

BG and Education Directorate [2021] ACTOFOI 06 (15 June 2021)**Decision and reasons for decision of Acting Senior Assistant Ombudsman,
Symone Andersen**

Application Number	AFOI-RR/20/10030
Decision Reference	[2021] ACTOFOI 06
Applicant	BG
Respondent	Education Directorate
Decision Date	15 June 2021
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – existence of documents – information subject to legal professional privilege – Cabinet information – personal information – prejudice trade secrets, business affairs or research – prejudice intergovernmental relations – prejudice an agency’s ability to obtain confidential information - promote open discussion of public affairs and enhance the government’s accountability - contribute to the positive and informed debate on important issues or matters of public interest - reveal the reason for a government decision and any background or contextual information that informed the decision

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)(b) of the FOI Act, I **vary** the decision of the Education directorate’s (Education) dated 2 July 2020.

Background of Ombudsman review

3. On 20 April 2020, the applicant applied to Education for access to:

All documents and records (excluding drafts and duplicates) that informed the 8 April 2020 announcement that '[a]t the start of term 2, ACT public schools will be moving to a remote delivery of learning' (i.e. were in existence at the time of the announcement), including (but not limited to):

- *final policy proposals in relation to both the decision and implementation considerations, including matters such as risk assessments, health impact assessments of children using devices for sustained periods, legal advice, delivery model, privacy impact assessments etc*
- *final briefs to Directorate Executive Managers and/or Minister of Education*
- *meeting minutes and/or notes or transcripts from stakeholder discussions, meetings or panels. Stakeholders may include unions, P&C Council, Catholic Education, AIS, other jurisdictions, Commonwealth Minister, Commonwealth Department of Education, other organisations, or individuals*
- *agreement/s between any union, Directorate and/or Minister of Education*
- *research relied on to inform the decision, and*
- *emails between the Directorate, Minister for Education and/or stakeholders.*

4. On 2 July 2020, the respondent advised Education it had identified 56 documents as falling within the scope of the access application. Education gave the applicant full access to nine documents, partial access to 41 documents and refused access to four documents. Education withheld two documents from release, pending further third-party consultation. In making its decision, Education relied on ss 1.2, 1.6, 2.2(a)(ii) and 2.2(a)(xi) of the FOI Act.

5. On 27 July 2020, Education advised the applicant their decision regarding the two documents which it had withheld, pending third party consultation. Education decided to give the applicant partial access to one document and refused access to one document. In making this decision, the respondent relied on the views of the third parties consulted and ss 2.2(a)(ii), 2.2(a)(x), 2.2(a)(xi) and 2.2(a)(xii) of the FOI Act.

6. On 13 July 2020, the applicant sought Ombudsman review of Education's decision under s 73 of the FOI Act.

7. On 24 February 2021, I provided my preliminary views about the respondent's decision to the parties in a draft consideration.

8. On 24 February 2021, the applicant provided the following submissions in response to my draft consideration:

While I do not agree with all aspects of the decision, and am deeply concerned that no more documents exist, I would prefer to see the decision made. I will then decide if I will take further action with this matter.

9. On 27 April 2021, the respondent provided the following submissions in response to my draft consideration:

Document 1, page 7: SEMC is the Security and Emergency Management Subcommittee of Cabinet. As SEMC is a subcommittee of Cabinet, references to discussions to be held at, or information prepared for, SEMC have the same protections as if they were discussed or submitted directly to Cabinet. The Cabinet Handbook states “The same requirements for conduct of meetings, preparation of advice and security of information apply to Cabinet subcommittees”

Document 9, page 1, para 1: The information is personal information of two employees as its release could enable them to be identified, based on the number of employees involved and the school at which they are employed. The employees have a right to privacy in relation to their personal information.

Document 12, page 3: The information is personal information of two employees as its release could enable them to be identified, based on the number of employees involved and the school at which they are employed. The employees have a right to privacy in relation to their personal information.

Document 16, page 2: Specifically references providing information to the Chief Minister in advance of a Cabinet meeting, with the inference being that it would be discussed at Cabinet i.e. is a deliberation of Cabinet

Document 16, page 3: The identification of the school in the context of “litigation” and “social media” could enable a person to be identified, which would be a disclosure of their personal information and be prejudicial to the person’s right to privacy

Document 21, page 2: Refers to a matter being considered by SEMC. As SEMC is a subcommittee of Cabinet, references to discussions to be held at, or information prepared for, SEMC have the same protections as if they were discussed or submitted directly to Cabinet.

10. I will address each of the above points under the relevant sections below.
11. The respondent agreed with the remainder of the draft consideration.

Information at issue

12. The information at issue in this review is the information that was withheld from disclosure under the relevant provisions of the FOI Act.

13. The issues in this review are whether:

- documents exist in relation to particular parts of the applicant’s request, and
- whether giving the applicant access to the information at issue would be contrary to the public interest.

14. In making decision, I had regard to:

- the applicant’s original access application and review application

- Education's decision
- the FOI Act, in particular ss 1.2, 1.6, 2.1(a)(i), 2.1(a)(ii), 2.1(a)(vii)
- Education's FOI processing file relating to the access application
- an unedited copy of the information at issue
- the applicant's response to my draft consideration
- the respondent's response to my draft consideration
- relevant case law; *Waterford v Commonwealth of Australia*¹, *Taggart and Queensland Police Service*², *Mann v Carnell*³, *Alistair Coe and ACT Health Directorate*⁴

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. 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.
17. 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.
18. Section 35(1)(c) of the FOI Act provides 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.
19. 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.

¹ *Waterford v Commonwealth of Australia* [1987] HCA 25; (1987)

² *Taggart and Queensland Police Service* [2015] QICmr 16

³ *Mann v Carnell* [1999] HCA 66

⁴ *Alistair Coe and ACT Health Directorate* [2018] ACTOFOI 4

20. Section 72 of the FOI Act provides the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.
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.

The contentions of the parties

23. In its decision notice, Education said:

For some parts of your request, there were no documents identified that contained relevant information. For example, no information was located that provided risk assessments, health impact assessments of children using devices for sustained periods, or privacy impact assessments.

I place significant weight on the right to privacy of individuals and their right to have their personal information protected. I have decided that their right to privacy in relation to their personal information has a higher standing of public interest not to disclose, than the public interest in disclosing this information. Accordingly, the names of third parties, and their contact details have been deleted from the information being provided to you.

Similarly, information relating to business affairs of persons or organisations has been deleted from the documents, as I have decided that they have a right to have their business information protected, particularly names of their employees.

24. In their application for Ombudsman review, the applicant said:

Having reviewed these documents I am concerned about the advice that certain requested documents do not exist, that there are documents missing about the decision to close schools, and that exemptions have been applied incorrectly.

25. The applicant provided further submissions in support of their review application on 20 July 2020:

I am deeply concerned that documents such as risk assessments, health impact statements or privacy impact statements do not exist in regards to remote learning. To be clear, there was no time limit placed on when these documents were created despite attempts by the Directorate to have me limit documents from 2020 onwards. To say such documents do not exist is concerning, as they should be a fundamental aspect of considering remote learning for the children of the ACT.

There is a distinct lack of information from ACT Health about when or if to close schools, despite documents alluding to the Directorate/Government intending to follow their advice.

I was verbally advised there was a forum attended by the ACT P&C Association, Education Union and various experts where discussion occurred about COVID-19 and schools, and submissions such as medical research were made. Document 5 and the out of session paper that I am awaiting a decision on to finalise this request allude to such forums. However, documents such as agendas, documents

distributed to participants, documents submitted to the forum etc - appear to be missing from this decision.

Any documents with a public interest element should be released. The decision to close schools during Wave 1 of this pandemic is of immense public significance, and any documents that sheds the smallest amount of light on how that decision was made - whether on the basis of medical evidence, at the behest of a union and/or on the whims of a government - should be released in full.

26. In response to receiving notice this review, Education advised:

His comment referring to his 'concern that certain requested documents do not exist' and that 'there are documents missing', appears to be in response to the paragraph in the decision letter which advised that, for some parts of his request, there were no documents identified that contained relevant information. For example, no information was located that provided risk assessments, health impact assessments of children using devices for sustained periods, or privacy impact assessments. Assessments of these types that were specific to the COVID-19 situation were not undertaken when decisions were being made to implement remote learning in term 2 because existing policy frameworks and systems were considered fit for purpose and therefore were relied upon. For example, the Communities Online: Acceptable Use of ICT Parents and Students policy covers matters such as e-safety and appropriate behaviours of students when working online.

In addition, resources for students and families about e-safety are available on the Directorate's website. Similarly, the Students with a Disability: Meeting Their Educational Needs policy was also relevant and provided the necessary framework. These are just some examples of many that were considered. However, there are no documents available that provide evidence of this consideration as part of the decision process.

In order to implement a sound remote learning model for Term 2, decisions had to be made very quickly, based on the best available information at the time and relying on existing systems and mechanisms where possible. For example, the deployment of Chromebook devices and use of specific software platforms were already embedded programs in the Directorate that are underpinned by due diligence considerations, including a privacy impact assessment. The Directorate leveraged off these already successful programs to provide remote learning for students in Term 2.

As the Directorate had in place the policies and systems to support the change to remote learning, priority was given, in the brief lead time for implementation, to areas such as staff training, technology deployment, distribution of Chromebooks to students, considerations for students who required additional supports (including home internet access), preparation of resources, etc. whilst ensuring the safety and wellbeing of staff and students. These were unprecedented circumstances that required an extraordinary response.

27. These submissions are discussed in more detail below.

Preliminary issues

Existence of documents

28. In the application for review, the applicant stated 'I am concerned about the advice that certain requested documents do not exist, that there are documents missing about the decision to close schools.'

29. S 34(1) of the FOI Act provides:

(1) An agency or Minister deciding an access application must take all reasonable steps to identify all government information within the scope of the application.

30. In response to this review, Education provided evidence of the document searches conducted.

This included a 'call for documents' to the relevant business areas. I reviewed a copy of the document searches and I am satisfied Education took all reasonable steps to identify information within the scope of the applicants request.

31. I note Education's submissions, in particular that 'Assessments of these types that were specific to the COVID-19 situation were not undertaken when decisions were being made to implement remote learning in term 2 because existing policy frameworks and systems were considered fit for purpose and therefore were relied upon.

32. It is apparent that much of the decision making in relation to Education's decision to move to online learning was done quickly in response to Covid-19. I am satisfied with Education's submission that some of the specific documents the applicant requested do not exist, as other documents were relied upon.

33. To that end, I am satisfied that Education has taken all reasonable steps to identify documents within the scope of the applicant's request and there are no further documents in relation to their request, as advised by Education in the original decision notice.

Considerations

34. I carefully considered an unedited copy of the information at issue together with the information provided by the applicant and Education.

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

35. Education found that some of the information at issue contains information that is contrary to the public interest information to disclose under Schedule 1 of the FOI Act.

36. I reviewed the information at issue and I am satisfied it does not fall under the exceptions outlined in Schedule 1. That is, the information at issue does not identify corruption, an offence, or misuse of power in a law enforcement investigation. As a result, provisions of Schedule 1 of the FOI Act 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.

Information subject to legal professional privilege

37. Under Schedule 1, s 1.2 of the FOI Act, Legal Professional Privilege (LPP) is information:
... that would be privileged from production or admission into evidence in a legal proceeding on the grounds of legal professional privilege.
38. LPP is not defined in the FOI Act, however, *Waterford v Commonwealth of Australia*⁵ sets out the three common law factors that must exist for LPP to apply:
- An independent legal practitioner and client relationship must exist,
 - The communication (as opposed to the document per se) must have been made for the purpose of giving or receiving legal advice, or for use in litigation (actual or anticipated), and
 - The advice must have been confidential.
39. The information at issue which Education advised is covered by LPP include documents 29, 30 and 38 which comprises of an email and meeting notes discussing legal advice.
40. To determine whether LPP applies, I considered below whether each of the above elements exist in this case.

Does a legal practitioner and client relationship exist?

41. I am satisfied the information at issue is advice provided to Education by the Australian Government Solicitor, which is a lawyer-client relationship.

What was the dominant purpose of the information?

42. Education sought legal advice from the Australian Government Solicitor regarding the respondent's duty of care. The information at issue consists of such advice.
43. After reviewing this information, I consider the information was created for the dominant purpose of providing legal advice to Education.

Was the information communicated in confidence?

44. As discussed above, the information at issue comprises legal advice provided by the Australian Government Solicitor to Education and the advice is clearly marked 'Legal – In Confidence'.
45. The Ombudsman Freedom of Information Guidelines provide that simply marking documents as such is not determinative that a particular document is confidential.⁶ However, having read the

⁵ [1987] HCA 25

⁶ Ombudsman FOI Guidelines 4: Considering the public interest, page 16

un-redacted material and considering the circumstances in which the advice was provided, I am satisfied the information was communicated in confidence.

Was LPP waived?

46. LPP is waived if the information at issue was released to the public at large, or a third party (unless this is done on a confidential basis).⁷ I do not consider sharing legal advice internally, within the one organisation, amounts to a waiver of LPP.
47. Based on the information before me, my preliminary view is the respondent has not waived LPP.
48. For these reasons, I consider the information in documents 29, 30 and 38 are subject to LPP and it would be contrary to the public interest to disclose this information under schedule 1, 1.2 of the FOI Act.

Cabinet Information

49. Information that is taken to be contrary to the public interest to disclose under Schedule 1 includes Cabinet information, which is:
 - (a) Information –
 - a. that has been submitted, or that a Minister proposes to submit to Cabinet for its consideration and that was brought into existence for that purpose, or
 - b. that is an official record of Cabinet, or
 - c. that is a copy of, or part of, or contains an extract from, information mentioned in paragraph (a) or (b), or
 - d. the disclosure of which would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision)
 - (b) Subsection (1) does not apply to purely factual information that –
 - a. is mentioned in subsection (1) (a), or
 - b. is mentioned in subsection (1) (b) or (c) and is a copy of, or part of, or contains an extract from, a document mentioned in subsection (1) (a)
50. The information at issue which Education contends is Cabinet information include documents 1, 2, 3, 16 and 40, and comprises emails, briefs, strategy documents and other informative material prepared for the Minister for Education and Early Childhood Development in the context of ACT school's response to Covid-19.

<https://www.ombudsman.act.gov.au/publications/foi-guidelines>

⁷ Mann v Carnell [1999] HCA 66

51. Education has identified the information as being information that 'was provided, or was produced for the purpose of being provided, to Cabinet s 1.6(1)(a)'.
52. The applicant does not contend the information is Cabinet information, rather, that the 'exemption was applied incorrectly'.
53. Accordingly, the issue is whether schedule 1, s 1.6(1)(a) does apply to the information at issue, and whether one of the exceptions in schedule 1, 1.6 (2) is relevant or not.
54. I reviewed a copy of the un-redacted information. Regarding documents 2, 3 and 40, based on the nature and context of the material, I accept that it comprises information prepared for consideration of Cabinet. I also accept that the information contains deliberative material and is not purely factual. The documents are marked as Cabinet, and whilst this is not a determinative factor, the substantive nature of the material clearly demonstrates a forthcoming consideration of Cabinet.
55. For these reasons, I am satisfied the information in documents 2, 3, 17 and 40 are Cabinet information for the purposes of schedule 1, 1.6 (1)(a) of the FOI Act and would be contrary to the public interest to disclose.
56. Regarding the information in document one (page seven), document 16 (page two) and document 21 (page two), my preliminary view in the draft consideration was that I was not satisfied this information is information that was provided, or produced for the purpose of being provided, to Cabinet. In response to my draft consideration, Education provided a submission stating that this material is exempt on the basis it was discussed in Cabinet, or prepared for the purpose of discussions in Cabinet.
57. The material in each document is a sentence stating that an issue will be considered by the Chief Minister or by the SEMC. It does not disclose the substance of the issue or reveal any specific deliberations, it is merely a statement of fact. Whilst the issues the statements refer to may be considered by Cabinet and may attract the Cabinet exemption, the statement that the issue will be considered by Cabinet is not in itself exempt.
58. Irrespective of the above, the Cabinet exemption does not apply to purely factual information, as discussed in Schedule 1, 1.6(1)(b) of the FOI Act. I consider a sentence stating that an issue will be considered is a factual statement. Accordingly, I do not accept that the material in document one (page seven), document 16 (page two) and document 21 (page two) is Cabinet information for the purposes of Schedule 1, 1.6(1)(a) of the FOI Act.

59. I now consider whether the reminding information at issue is contrary to the public interest to disclose under Schedule 2 of the FOI Act.

Public interest test

60. 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.

61. 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.

62. 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

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

64. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, I agree with Education that the following factors are relevant to the remaining information at issue. Disclosure of the information could reasonably be expected to:

- Promote open discussion of public affairs and enhance the government's accountability – Schedule 2, 2.2(a)(i);
- Contribute to the positive and informed debate on important issues or matters of public interest - Schedule 2, 2.2(a)(ii); and
- Reveal the reason for a government decision and any background or contextual information that informed the decision – Schedule 2, 2.2 (a)(viii).

65. 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.⁸ This concept is promoted through the objects of the FOI Act.⁹

⁸ See s 17 of the FOI Act.

66. The documents relate to the ACT Government's decision to transition to online learning in response to Covid-19. It is reasonable to accept this decision has impacted a large portion of the general public.
67. I accept the documents would assist in increasing accountability, inform public debate on the important issue of online learning (in the context of Covid-19) and reveal the reasons for a government decision. As such I have afforded each of the above factors significant weight.
68. For these reasons, I am satisfied that disclosure of the information sought could reasonably be expected to promote the objects of the FOI Act.

Factors favouring nondisclosure

69. Education contends there are four factors favouring non-disclosure, stating that 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 2004* (HR Act) (schedule 2, s 2.2(a)(ii));
 - prejudice trade secrets, business affairs or research of an agency or person (schedule 2, s 2.2(a)(xi));
 - prejudice intergovernmental relations (schedule 2, s 2.2(a)(x)); and
 - prejudice an agency's ability to obtain confidential information (s 2.2(a)(xii)).

Individual's right to privacy

70. A factor favouring non-disclosure is that 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 HR Act.
71. Education submitted:

I place significant weight on the right to privacy of individuals and their right to have their personal information protected. I have decided that their right to privacy in relation to their personal information has a higher standing of public interest not to disclose, than the public interest in disclosing this information. Accordingly, the names of third parties, and their contact details have been deleted from the information being provided to you.

⁹ See s 6(b) of the FOI Act.

72. 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’. It does not provide a general right to privacy,¹⁰ but can essentially be viewed as the right of an individual to preserve their personal sphere from interference from others.
73. The *Information Privacy Act 2014* (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.
74. 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.
75. The information at issue which Education contends contains personal information of its staff and third parties are in documents one, four, six, seven, eight, nine, 12, 13, 14, 16, 18, 21 – 37, 39, 41, 43, 45 – 48, 51, 54 and 55.
76. The disclosure of information about agency staff is not generally considered to prejudice the protection of the individual’s right to privacy where the information is wholly related to the individual’s routine day-to-day work activities.¹¹
77. In respect of the names and contact details of third parties (non-government individuals), it is my view that their personal information would not normally be captured in the documents encompassed by the applicant’s request.
78. Their information has only been captured under the irregular circumstances surrounding the documents, being the State and Territories response to Covid-19. I have therefore placed significant weight on their right to privacy.
79. With respect to the names and contact details of Education and other State and Territory employees (where they appear in the context of correspondence between Government agencies), I consider that disclosure of this information would only reveal that government employees are performing their normal duties, which I consider would contribute to the accountability and transparency of government action and decision-making. Education has not provided sufficient reasoning as to why disclosure of names and contact details of government

¹⁰ Alistair Coe and ACT Health Directorate [2018] ACTOFOI 4 at [43]

¹¹ Taggart and Queensland Police Service [2015] QICmr 16 at [17].

staff would prejudice their right to privacy. As such, I am not satisfied disclosure of this information could reasonably be expected to prejudice the protection of an individual's right to privacy.

80. In response to my draft consideration, Education disagreed with my view that the personal information in document 9 (page 1, para 1), document 12 (page 3) and document 16 (page 3) should be released. I have addressed each document specifically below:

- Document 9 (page 1, para 1) – this material refers to teachers from a school being asked to self-isolate in response to Covid-19. Education submits that release of the school name and the number of teachers asked to self-isolate could result in those teachers being identified. Since there is a considerable number of teachers who teach at the school in question, I do not consider that simply disclosing the number of teachers who were asked to self-isolate would by itself be enough to identify those specific teachers. Accordingly, I am not satisfied disclosure of this information could reasonably be expected to prejudice the protection of an individual's right to privacy.
- Document 12 (page 3) – this material refers to the same information as document 9. For the same reasons as above, I am not satisfied disclosure of this information could reasonably be expected to prejudice the protection of an individual's right to privacy.
- Document 16 (page 3) – this material refers to the name of a school. Education submits that identification of the school in the context of litigation and social media could enable a person to be identified. The document does not discuss any issues regarding the school in the context of litigation or social media. Furthermore, the students' name is to be withheld under schedule 2, s 2.2(a)(ii) of the FOI Act. Given the number of students who attend the school in question, I do not accept that identifying the name of the school could reasonably be expected to lead to that student being identified. As such, I am not satisfied disclosure of this information could reasonably be expected to prejudice the protection of an individual's right to privacy.

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

81. Education has submitted that documents eight, nine, 14, 16, 24, 25, 32 and 33 contain 'information relating to business affairs of persons or organisations has been deleted from the documents' and this information should not be disclosed in order to protect business information, particularly the names of employees.

82. However, Education has not specified how the disclosure of this information would prejudice the business affairs of the people or businesses to which the information relates. Furthermore, I

have reviewed a copy of the un-redacted information and in my view there is no apparent sensitivity to the information.

83. I accept that information pertaining to third party businesses working with or providing information to the ACT Government is 'business information'. However, I am of the view that disclosing this fact could not reasonably be expected to prejudice the business affairs of the third parties. Based on the information before me, I am not satisfied this factor is applicable, noting the FOI Act places the onus on the party seeking not to disclosure information.

Prejudice intergovernmental relations

84. Education has submitted that documents 42A, B, C, D and 49B contain Education Council briefs and papers and if this information is disclosed, this would prejudice intergovernmental relations.
85. I consider the purpose of this factor favouring non-disclosure is to protect the relationships between Australian Governments. I also consider the additional factor of protecting an agency's ability to obtain confidential information, in these circumstances, also relates to protecting these relationships.
86. Accordingly, for disclosure to prejudice intergovernmental relations, the disclosure of the information should reveal information provided in confidence between the ACT, Federal or other State and Territory Governments.
87. The Education Council is a national body which provides a forum to coordinate education policy at the national level. The documents contain information provided to the Education Council from all States and Territories in relation to their respective responses to Covid-19.
88. Having reviewed a copy of the un-redacted information, my preliminary view is the information may prejudice intergovernmental relations on the grounds the information was communicated on a confidential basis and disclosure could reasonably be expected to:
- adversely affect ongoing intergovernmental relations
 - cause another government to be hesitant about providing information to the ACT Government in the future
 - result in a loss of trust and cooperation between governments, and
 - prejudice the workings of the Education council specifically, including the full and open participation by all of it's members.
89. Given the importance of high level intergovernmental cooperation in times of national crisis (such as Covid-19), I afford the protection of the information in Documents 42A, B, C, D and 49B significant weight.

Prejudice an agency's ability to obtain confidential information

90. Education also submitted that disclosure of information in Documents 42A, B, C, D and 49B would prejudice an agency's ability to obtain confidential information on the basis the documents were written in the spirit of cooperation and confidentiality at high levels of government'.
91. I already determined that the information was provided in confidence by various third parties. It is reasonable then, to expect that disclosure of the documents would prejudice the ACT Government's ability to obtain similar information in forthcoming scenarios of a similar nature.
92. As already noted above, the ability to obtain confidential information for the purposes of managing a crisis such as Covid-19 is of significant importance. Accordingly, I afford the protection of the information in Documents 42A, B, C, D and 49B significant weight.

Balancing the factors

93. As I have identified public interest factors favouring disclosure and non-disclosure, I now must consider the public interest balancing test as set out in s 17 of the FOI Act.
94. I note that balancing public interest factors is not, however, simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being consider in the public interest. The decision-maker's task is to consider the relative importance and weight of each factor they have identified. The weight given to a factor will depend on the effect that disclosing the information would have on the public interest.
95. The FOI Act also has a pro-disclosure bias, and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side, rather the scales are 'laden in favour of disclosure'.¹⁰
96. I am satisfied, on balance, the names of government staff in the context identified at paragraph 73, the public interest factors favouring disclosure outweigh the public interest factors favouring nondisclosure due to the fact that disclosure would only reveal that government employees are performing their normal duties.
97. I am satisfied that, on balance, in relation to third party business information, the public interest factors favouring disclosure outweigh the public interest factors favouring non-disclosure due to the fact that Education has not provided sufficient evidence as to why disclosure would prejudice the business affairs of third parties.
98. For all the remaining information, based on the information before me in this review, I am satisfied, on balance, the public interest factors favouring nondisclosure outweigh the public interest factors favouring disclosure. This is because, as discussed above, I consider there is

significant public interest in the ACT government's ability to obtain confidential information and maintain strong intergovernmental relations in a time of public crisis.

Conclusion

99. Under s 82(2)(b), I vary the respondent's decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

100. I consider that the applicant should be given access to the information in:

- Document one, page seven;
- Document four in its entirety;
- Document eight, page one;
- Document nine, page one, paragraph one;
- Document nine, page two;
- Document 12 in its entirety;
- Document 14, page two;
- Document 16, page two in its entirety;
- Document 16, page three in its entirety with the exception of a third party's name;
- Document 21, page two in its entirety;
- Document 23, with the exception of the names of third party individuals that have been withheld;
- Document 24, page three;
- Document 25, page three, paragraph one;
- Document 32 with the exception of the names of third party individuals that have been withheld;
- Document 33, page two; and
- Document 33, page three with the exception of the names of third parties individuals that have been withheld

Symone Andersen

Acting Senior Assistant Ombudsman

15 June 2021