

## Brindabella Christian College and Education Directorate [2020] ACTOFOI 23 (16 November 2020)

### Decision and reasons for decision of Senior Assistant Ombudsman, Louise Macleod

<b>Application Number</b>	AFOI-RR/20/10041
<b>Decision Reference</b>	[2020] ACTOFOI 23
<b>Applicant</b>	Brindabella Christian College
<b>Respondent</b>	Education Directorate
<b>Decision Date</b>	16 November 2020
<b>Catchwords</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – irrelevant factors – misinterpreting or misunderstanding the information – could result in confusion or unnecessary debate – applicant’s identity, circumstances, or reason for seeking access to the information – positive and informed debate on important issue or matter of public interest – 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)(a) of the FOI Act, it is my decision to **confirm** the decision of the Education Directorate (Education), dated 16 July 2020.

### Background of Ombudsman review

3. On 27 May 2020, an FOI applicant applied to Education for access to:
  - a. ... all the submissions made to the 2013 Review of Approval and Registration Processes.
  - b. ... a copy of the confirmation from the ACT Minister of Education or its delegate of receipt of the Annual Statement of Assurance for Brindabella in 2016, 2017, 2018

and 2019 from the Association of Independent Schools, and any correspondence related to this confirmation of receipt.

- c. If there is no evidence of confirmation of receipt by the Department to the AIS, ...the confirmation from Association of Independent Schools to the Department that it received and approved the Statements of Assurance from Brindabella Christian College in 2016, 2017, 2018 and 2019.
  - d. ... community comments about the application by Brindabella for the registration at additional education levels (year 5 & 6) at the Charnwood campus and the documentation about the reasons to the application's approval by the Department.
  - e. ... a copy of the most recent application forms for the application of registration renewal for Brindabella for both the Lyneham and Charnwood campuses.
  - f. ... a copy of BBC's submitted complaints policy, supplied to the Directorate as part of the most recent registration process.
  - g. ... the total number of complaints received by the ACT Government about BCC during 2019, and a summary of the type of request, and any actions taken by the Directorate in response to them.
  - h. ...a copy of the most recent audit of student enrolments at BCC.
4. Education identified a number of documents in the scope of the application. Brindabella Christian College (**the applicant**) was a third party that Education consulted under s 38 of the FOI Act, regarding the release of a number of documents.
  5. The applicant responded to Education's consultation invitation on 2 July 2020.
  6. On 16 July 2020, Education decided to give the FOI applicant access to information, including the document which is the subject of this review. Education relied on ss 17, 50 and Schedule 2, s 2.1(a)(ii) in making its decision.
  7. On 3 August 2020, the applicant applied for Ombudsman review of Education's decision to disclose this document in part, under s 73 of the FOI Act.
  8. On 12 October 2020, I provided my preliminary view on Education's decision to the parties in the form of a draft consideration.

9. On 12 October 2020, Education formally accepted my preliminary view and the reasons I gave.
10. On 20 October 2020, the applicant made additional submissions, submitting that my preliminary view overstated the effect that disclosing the information at issue could reasonably be expected to have on promoting positive and informed debate in the community, and understated the prejudice the applicant's business affairs could reasonably be expected to suffer. I addressed these submissions in more detail below.
11. The applicant maintained redactions made by Education under s 50 of the FOI Act do not alleviate the prejudice that could reasonably be expected to flow from the disclosure or limit the extent of any prejudice such that disclosure could be in the public interest.

## Information at issue

12. The information at issue in this review was one document, titled Brindabella Christian College (BCC) – Student Transfer Register/Census Data Comparison 2020, except for the redactions Education decided to make on 16 July 2020.
13. The issue before me was whether the information at issue is contrary to the public interest to disclose.
14. In making my decision, I had regard to:
  - Brindabella Christian College's application for Ombudsman review
  - Brindabella Christian College's annual reports for 2018, 2017 and 2016
  - Education's decision notice and reasons
  - the FOI Act, in particular ss 6, 7, 9, 17 and Schedule 2
  - an unredacted copy of the information at issue
  - relevant case law, including *Mangan and The Treasury*,<sup>1</sup> *Stewart and SunWater; Stanwell Corporation Limited*,<sup>2</sup> and *Google Australia Pty Ltd and Wing Aviation and Environment, Planning and Sustainable Development Directorate*<sup>3</sup>

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<sup>1</sup> [2005] AATA 898.

<sup>2</sup> [2012] QICmr 70.

<sup>3</sup> [2019] ACTOFOI 19.

## Relevant law

15. The FOI Act provides every person with a 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.<sup>4</sup>
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 requires a balancing of public interest factors favouring disclosure against factors favouring nondisclosure to determine whether disclosure would be contrary to the public interest.
18. Under the FOI Act, a party seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.<sup>5</sup> In this review, the party seeking to prevent disclosure is Brindabella Christian College.
19. Schedule 2 of the FOI Act sets out the public interest factors to be balanced when determining the public interest under s 17.

## The contentions of the parties

20. Education's decision notice said:

... I do not agree... that there are no factors in the public interest that favour disclosure... Whilst the factors favouring disclosure... may not be directly applicable ... [i]t is my view that matters relating to children's education are of broad public interest, and I am aware that there have been a number of media stories and letters to the Minister about BCC which indicates to me that it is of community concern.

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<sup>4</sup> Section 7 of the FOI Act.

<sup>5</sup> Section 72 of the FOI Act.

21. The applicant's review application contended:

... the release of [the information at issue] is contrary to the public interest information pursuant to s 38(5)(b) of the FOI Act and our client objects to the disclosure of [the information at issue].

...

... The redactions... do not remove the prejudice caused by the release... to BCC's business affairs on the basis that it may impact community confidence in BCC and the school's reputation, which may result in students moving away from the school.

22. I addressed these submissions below.

## Considerations

23. I reviewed a copy of the information at issue as well as information provided by Education and the applicant.

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

24. Neither party to this review suggested the information is taken to be contrary to the public interest under Schedule 1 of the FOI Act. For the information sought to be contrary to the public interest it must therefore have been contrary to the public interest under the test set out in s 17.

*Public interest test*

25. To determine whether disclosure of information is contrary to the public interest, s 17(1) of the FOI Act prescribes the following steps:

- 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;
- 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;
- 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 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. The applicant submitted:

... the release of the Documents may... embarrass BCC for an ulterior purpose seeking to damage the reputation of BCC, or to continue to facilitate vexatious complaints against BCC... [The information] would be used in a sensational manner by the media or members of the public to tarnish the reputation of BCC and suggest that students are leaving BCC in large numbers, which is inaccurate. This would, in itself, threaten the financial viability of the school.

...

Document 4 contains inaccurate and misleading data about the number of students enrolled at BCC in the years 2019 and 2020.

28. Further, the applicant's response to my draft consideration included similar submissions, specifically:

... the proposed redactions will not prevent the media or members of the public from reporting misinformation as fact.

29. Relevantly, the FOI Act prohibited my considering whether disclosure 'could result in a person misinterpreting or misunderstanding the information'.<sup>6</sup>

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<sup>6</sup> Section 17(2)(b) of the FOI Act.

30. Similarly, I was prohibited from considering information about the FOI applicant including any reason they may or may not have for seeking access to the information.<sup>7</sup>

31. Accordingly, I was not able to consider, or give any weight to whether the information:

- may or may not have been sought by a person seeking to damage Brindabella's reputation or cause embarrassment or to facilitate complaints, vexatious or not, about the school.
- may be used by the media to make 'sensational' comments about Brindabella.
- could lead to a person misinterpreting the information.

*Factors favouring disclosure*

32. Schedule 2, s 2.1 contains a non-exhaustive list of factors favouring disclosure in the public interest. In this review, I decided one factor was relevant.

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

33. The FOI Act recognises the public interest in disclosing information that could reasonably be expected to contribute to positive and informed debate on important issues or matters of public interest.<sup>8</sup>

34. Education decided that schooling is a matter of public interest generally but did not point to a prescribed Schedule 2 factor, instead arguing that Schedule 2 is non-exhaustive. Schedule 2 is indeed non-exhaustive but I consider that information about the schooling of children is a matter of public interest, under Schedule 2, s 2.2(a)(ii).

35. In response to my draft consideration, the applicant agreed that schooling is a matter of public interest and directed its submissions to whether disclosure of the information at issue could reasonably be expected to contribute to positive and informed debate.

36. The applicant's submitted the information at issue is 'inaccurate' and could mislead the reader, and this means any debate it contributes to cannot reasonably be expected to be positive and informed.

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<sup>7</sup> Section 17(2)(f) of the FOI Act.

<sup>8</sup> Schedule 2, s 2.1(a)(ii) of the FOI Act.

37. I carefully considered the information at issue and I considered that the number of students recorded on the Student Transfer Register was the number recorded on the register, and the number on the school's census is the number recorded on the school's census at a specific point in time. This is distinct from, for instance, a typographical error falsely representing what the Student Transfer Register has recorded.
38. In addition, to accept the applicant's position, I would have needed to consider whether a person might misinterpret the information or draw an inaccurate inference from it – the inference being that the discrepancy reflects a large number of students departing the school. This is an irrelevant consideration, as I note above. Accordingly, I cannot accept this submission as to why this factor warrants little weighting.
39. Further, I considered the applicant is open to provide more information and context regarding the figures if it is concerned about inferences readers may or may not draw from the information at issue.
40. My preliminary view was that I should afford this factor moderate weight because the scope of the information is limited to numbers of enrolled students and discrepancies between Brindabella Christian School's census and the Student Transfer Register. Having considered the applicant's submission, my view was unchanged and accordingly my decision was to afford this factor moderate weight.

*Factors favouring non-disclosure*

41. I decided that one of the factors favouring non-disclosure in Schedule 2, s 2.2 is relevant to the information at issue.

Business affairs

42. The FOI Act recognises the public interest in preventing disclosure of information that could reasonably be expected to prejudice the business affairs of an entity.<sup>9</sup> The term 'business affairs' means:

the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs.<sup>10</sup>

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<sup>9</sup> Schedule 2, s 2.2(a)(xi) of the FOI Act.

<sup>10</sup> *Mangan and The Treasury* [2005] AATA 898 at [40] citing *Cockroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd* (1986) 64 ALR 97.



43. I accept the applicant's submission that the information at issue relates to its money-making affairs. The question is whether disclosure of the information at issue could reasonably be expected to prejudice these affairs. In *Google Australia Pty Ltd and Wing Aviation and Environment, Planning and Sustainable Development Directorate*,<sup>11</sup> I observed comments of the Queensland Information Commissioner that:

... the particular prejudice or adverse effect... could reasonably be expected to flow from disclosure. This phrase requires an expectation that is reasonably based... it is not enough to simply assert that disclosure will result in some kind of adverse consequence.<sup>12</sup>

44. The applicant submitted that release of the information at issue:

may impact community confidence in BCC and the school's reputation, which may result in students moving away from the school.

45. The information at issue includes a comparison of the number of students enrolled at Brindabella Christian School in 2019 and 2020 according to annual censuses. It notes the discrepancy between enrolments at the Charnwood campus in 2019 and 2020 represents a 32 per cent decrease. It also includes the number of students listed as attending Brindabella Christian College on the Student Transfer Register for 2020 and notes there is a 41 per cent disparity between the number in the 2020 census and on the Transfer Register. The information at issue does not explain the reasons for the discrepancies in the data in 2019 and 2020.

46. The applicant submitted that people may draw inferences from this information that students are leaving the school and this may impact on the decision of others to leave the school. I consider that accepting this argument would require me to consider if releasing the information could result in a person misinterpreting or misunderstanding the information, which I am unable to consider under the FOI Act.

47. I also considered the fact that information about the number of students enrolled at Brindabella Christian College is published in the school's annual reports. My preliminary view was the information at issue could reasonably be expected to prejudice the applicant's business affairs to a moderate extent because it could reveal a decline in student numbers at the school's Charnwood campus. However, after considering the further submissions made

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<sup>11</sup> [2019] ACTOFOI 14 at [82].

<sup>12</sup> *Stewart and SunWater; Stanwell Corporation Limited* [2012] QICmr 70 at [83].

by the applicant and again reviewing the information at issue, I consider the only basis for expecting prejudice to occur is if the information is misinterpreted. This is an irrelevant factor I was prohibited from considering. The fact that the applicant's submissions relied on irrelevant factors meant that I could not consider any particular effect disclosure could reasonably be expected to have. Accordingly, I decided not to afford this factor weight.

### *Balancing the factors*

48. One factor in this review favoured disclosure of the information at issue while another favoured non-disclosure. Section 17 required me to balance the competing public interest considerations raised by these factors.
49. The information at issue could reasonably be expected to contribute to positive and informed debate on a matter that all parties agreed to be one of public interest. My decision was to afford this factor moderate weight.
50. On the other hand, I decided the applicant's arguments against disclosure relied on irrelevant factors the FOI Act does not allow me to consider.
51. Section 72 of the FOI Act places the onus on a party seeking to prevent disclosure to show that disclosure would be contrary to the public interest. I decided the applicant had not discharged that onus in this review.

## **Conclusions**

52. Accordingly, under s 82(2)(a) of the FOI Act, I decided to **confirm** Education's decision to give access to the information at issue under s 35(1)(a) of the FOI Act.

**Louise Macleod**  
**Senior Assistant Ombudsman**  
**16 November 2020**