[9]
32. The respondents argues this is because publically disclosing clinical records could prejudice the extent to which veterinarians will keep and provide clinical notes as part of an investigation.
33. I do not, however, consider that disclosure of the information at issue would, or could reasonably be expected to have this effect, given that it does not reveal any specific method or procedure for dealing with a contravention or possible contravention of the law.
34. The information at issue is clinical notes of a veterinary practitioner that were considered by the Veterinary Practitioners Board (**Board**) as part of their investigation. They do not reveal anything about how the Board operates, nor do I consider that disclosure of this information would be useful to someone seeking to act in contravention of the law.
35. As the Queensland Information Commissioner has noted, information that discloses methods or procedures that are neither obvious nor a matter of public knowledge are more likely to prejudice their effectiveness.[10] I do not consider that to be the case here.
36. As a result, I do not consider the information at issue is contrary to the public information under Schedule 1, s 1.14(1)(f).

Information given in the course of an investigation of a contravention or possible contravention of the law if the information was given under compulsion under an Act that abrogated the privilege against self-incrimination

37. The respondent also contends the information at issue is contrary to the public interest information on the grounds that the information was given in the course of an investigation of a contravention or possible contravention of the law if the information was given under compulsion under an Act that abrogated the privilege against self-incrimination. [11]
38. I do not, however, consider the information at issue is information that falls within the scope of Schedule 1, s 1.14(2).

[9] Schedule 1, s 1.14(1)(f) of the FOI Act.
[10] See *Re T and Department of Health* (1994) 1 QAR 386 at paragraph 32.
[11] Schedule1, s 1.14(2) of the FOI Act.

39. I accept the clinical notes at issue were obtained by the Board in the course of an investigation into possible contraventions of the law by a veterinary practitioner, with it clear that this provision is not limited to contraventions of the criminal law. I am not, however, satisfied the information was given under compulsion under an Act that abrogated the privilege against self-incrimination.
40. The respondent has advised that at the time of the investigation, the Board could demand to see all pertinent records as part of a complaint investigation, under the *Veterinary Surgeons (Standards Statement) Approval 2018 (No 1)*, a notifiable instrument made under s 16 of the *Veterinary Surgeons Regulation 2015*.
41. I have no evidence before me that the Board did demand the information at issue be provided or that a failure to answer questions would result in disciplinary action. But regardless, any such demand was not made under a statute that abrogates the privilege against self-incrimination.
42. To fall within the scope of Schedule 1, s 1.14(2), the relevant direction must have been given under an Act that abrogates the privilege against self-incrimination – that is, a statute must require the person giving the information to do so, regardless of whether that information may be self-incriminatory.
43. As a result, I consider that this provision is only relevant where:
    - there is an identifiable claim of privilege, and
    - there are clear words in the statute abrogating that privilege, or a necessary implication to that effect.
44. This is consistent with the approach in *Pyneboard Pty Ltd v Trade Practices Commissioner,*[12] where the High Court held that in the absence of express words of abrogation, whether the privilege is abrogated by implication will depend upon '*the language and character of the provision and the purpose which it is designed to achieve*'.[13]
45. In my view, there are no provisions in the *Veterinary Surgeons Act 2015* or related legal instruments, which applied at the time of the investigation, that expressly abrogate the privilege against self-incrimination. Nor do I consider there is a sufficient indication that there existed an intention that the privilege against self-crimination should be abrogated.
46. As a result, I do not consider the information at issue is contrary to the public information under Schedule 1, s 1.14(2).

[12] (1983) 152 CLR 328.
[13] Ibid at paragraph 341. See also *Potter v Minahan* (1908) 7 CLR 277 at 304.

Public interest test

47. As I do not consider the information at issue to be contrary to the public interest information under Schedule 1 of the FOI Act, I will proceed to apply the public interest test.

48. 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.

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

Irrelevant factors

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

Factors favouring disclosure

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

52. In its decision notice, the respondent identified the following factors favouring disclosure to be relevant in this access application:

    - reveal the reasons for a government decision and any background or contextual information that informed the decision (Schedule 2, s 2.1(a)(viii) of the FOI Act), and
    - contribute to the administration of justice generally, including procedural fairness (Schedule 2, s 2.1(a)(xiii) of the FOI Act).

53. I agree disclosure of the information at issue may reveal the reasons for a government decision as the clinical notes may provide the applicant with contextual information regarding the decision made about her complaint by the ACT Veterinary Practitioners Board.

54. I note the Board has, however, provided the applicant with a summary of the opinion provided by an independent expert, who was asked to consider all of the material relevant to her complaint, including documentation from a number of veterinarians.

55. I have reviewed this summary and can see the independent expert refers to the clinical notes a number of times in the summary. As a result, I agree with the respondent that disclosure of the information may not add further context or understanding of how the Board decided the applicant's complaint than already provided. As a result, I have not placed significant weight on the factor provided for in Schedule 2, s 2.1(a)(viii) of the FOI Act.

56. As identified by the respondent in its decision notice, procedural fairness is also provided for in the *Veterinary Practice Act 2018* (ACT), with, as noted above, the applicant already provided with a summary of information considered by the Board. Therefore, for the same reasons as discussed at [29]-[30], I have not placed significant weight on this factor favouring disclosure of the information at issue.

57. Despite the limited weight placed on these factors, I note that when considering the public interest, access to information sought must be granted, unless disclosure of the information would be contrary to the public interest.

58. 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.[14] This concept is promoted through the objects of the FOI Act.[15]

Factors favouring nondisclosure

59. When applying the public interest test under s 17 of the FOI Act, decision-makers are required to identify any factor favouring disclosure that applies in relation to the information, including any factor mentioned in Schedule 2, s 2.1 of the FOI Act.

60. The respondent's public interest balancing test focused mainly on the ownership of the clinical notes that are being sought by the applicant.[16]

61. The applicant has, however, submitted that the respondent's reliance on the *Breen v Williams*[17] case is incorrect. I agree with the applicant and do not consider ownership of information a relevant consideration when undertaking the public interest balancing test.

62. I also consider *Breen v Williams*[18] to have limited relevance to this review because it considers the ownership of the clinical notes in the common law context, and the fiduciary duty obligations between a medical practitioner and their patient. In this case, the High Court unanimously held that health consumers do not have a right of access to medical records as a matter of common law.

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[14] See s 17 of the FOI Act.

[15] See s 6(b) of the FOI Act.

[16] Submissions at [244].

[17] [1996] HCA 57.

[18] Ibid.

63. I do not, however, consider this impacts on whether consumers have a right to access clinical information under relevant privacy or information access legislation – in this case, veterinary clinical information under the FOI Act. Information, which I note is within jurisdiction of the FOI Act, because it is government information – that is, information held by the Board.

64. While it would be open to the ACT Government to legislate to exempt veterinary records that become government material from disclosure through legislative amendment, as it stands, the FOI Act overcomes *Breen v Williams,*[19] which relates to common law rights only.

65. Therefore, in this review, the issue is whether disclosure of the information at issue, that is government information held by the respondent, is contrary to the public interest information under the FOI Act.

66. Under the FOI Act, ownership of information is relevant insofar as it requires agencies and Ministers to consult with the owner of the information only if disclosure is reasonably expected to be of concern to the relevant third party.

67. The respondent has, however, also submitted that disclosure of the information at issue could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person. I have considered this below.

68. I have also discussed two additional factors against non-disclosure below which the respondent raised as relevant in its response to the draft consideration.

<u>Prejudice trade secrets, business affairs or research of an agency or person</u>

69. Schedule 2, s 2.2(a)(xi) of the FOI Act provides that information is contrary to the public interest if disclosure could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person.

70. The respondent has refused access in full to the clinical notes on the basis that this factor is relevant and could reasonably be expected to prejudice the business affairs of the veterinarian.

71. The respondent advised:

> It is usual practice in a complaint situation that relevant papers are released by the Board to both parties to a complaint. In this case, I am advised by the President of the Board, that the documents were not released to the applicant because [the veterinarian] specifically stated [they] did not provide consent to the release of documents.

72. During the processing of the access application, the respondent consulted with the veterinarian, as a relevant third party, as required under s 38 of the FOI Act.

[19] [1996] HCA 57.

73. The veterinarian's consultation response reaffirmed their objection to disclosure of the clinical notes and pointed to the disclaimer on the notes:

> …these records were compiled as an aide memoire only for the sole and exclusive purpose and benefit of the authors, are by their nature incomplete… and were not compiled for third party or legal purposes…these notes are general in nature, recording certain aspects in the sole discretion of the veterinarian(s) concerned regarding certain information that was available at the time.

74. The veterinarian again re-iterated these views in his response to the draft consideration, referring to *Breen v Williams*[20] and stating that the contents of his clinical notes are private and confidential, and

> …have the same status as my entries in my personal diary – there is not another person on this planet that is entitled to see either one.

75. As outlined above at [63], the information at issue is, however, held by the Board, which it was entitled to request and view as part of its complaint investigation. The question is now whether the information at issue can be considered contrary to the public interest, taking into account the factors for and against disclosure outlined in the FOI Act.

76. The fact the veterinarian objects to disclosure is not, however, in itself sufficient for Schedule 2, s 2.2(a)(xi) to apply. I must consider whether disclosure could reasonably be expected to prejudice his business affairs, taking into account any further information provided by the third party as part of the consultation process.

77. The phrase 'reasonably be expected' is an objective test considered in *Attorney-General's Department v Cockcroft*[21] in relation to s 43(1)(c)(ii) of the *Freedom of Information Act 1982* (Cth). Bowen CJ and Beaumont J stated that:

> In our opinion, in the present context, the words 'could reasonably be expected to prejudice the future supply of information' were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous ... It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like. To construe s 43(1)(c)(ii) as depending in its application upon the occurrence of certain events in terms of any specific degree of likelihood or probability is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based.

78. I consider the discussions in *Cockcroft*[22] are relevant in this Ombudsman review. Accordingly, the words 'could reasonably be expected' in Schedule 2 of the FOI Act should be given their ordinary meaning and the expectation must be reasonably based, highly likely and not merely speculative, conjectural or hypothetical.[23]

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[20] [1996] HCA 57.
[21] (1986) 64 ALR 97 at [106].
[22] Ibid.
[23] *Murphy and Treasury Department* (1995) 2 QAR 744 at paragraph 44, citing *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [160].

79. While I recognise the decision-maker has set out clear reasons for her decision in this matter, it remains unclear from the information before me how disclosure of the information at issue could reasonably be expected to prejudice the veterinarian's trade secrets, business affairs or research.
80. I have no information before me to suggest the information at issue includes trade secrets or research of the veterinarian. There is also insufficient evidence to demonstrate that disclosure would have a negative impact on his business affairs, particularly given the substance of the information contained in the clinical notes was already provided to the applicant through the Board.
81. The fact the information consists of professional notes is, in my view, not sufficient to demonstrate that the disclosure could reasonably be expected to prejudice the veterinarian's business affairs. As a result, I am not satisfied the respondent has discharged its onus under s 72 of the FOI Act in establishing that the information at issue is contrary to the public interest to disclose.

Prejudice the flow of information to the police or another law enforcement or regulatory agency

82. In the respondent's additional submissions in response to the draft consideration, they argued that for the same reasons as outlined at paragraph [31], the disclosure could reasonably be expected to prejudice the flow of information to the police or another law enforcement or regulatory agency.
83. I accept the information at issue is information provided to the Board by the veterinarian involved. I do not, however, agree with the respondent's submission that disclosing the information under the FOI Act may mean veterinary practitioners will be less forthcoming in providing information to the Board.
84. While there are some risks in veterinary practitioners not being as forthcoming in providing voluntary information to the Board in future, I do not accept there will be a significant reduced level of cooperation given the mandatory powers to request information from practitioners under the current *Veterinary Practice Act 2018*.
85. It was, and is, in the interests of veterinary practitioners to provide such information to the Board. A failure to cooperate will be to their detriment.
86. As a result, I am not satisfied the factor favouring nondisclosure outlined at Schedule 2, s 2.2(a)(ix) is a relevant factor in relation to the information at issue.

Prejudice security, law enforcement or public safety

87. In the respondent's additional submissions in response to the draft consideration, they argued that for the same reasons as outlined at paragraph [31] that disclosure could reasonably be expected to prejudice law enforcement associated with veterinary practitioners.
88. For the same reasons as outlined above in paragraphs [83] and [84], I am not, however, satisfied that such prejudice is reasonably expected. Such prejudice needs to be reasonably based, highly likely and not merely speculative, conjectural or hypothetical, as discussed from [77] to [78] above.

89. I am not satisfied the respondent has discharged their onus in regards to this factor and therefore, do not consider this to be a relevant factor favouring nondisclosure.

90. I note there is no requirement under the FOI Act that it be in the public interest for information to be disclosed, rather it must be disclosed if the decision-maker is not satisfied that the relevant information is contrary to public interest information.

Balancing the factors

91. I now have to consider the public interest balancing test as set out in s 17 of the FOI Act.

92. While I have placed minimal weight on the factors favouring disclosure, I do not consider there are factors favouring nondisclosure of the information at issue.

93. I am not satisfied the respondent has discharged its onus under s 72 of the FOI Act in establishing the information at issue is contrary to the public interest to disclose.

94. I note the Board has indicated there is a difference between providing clinical notes to a person who has an interest in the matter (e.g. owner of the animal), as opposed to releasing publically. In this case, it was, however, open to them to provide the documents to the FOI applicant outside of the access application process, but it chose not to do so.

Conclusion

95. I set aside and substitute the respondent's decision to refuse access to the information at issue under
s 35(1)(c) of the FOI Act.

96. I am not satisfied the information at issue, being the clinical notes, is contrary to the public interest to disclose. The respondent is to give the applicant access to the information at issue.

Louise Macleod
Senior Assistant Ombudsman

20 March 2020