

Decision and reasons for decision of ACT Ombudsman

Application number:	AFOI-RR/23/10014
Decision reference:	[2023] ACTOFOI 21
Applicant:	Leanne Castley MLA
Respondent:	ACT Health Directorate
Agency reference:	ACTHDFOI 22-23.36
Date:	28 September 2023
Catchwords:	<i>Freedom of Information Act 2016</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 – contribute to positive and informed debate on important issues or matters of public interest – allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official – prejudice the protection of an individual’s right to privacy or any other right under the <i>Human Rights Act 2004</i> – prejudice an agency’s ability to obtain confidential information – prejudice the management function of an agency or the conduct of industrial relations by an agency

Decision

1. For the reasons set out below, I have decided to vary the decision of the ACT Health Directorate (**ACT Health**) dated 20 March 2023 under s 82(2)(b) of the *Freedom of Information Act 2016* (**FOI Act**).
2. The variation of the original decision has the practical effect of disclosing a larger proportion of the information at issue than the original decision.

Background of Ombudsman review

3. On 30 January 2023, the applicant applied to ACT Health for access to:

‘Report of the review of the ACT Health Directorate Division, and all correspondence with the

Minister's office regarding this review.'

4. ACT Health clarified with the applicant that what was being sought was a report concerning an organisational workplace health check (**health check**) of the Digital Solutions Division (**DSD**) within ACT Health.
5. On 24 February 2023, ACT Health undertook third party consultation with the organisation engaged to conduct the health check, CPM Reviews, under s 38 of the FOI Act. On the same day, CPM Reviews advised:

[we make] no objection to the release of the material... namely the report produced by our Reviewers and the appropriate annexures. This of course assumes that the Directorate will make its own assessment of any privacy considerations.
6. CPM Reviews have not sought to join this review as an interested third party.
7. On 20 March 2023, ACT Health advised the applicant it had identified 3 documents within the scope of the application. ACT Health refused access to 2 documents and provided partial access to one document.
8. On 30 March 2023, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
9. On 1 August 2023, I provided my preliminary views to the parties in a draft consideration.
10. On 8 August 2023, the applicant indicated they accepted my draft consideration, proposing amendments to the weightings in the public interest test.
11. On 24 August 2023, the respondent indicated that they accepted the reasoning in my draft consideration, making additional submissions.

Information at issue

12. The information at issue in this matter is a report compiled by a third party (CPM Reviews) regarding an internal staff survey conducted by ACT Health Directorate.
13. In making my decision, I have had regard to:
 - the applicant's review application
 - the respondent's decision
 - additional submissions made by the applicant in lodging their request for review

- additional submissions made by the respondent in response to the review commencing
- additional submissions made by both parties in response to my draft consideration
- the FOI Act, in particular s 72 and Schedule 2, ss 2.2(a)(ii), (xii), (xv) and 2.2(b)(v)
- an unedited copy of the information at issue
- the ACT Ombudsman FOI guidelines made under s 66 of the FOI Act
- relevant case law, including:
 - *'BS' and Chief Minister, Treasury and Economic Development Directorate* [2022] ACTOFOI 5
 - *'BV' and Environment, Planning and Sustainable Development Directorate* [2022] ACTOFOI 10
 - *Peter Brewer and Justice and Community Safety Directorate* [2022] ACTOFOI 8
 - *'CA' and Environment, Planning and Sustainable Development Directorate* [2023] ACTOFOI 7
 - *'BZ' and Transport Canberra and City Services* [2023] ACTOFOI 6
 - *'BY' and Chief Minister, Treasury and Economic Development Directorate* [2023] ACTOFOI 4
 - *Francis and Australian Sports Anti-Doping Authority (Freedom of information)* [2019] AATA 12

Relevant law

14. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.¹ This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.²
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 in s 17 sets out the 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.

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

17. The FOI Act permits refusal of access to information where the information sought is “contrary to the public interest information”.³
18. 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

19. In its decision notice, the respondent said:

On balance, the factors favouring disclosure did not outweigh the factors favouring non-disclosure as a reasonable amount of information regarding the report of the review has been provided. The release of the redacted information would or could reasonably be expected to have a detrimental effect for the agency’s ability to conduct future reviews within the organisation as it will likely reduce future engagement in staff culture surveys.

20. In the application for Ombudsman review, the applicant noted their belief that the factors provided favouring nondisclosure were not correctly assessed by the decision maker.
21. In response to my draft consideration, the applicant accepted the reasoning but suggested that greater weight should be afforded to the factors favouring disclosure, citing commentary in ACT Budget Estimates and documents received in a separate access application they had made.
22. In response to my draft consideration, the respondent accepted the reasoning but proposed additional redactions to the information at issue.

Consideration

Public interest test

23. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five 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;

³ Section 35(1)(c) 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

24. In their initial submission to this review the respondent stated: (emphasis added):

In addition, it is the view of ACTHD that the public release of the identifiable comments would be detrimental to the good work that has occurred and could be reasonably expected to negatively impact on the area **and Directorate as a whole**.

25. The emphasised section of the above submissions is suggestive of potential reputational harm to ACT Health as a body from the disclosure of the information at issue being one of the reasons why disclosure should not occur.

26. In my draft consideration, I put it to the parties that I considered this line of reasoning is analogous to s 17(2)(a) of the FOI Act which states the potential that access being provided to information 'could result in embarrassment to the government or cause a loss of confidence in the government' is a factor that must not be taken into account.⁴

27. I set out my conclusion that I would accordingly not be considering potential embarrassment or lost confidence in ACT Health as part of this review.

28. In response to the draft consideration the respondent clarified their position stating:

I wish to expand on the previous contentions made by the Directorate regarding the release of information contained in this report having a negative impact on the division and the wider Directorate. I wish to clarify that this was not intended to imply reputational damage to the agency. The statement was in regards to the engagement of staff in future surveys intended to seek frank and fearless insight into the experiences of our staff, particularly in areas identified as having issues with staffing experiences and are not reflective a positive culture...The review was undertaken as a culture

⁴ s 17(2)(a) of the FOI Act.

improvement exercise...where people are able to raise concerns without judgement or negative consequence.

29. On the basis of the above submissions I am satisfied that it was not the intent of the respondent to make a decision based on potential reputational harm.

Factors favouring disclosure

30. In their original decision, ACT Health relied on three factors favouring disclosure.

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

31. A factor favouring disclosure is that disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.⁵
32. I consider this factor is relevant for this matter. Significant media interest has been directed to the internal culture of ACT Health in recent times, including in following the annual reviews that have been conducted by the government.⁶
33. ACT Health has been undertaking a program of workplace culture monitoring, reporting and systemic improvement since the Final Report of the Independent Review into the Workplace Culture within ACT Public Health Services was handed down on 5 March 2019.⁷ This review came after a 10 September 2018 statement from the then ACT Health Minister which identified that improving the culture at ACT Health would be a necessary priority.⁸
34. I note the ACT Government's acknowledgement of the public interest in this area with proactive disclosure of the findings of annual reviews into the ACT health system and a public acknowledgement that cultural reform is an ongoing task.⁹
35. While the information at issue in this matter is separate to the annual reviews conducted by government, it references the same issues of organisational culture in ACT Health and represents a desire to acknowledge the workplace culture in the DSD of ACT Health as of late

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

⁶ [Culture Review Implementation | Health \(act.gov.au\)](http://act.gov.au/culture-review-implementation)

⁷ [Final Report Independent Review into Workplace Culture.pdf \(act.gov.au\)](http://act.gov.au/final-report-independent-review-into-workplace-culture.pdf)

⁸ [Statement on ACT Health culture - Chief Minister, Treasury and Economic Development Directorate](http://act.gov.au/statement-on-act-health-culture)

⁹ [Third Independent Annual Review 2023 | Health \(act.gov.au\)](http://act.gov.au/third-independent-annual-review-2023)

2022 to allow for changes and improvements to be made after the implementation of the Digital Health Record (DHR).¹⁰

36. I therefore consider there is similar public interest in the information at issue as there is in the material proactively disclosed by the ACT Government on the culture of ACT Health as a broader whole and I afford this factor moderate weight.

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

37. A factor favouring disclosure is that disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of public interest.¹¹
38. I consider this factor to be relevant for this review. The information at issue acknowledges below (emphasis added) the likelihood of negative responses owing to the timing of the survey, stating this was by design to allow staff to provide frank feedback on their workplace satisfaction which would allow for a focus on wellbeing after an intense period with the launch of the DHR.

ACT Health noted at the outset that the check was happening at a time of very high workload and at the start of a large realignment and staff transition program designed to move forward from the initial launch and implementation of the Digital Health Record (DHR). This was reflected in the response rate and the types of comments made. **There was an intentional decision to proceed at this particular time, however, to identify issues relevant to workplace satisfaction, performance and morale so as to consciously position DSD for a positive future and to focus on wellbeing and recovery elements,** amongst others - particularly for the next 'post-COVID and post-DHR launch' stage.¹²

39. The majority of the information disclosed in the original decision was either positive feedback or feedback concerning the administrative process of the staff survey (such as response rates and numbers) rather than information which identified areas of concern raised by staff in their responses, with none of the free text responses provided being disclosed.¹³

¹⁰ DHR is a single electronic medical records system for the ACT public health system. DHR commenced operating in November 2022. See [Digital Health Record \(DHR\) | Health \(act.gov.au\)](https://www.health.act.gov.au/digital-health-record-dhr).

¹¹ Schedule 2, s 2.1(a)(ii) of the FOI Act.

¹² Extracted from the original decision notice, currently publicly available via the ACT Health Disclosure Log at [ACTHDFOI22-23.36 ACTHD Response_DL.pdf](#)

¹³ This can be seen based on the information across pages 16 and 17 of the disclosed material where the section 'Identified strengths' is nearly fully disclosed while the following section 'Specific areas of concern' is nearly entirely redacted.

40. I consider that both the positive and negative feedback provided in the staff survey would contribute to an informed debate on an issue of public interest. An informed debate requires a balance of information be considered.
41. The deliberate decision to proceed at that particular point in time recognises the value placed by ACT Health on receiving feedback around the DHR launch and implementation that may be negative, in order to plan for future improvements. It therefore follows this feedback has particular value with regards to understanding the issue.
42. I consider there is considerable public interest in the information at issue which could be reasonably likely to contribute to positive and informed debate by giving direct sources of information to inform debate in the public sphere.¹⁴
43. On this basis, I afford this factor a moderate weight in this decision.

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

44. A factor favouring disclosure is that disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official.¹⁵
45. The information at issue, as stated above at paragraph [38], includes information obtained for the express purpose of assessing the mood and culture of the staff in the DSD team in order to set a direction after the DHR launch.
46. I believe it is reasonable to accept that ACT Health conducted this survey including the options for free text responses from staff with the knowledge this could bring complaints, accusations, venting of general frustrations and other such matters to their attention by providing staff with a vehicle to raise these matters, without having comments being specifically attributable to them personally.

¹⁴ 'BY' and Chief Minister, Treasury and Economic Development Directorate [2023] ACTOFOI 4 at 36

¹⁵ Schedule 2, s 2.1(a)(v) of the FOI Act

47. There is therefore a reasonable expectation, particularly in regard to possible free text responses, the information at issue could allow or assist inquiry into possible deficiencies in the conduct or administration of the team as a whole or particular individuals within the team.¹⁶
48. It is reasonable to expect that disclosure could assist inquiries into ACT Health's plans for future cultural improvements as well as determining if existing policies and procedures to support staff are sufficient and working as intended.
49. I therefore afford this factor a strong weight in this decision.

Factors favouring nondisclosure

50. In the original decision ACT Health identified three factors favouring nondisclosure.

Prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004*

51. A factor favouring nondisclosure is that disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004 (Human Rights Act)*.¹⁷

52. 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.

53. I agree this factor is relevant in this matter to the extent that specific individuals within ACT Health are specifically named within the information at issue. CPM Reviews stated they would anonymise and de-identify the responses to the survey, and this is reflected in the information at issue, extracted here:

Participants were assured of anonymity and that no comments would be attributed. All participants agreed to adhere to those provisions. Information that might identify an individuals' feedback has been excluded from reporting herein.

54. ACT Health provided similar assurances to staff in their internal correspondence inviting staff to complete the survey, extracted here:

¹⁶ [4.-Ombudsman-Guidelines-Considering-the-public-interest.pdf \(act.gov.au\)](#)

¹⁷ Schedule 2, s 2.2(a)(ii) of the FOI Act.

We are committed to ensuring staff are able to provide honest feedback, comments and suggestions without being identified. The survey is anonymous and will be run by People Strategy and Culture and the privacy and confidentiality of responses will be respected at all times.

55. I consider this does not represent a broad-based guarantee or undertaking that responses will not be used or shared, merely that they would be de-identified and people's individual responses would be anonymous.
56. Statements that information will remain confidential do not themselves bring a presumption that any disclosure of the material would be contrary to the public interest.
57. ACT Health appropriately identified that CPM Reviews would potentially have an interest in the information at issue and consulted them under s 38 of the FOI Act. CPM Reviews indicated they had no objections to any of the material being released in their response, so I consider the names of CPM Reviews staff are appropriate to disclose where they appear in the text of the documents, noting they are already publicly available via the CPM Reviews website.¹⁸
58. Having reviewed the material I am satisfied that, with the exception of individual names that were not removed in the first instance, CPM had sufficiently anonymised and de-identified the individual responses to the survey in line with the stated claim provided to staff when seeking participation in the survey.
59. Where individuals' names had not been removed by CPM, or where a free text response provided sufficient detail about the responder's or another staff member's personal situation to potentially identify them, I consider those specific sections are contrary to the public interest and should be redacted.
60. I consider that disclosure of this information could represent an arbitrary interference with a person's privacy under s 12(a) of the Human Rights Act.
61. Disclosure of this information could also potentially prejudice the fair treatment of an individual in line with Schedule 2, s 2.2(b)(v) of the FOI Act. I consider the information may contain unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct of particular individuals.

¹⁸ [Reviewers | CPM Reviews](#)

62. Where information at issue has been appropriately de-identified, I find it unreasonable to expect that disclosure could represent an unlawful or arbitrary right to the privacy of an individual as no individual could be identified from the material.
63. I therefore afford this factor a strong weight in this decision, however only with regards to information that could identify particular individuals rather than broadly across the scope of the information at issue.

Prejudice an agency's ability to obtain confidential information

64. A factor favouring nondisclosure is that disclosure could be reasonably expected to prejudice an agency's ability to obtain confidential information.¹⁹
65. This Office's FOI Guidelines define confidential information as information of a confidential nature which was obtained in confidence.²⁰ It must then be established there is a factual basis to believe that disclosure would be reasonably expected to prejudice the agency's ability to obtain this confidential information in the future.
66. An expectation of confidentiality does not itself comprise a legal basis for nondisclosure under the FOI Act.²¹
67. Confidential information has been defined in the context of FOI as information which is secret or only known to a limited group as laid out in *Francis and Australian Sports Anti-Doping Authority (Freedom of information)* [2019] AATA 12:²²

For the information to have the quality of confidentiality it must be secret or only known to a limited group. Information that is common knowledge or in the public domain will not have the quality of confidentiality.

68. While the above case is in the context of the Commonwealth FOI regime, the definition has been accepted in the context of the ACT FOI scheme.
69. The information at issue details the following regarding assurances made to DSD staff members:
- To encourage frank comment, participation was anonymous and comments were not attributed.

¹⁹ Schedule 2, s 2.2(a)(xii) of the FOI Act

²⁰ [4.-Ombudsman-Guidelines-Considering-the-public-interest.pdf \(act.gov.au\)](#)

²¹ *'BS' and Chief Minister, Treasury and Economic Development Directorate* [2022] ACTOFOI 5 at [47]

²² *Francis and Australian Sports Anti-Doping Authority (Freedom of Information)* [2019] AATA 12 [104]

70. Conditions of anonymity and responses not being attributed to individual survey respondents does not represent a broad guarantee of confidentiality in terms of total nondisclosure of the information provided in survey responses outside the agency.

71. I note ACT Health asserts the information at issue is confidential. However, in order for this factor to be relevant ACT Health needs to establish there is a factual basis for the potential of disclosure to prejudice their ability to obtain similar information in the future. An assertion there is the potential for prejudice is not sufficient.

72. In the original decision letter, ACT Health stated:

The release of the redacted information would or could reasonably be expected to have a detrimental effect for the agency's ability to conduct future reviews within the organisation as it will likely reduce future engagement in staff culture surveys.

73. In their submissions to this review, ACT Health stated:

It is the position of the Directorate that continued confidentiality around conducting these types of internal reviews is integral to ensuring the agency's ability to conduct future surveys within the organisation. Providing reassurance of confidentiality to the staff is an imperative as external and media focus on the responses are likely to reduce engagement and diminish the honest and truthful participation of staff members.

74. When considering whether ACT Health established a factual basis for potential prejudice to the ability to obtain confidential information in the future, it is important to look at the broader context surrounding the information at issue.

75. As outlined above at paragraph [34], ACT Health is proactively disclosing information from annual health checks. The original decision also discloses portions of the specific DSD report, mostly the more positive aspects of the feedback provided.

76. I therefore consider that staff surveys within the context of ACT Health exist in an environment where staff members responding expect at a minimum partial disclosure of their responses, rather than total confidentiality. The survey was a voluntary process with participants being informed that responses would be de-identified and not attributable to any one person.

77. This environment lessens any potential prejudice to the ability of ACT Health to have staff give honest feedback in future surveys as staff participating in these surveys are aware that findings will be published in some form. Rather than having a chilling effect on staff providing frank feedback, publication could also have a necessarily positive effect on response rates if honest

and/or negative feedback is published and issues raised within said feedback is then acted upon by the agency.

78. These circumstances distinguish this matter from processes that carry a greater expectation of privacy such as internal complaints about bullying or harassment, performance reviews or witness statements provided for workplace investigations.
79. Accordingly, I do not find that this factor is relevant in this review as ACT Health have not established any actual prejudice to their future ability to obtain confidential information if the information at issue is disclosed and I afford it no weight in this decision.

Prejudice the management function of an agency or the conduct of industrial relations by an agency

80. A factor favouring nondisclosure is that disclosure could be reasonably expected to prejudice the management function of an agency or the conduct of industrial relations by an agency.²³
81. Nothing in the original decision or ACT Health's submissions suggests there is an industrial relations issue at play regarding the information at issue, so for this factor to be relevant in this decision it must be related to potential prejudice to the management function.
82. The 'management function' of an agency may include activities such as recruitment, training, performance reviews, promotion, counselling, discipline, compensation and occupational health and safety.
83. In the original decision letter, ACT Health noted the importance they placed on protecting the mental health and wellbeing of staff members, stating:

The concern for staff welfare is paramount in ACTHD's consideration and must take measures to protect staff from experiencing stress and anxiety in anticipating uncertainty in this circumstance.

84. In their submissions to this review, ACT Health expanded upon this point:

My consideration in this instance was that I decided that releasing the provided answers and verbatim comments of the participants as well as information that could be used to identify individual participants constituted an unreasonable disclosure of personal information and would not demonstrate our commitment to creating a psychologically safe workplace, where people are able to raise concerns without judgement and a negative consequence.

²³ Schedule 2, s 2.2(a)(xv) of the FOI Act.

85. I consider this factor is relevant in this review on a broad level. If information is released that identifies specific individuals, and that could cause distress, this may prejudice the management function of ACT Health in terms of workplace health and safety. In this regard, I note the report by CPM Reviews states there was evidence of some fear of retribution from a component of the employee group who provided input.
86. I also understand that individuals could be distressed at the possibility of being identified, even if given assurance as to the removal of all potentially identifying information.
87. This factor is relevant with respect to both individuals voicing concerns and individuals about whom concerns might be voiced.
88. On this basis I afford the factor low weight in this review as any potential prejudice to the management function can be managed through redactions to material that would identify specific individuals.

Balancing the factors

89. In making this decision, I considered three factors favouring disclosure and three factors favouring non-disclosure.
90. Balancing public interest factors is not merely a tallying exercise, where the public interest is established solely by the number of applicable factors on either side. I considered the relative importance and weight each factor should be given. The weight given to the factors depends on the effect that disclosing the information would have on the public interest.
91. The FOI Act also has a pro-disclosure bias. The public interest test and weighing of factors is approached as scales 'laden in favour of disclosure'.²⁴
92. In this instance, I have afforded one factor favouring disclosure a strong weight and two factors favouring disclosure a moderate weight while affording one factor favouring nondisclosure a strong weight, one factor low weight and one factor no weight.

Meeting the onus

²⁴ [Explanatory Statement, Freedom of Information Bill 2016](#).

93. Section 72 of the FOI Act places the onus of establishing that information is contrary to the public interest information on the person seeking to prevent disclosure of the information.²⁵
94. The original decision and subsequent submissions from ACT Health clearly articulate the position that releasing provided answers and verbatim comments from survey participants would be contrary to the public interest.
95. The original decision states (emphasis added):
- On balance, the factors favouring disclosure did not outweigh the factors favouring non-disclosure **as a reasonable amount of information regarding the report of the review has been provided.**
96. Disclosure of portions of information at issue in a review does not in itself allow an agency to assert releasing the remainder of the information is contrary to the public interest, and it does not affect how the balancing exercise is to be conducted under s 17 of the FOI Act.
97. ACT Health's reasons for deeming the majority of the information as contrary to the public interest information are contradicted by the release of the portions of the survey report which were more positive in their feedback compared to the redacted material.
98. The reasons provided as to why disclosure would be contrary to the public interest could, if deemed to be correct, apply to the entirety of the information at issue and nothing in the reasons distinguishes the released material from the material that was deemed to be contrary to the public interest information.
99. In this instance, I consider that ACT Health has not met the onus set out in Section 72 of the FOI Act to establish that the majority of the information at issue is contrary to the public interest information.
100. In this decision, I consider that certain material should still be deemed to be contrary to the public interest and is not suitable for release and this is reflected in the proposed redactions I have prepared and provided to ACT Health.

Conclusion

101. For these reasons, my decision is to **vary** CMTEDD's decision under s 82(2)(b) of the FOI Act.

²⁵ Section 72 of the FOI Act.

Iain Anderson

ACT Ombudsman

28 September 2023