

## ***Jon Stanhope and ACT Health Directorate [2020] ACTOFOI 22*** **(12 November 2020)**

### **Decision and reasons for decision of ACT Ombudsman, Michael Manthorpe PSM**

<b>Application Number</b>	AFOI-RR/20/10039
<b>Decision Reference</b>	[2020] ACTOFOI 22
<b>Applicant</b>	Jon Stanhope
<b>Respondent</b>	ACT Health Directorate
<b>Decision Date</b>	12 November 2020
<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 – reveal any deliberation of Cabinet

### **Decision**

1. Under s 82(2)(c) of the *Freedom of Information Act 2016 (ACT)*, I **set aside and substitute** the decision of the ACT Health Directorate (**Health**) dated 24 July 2020.

### **Background of Ombudsman review**

2. On 11 June 2020, the applicant applied to Health for access to ‘A copy of the ACT Health Capital Asset Development Plan’.
3. By agreement, the parties refined the scope of the access application to include only the Table of Contents and Executive Summary of the Plan.
4. On 24 July 2020, Health advised the applicant it had identified two documents. Health gave the applicant full access to the Table of Contents and partial access to the Executive Summary.

5. On 27 July 2020, the applicant applied to the Ombudsman for a review of Health's decision under s 73 of the FOI Act.
6. On 28 September 2020, I provided my preliminary view about the respondent's decision to the parties in a draft consideration.
7. On 28 September 2020, the applicant advised that he accepted my draft consideration and had no further submissions to make in this matter.
8. On 16 October 2020, Health advised it did not wish to provide any more submissions and will comply with the decision set out in my draft consideration.

## Information at issue

9. The information at issue in this review are the sections of the Executive Summary that Health decided were taken to be contrary to the public interest to disclose under Schedule 1, s 1.6(d) of the FOI Act. Health decided that on this basis the applicant should not be given access to the information at issue.
10. The issue in this review is whether giving access to the information would be contrary to the public interest on the basis of Schedule 1, s 1.6(d) of the FOI Act.
11. In making my decision, I have had regard to:
  - the applicant's access application and review application
  - Health's decision notice
  - the respondent's FOI processing file relating to the access application
  - the FOI Act, in particular ss 6, 7, 9, 50, 72 and Schedule 1, s 1.6(d)
  - an unedited copy of the information at issue
  - relevant case law: *Ryman and Department of Main Roads*,<sup>1</sup> and *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate*<sup>2</sup>

## Relevant law

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<sup>1</sup> (1996) 3 QAR 416.

<sup>2</sup> [2019] ACTOFOI 6.

12. 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.<sup>3</sup>
13. 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.
14. Where an access application is made for government information in a record containing contrary to the public interest information and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted, s 50 permits such deletions.
15. Section 72 of the FOI Act provides that a person seeking to prevent disclosure of government information bears the onus of establishing that it is contrary to the public interest information.
16. Categories of information that are taken to be contrary to the public interest to disclose are set out in Schedule 1 of the FOI Act.
17. Relevantly, one category under Schedule 1 is Cabinet information, which is:
  - (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; or
    - (b) is an official record of Cabinet; or
    - (c) is a copy of, or part of, or contains an extract from, information mentioned in paragraph (a) or (b); or
    - (d) the disclosure of which would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision).

## **The contentions of the parties**

18. Health's decision stated that:

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<sup>3</sup> Section 7 of the FOI Act.

This document is comprised of information that would reveal deliberations of Cabinet. This information is therefore taken to be contrary to the public interest to release, under Schedule 1.6(1)... (d)

19. The applicant's review application contended that:

1. The release is partial under Schedule 1, Section 1.6 as advised in the decision letter. Section 1.6 (1) of this Schedule exempts the Cabinet Information. However, Schedule 1.6 (2) states that the exemption does not apply to purely factual information.
2. Some of the information redacted appears to be factual information, for example, construction schedule, so it should not be exempt under Section 1.6 (1). The decision letter does not explain the nature of the information and why Section 1.6 (2) is not applicable.
3. It is possible the redacted information would in any event be subject to other disclosure provisions regarding executive document release.
4. The decision letter advises that factors considered in favour of disclosure were Schedule 2.1 (a) (i) and 2.1 (a) (iv). The decision maker should have taken into account Schedule 2.1 (a) (ii) and 2.1 (a) (iii) which are clearly relevant. Schedule 2.1 (a) (ix) (B) [information being out-of-date] may or may not be applicable subject to interpretation. The decision may be deficient, and the letter is deficient in not explaining why (a) the provisions considered do not outweigh the Cabinet privilege, and (b) why other provisions mentioned above are not relevant.
5. The decision appears to have leaned towards non-disclosure, which is against the objects of the Act under Part 2.
6. The release of the information may be politically embarrassing, but I do not think that the exemptions claimed apply.

## **Preliminary issue**

20. Health decided the Executive Summary should be disclosed, subject to various redactions. The redactions were made solely on the basis that Schedule 1, s 1.6(d) applied to the information at issue. As neither party disputes the decision, except in respect of the redactions, I considered the sole question to be determined was whether Schedule 1, s 1.6(d) applied to the information at issue. Health did not make any alternative submission in response to my draft consideration that suggested the information was contrary to the public interest on any other basis. As the

party seeking to prevent disclosure, s 72 placed the onus of raising alternative submissions on Health.

21. A deletion under s 50 is made in the course of a decision to give access.<sup>4</sup> It follows that if the basis for the deletion is incorrect, and neither party disputes the decision to give access to the document itself, access should also be given to the deleted information.
22. The applicant referred to the Schedule 2 balancing of public interest factors in their submissions. Health's decision to refuse access to the information at issue was based on a Schedule 1 factor. If this factor is established, the balancing of public interest factors is not required as Schedule 2 is not relevant.
23. Additionally, the applicant submitted Health had erred in its decision to redact the information because Schedule 1, s 1.6(2) creates an exception for factual information. The 'purely factual information' exception referred to by the applicant only applies to ss 1.6(1)(a), (b) and (c). As this review involves a consideration of s 1.6(1)(d), this exception does not apply.

## Considerations

24. I have carefully considered an unredacted copy of the information at issue together with the information provided by the applicant and Health.

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

25. Having reviewed the information at issue I am satisfied it does not fall under any exceptions outlined in Schedule 1. That is to say, the information at issue does not identify corruption, an offence, or misuse of power in a law enforcement investigation. Accordingly, I have considered whether the information at issue is taken to be contrary to the public interest information under Schedule 1.
26. Health submitted that as the information at issue was contained in the Capital Asset Development Plan, developed in 2008, it was the subject of Cabinet deliberations at various times since the report's creation and that disclosure would therefore reveal the deliberations of Cabinet.

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<sup>4</sup> Section 50 of the FOI Act.

27. On 11 September 2020, Health provided a list of Cabinet submissions made from 2008 to 2020 which involved the discussion of, or were informed by, the Capital Asset Development Plan.
28. I reviewed the information at issue, which includes information about the number of units/rooms in ACT Health facilities as well as estimated costings, largely from 2010.
29. Despite the list of submissions that appear to rely on information contained in the Capital Asset Development Plan, I consider it does not reveal how specific Cabinet deliberations would be revealed by disclosing the information at issue.
30. I consider there to be a distinction between information that would reveal the confidential deliberations of Cabinet and information that may inform members of Cabinet before deliberations take place. This distinction is accounted for in the Act which provides that Cabinet submissions that were brought into existence for the purpose of shaping discussion are contrary to the public interest to disclose under Schedule 1, s 1.6(1)(a). I note Health did not contend the Capital Asset Development Plan itself is a Cabinet submission, but rather that it had informed other submissions made for and considered by Cabinet.
31. In *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate*,<sup>5</sup> the information at issue was an attachment to a Cabinet Submission. In that review, I accepted the information at issue was created for a deliberative purpose of Cabinet. However, the information was a standalone document that summarised the processes and results of consultation activities. I considered that while Cabinet could be informed by the results of the consultation, and may have deliberated on the options available to it, the information itself did not disclose a deliberation or decision of Cabinet.
32. In making my decision, I also considered the reasoning of the Queensland Information Commissioner in *Ryman and Department of Main Roads*,<sup>6</sup> that:

... A document whose creation preceded ‘active discussion and debate’ in Cabinet (even though it was created and submitted to provide information to assist Cabinet debate or indeed to contribute the opinions and recommendations on policy matters of an individual Minister) cannot logically constitute a record of what was actively discussed and debated in Cabinet on the occasion of the document’s consideration by Cabinet. Such material could be incorporated by reference into the active discussion

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<sup>5</sup> *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 6 at [32]-[33].

<sup>6</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].

and debate, for example ‘I agree with the recommendations set out in the Cabinet submission’, but that cannot equate to the material prepared to assist Cabinet deliberation with the Cabinet deliberation itself.’

33. In this review, I accept Cabinet may have considered the information at issue at various times since 2008. However, I am satisfied it does not reveal any specific Cabinet deliberation, as I required in *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate*.<sup>7</sup>

#### *Public interest test*

34. In Health’s initial decision letter to the applicant, it identified two factors favouring disclosure applying to the information at issue, under Schedule 2 of the FOI Act, including Schedule 2, s 2.1(a)(i) and 2.1(a)(iv). As the information at issue in this review was refused due to a Schedule 1 factor, which if shown, is taken to be information that is contrary to the public interest to disclose, I am not required to undertake the balancing test in s 17 of the FOI Act to decide the public interest. For this reason, I did not consider these factors further in this decision.

35. The decision to refuse access to the information at issue in this review was on the basis that it was contrary to the public interest under Schedule 1, s 1.6(d).

36. Having decided that Schedule 1, s 1.6(d) is not applicable to the information at issue, I consider that Health should give access to the whole document.

## **Conclusion**

37. Accordingly, under s 82(2)(c), I **set aside and substitute** the Health’s decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

38. Health should give the applicant access to the information at issue.

**Michael Manthorpe PSM**  
**ACT Ombudsman**  
**12 November 2020**

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<sup>7</sup> *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 6 at [32]-[33].