

Decision and reasons for decision of Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10012
Decision reference:	[2023] ACTOFOI 23
Applicant:	“CO”
Respondent:	ACT Health Directorate
Respondent reference:	ACTHDFOI22-23.38
Date:	31 October 2023
Catchwords:	<i>Freedom of Information Act 2016</i> – information is not held by the respondent – refuse to deal with application – unreasonable and substantial diversion of the respondent’s resources – abuse of process – unreasonable request for personal information

Decision

1. The applicant applied for Ombudsman review of ACT Health Directorate’s (**ACTHD**) decision that part of the information sought is not held by ACTHD, and to refuse to deal with the remainder of the application on the grounds:
 - dealing with the application would require an unreasonable and substantial diversion of resources, and
 - part of the application involves an abuse of process in that it is an unreasonable request for personal information.
2. For the purpose of s 82 of the *Freedom of Information Act 2016* (**FOI Act**), I am a delegate of the ACT Ombudsman.
3. For the reasons set out below, I have decided to **vary** ACTHD’s decision under s 82(2)(b) of the FOI Act. Specifically, I agree with ACTHD’s decision that part of the information is not held, and part of the application would require an unreasonable and substantial diversion of resources; however, I disagree with ACTHD’s finding that the application is an abuse of process.

Background to Ombudsman review

4. On 9 February 2023, the applicant applied to ACTHD for access to:¹

"The Applicant was offered a position as a part of a cohort of 40 people who were engaged to assist with packaging Rapid Antigen Tests as a response to the COVID 19 Pandemic. The role was discontinued for operational reasons and the offers to each member of the cohort were withdrawn"

By FOI - I request, 1. Your threads of communication, with personal details redacted, to each of the 40 people prior to the offer;

The written decision or notice of the operational reasons or minutes where this was decided;

The threads containing the offers;

And, the threads containing the withdrawals....

I emphatically do not want the candidates' identities, but please notify them of my request.

5. On 10 March 2023, ACTHD decided information about the 'written decision or notice of operational reasons or minutes' for withdrawing the position offers was not held by ACTHD.
6. On 10 March 2023, ACTHD also advised the applicant of its intention to refuse to deal with the remainder of the application.² The period for consultation on the proposed refusal ended on 24 March 2023. ACTHD did not receive a response from the applicant.
7. On 24 March 2023, ACTHD refused to deal with the remainder of the application because dealing with this part of the application would require an unreasonable and substantial diversion of ACTHD resources and involves an abuse of process.³
8. On 27 March 2023, the applicant applied for Ombudsman review of ACTHD's access decision.
9. On 6 October 2023, the acting Senior Assistant Ombudsman provided their preliminary views to the parties in a draft consideration.
10. On 11 October 2023, ACTHD accepted the draft consideration. The applicant did not respond to the draft consideration.

Scope of Ombudsman review

11. The key issues to be decided in this Ombudsman review are:
 - whether the requested information is held by ACTHD
 - whether dealing with the application would require an unreasonable and substantial diversion of ACTHD resources, and
 - whether the application involves an abuse of process.

¹ ACTHD reference: ACTHDFOI22-23.38.

² Section 46 of the [FOI Act](#).

³ Section 43(1)(a) and (c) of the [FOI Act](#).

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

- the applicant’s access applications and review application
- the respondent’s decisions of 24 March 2023 and further submissions
- the FOI Act, in particular ss 35, 38, 43, 44 and 46
- the respondent’s FOI processing file relating to the access application
- the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act
- relevant case law, including:
 - [‘AF’ and Community Services Directorate \[2018\] ACTOFOI 11](#) (17 December 2018)
 - [BD and Canberra Health Services \[2020\] ACTOFOI 29 \(17 December 2020\)](#).

Relevant law

13. Section 7 of the FOI Act gives every person 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.⁴
14. An agency or Minister deciding an access application (**the respondent**) must take reasonable steps to identify all government information within the scope of the application.⁵
15. A respondent may decide an access application by deciding the information is not held by the respondent.⁶
16. A respondent may decide an access application by deciding to refuse to deal with the application.⁷
17. A respondent may refuse to deal with an application wholly or in part if dealing with the application would require an unreasonable and substantial diversion of the respondent’s resources.⁸
18. A respondent may also refuse to deal with an application if the application involves an abuse of process.⁹ An ‘abuse of process’ includes an unreasonable request for personal information about a person.¹⁰

⁴ Section 35(1)(c) of the [FOI Act](#).

⁵ Section 34(1) of the [FOI Act](#).

⁶ Section 35(1)(b) of the [FOI Act](#).

⁷ Section 35(1)(d) of the [FOI Act](#).

⁸ Section 43(1)(a) of the [FOI Act](#).

⁹ Section 43(1)(c) of the [FOI Act](#).

¹⁰ Section 43(4)(b) of the [FOI Act](#).

19. If the respondent considers some or all of the information applied for is not contrary to the public interest information; but disclosure of the information may reasonably be expected to be of concern to a person or entity (a relevant third party), the respondent must take reasonable steps to consult with the relevant third party.¹¹

The parties' submissions

20. ACTHD's decision notice dated 10 March 2023 said:

In relation to the part of the scope of your application, *The written decision or notice of the operational reasons or minutes where this was decided*, it is my decision, ACTHD does not hold relevant Information in accordance with section 35 (1)(b) of the Act. A thorough search has been conducted by two areas within the Directorate. After consultation with the relevant line areas considered to potentially hold relevant information, no documentation has been located within the scope of your application.

Information relevant to the packaging of Rapid Antigen Tests and how this was conducted is publicly available, and can be found on the Legislative Assembly for the Australian Capital Territory site: <https://www.hansard.act.gov.au/hansard/10th-assembly/2022/HTML/week01/124.htm>.

21. In relation to the remainder of the application, ACTHD's decision notice dated 24 March 2023 said:

As outlined in our intention to refuse letter regarding the remaining part of your application, the search and location of the information requested would require an unreasonable and substantial diversion of resources. The information requested also involves an abuse of process, which includes section 43(4)(b) *an unreasonable request for personal information about a person*. Personal employment information of individuals is protected under the *Human Rights Act 2004* and the *Information Privacy Act 2014*.

22. In their review application dated 27 March 2023, the review applicant submitted the resources involved in consulting relevant third parties would not be substantial, and it would be relatively simple to locate the requested information and prepare edited copies to delete information about the identities of the relevant third parties.

23. These submissions are discussed in more detail below.

Consideration

Identifying information within the scope of the application

24. ACTHD decided part of the application by deciding information about the 'written decision or notice of the operational reasons or minutes' for the withdrawal of offers for Rapid Antigen Test (RAT) packing positions is not held by ACTHD.

¹¹ Sections 38(1) and 38(2) of the [FOI Act](#).

25. I have considered whether ACTHD took reasonable steps to identify the requested information. What amounts to reasonable steps may vary in different circumstances, depending on the nature of the information sought and the search methods available to the entity.¹²
26. ACTHD explained the steps taken to identify information, including searching electronic records and consulting with ACTHD staff. ACTHD provided submissions to the Ombudsman showing information about the RAT packing operation was identified by ACTHD.
27. The information located via these searches was found not to be within the scope of the application because it simply referred to the decision for the Emergency Services Agency (ESA) to support the RAT packing operation, and did not describe the decision to discontinue the ACTHD recruitment process or the operational reasons for that decision.
28. I acknowledge the applicant expected information within the scope of their request would be held by ACTHD, particularly noting the advice given to the applicant by ACTHD that the recruitment process was discontinued for 'operational reasons'.
29. At the same time, I consider it understandable that in the context of an emergency response to a global pandemic, ACTHD would have been required to make and implement certain operational decisions quickly, and that within such a fast-paced operating environment, it is possible ACTHD would have taken steps to withdraw the recruitment offers simply as a consequence of the earlier decision to utilise existing resources for multi-agency RAT packing, and without recording a fresh or separate decision.
30. In accordance with better practice principles for public administration and recordkeeping, and with the benefit of hindsight, it would have been desirable for ACTHD to document and keep records of such a decision separately.
31. Nevertheless, on balance, I accept ACTHD's submission that after taking reasonable steps, it was unable to locate information recording a specific decision, or operational reasons, for ceasing the recruitment process and withdrawing offers.
32. I note ACTHD provided the applicant with publicly available information about ACTHD's and ESA's involvement in the RAT packing operation, including the use of a mixed workforce of volunteers and ACT Government staff.¹³

¹² ['AF' and Community Services Directorate \[2018\] ACTOFOI 11 \(17 December 2018\)](#), [39] – [45].

¹³ [Ministerial Statement – COVID-19 pandemic – emergency services support, 9 February 2022](#).

33. Based on my examination of the evidence of searches provided by ACTHD, including records of consultation with staff within the Office of the Chief Health Officer, I am satisfied ACTHD took reasonable steps to identify information about the decision or operational reasons for discontinuing the role.
34. I confirm the decision that the information is not held by ACTHD.

Unreasonable and substantial diversion of resources

35. The applicant also applied for the threads of communication, with personal details redacted, to each of the 40 applicants prior to the offer, containing the offer and containing the withdrawals for RAT packing positions.
36. ACTHD decided to refuse to deal with this part of the application because dealing with the application would require an unreasonable and substantial diversion of ACTHD resources.¹⁴
37. The diversion of resources would be 'unreasonable and substantial' only if the resources required to process the application would substantially inhibit the ability of ACTHD to exercise its functions; and the extent to which the public interest would be advanced by giving access does not justify the use of the required resources.¹⁵
38. Neither the notice to the applicant of the intention to refuse their access application, or the decision notice, referred to the evidence or other material considered by ACTHD in determining the resources required to deal with the application or the extent to which the public interest would be advanced by giving access.¹⁶
39. To search and locate the requested information, ACTHD would likely need to search email inboxes or electronic filing systems, and manually review those records to determine whether the information fell within the scope of the request.
40. The applicant has requested information about the communications between ACTHD and 40 individuals over a period of time for the purpose of a recruitment process. I consider the volume of information requested could involve, at a minimum, over 120 documents.

¹⁴ Section 43(1)(a) of the [FOI Act](#).

¹⁵ Section 44 of the [FOI Act](#).

¹⁶ Section 55 of the [FOI Act](#).

41. It is likely some of the requested information would be duplicated within email chains sent to each applicant, for example the communications from ACTHD about the role and the decision to discontinue the role.
42. It is possible each thread of communication will vary in sensitivity depending on the nature of the correspondence. For example, it is reasonable to expect ACTHD would have received information about a person's work history and education, and those candidates may have supplied evidence of their qualifications.
43. While the applicant expressed they do not seek the candidates' identities, the requested information would need to be carefully examined and collated to ensure those individuals are not identifiable. For these reasons, I consider the resources required to identify, locate, collate, and examine the requested information would be significant.
44. The diversion of ACTHD's resources to deal with this application would substantially inhibit the ability of ACTHD to exercise its functions, in particular to deal with other access applications, as experienced staff would likely be involved in collating and de-identifying the information.
45. In my view, I do not believe the extent to which the public interest would be advanced by giving access to the information justifies the use of the required resources, because release of the information would not provide any greater understanding of the recruitment process undertaken by ACTHD.
46. I confirm the decision to refuse to deal with this part of the application as dealing with the application would require an unreasonable and substantial diversion of ACTHD's resources.

Abuse of process – unreasonable request for personal information

47. ACTHD also decided to refuse to deal with part the remainder of the application because it involves an abuse of process, being an unreasonable request for personal information about a person.
48. I have considered whether the application is a request for personal information, noting the applicant has said they do not seek the candidate's identities.
49. For the purpose of the FOI Act, 'personal information' means information or an opinion, whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.¹⁷

¹⁷ Dictionary – personal information, [FOI Act](#).

50. In *BD and Canberra Health Services*, the former Senior Assistant Ombudsman said:¹⁸

[20] The application specifically asks for personal information ‘such as names or specialty’ and health records to be excluded. Once information has been de-identified by removal of names and other personal information, I do not consider that identity is apparent, or can reasonably be ascertained, even though the information relates to a person. That is because the Dictionary definition requires the identity of the person to be ascertainable.

[21] The application could not, therefore, be decided to constitute an abuse of process on the basis that it unreasonably requested personal information about any persons.

51. I do not consider the application to be an unreasonable request for personal information, noting the applicant did not seek information about the candidates’ identities. I do not accept this part of the application involves an abuse of process.

Conclusion

52. For these reasons, I **vary** ACTHD’s decision under s 82(2)(b) of the FOI Act to be as follows:

- information sought in part of the application is not held by ACTHD
- the remainder of the application will not be dealt with because dealing with the application would require an unreasonable and substantial diversion of the respondent’s resources.

David Fintan
Senior Assistant Ombudsman
31 October 2023

¹⁸ [BD and Canberra Health Services \[2020\] ACTOFOI 29 \(17 December 2020\)](#).