

## ***'BR' and Canberra Health Services [2022] ACTOFOI 3 (26 April 2022)***

### **Decision and reasons for decision of Acting Senior Assistant Ombudsman**

**Symone Andersen**

**Application Number** AFOI-RR/22/10002

**Decision Reference** [2022] ACTOFOI 3

**Applicant** 'BR'

**Respondent** Canberra Health Services

**Decision Date** 26 April 2022

**Catchwords** *Freedom of Information Act 2016 (ACT)* – deciding access – whether disclosure of information is contrary to the public interest – transfer of access application – contribute to the administration of justice generally, including procedural fairness – contribute to the administration of justice for a person – impede the administration of justice generally, including procedural fairness – impede the administration of justice for a person – prejudice the management function of an agency or the conduct of industrial relations by an agency – prejudice a deliberative process of government – information is about unsubstantiated allegations of misconduct, or unlawful, negligent or improper conduct and disclosure of the information could prejudice the fair treatment of an individual

### **Decision**

1. For the purposes of s 82 of the *Freedom of Information Act 2016 (FOI Act)*, I am a delegate of the ACT Ombudsman.

2. Under s 82(2)(a) of the FOI Act, I **confirm** the decision of the Canberra Health Services (**CHS**), dated 25 January 2022.

## Background of Ombudsman review

3. On 5 January 2022, the applicant applied for access to information held by CHS under the FOI Act. The access application was for:  
  
... a copy of complaint made about me... Official Visitor in Mental Health and my performance of duties as an Official Visitor.
4. On 25 January 2022, the Chief Operating Officer (COO) of CHS decided to refuse access to the information it holds.
5. On 2 February 2022, the applicant applied for Ombudsman review under s 73 of the FOI Act.
6. On 29 March 2022, I provided my preliminary views about the respondent's decision to the parties in a draft consideration.
7. Neither the respondent or the applicant provided submissions in relation to my draft consideration.

## Information at issue

8. The information at issue in this Ombudsman review is the information the applicant was refused access to under CHS' decision of 25 January 2022. I note paragraph [21] and I exclude pages 2-9 of the information at issue on the basis it is out-of-scope.
9. This review is therefore to determine whether the decision to refuse access to the information at issue is still the correct and preferable decision.
10. In making my decision, I have had regard to:
  - the applicant's access application and review application to the Ombudsman
  - the respondent's decision
  - the respondent's FOI processing file relating to the access application
  - the FOI Act, in particular Schedule 2, s 2.2
  - an unedited copy of the information at issue, and
  - relevant case law, in particular *'BM' and Justice and Community Safety Directorate [2021] ACTOFOI 14* (23 November 2021).

## Relevant law

11. Every person enjoys an enforceable right of access to government information.<sup>1</sup> This right is subject to provisions of the FOI Act which allow for access to be refused under certain circumstances.<sup>2</sup>
12. 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
13. The public interest test provided 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.
14. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.<sup>3</sup>
15. 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.<sup>4</sup>
16. 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

17. CHS' COO identified two factors favouring disclosure and five factors favouring nondisclosure.

The COO decided:

On balance, given that the complaint review is ongoing, and as part of the process you may be provided further information by the Official Visitor's Board, I have decided that each of the factors favouring non-disclosure outweigh the factors favouring disclosure and therefore I withhold the provision of the requested information.

18. The applicant's application for Ombudsman review submits:

[The decision] asserts that I am required to respond and defend myself against an unknown complaint and unknown complainant.

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<sup>1</sup> Section 7 of the FOI Act.

<sup>2</sup> Section 35(1)(c) of the FOI Act.

<sup>3</sup> Section 35(1)(c) of the FOI Act.

<sup>4</sup> Section 50 of the FOI Act.

I don't accept the decision as credible.

It is poor administrative practice, a breach of natural justice and unfair.

19. CHS' COO provided additional submissions after being notified of the review, submitting that:

Access to the requested information was refused to the applicant as the information is the subject of a complaint made... to the Official Visitor's Board. I decided that as the process is not managed by CHS, provision of the information would prejudice the deliberative process in this matter... [I]t is not for CHS to provide the subject of the complaint with the identity of the complainant or the details submitted. Procedural fairness is the responsibility of the entity, the Official Visitor's Board, accessing the complaint.

20. These submissions are referred to further in my reasons below.

### **Preliminary issue – scoping**

21. I carefully considered an unredacted copy of the information that CHS' decision was based on. In my opinion, CHS defined the scope of the access application unnecessarily broadly. Page 1 is clearly relevant and falls within the scope of the information at issue, but other than that I do not consider the remaining information I received from CHS is information that falls within the scope of the application. The application is quite clear that it is seeking a copy of a complaint made about the applicant. Much of the information at issue (pages 2-9) is extraneous material.

### **Preliminary issue – whether CHS' reasons were consistent with the FOI Act**

22. The information provided by CHS after it was notified of this review raises several issues which I considered I should address in my decision.

#### Whether CHS were able to rely on the FOI Act in finding the fact that the process is not managed by CHS was a relevant factor for consideration

23. The first issue is the relevance that CHS assigned to the fact that the Official Visitor's Board was the recipient of the complaint and is engaged in a separate process to handle the complaint. As the body handling the complaint, the Official Visitor's Board is responsible for ensuring the complaint is dealt with in a procedurally fair manner.
24. The obligation of the Official Visitor's Board to provide procedural fairness exists separately from this access application and is relevant only as far as CHS' handling of the request could impact upon that process, as set out in the factors for and against disclosure in Schedule 2 of the FOI Act. In other words, the fact that the Official Visitor's Board and not CHS may owe

procedural fairness to the complainant and the subject of the complaint is not a relevant consideration that the FOI Act permits CHS to consider in a broader sense.

25. Rather, the procedural fairness issue can only be relevant insofar as it informs consideration of Schedule 2, s 2.2(a)(iv) and 2.2(a)(v) which are, respectively, impeding the administration of justice generally including procedural fairness and the administration of justice for a person. CHS appears to have erred by answering the questions raised by these factors with a mistaken view that these were not matters for it to consider. However, there did not appear to be a basis for this view in the FOI Act.

Whether CHS dealt with the application appropriately given its determination that the Official Visitor's Board should be deciding the application

26. Insofar as CHS had concerns about making a decision on the information at issue, it ought to have, at a minimum, considered transferring the access application under s 57 of the FOI Act.

27. On 15 February 2022, the Office wrote to CHS to enquire about whether this approach was considered. CHS responded on 18 February 2022, advising:

CHS was the agency that the applicant applied to for access to the information. CHS holds all the information in scope of the application and has no expectation that another agency holds additional information that is not held by CHS. CHS was able to make a decision under the FOI Act regarding the disclosure of the information, therefore did not consider a transfer or partial transfer appropriate. The applicant had previously asked the Official Visitors Board for the information, which was refused. CHS considers that if the applicant had wished for Official Visitors Board to decide access under [sic] she would have provided the application to them.

28. I disagree with this explanation, because the statement that 'CHS was able to make a decision' appears to me to conflict with CHS' position, outlined in submissions on 18 February 2022 that:

Any provision of information regarding the complaint should be determined by the Official Visitors Board...

29. CHS relied on this argument, which is not, in my view, provided for in the FOI Act. As such, CHS was not 'able to make a decision' in a real sense, in that it was not willing to consider the merits of the application— it appears CHS was resolved to refuse access to begin with.

30. CHS' position that 'any provision of information regarding the complaint should be determined by the Official Visitors Board' indicates that CHS believes the Official Visitors Board also holds the relevant information for this request. Therefore, CHS is obligated under s 58(1) of the FOI Act to provide a copy of the access application to the Official Visitors Board, which it did not do.

31. Section 6 of the FOI Act sets out its objects which include:

- Ensure that, to the fullest extent possible, government information is freely and publicly available to everyone;<sup>5</sup> and
- Facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of the maximum amount of government information.<sup>6</sup>

32. I consider that, having resolved it would be inappropriate to give access to the information at issue, it was contrary to the objects of the FOI Act for CHS to spend time making the decision it made. This is because the option of transferring the application to the agency that it submits would be better placed to consider the applicant may have been open to it.

## Considerations

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

33. Neither party in this Ombudsman review suggested the information sought contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the information at issue to be contrary to the public interest information, it must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

### *Public interest test*

34. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:<sup>7</sup>

- identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in schedule 2, section 2.1;
- identify any factor favouring nondisclosure that applies in relation to the information (a relevant factor favouring nondisclosure), including any factor mentioned in schedule 2, section 2.1;
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;

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<sup>5</sup> Section 6(e) of the FOI Act.

<sup>6</sup> Section 6(f) of the FOI Act.

<sup>7</sup> Section 17(1) of the FOI Act.

- 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*

35. I do not consider that any irrelevant factors I am prohibited from considering arise in this review.

*Factors favouring disclosure*

36. Two factors favouring disclosure are relevant to this review, having been relied on by CHS.

Contribute to the administration of justice generally, including procedural fairness

37. A reasonable expectation that disclosure of information could contribute to the administration of justice, including procedural fairness, favours disclosure under the FOI Act.<sup>8</sup> CHS decided that this factor was applicable. The decision letter did not explain how or why this factor was relevant. It did refer to the complaint being the subject of an ongoing complaints resolution process by the Official Visitors Board but did not explain how disclosure could afford procedural fairness to the applicant.

Contribute to the administration of justice for a person

38. A reasonable expectation that disclosure of information could contribute to the administration of justice for a person favours disclosure under the FOI Act.<sup>9</sup> CHS decided that this factor was applicable. The decision letter did not explain the consideration of how disclosure would contribute to the administration of justice in this matter.

*Factors favouring non-disclosure*

39. In making the decision, CHS relied on five factors favouring non-disclosure.

Impede the administration of justice generally, including procedural fairness

40. A reasonable expectation that disclosure of information could impede the administration of justice generally, including procedural fairness, weighs against disclosure under the FOI Act.<sup>10</sup>

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<sup>8</sup> Schedule 2, s 2.2(a)(iv) of the FOI Act.

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

<sup>10</sup> Schedule 2, s 2.2(a)(iv) of the FOI Act.

41. The decision letter provided to the applicant only stated that the decision-maker had decided the factors favouring non-disclosure, including this one, outweighed the factors favouring disclosure. The decision letter did not attend to how CHS expected the information to impede the administration of justice. Moreover, it did not attend to the question of how severe the impediment was likely to be or indeed how likely any expected impediment was at all.
42. I reviewed an unredacted copy of the information at issue. My view is that disclosing the information at issue could not reasonably be expected to impede the administration of justice generally, including procedural fairness. This is because it is not clear to me what the impediment would be or how it would manifest itself. As such, I did not afford this factor any weight.

Impede the administration of justice for a person

43. A reasonable expectation that disclosure of information could impede the administration of justice for a person, weighs against disclosure under the FOI Act.<sup>11</sup>
44. The decision letter provided to the applicant only stated that the decision-maker had decided that the factors favouring non-disclosure, including this one, outweighed the factors favouring disclosure. The decision letter did not attend to how CHS expected the information to impede the administration of justice. Moreover, it did not attend to the question of how severe the impediment was likely to be or indeed how likely any expected impediment was at all.
45. I reviewed an unredacted copy of the information at issue. My view is that disclosing the information at issue could not reasonably be expected to impede the administration of justice for a person, including procedural fairness. This is because it is not clear to me what the impediment would be or how it would manifest itself. As such, I did not afford this factor any weight.

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

46. A reasonable expectation that disclosure of information could prejudice the management function of an agency or the conduct of industrial relations by an agency, weighs against disclosure under the FOI Act.<sup>12</sup>
47. The decision letter provided to the applicant did not specify which aspect of this factor CHS relied on. It was therefore unclear whether the reasonable expectation relied upon was that

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<sup>11</sup> Schedule 2, s 2.2(a)(v) of the FOI Act.

<sup>12</sup> Schedule 2, s 2.2(a)(xv) of the FOI Act.

disclosure of the information could prejudice the management function of the Official Visitor's Board or the conduct of industrial relations by it. Perhaps CHS formed a reasonable expectation that both aspects could eventuate. The decision letter did not attend to how this prejudice may occur or manifest itself, nor did it appear to reflect any consideration of how likely this prejudice was to eventuate and how severe it could reasonably be expected to be.

48. I reviewed an unredacted copy of the information at issue. My view is that disclosing the information at issue could reasonably be expected to prejudice the management function of the Official Visitor's Board.
49. In *'BM' and Justice and Community Safety Directorate*<sup>13</sup> I decided in relation to similar information. In that case, like this one, the applicant was the subject of a complaint. I commented that:

Giving access to the information to the person who is the subject of the disclosure, who may be able to divulge it to any third person and so on, inherently risks detriment to the person making the disclosure in a way that is prejudicial to the ability of the agency to conduct its own autonomous management function.<sup>14</sup>

50. In my view this matter is comparable, and I afforded this factor considerable weight.

#### Prejudice a deliberative process of government

51. A reasonable expectation that disclosure of information could prejudice a deliberative process of government, weighs against disclosure under the FOI Act.<sup>15</sup>
52. The decision letter provided to the applicant did not specify what the deliberative process being relied upon was or how disclosure of the information at issue could reasonably be expected to prejudice it. It did not attend to how this prejudice may occur or manifest itself. It did not appear to reflect the consideration of how likely this prejudice was to eventuate or how severe it could reasonably be expected to be.
53. I reviewed an unredacted copy of the information at issue. My view is that disclosing the information at issue could not reasonably be expected to prejudice the Official Visitor's Board's deliberation on matters raised in it. The substance of the information at issue, I would assume, has been or will be put to the applicant as is typical in the management of complaints. Disclosing an original copy of the complaint may have detrimental effects, including in relation to the agency's management function as I discussed above but I do not think it inherently

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<sup>13</sup> [2021] ACTOFOI 14 (23 November 2021).

<sup>14</sup> *'BM' and Justice and Community Safety Directorate* [2021] ACTOFOI 14 (23 November 2021) at [53].

<sup>15</sup> Schedule 2, s 2.2(a)(xvi) of the FOI Act.

prevents an agency from being able to deliberate on the matters raised because the substance of the allegation is typically disclosed. As such, I did not afford this factor any weight.

Information is about unsubstantiated allegations of misconduct, or unlawful, negligent or improper conduct and disclosure of the information could prejudice the fair treatment of an individual

54. A reasonable expectation that the information, if it is about unsubstantiated allegations of misconduct, or unlawful, negligent, or improper conduct, could prejudice the fair treatment of an individual weighs against disclosure under the FOI Act.<sup>16</sup>
55. The decision letter provided to the applicant did not attend to how the fair treatment of an individual could be prejudiced by disclosure of the information at issue. Moreover, it did not appear to reflect any consideration of how likely this prejudice was to eventuate or how severe CHS expected it to be, despite relying on it as a basis for decision.
56. I reviewed an unredacted copy of the information at issue. My view is that this factor is not as applicable when the person seeking access to the information is the person against whom the unsubstantiated allegation is made. I am not convinced that disclosing this information could reasonably be expected to prejudice their fair treatment given the complaint is about them. As such, I did not afford this factor any weight.

#### *Balancing the factors*

57. In making my decision, I considered two factors favouring disclosure and five favouring non-disclosure.
58. I gave no weight to either of the factors which CHS found to favour disclosure, and no weight to four of the five factors identified by CHS favouring non-disclosure.
59. On the other hand, I considered that disclosing the information at issue could reasonably be expected to prejudice the management function of the Official Visitor's Board by precluding its autonomy and control over the management of the issues raised and risking they be divulged to any number of third parties without a means of preventing this from occurring. In my view this factor warranted considerable weight.
60. 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 factors depends on the

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<sup>16</sup> Schedule 2, s 2.2(b)(v) of the FOI Act.

effect that disclosing the information could reasonably be expected to have on the public interest.

61. 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'.<sup>17</sup>
62. However, in this case my decision was there were no factors favouring disclosure of the information in page 1 and one factor which strongly supported refusal of access.
63. I outlined the concerns I had with CHS' reasons in this decision but ultimately, I consider that the decision to refuse access was the correct outcome, albeit for different reasons.

## Conclusion

64. Under s 82(2)(a), I confirm the respondent's decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

**Symone Andersen**

**Acting Senior Assistant Ombudsman**

**26 April 2022**

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<sup>17</sup> [Explanatory Statement, Freedom of Information Bill 2016.](#)