

'BQ' and University of Canberra [2022] ACTOFOI 2 (25 March 2022)**Decision and reasons for decision of Acting Senior Assistant****Ombudsman Symone Andersen**

Application Number	AFOI-RR/21/10018
Decision Reference	[2022] ACTOFOI 2
Applicant	BQ
Respondent	University of Canberra
Decision Date	25 March 2022
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – promote open discussion of public affairs and enhance the government's accountability – individual's right to privacy – agency's ability to obtain confidential information – disclosure is prohibited by an Act of the Territory, a State or the Commonwealth

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (FOI Act)*.
2. For the reasons set out below, I have decided to, under s **82(2)(a)** of the FOI Act, **confirm** the University of Canberra (UC)'s decision of 15 June 2021.

Background of Ombudsman review

3. On 30 March 2021, the applicant submitted two separate access applications to the respondent.
On 14 May 2021, the scope of each application was agreed as follows:

First application

1. Records dated between 1 January 2019 until 14 May 2021 regarding sexual misconduct, which are:
 - a. email briefings;
 - b. reports made in the University's incident reporting system;
 - c. audits; and
 - d. AV material including CCTV, video footage and photos, held by:
 - e. the Office of the Vice-Chancellor;
 - f. the Office of the Dean of Students; and
 - g. People and Diversity.

Second application

1. Records between 1 January 2019 until 14 May 2021, that are:
 - a. email briefings;
 - b. reports; and
 - c. AV material including CCTV, video footage and photos, held by the Office of the Vice-Chancellor, regarding
 - d. staff misconduct;
 - e. staff bullying; and
 - f. staff harassment.
 2. Quarterly reports prepared by People and Diversity containing summaries of the status of investigations regarding the matters identified at 1(d), 1(e) and 1(f), between 1 January 2019 and 14 May 2021.
4. On 15 June 2021, UC advised the applicant it had identified 38 documents as in-scope across the two applications.
 5. UC advised that it withheld one additional document while it consulted with a relevant third party and this document was ultimately released to the applicant.
 6. UC refused access to all remaining documents in full. In making its decision, UC relied on Schedule 2, ss 2.2(a)(ii), (a)(xii) and 2.2(b)(iv) of the FOI Act.
 7. On 17 June 2021, the applicant applied for Ombudsman review of UC's decision under s 73 of the FOI Act.

8. On 26 November 2021, I sent my draft consideration to the parties, indicating that I was inclined to confirm the decision.
9. On 30 November 2021, the applicant wrote to me to make additional submissions which I considered below, while making my final decision.
10. On 6 December 2021, UC wrote to me to advise that it accepted the view I set out in my draft consideration and did not wish to make further submissions.

Information at issue

11. The information at issue in this Ombudsman review are the documents withheld by UC.
12. The issue to be decided is whether giving the applicant access to this information would be contrary to the public interest.
13. In making my decision, I had regard to:
 - the applicant's access and review applications
 - UC's decision notice
 - the ACT Ombudsman FOI Guidelines (the **Guidelines**)
 - the FOI Act, in particular Schedule 2, s 2.2(a)(ii), (xi) and 2.2(b)(iv)
 - UC's FOI processing file relating to the applicant's access application
 - the applicant's response to my draft consideration, and
 - an unedited copy of the information at issue.

Relevant law

14. 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.
15. 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.
16. 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.

17. 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.
18. 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.
19. 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

20. In its decision notice, UC said:

I have decided in this instance, the public interest in disclosing email briefings, reports and AV material about sexual misconduct and staff misconduct, bullying and harassment is outweighed by the public interest against disclosure. This is because disclosure of this information would:

1. prejudice individuals' rights to privacy;
2. be prohibited (without consent) by the IPA; and
3. prejudice the University's ability to obtain confidential information in the future.

21. The applicant's review application said:

I disagree with the exemptions applied and would expect the documents to at least be released in part with personal information redacted, including in relation to AV material such as video footage. I would expect identifying information such as faces or a distinctive tattoo to be blurred before release.

The public interest test was also incorrectly applied in that arguments favouring disclosure outweigh arguments favouring non-disclosure.

22. In response to my draft consideration, the applicant also submitted that:

I understand the argument against disclosure, but my experience is many of those who have complained about these issues are happy to have them disclosed with their names and specific identifying information... redacted.

...

For universities to be accountable and given the findings of the AHRC which found that their efforts so far were insufficient, I think its important that some disclosure should be provided even if the bulk of the information would need to be redacted.

Considerations

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

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

24. Neither party to this review suggested the information at issue is contrary to the public interest information under Schedule 1. Accordingly, I considered whether the information at issue was, on balance, 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 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.

26. 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

27. I have noted 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

28. One factor favouring disclosure is relevant in this review.

Promote open discussion of public affairs and enhance the government's accountability

29. I consider that allegations of sexual misconduct, bullying and harassment and the management of these allegations by UC is a matter of public interest. UC is a higher education provider in the ACT and the public has an obvious interest in UC managing allegations effectively. Disclosing the information at issue could therefore promote open discussion of public affairs and enhance the government's accountability.

Pro-disclosure bias

30. 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

31. For these reasons, I am satisfied that disclosure of the information sought could reasonably be expected to promote the objects of the FOI Act and factor 2.1(a)(i).

Factors favouring non-disclosure

32. Three factors favouring non-disclosure are relevant in this review.

An individual's right to privacy

33. Section 12(a) of the *Human Rights Act 2004* (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 any more general right to privacy but can essentially be interpreted as the right of an individual to preserve their personal sphere from interference by others.

34. 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.

35. Personal information is defined in s 8(1) 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.

36. The respondent states that disclosure of the information in all documents could reasonably be expected to prejudice the protection of an individual's right to privacy.

¹ See s 17 of the FOI Act.

² See s 6(b) of the FOI Act.

37. The respondent submitted:

I have applied Schedule 2, 2.2(a)(ii) of the Act to all records which are about sexual misconduct, staff misconduct, staff bullying and staff harassment, and include the following types of information:

1. identifying information about complainants, witnesses, confidants, staff, students, third parties, and offenders (alleged and substantiated);
2. complaints, reports, briefings about incidents – whether true or not;
3. personal decisions, opinions and discussions; and
4. specific individual circumstances and environments.

The individuals considered in these records would expect the University to protect their privacy. I am satisfied the disclosure of this information could reasonably be expected to prejudice the protection of their right to privacy.

38. I have reviewed a copy of the unredacted material, which includes both documents and video files. I agree with the respondent insofar as the majority of the information contained in the documents would fall into one of the categories mentioned at paragraph 37. Further, the applicant does not dispute that the information is personal information for the purposes of Schedule 2, 2.2(a)(ii) of the FOI Act. The applicant states:

I disagree with the exemptions applied and would expect the documents to at least be released in part with personal information redacted, including in relation to AV material such as video footage. I would expect identifying information such as faces or a distinctive tattoo to be blurred before release.

39. In my opinion, the redaction of any identifying material would leave only a shell of a document that would contain little to no informative material. Given the volume of information (including video files), I consider it would be unreasonable for the respondent to do so. Further, where there is information that may not be considered as personal information, it is so intertwined with the personal information of third parties that it would be impractical to separate. I also note that the respondent offered to create and provide the applicant with statistical information that would not capture any personal information and that this offer was declined.

40. I have decided that release of the information at issue could reasonably be expected to prejudice the protection of an individual's right to privacy. Considering the serious nature of the information and the context in which it was provided and/or captured by the respondent, I have afforded significant weight on this non-disclosure factor.

41. The applicant requested that the individuals who made the allegations be consulted with. However, s 38 of the FOI Act requires consultation only where the respondent considers that 'some or all of the government information applied for is not contrary to the public interest information.' This is because the emphasis of s 38 of the FOI Act is with notifying individuals that

information about them might be disclosed so that they are given an opportunity to comment or seek a review if they consider that the decision is incorrect. Section 38 of the FOI Act does not require that a decision-maker seek the personal preferences of persons when information is contrary to the public interest and therefore not to be disclosed. A requirement to do this would significantly increase the necessary resources that a respondent must deploy to process an access application. Moreover, the information at issue relates to sensitive matters and individuals may not wish to be contacted at a later date to be asked whether the information should be disclosed. Accordingly, I consider that UC acted in a manner consistent with its obligations under the FOI Act and exercised any discretion under s 38 of the FOI Act appropriately in the circumstances.

Agency's ability to obtain confidential information

42. The Guidelines state that this factor is more likely to be relevant where:

- the information that is applied for is of a confidential nature; and
- it was obtained in confidence.

43. Information is of confidential nature if it is secret or only known to a limited group.³ It is reasonable to assume that the information at issue would only be known to those parties who are directly involved. There is nothing before me to suggest that the information has been widely distributed by the respondent. Further, considering the sensitive nature of the information, I have no reason to believe that the third parties (to whom the information relates) would have distributed the information. The applicant has not provided any submissions to the contrary. As such, I found the information to be of a confidential nature.

Obtained in confidence

44. Agencies need to determine if the information was communicated and received under an express or implied understanding that the information would be kept confidential.⁴ In their original decision, the respondent submitted:

Where this factor has been applied, the University has obtained that information on the basis it was obtained confidentially. The University encourages staff, students, and the public to report incidents, especially those of a serious nature as contemplated in the scope of these FOI applications. The University explicitly provides to anyone making a report, that the report "will be treated confidentially and with respect."

45. In response to this review, the respondent provided additional submissions on this factor:

³ *Francis and Australian Sports Anti-Doping Authority (Freedom of Information)* [2019] AATA 12 [104].

⁴ *Re Maher and Attorney-General's Department* [1985] AATA 180.

The University affirms the information that is reported to the University, is provided on the condition that information is to be held in confidence. If the University discloses those reports publicly, and freely available on its website, the University's ability to continue to obtain that information and retain the trust of its community, is severely diminished.

46. The respondent provided our office with examples of documents which they provide to individuals making a report, the documents expressly state information provided in a report will be treated in confidence. It is reasonable then to expect that third parties who have provided this information have done so on the premise that it would be kept in confidence. The applicant has not provided any submissions to the contrary. As such I found the information was obtained under the express understanding that it would be kept confidential.

Prejudice the agency's ability to obtain confidential information in the future

47. Agencies must establish that disclosure of the information could reasonably be expected to prejudice the agency's ability to obtain confidential information in the future. It is not sufficient for agencies to make broad claims of prejudice. To support their claim, agencies need to establish a factual basis and not make mere assertions speculating as to the possible consequences of disclosure.⁵

48. The respondent submits:

If the University discloses this kind of information to the public, the University's ability to obtain that kind of information in the future may be prejudiced. The University relies on its community to report such incidents so that it can take appropriate action.

49. I agree with the respondent insofar as students or other members of the public would be far less inclined to provide information to UC if that information were to be released to the wider public. I accept that it is of significant importance that members of the public feel safe to provide the type of information included in scope so that UC can take appropriate action. Accordingly, I consider disclosure of the information in documents 12-26 (application one) and 1-5 and 8 (application two) could reasonably be expected to prejudice the respondent's ability to obtain confidential information. Given the importance and serious nature of the information, I have afforded this factor significant weight.

Disclosure is prohibited by an Act of the territory, a State or the Commonwealth

50. Schedule 2, section 2.2(b)(iv) is a factor favouring nondisclosure if the information is information disclosure of which is prohibited by an Act of the Territory, a State or the Commonwealth.

51. The respondent submitted:

⁵ Ombudsman FOI Guidelines 4, considering the public interest, page 68.

The University is subject to the *Information Privacy Act 2014* (ACT) (IPA). The IPA regulates the handling of personal information by public sector agencies.

The records in scope of the FOI applications contain personal information pursuant to section 8 of the IPA. The University must use and disclose personal information in accordance with the IPA. The University does not have consent from the individuals whose information is included in the records to disclose their personal information to the public.

If the University releases the personal information of these individuals without their consent, the release of that personal information may result in those individuals making a privacy complaint against the University to the Australian Information Commissioner pursuant to section 34 of the IPA.

52. I have considered territory privacy principle (TPP) 6, which covers the use or disclosure of personal information held by an agency. TPP 6.1 relevantly provides:

If a public sector agency holds personal information about an individual that was collected for a particular purpose (the primary purpose), the agency must not use or disclose the information for another purpose (the secondary purpose) unless—

- a. the individual has consented to the use or disclosure of the information; or
- b. TPP 6.2 or TPP 6.3 applies in relation to the use or disclosure of the information

53. TPP 6.2 applies in relation to the use or disclosure of personal information where disclosure of the information is required or authorised by or under an Australian law or court or tribunal order.

54. I consider that disclosure under the FOI Act would constitute disclosure authorised by an Australian law. As such, I do not consider that Schedule 2, section 2.2(b)(iv) of the FOI Act is applicable in this case and I have afforded it no weight.

Balancing the factors

55. I considered the public interest balancing test as set out in s 17 of the FOI Act.

56. I identified one factor favouring disclosure and two factors favouring non-disclosure. I was not satisfied that any weight should be given to the non-disclosure factor ss 2.2(b)(iv) as the respondent suggested on the basis it is not applicable.

57. I found that disclosure of the documents in general could promote open discussion of public affairs and enhance the respondent's accountability. However, the specific details contained within, which make up a significant amount of the documents, is unlikely to contribute to this pro-disclosure factor. Therefore, I afforded this factor minimal weight.

58. I found that disclosure of the documents could prejudice an agency's ability to obtain confidential information and prejudice the protection of an individual's right to privacy. For the reasons discussed above I afforded each significant weight.

59. I am satisfied that, on balance, the public interest factors favouring non-disclosure outweigh the public interest factors favouring disclosure for all the information sought.

Conclusion

60. Under s 82(2)(a) of the FOI Act, I have decided to **confirm** UC's decision to refuse access to the information at issue under s 35(1)(a).

Symone Andersen
Acting Senior Assistant Ombudsman
25 March 2022