ACT Ombudsman

OMBUDSMAN AN OFFICER OF THE ACT LEGISLATIVE ASSEMBLY

"BX" and ACT Health Directorate [2022] ACTOFOI 12 (23 December 2022)

Decision and reasons for decision of Senior Assistant Ombudsman David Fintan

Application Number	AFOI-RR/21/10029
Decision Reference	[2022] ACTOFOI 12
Applicant	"BX"
Respondent	ACT Health Directorate
Decision Date	23 December 2022
Catchwords	*Freedom of Information Act 2016* (ACT) – deciding – reasonable steps to identify all government information within scope – whether the information is not held by the respondent – direction to conduct further searches – Cabinet information

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)(c) of the FOI Act, I **set aside and substitute** the decision of the ACT Health Directorate (**ACTHD**), dated 6 October 2021.

Background of Ombudsman review

3. On 6 August 2021, the applicant applied to the Justice and Community Safety Directorate (**JACS**) for access to information relating to COVID-19 and the public health response. The applicant asked for evidence demonstrating:

    1. That there is a novel coronavirus designated SARS-CoV-2 that has been reliably identified according to the scientific method.
    2. That SARS-CoV-2 is the sole cause of a new coronavirus disease 2019 (COVID-19), which is a distinct disease that is reliably differentiated from other diseases.

3. That COVID-19 presents a public health risk to the ACT community in general that exceeds the public health risk from other diseases in the community to date.
4. That people who are asymptomatic but diagnosed with COVID-19 spread the disease to others in a substantial enough way that merits concern.
5. That the polymerase chain reaction (PCR) method and all of its derivatives are a reliable diagnostic test for whether a person has the SARS-CoV-2 virus and are infectious.
6. That the SARS-CoV-2 virus is transmitted from person to person in a manner that face masks prevent, and the benefits of face mask use outweigh any harms to the wearer in the short, medium and long term, and other harms to the public and the environment.
7. That testing, quarantining, limiting gatherings, social distancing, contact tracing, lock downs, border closures, travel restrictions, frequent hand sanitisation and vaccination using novel technologies are justified in the circumstances and that there are no other viable alternatives to better respond to the perceived risks posed.
8. That people who have had COVID-19 should still get a vaccine for COVID-19 as it will protect the person from getting COVID-19 again or passing it onto someone else.
9. That the COVID-19 vaccines currently available are safe and do not contain potential toxic ingredients or cause potential toxicity within the body.

4. In their access application, the applicant provided additional detail, requesting 'all records in the possession, custody or control of the ACT Health Directorate describing':

a) … the real world (i.e. not simulated, modelled or theorised) isolation and purification of the novel coronavirus designated SARS-CoV-2 from a diseased patient anywhere in the world, which evidences that the patient was infected by this isolated and purified novel coronavirus and that the disease they were suffering from was solely caused by this isolated and purified novel coronavirus.

b) … the public health risk to the ACT community in general, and also according to particular groups who may be more at risk than others, in relation to:

   i. the infection fatality rate of SARS-CoV-2 and COVID-19, and also with reference to how this compares to seasonal influenza and recorded influenza outbreaks; and

   ii. the estimated prevalence of natural immunity and robust immune responses for SARS-CoV-2 and COVID-19 from individuals that have been previously exposed to the SARS-CoV-2 virus and/or other viruses that enable cross-reactivity.

c) … the following in relation to testing and diagnosis for SARS-CoV-2 and/or COVID-19:

   i. the diagnostic sensitivity and diagnostic specificity of each type of test used within the ACT;

   ii. the cycle threshold that laboratories adhere to when using the PCR method on specimens, and whether this threshold has changed over time, and whether this threshold is different for different groups of people including but not limited to vaccinated and unvaccinated individuals;

   iii. the known limitations and the estimated false positive rate of tests used within the ACT; and

   iv. the clinical diagnostic criteria for differentiating a case of COVID-19 from a case of another disease with similar clinical characteristics, in conjunction with, and also in the absence of, a laboratory test result.

d) … the extent to which asymptomatic individuals have been a significant contributor in driving:

   i. the spread of SARS-CoV-2; and

   ii. the spread of any virus in any previous viral epidemic or pandemic,

e) … the real world (i.e. not simulated, modelled or theorised) effectiveness of cloth, surgical and respirator face mask use in the general community for preventing the contraction and transmission of the SARS-CoV-2 virus or any other influenza or coronavirus, as well as the individual, societal and environmental harms that can occur from general community use of these face masks in the short, medium and long term.

f) … the potential and/or known toxicity, including but not limited to reproductive toxicity and genotoxicity, of current COVID-19 vaccines and the same for their individual ingredients.

g) … the absolute risk reduction from COVID-19 vaccination per type of vaccine for people who:

i. have never been diagnosed with COVID-19, covering risk reduction from disease, risk reduction from death, and risk reduction from transmission to others; and

ii. have recovered from COVID-19, covering risk reduction for recurrence of disease, risk reduction from death and risk reduction for transmission to others.

h) … the alternatives that have been considered to date to mitigate perceived risks to the ACT community from SARS-CoV-2 and COVID-19 in relation to:

i. focused protection of the most vulnerable groups;

ii. use of re-purposed medicines and supplements individually or in combination including but not limited to Hydroxychloroquine, Ivermectin, Favipirivir, Fluvoxamine, Quercetin, Metformin, Vitamin D, Vitamin C, and Zinc either in prophylaxis or treatment; and

iii. promotion of dietary and lifestyle changes that can improve the immune system, including but not limited to reduced stress, exercise, a diet full of essential vitamins and minerals linked to a healthy immune system, and avoiding exposure to known toxins that can impair the immune system.

5. JACS transferred the access application to ACTHD on 6 August 2021, in accordance with s 57 of the FOI Act.

6. On 3 September 2021, ACTHD provided the applicant with a notice of intention to refuse to deal with the access application because dealing with the application would require an unreasonable and substantial diversion of resources,[1] and because the information was already available to the applicant.[2]

7. On 7 September 2021, the applicant agreed to narrow the scope of the access application, advising ACTHD:

> I have revised the FOI request to seek the decision support materials supplied to the [Health] minister and Chief Health Officer which describe the particular matters covered in points a, b, d, e and h – which means materials referenced in development of the decision support materials are no longer in scope.

8. On 6 October 2021, the respondent advised the applicant it had not identified any documents as falling within the scope of the access application. In making its decision, the respondent relied on s 35(1)(b) of the FOI Act.

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

9. On 27 October 2021, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.

10. On 30 March 2022, the Acting Senior Assistant Ombudsman, Symone Andersen, provided her preliminary views about the respondent's decision to the parties in a draft consideration.

11. The respondent accepted the Acting Senior Assistant Ombudsman's draft consideration and did not provide any additional submissions.

12. On 18 April 2022, the applicant provided submissions in relation to the Acting Senior Assistant Ombudsman's draft consideration. I address the applicant's responses to the draft consideration in my reasons below.

Additional searches

13. On 29 April 2022 and 3 June 2022, staff from the Office met with officers from ACTHD to discuss the scope of the access application and the searches conducted by ACTHD.

14. On 6 July 2022, I requested additional information from ACTHD on the searches conducted, including examples of briefing materials it had assessed as not containing information within the scope of the access application.

15. On 26 July 2022, ACTHD provided to me a sample of 9 documents identified during its searches, as examples of such briefing materials. On review of these documents, I identified some information which I considered may fall within the scope of the access application.

16. On 19 August 2022, I directed ACTHD to conduct a further search for information within the scope of the access application under s 80 of the FOI Act.

17. On 11 November 2022, ACTHD provided me with the results of its further search, stating it had not identified any additional documents containing information within the scope of the access application. ACTHD also submitted that access to the information I had identified as potentially falling within the scope of the access application should be refused under s 35(1)(c) of the FOI Act because it is Cabinet information.

Scope of Ombudsman review

18. In the application for review, the applicant questioned the absence of any documents containing information within the scope of the access application, submitting:

> … I find it very difficult to believe that there is no material evidence available on these points that was supplied to a decision maker, where the decision maker is neither a virologist, epidemiologist, vaccinologist, or specialist with any relevant expertise in the complexity of upholding good public health and well being during a purported pandemic.

19. I considered it necessary to test the applicant's submissions on this point further, which is why I requested examples of the briefing materials ACTHD had reviewed in making its decision and directed ACTHD to undertake a further search under s 80 of the FOI Act, as outlined in paragraphs 14 to 17 above.

20. There are 3 issues to be decided in this Ombudsman review:

- whether ACTHD has taken all reasonable steps to identify all government information within the scope of the access application, as it is required to do so under s 34 of the FOI Act
- whether the additional information identified during the course of this review is within scope of the access application, and
- if the additional information is within scope, whether it is taken to be contrary to the public interest to disclose because it is Cabinet information under Schedule 1, s 1.6 of the FOI Act, or whether it can be released on the basis it is purely factual information under Schedule 1, s 1.6(2) of the FOI Act.

21. 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 34, 35 and Schedule 1, s 1.6
- the *Freedom of Information (Volume 3 - Dealing with Access Applications) Guidelines 2020*
- the Explanatory Statement to the Freedom of Information Bill 2016
- the respondent's FOI processing file relating to the access application, including evidence of searches
- the applicant's submissions of 18 April 2022 in response to the draft consideration
- discussions between staff from the ACT Ombudsman (**Office**) and officers from ACTHD, and submissions from ACTHD following those discussions
- additional information identified by ACTHD, and
- relevant case law, including, *AF and Community Services Directorate* [2018] ACTOFOI 11 (17 December 2018), *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138, *De Tarle and Australian Securities and Investments Commission (Freedom of*

Information) [2015] AATA 770, *Nash and Queensland Police Service* [2012] QICmr 45 and *PDE and the University of Queensland* [2009] QICmr 7.

Relevant law

22. 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 ways in which access applications may be decided.

23. Section 34(1) of the FOI Act provides that an agency or Minister deciding an access application must take reasonable steps to identify all government information within the scope of the application.

24. Section 35(1)(b) of the FOI Act provides that an access application may be decided by the respondent deciding that the information is not held by the respondent.

The contentions of the parties

25. In its decision notice, the respondent said:

> I have not identified documents holding the information within scope of your access application. My access decisions are detailed further in the following statements addressing each part of your application.
>
> …
>
> ACTHD does not hold documents relevant to the scope of your application in accordance with Section 35(1)(b) of the Act. Information regarding each section is provided as follows…

26. The decision notice of the respondent then proceeded to address each of the applicant's points in the application, explaining why no information was held and suggesting where relevant publicly available information may be located.

27. In the application for Ombudsman review, the applicant said:

> From my perspective there should at a minimum have been the following provided in the FOI response:
>
> 1. Information under point B of my FOI request covering:
>
> i. decision support materials quoting the infection fatality rate of the virus, which is allegedly a seasonal respiratory communicable pathogen like influenza, and most certainly would have been subject to comparison by any competent public health authority to determine whether the difference in mortality profile justifies the unprecedented measures taken.
>
> 2. Information under point C of my FOI request covering:
>
> i. the diagnostic sensitivity and diagnostic specificity for each type of test used, as this should be on the package insert or available on the manufacturer's website if the tests are certified for diagnostic purposes.

ii. the Cycle Threshold parameters used, as this is a standard aspect that can be varied when using PCR assays, and should be known by the Pathology area of Canberra Health Services, even if they are using manufacturer recommended cycle thresholds.

iii. the clinical diagnostic criteria for case differentiation with or without a test result. Surely between COVID-19 response and Pathology areas there should be records of how to differentiate diagnosis between COVID-19 and other diseases with similar symptoms – otherwise a case of the cold or flu would mistakenly be confused with COVID, causing unnecessary alarm and harmful intervention on an individual or societal level.

3. Information under point D of my FOI request covering:

   i. the constant messaging and then coercion of individuals who have no symptoms to be tested and then isolate if they return a positive test cannot to any reasonable individual have been based on no evidence at all. Surely this theory of asymptomatic spread of the alleged virus is based on evidence from previous viral epidemics or pandemics and not mere speculation, and surely this was conveyed in decision support materials.

4. Information under point E of my FOI request covering at a minimum the actual effectiveness and safety profile of face mask use in the general community for any other influenza or corona virus. Surely decisions to mandate face masks in the general community have been based on some evidence, be it experimental or theoretical, and this has been conveyed in decision support materials.

5. Information under point G of my FOI request covering:

   i. the actual risk reduction individuals who have recovered from the virus can expect if they receive a vaccine. Surely a public authority would not suggest on its website that recovered individuals should still get the vaccine because it provides added protection, without having evidence of this, while knowing that the vaccine has adverse risks associated with it, which must be weighed against benefits.

28. In its submissions to this review, the respondent said:

> The ACT Chief Health Officer's (CHO) considerations with regard to the enactment of Public Health Directions are often not a straightforward process and involve many complex deliberations. They rest on many contributary factors including extensive public health experience and knowledge, observations of jurisdictional situational information, and policies and experiences from other Australian jurisdictions in relation to the pandemic. In addition, similar infectious disease risk mitigations, National advice and guidelines, published research worldwide, human rights considerations, and a judgement of the situation in the ACT are all considered.
>
> Many of the decisions taken by the CHO are based on long standing proven public health measures, such as the use of mask wearing as an infection control measure. Much, if not all, of the information sought by this applicant relates to general misinformation that is circulated by COVID-19 sceptics. As such, some of the information requested would not be taken into account by the public health response.

29. These submissions are discussed in more detail below.

Considerations

Identifying information within the scope of the application

30. The FOI Act requires the agency or Minister must take 'reasonable steps' to identify all the government information within the scope of the access application[3] before making a decision it does not hold the information.[4]

31. In *AF and Community Services Directorate*[5] the Senior Assistant Ombudsman stated:

> The FOI Act is silent on what constitutes 'reasonable steps'. The meaning of 'reasonable', in the context of searches for documents sought under FOI legislation, has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as judged to be appropriate or suitable to the circumstances or purpose.[6]

32. What amounts to reasonable steps may vary in different circumstances. It would, however, include a search of electronic records and a manual search of physical records, where applicable.[7]

33. In considering whether reasonable steps have been taken to identify all relevant information, some relevant factors include:

- the administrative arrangements of government
- the agency structure
- the agency's functions and responsibilities (particularly with respect to the legislation which it has administrative responsibility and the other legal obligations that fall to it)
- the agency's practices and procedures (including but not exclusive to its information management approach), and
- other factors reasonably inferred from information supplied by the applicant including:
    - the nature and age of the requested document/s, and
    - the nature of the government activity to which the request relates.[8]

[3] Section 34(1) of the FOI Act.
[4] Section 35(1)(b) of the FOI Act.
[5] [2018] ACTOFOI 11 (17 December 2018).
[6] *AF and Community Services Directorate* [2018] ACTOFOI 11 (17 December 2018) at [39], citing *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138 and *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770.
[7] Clause 23 of the Explanatory Statement to the Freedom of Information Bill 2016 (ACT).
[8] *Nash and Queensland Police Service* [2012] QICmr 45 at [14]-[16] and *PDE and the University of Queensland* [2009] QICmr 7 at [37].

34. During the course of this Ombudsman review, I requested from ACTHD evidence of searches undertaken by ACTHD. In reply, ACTHD advised that searches had been performed on ACTHD's electronic document management system, email management system, and other electronic directories used by ACTHD.

35. Additionally, ACTHD submitted:

> It should be noted that the CHO, and the Public Health experts supporting her, have routine access to a significant amount of information in relation to academic studies, case information, situational updates and other relevant information which would inform decision making in relation to the pandemic. While most of this information is out of scope of this request, we cannot exclude the possibility that the CHO or these staff have, at some point in the past 20 months, reviewed materials that are in scope that impacted on decision making. However, this information was not included in specific briefing materials provided to the Minister or the CHO, as outlined in the applicant's request.
>
> I can assure you that the Office of the Chief Health Officer has undertaken a thorough review of documentation related to the applicant's request. The ACT Health Directorate has attempted to provide the applicant with the relevant information pertinent to the specifics of his application. The ACT Health FOI Team has also assisted the applicant and spent significant time, through multiple telephone calls and emails seeking to confirm the requirements of this request.

36. In the draft consideration, the Acting Senior Assistant Ombudsman's preliminary view was that she was satisfied ACTHD had taken reasonable steps to identify all government information within the scope of the access application.

37. In response to the draft consideration, the applicant submitted:

> … it seems absurd that there is no material of epidemiological significance that was provided to a layperson decision maker to support the statutory public health decision or consideration they made, which ended up having significant ramifications on the lives of all people residing in the Territory.
>
> … I draw your attention to ACTHD's response in point 33 of your draft consideration, which makes reference to "specific briefing materials provided to the Minister or the CHO." You will note that, while my request made mention of briefing materials, this was provided as an example, and the actual term I used was "decision support materials", which was referenced in points a), b), d), e) and h) of my FOI request.
>
> I am not sure what ACTHD has interpreted "briefing materials" to cover, but in my view "decision support materials" encompasses any material supplied to a decision maker prior to them making a particular decision or finalising their consideration on a matter, which supported them to make their decision or finalise their consideration. This would include materials in e-mails, instant messaging logs, text messages, as well as other records such as documents.
>
> The materials sought in points c), f) and g) of my FOI request are not isolated to "briefing materials" or "decision support materials", they are for "all records".

38. As described in paragraphs 14 to 17 above, I then requested example documents from ACTHD and directed ACTHD to undertake a further search under s 80 of the FOI Act.

39. I have considered the evidence of searches provided by ACTHD in the course of the review. The evidence provided by ACTHD consisted of a document titled "Information Search Request." The document set out the scope of the request in detail, which I will summarise as all decision support materials relating to points a, b, d, e and h of the FOI request, and all records in relation to points c, f and g of the FOI request.

40. In addition to demonstrating searches were undertaken of ACTHD's electronic document management system, emails, calendar application and other electronic directories, the document also noted:

> Any "decision support" materials provided to the Minister for Health would have been in the form of either briefings or Cabinet submissions, which are recorded on [the electronic document management system]. These were searched by the Director, Office of the Chief Health Officer for the information requested.
>
> Emails sent to the Minister for Health from the CHO or Deputy CHO were search for in the inboxes (sent items) of Dr Kerryn Coleman and Dr Vanessa Johnston.
>
> Any "decision support" materials provided to the Chief Health Officer would have been provided in (a) a minute or (b) via email. [The electronic document management system] was searched for any minutes for the information requested. As a back up, the Q drive for COVID-19 response was also searched. The inboxes of both the CHO and the Deputy CHO were also searched for this information. The inclusion of the Deputy CHO was to ensure any periods of Acting in the CHO role were covered.

41. I also considered the respondent's submissions to this review, particularly in relation to the applicant's submission that they sought "all records" in relation to paragraphs (c), (f) and (g) of the access application. In their response to my Office's notification of the review, ACTHD submitted:

> [In relation to point c of the access application] COVID-19 tests used in the ACT, as with all tests in use Australia wide are approved by the Therapeutic Goods Administration. As this is not an ACT Government responsibility, ACT Health Directorate was not able to identify specific documents in scope of this part of the request. COVID-19 testing in the ACT is carried out in accordance with the manufacturer's specifications. The applicant was referred to publicly available peer reviewed studies undertaken by academic bodies in relation to this matter.
>
> [In relation to points f and g of the access application] COVID-19 Vaccines used in the ACT, as with vaccines Australia wide, are approved by the Therapeutic Goods Administration. As this is not an ACT Government responsibility, ACT Health Directorate was not able to identify specific documents in scope of this part of the request. COVID-19 Vaccinations in the ACT are administered in accordance with the manufacturer's specifications. The applicant was referred to publicly available peer reviewed studies undertaken by academic bodies in relation to this matter and the advice of the Australian Technical Advisory Group of Immunisation (ATAGI) – https://www.health.gov.au/committees-and-groups/australian-technical-advisory-group-on-immunisation-atagi#atagi-advice.

42. Staff from my Office met with officers from ACTHD on 29 April 2022 and 3 June 2022 to discuss in detail the applicant's FOI request, the steps taken by ACTHD to identify any information in scope, and the searches undertaken by ACTHD.

43. In making my decision and taking into account the submissions of ACTHD, the meetings between staff from the Office and officers from ACTHD, and ACTHD's responses to my request and direction to conduct additional searches, I am satisfied ACTHD has taken reasonable steps to identify all government information within the scope of the access application, as it is required to do so under s 34(1) of the FOI Act.

Is there any government information within the scope of the access application?

44. I have considered the wording of the access application and its scope. The *Freedom of Information (Volume 3 - Dealing with Access Applications) Guidelines 2020* made by the ACT Ombudsman under s 66 of the FOI Act provide guidance on determining scope:

> It is important that agencies and Ministers broadly and fairly read the scope of the access application. Officers should keep in mind that applicants exactly what government information an agency or Minister may hold, and the FOI Act does not require a precise description of information to be provided.

45. I consider that one of the nine documents provided to me by ACTHD as an example of briefing materials originally deemed not to contain information within the scope of the access application does in fact contain such information.

46. In particular, I am satisfied this document contains information within the scope of paragraph (h) of the revised access application, in that it relates to "use of re-purposed medicines and supplements individually or in combination including but not limited to Hydroxychloroquine, Ivermectin … " (refer paragraph 4 above).

Is the additional information Cabinet information under Schedule 1, s 1.6 of the FOI Act?

47. I have considered whether the additional information mentioned in paragraph 46 above is Cabinet information for the purposes of Schedule 1, s 1.6 of the FOI Act.

48. The document in which the additional information appears is a Cabinet Submission. I am satisfied the document was submitted to Cabinet for its consideration and was brought into existence for that purpose, and therefore it is Cabinet information within the meaning of Schedule 1, s 1.6(a) of the FOI Act.

Is the additional information purely factual under Schedule 1, s 1.6(2) of the FOI Act?

49. I have further considered whether the Cabinet information includes any "purely factual information" within the meaning of Schedule 1, s 1.6(2) of the FOI Act.

50. For the purposes of s 1.6(2) of the FOI Act, purely factual information is limited to basic factual information as opposed to advice or projections about future events.

51. I have reviewed the contents of the additional information at issue, and I am satisfied there is some information within the document that is purely factual.

52. In my view, paragraph 41 of the Cabinet Submission, which appears under a subheading "Media/Communications", is a factual statement merely acknowledging that some treatments promoted in the community, such as hydroxychloroquine and ivermectin, have no benefit when tested in human trials. This statement is presented as a factual update only and does not appear to be connected with any deliberative content.

Conclusion

53. For the reasons set out above, the decision of ACTHD dated 5 October 2021 that the information is not held by ACTHD under s 35(1)(b) of the FOI Act, should be set aside and substituted with a new decision under s 82(2)(c) of the FOI Act, with respect to the information at issue in this review.

54. Paragraph 41 of the Cabinet Submission should be released. All other information contained in the document remains out of scope.

David Fintan
Senior Assistant Ombudsman

23 December 2022