

'CE' and Education Directorate [2023] ACTOFOI 13 (20 July 2023)

Application number:	AFOI-RR/23/10020
Agency reference:	FILE2022/195, FILE2022/2758 and FILE 2023/3532
Decision reference:	[2023] ACTOFOI 13
Applicant:	'CE'
Respondent:	Education Directorate
Date:	20 July 2023
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – personal information of the applicant – prejudice the protection of an individual's right to privacy – prejudice an agency's ability to obtain confidential information

Decision

1. I am a delegate of the ACT Ombudsman for the purpose of s 82 of the *Freedom of Information Act 2016 (FOI Act)*.
2. For the reasons set out below, I have decided to **confirm** the decision of the Education Directorate (**Education**) dated 26 April 2023 under s 82(2)(a) of the FOI Act to refuse access to the personal information of third parties and witness statements and give access to the remainder of the information.

Background of Ombudsman review

3. On 8 January 2022, the applicant applied to Education for (**first application**):¹

Records pertaining to my employment with the ACT Education Directorate. I am particularly seeking documentation about a preliminary assessment that was undertaken by [staff member], initiated in [month, year] at the Principal's request.

I am requesting documentation of all communication between the Principal..., and the Directorate's HR Department in relation to myself as an employee at [school] and to any complaints raised against me, including issues raised by [staff member] and/or [staff member].

¹ Education reference: FILE2022/195.

I am also requesting documentation about the Preliminary Assessment process that [staff member] led, including the number of people interviewed (staff, students, other) to ascertain the investigation process which took almost two months to complete.

Further, I am also requesting documentation regarding my registration for fixed term and casual employment which has been temporarily suspended as a result of the PA, and any documents relating to the Directorate's management of the preliminary assessment (PA), during and after the PA findings were shared.

4. On 1 March 2022, the Education information officer decided the first application by giving full access to 22 documents, and access to 4 documents with deletions because the deleted information was contrary to the public interest information (parts of documents 1, 5, 8 and 12).²
5. On 11 March 2022, the applicant applied to Education for access to information (**second application**). On 15 March 2022, the scope of the second application was confirmed as:³

Any correspondence, including emails and notes taken, which relate to yourself, between the Principal and any other parties between 1 March 2021 and 16 April 2021.
6. On 13 May 2022, the applicant applied to Education for access to information (**third application**).⁴
7. On 11 April 2022, the Education information officer decided the second application by giving access to 2 documents with deletions because the deleted information was contrary to the public interest information.⁵
8. On 22 July 2022, the applicant applied for Ombudsman review of Education's access decision on the third application.⁶
9. On 27 February 2023, the applicant applied for Ombudsman review of Education's access decision on the first and second applications, requesting an extension of time to make the application.⁷
10. On 2 March 2023, the delegate decided not to give an extension of time to make the application for Ombudsman review of the first and second applications.⁸

² Section 35(1)(c), s 50 of the [FOI Act](#). Note parts of document 14 were deemed out of scope of the application (did not relate to applicant).

³ Education reference FILE2022/2758.

⁴ Education reference FILE2022/5152.

⁵ Section 35(1)(c), s 50 of the [FOI Act](#).

⁶ ['CB' and Education Directorate \[2023\] ACTFOI 9 \(20 June 2023\)](#).

⁷ Section 74(1)(b) of the [FOI Act](#).

⁸ ACT Ombudsman reference: AFOI-RR/23/10009.

11. On 24 March 2023, the applicant applied to Education for **(fourth application)**:⁹

...all records, including but not limited to emails, diary notes and files notes, relating to myself...

This request relates to my employment with the ACT Education Directorate and includes any records generated, received, sent or recorded from the beginning of my employment with the Directorate in [year] to the present date of this email. This request includes the records of all personnel who have made or received comments or information about me, directly or indirectly, and also includes a request to release all notes and records related to the Preliminary Assessment conducted by [staff member] plus any correspondence between ACT Education Directorate employees that mentions or relates to me.

12. On 26 April 2023, the Education information officer decided the fourth application by giving full access to 22 documents and partial access to 6 other documents with deletions to remove contrary to the public interest information (**employment records**).¹⁰

13. On 28 April 2023, the applicant applied for Ombudsman review of Education's decision to refuse access to contrary to the public information within these 6 other documents.

14. On 7 July 2023, I provided my preliminary view to the parties in a draft consideration.

15. On 11 July 2023, Education accepted the draft consideration. The applicant did not respond to the draft consideration.

Information at issue

16. The information at issue in this Ombudsman review is the personal information of third parties and witness statements (**third-party information**) within the employment records to which the applicant was refused access under Education's decision of 28 April 2023 on the fourth application.¹¹

17. The issue to be decided in this Ombudsman review is whether the third-party information is 'contrary to the public interest information' for the purposes of the FOI Act.

18. In making my decision, I have had regard to:

- the applicant's access application and review application
- the respondent's decisions of 1 March 2022, 11 April 2022 and 26 April 2023
- the FOI Act, in particular ss 6, 7, 16, 17, 35, 50, 72 and Schedule 2
- the respondent's FOI processing file relating to the access application
- the *Human Rights Act 2004* (ACT) (**Human Rights Act**)

⁹ Education reference FILE2023/3532.

¹⁰ Section 35(1)(c), s 50 of the [FOI Act](#).

¹¹ Parts of documents 1, 5 and 12 from the first application (FILE2022/195), documents 1 and 2 from the second application (FILE2022/2758) and document 8 from the fourth application (FILE2023/3532).

- the *Information Privacy Act 2014 (ACT) (Information Privacy Act)*
- an unedited copy of the employment records
- the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act.

Relevant law

19. Section 7 of the FOI Act gives every person 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.
20. The FOI Act permits refusal of access to information where the information sought is contrary to the public interest information.¹²
21. 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.
22. 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.
23. In conducting the public interest test, a decision-maker must ensure none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.
24. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.
25. Section 72 of the FOI Act provides the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

The parties' submissions

26. Education's decision notice dated 26 April 2023 said:

As two of your 2022 requests were made over 12 months ago, the Directorate can revisit records covered by those applications....

¹² Section 35(1)(c) of the [FOI Act](#).

Searches have been undertaken within the Directorate and the only records identified that are within the scope of your application were considered and provided to you in response to your previous requests. No additional records were identified. I am satisfied that appropriate searches were conducted.

I have reconsidered the records collated for your previous requests that were not released in full. I have decided that some of the information contained in one of the records (Record 8 of FILE2022/195) may be released and a new version is provided at Attachment A to this letter.

However, the public interest factors in relation to other information which had been deleted from the records for your first two requests have not changed from what was set out in the decision letters sent to you on 1 March 2022 and 11 April 2022. Consequently, the remaining information contained remains redacted.

27. Education's decision notice dated 1 March 2022 (documents 1, 5 and 12 from the first application) said:

I place significant weight on the right to privacy of individuals and their right to have their personal information protected. I have decided that their right to privacy in relation to their personal information has a higher standing of public interest not to disclose, than the public interest in disclosing this information. Accordingly, some the records are partially released with third party information deleted from the records being provided to you.

I have decided that some of the records were created with the author's expectation that they would be treated in-confidence and I have determined that it would be detrimental to the Directorate's ability to obtain confidential information, including the participation of students in investigation processes, if these were released. My decision is that the public interest in not disclosing these records strongly outweighs the public interest that would arise from disclosing them.

28. Education's decision notice dated 11 April (documents 1 and 2 from the second application) said:

I place significant weight on the right to privacy of individuals and their right to have their personal information protected. I have decided that their right to privacy in relation to their personal information has a higher standing of public interest not to disclose, than the public interest in disclosing this information. Accordingly, the records are partially released with third party information deleted from the records being provided to you.

29. These submissions are discussed in more detail below.

Consideration

30. Neither party participating in this Ombudsman review suggested the third-party information is information which is taken to be contrary to the public interest under Schedule 1 of the FOI Act.

31. Education refused access to the third-party information because disclosure of this information would, on balance, be contrary to the public interest.

Public interest test

32. To determine whether, on balance, disclosure is contrary to the public interest, the FOI Act prescribes the following 5 steps:¹³

- identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in Schedule 2, section 2.1
- identify any factor favouring nondisclosure that applies in relation to the information (a relevant factor favouring nondisclosure), including any factor mentioned in Schedule 2, section 2.2
- balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure
- decide whether, on balance, disclosure of the information would be contrary to the public interest
- unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.

Pro-disclosure bias

33. In addition to the non-exhaustive factors favouring disclosure listed in Schedule 2, s 2.1, the FOI Act is intended to be administered with a pro-disclosure bias and relevant discretions be exercised as far as possible in favour of disclosing government information.¹⁴ This concept is promoted through the objects of the FOI Act.¹⁵

Factors favouring disclosure

34. Education considered one factor favouring disclosure of the employment records, that the information is the personal information of the applicant.

Personal information of the applicant (Schedule 2, s 2.1(b)(i))

35. The FOI Act recognises a public interest in disclosing information to an applicant where the information is personal information of the applicant.¹⁶

¹³ Section 17(1) of the [FOI Act](#).

¹⁴ Section 9 of the [FOI Act](#).

¹⁵ Section 6 of the [FOI Act](#).

¹⁶ Schedule 2, s 2.1(b)(i) of the [FOI Act](#).

36. I accept the employment records contain the personal information of the applicant, including joint personal information of the applicant and third parties in some of the third-party information.¹⁷
37. I consider some of the third-party information is not the personal information of the applicant, and for this reason this factor does not apply to this information.¹⁸
38. I attribute moderate weight to this factor in relation to the remainder of the third-party information, as the majority of the information about the applicant was released and information about the applicant which was not released was provided to the applicant in the form of a summary.¹⁹

Factors favouring nondisclosure

39. Education considered 2 factors favouring non-disclosure of the employment records.

Information could prejudice the protection of an individual's right to privacy (Schedule 2, s 2.2(a)(ii))

40. A reasonable expectation disclosure could prejudice an individual's right to privacy under the Human Rights Act is a factor favouring nondisclosure under the FOI Act.²⁰
41. 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.
42. In considering whether the disclosure of this information could reasonably be expected to prejudice the protection of an individual's right to privacy, relevant matters include any detriment disclosure may cause, the nature of the information, and the circumstances in which the information was collected or obtained.²¹

¹⁷ Parts of document 5 from the first application (FILE2022/195), and parts of document 8 from the fourth application (FILE2023/3532).

¹⁸ Parts of document 1 and 12 from the first application (FILE2022/195), parts of documents 1 and 2 from the second application (FILE2023/3532).

¹⁹ Parts of document 5 from the first application (FILE2022/195), and parts of document 8 from the fourth application (FILE2023/3532).

²⁰ Schedule 2, s 2.2(a)(ii) of the [FOI Act](#).

²¹ [Freedom of Information \(Volume 4 – Considering the Public Interest\) Guidelines 2020](#), [9.3].

43. The Information Privacy Act contains the Territory Privacy Principles (**TPPs**), which govern public sector agencies' collection, management, use and disclosure of personal information.
44. TPP 6.1 provides an agency must not use or disclose personal information about an individual collected for a particular purpose for another purpose (secondary purpose) without consent, or unless one of the exceptions in TPP 6.2 or 6.3 apply.²²
45. I consider the third-party information was collected by or disclosed to Education for the purposes of communicating staff leave, providing personal contact details, performing human resources functions, and addressing student welfare issues.
46. I note the individuals to whom the third-party information relates, or their legal guardians, were not consulted on the possible release of their personal information.
47. I do not consider those individuals would reasonably expect Education to use or disclose the information for a purpose unrelated to the activities described at [45] above.
48. I attribute significant weight to this factor because I consider disclosure could result in a breach of the TPPs and therefore prejudice the protection of an individual's right to privacy within the meaning of Schedule 2, s 2.2(a)(ii) of the FOI Act.

Prejudice an agency's ability to obtain confidential information (Schedule 2, s 2.2(a)(xii))

49. A reasonable expectation that disclosure of information could prejudice an agency's ability to obtain confidential information weighs against disclosure under the FOI Act.²³ Education considered this factor in respect of the information contained in document 8 (witness statements).
50. Based on my examination of the witness statements, I am satisfied this information was provided by school students. I accepted Education's submission that the information was provided on the expectation it would be treated in confidence.
51. I consider it is reasonable to expect Education may need to rely on the cooperation of witness, including school students, to provide information voluntarily for the purpose of an assessment by Education.

²² [Information Privacy Act](#), Schedule 1, Part 1.3 Dealing with Personal Information, TPP 6 – use or disclosure of personal information.

²³ Schedule 2, s 2.2(a)(xii) of the [FOI Act](#).

52. If students believed that such information provided as part of this process would be disclosed for another purpose, I consider it is reasonably likely they may choose not to disclose relevant information.
53. I therefore consider the Education Directorate's ability to obtain confidential information, which is necessary for the purposes of performing its functions, would be significantly impaired if such information were to be disclosed.
54. I attribute significant weight to this factor, having regard to the strong public interest in ensuring all relevant confidential information is made available to the Education Directorate for the purpose of investigating or assessing workplace incidents.

Balancing the factors

55. I have identified per [37] above that one public interest factor does not apply to information which is not the personal information of the applicant.
56. I have identified one public interest factor which favours disclosure of part of the third-party information, being information which is the personal information of the applicant.²⁴ I attribute moderate weight to this factor.
57. I have identified 2 public interest factors favouring nondisclosure of the third-party information, being Schedule 2, s 2.2(a)(ii) and s 2.2(xii) of the FOI Act. I attribute significant weight to these factors.
58. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being considered in the public interest. The decision-maker's task 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 disclosing the information would have on the public interest.
59. The FOI Act has a pro-disclosure bias, and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side, rather the scales are 'laden in favour of disclosure.'

²⁴ Schedule 2, s 2.1(b)(i) of the [FOI Act](#).

60. I am satisfied, on balance, the public interest factors favouring non-disclosure outweigh the public interest factor favouring disclosure of the third-party information. This is because I attribute overall significant weight to the 2 factors favouring non-disclosure, whereas I have attributed moderate, but less, weight to the factor favouring disclosure (including the pro-disclosure bias in the FOI Act).

Conclusion

61. For the reasons set out above, I confirm the decision of the Education Directorate under s 82(2)(a) of the FOI Act, to refuse access to the third-party information under s 35(1)(c) of the FOI Act and give access to the remainder of the information.

David Fintan
Senior Assistant Ombudsman
20 July 2023