

BD and Canberra Health Services [2020] ACTOFOI 29**(17 December 2020)****Decision and reasons for decision of Senior Assistant Ombudsman,
Louise Macleod**

Application Number	AFOI-RR/20/10049
Decision Reference	[2020] ACTOFOI 29
Applicant	BD
Respondent	Canberra Health Services
Decision Date	17 December 2020
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – refuse to deal with the application – application involves an abuse of process – unreasonable request for personal information about a person

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**).
2. Under s 82(2)(c) of the FOI Act, I **set aside** the decision of the Canberra Health Services (**CHS**), dated 3 September 2020.

Background of Ombudsman review and relevant law

3. The FOI Act gives every person a 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. On 27 July 2020, BD applied to CHS for access to:

For all specialist staff doctor employees of Canberra Health Services (either fulltime or part time), with a rehabilitation program/plan or subsequent alteration, or graduated return to work program/plan signed by the relevant parties between 1/7/18 and 1/7/20.

I request to be provided please:

The various verbatim written clauses regarding applications/submissions/requests for leave (annual, TESL long service) including any time period in advance applications are required or suggested to be made that are written in the stated rehabilitation program/plan or subsequent alteration, or graduated return to work program/plan.

Please specify the number of fulltime or part time specialist doctors employed by Canberra Health Services that each different clause identified applies to regarding submission/requesting these types of leave in advance.

Please also specify the number of fulltime or part time staff specialist doctors employed by Canberra Health Services that have no clause detailing the time in advance to submit/request a leave submission/request/application.

The total number of rehabilitation programs/plans, or graduated return to work programs/plans signed by the relevant parties to examine is expected to be less than 20, with all programs readily identifiable by the ACT Health Injury Management Unit, and ACT Health People and Culture.

Secondly, the programs/plans, and statistics are required to be gathered as part of compliance previously with Comcare, and under the self-insured requirements using the SRC.

With this FOI request personal information is not requested or required to be provided such as names or specialty or the fulltime or part time staff specialist doctors employed by Canberra Health Services with the rehabilitation program, rehabilitation program alteration, or graduated return to work programs.

The additional component to the FOI request is for the equivalent (if present) various verbatim written clauses regarding 'upgrade' of work that are written in the stated rehabilitation program/plan or subsequent alteration, or graduated return to work program/plan for all specialist staff doctor employees of Canberra Health Services (either fulltime or part time).

5. Section 43(1)(c) permits an agency to refuse to deal with an access application if the application involves an abuse of process. Section 43(4)(b) defines the phrase 'abuse of process' as, among other things:

an unreasonable request for personal information about a person

6. On 13 August 2020, CHS wrote to the applicant advising of their intention to refuse to deal with the application on the basis that it constituted an abuse of process because it was an unreasonable request for personal information.
7. On 3 September 2020, CHS decided to refuse to deal with the access application on this basis.
8. On 11 September 2020, BD applied, under s 74 of the FOI Act, for the ACT Ombudsman to review CHS' decision.
9. On 23 November 2020, I provided my preliminary views about CHS' decision to the parties in my draft consideration.
10. On 30 November 2020, CHS responded to my draft consideration, advising their acceptance of my preliminary view that the original decision was incorrect.
11. The applicant did not provide further submissions in response to my draft consideration.

Issue

12. The issue in this Ombudsman review is whether CHS' decision to refuse to deal with the access application was correct.
13. In making my decision I have had regard to:
 - the original access application
 - CHS' decision notice
 - The FOI Act, in particular ss 7, 35, 43 and the Dictionary

The contentions of the parties

14. CHS' decision notice states:

[i]t is my decision that the public interest would not be served by unreasonably requesting the personal information of other CHS employees.

15. CHS made submissions after being notified of this review, contending that:

...the information [the applicant] is seeking is personal information of individuals that is protected under the *Human Rights Act 2004*...

The collation of this information would require staff members to determine which staff specialist doctors have a Rehabilitation Program/Plan or Return to Work Program/Plan. Then staff would have to go through the individualised plans to determine which ones held the type of information

specified, and finally create a de-identified document where the staff members' identity may still be evident. Therefore, I believe it would be unreasonable to go through individual Programs/Plans of agency staff to determine if they held this information. This would breach the Directorates responsibility under the IP Act and contain information in records that are not accessible under the FOI Act.

16. The application for Ombudsman review states:

I wish to document as stated in the FOI request, amended FOI request, and clarifying emails below that I have never requested any personal identifying information, or Health Records of any CHS doctor, only the relevant upgrade clauses for graduated return to work at CHS.

I have provided written consent form, to provide the documents with my personal health information, or documents considered to be personal health records.

I do not request any personally identifiable information for any other doctor, and clearly this would not be identified in the request despite this being the reason used to decline the FOI request.

17. These submissions are discussed in more detail below.

Considerations

18. I have considered both parties' submissions.

19. The Dictionary of the FOI Act defines 'personal information' as:

information or an opinion about a person... whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion...

20. I consider CHS' decision is incorrect. 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.

Conclusion

22. For these reasons, under s 82(2)(c) of the FOI Act, I decide to **set aside** the decision of Canberra Health Services dated 3 September 2020.
23. CHS must deal with the access application in accordance with the FOI Act because it is not an abuse of process under s 43(4)(b).