

Vicki Dunne and ACT Health Directorate [2019] ACTOFOI 18 (31 October 2019)

Decision and reasons for decision of ACT Ombudsman, Michael Manthorpe PSM

Application Number:	AFOI-RR/19/10020
Decision Reference:	[2019] ACTOFOI 18
Applicant:	Ms Vicki Dunne MLA
Respondent:	ACT Health Directorate
Decision Date:	31 October 2019
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – Cabinet information – prejudice the protection of an individual’s right to privacy under the <i>Human Rights Act 2004</i> – prejudice the administration of justice generally, including procedural fairness – 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. Under s 82(2)(b), of the ACT *Freedom of Information Act 2016* (FOI Act), I **vary** the decision of the ACT Health Directorate, dated 18 July 2019, with respect to the information at issue in this review, being email correspondence, Ministerial briefs and attachments, Cabinet briefs and attachments and meeting agendas.

Background of Ombudsman review

2. On 30 May 2019, the applicant applied to the respondent for access to:

I would like copies of documents related to the Independent Culture Review Panel;

- Correspondence between members of the Independent Health Culture Panel, the Minister for Health and Wellbeing and the Director-General of ACT Health and other senior officials in ACT Health during the panel's existence and after the panel submitted its report. This also includes correspondence between the Minister, ACT Health and Canberra Health Services sparked by documents sent by members of the Independent Health Culture Panel to the Minister for Health and Wellbeing, ACT Health and Canberra Health Services.
- Briefs prepared for the Minister for Health and Wellbeing and the Minister for Mental Health and Wellbeing directly related to the Independent Panel on Health Culture and its findings. This includes all briefs including Question Time Briefs and Estimates Briefs.
- Reports prepared for the Director-General of ACT Health and other senior officials in ACT Health related to the findings of the Independent Panel and implementation of its recommendations.
- Documents related to the preparation of a response to the report of the Independent Panel on Health Culture.
- Communications strategy for the release of the Interim and final report on health culture and communications strategy and associated correspondence.
- Documents related to the initial meeting of the Culture Review Oversight Group on 28 March 2019 including agenda, minutes, notes, reports prepared for the meeting, action items and correspondence related to the work of the Oversight Group since 28 March 2019. This does not include purely administrative details such as time and venue of the meeting.

3. On 3 July 2019, the respondent undertook third party consultation with two relevant third parties under s 38 of the FOI Act in relation to 30 pages of information comprising correspondence and attachments.

4. On 4 and 8 July 2019, the third parties responded to the consultation request. One third party did not raise objections to the disclosure of the consulted information. The second third party raised concerns relating to privacy.

5. It is unclear from the respondent's decision whether any consideration was given to the third party's objections.

6. On 18 July 2019, the respondent advised the applicant that it had identified 58 documents (totalling 670 pages) as falling within the scope of the access application. The respondent gave the applicant access to 31 documents in full and 27 documents in part.

7. In making its decision, the respondent relied on information being Cabinet information (Schedule 1, s 1.6 of the FOI Act) and disclosure of information prejudicing:
 - the protection of an individual's right to privacy (Schedule 2, s 2.2(a)(ii) of the FOI Act)
 - the administration of justice generally, including procedural fairness (Schedule 2, s 2.2 (iv) of the FOI Act)
 - an agency's ability to obtain confidential information (Schedule 2, s 2.2 (xii) of the FOI Act), and
 - the management function of an agency or the conduct of industrial relations by an agency (Schedule 2, s 2.2 (xv) of the FOI Act).
8. On 6 August 2019, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
9. On 10 October 2019, I provided my preliminary views about the respondent's decision to the parties in my draft consideration.
10. On 15 October 2019, the respondent provided submissions in relation to my draft consideration:

I would like to see your further consideration to the disclosure of information in document 38 that is duplicated in document 48. Paragraph 9, that immediately follows the list of hot spots in each document (Pages 436 and 543), outlines the methodology used by the Review Panel to identify work areas as 'hot spots'. This particular paragraph also notes that agencies have developed focused programs of work within the 'hotspots' identified as having a poor workplace culture and/or ongoing issues with bullying and harassment. It is the contention of the Directorate the reasons for redacting the list of hot spots also apply to the release of this paragraph. The disclosure of this information may allow work areas to self-identify (correctly or incorrectly) as a 'hot spot' and may subsequently be detrimental to the extensive good work that has occurred to date.

11. The applicant did not provide submissions in relation to my draft consideration.

Scope of Ombudsman review

12. The information at issue in this Ombudsman review are the 27 documents¹ the respondent decided to partially release to the applicant.
13. That information comprises email correspondence, Ministerial briefs and attachments, Cabinet briefs and attachments and meeting agendas.
14. 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.

¹ Identified in the respondent's schedule to the decision notice, dated 18 July 2019, as documents 1-8, 10-15, 18, 23-27, 38, 40, 42, 48, 49, 50 and 52.

15. In making my draft consideration, I have had regard to:
- the applicant's access application and review application
 - the respondent's submissions to my draft consideration
 - the respondent's decision
 - the FOI Act, in particular ss 7, 16, 35(1)(c), 50, 72, Schedule 1 and Schedule 2
 - the respondent's FOI processing file relating to the access application
 - an unedited copy of the information at issue
 - relevant case law, in particular *Alistair Coe*,² *Taggart and Queensland Police Service*³ and *8A3BPQ and Queensland Police Service*.⁴

Relevant law

16. 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.
17. Contrary to the public interest information is defined in s 16 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.
18. 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.
19. 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.
20. 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 has been deleted.
21. 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.

² [2018] ACTOFOI 4 (5 September 2018).

³ [2015] QICmr 16.

⁴ [2014] QICmr 42.

22. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose.
23. 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

24. In its decision notice, the respondent said:

Although I consider the factors favouring disclosure to be relevant, they are significantly outweighed by the factors favouring non-disclosure, therefore on balance, the information identified is considered contrary to the public interest and I have decided not to disclose this information.

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

There is a great deal of interest in the poor state of ACT public health culture and plans to reform it. Many ACT Health and Canberra Health Services employees and members of the community have raised concerns about bullying. It is in the public interest that the documents related to plans to reform health culture be made available. It is also in the public interest that the areas of ACT Health and Canberra Health Services which have had the worst problems with poor health culture be published. Poor health culture has had an impact not only on staff in the ACT public health system but on the care of patients. Poor health culture has resulted in the loss or reduction of accreditation of various areas within the public health system and to the expenditure of additional public money to provide health services.

Considerations

26. I have examined an unedited copy of the information at issue together with the information provided by the applicant and respondent.
27. For the reasons set out below, I am satisfied that some of the information at issue is contrary to the public interest to disclose under Schedule 1, s 1.6 and Schedule 2, ss 2.2(a)(ii), (iv), (xii) and (xv) of the FOI Act.

Conclusion

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

28. The respondent decided that some of the information contained in documents 18 and 23-27 is Cabinet information that is taken to be contrary to the public interest to disclose under Schedule 1, s 1.6 of the FOI Act
29. For information to be Cabinet information, a Minister must have submitted, or be proposing to submit, the information to Cabinet for its consideration, and the information must have been brought into existence for that purpose, or is a copy, part or extract of such information.

30. However, Schedule 1, s 1.6(2) of the FOI Act contains a relevant exception, in that purely factual information is not contrary to the public interest to disclose where it is mentioned in:
- information that has been submitted, or that a Minister proposes to submit to Cabinet, and that was brought into existence for that purpose, and
 - where disclosure would not disclose a deliberation or decision of Cabinet and the fact of the deliberation or decision has not been officially published.
31. The respondent's decision does not explain how information in documents 18 and 23-27 fall within the Schedule 1 definition of Cabinet information. From my examination of an unedited copy of the briefs, I consider it is reasonably apparent that the information contained in documents 18 and 23-27 comprises information that was submitted to, or proposed to be submitted to, Cabinet.
32. The information redacted by the respondent contained in documents 18 and 23-27 discusses the Cabinet process, includes draft information for Cabinet consideration, and the information identifies issues for Cabinet consideration and deliberation.
33. For the above reasons, I consider disclosing the information contained in documents 18 and 23-27 would disclose a deliberation or decision of Cabinet, and therefore, I consider it is Cabinet information under Schedule 1, s 1.6 of the FOI Act. Accordingly, I confirm the respondent's decision that disclosure of the information in documents 18 and 23-27 is contrary to the public interest to disclose.

Public interest test

34. 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.
35. 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

36. I have noted the irrelevant factors listed in s 17(2) of the FOI Act and am satisfied that I have not considered any irrelevant factors in this review. This includes the following factor which might appear to apply:
- that access to the information could inhibit frankness in the provision of advice from the public service.⁵

Factors favouring disclosure

37. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.
38. Of the factors favouring nondisclosure listed in Schedule 2, s 2.1 of the FOI Act, the respondent identified the following factors favouring disclosure of the information at issue:
- promote open discussion of public affairs and enhance the government's accountability,⁶ and
 - contribute to positive and informed debate on important issues or matters of public interest.⁷
39. In submissions to this Ombudsman review, the applicant contended:

I wish to obtain documents 38 and 49 relating to the agendas for the Culture Review Oversight Group under Schedules 2.1a of the FOI Act 2016 to promote open discussion and positive and informed debate. There is a great deal of interest in the poor state of ACT public health culture and plans to reform it...It is in the public interest that the documents related to plans to reform health culture be made available.

It is also in the public interest that the areas of ACT Health and Canberra Health Services which have had the worst problems with poor health culture be published. Poor health culture has had an impact not only on staff in the ACT public health system but on the care of patients. Poor health culture has resulted in the loss or reduction of accreditation of various areas within the public health system and to the expenditure of additional public money to provide health services.

40. Following review of the information at issue, I consider the factors favouring disclosure, as identified by the respondent and applicant⁸ are relevant in this review.
41. I consider that disclosing the information at issue would contribute to open discussion and informed debate.

⁵ Section 17(2)(e) of the FOI Act.

⁶ Schedule 2, s 2.1(a)(i) of the FOI Act.

⁷ Schedule 2, s 2.1(a)(ii) of the FOI Act.

⁸ At [38]-[39].

42. As noted above,⁹ the applicant contends that there is a great deal of public interest in these matters. No specific factors for disclosure have, however, been raised by the applicant.
43. While I note that a matter being of public interest does not equate to it being in the public interest, I consider the following factors favouring disclosure could, nevertheless, also be relevant:
- ensure effective oversight of public funds¹⁰
 - reveal the reason for a government decision and any background or contextual decision that informed the decision¹¹
44. I am satisfied these are relevant considerations favouring disclosure in this review, and in the interests of enhancing transparency and accountability, I afford them significant weight.

Factors favouring nondisclosure

45. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure.
46. Of those factors, the respondent considered the following factors relevant to the disclosure of the information at issue:
- prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act* (HR Act)¹²
 - impede the administration of justice generally, including procedural fairness¹³
 - prejudice an agency's ability to obtain confidential information,¹⁴ and
 - prejudice the management function of an agency or the conduct of industrial relations by an agency.¹⁵

Protection of an individual's right to privacy

47. A factor favouring non-disclosure under Schedule 2, s 2.2(a)(ii) of the FOI Act is that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the HR Act.
48. In the ACT Ombudsman review case of *Alistair Coe*,¹⁶ the Ombudsman discussed that an individual's right to privacy can extend beyond the protection of the right to privacy provided for by the HR Act.

⁹ At [39].

¹⁰ Schedule 2, s 2.1(a)(iv) of the FOI Act.

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

¹² 2004 (ACT).

¹³ Schedule 2, s 2.2(a)(iv) of the FOI Act.

¹⁴ Schedule 2, s 2.2(a)(xii) of the FOI Act.

¹⁵ Schedule 2, s 2.2(a)(xv) of the FOI Act.

¹⁶ [2018] ACTOFOI 4 (5 September 2018).

49. Some of the information sought, contained in documents 1, 2, 4-8 and 10-15, includes personal information of individuals such as mobile phone numbers and personal email addresses.
50. In deciding whether to disclose the information, the respondent consulted relevant third parties, under s 38 of the FOI Act.
51. I have reviewed the third parties consultation responses and I consider no objections were raised regarding the protection of an individual's right to privacy or any other right under the HR Act.
52. The respondent redacted an email address in document 1. I consider disclosure of the email address could not reasonably be expected to prejudice an individual's right to privacy or any other right under the HR Act. It is not clear from the respondent's decision notice the reasons why it considered the email address to be personal information. The email address is a publicly available business email address. I do not consider the email address to be personal information of a person and therefore, do not consider Schedule 2, s 2.2(a)(ii) to be a relevant factor favouring nondisclosure in this case.
53. The respondent also redacted an individual's name in documents 1-2. I agree with the respondent that this information is personal information of an individual. Taking into account the nature of the information in the rest of the documents and the circumstances, I consider disclosure of this information could reasonably be expected to prejudice an individual's right to privacy as provided for under Schedule 2, s 2.2(a)(ii) of the FOI Act.
54. From documents 2, 4-8 and 10-15 the information redacted is a mobile phone number and I consider this to be personal information as this number is not publicly available or well-known information. Therefore I consider Schedule 2, s 2.2(a)(ii) of the FOI Act to be a relevant factor in this case.

Prejudice the administration of justice generally, including procedural fairness

55. The respondent decided that disclosure of some of the information contained in documents 1 and 2 could reasonably be expected to impede the administration of justice generally, including procedural fairness under Schedule 2, s 2.2(a)(iv) of the FOI Act.
56. From review of document 1, I consider disclosure of the information the respondent redacted not to be contrary to the public interest information. The information that has been redacted, in my view, does not contain information that could reasonably be expected to impede the administration of justice generally, including procedural fairness. This is because the information is general and procedural in nature with no specific information or unsubstantiated allegations.

57. Document 2 comprises correspondence containing information which may be unsubstantiated allegations. From the information before me, it is not clear whether there is any current or future investigation or enquiry in relation to the unsubstantial allegations. Nevertheless, I consider that to avoid prejudice to procedural fairness, prior to disclosure, it would be appropriate for such matters to be considered by the respondent, with the third party given the opportunity to comment on the allegations.
58. I agree with the respondent that given the unsubstantiated nature of the allegations, the release of the information in document 2 could prejudice the administration of justice, and in particular procedural fairness for any individuals involved.

Prejudice an agency's ability to obtain confidential information

59. Schedule 2, s 2.2(a)(xii) of the FOI Act provides that if disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information then it is contrary to the public interest information.
60. In submissions to this review, the respondent said it had decided not to disclose the information at issue because:
- Maintaining the strictest confidentiality was important to ensuring the integrity of the Review process and providing staff with the confidence to come forward and tell their stories, without fear. The need for confidentiality has continued into the implementation phase being led by the ACT Health Directorate, in close collaboration with Canberra Health Services and Calvary Public Hospital.
61. The respondent decided Schedule 2, s 2.2(a)(xii) of the FOI Act applied to parts of document 2-3, 38, 40, 42, 48-50 and 52.
62. Documents 2-3 contain information about areas of concern following the review. The respondent redacted part of documents 2-3 as it decided disclosure of the information would prejudice the agency's ability to obtain confidential information.
63. In submissions to this review, the respondent contended:
- ...the release of the details of the various hotspots identified in the Independent Review could be detrimental to the good work that has occurred to date and could impact on the staff working within those areas, particularly if the information is publicly released and politicised.

64. I have reviewed the information contained in documents 2-3 and am satisfied it identifies the 'various hotspots' identified by the review. I agree with the respondent that disclosure of this information would prejudice the agency's ability to obtain confidential information. The list was created following the independent review into the agency's workplace culture, as a result of voluntary submissions from staff from various business units within the agency.
65. It is clear from the respondent's submissions to this review that submissions were provided on the basis of confidentiality. Without these submissions, the independent review would not have the ability to collate a list and report on the areas of concern within the agency. Disclosure of the list of business units could inherently identify the staff who provided submissions to the independent review, especially if the business unit is a small team. Therefore, I consider disclosure of the list of business units could reasonably be expected to inhibit the flow of confidential information from staff in relation to reviews into the workplace and consequently, staff could reasonably become reluctant to participate and provide voluntary information in future reviews, if they believe their identity including the business unit they work in could be disclosed in response to an access application under the FOI Act.
66. I consider disclosure of the business units details in documents 2-3 could reasonably be expected to prejudice the agency's ability to obtain confidential information.
67. Document 38 comprise an agenda and meeting paper for the Culture Review Oversight Group (CROG). The respondent refused access to this document in full. From my examination, I am not satisfied disclosure of the whole document could reasonably be expected to prejudice an agency's ability to obtain confidential information because most of the information in the document is factual or publicly available information. For example, the meeting paper at point 6 quotes page 12 of the Final Report which is publicly available.
68. Further, the agenda contains discussion items in general terms and, on the whole, do not disclose any specific information regarding, for example, individualised programs for implementation and business units.

69. From reviewing the agenda, I am not satisfied the respondent has discharged their onus, as required by the FOI Act,¹⁷ in regards to the relevance of this factor to the whole agenda, and therefore I do not consider this to be a relevant factor favouring nondisclosure with respect to the whole agenda.
70. However, the information contained under the heading 'Referrals' details the specific business units as areas of concerns identified through the independent review. I agree with the respondent¹⁸ that disclosure of the business areas could prejudice the agency's ability to obtain confidential information. The list of business areas was created following the independent review into the agency's workplace culture, as a result of voluntary submissions from staff from various business units within the agency.
71. For the same reasons as discussed at [65], I consider disclosure of the list in document 38 (part of pages 435-436) could reasonably be expected to prejudice the agency's ability to obtain confidential information.
72. As discussed at [10], the respondent provided submissions in relation to my draft consideration about paragraph nine in document 38. The respondent contends this should not be disclosed for the same reasons as discussed at [70].
73. I have reviewed paragraph nine in document 38 and I do not consider disclosure of the whole paragraph could reasonably be expected to prejudice the agency's ability to obtain confidential information.
74. However, I do consider disclosure of the first sentence of paragraph nine which "outlines the methodology used by the Review Panel to identify work areas a 'hot spots'"¹⁹ could reasonably be expected to prejudice the agency's ability to obtain confidential information. The respondent has advised that disclosure could "allow work areas to self-identify (correctly or incorrectly) as a 'hot spot' and may subsequently be detrimental to the extensive good work that has occurred to date." This is on the basis that, as advised by the respondent, following the review, there is an organisation-wide focus on improving the culture, but ACT Health has decided not to single out identified business units, as they believe this would undermine the steps they are taking to implement the review's recommendations.

¹⁷ Section 72 of the FOI Act.

¹⁸ Submissions at [60].

¹⁹ Submissions at [10].

75. The remaining information in paragraph nine of document 38 discusses in general terms about the information relayed to Senior Executives and the steps taken to address the issues identified in the review. I am not satisfied disclosure of the remaining information in the paragraph could reasonably be expected to prejudice the agency's ability to obtain confidential information.
76. I note that whether access to the information could result in a person (or in this case, a business unit) misinterpreting or misunderstanding the information is an irrelevant factor that must not be taken into account when deciding whether disclosure of the information would, on balance, be contrary to the public interest.²⁰
77. Document 40 contains talking points for the Minister. The respondent has redacted information on pages 443-444 on the basis that disclosure of the information could prejudice the agency's ability to obtain confidential information.
78. Following review of the information, I consider only disclosure of dot points 4, 6, 8 and 10-12 would have a detrimental impact on the agency's ability to obtain confidential information. The other information is general in nature and does not specifically identify individuals or business units and therefore, I am not satisfied disclosure of the other dot points could reasonably be expected to prejudice the agency's ability to obtain confidential information.
79. Document 42 comprises a Ministerial Brief including attachments. The respondent redacted one sentence contained in document 42 which outlines forward planning of the agency. Based on the information before me, I consider the respondent has not discharged their onus under s 72 of the FOI Act to sufficiently explain how disclosure of this sentence could prejudice the agency's ability to obtain confidential information. Therefore, I consider disclosure of the sentence is not contrary to the public interest.
80. Document 48 comprise Ministerial Brief with attachments. These attachments include a number of CROG's and Culture Review Implementation Steering Group's agendas and meeting papers and correspondence to the Minister. The respondent redacted a number of pages²¹ in full in document 48 on the basis disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information.

²⁰ FOI Act s 17(2)(b).

²¹ Pages 533-575.

81. From my examination of the agendas and meeting papers,²² I am not satisfied disclosure of these pages could reasonably be expected to prejudice an agency's ability to obtain confidential information. I consider the information in the document is factual or publicly available information.
82. Further, the agenda contains discussion items in general terms and, on the whole, do not disclose any specific information regarding, for example, individualised programs for implementation and business units.
83. Therefore, I do not consider disclosure of pages 533-545 could reasonably be expected to prejudice an agency's ability to obtain confidential information.
84. Pages 540-544 are a duplicate of document 38. These pages and page 546 detail the specific business units as areas of concern identified by the review. For the same reasons as discussed [67]-[71], I consider only disclosure of part of pages 542-543 and page 546, being the names of business units, could reasonably be expected to prejudice an agency's ability to obtain confidential information.
85. The respondent's submissions in relation to my draft consideration, discussed at [72]-[75], also applies to paragraph nine in document 48 as it is a duplicate of document 38. For the same reasons discussed at [72]-[75], I do consider Schedule 2, s 2.2(a)(xii) of the FOI Act to be relevant to only the first sentence of paragraph nine in document 48.
86. Documents 49 and 50 are agendas and meeting papers. The respondent has decided disclosure of the whole document could reasonably prejudice an agency's ability to obtain confidential information under Schedule 2, s 2.2(a)(xii) of the FOI Act. I have reviewed the information contained in these pages and, while page 581 mentions a confidential paper, it does not identify the details in the confidential paper. Further, I consider the agenda contains general information only and does not contain any confidential information, as contended by the respondent. Therefore I do not consider Schedule 2, s 2.2(a)(xii) of the FOI Act to be relevant to document 49.
87. Document 52 (pages 628-648) is described by the respondent as a Ministerial Brief containing a draft agenda and minutes for a CROG meeting. Both the agenda and minutes contain information in general terms such as the overview of the process.

²² Pages 533-545 and 568-575.

88. From the information before me, I do not consider disclosure of the draft agenda could prejudice an agency's ability to obtain confidential information. The respondent has not provided sufficient explanation of the expected harm or prejudice to the process.

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

89. Schedule 2, s 2.2(a)(xv) of the FOI Act provides that if disclosure of the information could reasonably be expected to prejudice the management function or the conduct of industrial relations by an agency, disclosure of that information is contrary to the public interest.
90. The respondent contends that disclosure of any confidential information above, discussed at [59]-[87],²³ would consequently prejudice the management function of the agency or the conduct of industrial relations by the agency.²⁴
91. The respondent also contended disclosure of business units could inadvertently identify staff working in those areas who provided submissions to the panel.
92. The Queensland Information Commissioner case of *Taggart and Queensland Police Service*²⁵ discusses, in the context of workplace investigations:
- Staff usually supply information to workplace investigators on the understanding that it will only be used for the investigation or any subsequent disciplinary action. It is reasonable to expect staff to cooperate with an investigative process ... truthfully, completely and promptly. However, in my view, disclosing this information outside of the investigation process where there can be no restriction on its use, dissemination or republication, could reasonably be expected to make staff reluctant to fully participate in future investigations and prejudice the future flow of information to investigators. This, in turn, could reasonably be expected to adversely impact [an agency's] ability to conduct workplace investigations and manage staff.²⁶
93. I consider the discussions in *Taggart* are relevant in this Ombudsman review, and that it is essential for the effective conduct of workplace investigations, including independent reviews into an agency's workplace, that participants are able to provide, in confidence, their account of events, truthfully, completely, and without apprehension or reluctance.

²³ Documents 1, 3 and 38, 40, 42, 48-50 and 52.

²⁴ Schedule 2, s 2.2(a)(xv) of the FOI Act.

²⁵ [2015] QICmr 16 (*Taggart*).

²⁶ *Ibid*, citing *8A3BPQ and Queensland Police Service* [2014] QICmr 42 at [42].

94. In this review, I have considered the fact that submissions were provided to the panel voluntarily, on a confidential basis, with the understanding that it was to be used only by the independent panel to inform their report.²⁷
95. Disclosure of this information could reasonably be expected to have a detrimental effect on future industrial relations reviews conducted by the agency as staff would be reluctant to provide and participate if they believe that the information they provide could be disclosed.
96. I consider Schedule 2, s 2.2(a)(xv) of the FOI Act to be a relevant factor favouring nondisclosure of the confidential information²⁸ as disclosure of such information could reasonably be expected to prejudice the management function or the conduct of industrial relations by an agency, disclosure of that information is contrary to the public interest.

Balancing the factors

97. As I have identified public interest factors favouring disclosure,²⁹ I now to consider the public interest balancing test as set out in s 17 of the FOI Act.

98. In submissions to this review, the respondent contended:

...I gave due consideration to the public interest in the release of this information. It is my decision that the public interest in the release of this information is adequately served by the considerable amount of information made available by the ACT Government on the matter...

Commitments have also been made by the Ministers and the principle officers of organisations to publicly advise on the progress of the implementation of the review recommendations...

99. I have considered the information already available in the public domain and whether the public interest is served by disclosing the information at issue.
100. I am satisfied that, on balance, based on the reasons above, the public interest factors favouring nondisclosure outweigh the public interest factors favouring disclosure in this case. In particular, it is my view that there is a substantial public interest in protecting workplace culture investigation processes.

Conclusion

101. With respect to the information at issue, I confirm the following aspects of the respondent's decision:

- Document 2 – Schedule 2, s 2.2(a)(ii), (iv), (xiii) and (xv) of the FOI Act applies to the information redacted

²⁷ See [60].

²⁸ Discussed at [59]-[87].

²⁹ See [40]-[43].

- Documents 4-8 and 10-15 – Schedule 2, s 2.2(a)(ii) of the FOI Act applies to the information redacted
- Documents 18 and 23-27 – Schedule 1, s 1.6 of the FOI Act applies to the information redacted.

102. I **vary** the following aspects of the respondent's decision:

- Document 1 – only the name is contrary to the public interest information under Schedule 2, s 2(a)(ii) of the FOI Act.
- Documents 3, 38 and 48 – only the names of the business units³⁰ and the first sentence of paragraph nine³¹ are contrary to the public interest information under Schedule 2, s 2.2(a)(xii) and (xv) of the FOI Act.
- Document 40 – only dot points 4, 6, 8 and 10-12 are contrary to the public interest information under Schedule 2, s 2.2(a)(xii) and (xv) of the FOI Act.

103. The remaining information at issue is, on balance, not contrary to the public interest to disclose.

Michael Manthorpe PSM

ACT Ombudsman

31 October 2019

³⁰ Pages 542-543 and 546.

³¹ Pages 436 and 543.