

## ***Elizabeth Lee and Chief Minister, Treasury and Economic Development Directorate [2022] ACTOFOI 4 (16 May 2022)***

### **Decision and reasons for decision of Acting ACT Ombudsman, Penny McKay**

<b>Application Number</b>	AFOI-RR/21/10028
<b>Decision Reference</b>	[2022] ACTOFOI 4
<b>Applicant</b>	Elizabeth Lee MLA
<b>Respondent</b>	Chief Minister, Treasury and Economic Development Directorate
<b>Decision Date</b>	16 May 2022
<b>Catchwords</b>	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – Cabinet information – whether information is purely factual

### **Decision**

1. Under s **82(2)(b)** of the FOI Act, I **vary** the decision of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD), dated 28 September 2021.

### **Background of Ombudsman review**

2. On 1 September 2021, the applicant applied to CMTEDD for access to five briefs, including, relevantly, the Sustainable Household Scheme Business Case 2021—22 (**the Business Case**).
3. On 28 September 2021, the CMTEDD Information Officer decided to refuse access to information including the entirety of the Business Case. This is the sole document relevant in this review.
4. On 8 October 2021, the applicant applied for Ombudsman review of the CMTEDD decision to refuse access to the Business Case.

5. On 23 March 2022, I provided my preliminary views about the respondent's decision to the parties in a draft consideration.
6. The applicant accepted my draft consideration and did not provide any additional submissions.
7. On 6 April 2022, the respondent provided submissions in relation to my draft consideration. The submissions required careful consideration which I undertook before making my final decision. I address the respondent's responses to my draft consideration in my reasons below.

## Information at issue

8. The information at issue in this review is the Business Case in its entirety.
9. The issue to be decided is whether giving the applicant access to this information would be contrary to the public interest.
10. In forming my preliminary view, I considered:
  - the *Freedom of Information Act 2016* (ACT), particularly Schedule 1, s 1.6
  - the ACT Cabinet Handbook
  - the CMTEDD decision letter and information provided regarding the information at issue after being notified of the commencement of this review
  - an unedited copy of the information at issue
  - the respondent's submissions to my draft consideration, and
  - relevant cases, including *Hudson (as agent for Fencray Pty Ltd) and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123, *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945, *Harris v Australian Broadcasting Corporation and Ors* [1984] FCA 8, *Ryman and Department of Main Roads* (1996) 3 QAR 416 and *Jon Stanhope and ACT Health Directorate* [2020] ACTOFOI 22.

## Relevant law

11. Every person enjoys an enforceable right of access to government information.<sup>1</sup> However, the FOI Act creates an exception to this right by allowing for refusal of access to information that is 'contrary to the public interest information'.<sup>2</sup>

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<sup>1</sup> Section 7 of the FOI Act.

12. 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.

13. The party seeking to prevent disclosure of government information bears the onus of establishing that information is contrary to the public interest information.<sup>3</sup>

14. Schedule 1 of the FOI Act sets out categories of information that are taken to be contrary to the public interest to disclose.

## The contentions of the parties

15. The CMTEDD decision notice said the information at issue:

Contains information that was prepared for, or would disclose, the deliberations of Cabinet...

In reviewing the document, I consider they contain information which has been developed as part of the Cabinet consideration process... or is directly related to the deliberation and considerations of Cabinet...

16. In the review application, the applicant contended that:

...under section 1.6 in the Act it states "(2) Subsection (1) does not apply to purely factual information". As a business case is factual information, the Sustainable Household Scheme Business Case 2021-22 should be publicly released.

## Considerations

17. I carefully considered an unredacted copy of the information at issue together with the information provided to me by the parties.

### *Information taken to be contrary to the public interest to disclose under Schedule 1*

18. The question in this review is whether it was incorrectly determined that information in the Business Case was taken to be contrary to the public interest to disclose under Schedule 1, s 1.6(1)(a) of the FOI Act. This section is set out below:

(1) information—

- (a) that has been submitted, or that a Minister proposes to submit, to Cabinet for its consideration and that was brought into existence for that purpose...

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<sup>2</sup> Section 35(1)(c) of the FOI Act.

<sup>3</sup> Section 72 of the FOI Act.

19. To establish whether 1.6(1)(a) of the FOI Act was incorrectly determined to apply I must consider whether the Business Case meets the definition set out above and whether the exception in 1.6(2)(a) applies to overcome 1.6(1)(a).
20. Schedule 1, s 1.6(2)(a) provides:
  - (2) Subsection (1) does not apply to purely factual information that—
    - (a) is mentioned in subsection (1)(a);
21. To assist in forming my preliminary view, on 28 October 2021, my Office wrote to CMTEDD seeking additional information about the document. Specifically, my Office observed that the document did not contain the DLM required under the ACT Cabinet Handbook, and requested an explanation for how, if it were indeed a Cabinet document, it could be so without the DLM.
22. CMTEDD responded on 3 November 2021, advising the version of the document I was given was an exact copy of the version given to Cabinet except the version given to Cabinet contained the DLM.
23. I do not consider the absence of the DLM on the single copy of the document to be a material issue.
24. More importantly, on 22 November 2021, my Office sought alternative (without prejudice to its original decision) submissions from the CMTEDD about where I should draw the line between Cabinet and purely factual information were I to decide that the correct decision would be to disclose some of the information in the Business Case.
25. On 6 December 2021, CMTEDD responded to the request declining to make alternative submissions on the basis that:
  1. The business case doesn't contain any discreet factual information. The intention of the document is entirely deliberative. It outlines options for how the Government could fund the sustainable household scheme.
  2. The Government agreed to the business case in ERC [Expenditure Review Committee], and then the ERC decisions were formalised in a Cabinet decision.
26. My preliminary view was the information at issue was submitted to Cabinet and it was brought into existence for that purpose. Schedule 1, s 1.6(1)(a) therefore applies, *prima facie*.
27. As for the exception set out in Schedule 1, s 1.6(2)(a), I considered comments made by the Queensland Information Commissioner previously that:

... I think it is safe to say that merely factual matter is generally to be distinguished from matter expressing the opinions and recommendations of individual Ministers on policy issues and policy options

requiring Cabinet determination. Factual matter which merely provides the factual background, or informs Cabinet of any relevant facts, so as to assist its deliberations on policy issues, will generally constitute ‘merely factual matter’.<sup>4</sup>

28. In *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)*,<sup>5</sup> the AAT quoted the Full Court of the Federal Court in *Harris v Australian Broadcasting Corporation and Ors* and I have extracted the relevant statement below:

In our view some [of the information] may be classed as purely factual material; others, which are of such a character as to disclose a process of selection involving opinion, advice or recommendation for the purpose of the deliberative process may be exempt.<sup>6</sup>

29. In forming my preliminary view, I considered these authorities in relation to the onus borne by a respondent under s 72 of the FOI Act.
30. Section 72 of the FOI Act places the onus of establishing that information should not be disclosed on the party seeking to prevent disclosure. My preliminary view was that CMTEDD had not met this obligation by failing to identify any information in the Business Case which it considers to be ‘purely factual’ information.
31. I reached this view having considered an unredacted copy of the Business Case. To my draft consideration I attached a copy with the redactions I proposed to allow marked in red and the information I consider appropriate to disclose marked in green. That copy was provided only to CMTEDD as the applicant’s right of access to the information depended on my final decision. In essence, I accepted that disclosing sections of the document which frame various options and advocate for particular options go beyond disclosing factual matters and constitute matter expressing the opinion or recommendation of a Minister. Alternatively, some of the Business Case appeared to me to state matters that may fairly be described as ‘purely factual’.
32. CMTEDD provided the following submissions on the redactions I proposed to allow and the information I considered appropriate to disclose:

1. [The financial impacts summaries] are the recommendation of the sponsoring Minister in numerical form. They provide a financial representation of the option recommended by the Minister and as such would vary depending on the option recommended.

In fact, the financial information... is the focus of the Cabinet decision and that financial information is frequently adjusted on the basis of Cabinet deliberations. The figures have no

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<sup>4</sup> *Hudson (as agent for Fencray Pty Ltd) and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at [61].

<sup>5</sup> [2015] AATA 945 at [47].

<sup>6</sup> *Harris v Australian Broadcasting Corporation and Ors* [1984] FCA 8 at [19] quoted in *Wood; Secretary, Department of Prime Minister and Cabinet and (Freedom of Information)* [2015] AATA 945 at [47].

independent meaning outside the context of the Minister's recommendation and cannot be considered factual statements.

2. The section titled 'policy alignment' also reflects the intended outcome or effect of the recommended option and does not represent factual information.

The section highlights how the recommended option would be intended to align with other government policies. This alignment represents the opinion and recommendation of the Minister and is quite different to factually reciting those policies.

3. The section titled 'Communications' refers to the intended audience and as per above forms part of the recommended approach rather than a statement of fact.

I draw your attention to the use of the phrase 'target audience' which represents a recommendation of the Minister rather than a statement of fact.

33. After careful consideration, I am persuaded by these submissions because they articulate the distinction between purely factual matters and matters expressing the opinion or recommendation of a Minister.

34. CMTEDD's decision letter also referred to Schedule 1, s 1.6(1)(d) of the FOI Act as follows:

- (1) Information:

- (d) The disclosure of which would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision).

35. In *Jon Stanhope and ACT Health Directorate*,<sup>7</sup> the former Ombudsman referred to the Queensland Information Commissioner's comments in *Ryman v Department of Main Roads*,<sup>8</sup> which pointed out that a document prepared prior to any actual Cabinet deliberations is unlikely to be able to, logically, disclose the deliberations of Cabinet.

36. In my draft consideration, my preliminary view was that Schedule 1, s 1.6(1)(d) was inapplicable in this review as the document was prepared before Cabinet considered the issues it presents and the risk of it disclosing Cabinet deliberations seemed low.

37. In response to my draft consideration, CMTEDD submitted:

In relation to your consideration of the application in Schedule 1, s 1.6(1)(d) and the references to the case of *Ryman v Department of Main Roads*, the comments of the Queensland Information Commissioner should be noted as not categorical and in using the word 'unlikely' they recognise that there could be instances where documents created prior to Cabinet deliberations do in fact reveal those deliberations. However, your draft consideration appears to base your decision solely on the sequencing of the document's creation relative to the Cabinet deliberations rather than the potential for the release of the information to disclose the deliberations of Cabinet.

In addition, please draw your attention to page 50 of the explanatory statement of the *Freedom of Information Act 2016* which, when discussing the intent of Schedule 1, outlines that "... the classifications

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<sup>7</sup> [2020] ACTOFOI 22 (12 November 2020) at [32].

<sup>8</sup> *Ryman and Department of Main Roads* (1996) 3 QAR 416 at [39] quoting *Re Hudson (as agent for Fencray Pty Ltd) and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123 at [36]-[47].

*are generally narrower and as much as possible articulate specific information or outcomes that would actually be harmful to the public interest.”* The fact that a document was prepared prior to the deliberation does not automatically mean that it could not be used to infer the deliberations of Cabinet, particularly when combined or compared against other publicly available information.

... As such, we do not agree that a strict rule can be applied that automatically excludes the application of Schedule 1, s 1.6(2)(d) to information that was created prior to a Cabinet deliberation. Rather it is our view that the public interest test should be applied to each document on its individual circumstances and merits.

38. In making my decision, I considered this submission and ultimately decided to agree with it. I am satisfied that Schedule 1, s 1.6(1)(d) is applicable in this review. I am persuaded that a strict rule should not be applied to automatically exclude its application in this case, and that each document should be considered on its individual circumstances and merits.

## Conclusion

39. For these reasons, my decision is to vary the CMTEDD’s decision of 28 September 2021 under **s 82(2)(b)** of the FOI Act.
40. Some of the information at issue is contrary to the public interest information under Schedule 1, ss 1.6(1)(a) and (d) and should be withheld from release.
41. My decision is that access be granted to the remainder of the information, being ‘purely factual’ information for the purposes of Schedule 1, s 1.6(2)(a).

**Penny McKay**  
Acting ACT Ombudsman

16 May 2022