

BA and Community Services Directorate [2020] ACTOFOI 26 (16 December 2020)

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

Application Number	AFOI-2020-10037
Decision Reference	[2020] ACTOFOI 26
Applicant	BA
Respondent	Community Services Directorate
Decision Date	16 December 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – individual’s right to privacy - advance the fair treatment of individuals – third party consultation

Decision

1. For the purposes of s 82 of the *Freedom of Information Act 2016 (FOI Act)*, I am a delegate of the ACT Ombudsman.
2. Under s 82(2)(a) of the FOI Act, I **confirm** the decision of the Community Services Directorate (CSD), dated 16 April 2020.

Background of Ombudsman review

3. On 21 November 2019 the applicant applied to CSD for access to:
 - (1) The exact dates that I was in ..[juvenile detention centre].
 - (2) Material prepared by community services for the ACT Children’s court, especially
 - (a) Material that confirmed that I was a victim of childhood domestic violence.
 - (b) Material from psychiatrist... [named psychiatrist] that I had been diagnosed with

PTSD in relation to childhood domestic violence.

(c) Documents or case work that listed that I had previously been known as... [name provided].

(3) Any material in your possession relating to me and the ACT Supreme Court (which overturned conviction and released me from (juvenile detention centre))
And Health Records in relation to point (2b)

4. On 12 January 2020, the applicant applied to the respondent for access to:
I seek all materials held by your department in relation to me since I applied for housing in 2017 (with the standard exception of the names of junior staff). I especially seek all material relating to the decision to classify me as high needs such as support letters and all case officer notes/comments in my file.
5. On 24 January 2020, CSD requested the two FOI requests be combined and sought an extension of time from the applicant to 16 April 2020.
6. On 29 January 2020, the applicant agreed to combine his two applications and agreed to the extension of time for processing his request.
7. On 11 February 2020, CSD contacted the applicant regarding releasing information in two stages in response to the combined FOI request, to which the applicant agreed.
8. On 17 February 2020, CSD advised the applicant that information contained in stage 2 involved third parties and the timeframe for processing stage 2 would be extended to 7 May 2020 under s 40 of the FOI Act.
9. On 18 February 2020, CSD advised the applicant it had identified two files falling within the scope of the access application under stage 1. It is not clear from the documents provided to our Office, how many documents were captured by the two files. CSD refused access, in part, to several documents. In making its decision, it relied on ss 1.3 and 2.2(a)(ii) of the FOI Act.
10. On 16 April 2020, CSD advised the applicant it had identified four files falling within the scope of the access application under stage 2. It is not clear from the documents provided to our Office how many documents were captured by the four files. CSD refused access in part to several documents. In making its decision, it relied on ss 1.3 and 2.2(a)(ii) of the FOI Act.
11. On 27 July 2020, the applicant sought Ombudsman review of CSD's decision under s 73 of the FOI Act.
12. On 1 December 2020, I provided my preliminary views about CSD's decision to the parties in a draft consideration.

13. The applicant provided the following submissions in response to my draft consideration:

My most important and repeated submission that I was a 'named recipient' of the original document and hence there can be no unlawful privacy violation by its full release to me has not been mentioned, much less addressed in the draft decision. The fact that I had full and lawful access, not in an arbitrary way but as a named recipient, was my main submission and a point that I repeatedly made.

14. I also considered the applicant's submissions dated 28 July 2020 (a) and 30 August 2020 (b) respectively:

(a) As to the pre-sentence report, it is a document prepared for a court in relation to me. It was available to me 20 years ago. I find it inexplicable and contrary to the public interest that they would make redactions...

(b) ..an issue may arise under the s138c of the Legislation Act? It applies when working out the meaning of legislation and when its apparent meaning *leads to a result that is manifestly absurd or is unreasonable*

I would strongly contend that a mandatory consultation provision that prevents full access to a document to a named recipient of a document who had full and lawful access to it at the time is a result that is both manifestly absurd and unreasonable...

..I would respectfully suggest that redacting information to a named recipient of a document who had full and lawful access to it at the time is not consistent with the purposes of the FOI Act 2016. Such an outcome would be contrary to the Acts purposes which are to regulate access to information and protect privacy in the first instance, not to retrospectively impose hurdles when none existed at the time of the document's creation.

15. I discuss the applicant's submission in further detail below.

Preliminary issues

16. In response to my draft consideration, the applicant has reiterated they were a 'named recipient' to the documents at issue and as such, there can be no privacy violation by virtue of disclosure of the information at issue. They also claim in this matter, the third party consultation provisions of the FOI Act are manifestly absurd and unreasonable and inconsistent with the purpose of the Act.

17. I appreciate the documents were prepared for the ACT Children's Court to which the applicant was named. This however, does not mean the applicant can automatically access all the redacted information at issue. The third party consultation provision in the FOI Act does not explicitly prevent access to information, but it is a requirement that gives third parties the opportunity to make submissions prior to the release of their own personal information. I do not

consider that consulting third parties who are named in court documents amounts to a *manifestly absurd or unreasonable* interpretation of the consultation requirements under the FOI Act or is inconsistent with the objects of the FOI Act.

18. A primary objective of the FOI Act is to provide a right of access to government information unless access to the information would, on balance, be contrary to the public interest. The respondent's decision rests upon the redacted material being information that would be contrary to the public interest to disclose. As such, I do not consider CSD's decision to be inconsistent with the objects of the FOI Act.

The contentions of the parties

19. In its decision notice, CSD said:

My reason for not granting access to information contained in documents identified in the Table of Contents and Attachment B is that I find the information, on balance, to be contrary to the public interest to disclose under the test set out in section 17 of the FOI Act.

For example, information referenced at 68-69 in the enclosed Table of Contents 3 relates to young detainees from (juvenile detention centre). It is an offence under section 712A of the Criminal Code 2002 to publish information that identifies or allows the identity of the person as a young person subject to children's proceedings to be worked out.

It is my decision that disclosure of any information that would identify these individuals would constitute an offence under section 712A of the Criminal Code 2002 and therefore is contrary to the public interest to disclose to you.

A number of documents identified contain the contact details of a third party. Section 38 of the Act applies because the disclosure may reasonably be expected to be of concern to the individuals as the information is their own personal information.

There were no factors favouring disclosure of this information identified. As there are no restrictions on what an applicant can do with information received under the FOI ACT, I, as the Information officer need to take into consideration whether the release of information to the world at large, would be an unreasonable disclosure of personal information and in this instance, I am satisfied it would be an unreasonable disclosure.

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

I sought my youth justice file from... [juvenile detention centre] from 1999. I was a detainee but my conviction was quashed by the ACT Supreme Court. In the pre-sentence report for the ACT Children's court multiple important elements were redacted. Most importantly, an admission from my mother

that I had suffered violent bashings from my father was entirely redacted. As this is a pre-sentence report for me that I also had access to at the time of the Children's court proceedings, it is incomprehensible why this material is redacted. I need the information as corroboration that I suffered childhood abuse for other matters.

I also requested other materials in the form of records that the directorate held that confirmed this but these were not provided.

21. These submissions are discussed in more detail below.

Information at issue

22. The information at issue in this Ombudsman review is the pre-sentence report and sentencing remarks, specifically the information that was redacted in these documents by virtue of CSD's decision to partially release each document.

23. 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.

24. In making my draft consideration, I had regard to:

- the applicant's access application and review application
- the respondent's decision
- the FOI Act, in particular ss 2.2(a)(ii)
- the United Nations *Convention on the Rights of the Child (Convention)*, in particular Article 3(1),
- the *Human Rights Act 2004 (HR Act)*
- the *Information Privacy Act 2014 (IP Act)*
- the respondent's FOI processing file relating to the access application
- relevant case law; *Minister of State for Immigration and Ethnic Affairs v. Teoh (1995)*
- an unedited copy of the information at issue.

Relevant law

25. 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.

26. 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.

27. 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.
28. 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.
29. Section 50 of the FOI Act applies if an access application is made for government information in a record containing contrary to the public interest information and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted.
30. 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.
31. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

Considerations

32. I 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

33. Neither party to this Ombudsman review has suggested the information at issue contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the information sought to be contrary to the public interest, disclosure of the information sought must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

Public interest test

34. 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.
35. 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

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

Factors favouring disclosure

37. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.
38. 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.¹ This concept is promoted through the objects of the FOI Act.²
39. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, I consider that factor 2.1 (vii) is relevant - disclosure of the information could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government.

¹ See s 17 of the FOI Act.

² See s 6(b) of the FOI Act.

40. The applicant has expressed their intent to use the documents as evidence of character in a current citizenship application. It is reasonable to expect the documents will advance the fair treatment of the applicant with the Australian Government department responsible for the applicant's citizenship application.
41. As discussed in further detail below, the actual information at issue (being the redacted material), comprises only a small percentage of the overall documents. In my view, the redacted material would not increase the value of the documents in the context of providing them as evidence. For this reason, I afford factor 2.1 (vii) minimal weight.

Factors favouring nondisclosure

42. Of the factors favouring nondisclosure listed in Schedule 2, s 2.2, I consider that one is relevant to the information at issue.

S 2.2(a)(ii) – 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 2004*

43. CSD stated:

A number of documents identified contain the contact details of a third party. Section 38 of the Act applies because the disclosure may reasonably be expected to be of concern to the individuals as the information is their own personal information.

44. The applicant stated:

The Convention on the rights of the child in an international treaty ratified by the Australian Parliament. In *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995)183 CLR 273 the majority High Court judgement said (at 26)

Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international

instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.

Most relevantly, Article 3(1) of the Convention states

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

As the redacted statements in both documents in question concern matters that:

1. Were the subject of statements made by my mother/parents to ACT Juvenile Justice when I was not an adult (a child for the purposes of the convention)
2. Were fundamentally for the for the purposes of the ACT Children's Court
3. Related to incident(s) that happened when I was a child

They would fall squarely within the scope of Article 3 (1). As such I would contend that my best interest must be a primary consideration in how they are dealt with, whether for the FOI Act or for any other purpose.

.. I respectfully contend that any public interest points in favour of redaction must be secondary to the best interests of the child.

45. Section 12(a) of the HR Act provides that everyone has the right 'not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily'.³ It does not provide a general right to privacy, but can essentially be viewed as the right of an individual to preserve their personal sphere from interference from others.
46. The IP Act identifies the circumstances in which the disclosure of information may constitute a breach of an individual's privacy. An individual's personal information can only be disclosed in accordance with the Territory Privacy Principles listed in Schedule 1 of the IP Act.
47. Personal information is defined in s 8 of the IP Act as:
 - (a) information or an opinion about an identified individual or an individual who is reasonably identifiable
 - (i) whether the information or opinion is true or not; and
 - (ii) whether the information or opinion is recorded in a material form or not.
48. I reviewed a copy of the un-redacted documents. They contain the names and other information of third parties who provided information to the ACT Children's Court in relation to the applicant's sentencing in July 1999.

³ See s 12(a) of the HR Act

49. Throughout the course of this review, the applicant has made it apparent they are specifically seeking information in the documents provided by their parent/s.
50. The respondent advised the applicant of the requirements under the FOI Act to consult with third parties, at which time the applicant requested the respondent not contact their parents for third party consultation. The respondent advised the applicant that information relating to their parent/s would not be released if third party consultation was not undertaken.
51. Section 38 of the FOI Act relevantly provides:
 - (1) This section applies if the respondent to an access application considers that
 - (a) some or all of the government information applied for is not contrary to the public interest information; but
 - (b) disclosure of the information may reasonably be expected to be of concern to a person or another entity other than the Territory (a relevant third party).
 - (2) The respondent must take reasonable steps to consult with the relevant third party before deciding to give access to the information.
52. I considered the applicant's submissions about any potential ambiguity as to the requirements of s 38 of the FOI Act. In particular, the applicant relevantly states:

this is a zero sum where my best interests directly conflict any privacy rights my parents may have. I respectfully contend however that there can simply be no comparison on whose conflicting rights ought to prevail.
53. It is reasonable to expect that information provided by third parties to the Courts would be of concern to those individuals, irrespective of the passing of time. This includes both the names of third parties and any statements made by them to the Courts. Section 38 of the FOI Act is clear insofar as requiring consultation in this instance, as such there is little to no ambiguity.
54. To the extent there is any ambiguity, the applicant is no longer a child and the information relates to their interests as an adult. As such, Article (3)(1) of the Convention is not relevant in this matter.
55. If the respondent is unable to meet their obligations under s 38(2) of the FOI ACT (at the applicant's request), then it is reasonable for the respondent to withhold the personal information of the applicant's parents contained in the documents.
56. I further note the applicant's submissions that they want to obtain the un-redacted documents to help them with character considerations for a current citizenship application and potential

future membership of professional bodies, and ‘the administration of justice is ill-served if these bodies are only able to read redacted information’.

57. As discussed above, I agree the documents are likely to assist the applicant in forthcoming dealings with Australian Government Agencies and other various professional bodies. However, I do not agree the redaction of third party personal information is likely to hinder the value of the documents.
58. Therefore, I do not consider the natural administration of justice to be ill-served by virtue of the respondent’s decision and I do not consider this a relevant consideration in terms of whether or not to grant access to the information at issue.
59. For the reasons listed above, I am satisfied the information at issue could reasonably be expected to prejudice the protection of an individual’s right to privacy. Based on the nature of the information and the applicant’s refusal to allow third party consultation, I afford this factor significant weight.

Balancing the factors

60. One factor in this review favoured disclosure of the information at issue while another favoured non-disclosure. Section 17 requires me to balance the competing public interest considerations raised by these factors.
61. The information at issue could reasonably be expected to prejudice the protection of an individual’s right to privacy. Having considered the applicant’s submissions and the nature of the material, my decision is to afford this factor significant weight.
62. The information at issue could reasonably be expected to advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government. For the reasons discussed above, my decision is to afford this factor minimal weight.
63. I am satisfied that, on balance, the public interest factors favouring non-disclosure outweigh the public interest factors favouring disclosure for all of the information sought.

Conclusion

64. Under s 82(2)(a), I confirm the CSD's decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

Louise Macleod
Senior Assistant Ombudsman

16 December 2020