

'AQ' and Canberra Health Services [2020] ACTOFOI 2 (21 January 2020)

Decision and reasons for decision of Acting Senior Assistant Ombudsman, Cathy Milfull

Application Number	AFOI-RR/19/10030
Decision Reference	[2020] ACTOFOI 2
Applicant	'AQ'
Respondent	Canberra Health Services
Decision Date	21 January 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – unreasonable and substantial diversion of resources – frivolous or vexatious application – abuse of process application

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the ACT *Freedom of Information Act 2016 (FOI Act)*.
2. Under s 82(2)(c) of the FOI Act, I **set aside and substitute** the decision of the Canberra Health Services (**respondent**), dated 18 October 2019, with respect to the processing of this access application.

Background of Ombudsman review

3. On 2 September 2019, the applicant applied to the respondent for access to:
 - 1) Copies of briefings to the Minister for Health and Wellbeing related to the management of ACT Government funding and applications for funding and grants provided to or for the Australian National University (ANU), including the management of ACT Government funding for ANU programmes, from January 2017 to date.
 - 2) All documents related to planning, funding and approval of ANU Grand Challenges projects by Canberra Health Services from January 2017 to date.
 - 3) All documents related to the planning, funding and approval of the MRI research scans requested/organised by HOD Neurology from January 2017 to date. (see File 1).

4. On 20 September 2019, the respondent wrote to the applicant, advising that his application did not meet minimum requirements under s 30 of the FOI Act. It also gave the applicant notice of its intention to refuse to deal with the access application under the following sections of the FOI Act:
 - 43(1)(a) – dealing with the application would require an unreasonable and substantial diversion of the respondent’s resources
 - 43(1)(b) – the application is frivolous or vexatious
 - 43(1)(c) – the application involves an abuse of process
 - 43(1)(d) – the government information is already available to the applicant.
5. The applicant responded to the notice within the consultation period and, following discussions with the respondent’s FOI team, revised the scope of the access application to:
 - 1) [removed]
 - 2) All documents related to the process of planning, funding and approval of ANU Grand Challenges project (Our Health in Our Hands) by Canberra Health Services.
 - 3) All documents related to the process of planning, funding and approval of the MRI research scans by HOD Neurology. (see File 1 previously provided).¹
6. On 18 October 2019, the respondent decided the revised request had removed the ground for refusal under s 43(1)(d) of the FOI Act. However, it refused to deal with the access application on the basis that the other grounds for refusal (ss 43(1)(a)-(c) of the FOI Act) remained.
7. On 23 October 2019, the applicant sought Ombudsman review of the respondent’s decision under s 73 of the FOI Act.
8. On 19 December 2019, preliminary views about the respondent’s decision was provided to the parties in a draft consideration, dated 17 December 2019.
9. On 23 December 2019, the applicant advised they accepted the draft consideration.
10. On 17 January 2020, the respondent advised they accepted the draft consideration.

Scope of Ombudsman review

Consultation requirements

11. As a preliminary issue, I have considered whether appropriate consultation was undertaken with the applicant as required by s 46 of the FOI Act.

¹ (Revised request).

12. Before refusing to deal with an access application under ss 43(1)(a), (b) or (c) of the FOI Act, the respondent was required to:
 - advise the applicant of its intention to refuse to deal with the access application, and
 - give the applicant the opportunity to consult with the respondent and negotiate and refine the scope of the access application.
13. I am satisfied the respondent gave the applicant reasonable written notice of its intention to refuse to deal with the access application, and the opportunity to refine the scope of the access application, in its letter dated 20 September 2019.
14. Such consultation was not, however, required in relation to s 43(1)(d) of the FOI Act, with different requirements to be met in terms of this refusal reason. But as this refusal ground is not at issue in this Ombudsman review, I have not discussed this further.
15. It is also noted the respondent included in its letter, dated 20 September 2019, advice that the application did not meet the minimum requirements under s 30 of the FOI Act, and its intention to refuse to deal with the application.
16. This approach is not considered consistent with the FOI Act, given an agency's obligation to assist an applicant under s 31 of the FOI Act to ensure their access application meets minimum requirements. Furthermore, if, despite reasonable steps being taken by the respondent, the access application still did not meet these requirements, there would have been no valid access application to be refused.
17. Following further scoping discussions, the respondent, nevertheless, proceeded to make a decision on the access application. As a result, I consider the issue of whether the application was valid to begin with to be a non-issue and have proceeded to review the respondent's decision.

Issues to be decided

18. The only issues to be determined in this review are whether:
 - dealing with the access application would require an unreasonable and substantial diversion of the respondent's resources
 - the application is frivolous or vexatious
 - the application involves an abuse of process.

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

- the applicant's access application and review application
- the respondent's decision
- the FOI Act, in particular ss 7, 35, 43(1)(a)-(c), 44
- the respondent's FOI processing file relating to the access application
- an unedited copy of the information at issue
- relevant case law including *Underwood*,² *Cianfrano and Premier's Department*,³ *Colefax and Department of Education and Communities (NSW)*,⁴ *The Age Company Pty Ltd and CenITex*⁵ and *Burdon and Suburban Land Agency*.⁶

Relevant law

20. 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.

21. Section 35(1)(d) of the FOI Act provides that the respondent may refuse to deal with an access application for the reasons set out in s 43 of the FOI Act. Reasons utilised by the respondent in deciding to refuse to deal with the access application are discussed individually below.

The contentions of the parties

22. In its decision notice, the respondent relied on its reasons in the consultation notice to the applicant. The consultation notice stated:

...the resources required to identify, locate, collate and examine the required information would substantially inhibit the ability of the Division of Medicine, Canberra Health Services to exercise its functions.

It is my decision that after 12 requests in around 18 months, your applications appear to be an abuse of the FOI process.

² [2016] QICmr 48.

³ [2006] NSWADT 137.

⁴ [2013] NSWADT 130.

⁵ [2013] VCAT 288.

⁶ [2019] ACTOFOI 12.

None of [the applicant's Ombudsman reviews] have overturned or set aside the decision of the Directorate. I believe that your applications are frivolous and bordering on vexations and have been submitted to pursue an interpersonal dispute in the workplace.

Any single request, when taken in isolation, may not be deemed an unreasonable and substantial diversion of our resources, however, taken as a whole, it has.

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

It is my decision that this application is not a genuine application for information that is in the public interest, but is instead, part of an ongoing series of requests both under FOI and other processes to cause disruption in the Division of Medicine and CHS more broadly.

24. More specific submissions made in relation to specific refusal reasons are discussed below.

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

I am extremely disappointed with handling of my FOI application by CHS, the lack of transparency, and their unwillingness to share information in a timely manner. This is not in accordance with Section 9 of the ACT FOI Act 2016. I am very concerned that the allegations made against me for submitting this FOI application is nothing but an act of retaliation and tactics to intimidate me for exercising my enforceable rights under the FOI Act. I have noted the irrelevant factors listed in s 17(2) and I do not consider that any irrelevant factors arise in this Ombudsman review.

Considerations

26. I have reviewed the information provided by the applicant and respondent.

Unreasonable and substantial diversion of resources

27. A respondent can refuse to deal with an access application under s 35(1)(d) of the FOI Act, if dealing with the application would require an unreasonable and substantial diversion of the respondent's resources.⁷

28. Under s 44 of the FOI Act, dealing with an access application will only be considered to require an unreasonable and substantial diversion of resources where:

- the resources required to identify, locate, collate and examine any information held by the respondent would substantially inhibit the ability of the respondent to exercise its functions, and
- the extent to which the public interest would be advanced by giving access to the information does not justify the use of the required resources.

29. I have considered below what resources are likely to be required to process the access application, and whether use of these resources would substantially inhibit the ability of the respondent to exercise its functions.

⁷ See section 43(1)(a) of the FOI Act.

30. In doing so, I have had regard to what work would be required to deal with the application in the context of the agency's functions and its resources.⁸ I also consider the following list of non-exhaustive factors identified in *Cianfrano and Premier's Department*⁹ relevant to what constitutes 'unreasonable and substantial diversion of resources':

- the terms of the request, especially if the request was expressed globally
- the demonstrated importance of the documents
- the size of the agency and extent of its resources
- the agency's estimate of number of documents, pages, processing time and cost (salary of FOI staff)
- the reasonableness of the initial assessment and whether the applicant has been cooperative in refining the scope, and
- whether the processing time is more than 40 hours' work.¹⁰

What resources were required to deal with the access application?

31. The respondent's consultation notice advised the applicant that, due to the broad scope of the access application, dealing with the access application would "substantially inhibit the ability of the Division of Medicine, Canberra Health Services to exercise its functions."¹¹

32. The respondent further explained in their consultation notice that:

When you consider the hours of senior officer's time invested into each request, this has had a significant impact on the resources of the Division.

33. It is, however, unclear:

- why a person at this level would be required to identify, locate, collate and examine all the information previously provided and to establish if there is any additional information, and
- how the broader functions of the Division would be impacted by the processing of the application.

34. The respondent has not clearly identified the specific resources, or the amount of time, that would be required to deal with the access application. In these circumstances, it is difficult to determine what resources are required to deal with the access application. I note, however, that:

⁸ *Underwood* [2016] QICmr 48.

⁹ [2006] NSWADT 137 (*Cianfrano*), confirmed in *Colefax and Department of Education and Communities (NSW)* [2013] NSW ADT 130.

¹⁰ *Cianfrano* at [62-63].

¹¹ See [22].

- The applicant is seeking to access information about the process of planning, funding and approving two particular projects.
- While the scope of the request was originally expressed quite broadly, the applicant subsequently reduced the scope of the request.
- It is expected that any relevant information would be included on the file(s) for these projects.

Whether the resources required would substantially inhibit the ability of the agency to exercise its functions

35. Based on the information before me, I am not satisfied the resources required would substantially inhibit, the ability of the agency to exercise its functions.
36. The respondent has asserted this is the case (see paragraph [22]), but, as discussed at paragraph [34], did not provide any further details.
37. As outlined in *Burdon and Suburban Land Agency*,¹² it is not necessary for the respondent to demonstrate that processing an access application would require such resources so as to disrupt the delivery of its primary business functions. But the agency does need to demonstrate that processing the access application would unreasonably divert the resources of the agency for s 44 of the FOI Act to apply.
38. The respondent has, however, only referred to the number of access applications made by the applicant over a period of time. It has not explained the resources required to deal with this particular access application, relative to its other priorities and functions.
39. I note the FOI Act must be applied with a view to facilitating and promoting the disclosure of the maximum amount of government information, promptly, and at the lowest reasonable cost.¹³
40. In this context, I am not satisfied the respondent has demonstrated that the resources required to process the access application would substantially inhibit the ability of the agency to exercise its function. For this reason, I consider it unnecessary to consider to what extent the public interest in giving access would justify the use of these resources under s 44(1)(b) of the FOI Act.

Frivolous or vexatious application

41. A respondent can refuse to deal with an access application under s 35(1)(d) of the FOI Act where they are satisfied the application is frivolous or vexatious.¹⁴

¹² [2019] ACTOFOI 12.

¹³ Section 6(f) of the FOI Act.

¹⁴ Section 43(1)(b) of the FOI Act.

42. This provision is designed to ensure the capacity of respondents to discharge their normal functions is not undermined by processing unnecessary access applications.
43. It is, however, the Ombudsman's view that respondents should only use this refusal reason as a last resort, and the applicant is engaging in unreasonable behaviour.¹⁵ This is because, it has the practical effect of preventing a person from exercising an important legal right conferred by the FOI Act.
44. Agencies are also encouraged to first make use of the steps available under the FOI Act, which respondents can take to reduce the impact individual access applications may have on the workload or operations of the respondent, including consulting with the applicant and clarifying the scope of the access application.
45. As a result, I consider that where this refusal reason is used, agencies should provide clear and convincing reasons on why it is appropriate in the circumstances.
46. The terms 'frivolous' and 'vexatious' are not defined in the FOI Act and should be given their ordinary meaning:
 - *frivolous* – of little or no weight, worth or importance or characterised by lack of seriousness or sense.¹⁶
 - *vexatious* – instituted without sufficient grounds, and serving only to cause annoyance.¹⁷
47. In determining whether an access application is frivolous or vexatious, I consider that respondents should have regard to relevant individual circumstances, including but not limited to:
 - the number of access applications made by the applicant
 - the overall number of access applications received by the respondent during the relevant period
 - the subject matter and/or nature of the access applications made by the applicant
 - the applicant's dealings with the respondent
 - whether the applicant has previously received some or all of the information requested, either under the FOI Act or otherwise
 - the purposes of the access applications and whether the access application is made for a purpose other than the seeking of access to information.

¹⁵ For further guidance on unreasonable behaviour see: https://www.ombudsman.gov.au/_data/assets/pdf_file/0022/35617/GL_Unreasonable-Complainant-Conduct-Manual-2012_LR.pdf.

¹⁶ The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.

¹⁷ Ibid.

48. In its submissions, the respondent contends:

[The applicant], an employee, is party to departmental information. [They] have used this information to target FOI requests to inconvenience certain staff members. It is my decision that this request was made for this purpose and is therefore frivolous and an abuse of the FOI process.

[The applicant] has, this year, submitted nine FOI applications in addition to the five submitted in 2018. Of these nine the first five of these were processed with responses provided to [the applicant]. This request and another submitted at the same time were refused under Section 43 of the Act. On the same day the refusal for this application was provided CHS received an addition two requests from [the applicant]. Of the seven applications finalised this year [the applicant] has sought Ombudsman review on five applications in addition to the review [the application] sought at the end of last year.

...these research activities are, in the case of one not commenced and in the case of the other is only in the early stages...They are not managed or funded by CHS and if [the applicant] wanted to gain an understanding of these projects an application to ANU would be more appropriate.

49. Based on the information before me, I do not agree with the respondent that the access application is frivolous.

50. I do not consider it relevant whether the applicant would be able to gain more information from ANU about the projects he is seeking information on. This is a matter that could have been discussed with the applicant as part of scoping discussions, but the applicant now seeks information held by the respondent in terms of the "process of planning, funding and approval" of these projects, which have since received grant funding and are now being progressed.

51. I am also not satisfied the application is vexatious. Although the respondent is clearly concerned that it has only been lodged to cause annoyance, it describes the application(s) as only 'bordering on vexatious', and the respondent has not provided evidence to demonstrate that the applicant has engaged in unreasonable behaviour.

52. I do not consider it relevant that the applicant has lodged a number of review applications with the Ombudsman in relation to decisions made by the respondent, particularly where a decision has not yet been made by the Ombudsman on these matters.

53. I do consider it relevant that the applicant has lodged multiple access applications during 2018-19. Submitting a significant number of access applications does not, however, automatically make an application vexatious.¹⁸ Furthermore, the respondent has not provided sufficient information to ascertain the overall impact the access applications has had on the

¹⁸ See *The Age Company Pty Ltd v CenITex* [2013] VCAT 288.

respondent, what the subject matter and/or nature of those access applications are and whether the applicant has previously received the same information.

Abuse of process application

54. A respondent can refuse to deal with an access application under s 35(1)(d) of the FOI Act where they are satisfied the application involves an abuse of process.¹⁹
55. The FOI Act includes two specific examples of what constitutes an abuse of process:
 - (a) Harassment or intimidation of a person; and
 - (b) An unreasonable request for personal information about a person.²⁰
56. The respondent submits that the access application is an abuse of the FOI process for the same reasons as discussed at paragraph [22].
57. I have discussed below whether I consider the application an abuse of process taking into account the examples of an abuse of process included in the FOI Act, as well as other potentially relevant circumstances, noting the examples of situations that constitute an abuse of process under the FOI Act are not exhaustive.

Harassment or intimidation of a person

58. The terms 'harassment' and 'intimidation' are not defined in the FOI Act and therefore, should be given their ordinary meaning – to 'harass' a person is to disturb them persistently or torment them, and to 'intimidate' a person is to use fear to force or deter the actions of the person, or to overawe them.²¹
59. This example of abuse of process does not, however, appear relevant in this matter.
60. Even if the access application was, as submitted by the respondent, designed to "inconvenience certain staff members", there is no evidence before me to demonstrate how such inconvenience has resulted in the harassment or intimidation of these persons.
61. The respondent has not sufficiently explained how the access application constitutes harassment or intimidation of a person.
62. It remains unclear from the information before me how the access application has been targeted to impact either the Division of Medicine and/or a senior officer, as contended by the respondent.

¹⁹ Section 43(1)(c) of the FOI Act.

²⁰ Section 43(4) of the FOI Act.

²¹ The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.

63. There is no suggestion, for example, that the applicant has engaged in behaviour in circumstances the Office of the Australian Information Commissioner's FOI Guidelines provide that might establish harassment and intimidation, for example:

- utilising language that is insulting, offensive or abusive
- making unsubstantiated, derogatory and inflammatory allegations against employees
- making demands unrelated to rights under the FOI Act, or
- not reasonably responding to requests regarding processing of his access application.²²

64. As a result, I am not satisfied the application constitutes an abuse of process on the basis of harassment or intimidation of a person.

Unreasonable request for personal information about a person

65. I also do not consider the access application to be an abuse of process on the basis that it constitutes an unreasonable request for personal information about a person or persons.

66. The scope of the access application relates to the process of planning, funding and approving of two particular projects. The information that is within the scope of the access application may capture some personal information about staff related to their day-to-day work activities. However, the applicant has not indicated they are seeking access to personal information about a person, or persons involved in the projects, beyond information related to staff day-to-day work activities.

Other relevant circumstances

67. As noted above, the examples of situations that constitute an abuse of process included in the FOI Act are not exhaustive. As a result, I have considered whether there are any other circumstances in this case which could be considered to amount to an abuse of process – noting that the respondent has only raised the issue of multiple applications being lodged.

²² Office of the Australian Information Commissioner, FOI Guidelines Part 12 – Vexatious applicant declarations (<https://www.oaic.gov.au/assets/freedom-of-information/guidance-and-advice/foi-guidelines/part-12-vexatious-applicant-declarations-v1-4.pdf>) – see also discussion in *Indigenous Business Australia and 'QB' (Freedom of information)* [2019] AICmr 14 (29 April 2019).

68. In *University of Queensland and Respondent*,²³ the Queensland Information Commissioner noted that other grounds for abuse of process established at common law includes:

- duplicate proceedings already pending or determined and therefore incapable of serving a legitimate purpose
- the making of unsubstantiated or defamatory allegations in applications
- wastage of public funds and resources.

69. While I appreciate that the applicant's multiple access applications may have placed considerable demands on the respondent's limited FOI resources, I do not have sufficient evidence before me to be satisfied that such actions constitute unreasonable interference with the respondent's operations to the extent that they would amount to an abuse of process.

70. For the reasons above, I do not consider the access application an abuse of the FOI process.

Conclusion

71. For the reasons set out above, I set aside the respondent's decision to refuse to deal with the access application under s 35(1)(d) of the FOI Act.

72. The respondent is to deal with the access application in accordance with the FOI Act.

Cathy Milfull

Acting Senior Assistant Ombudsman

21 January 2020

²³ (27 February 2019).