

'AS' and Canberra Health Services [2020] ACTOFOI 5 (23 January 2020)

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

Application Number	AFOI-RR/19/10023
Decision Reference	[2020] ACTOFOI 5
Applicant	'AS'
Respondent	Canberra Health Services
Decision Date	23 January 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – prejudice the protection of an individual's right to privacy under the <i>Human Rights Act 2004</i> – prejudice the management function of an agency or the conduct of industrial relations by an agency

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 ACT *Freedom of Information Act 2016* (FOI Act), I **set aside and substitute** the decision of Canberra Health Services (**respondent**), dated 9 August 2019, with respect to the information at issue in this review, being a list of research projects run by the multiple sclerosis clinic and a copy of the organisational structure of the neurology department at the Canberra Hospital.

Background of Ombudsman review

3. The applicant is employed by the respondent.

4. On 20 May 2019, the applicant applied to the respondent for access to:

- 1) All documents including but not limited to letters, records, emails, file notes etc, relating to the executive approval of the *'approved duty statement'* for staff specialist neurologist recruitment (Position Number 20538) dated 25/02/2014 specifically in relation to point 2 of the responsibility statement – *"Develop and deliver a specific service for patients with multiple sclerosis"* and point 1 of the selection Criteria [sic] – *"Extensive experience in the practice of Neurology, with particular emphasis on the care of patients with multiple sclerosis."*
- 2) All documents including but not limited to letters, records, emails, file notes etc, between the ACT Department of Health/TCH executive and human resources area within the Department relating to the preparation and approval for the job advertisement specifically for the *'continue (and develop) the MS clinic'* component of this advertisement (2014).
- 3) All documents including but not limited to letters, records, emails, file notes etc, related to planning and establishment of multiple sclerosis clinic [sic] at the Canberra Hospital in or around 2011.
- 4) All documents including but not limited to letters, records, emails, file notes etc, relating to the official policy and commitment or future aspirations of ACTH/CHS regarding the *'scope'* and *'nature of clinical work'* to be conducted in multiple sclerosis clinic [sic] at The Canberra Hospital.
- 4) [sic] All documents including but not limited to letters, records, emails, file notes etc, that gave rise to the specific remarks made by Mr Michael De'Ath, Director General, ACTH regarding the *'position or intent of the ACT Health'* for my recruitment as staff specialist neurologist and describing the *'scope'* and *'nature of clinical activities'* of the multiple sclerosis clinic/ service at ACTH/CHS in his letters dated 25 June 2018 and 13 October 2018 sent to me (Rajat Lahoria) via Mr Tony Chase from Australian Medical Association (AMA). (Redacted letters available on request)
- 5) All documents including but not limited to letters, records, emails, file notes etc, from January 2012 to May 2019 relating to the planning and development of Autologous Haematologic Stem Cell Transplant Program for multiple sclerosis patients at the Canberra Hospital (ACTH/CHS).
- 6) Neurology department budget for all financial years starting with 2014 to 2019.
- 7) All documents including but not limited to letters, records, emails, file notes etc, relating to the approval of funding for multiple sclerosis nurse position and approval from human resources department for RN level 2 classification by (or on behalf of) Ms Marina Buchanan-Grey in 2016.
- 8) All documents including but not limited to letters, records, emails, file notes etc, relating to the assessment and review of multiple sclerosis nurse position/ performance by Ms Kellie Noffke and Ms Elizabeth Forbes from March 2017 to May 2019.
- 9) List of all previous (from July 2015 to May 2019), current and prospective research projects involving multiple sclerosis patients seen and managed through the multiple sclerosis clinic at the Canberra Hospital.
- 10) Official structure of the neurology department at The Canberra Hospital with regards to clinical and non-clinical FTE components of all staff specialists.
- 11) Copy of the notes taken by Ms Janine Hammat during the 21 December 2018 meeting attended by Ms Bernadette McDonald and Dr Lahoria.

This information is personal information or directly related to my employment with The Canberra Hospital as staff specialist neurologist and provider of the multiple sclerosis service at the hospital. The information has been directly requested from CHS but has not been provided.¹

¹ (Original request).

5. On 11 June 2019, the applicant refined the scope of the request to:

Neurology/Planning documents

- 1) All documents about the clinical planning and establishment of multiple sclerosis clinic at the Canberra Hospital in or around 2011. Including documents about the official policies of and the scope of clinical work to be conducted in multiple sclerosis clinic at The Canberra Hospital.
- 2) All documents about the clinical planning and development of Autologous Haematologic Stem Cell Transplant Program for multiple sclerosis patients at the Canberra Hospital prior to December 2017.
- 3) Neurology department budget for each financial year 2014 to 2019.
- 4) All documents about the assessment and review of the current multiple sclerosis nurse position.
- 5) List of all research projects involving multiple sclerosis managed through, or to be managed through the multiple sclerosis clinic at the Canberra Hospital.
- 6) Official structure of the neurology department at The Canberra Hospital with regards to clinical and non-clinical FTE components of all staff specialists.²

6. Between 9 and 17 July 2019, the respondent undertook third party consultation with the following parties and sought their views on the release of information:

- Professor James Wiley (contacted on 17 July 2019, no response provided)
- Dr Colin Andrews (advised no objection on 18 July 2019)
- Mr Helmut Butzkueven (advised no objection on 19 July 2019)
- Dr John Moore (advised no objection on 22 July 2019)
- MS Australia (consented to release on 22 July 2019), and
- Mr Stephen Rice (contacted on 17 July 2019, no response provided).

7. On 30 July 2019, the respondent advised the applicant it had identified 42 documents within scope of the access application. The respondent gave the applicant access to 13 documents in full, 29 documents in part and refused access to the remaining 29 documents.³

8. In making its decision, the respondent relied on the disclosure of the information to be either:

- a health record and therefore not subject to the FOI Act (s 12 of the FOI Act)
- prejudicial to the protection of an individual's right to privacy or any other right under the Human Rights Act 2004 (HR Act) (Schedule 2, s 2.2(a)(ii) of the FOI Act), and
- prejudicial to the management function of an agency or the conduct of industrial relations by an agency (Schedule 2, s 2.2(a)(xv) of the FOI Act).

² (Clarified request).

³ Refused access to documents 2-5, 7-9, 11-13, 16-19, 23 and 29-42.

9. On 9 August 2019, the respondent provided an updated decision notice to 'rectify an error in the original letter regarding the publication of this information on the ACT Health Disclosure log'.⁴ There was no change to the information identified as in scope or to which access was granted.
10. On 25 August 2019, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act, specifically in relation to points 5 and 6 of the clarified request.
11. On 29 August 2019, the respondent provided a further updated decision notice to the applicant explaining it had conducted a second search and located a further four pages of information (additional information):

Two additional documents have been located that fall within the scope of your request.

Document 1 contains information that is similar to document 4 of the package previously provided, however holds additional information regarding the date the document was sent therefore I have deemed it to be a different document.

Document 2 is an additional email from Christian Lueck with an attachment.
12. The additional information was provided to the applicant.⁵
13. On 18 December 2019, our Office provided preliminary views about the respondent's decision to the parties in a draft consideration.
14. On 23 December 2019, the applicant advised they accepted the draft consideration.
15. On 17 January 2020, the respondent advised they accepted and would comply with the draft consideration.

Scope of Ombudsman Review

16. The information at issue in this review is only information relevant to points 5 and 6 of the clarified request, with the applicant limiting his review to these specified categories of information as noted above.
17. No documents were provided to the applicant in relation to these categories of information, which relate to a list of research projects run by the multiple sclerosis clinic at the Canberra Hospital, and a copy of the organisational structure of the neurology department at the Canberra Hospital (that is, an internal organisational chart).

⁴ Updated decision letter dated 9 August 2019.

⁵ Section 36(3)(a) of the FOI Act requires an agency to tell the applicant additional information has been found.

Reasons for decision

18. As a preliminary issue, I note that no reasons were provided in the decision notice for not providing access to the documents in points 5 and 6 of the clarified request, with the schedule attached to the decision notice simply indicating 'nil documents' for these categories of information. The decision notice also does not specify under which section of the FOI Act a decision has been taken.
19. On the basis of the 'nil documents', it could, however, be assumed that, in relation to document categories 5 and 6, the respondent decided that the information was not held by the respondent under s 35(1)(b) of the FOI Act given their reference to 'nil documents'.
20. This assumption has been made by the applicant who, as a result, has requested the Ombudsman consider whether reasonable efforts were made to identify the requested information.
21. Section 34 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.
22. I note, however, that:
 - the applicant reports subsequent advice from the respondent that point 5 information should already be available – which suggests this information does exist (see paragraph [38] below)
 - submissions received from the respondent as part of this review (see paragraph [0] below), suggest that certain documents exist which may be relevant to the access application, and
 - additional documentation has been provided to the Ombudsman as part of this review process.
23. Given this context, I do not believe this review needs to address the reasonableness of the searches undertaken by the respondent.

Scoping the application

24. If relevant information does exist this, however, suggests there may be an issue about the scope of the access application as determined by the respondent.
25. Agencies are expected to broadly and fairly read the scope of an access application, with decision-makers having regard to the wording of the access application and the context in which it is made. Requests must not be interpreted with the exactitude that applies to legislation or a set of pleadings.⁶

⁶ *Re Gould and Department of Health* [1985] AATA 63.

26. There is, however, no obligation on the agency to 'create' additional information or documents where they don't exist. Documents should, however, be included where they fall within the scope of the applicant's request, even if they do not, for example, include all the details requested by the applicant. This is consistent with the pro-disclosure approach required under the FOI Act.
27. Regardless, any procedural defect will be addressed by this review, with the additional documents provided by the respondent considered to be in scope and consequently, included within this review. This includes:
- document 1 - an organisation chart
 - document 2 – an organisation chart, and
 - document 3 – an excel spreadsheet listing projects.
28. I note, however, that only two of the research projects listed in document 3 relate to the multiple sclerosis clinic at the Canberra Hospital. Accordingly, the remaining research projects are not within scope of the request and should be redacted.

Issues for consideration

29. Given my consideration of the preliminary issues above, the only issue remaining to be decided in this Ombudsman review is whether giving the applicant access to the information at issue (that is, documents 1 to 3 listed above) would be contrary to the public interest.
30. 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, 16, 17, 34, 35, 72 and Schedule 2
 - the Human Rights Act 2004 (HR Act)
 - the Information Privacy Act 2014 (IPA)
 - the respondent's FOI processing file relating to the access application
 - an unedited copy of the information at issue
 - relevant case law, in particular, *Re Gould and Department of Health*⁷ and *'AE' and Health Directorate*⁸
 - the submissions of the parties.

⁷ [1985] AATA 63 (*Re Gould*).

⁸ [2018] ACTOFOI ('AE').

Relevant law

31. 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.
32. Contrary to the public interest information is defined in s 16 of the FOI Act as:
information—
 - (a) that is taken to be contrary to the public interest to disclose under schedule 1; or
 - (b) the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17.
33. The public interest test set out in s 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
34. Section 34 of the FOI Act provides that an agency or Minister deciding on access applications must take reasonable steps to identify all government information within the scope of the application.
35. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information sought because the information being sought is contrary to the public interest information.
36. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.
37. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

The contentions of the parties

38. The applicant contends there must be more documents in existence or held by the respondent, stating that:

...The decision maker has determined that no information is held by the agency in this regard. After further discussion with ACTH FOI officer, I have been informed that I should automatically have access to the information related to Point 5 which is not the (sic) true.

I have significant reservations about the decision that no information exists for points 5 and 6 of my request and seriously doubt whether reasonable efforts were made to identify the requested information.

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

On this list [of ACT Health research projects] are two research projects that do involve multiple sclerosis, however neither of these projects are managed or proposed to be managed by the multiple sclerosis clinic at the Canberra Hospital. They are coordinated by the Australian National University, [sic] and the [applicant] is aware of these projects and declined to be involved in either. I am advised that [applicant] contacted the FOI team at ACT Health and was told during that conversation that it had been stated that he would be aware of any research projects being managed through the clinic as he would be involved or leading the research.

In deciding whether to provide access to the documents requested by the applicant, Canberra Health Services had a number of considerations. The internal working arrangements of our specialist medical professionals as well as other staff are intricately linked with the operation of the department.

A careful balance was struck between the disclosure of staff employment arrangements and the internal workings of the department.

There is currently no official structure of the neurology department at Canberra Hospital that separates the clinical and non-clinical components of the work of staff specialist or any other staff within the department. Work was conducted with our finance area to produce a report able to demonstrate this, however this was unable to be done effectively. I have provided a copy of the Neurology Reporting structure, but this does not break down the FTE into clinical and non-clinical work hours.

In making my decisions regarding the FOI access application, I gave due consideration to the public interest in the release of this information. It is my decision that the public interest in this documentation is minimal but what has been released is not contrary to the public interest...

Considerations

40. I have carefully considered an unedited copy of the information at issue together with the information provided by the parties.

Information that is taken to be contrary to the public interest to disclose under Schedule 1

41. Neither party to this Ombudsman review has suggested the information at issue contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act. Therefore, for the information at issue to be contrary to the public interest information, disclosure must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

Public interest test

42. To determine whether disclosure of information is, on balance, contrary to the public interest, s 17(1) of the FOI Act prescribes the following five steps:
- (a) identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in schedule 2, section 2.1;
 - (b) identify any factor favouring nondisclosure that applies in relation to the information (a relevant factor favouring nondisclosure), including any factor mentioned in schedule 2, section 2.2;
 - (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
 - (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;
 - (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.
43. In addition, there is a step of ensuring none of the irrelevant factors listed in s 17(2) of the FOI Act have been considered.

Irrelevant factors

44. I have noted the irrelevant factors listed in s 17(2) of the FOI Act and am satisfied that I have not considered any irrelevant factors in this review.

Factors favouring disclosure

45. The respondent has indicated the public interest in the information at issue is minimal, but did not identify any particular public interest factors favouring disclosure as relevant.
46. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.
47. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, I consider that three factors apply:
- promote open discussion and enhance government accountability (Schedule 2, s 2.1(a)(i) of the FOI Act), and
 - ensure effective oversight of expenditure of public funds (Schedule 2, s 2.1(a)(iv) of the FOI Act)
 - contribute to innovation and facilitate research (Schedule 2, s 2.1(a)(xvi) of the FOI Act).

48. There is public interest in accountability and open discussion given this is a health department of the ACT which provides services to the community. I consider that it is in the public interest to know how public funds are being or have been spent by the agency and its impact on the community. I accept that disclosure of any information within the scope of the access application would contribute to greater transparency and accountability.
49. Similarly, information about staffing and research projects being undertaken would help ensure greater community oversight of the expenditure of public funds.
50. Release of document 3 would also better inform the community regarding analysis of particular medical research topics.

Factors favouring nondisclosure

51. As the information at issue was not originally identified as in scope of the request, the respondent did not identify any factors favouring nondisclosure that apply.
52. In its submission to the review, the respondent, however, suggests that they considered the impact on other staff, as well as the internal workings of the relevant work area.
53. In this context, I have considered whether the two factors favouring nondisclosure apply in this review – that is, whether disclosure could reasonably be expected to prejudice:
 - the protection of an individual's right to privacy or any other right under the HR Act (Schedule 2, s 2.2 (a)(ii) of the FOI Act), and
 - the management function of an agency or the conduct of industrial relations by an agency (Schedule 2, s 2.2 (a)(xv) of the FOI Act).

Prejudice the protection of an individual's right to privacy

54. A factor favouring non-disclosure under Schedule 2, s 2.2(a)(ii) of the FOI Act is that disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the HR Act.
55. The HR Act does not, however, provide a general right to privacy. Rather, it provides the right not to have one's privacy, family, home or correspondence interfered with unlawfully or arbitrarily.⁹

⁹ See s 12(a) of the HR Act.

56. When deciding whether disclosure would result in unlawful or arbitrary interference with the relevant individual's privacy, it is relevant to consider whether disclosure could be reasonably expected to result in a breach of the IP Act.
57. The IP Act identifies the circumstances in which the disclosure of information may constitute a breach of an individual's privacy. An individual's personal information must only be disclosed in accordance with the Territory Privacy Principles (TPPs) in Schedule 1 of the IP Act.
58. From my examination of Documents 1 and 2, I consider that some of the information may be of a personal nature in that it contains the names and position details of ACT Health employees.
59. The disclosure of information about agency staff, however, will not generally be considered to prejudice the protection of the individual's right to privacy where the information is wholly related to the individual's routine day-to-day work activities.¹⁰ Disclosure of information that will only reveal that the individual is performing their work duties, is considered to contribute to accountability and transparency of government action and decision-making.
60. I also note that:
- this information is likely to be known to staff within the relevant work area already
 - information about staff specialists within neurology is already publicly available.¹¹
 - as part of their open access obligations, agencies are encouraged to make organisational structure information pro-actively available where possible.
61. For these reasons, I do not consider that release of any of the information in documents 1 and 2 would prejudice the protection of an individual's right to privacy or any other right under the HR Act.
62. In relation to the information on two projects included in document 3, I am also not satisfied that release would prejudice the protection of an individual's right to privacy or any other right under the HR Act, given that:
- information about the Our Health in Our Hands project is already publicly available¹²
 - only basic information about the projects is provided, and
 - some personal information is included, but this is either related to day-to-day work duties as above, or is the information of the applicant.

¹⁰ 'AE' at [49]-[51].

¹¹ See <https://health.act.gov.au/hospitals-and-health-centres/canberra-hospital/wards-and-departments/medical-services#aclxrs>

¹² See <https://www.anu.edu.au/research/research-initiatives/our-health-in-our-hands>

63. Consequently, I consider Schedule 2, s 2.2(a)(ii) of the FOI Act is not a relevant factor in this case.

Prejudice the management function of an agency or the conduct of industrial relations by an agency

64. Schedule 2, s 2.2(a)(xv) of the FOI Act provides that if disclosure of the information could reasonably be expected to prejudice the management function or the conduct of industrial relations by an agency, disclosure of that information is contrary to the public interest.

65. In this case, I do not consider disclosure of documents 1 and 2 could reasonably be expected to prejudice the management function of Canberra Health Services, as it does not include any information beyond information related to routine day-to-day work activities and the structure of the work areas, which staff would be expected to have access to.

66. Similarly, I do not have any evidence before me to explain how the relevant sections of Document 3 could prejudice the management function of the respondent or their conduct of industrial relations – given that it comprises basic information about a known research project, and information which would already be known by the applicant.

67. I consider Schedule 2, s 2.2(a)(xv) of the FOI Act is not a relevant factor in this case.

Conclusion

68. Under s 82(2)(c), I set aside the respondent's decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

69. With respect to the information at issue and for the reasons I have outlined above, under s 82(c) of the FOI Act I consider:

- the respondent's decision that the information at issue does not exist should be set aside, and
- the information at issue should be released to the applicant.

Cathy Milfull
Acting Senior Assistant Ombudsman

23 January 2020