

'AB' and Chief Minister, Treasury and Economic Development Directorate [2018] ACTOFOI 2 (23 August 2018)

Decision and reasons for decision of Senior Assistant Ombudsman, Paul Pfitzner

Application Number:	AFOI-RR/18/10013
Decision Reference:	[2018] ACTOFOI 2
Applicant:	'AB'
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Decision Date:	23 August 2018
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> — deciding access — whether disclosure of information is contrary to the public interest — 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* (the FOI Act).
2. Under s 82(1) of the FOI Act, I confirm the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 8 May 2018, as varied by CMTEDD's decision of 22 August 2018.¹

¹ Under s 12 of the FOI Act, the FOI Act does not apply to a 'health record' under the *Health Records (Privacy and Access) Act 1997*. On 22 August 2018, CMTEDD agreed to provide the applicant with the information that it considers to be 'health record' information, information which it had refused in its decision of 8 May 2018. While deciding to give access to the 'health record' information on a voluntary basis, CMTEDD maintains that the use of s 12 was correct in the circumstances. As the information has been provided, it is unnecessary to consider this issue further.

Scope and background of Ombudsman review

3. On 1 May 2018, the applicant applied to CMTEDD for access to information provided by an informant or informants (the informant)² about a medical condition alleged to affect the applicant's ability to drive a motor vehicle.
4. On 8 May 2017, CMTEDD identified one document, being an email (the email), as falling within the scope of the access application. CMTEDD decided to give the applicant access to the email in part.
5. In making its decision, CMTEDD found:
 - the FOI Act does not apply to some of the information contained in the email, as the information is a 'health record' pursuant to the *Health Records (Privacy and Access) Act 1997*,³ and
 - it would be contrary to the public interest to disclose the personal information of the informant.
6. On 24 May 2018, the applicant sought Ombudsman review of CMTEDD's decision under s 73 of the FOI Act.
7. On 15 June 2018, the applicant informed the ACT Ombudsman's Office (the Office) that he is seeking to identify the informant.
8. I provided my preliminary views about CMTEDD's decision to the parties in my draft consideration dated 20 July 2018.
9. On 14, 20 and 21 August 2018, the applicant responded to my draft consideration with submissions. In part, the applicant submits that he knows the 'health record' information as that information was provided to him by Access Canberra as part of the process of addressing his concerns in relation to his ability to maintain an ACT driver's licence.
10. On 22 August 2018, CMTEDD advised the Office of its decision to provide the 'health record' information to the applicant, based on the additional information the applicant has provided in his submissions. Accordingly, the 'health record' information is now outside the scope of this Ombudsman review.

² In this case, I use the term 'informant' both as singular and as plural.

³ Under s 12 of the FOI Act, the FOI Act does not apply to information that is a 'health record' under the *Health Records (Privacy and Access) Act 1997*.

11. The only issue to be decided in this Ombudsman review is whether giving the applicant access to the information in the email that identifies the informant (the information sought) would be contrary to the public interest, as CMTEDD has found.
12. In making my decision, I have had regard to:
 - the applicant's application for Ombudsman review
 - CMTEDD's decision
 - the FOI Act, in particular ss 7, 16, 17, 35 and schedules 1 and 2
 - the Explanatory Statement to the Freedom of Information Bill 2016
 - the *Human Rights Act 2004*, in particular s 12
 - the *Information Privacy Act 2014*, in particular s 14
 - CMTEDD's FOI processing file relating to the access application, including an unedited copy of the email
 - relevant case law, in particular '*LG*' and *Department of Human Services (Freedom of information)*⁴, '*HC*' and *Department of Human Services*⁵ and *Mewburn and Queensland Police Service*,⁶ and
 - the submissions of the parties, including the applicant's submissions in response to my draft consideration.

Relevant law

13. 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.
14. 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.

⁴ [2017] AICmr 37 ('*LG*').

⁵ [2015] AICmr 61 ('*HG*').

⁶ [2014] QICmr 49 ('*Mewburn*').

15. 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.

16. The public interest test set out in s 17 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.

17. In this Ombudsman review, the applicant is seeking information that will identify the informant. However, the FOI Act provides for significant protections restricting the disclosure of personal information.

18. The FOI Act defines 'personal information' as:

information or an opinion (including information forming part of a database), whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.⁷

19. Schedule 2 of the FOI Act sets out the public interest factors that, where relevant, must be considered when determining the public interest and contains an explicit recognition of the public interest in protecting human rights, including the right to privacy.⁸

The contentions of the parties

20. In this case, the applicant is expressly seeking to identify the informant through the information sought. The applicant explains:

This was a malicious submission and it is important that I know who made the report.

Whilst I agree that an individual has the right to know their identity will be held in confidence when corresponding with the ACT government anonymously in most circumstances, surely this does not apply to malicious and vexatious submissions. The reporter has wasted the RTA's time. It has cost me money and caused me immense stress. Whoever reported me planned to destroy my ability to earn a living. This is not in the spirit of the law. I would also suggest that releasing the identity would deter people from making vexatious claims.

⁷ See Dictionary to the FOI Act 'personal information'. This definition excludes some information of an officer of an agency, or a staff member of a Minister.

⁸ Schedule 2, s 2.2(a)(ii). See also, Explanatory Statement, Freedom of Information Bill 2016 (ACT) 6.

21. In its reasons for decision, CMTEDD said:

I am satisfied that the protection of an individual's right to privacy ... is a significant factor as the parties involved have provided their personal information anonymously for the purposes of meeting obligations under relevant legislation, which in my opinion, outweighs the benefit which may be derived from releasing the personal information of the individuals involved in this matter. Individuals are entitled to expect that the personal information they have supplied as part of this process will be dealt with in a manner which protects their privacy.

I am also satisfied that an individual has the right to know their identity will be held in confidence when corresponding with the ACT Government anonymously. Failing to protect the identity of members of the public when corresponding with the ACT Government could prejudice the future flow of information to a regulatory agency under the Act.

Considerations

22. As the informant's identity would be clearly apparent from the email, and the email identifies the informant as an informant, I am satisfied the information sought is the personal information of the informant.

23. I now need to consider the tests in the FOI Act to decide whether the information sought is contrary to the public interest information.

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

24. Schedule 1 of the FOI Act provides a list of information that is taken to be contrary to the public interest to disclose. Schedule 1 does not list a public interest ground for 'personal information', although it does specifically list 'sensitive information'.⁹

25. Sensitive information is defined in s 14 of *Information Privacy Act 2014* as:

sensitive information, in relation to an individual, means personal information that is—

- (a) about the individual's—
 - (i) racial or ethnic origin; or
 - (ii) political opinions; or
 - (iii) membership of a political association; or
 - (iv) religious beliefs or affiliations; or
 - (v) philosophical beliefs; or
 - (vi) membership of a professional or trade association; or
 - (vii) membership of a trade union; or
 - (viii) sexual orientation or practices; or

⁹ At schedule 1, s 1.4 of the FOI Act.

- (ix) criminal record; or
 - (b) genetic information about the individual; or
 - (c) biometric information about the individual that is to be used for the purpose of automated biometric verification or biometric identification; or
 - (d) a biometric template that relates to the individual.
26. From my examination of the email, I am satisfied that the information sought is not 'sensitive information'. Accordingly, the information sought is not contrary to the public interest information under schedule 1.
27. Therefore, for the information sought to be contrary to the public interest information, disclosure of the information must, on balance, be contrary to the public interest under the test set out in s 17.

The public interest test

28. To determine whether information is, on balance, contrary to the public interest, s 17(1) 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.
29. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) are considered.

Irrelevant factors

30. I have noted the irrelevant factors listed in s 17(2) and I am satisfied that I have not considered any irrelevant factors in this case.

Factors favouring disclosure

31. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.

32. Of the factors favouring disclosure in schedule 2, s 2.1, I consider that none are relevant in this case.
33. However, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of a representative democracy.¹⁰ This concept is promoted through the objects of the FOI Act.¹¹
34. I consider that giving access to the information sought would promote government transparency and the objects of the FOI Act. I identify this as the only public interest factor favouring disclosure in this case.
35. The applicant contends that an individual's right to anonymity does not apply to malicious and vexatious submissions. In his responses to my draft consideration, the applicant indicates that he is in disagreement with members of his family, such that particular members of his family may have been acting maliciously against him. The applicant also contends that there is a public interest in protecting his privacy.
36. I accept that, in circumstances where an informant has clearly acted maliciously or vexatiously, the public interest might be served by disclosing the identity of the informant, as disclosure might contribute to the administration of justice for the wronged person. However, in this case it is not apparent that the informant, in providing information about the applicant's medical condition, was motivated by anything more than a reasonable concern for the safety of all road users.
37. The applicant has raised the protection of his own privacy as a public interest factor favouring disclosure. However, the disclosure of the applicant's personal information is not at issue in this Ombudsman review, as I am only considering whether the identity of the informant should be disclosed.

Factors favouring nondisclosure

38. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure.
39. Of the factors favouring nondisclosure, I consider that three are relevant in this case. Disclosure could reasonably be expected to prejudice:
- an agency's ability to obtain confidential information

¹⁰ See s 17 of the FOI Act.

¹¹ See s 6(b) of the FOI Act.

- the flow of information to the police or another law enforcement or regulatory agency, and
- the protection of an individual's right to privacy.

Confidentiality and the flow of information to Government

40. In its reasons for decision, CMTEDD reasoned that the informant has the right to know that their identity will be held in confidence when corresponding with the ACT Government anonymously.
41. The question of whether an informant has an expectation of confidentiality when providing information to government has been considered in other FOI jurisdictions.
42. In the Commonwealth case of *LG*, the Australian Information Commissioner considered whether details provided by an informant through a Centrelink online tip off form were provided in confidence. In that case, the Commissioner discussed that the Centrelink website advises that when reporting fraud, 'we will keep everything you tell us confidential'. The Commissioner found the website supported an expectation of anonymity.¹²
43. Similarly, in the Commonwealth case of *HC*, the Australian Information Commissioner was satisfied that a Centrelink informant would wish for their identity to be known only to those who need to know it for the purpose of enforcing or administering the law.¹³
44. I consider that the Commissioner's discussions in *LG* and *HC* are relevant to this Ombudsman review.
45. In the email, the informant expressly said 'PLEASE KEEP THIS MY EMAIL ADDRESS, NAME AND EMAIL CONFIDENTIAL.' In this case, I consider that the informant has expressed a clear wish that their identity be known only to those who need to know it for the purpose of enforcing or administering the law.
46. I am satisfied that these circumstances demonstrate a substantial public interest in maintaining the confidence of informants in order to protect the flow of information to regulatory agencies.

¹² *LG* at [16].

¹³ *HC* at [15].

The right to privacy

47. Where a decision maker is considering personal information in response to an FOI application, a decision to grant access must take into account the context of the *Human Rights Act 2004* which provides protection for privacy and reputation.¹⁴

48. An informant's right to privacy has been considered in other FOI jurisdictions.

49. In the Queensland case of *Mewburn*,¹⁵ Mr Mewburn sought access to police complaints, reports and investigations about him.

50. In submissions, Mr Mewburn said:

Reasons provided by the decision maker included public interest and police procedure. In this case, I am advised that the right of a member of the public to have me investigated by police, my personal information detailed on police records and polices' right to investigate me has overcome my human rights, my equality before the law, my right to natural justice and my right to procedural fairness. I am told this is to prevent the informant(s) 'fear of reprisals'. Therefore, an informant(s) fear (real or imagined) is even more important than individual rights... History is full of atrocities carried out in the public interest and I will not go into that here.¹⁶

51. In addressing Mr Mewburn's submissions, the Queensland Information Commissioner discussed:

The concept of 'privacy' is not defined in either the [Queensland *Right to Information Act 2009*] or the [Queensland *Information Privacy Act 2009*]. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere from interference from others. I consider that providing information to law enforcement authorities such as [Queensland Police Service] is a private action falling within an individual's personal sphere and that disclosing the identity of a person who has been a complainant in a police matter would be a significant intrusion into the individual's privacy. Members of the community have a legitimate expectation that, in providing information to [Queensland Police Service], their privacy will be maintained and respected as far as possible.¹⁷

52. I consider that the Commissioner's discussions in *Mewburn* are relevant to this Ombudsman review. I consider that the informant in this case would have a legitimate expectation that, in providing information to government, their privacy will be maintained and respected as far as possible.

¹⁴ Section 12 of the *Human Rights Act 2004*.

¹⁵ [2014] QICmr 49 (*'Mewburn'*).

¹⁶ *'Mewburn'* at [19].

¹⁷ *'Mewburn'* at [22].

Balancing the factors

53. I have identified a factor favouring disclosure, being the pro-disclosure bias of the FOI Act towards the disclosure of information. However, balanced against this factor is the substantial public interest in protecting the flow of information to government. If the personal information of the informant was disclosed, it is reasonable to expect that individuals would be discouraged from providing information to the government in the future.
54. I am satisfied that, on balance, the public interest factors favouring nondisclosure outweigh the public interest factor favouring disclosure, therefore, disclosure would be contrary to the public interest.

Conclusion

55. Giving the applicant access to the information sought would, on balance, be contrary to the public interest. I confirm CMTEDD's decision to refuse access under s 35(1)(c) of the FOI Act.

Paul Pfitzner
Senior Assistant Ombudsman
23 August 2018