

AX and Canberra Health Services [2020] ACTOFOI 25 (16 December 2020)

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

Application Number	AFOI-RR/20/10029
Decision Reference	[2020] ACTOFOI 25
Applicant	AX
Respondent	Canberra Health Services
Decision Date	16 December 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – information subject to legal professional privilege – identities of people making disclosures – individual’s right to privacy

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)(b) of the FOI Act, I **vary** the decision of Canberra Health Services (**CHS**) dated 19 May 2020.

Background of Ombudsman review

3. On 14 April 2020, the applicant applied to CHS for access to:
 1. All emails and attachments SENT To or FROM Mr Chris Millroy that mention or are related to [the applicant]
 2. All emails, and attachments SENT TO or FROM Ms Janine Hammat that mention or are related to [the applicant]

3. All agendas, and minutes of meetings that Mr Chris Milroy attended related to [the applicant]
4. All agendas, and minutes of meetings that Ms Janine Hammat attended related to [the applicant] including the briefing meetings with Bernadette McDonald.
5. All documents related to [the applicant's] request to undertake reporting off [sic] Canberra Hospital Imaging studies from home, or an appropriate office on campus out of the main Medical Imaging Department reporting area.
4. The application was for information dated 1 May 2019 to 8 April 2020.
5. On 19 May 2020, CHS advised the applicant that it holds 172 documents that are in-scope. CHS decided to give the applicant unrestricted access to 93 documents, partial access to 61 documents and refused access to 18 documents. Where access to information was not given, CHS relied on Schedule 1, s 1.2 and s 1.9 and Schedule 2, s 2.2(a)(ii) of the FOI Act.
6. The applicant applied for Ombudsman review of this decision under s 74 of the FOI Act on 11 June 2020.
7. I provided my preliminary views about CHS' decision to the parties in my draft consideration on 24 November 2020.
8. CHS responded to my draft consideration on 1 December 2020 indicating that it accepted my preliminary view.
9. The applicant responded to my draft consideration on 9 December 2020 indicating that he did not accept my preliminary view. I will address the applicant's specific submissions in the section of this notice titled 'Considerations'.

Information at issue

10. The information at issue in this review is all of the information that CHS decided was contrary to the public interest to disclose.
11. The issue to be decided by me is whether the information at issue is contrary to the public interest information.
12. In deciding this matter, I had regard to:
 - the FOI Act, in particular ss 16, 17, Schedule 1, s 1.2 and s 1.9 and Schedule 2, s 2.2(a)(ii)
 - the applicant's original access application
 - the respondent's decision notice
 - the applicant's submissions
 - the respondent's submissions

- an unredacted copy of the information at issue
- CHS' file relating to the application
- relevant case law including *Cockroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd*;¹ *Taggart and Queensland Police Service*.²

Relevant law

13. The FOI Act gives every person an enforceable right of access to government information, subject to any provisions of the Act providing a basis on which access can be refused.³
14. 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

the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17
15. The public interest test provided for in s 17 sets out a 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.
16. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.⁴
17. Where a record contains some information that is contrary to the public interest, but information that it is in the public interest to disclose too, the contrary to the public interest information should be deleted, where practicable.⁵
18. The onus of establishing information should not be disclosed rests with the party seeking to prevent disclosure.⁶
19. Schedule 1 of the FOI Act sets out categories of information taken to be contrary to the public interest to disclose.

¹ (1986) 64 ALR 97.

² [2015] QICmr 16.

³ Section 7 of the FOI Act.

⁴ Section 35(1)(c) of the FOI Act.

⁵ Section 50 of the FOI Act.

⁶ Section 72 of the FOI Act.

20. 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

21. CHS decided to refuse access to 18 documents on the basis that:

Documents at references 6, 19-20, 40, 48, 60, 62, 71, 73, 88, 98, 119 and 125 are wholly comprised of the following information;

- Schedule 1.2 Information subject to legal professional privilege- Information that would be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege

Documents at reference 3 and 4 are wholly comprised of the following information;

- Schedule 1.9 Identities of people making disclosures – Information that would, or could reasonably be expected to, disclose the identity of a person who has made (a) a public interest disclosure under the *Public Interest Disclosure Act 2012*.

22. CHS decided to partially grant access to 61 document on the basis that:

Documents at references 24, 29-31, 33-34, 39, 46-47, 50-51, 69-70, 77, 94, 97, 99-101, 101, 123, 126, 128, 130-131, 135, 141 and 145 are partially comprised of the following information;

- Schedule 1.2 Information subject to legal professional privilege- Information that would be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege

Documents at references 3 and 4 are wholly comprised of the following information;

- Schedule 1.9 Identities of people making disclosures – Information that would, or could reasonably be expected to, disclose the identity of a person who has made (a) a public interest disclosure under the *Public Interest Disclosure Act 2012*.

23. AX's application for Ombudsman review contends that:

I disagree with the serial redactions... I have no issue with redacting the names of any other named parties...

The claim of legal professional privilege over numerous documents is tenuous and not applicable given the criteria to maintain privilege does not appear to be satisfied, and the following established precedent cases regarding FOI requests and claims of privilege have not been satisfied.

24. The cases referred to for precedent in the applicant's submissions are *Chris Lewis and Australian National University*,⁷ *'PO' and Australian Federal Police*,⁸ and *Carver and Fair Work Ombudsman*.⁹
25. I address the submissions the applicant made in response to my draft consideration 'Considerations' section of this notice.

Considerations

26. I viewed an unedited copy of the information at issue and considered all of the information provided by each party.

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

27. CHS decided some of the information sought is contrary to the public interest information under Schedule 1 of the FOI Act.
28. Exceptions to Schedule 1 include information that identifies corruption, an offence, or misuse of power in a law enforcement investigation. In reviewing an unedited copy of the information at issue, I do not consider that any such exceptions are applicable.
29. Accordingly, I considered whether CHS has correctly decided not to disclose information on the basis of Schedule 1 factors.

Legal professional privilege (LPP)

30. Information that would be privileged from production or admission into evidence in a legal proceeding on the ground of LPP is taken to be contrary to the public interest information under the FOI Act.¹⁰
31. To determine whether information would be privileged in a legal proceeding, I consulted the *Evidence Act 2011* (ACT). The applicant's response to my draft consideration contested that I

⁷ [2018] AICmr 63.

⁸ [2018] AICmr 72.

⁹ [2011] AICmr 5.

¹⁰ Schedule 1, s 1.2 of the FOI Act.

had erred in doing so. Without consulting the rules of evidence in the ACT, I am unable to determine whether information would be privileged from production or admission into evidence. The applicant's claim 'the Evidence Act may be superseded by Federal law and case precedents in this situation' did not expand on what those applicable laws might be. Although the claim that Federal law takes precedence was not substantiated in the applicant's submission, for present purposes, I note that s 118 of the *Evidence Act 1995* (Cth) is consistent with s 118 of the *Evidence Act 2011* (ACT) (Evidence Act) as part of Australian's Uniform Evidence Law. I did not find the applicant's submission altered my preliminary view.

32. Section 118 of the Evidence Act is the provision a claim of privilege can rely on. It provides:

Evidence must not be presented, if, on objection by a client, the court finds that presenting the evidence would result in disclosure of –

- (a) A confidential communication made between the client and a lawyer; or
- (b) A confidential communication made between 2 or more lawyers acting for the client; or
- (c) The contents of confidential documents... prepared by the client, lawyer or someone else;

for the dominant purpose of the lawyer or 1 or more of the lawyers, providing legal advice to the client.

33. First, the applicant submits the information CHS incorrectly refused access to information on the basis of LPP.

34. Having reviewed the information the applicant was refused access to, my decision is that where access was refused to information in documents 3, 4, 8, 10, 11, 19, 20, 24, 29, 30, 31, 33, 34, 39, 40, 46, 47, 48, 50, 51, 55, 58, 60, 62, 69, 70 (in part), 71, 73, 77, 88, 94, 97, 98, 99, 100, 101, 104, 119, 123, 126, 128, 130, 131, 135, 141, 145, the decision to refuse access meets the criteria for LPP established by s 118 of the Evidence Act.

35. Each document contains a communication or communications between CHS executives and legal representatives acting on their behalf, communicating confidentially for the purpose of obtaining legal advice on matters relating to disputes between AX and CHS.

36. My preliminary view was that CHS incorrectly determined that redacted information in documents 6, and part of document 70 was subject to LPP.

37. In his response to my preliminary view, AX submits:

Legal privilege is subjective, as the precedent cases indicate and often needs to be decided by a binding external party. Legal privilege is also not constant but is lost because of various reasons such as dissemination to a wide audience, the document having multiple purposes not just legal opinion etc.

It is beyond reasonable to believe 45 identified documents claimed as legal privilege were only distributed to a limited number of ACT Gov (sic) staff and independent legal advisors, and the documents were not prepared for multiple purposes and contain just legal opinion.

38. These submissions were vague and did not persuade me that my reasoning had erred or that I neglected any law in forming my preliminary view. Rather, the submissions merely cast general doubt on the correctness of my preliminary view and CHS' decision without giving specific reasons. For instance, the applicant's submission that a large number documents were claimed to be subject to LPP is not a relevant consideration under the FOI Act. Under the Act, I must assess each document according to the law and determine whether CHS decided correctly or not.
39. Document 6 is not a confidential communication, the dominant purpose for which is to communicate legal advice. While it may foreshadow legal advice, document 6 is about human resources and does not itself contain legal advice.
40. Document 70 is comprised of emails, all but one of which are subject to LPP. Consistent with my preliminary view, my decision is that Mr Millroy's email to Ms Hammat forwarding a CHS policy at 08:16 AM on Wednesday 14 August 2019 cannot be subject to legal professional privilege because it is not a communication between legal representatives and clients. It is a communication between two executives, sharing an internal policy document. However, I consider the remainder of document 70 is privileged under s 118 of the Evidence Act, being confidential communication between legal representatives and clients for the dominant purpose of providing legal advice.
41. Second, the applicant submits that CHS waived the privilege. Privilege can be lost under s 122(2) of the Evidence Act if, as provided in s 122(3)(a), CHS' actions constituted a *knowing* and *voluntary* disclosure of the information that privilege is claimed over.
42. The applicant's submissions on this second argument cites several cases. I was not persuaded by the applicant's submissions for the reasons set out below.
43. The applicant appears to have misunderstood the authorities on which he relied, as these cases did not directly decide the issue on the waiver of LPP.

44. In *Chris Lewis and the Australian National University*,¹¹ the Australian Information Commissioner decided that some of the documents were not created for the dominant purpose of either obtaining legal advice or engaging in ongoing or anticipated litigation. Mr Lewis did not make any submission that LPP had been waived by the University.
45. In *PO and Australian Federal Police* the Australian Information Commissioner found LPP was not waived in circumstances where legal advice is communicated internally so that agency staff are able to act in accordance with it.¹²
46. *Carver and Fair Work Ombudsman* did not require the Australian Information Commissioner to consider LPP or any waiver of it.¹³
47. I reviewed the documents and do not consider that CHS waived privilege except in one instance, document 125.
48. Document 125 constitutes a *knowing* and *voluntary* disclosure of information to a third party. Accordingly, document 125 appears to be a privileged document in respect of which LPP has been waived.

Identities of people making disclosures under the Public Interest Disclosure Act 2012

49. The FOI Act protects the identities of individuals who make disclosures under the *Public Interest Disclosure Act 2012*, by providing that information identifying a discloser is contrary to the public interest to disclose.¹⁴
50. The applicant submits that he knows the identities of the disclosers and that Schedule 1, s 1.9 is therefore inapplicable. For the purpose of this decision, it is sufficient to say that *even if* the applicant does know the names of the disclosers, information identifying them is still contrary to the public interest information under Schedule 1, s 1.9 of the FOI Act.

Document 3 (pages 13-14)

51. AX was refused access to Document 3 in full on the basis of Schedule 1, s 1.9. Document 3 comprises pages 13 and 14 on the schedule that accompanied CHS' decision. I reviewed page 14 and am satisfied it should be taken to be contrary to the public interest. Disclosing

¹¹ [2018] AICmr 63.

¹² [2018] AICmr 72.

¹³ [2011] AICmr 5.

¹⁴ Schedule 1, s 1.9 of the FOI Act.

page 14 could reasonably be expected to identify a person who has made a disclosure because it is correspondence to a person about a disclosure they made.

52. Page 13 is an email from Ms Hammat to an ACT Government lawyer. It would not be practicable to make redactions to this document under s 50 and I consider CHS were correct in deciding not to disclose it.

Document 4 (pages 15-16)

53. AX was refused access to Document 4 in full on the same basis. Document 4 comprises pages 15 and 16. My decision is that page 15 should be dealt with in the same way as page 13 and should not be disclosed.

54. I reviewed page 16 and am satisfied that it should be taken to be contrary to the public interest. Disclosing page 16 could reasonably be expected to identify a person who has made a disclosure because it is correspondence to a person about a disclosure they made.

Document 55 (pages 535-539) and Document 56 (pages 540-544) and Document 57 (pages 545-549) and Document 58 (pages 550-556)

55. Documents 55, 56, 57 and 58 contain information redacted on the basis of Schedule 1, s 1.9. I reviewed the decision of CHS and my decision aligns with it. Disclosing this information could reveal the identity of a person making a disclosure under the Public Interest Disclosure Act.

Document 66 (pages 601-663)

56. I reviewed an unredacted copy of document 66 and my decision is the information could disclose the identity of a person making disclosure under the Public Interest Disclosure Act.

Document 72 (pages 725-736)

57. I reviewed an unredacted copy of page 728 and my decision is the information could disclose the identity of a person making a disclosure under the Public Interest Disclosure Act.

Document 95 (pages 1019-1032)

58. I reviewed an unredacted copy of page 1022 and my decision is the information could disclose the identity of a person making a disclosure under the Public Interest Disclosure Act.

Document 96 (pages 1033-1064)

59. I reviewed an unredacted copy of page 1036 and my decision is the information could disclose the identity of a person making a disclosure under the Public Interest Disclosure Act.

Public interest test

60. The remaining information at issue is personal information of individuals other than AX. CHS decided it was contrary to the public interest to disclose this information because it could reasonably be expected to prejudice an individual's right to privacy under the Human Rights Act. To determine whether the rest of the information at issue is contrary to the public interest to disclose, 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.¹⁵

61. Additionally, s 17 lists a number of irrelevant factors that cannot be considered when conducting the public interest test.

Irrelevant factors

62. I note the irrelevant factors in s 17(2) and have not had regard to any irrelevant factors in forming my preliminary view.

Factors favouring disclosure

¹⁵ Section 17(1) of the FOI Act.

Inform the community of the government's operations

63. My decision is that information in document 159 relating to leave entitlements CHS owed to employees as at January 2020 could reasonably be expected to inform the community of the government's operations. Having decided this factor was applicable solely to document 159, my decision must then turn to the remainder of the information at issue.

Do any other factors favouring disclosure apply?

64. Schedule 2, s 2.1 of the FOI Act contains a list of public interest factors favouring disclosure. CHS decided that disclosure of the documents (other than information falling under Schedule 1) could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.

65. The phrase 'reasonably be expected' is an objective test, which:

... require[s] a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous...¹⁶

66. Having regard to the nature of the information at issue, I consider it would be irrational, absurd and ridiculous to expect the disclosure of mobile telephone numbers or other sensitive personal information to promote this public interest factor.

Factors favouring nondisclosure

67. Schedule 2, s 2.2 of the FOI Act contains a list of public interest factors which weigh against disclosure. Having regard to the nature of the information at issue, being personal information of individuals other than AX, I consider that one is relevant.

An individual's right to privacy

68. A reasonable expectation that disclosure of information could prejudice an individual's right to privacy under the Human Rights Act weighs against disclosure.¹⁷

69. The Human Rights Act establishes that:

¹⁶ *Cockroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd* (1986) 64 ALR 97 at 106.

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

Everyone has the right –

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily...¹⁸

70. Generally speaking, information about public servants, including names and day-to-day duties in the course of employment in the public service is not private information that could reasonably be expected to prejudice an individual's rights under the Human Rights Act. This position is supported in other jurisdictions.¹⁹

Personal information of individuals other than AX in correspondence between AX's legal representative and CHS

71. Documents 8, 9, 10, 11, 12, 13, 14, 15, 16, 28, 75, 115, 117, 127, 133, 134, 143, 144, 152, 155, 157, 158, 161, 165 and 170 contain personal information relating to individuals other than AX. I considered that document 6 was not subject to LPP, however, it contains personal information relating to individuals other AX. The personal information in the abovementioned documents is of a private rather than a public nature. My preliminary view was that it could reasonably be expected to prejudice an individual's right to privacy to have disclosed information exchanged between their legal representative and employer.

72. However, I considered there were some exceptions to this finding in relation to redacted information on page 37 of document 8, document 64 and document 159. Page 37 of document 8 refers to preliminary discovery processes involving AX and an open source search reveals the identities of the individuals whose names are redacted. As this information is readily available to the public, my decision is the personal information redacted in that context could not prejudice an individual's rights to have their privacy interfered with unlawfully or arbitrarily under the Human Rights Act.

73. Document 64 contains a redacted sentence. The sentence does not seem to identify any individual and it is unclear how it could reasonably be expected to prejudice an individual's right to privacy under the Human Rights Act.

74. Another such exception is document 159. The information redacted in document 159 is information about staff leave balances within CHS generally but does not identify any

¹⁸ Section 12 of the Human Rights Act.

¹⁹ The Queensland Information Commissioner adopted this position in *Taggart and Queensland Police Service* [2015] QICmr 16 at [17].

individuals expressly or implicitly. I do not need to consider whether it meets the definition of personal information, because even assuming it is personal information, I consider I could not reasonably expect disclosure to prejudice any individuals' rights to privacy under the Human Rights Act.

75. The applicant's response to my draft consideration stated both that he 'has never requested personal details of another person, and has stated that personal details can be redacted' and simultaneously that the disclosure of personal information could not reasonably be expected to prejudice an individual's right to privacy under the Human Rights Act. Due to these unclear and inconsistent submissions, I decided to include personal information and consideration of Schedule 2, s 2.2 (a)(ii) as information at issue in this review, where I am obliged to make the correct and preferable decision.

Mobile phone numbers of public sector employees

76. Some of the information at issue is personal information in the form of mobile phone numbers of government employees. This information is redacted in documents 8, 9, 10, 11, 22. I consider that disclosure of this information could reasonably be expected to prejudice those employees' rights to privacy and is therefore distinguishable from the information that tends to be inappropriate to redact under the view taken in *Taggart and Queensland Police Service*.

Balancing the factors

Document 8

77. My decision is the discovery process referred to in document 8 (at page 37) relates to a matter that is not private. Accordingly, I do not consider that disclosure of the redacted information could reasonably be expected to prejudice an individual's right to privacy under the Human Rights Act. This means it is not contrary to the public interest information and CHS should disclose it to the applicant.

Document 64

78. My decision is that disclosure of information CHS decided to refuse access to in document 64 could not reasonably be expected to prejudice an individual's right to privacy under the

Human Rights Act. This means it is not contrary to the public interest information and CHS should disclose it to the applicant.

Document 159

79. I consider disclosure of document 159 could reasonably be expected to inform the community of the government's operations, a factor favouring disclosure under the FOI Act.²⁰ My decision is that I should afford this factor moderate weight.
80. I do not consider that any factors favouring non-disclosure apply to document 159 and accordingly my decision is that it is in the public interest to disclose document 159.

Remainder of the information at issue

81. I do not consider there are any factors favouring disclosure relevant to the remainder of the information at issue refused on the basis of a Schedule 2 factor in this review.
82. Nevertheless, AX has an enforceable right to the information at issue unless to disclose it would be contrary to the public interest. This is provided for in s 7 of the FOI Act and the fact the FOI Act also has a pro-disclosure bias. This means the public interest test should not be approached on the basis there are scales in equilibrium, waiting for arguments to be put on each side, but rather the scales are 'laden in favour of disclosure'.²¹
83. Balancing public interest factors is not, however, simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being considered to represent the public interest. My task as the decision-maker is to consider the relative importance and weight of each factor they have identified. The weight given to a factor will depend on the effect that disclosure could reasonably be expected to have on the public interest.
84. I identified one public interest factor favouring nondisclosure, contained in Schedule 2, s 2.2(a)(ii). My decision is that disclosure of much of the information at issue could reasonably be expected to prejudice an individual's right to privacy under the Human Rights Act. I consider I should afford this factor considerable weight.

²⁰ Schedule 2, s 2.1(a)(iii) of the FOI Act.

²¹ Explanatory Statement, [Freedom of Information Bill 2016](#) (ACT) 13.

85. My decision is the remainder of the information at issue (with the exception of information redacted from documents 8, 64 and 159) should not be disclosed, because to disclose it would be contrary to the public interest.

Conclusion

86. My decision is to **vary** CHS' decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

87. Of the information at issue, CHS should give the applicant access to:

Access refused under Schedule 1, 1.2

- information in document 6, except for the one sentence in the paragraph beneath 'Hi Janine and Sean' which relates to a sensitive private matter, the disclosure of which could reasonably be expected to prejudice an individual's right to privacy, and
- Mr Millroy's email to Ms Hammat forwarding a CHS policy at 08:16 AM on Wednesday 14 August 2019 which forms a part of document 70.

Access refused under Schedule 2, s 2.2(a)(ii)

- information redacted from documents 8, 64 and 159

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