

Decision and reasons for decision of Senior Assistant Ombudsman

Application number:	AFOI-RR/22/10038
Agency reference:	ACTHDFOI22-23.25 and ACTHDFOI22-23.15
Applicant:	“CM”
Respondent:	ACT Health Directorate
Date:	27 September 2023
Catchwords:	<i>Freedom of Information Act 2016</i> – refusing to deal with application – information already available to applicant – reasonable steps to identify all government information within scope – information not held by respondent

Draft consideration

1. For the purpose of s 82 of the *Freedom of Information Act 2016* (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. The applicant applied for Ombudsman review of 2 ACT Health Directorate (**ACTHD**) decisions made on 16 December 2022 under the FOI Act.
3. ACTHD decided the first application by:¹
 - refusing to deal with the part of the application which requested information previously provided to the applicant by ACTHD, and
 - determining the remainder of the requested information is not held by ACTHD.
4. ACTHD decided the second application by determining the information is not held by ACTHD.²
5. For the reasons set out below, I have decided to **confirm** both of ACTHD’s decisions dated 16 December 2022 under s 82(2)(a) of the FOI Act.

¹ ACTHD reference: ACTHDFOI22-23.15.

² ACTHD reference: ACTHDFOI22-23.25.

Background to Ombudsman review

The previous access application

6. On 29 March 2022, prior to making the access applications the subject of this review, the applicant applied to ACTHD for:³

September to 3 March 2022

1. Documents generally concerning the Administrative Support Officer, Covid-19 operations position and hiring process from 1 September 2021 to 31 December 2021. Without limiting the scope of the request, this might include:

- Advice, discussion, reports, with personal details omitted,
- Records of the planning as to how roles are to be allocated and Health Department staffing or funding priorities.
- Related disclosures.

December 2021 to 3 March 2022

2. In relation to Covid-19 operations, documents discussing Rapid Antigen Testing packaging, and specifically, the possibility of contracting, either privately, through the ASO positions, or otherwise, to repackage Covid-19 tests, as contemplated in the e-mail of Friday, 21 January 2022 at or around 3.57pm.

December 2021 to 3 March 2022

3. The contemplated uses in this of employees to be hired placed on the merit pool for the ASO-3 position, as announced on 19 January 2022.

4. January 2021 to 3 March 2022

The possibility of offering paid training in Health Department protocols to persons on said merit list.

5. September to 3 March 2022

All documents concerning myself in relation to ACT Health's Covid-19 operations personally, with others' details omitted details or redacted where applicable.

7. On 29 April 2022, ACTHD decided this application by giving access to 2 documents and partial access to 5 documents.⁴ With the applicant's agreement, part of this request was dealt with outside of the FOI Act where information about the applicant was released informally.

The access applications subject of this review

8. On 4 November 2022, the applicant applied to ACTHD for access to all documents relating personally to the applicant, including documents that may have already been released pursuant to FOI (**first application**).⁵

³ ACTHD reference: ACTHDFOI21-22.45.

⁴ See ACTHD FOI Disclosure log: [ACTHDFOI21-22.45](#).

⁵ ACTHD reference: ACTHDFOI22-23.15.

9. On 17 November 2022, ACTHD contacted the applicant to clarify the scope of the application stating:

On 29 April 2022 the ACT Health Directorate provided a formal response to your FOI application ACTHDFOI21-22.45 a copy of the response to this application is published on the ACT Health Disclosure log on our website. In addition to this the directorate provided you with 102 pages of documentation informally under section 8 of the FOI Act....

I have enquired with relevant areas of the directorate to establish what additional information may be held within the scope of this application that has not been provided to you and I have not been able to locate any. Could you please provide a more concise description of the information relevant to your request to enable the agency to identify the government information sought.

10. On 20 November 2022, the applicant revised the scope of the first application to include all information under the same terms as the previous application and other additional information.
11. On 20 November 2022, the applicant applied to ACTHD for access to **(second application)**:⁶

... any e-mails to or from (but excluding those addressed to/from [applicant email address]) the following e-mails:...That contain the term '[applicant name] or '[applicant email address]' anywhere in their content, header, or general metadata.

12. On 22 November 2022, ACTHD contacted the applicant to clarify the scope of the applications, asking:

Could you please specify areas that may hold additional information, subsequent to your previous FOI application as I have not located additional information held by the Directorate.

13. On 23 November 2022, the applicant advised ACTHD they considered the scope of the first application would be likely to capture information which had not been previously provided, in particular information about further contact relevant to the applicant since 29 April 2022.
14. On 23 November 2022, the applicant clarified the scope of the first application included a copy of the standard contract ACTHD would have given to a newly engaged employee, a copy of the contract for Rapid Antigen Test packing given to the external entity,⁷ and the details about the entity who entered into this contract.
15. On 29 November 2022, ACTHD asked the applicant if the applicant could clarify the scope of the first application to enable ACTHD to process it.

⁶ ACTHDFOI22-23.25.

⁷ This is a reference to information released by ACTHD in response to the previous access application (ACTHD reference: ACTHDFOI22-23.15) in which there is advice that 'there was a decision for Rapid Antigen Tests packing to be undertaken by an entity external to ACT Health.'

16. On 30 November 2022, the applicant confirmed the scope of the first application as:

Scope:

- 1) all documents relating personally to the individual [applicant], including documents that may have already been released by FOI, anew. I am willing to exclude the prior FOI request and its results itself, but not the relevant documents, if this increases convenience for you.
- 2) If you could release all documents under the same terms as the previous FOI Request. This is not a request for an additional copy. Please deem these included in this FOI request. Additionally, please explain any redactions and describe their proportionality, to facilitate the appeal of these redactions, as of right.
- 3) Would you please also kindly include any documents that I might be entitled to request regard myself under any of the following legislation? Freedom of Information Act 2016 Health Records (Privacy and Access) Act 1997 Human Rights Act 2004 Information Privacy Act 2014 Public Sector Act 2014 Territory Records Act 2002 Workplace Privacy Act 2011
- 4) Any information referring to myself or including the term "[applicant name]" shared with other agencies, including ACT or Commonwealth or others, or held jointly across organisations? Hopefully this helps.
- 5) e-mails with the word '[applicant first name]' in it, referring to me, held by (to or from?) the Minister?
- 6) Again, held by the Minister, the phrase "[applicant name]": Word documents, Excel sheets, txt files, database entries.
- 7) "I have enquired with relevant areas of the directorate to establish what additional information may be held within the scope of this application that has not been provided to you and I have not been able to locate any." - The enquiries here, please. Are these e-mails? Which relevant areas? Where did they look?

17. On 12 December 2022, the applicant contacted ACTHD and said:

You know how you [sic] Covid-HR said they have no more documents? There's a link in an e-mail of 1 February with the subject line "ACT Health Recruitment Survey", congratulating me for placement in a merit pool, with a link to a Google form, to which I responded.

- a. Given I have requested all information about myself, can I get copies both the form/survey and my response?
- b. And, also, job descriptions of the roles that I applied for?

18. On 16 December 2022, ACTHD decided the first application by deciding:

- to refuse to deal with the part of the application which requested information previously provided to the applicant by ACTHD,⁸ and
- in respect of the remainder of the first application, the requested information is not held by ACTHD.⁹

⁸ Sections 35(1)(d), 43(1)(d) and 45(e)/(f) of the [FOI Act](#).

⁹ Section 35(1)(b) of the [FOI Act](#).

19. On 16 December 2022, ACTHD also decided the second application by deciding the information is not held by ACTHD.¹⁰
20. On 22 December 2022, the applicant applied for Ombudsman review of ACTHD's decisions on the first and second application.
21. On 18 January 2023, the Ombudsman wrote to the parties to attempt to resolve the review matter informally.
22. On 19 January 2023, during informal resolution, ACTHD provided the applicant with a copy of job descriptions for positions the applicant had applied for previously.
23. On 3 April 2023, the Ombudsman wrote to the applicant to advise ACTHD did not enter into a contractual arrangement for Rapid Antigen Test packing services, and that a contract between ACTHD and 'an entity external to ACTHD' does not exist.
24. On 5 April 2023, ACTHD provided the applicant with a copy of an internal email chain containing information about enquiries made by ACTHD staff to locate information in processing the first application.
25. On 17 April 2023, ACTHD provided the applicant with a copy of the applicant's recruitment survey responses.
26. On 8 September 2023, the Senior Assistant Ombudsman (Mr David Fintan) provided their preliminary views to the parties in a draft consideration.
27. On 8 September 2023, the ACTHD accepted the draft consideration. The applicant did not respond to the draft consideration.

Scope of Ombudsman review

28. The issues to be decided in this Ombudsman review are:
 - whether the information sought in the first application was already available to the applicant, and
 - whether ACTHD has taken all reasonable steps to identify all government information within the scope of the first and second application.

¹⁰ Section 35(1)(b) of the [FOI Act](#).

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

- the applicant's access applications and review application
- the respondent's decisions of 16 December 2022 and further submissions
- the FOI Act, in particular ss 6, 7, 16, 17, 35, 50, 72, Schedule 1 and Schedule 2
- 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:
 - [‘BV’ and Environment, Planning and Sustainable Development Directorate \[2022\] ACTOFOI 10 \(17 November 2022\)](#) (**‘BV’ and EPSDD**)
 - [Department of Defence and Health Directorate \[2019\] ACTOFOI 11 \(17 June 2019\)](#).

Relevant law

30. 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.¹¹
31. Section 34(1) of the FOI Act states an agency or Minister deciding an access application must take reasonable steps to identify all information within the scope of the application.
32. Section 35(1)(b) of the FOI Act provides a respondent may decide an access application by deciding the information is not held by the respondent.
33. A respondent may also decide an access application by deciding to refuse to deal with the application.¹² A respondent may refuse to deal with an application wholly or in part if the information is already available to the applicant.¹³
34. For the purpose of section 43(1)(d), information is already available to the applicant if the information has already been given to the applicant under the FOI Act or otherwise previously been given to the applicant.¹⁴

¹¹ Section 35(1)(c) of the [FOI Act](#).

¹² Section 35(1)(d) of the [FOI Act](#).

¹³ Section 43(1)(d) of the [FOI Act](#).

¹⁴ Section 45(e) and (f) of the [FOI Act](#).

35. For a decision to refuse to deal with an application because the information is already available to the applicant, the decision notice must include a statement about how the applicant can access the information.¹⁵

The parties' submissions

36. In deciding the first application, ACTHD's decision notice said:¹⁶

ACTHD does not hold Information relevant to the scope of your application in accordance with section 35 (1)(b) of the Act...After consultation with the relevant line areas considered to potentially hold relevant information, no documentation that has not been previously provided under FOI has been located within the scope of your application.

Previous information provided under FOI, I have refused to deal with under section 43(1)(d).

37. In deciding the second application, ACTHD's decision notice said:¹⁷

ACTHD does not hold Information relevant to the scope of your application in accordance with section 35 (1)(b) of the Act.... After consultation with the relevant line areas considered to potentially hold relevant information, no documentation has been located within the scope of your application.

38. In the application for Ombudsman review, the applicant submitted:

ACT Health FOI has refused to provide some important information that is within their power to provide:

1. the name of the 'entity external to ACT Health' that took my job;
2. the contract with the external entity;
3. the standardised contract that would have been provided to me at an ASO-3 level;
4. the job descriptions of ASO-3-6 positions that I applied for;
5. location data and records associated with PACER's emergency response; and
6. The results of a Google forms survey provided to ACT Health....

I have requested materials by way of FOI that can be shown to exist; and I would like access to them; the grounds of refusal provided by the FOI officers are demonstrably wrong....

I had requested e-mails between myself and several ACT Health addresses.

I had sought to exclude e-mails privately between myself and the addresses on a one-to-one basis by stating, 'excluding addressed to/from the applicant', although I believe, looking at the result, ACT Health FOI may have taken this as covering a one-to-many basis....

39. These submissions are discussed in more detail below.

¹⁵ Section 55(c) of the [FOI Act](#).

¹⁶ ACTHD reference: ACTHDFOI22-23.15.

¹⁷ ACTHD reference: ACTHDFOI22-23.25.

Consideration

Whether information was already available to the applicant

40. Where information is already publicly available, there is necessarily no need for an access application to be processed and a respondent may refuse to deal with the application.¹⁸
41. The applicant submitted, in dealing with their earlier application, ACTHD did not provide all of the requested information and therefore not all of this information is already available to the applicant.
42. The applicant has advised certain emails were not provided to them, including an email sent to multiple parties (including the applicant). The applicant provided a copy of this email with their review application.
43. It is not in dispute that the scope of the first and second applications was intended to capture the same information which was previously requested by the applicant under the FOI Act.¹⁹ As a result of the attempted informal resolution process, additional information has now been provided to the applicant.
44. In my view, part of the information requested in the first and second applications was previously given to the applicant under the FOI Act or given to the applicant informally, and for this reason was already available to the applicant.²⁰

Identifying information within the scope of the application

45. In the review application, the applicant has said ACTHD holds information within the scope of their application which was not provided to them.
46. 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 before making a decision it does not hold the information.²¹
47. As explained in 'BV' and EPSDD, what is required to satisfy the obligation to take reasonable steps to identify information will depend on the nature of the requested information.²²

¹⁸ Section 43(1)(d) of the [FOI Act](#) and [Explanatory Statement, Freedom of Information Bill 2016 \(ACT\)](#).

¹⁹ [Department of Defence and Health Directorate \[2019\] ACTOFOI 11 \(17 June 2019\)](#), [19].

²⁰ Sections 45(e) and (f) of the [FOI Act](#).

²¹ Section 34(1) of the [FOI Act](#).

²² [\[2022\] ACTOFOI 10](#), [36].

48. In summary, the first application is expressed as a request for all of the applicant's personal information including information about a job application for an administrative support officer position and other information about the recruitment process.
49. The second application is expressed as a request for emails to or from 6 different email addresses which contain the applicant's name and email address (excluding those addressed to/from the applicant).
50. ACTHD is responsible for developing strategic policy, oversight, and future planning of the health system, managing health services, and monitoring and evaluation of health programs.²³ The first and second applications involve information about the applicant obtained by or submitted to ACTHD for the purpose of a recruitment process.
51. ACTHD has submitted that the steps taken to locate information in scope included searching staff email Outlook accounts and group inboxes, and consulting with relevant line areas.
52. During the attempted informal resolution process, ACTHD explained that after contacting a former staff member, it received details about how to access data from the recruitment survey and was ultimately able to extract the applicant's survey responses and provide them to the applicant.
53. Further, ACTHD submitted the email chain containing information about enquiries made by ACTHD staff to locate information in processing the first application was not originally included in the scope, as these records were created after the application was made.
54. Having examined the information provided by the applicant and ACTHD, I consider ACTHD took steps to search locations where the information sought was expected to be held or able to be retrieved and relevant information was identified.
55. ACTHD conducted further searches during the attempted informal resolution process to locate information within the scope of the first application once details about the requested information was provided to assist.
56. ACTHD has explained the contractual documents sought were not created during the recruitment process, and for this reason this information is not held by ACTHD. ACTHD has also explained that information related to the Police, Ambulance & Clinician Early Response (PACER) are health records, and the FOI Act does not apply to health records.²⁴

²³ [Administrative Arrangements 2022 \(No 2\)](#).

²⁴ Section 12 of the [FOI Act](#).

57. I consider the steps taken by ACTHD to identify information within the scope of the request were reasonable in the circumstances. I do not consider a further search could reasonably be expected to locate additional information within the scope of the application which has not already been provided to the applicant.

58. In my view, I accept ACTHD does not hold any information about the applicant that is not already available to the applicant.

Conclusion

59. For the reasons set out above, I **confirm** both of ACTHD's decisions under s 82(2)(a) of the FOI Act. In respect of the first application, I **confirm** ACTHD's decision to:

- refuse to deal with the part of the application which requested information previously provided to the applicant by the ACTHD, and
- that the remainder of the requested information is not held by ACTHD.

60. In respect of the second application, I **confirm** ACTHD's decision the information was not held by ACTHD.

Katrina Dwyer

Acting Senior Assistant Ombudsman

27 September 2023