ACT Ombudsman

OMBUDSMAN AN OFFICER OF THE ACT LEGISLATIVE ASSEMBLY

'AR' and Canberra Health Services [2020] ACTOFOI 3 (21 January 2020)

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

Application Number	AFOI-RR/19/10031
Decision Reference	[2020] ACTOFOI 3
Applicant	'AR'
Respondent	Canberra Health Services
Decision Date	21 January 2020
Catchwords	*Freedom of Information Act 2016* (ACT) – 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:

> I would like copies of the following: 1) All documents related to review of my ([redacted]) FTE since July 2015. Please include all requests submitted to CHS executive along with the supporting documents, correspondence or documents pertaining to discussions about my FTE within the neurology department or with CHS management, and documents pertaining to decisions made in response to these requests. The requested information is personal information.

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) All documents related to review of my ([redacted]) FTE since September 2015. Specifically, the documents relating to the requests submitted to CHS executive and decisions made in response to these requests.

6. On 18 October 2019, the respondent decided the revised request did not remove the grounds for refusal under ss 43(1)(a)-(d) of the FOI Act.
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 18 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.
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 Act, as well as 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, 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 on the access application.

Conflict of interest

18. I note the applicant has also raised concerns about the potential for a conflict of interest if the decision-maker on his access application is the same staff member making decisions on his employment.

19. An Information Officer is not prevented from making a decision where they have previously dealt with a similar issue or the applicant, which may be a regular occurrence in some agencies. It is, however, important that each access application is approached with an open mind and considered afresh.

20. There is, however, insufficient evidence before me to demonstrate that this is an issue in this case.

Issues to be decided

21. 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
    - the information sought is already available to the applicant.
22. 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
    - relevant case law, including *Underwood*,[1] *Cianfrano and Premier's Department*,[2] *Colefax and Department of Education and Communities (NSW)*,[3] *Re SRB and SRC and Department of Health, Housing, Local Government and Community Services*,[4] *University of Queensland and Respondent*,[5] *The Age Company Pty Ltd and CenITex*[6] and *Burdon and Suburban Land Agency*.[7]

Relevant law

23. 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.

24. 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.

1 [2016] QICmr 48.
2 [2006] NSWADT 137.
3 [2013] NSWADT 130.
4 (1994) 33 ALD 171.
5 (27 February 2019).
6 [2013] VACT 288.
7 [2019] ACTOFOI 12.

The contentions of the parties

25. 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 all the information previously provided and to establish if there is any additional 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.
>
> 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 vexatious 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.

26. 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.

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

28. 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 my personal 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 note Information Officer's preference to discuss this face to face in a meeting instead of processing my FOI application. It is noteworthy that I have had multiple meetings with the Information Officer in her capacity as the Executive Director of Medicine, CHS and also requested other information directly from her none of which has been forthcoming. There is also the potential for conflict of interest if the Information Officer is also the officer dealing with my employment.

Considerations

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

Unreasonable and substantial diversion of resources

30. 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.[8]

31. 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.

32. As a result, 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.

33. In doing so, I have had regard to what work is required to deal with the application in the context of the agency's functions and its resources.[9] I also consider the following list of non-exhaustive factors identified in *Cianfrano and Premier's Department*[10] 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 the 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.[11]

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8 See section 43(1)(a) of the FOI Act.
9 *Underwood* [2016] QICmr 48.
10 [2006] NSWADT 137 (*Cianfrano*), confirmed in *Colefax and Department of Education and Communities* (NSW) [2013] NSW ADT 130.
11 *Cianfrano* at [62-63].

What resources were required to deal with the access application?

34. 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."[12]

35. 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.

36. 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 of Medicine would be impacted by the processing of this application.

37. 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:

- The applicant is seeking to access information created between July 2015 and 2 September 2019 (date of the access application), regarding himself, and a specific employment matter.
- While the scope of the request was originally expressed quite broadly, the applicant subsequently reduced the scope of the request, and provided the respondent with more information about the information he is specifically seeking – even if subsequent requests for meetings to discuss his employment situation were declined.
- It is expected that any relevant information would be included on the employment file(s) of the applicant.
- Noting previous requests received, the respondent would only be required to locate and identify relevant information the respondent holds and created since the last date related or similar information was disclosed to the applicant in response to an access application.
- The applicant has attempted to access the information sought via other avenues, advising that he would withdraw his access application if provided with the information by the respondent's HR department, but has been unsuccessful.

[12] See [25].

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

38. Based on the information before me, I am not satisfied that the resources required would substantially inhibit the ability of the agency to exercise its functions.

39. As discussed at paragraph [25], the respondent has asserted this is the case, but did not provide any further detail.

40. As outlined in *Burdon and Suburban Land Agency*,[13] 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.

41. 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.

42. 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.[14]

43. 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 extend 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

44. 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.[15]

45. This provision is designed to ensure the capacity of respondents to discharge their normal functions is not undermined by processing unnecessary access applications.

46. 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 client behaviour.[16] This is because it has the practical effect of preventing a person from exercising an important legal right conferred by the

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13 [2019] ACTOFOI 12.
14 Section 6(f) of the FOI Act.
15 Section 43(1)(b) of the FOI Act.
16 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.

FOI Act.

47. 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.

48. 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.

49. 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.[17]
- *vexatious* – instituted without sufficient grounds, and serving only to cause annoyance.[18]

50. 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 purpose of the access applications and whether the access application is made for a purpose other than seeking access to information

51. In submissions to this review, the respondent stated:

> [The applicant] has used FOI requests to inconvenience certain staff members within the Division with which he has a strained working relationship. It is my decision that this request was made for this purpose and is therefore frivolous and an abuse of the FOI process.
>
> …is trying to engage with [the applicant] to resolve long-standing personnel matters. I have tried to arrange to meet with [the applicant] to discuss his concerns, however he has declined meeting [sic] or has not attended, most recently 6 November 2019.

52. In the course of this review, my Office sought further information from the applicant regarding the meetings the respondent attempted to organise. The applicant advised:

> I can confirm that I have not received any information from HR. In fact I have not even received an acknowledgement of my email from HR.
>
> I did receive invitations for two without prejudice meetings from [redacted]. I did not attend those

[17] The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.
[18] Ibid.

> meetings because the meetings had a very broad agenda including issues related to my employment dispute with CHS and future of the neurology services at CHS. I was invited to those meetings along with my lawyer. One of the invitation was a forced direction to attend the meeting. I did not receive any invitation for a meeting with the specific purpose of providing me with the information that I requested through the FOI applications. I was never advised that CHS was willing to provide me the requested documents but would only do so during a face to face meeting. This was not indicated in the intention to refuse letter. This was not indicated to me by the FOI manager when I spoke to him over the phone to reduce the scope of my application. Therefore, I reject CHS claims that they invited me to any meetings to provide me the information I had requested. I believe those meetings were intended to threaten and intimidate me for submitting the FOI applications.

53. While there may be broader workplace issues between the applicant and respondent, these issues are outside the scope of an Ombudsman FOI review. In this review, I am only able to consider whether the respondent has met its obligations under the FOI Act.

54. Based on the information before me, I do not agree with the respondent that the access application is frivolous. It is clear to me the applicant is serious in his desire to obtain the relevant information from the respondent, which is his personal information, and as, the respondent itself has noted, he is seeking it in an attempt to resolve a workplace dispute.

55. Ideally, such matters should be addressed outside of the FOI context, but it is open to the applicant to seek access to this information under the FOI Act.

56. I am also not satisfied that 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 has not provided evidence to demonstrate that the applicant has engaged in unreasonable behaviour.

57. It is unclear to me if the respondent deems the applicant's non-attendance at the meetings as 'unreasonable behaviour'. Nonetheless, I have considered the applicant's reasoning for declining the meetings, and do not consider it unreasonable for the applicant to interpret the meeting requests to be outside of the access application.

58. 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.

59. 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.[19] Furthermore, the respondent has not provided sufficient information to ascertain the overall impact the access applications has had on the respondent, what the subject matter and/or nature of those access applications are and whether the applicant has previously received the same information.

60. I note that if the requested information has already been provided by the respondent, refusal on the grounds that it is already available would have been more appropriate – see discussion of ss 43(1)(d) and 45 of the FOI Act below; or if already requested and refused, s 43(1)(f) of the FOI Act may have been relevant.

Abuse of process application

61. 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.[20]

62. The FOI Act includes two 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.[21]

63. The respondent submits the access application is also an abuse of the FOI process for the same reasons as discussed at [25],

64. 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.

<u>Harassment or intimidation of a person</u>

65. 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.[22]

66. This example of abuse of process does not, however, appear relevant in this matter.

67. Even if the access application was, as submitted by the respondent, designed to "inconvenience

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19 See *The Age Company Pty Ltd v CenITex* [2013] VCAT 288.
20 Section 43(1)(c) of the FOI Act.
21 Section 43(4) of the FOI Act.
22 The Macquarie Online Dictionary, Macquarie Dictionary Publishers, 2019.

certain staff members", there is no evidence before me to demonstrate how such inconvenience has resulted in the harassment or intimidation of these persons.

68. The respondent has not sufficiently explained how the access application constitutes harassment or intimidation of a person.

69. It remains unclear from the information before me how the access application has been targeted to impact or "inconvenience certain staff members" in the Division of Medicine and/or the senior officer as contended by the respondent.

70. 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.[23]

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

Unreasonable request for personal information about a person

72. 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.

73. The scope of the access application relates to the applicant's employment, most of which would be held on an employee file or with the human resources department. Based on this, I do not consider the access application to be an unreasonable request for personal information about another person.

Other relevant circumstances

74. 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.

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[23] 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).

75. In *University of Queensland and Respondent*,[24] the Queensland Information Commissioner noted that other grounds for abuse of process established at common law includes:

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

76. While ideally workplace disputes would be addressed outside of the FOI context, the respondent has not provided any evidence to suggest that any such grounds apply in this matter.

77. While I appreciate that the applicant's multiple access applications may have placed considerable demands on the respondent's limited FOI resources, I also 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.

78. As a result, for the reasons outline above, I do not consider the access application to be an abuse of the FOI process.

Information already available to the applicant

79. Under s 45 of the FOI Act, information is considered already available to the applicant if the information:

> …
>
> (e) has previously been given to the applicant under this Act or the *Freedom of Information Act 1989* (repealed); or
>
> (f) has otherwise previously been given to the applicant.
>
> …

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

> …information in relation to [the applicant's] FTE has been provided in response to five previous applications FOI18-92 that was the subject of Ombudsman review, FOI19-11 that was the subject of Ombudsman review, FOI19-21, FOI19-24 that was the subject of Ombudsman review and FOI19-25…
>
> FTE information in relation to [the applicant] was also contained in FOI19-45 but was redacted as it was personal information about him and was required to be published on the disclosure log.

81. In the absence of further information from the respondent about the type of information previously provided to the applicant, I cannot be satisfied the information subject to this access application is identical to that previously disclosed to the applicant.

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[24] (27 February 2019).

82. While the consultation notice suggests the applicant has been provided with a substantial amount of information about his personal employment arrangements, it does not explain where the information requested in this particular application can be obtained – noting the applicant is seeking information about decisions made in terms of his FTE, as opposed to, factual information about his working hours, and those of other employees.

83. Furthermore, this information is not included in the decision notice, which is a requirement under s 55 of the Act where the refusal ground is that the government information is already available to the applicant.[25]

84. While FOI19-45 is not part of this review and is being considered separately by the Ombudsman, I also note that if the relevant information was in scope of this matter, but the information was redacted by the respondent, then the applicant still does not have access to this information.

85. For the reasons above, I am not satisfied that the information is already available to the applicant.

Conclusion

86. 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.

87. The respondent must deal with the access application in accordance with the FOI Act.

Cathy Milfull

Acting Senior Assistant Ombudsman

21 January 2020

[25] See s 55(c) of the FOI Act.