

BF and Canberra Health Services [2021] ACTOFOI 4 (6 May 2021)**Decision and reasons for decision of Acting Senior Assistant
Ombudsman, Symone Andersen**

Application Number	AFOI-RR/21/10006
Decision Reference	[2021] ACTOFOI 4
Applicant	BF
Respondent	Canberra Health Services
Decision Date	6 May 2021
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – allow or assist inquiry into possible deficiencies in the administration of an agency – an individual’s right to privacy – an agency’s ability to obtain confidential information – the management function of an agency or the conduct of industrial relations

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (ACT) (FOI Act)*.
2. Under s **82(2)(a)** of the FOI Act, I **confirm** the decision of Canberra Health Services (**CHS**) dated 1 February 2021.

Background of Ombudsman review

3. On 5 January 2021, the applicant applied for access to information described as the ‘2018 ACT Physicians network’s Clinical Examination Review.’
4. CHS identified one document fitting this description and decided to give partial access to the information it contained on 1 February 2021.

5. In deciding to give partial access, CHS relied on s 17 of the FOI Act as well as Schedule 2, ss 2.2(a)(ii), (vii), (xv) and (xvii). That is, CHS decided some of the information was contrary to the public interest to disclose because, variously, it could reasonably be expected to prejudice, an individual's right to privacy under the *Human Rights Act 2004* (ACT) (**Human Rights Act**); CHS' ability to obtain confidential information; CHS' management function and conduct of industrial relations; and the effectiveness of teaching or auditing procedures.
6. On 4 February 2021, the applicant applied for an Ombudsman review of CHS' decision under s 74 of the FOI Act.
7. I provided the parties with my preliminary views in a draft consideration on 1 April 2021. I asked that any further submissions the parties wished to make be submitted to me by 14 April 2021.
8. CHS responded to my draft consideration on 13 April 2021. I address CHS' submissions in this notice along with the other contentions of the parties.
9. After reviewing the submissions CHS made in response to my draft consideration, I contacted the applicant to give him an opportunity to respond. I took this step because I was persuaded by CHS' submissions about the names of persons who delivered training, which appear in questions 12 and 14. The applicant did not respond within four working days either to lodge submissions or to request more time to lodge submissions. Accordingly, I proceeded to make my final decision.

Information at issue

10. The information at issue in this review is the information that CHS redacted from the document it provided to the applicant.
11. The issue to be decided by me is whether the information at issue is contrary to the public interest information.
12. In deciding this matter, I have had regard to:
 - the applicant's original access application and their application for Ombudsman review
 - CHS' decision letter
 - CHS' letter to the Ombudsman in response to the review application
 - CHS' submissions in response to my draft consideration
 - the FOI Act, in particular Schedule 2, ss 2.2(a)(xii) and (xv)

Relevant law

13. The FOI Act gives every person an enforceable right of access to government information, subject to any provisions of the Act providing a basis on which access can be refused.¹
14. 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
15. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.²
16. The public interest test provided for in s 17 sets out a process for balancing public interest factors favouring disclosure and nondisclosure respectively. This balancing test must be used to determine whether disclosure would be contrary to the public interest.
17. Where a record contains some information that is contrary to the public interest, as well as information that is in the public interest to disclose, the contrary to the public interest information should be deleted, where practicable.³
18. The onus of establishing information should not be disclosed rests with the party seeking to prevent disclosure.⁴
19. Schedule 2 of the FOI Act sets out public interest factors to be balanced when conducting the s 17 test to determine the public interest.

The contentions of the parties

20. In its decision notice, CHS said:

Partial redactions have been made to the teaching contributors names contained on pages 13-14 and 16-17 and to participants verbatim comments on pages 22-23 as I believe this constituted (sic) an unreasonable disclosure of individuals' personal information. On balance, the factors favouring disclosure did not outweigh the factors favouring disclosure as the substantive information has been provided. The release of this information would or could reasonably be expected to have a

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

³ Section 50 of the FOI Act.

⁴ Section 72 of the FOI Act.

detrimental effect for the agency's ability to conduct future reviews within the organisation as it may reduce engagement and diminish the honest and truthful participation of staff members completing these feedback requests and the volunteers providing their educational resources.

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

The decision maker has used no basis for invocation of Section 17... Some of the information... which has been withheld does not identify individuals, nor could it lead to identification of individuals.

22. In its response to my draft consideration, CHS said:

CHS routinely discloses the names of ACT Government staff engaged in the business of government under the FOI Act and agrees this promotes transparency and accountability. On this occasion, CHS outlined that one of the factors that weighed heavily in its decision not to release the identity of volunteer staff specialists who deliver training, is specific to CHS duty of care and protection of personal information towards its employees.

23. I address these contentions in my reasons below.

Considerations

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

24. Neither party to this Ombudsman review suggested the information sought 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 at issue to be contrary to the public interest information disclosure, it must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

Public interest test

25. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:⁵

- 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

⁵ Section 17(1) of the FOI Act.

- 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 2.1
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure
- decide whether, on balance, disclosure of the information would be contrary to the public interest
- unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information

Irrelevant factors

26. I do not consider any irrelevant factors I am prohibited from considering arise in this review.⁶

Factors favouring disclosure

27. CHS decided that three public interest factors favouring disclosure were relevant. These were Schedule 2, s 2.1(a)(i): promote open discussion of public affairs and enhance the government's accountability, Schedule 2, s 2.1(a)(ii): contribute to positive and informed debate on important issues or matters of public interest and Schedule 2, s 2.1(a)(iv): ensure effective oversight of expenditure of public funds.
28. CHS' decision letter did not expand on how these factors were relevant. I disagree with the view that they are relevant. I do not think there is sufficient evidence on which to form a view that the survey is of any real interest to the public such that it is a matter of public discussion or debate. The information at issue is not financial information so I do not agree that disclosing it could assist oversight of public monies.

Allow or assist inquiry into possible deficiencies in the administration of an agency

29. A reasonable expectation that disclosure could allow or assist inquiry into possible deficiencies in government administration is a factor favouring disclosure under the FOI Act.⁷
30. In general, the results of a survey conducted to ascertain whether government administration has operated effectively could reasonably be expected to promote this public interest factor. The transparency which enables members of the public to access information

⁶ Section 17(2) of the FOI Act.

⁷ Schedule 2, s 2.1(a)(v) of the FOI Act.

increases the scrutiny on which public confidence relies. The wording in the FOI Act uses the verb ‘inquiry’ rather than ‘exposure’ to emphasise that it is the opportunity to scrutinise in case there may be deficiencies that is in the public interest.

31. In a review where the information at issue revealed serious deficiency, I may be inclined to afford this factor more weight. In this case, the opportunity to inquire is only generally relevant. Accordingly, I have afforded a moderate amount of weight to this factor.

Pro-disclosure bias

32. Additionally, the FOI Act has an express pro-disclosure bias which reflects the importance of access to government information for the proper working of representative democracy.⁸ This is promoted in the objects of the FOI Act.⁹
33. For these reasons, my preliminary view is the information at issue could reasonably be expected to promote the objects of the FOI Act and two public interest factors.

Factors favouring nondisclosure

34. Five factors favouring non-disclosure are relevant to the information at issue.

An individual’s right to privacy

35. A reasonable expectation that disclosure could prejudice an individual’s right to privacy under the Human Rights Act,¹⁰ weighs against disclosure under the FOI Act.¹¹
36. Section 12 of the Human Rights Act provides:
- Everyone has the right—
- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
 - (b) not to have his or her reputation unlawfully attacked.
37. There are two types of information in this review which CHS decided could prejudice individual privacy. The first category is the names of staff who deliver training. The second category is commentary and feedback provided by respondents to the survey.

⁸ Section 17 of the FOI Act.

⁹ Section 6(b) of the FOI Act.

¹⁰ *Human Rights Act 2004 (ACT)*.

¹¹ Schedule 2, s 2.2(a)(ii) of the FOI Act.

38. My preliminary view, which I set out in my draft consideration, was that the names of the volunteer staff specialists who deliver training is not information that could reasonably be expected to prejudice the right to privacy under s 12 of the Human Rights Act.
39. In response to my draft consideration, CHS submitted that:
- The identity of staff specialists providing training modules does not provide better oversight of the success of students.
40. This submission does not address the issue of whether a right to privacy under s 12 of the Human Rights Act is applicable in the present matter. The fact that a person delivers training to students is not a secret or private matter. Any number of people might be aware that a person delivers training.
41. In relation to the second category of information, I accept that the right to privacy under s 12 of the Human Rights Act could reasonably be expected to suffer prejudice from the disclosure of the information. A written response to a confidential survey is private correspondence and therefore within the scope of the right to privacy protected by s 12. The fundamental difference is that a person's comments in an anonymous survey are private and reasonably likely to remain so. A person can control the privacy of their feedback by opting not to disclose to any other person what they said. A person cannot however control other people publishing the fact that they deliver training, unless that training is subject to formal secrecy of a special nature that is lacking here.

An agency's ability to obtain confidential information

42. A reasonable expectation that disclosure could prejudice an agency's ability to obtain confidential information weighs against disclosure under the FOI Act.¹²
43. This public interest factor reflects the fact that an agency may find it difficult to obtain information if people are unwilling to provide it other than confidentially. Where a person is free to choose whether or not to provide confidential information, the FOI Act attempts to safeguard the information they share so that a person is less likely to be impeded from sharing by concern that their disclosure will be published. As it is a Schedule 2 factor it must be balanced against other public interest factors when considering the public interest test.
44. The information at issue includes responses to a survey in which participation was optional. Respondents were told that their comments would be anonymous. It is reasonable to expect

¹² Schedule 2, s 2.2(a)(xii) of the FOI Act.

that a person considering whether to opt in and what to say rely significantly on the understanding that their comments are confidential. CHS' decision letter states this and I concur with it. I consider the participants' survey responses could reasonably be expected to prejudice CHS' ability to obtain confidential information to a significant degree.

The management function of an agency or the conduct of industrial relations

45. A reasonable expectation that disclosure could prejudice the management function or industrial relations of an agency weighs against disclosure under the FOI Act.¹³
46. In my draft consideration, I commented that I was not satisfied CHS has discharged the onus it bears under s 72 of the FOI Act. As the party seeking to prevent disclosure, CHS must establish that it is contrary to the public interest information.
47. In response to my draft consideration, CHS submitted:

It is foreseeable that the possibility of perceived reputational damage, reliant on the successful pass rates of students, would provide a significant impediment to recruiting future volunteers
48. It was not entirely clear to me whether CHS' response to my draft consideration submitted that this factor weighed against disclosure of the names of those delivering training or whether it was referring to the individual privacy factor. CHS' submission could have been more clearly directed towards relevant public interest factors in the FOI Act.
49. CHS' submission may be interpreted as invoking the public interest factor which has regard to the management function of an agency or the conduct of industrial relations. In this respect, I accept the information at issue could reasonably be expected to cause prejudice if disclosed. The identities of persons who delivered particular training may be information that circulates publicly, but I accept that releasing a document placing individual names adjacent to survey results which are apparently meant to reflect their performance could prejudice the management function or industrial relations of CHS.

The effectiveness of testing or auditing procedures

50. A reasonable expectation that disclosure could prejudice the effectiveness of testing or auditing procedures weighs against disclosure under the FOI Act.¹⁴

¹³ Schedule 2, s 2.2(a)(xv) of the FOI Act.

¹⁴ Schedule 2, s 2.2(a)(xvii) of the FOI Act.

51. CHS' decision letter stated that this factor was weighed against disclosure. In my draft consideration, I commented that I was not satisfied CHS has discharged the onus it bears under s 72 of the FOI Act. CHS did not direct any of its submissions in response to my draft consideration to this factor. I maintain the view I expressed in my draft consideration that the onus imposed by s 72 has not been discharged.

Balancing the factors

52. The FOI Act requires me to balance the factors favouring disclosure against that favouring non-disclosure.

53. I have decided that one factor favours disclosure and three factors favour non-disclosure. I am not satisfied that any weight should be given to the effectiveness of testing or auditing procedures because CHS did not establish this should be a basis for refusal of access.

Written responses in questions 17 and 18

54. In my view, the information at issue could reasonably be expected to promote inquiry into possible deficiencies in the administration of CHS. My decision is to afford this factor a medium amount of weight.

55. On the other hand, I am satisfied disclosing this information could prejudice CHS' ability to obtain confidential information significantly and afford this factor favouring nondisclosure considerable weight. I also accept that disclosing this information could reasonably be expected to prejudice the right to privacy enjoyed by the individual authors under s 12 of the Human Rights Act.

56. On balance, my decision is that the written responses in questions 17 and 18 are contrary to the public interest information and should not be disclosed to the applicant.

Trainer names in questions 12 and 14

57. Given the fields of study are identified in questions 12 and 14, I accept the names of individual trainers do not promote the inquiry into possible deficiencies in CHS' training to a considerable degree. I afford the pro-disclosure factor a medium amount of weight in relation to this information because there may be a connection between the effectiveness of training and the person delivering it but there may be other deficiencies in training which are broader than the individual delivering it.

58. I am satisfied that disclosure of the names of the CHS staff adjacent to what may be interpreted (rightly or wrongly) as appraisals of their performance as trainers could reasonably be expected to prejudice CHS' management function and conduct of industrial relations. This factor weighs heavily against disclosure, although the evidence from CHS could have been clearer on this point. I do not accept that the status of these individuals as trainers is private and do not afford any weight to the protection of individual privacy under s 12 of the Human Rights Act. The decisive weight is in preventing prejudice to the management function and conduct of industrial relations by CHS. My decision is that the names redacted from questions 12 and 14 are contrary to the public interest information.

Pro-disclosure bias

59. The FOI Act has a pro-disclosure bias. The public interest test and weighing of factors is approached as though the scales are 'laden in favour of disclosure'.¹⁵

60. In this review, however, I am satisfied that on balance, the public interest is weighed persuasively against disclosure.

61. While I agree with CHS' decision to give partial access to the information, I have come to this conclusion based on different reasons.

Conclusion

62. For these reasons, my decision is to **confirm** the decision of CHS under s 82(2)(a) of the FOI Act, albeit for different reasons I have given above.

63. The information at issue is contrary to the public interest information to which the applicant should be refused access.

Symone Andersen

Acting Senior Assistant Ombudsman

6 May 2021

¹⁵ [Explanatory Statement, Freedom of Information Bill 2016.](#)