ACT Ombudsman

OMBUDSMAN AN OFFICER OF THE ACT LEGISLATIVE ASSEMBLY

'*BI*' *and Canberra Health Services* [2021] ACTOFOI 10

(21 September 2021)

Decision and reasons for decision of Acting Senior Assistant Ombudsman Symone Andersen

Application Number	AFOI-RR/21/10021
Decision Reference	[2021] ACTOFOI 10
Applicant	BI
Respondent	Canberra Health Services
Decision Date	21 September 2021
Catchwords	*Freedom of Information Act 2016* (ACT) – deciding access – refusing to deal with application – dealing with the application would require an unreasonable and substantial diversion of the respondent's resources

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016* (**FOI Act**).
2. Under s **82(2)(c)** of the FOI Act, I **set aside** the decision of Canberra Health Services (**CHS**) dated 25 June 2021 and **substitute** my decision that the access application does not constitute an unreasonable and substantial diversion of CHS' resources for the purposes of s 43(1)(a) of the FOI Act.
3. On 30 March 2021, the applicant made an access application to CHS under the FOI Act.
4. On 25 June 2021, CHS' Information Officer decided, under s 43(1)(a) of the FOI Act, to refuse to deal with the access application because dealing with it would require an unreasonable and substantial diversion of CHS' resources.

5. On 16 July 2021, the applicant applied for Ombudsman review of CHS' decision under s 73 of the FOI Act.

Relevant law

6. Every person has a right of access to government information.[1] However, the respondent to an access application may refuse to deal with the application if dealing with it would require an unreasonable and substantial diversion of resources.[2]

Meaning of unreasonable and substantial diversion of resources

7. Section 44 of the FOI Act elucidates the meaning of an 'unreasonable and substantial diversion of resources.' It provides:

> For section 43(1)(a), dealing with an access application would require an unreasonable and substantial diversion of the respondent's resources only if–
>
> (a) the resources required to identify, locate, collate and examine any information held by the respondent, including the resources required in obtaining the views of relevant third parties under section 38, would substantially inhibit the ability of the respondent to exercise its functions; and
>
> (b) 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.

Requirement to consult with the applicant before refusing to deal with an application

8. Section 46 of the FOI Act sets out the steps a respondent must take before refusing to deal with an application under, among other sections, s 43(1)(a). It is set out below:

> (1) Before refusing to deal with an access application… the respondent must—
>
> (a) tell the applicant, in writing, of—
>
> (i) the intention to refuse to deal with the application; and
>
> (ii) the ground for refusal; and
>
> (iii) the period for consultation on the proposed refusal (the *consultation period*); and

[1] Section 7(1) of the FOI Act.
[2] Section 43(1)(a) of the FOI Act.

(b) give the applicant—

(i) a reasonable opportunity to consult with the respondent and to provide any additional information relevant to the application during the consultation period; and

(ii) any information that may assist the applicant make an application in a form that would remove the ground for refusal.

(2) After any consultation with the respondent, the applicant may give the respondent an amended application.

Other relevant provisions

9. The FOI Act contains a clear statement that:

It is the intention of the Legislative Assembly that this Act be administered with a pro-disclosure bias and discretions given under it be exercised as far as possible in favour of disclosing government information.[3]

Background of Ombudsman review

10. CHS received the original access application on 30 March 2021. The original application was worded as:

- Can you provide a list of all health committees that have a consumer or community representative and are chaired by a member of the senior Executive please as at 1 Feb 2021.
- Can you provide the name of the representative and role on the committee, and include the selection process used in engaging that representative. If applicable, can you provide the organisation that the representative belongs to and any payments made for the representation.
  Can you disclose the level of funding provided to the individual or to the organisation.
  Eg whether the person is a volunteer or if a person is an employee of an organisation, then the level of funding provided by the ACT government in the 2020 and 2021 financial year.
- Can you also provide any other organisations that are represented on those committees that are external to the Health Directorate, please.
- This information is in the public interest so the public knows "who is representing" us.
  The Community Representatives should be known to the Canberra community. Otherwise how can I reach them.
- I think this information should be publicly listed on a public website and regularly updated without having FOI request.

[3] Section 9 of the FOI Act.

11. On 20 May 2021, CHS wrote to the applicant to propose a narrowing of the scope of the access application to:

> Providing a schedule of committees chaired by an Executive member (EGM/ED or higher) of the Directorate with a community representation and the Terms of Reference for each of those committees.

12. On 24 May 2021, the applicant proposed the scope instead be narrowed in the following terms:

> I would like the FOI request to include the core of the request, which is that the Territory *provide the identity of community representative (entity or individual) on the committees, and the selection method used in engaging the representative* [italics in original].
>
> I believe the provision of "selection method" or delegate decision or nominations/directions from the minister's office for the 20 positions should be available.
>
> The "letters of appointment" of each community representative on the 20 committees should also be made public…
>
> … I have requested "selection method" in place of the original "selection process"… to clarify that all the process documentation is not necessary.

13. On 1 June 2021, CHS' Information Officer signed a letter addressed to the applicant to notify him of her intention to refuse to deal with his access application (**the notice of intention**). The notice of intention was sent to the applicant via email on 7 June 2021. The consultation period CHS gave the applicant was 10 working days, expiring at the close of business on 22 June 2021.
14. On 15 June 2021, the applicant wrote to CHS by email. The applicant attempted to amend the access application in this letter, writing:

> I seek that you consider the amended request rather than the original request. The amended request is for the provision of:
>
> The name of the community representative, and the selection method used in engaging the representative on committees chaired by Health Senior Executives.

15. The applicant then provided some clarification on terms. Relevantly:

> If a committee has 3 or more community representatives, then it will be sufficient to provide the name of the committee and the number of community representatives.

> I have added the last sentence to address the concern raised in your [notice of intention to refuse to deal with the application] that there may be multiple community representatives on a committee, and this will contribute to the resources required to respond to the request.
>
> …
>
> To ensure there is no misunderstanding, I do not seek all the details of the selection process, simply the delegate's decision on which 'selection method' was used in the appointment. Typical selection methods could be an open process (whereby members of the public could apply for the appointment), or if there was a ministerial nomination or a direct approach to an individual.

16. Having amended his request, the applicant commented:

> I believe that there are multiple ways of responding to the request which does not require extensive resources. I have proposed that the release [sic] the letters of appointment of the community representatives on the Executive committees could be a useful approach and I can modify the request to be specific in this regard, if this would assist you.

17. On 25 August 2021, I provided my preliminary view to the parties in my draft consideration. My preliminary view was that the application did not constitute an unreasonable and substantial diversion of resources.
18. On 26 August 2021, the applicant wrote to me agreeing with the view set out in my draft consideration.
19. On 3 September 2021, CHS wrote to me accepting the view set out in my draft consideration and declining to make any further submissions.
20. Accordingly, my final decision is consistent with my preliminary view and the reasons for it are set out below.

Relevant considerations

Evidence obtained through consultation with the applicant was not given due consideration

21. The applicant's response to the notice of intention amended his application, contended that the amended application would alleviate the problems raised in the notice of intention and offered to modify the request further 'if this would assist'.
22. By requiring consultation, the FOI Act clearly requires that information provided during consultation be considered by the decision-maker. This would be consistent with the

well-established principle in Australian administrative law requiring a decision-maker to turn 'proper, genuine and realistic consideration to the merits' of a decision.[4]

23. On 25 June 2021, CHS' Information Officer decided to refuse to deal with the application. The decision notice said:

> It is my decision that the public interest would not be served by the substantial expenditure of resources required to continue processing your request.

24. The decision notice acknowledged that the notice of intention was sent and consultation invited. However, it made no reference whatsoever to the applicant's response. According to s 46(2), this response provided an amended application, so CHS was required to consider the application in its amended form rather than the original application.
25. I am not satisfied that CHS' Information Officer gave proper, genuine and realistic consideration to the application in its amended form, the applicant's submissions about how the amended application would be less resource-intensive to process, or the applicant's offer to re-engage to narrow the application further if it would assist CHS.

<u>The decision notice was defective</u>

26. Section 55 of the FOI Act sets out the contents required in a decision notice for a decision to refuse to deal with an application. The requirements are:

> For a decision to refuse to deal with an application, the decision notice must include a statement of the following:
>
> (a) the ground under s 43(1) for the refusal;
>
> (b) the findings on any material questions of fact referring to the evidence or other material on which the findings were based…

27. While the decision notice fulfilled the first requirement by stating the ground for refusal. In my view it did not, however, fulfill the second as it does not adequately explain the findings on the material questions of fact which are whether:
    - the application causes a diversion of resources
    - the diversion of resources is unreasonable
    - the diversion of resources is substantial

[4] *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 (24 July 2017) at [29].

28. The decision notice contains the finding that these circumstances exist. However, it does not refer to any evidence or other material on which the findings were based. Not only does the decision notice apparently fail to have regard to the applicant's response during the consultation period, but it does not refer to any evidence or material relied on to quantitatively or qualitatively assess the resources that would be needed to deal with the application. Nor does it explain the impact dealing with the application would have on CHS and whether this impact would be disproportionate to the advancement of the public interest that would result from disclosing the information.
29. In my view, the decision notice did not comply with s 55 and was therefore defective.

Do CHS' submissions show that the decision was, in substance, the correct and preferable decision?

30. When I notified CHS of this review I invited submissions in support of the original decision. CHS provided copies of correspondence exchanged with the applicant during the consultation period.
31. I considered this documentation to determine whether, on the merits, the decision should be confirmed notwithstanding the defective decision notice and lack of compliance with s 46.
32. The documentation shows that CHS made efforts to engage with the applicant prior to the Information Officer issuing the notice of intention. The fact that CHS engaged with the applicant at this time does not, in my view, rectify the defective decision notice or the issues I have raised regarding compliance with s 46.
33. CHS provided submissions which confirmed that no steps had been taken to identify, locate or examine information it may hold within the scope of the request. Rather, CHS reiterated the view that the consultation necessary to deal with the application would be extensive, an assessment which I have already said I consider to be uncertain if not inaccurate.
34. CHS also submitted that responses 'received included a request for further information… which then differed substantially at each conversation and/or communication'. For the purposes of my decision, it is sufficient to say that changes to the request are to be expected when an applicant is invited to make an amended application.

Conclusion

35. CHS' decision notice was defective according to the requirements of s 55 of the FOI Act. The decision notice contained a finding that dealing with the application would require an unreasonable and substantial diversion of resources with no reference to any evidence or material relied on.
36. Moreover, the decision appears to have been made without first observing the required consideration under s 46 to the applicant's correspondence of 15 June 2021. This correspondence both modified the application and had to be considered on its merits for the decision-maker to comply with the requirements in s 46.
37. Accordingly, I am satisfied that CHS' decision was not the correct and preferable decision. My decision is to **set aside and substitute** CHS' decision under s 82(2)(c). The application does not constitute an unreasonable and substantial diversion of resources.

Symone Andersen
Acting Senior Assistant Ombudsman
21 September 2021