

'BL' and Education Directorate [2021] ACTOFOI 13 (29 October 2021)**Decision and reasons for decision of Acting Senior Assistant Ombudsman
Symone Andersen**

Application number	AFOI-RR/21/10024
Applicant	'BL'
Respondent	Education Directorate
Decision Date	29 October 2021
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – contribute to positive and informed debate on important issues or matters of public interest – ensure effective oversight of expenditure of public funds – trade secrets, business affairs or research

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)(c), I have decided to **set aside** the decision of the Education Directorate (**Education**) and **substitute** my decision that the applicant should be given access to the information at issue.

Background of Ombudsman review

3. On 5 July 2021, the applicant made an access application under the FOI Act. The applicant applied to Education for access to:
 - (1) Annual Financial Reports and Statements [of Brindabella Christian College] provided to the Education Directorate since 1 January 2019
 - (2) Any explanatory notes or additional correspondence between the Directorate and [Brindabella Christian] College (or its representatives) regarding (1).
4. On 29 July 2021, Education's Information Officer decided to refuse access to 3 documents.
5. On 1 August 2021, the applicant applied for Ombudsman review of Education's decision under s 73 of the FOI Act.

6. On 8 September 2021, Brindabella Christian College applied to be a participant in this review under s 77(2) of the FOI Act.
7. On 15 September 2021, a delegate of the ACT Ombudsman decided to allow Brindabella Christian College to participate in this review.
8. On 15 October 2021, I provided the 3 parties with my draft consideration. My draft consideration set out my preliminary view, which was that Education's decision of 29 July 2021 should be set aside and substituted for a decision to give access to the information at issue.
9. On 20 October 2021, Brindabella Christian College wrote to notify me that it did not wish to make any further submissions. The correspondence noted Brindabella Christian College's view that Education's decision 29 July 2021 was the correct and preferable decision.
10. On 22 October 2021, Education wrote to me to notify me that it did not wish to make any further submissions. The correspondence noted that Brindabella Christian College did not wish to make any more submissions.
11. On 22 October 2021, the applicant wrote to me agreeing with my draft consideration and providing additional submissions to support the view I had taken in it.

Information at issue

12. The information at issue in this Ombudsman review is the information contained in all 3 documents to which access was refused.
13. The issue to be decided in this review is whether giving the applicant access to the information at issue would be contrary to the public interest.
14. In making my decision, I had regard to:
 - the applicant's original application and application for Ombudsman review
 - Education's decision letter
 - Education's submissions, provided to me after it was notified of the commencement of this review
 - the FOI Act, particularly ss 7, 16, 17, 35, 72 and Schedule 2, ss 2.1(a)(ii), 2.1(a)(iv) and 2.2(a)(xi)

Relevant law

15. Every person enjoys an enforceable right of access to government information.¹ However, the FOI Act creates an exception to this right by allowing for refusal of access to information that is ‘contrary to the public interest information’.²
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. Section 17 of the FOI Act sets out the test that must be used to balance public interest factors favouring disclosure and non-disclosure respectively. This test required me to:
- identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in Schedule 2, s 2.1
 - identify any factor favouring non-disclosure that applies in relation to the information (a relevant factor favouring non-disclosure), including any factor mentioned in Schedule 2, s 2.2
 - balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring non-disclosure
 - 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
18. Any party seeking to prevent disclosure of government information bears the onus of establishing that information is contrary to the public interest information.³

The contentions of the parties

19. Education’s decision notice stated:

I place significant weight on an organisation’s right to have their business affairs, trade secrets, confidential information and commercial interests protected, particularly in situations where confidentiality is expressly addressed and agreed between the parties.

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

³ Section 72 of the FOI Act.

20. The applicant contends that:

[m]atters concerning Brindabella Christian College and in particular its governance and operations have been the subject of widespread and continuing media and public interest.

In particular, public interest concerns the use of public monies and accountability in regards to its operations and governance. The school is a registered charity. It receives \$10,000,000 pa in public funds. The school's failure to publicly report to the Australian Charities and Not-for-Profits Commission (two years in arrears), in my opinion, also speaks to an unwillingness to be publicly accountable and is concerning.

21. After being notified about this review, Education provided additional submissions. Relevantly, Education submitted that:

...an organisation's financial statements are considered sensitive by the organisation, particularly where they operate in a competitive environment, regardless of their income source. This is evidenced by the 'non-disclosure of confidential information' clause contained in the Deeds of Grant... The fact that the information sought is covered by a confidentiality clause is indicative that disclosure could reasonably be expected to be prejudicial to [Brindabella Christian College's] business affairs and would be of concern to them.

22. I considered these submissions as I explain in the reasons below.

Considerations

23. I carefully considered an unredacted copy of the information at issue.

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

24. I am satisfied that none of the information at issue is information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act.

Irrelevant factors

25. I am satisfied that none of the irrelevant factors listed in s 17(2) were raised by any of the parties or have influenced my decision in any way.

Factors favouring disclosure

26. Two factors favouring disclosure are relevant in this review.

Contribute to positive and informed debate on important issues or matters of public interest

27. A reasonable expectation that disclosure could contribute to positive and informed debate on important issues or matters of public interest favours disclosure under the FOI Act.⁴

28. Education's Information Officer decided that:

As the education of children is a matter of broad public interest, I have decided that the factor favouring disclosure is that disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of public interest.

29. I consider this finding was correct. Transparency about the financial affairs of schools does contribute to positive and informed debate on the education of children, which is a matter of considerable public interest. The information at issue, which concerns the finances of Brindabella Christian College and terms agreed on with the ACT Government, could reasonably be expected to promote this factor to a significant extent.

Ensure effective oversight of expenditure of public funds

30. A reasonable expectation that disclosure could ensure effective oversight of expenditure of public funds favours disclosure under the FOI Act.⁵

31. Brindabella Christian College receives funding from the ACT Government. The information at issue could reasonably be expected to ensure effective oversight of this expenditure by revealing the terms on which the ACT Government agreed to grant funding to Brindabella Christian College between 2015-2020 and 2020-2025 and financial information about Brindabella Christian College which is routinely published on the Australian Charities and Not-for-Profits Commission [web page](#).

32. While the Deed of Grant for 2015-2020 is no longer current, the oversight of expenditure of public funds remains relevant after funds are spent for the purposes of government transparency and accountability. Moreover, the ability to compare the 2015-2020 and 2020-2025 grants is useful for this purpose.

33. For these reasons, I consider that the information at issue could reasonably be expected to promote this public interest factor to a significant extent.

⁴ Schedule 2, s 2.1(a)(ii) of the FOI Act.

⁵ Schedule 2, s 2.1(a)(iv) of the FOI Act.

Factors favouring non-disclosure

Trade secrets, business affairs and research

34. A reasonable expectation that disclosure could prejudice the trade secrets, business affairs or research of a person weighs against disclosure under the FOI Act.⁶
35. Education's Information Officer decided this factor was applicable and gave it overriding weight. However, the reasons given in the decision letter were unclear about how disclosing it would affect Brindabella Christian College's business affairs. The reasons addressed a sensitivity among organisations generally to the disclosure of information of this nature. However, as the applicant rightly noted in their submissions, Brindabella Christian College can be distinguished by the fact that it reports publicly on the Australian Charities and Not-for-Profits Commission [web page](#).
36. Brindabella Christian College's Financial Reports for previous years are published on that web page. Indeed, Brindabella Christian College's Financial Reports for 2019 and 2020 are overdue. The relevance is not that they are overdue, per se, but rather, that Brindabella Christian College's Financial Reports are prepared in the knowledge that they are routinely and indeed, mandatorily, published.
37. I therefore did not accept the contention that disclosing the information at issue could reasonably be expected to prejudice Brindabella Christian College's business affairs.

Balancing the factors

38. I identified two factors favouring disclosure which the information at issue could reasonably be expected to promote to a significant extent. I decided to afford each of these factors considerable weight.
39. On the other hand, I was not satisfied that disclosing the information at issue could reasonably be expected to prejudice the trade secrets, business affairs and research of Brindabella Christian College.

⁶ Schedule 2, s 2.2(a)(xi) of the FOI Act.

Conclusion

40. For these reasons, under s **82(2)(c)** of the FOI Act, I decided to **set aside** the decision of the Education Directorate dated 29 July 2021 and **substitute** my decision that the applicant should be given access to the information at issue.

Symone Andersen
Acting Senior Assistant Ombudsman
29 October 2021