

'BO' and ACT Ombudsman [2021] ACTOFOI 17 (6 December 2021)

Decision and reasons for decision of Acting Deputy Ombudsman, Louise Macleod

Application Number	AFOI-RR/21/10030
Decision Reference	[2021] ACTOFOI 17
Applicant	'BO'
Respondent	ACT Ombudsman
Decision Date	6 December 2021
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – information in possession of Ombudsman – <i>Ombudsman Act 1989</i> -

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 ACT Ombudsman, dated 28 September 2021.

Background of Ombudsman review

3. On 14 September 2021, the applicant applied to the ACT Ombudsman (respondent) for access to the following information:

'...I would like to request two reports regarding myself [name withheld] ... , under the FOI Act. The reports were written by [name withheld] of [organisation withheld], working out of the ACT Together consortium investigating reportable conduct allegations. I was told by [name withheld] that these final reportable conduct reports were provided to the Ombudsman's Office.

The first report was finalised around the end of November 2020.

The second report was finalised around the start of February 2021...'

4. On 28 September 2021, the respondent advised it identified 2 documents as falling within the scope of the access application and decided to refuse access in full to both documents.
5. In making its decision, the respondent relied on Schedule 1, s 1.12(c) of the FOI Act.
6. On 2 November 2021, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
7. On 18 November 2021, I provided my preliminary views about the respondent's decision to the parties in a draft consideration.
8. On 22 November 2021, the respondent advised they accepted my draft consideration and had no further submissions.
9. The applicant did not provide any further submissions

Information at issue

10. The information at issue in this Ombudsman review are the two documents the ACT Ombudsman refused access to.
11. 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.
12. In making my draft consideration, I considered:
 - the applicant's access application and review application
 - the respondent's decision
 - the FOI Act, in particular Schedule 1, s 1.12(c)
 - the *Ombudsman Act 1989* (Ombudsman Act)
 - the respondent's FOI processing file relating to the access application
 - an unedited copy of the information at issue.

Relevant law

13. 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.¹

¹ Section 7 of the FOI Act.

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. 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.
16. 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 was deleted.
17. The FOI Act provides that a party seeking to prevent disclosure of government information bears the onus of establishing the information is contrary to the public interest information²
18. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose.

The contentions of the parties

19. In its decision notice, the respondent said:

Schedule 1 section 1.12(c) provides that information in the possession of the Ombudsman that has been obtained or generated in relation to a function exercised under the *Ombudsman Act 1989*, division 2.2A (Reportable conduct) is information the disclosure of which is taken to be contrary to the public interest.

All of the information falling within the scope of your access application is information which was obtained or generated in relation to a function exercised by the Ombudsman under division 2.2A of the *Ombudsman Act 1989*.

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

...Schedule 1.12 does not explain anything other than to say that you were provided with information about me in relation to the reportable conduct investigation. I am asking for that information about myself, nobody else, so I fail to see how this applies to me.

I need copies of the reports I have requested access to in order to challenge reportable conduct allegations which have been substantiated. These substantiations have smeared my name and made it difficult to regain my WWVP registration, which affects my ability to work and to volunteer. I was unable to provide definitive proof that these reports never occurred, though I did submit a lot of information supporting the fact that the allegations were false. I have been provided with a final finding on the reportable conduct investigation, but the documented findings do not reflect the

² Section 72 of the FOI Act.

information that the investigator told me was included in the report. In order to appropriately refute the substantiations, I need to know what was included in the report presented to the Ombudsman.

.. Additionally, the report is about me and I have the right to know what is contained therein. I also have the right to challenge the finding as I am innocent of these substantiations.

21. These submissions are discussed in more detail below.

Considerations

22. 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

23. Schedule 1, section 1.12(c) provides that information in the possession of the Ombudsman that was obtained or generated in relation to a function exercised under division 2.2A (Reportable Conduct) of the Ombudsman Act, is information the disclosure of which is taken to be contrary to the public interest.

24. Under Schedule 1 of the FOI Act, information is taken to be contrary to the public interest unless the information identifies corruption or the commission of an offence by a public official or the scope of a law enforcement investigation exceeds the limits imposed by law.

25. The applicant alleges the exceptions outlined above are relevant on the basis there has been corruption in a reportable conduct investigation to which the documents at issue relate. The applicant states:

The investigator used a CYPs appraisal report to determine the findings, though the two processes are purportedly independent and separate. Also, the child at the heart of these allegations is returning to my care, as [named employee] of the CSD has made the decision that it is in his best interests.

26. I reviewed the information at issue, and I am satisfied it does not fall under the exceptions outlined in Schedule 1. The applicant did not provide sufficient information to determine that corruption took place in the reportable conduct investigation or subsequent reports. Based on the information before me, I am satisfied 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.

27. After reviewing a copy of the un-redacted material, I agree with the respondent that the entirety of the information in both documents is information that was obtained or generated in

relation to a function exercised by the Ombudsman under division 2.2A of the Ombudsman Act. The applicant's claim that the documents contain personal information about them has no bearing on the applicability of Schedule 1, s 1.12(c) of the FOI Act. For this reason, I am satisfied the information at issue is contrary the public interest information under Schedule 1, s 1.12(c) of the FOI Act and should not be disclosed.

Conclusion

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

Louise Macleod
Acting Deputy Ombudsman

6 December 2021