

Decision and reasons of ACT Ombudsman

Application number:	AFOI-RR/25/80008
Applicant:	Jo Clay MLA
Respondent:	City and Environment Directorate
Respondent reference:	24/134326
Date:	08 August 2025
Decision reference:	[2025] ACTOFOI 10
Catchwords:	Freedom of Information Act 2016 – deciding access – whether information is contrary to the public interest information – information that a Minister proposes to submit to Cabinet for its consideration and that was brought into existence for that purpose – information the disclosure of which would reveal Cabinet deliberations.

Decision

1. The applicant applied for access to feedback from relevant agencies on an application for a direct sale of land at the Hawker Group Centre submitted by Woolworths Group Limited (Woolworths) and any site investigation reports.
2. The applicant sought review of the decision made by the former Environment, Planning and Sustainable Development Directorate (EPSDD), now City and Environment Directorate, to refuse access to agency feedback because the information is Cabinet information.

3. The scope of this review does not include document 1 (email) as the applicant does not contest the decision in relation to this information; or document 30 (site investigation report) which was partially released to the applicant informally.
4. The applicant has also confirmed they are not contesting the decision in relation to the names and contact details of NBN Co, Evoenergy, Icon Water, Jemena Energy or National Capital Authority staff or the mobile numbers of ACT government staff within documents 2-29.
5. For the reasons set out below, I **set aside** EPSDD's decision under s 82(2)(c) of the FOI Act and make a **substitute** decision to give access to the information at issue because I do not consider this information is Cabinet information.

Background to Ombudsman review

6. On 11 December 2024, the applicant applied to EPSDD for access to:

Feedback from relevant entities through the Land Request Advisory Committee to Woolworths or its agents including Canberra Town Planning referred to in a Meeting Minute titled 'Discuss future direct sale application at the Hawker Group Centre' dated 17 November 2023.

Any reports arising from site investigation carried out to determine the suitability of the land for the development proposed by Woolworths – including studies for trees, traffic and parking, heritage, geo-technical conditions, water, sewerage, gas, environmental, ecological and contamination.

7. On 30 January 2025, EPSDD decided to grant partial access to 2 documents and refuse access to 28 documents.
8. On 4 February 2025, the applicant applied for Ombudsman review of EPSDD's decision.
9. On 11 February 2025, the Office of the ACT Ombudsman (the Office) sought information from EPSDD for the purpose of the review.

10. On 25 February 2025, EPSDD provided information to the Office, including a copy of the information at issue. As part of this response, EPSDD stated:

Information provided by Directorate on matters that will need to go before Cabinet for a decision forms part of the Cabinet package. It has not yet been determined what advice (and therefore supporting material) may need to form part of the future Cabinet package, and therefore it is appropriate for the Directorate to refuse the release until this determination has been made.

11. On 4 March 2025, the Office wrote to EPSDD to seek further information about the information at issue noting a decision had not yet been made about what advice may need to be submitted to Cabinet, and to propose potential informal resolution of the review.
12. On 11 March 2025, EPSDD responded to the Office noting the passage of time since the original decision and progress of the direct sale assessment, and confirmed that a full Cabinet submission will be produced where the Land Request Advisory Committee (LRAC) circulation and agency responses will be attached to that submission (being documents 3-29).
13. EPSDD also advised the site investigation report (document 30) could be released to the applicant informally but noted they would consult the third party who prepared the report.
14. On 27 March 2025, the Office wrote to EPSDD to seek further information for the review.
15. On 3 April 2025, EPSDD advised the third party who prepared the report requested that part of document 30 (pages 204-209, being the results of contaminated land searches) not be released because this information was purchased by the consultant (and is usually available for a fee).
16. On 22 May 2025, the Office contacted the applicant to confirm if they were contesting the deletion of third-party personal information on document 1.

17. On 23 May 2025, the applicant agreed to remove document 1 from the scope of this review (where the only deletions were the personal information of Woolworths representatives).
18. On 23 May 2025, the Office wrote to the applicant to confirm if they were contesting the release of part of document 30 (pages 204-209, the contaminated land searches). On the same day, the applicant confirmed they were not contesting the release of this information, noting they could access this information by applying and paying a fee.¹
19. On 17 June 2025, EPSDD provided a copy of document 30 (excluding pages 204-209) to the applicant to resolve part of this review informally.
20. On 1 July 2025, the Administrative Arrangements 2025 (No 1) commenced which abolished EPSDD and established the City and Environment Directorate (CED).²
21. On 23 July 2025, I provided the parties with my draft consideration setting out my preliminary view.
22. On 1 August 2025, CED provided a response to my draft consideration requesting that the personal information of external third parties and the mobile numbers of ACT government employees not be disclosed.
23. On 4 August 2025, our Office wrote to the applicant to confirm if they were seeking the personal information described above. On the same day, the applicant confirmed they were not seeking access to this information if information about where those staff worked was disclosed.
24. On 5 August 2025, CED agreed not to redact company or agency names.

¹ [Access Canberra, Contaminated Sites](#); ACT Government, [Administratively Set Fees and Charges](#), Environment, Planning and Sustainable Development Directorate.

² [Administrative Arrangements 2025 \(No 1\)](#).

Information at issue

25. The information at issue in this Ombudsman review is:

- combined agency comments on the direct sale enquiry provided to Woolworths (document 2), and
- information provided to agencies and their feedback on Woolworths Group Limited's direct sale enquiry (documents 3-29).

26. As noted above in the background the applicant did not contest the release of document 1 (email providing the agency comments to Woolworths), the personal information of third parties within documents 2-29; and partial access was provided to document 30 informally. As a result, this information is not considered within the scope of this review.

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

- the applicant's Ombudsman review application dated 4 February 2025
- the FOI access application dated 11 December 2024
- EPSDD's decision of 30 January 2025, FOI processing file and additional submissions
- CED's response to the draft consideration dated 1 August 2025
- an unredacted copy of documents 2-29
- the FOI Act, particularly ss 16, 35, 43, 45 and Schedule 1
- the Freedom of Information Guidelines (FOI Guidelines) made under s 66 of the FOI Act
- case law including:
 - *Jo Clay MLA and Environment, Planning and Sustainable Development Directorate* [2025] ACTOFOI 6 (20 May 2025).

Relevant law

28. 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.³
29. Section 35(1)(c) of the FOI Act provides 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.
30. 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.
31. Schedule 1 of the FOI Act sets out categories of information which is taken to be contrary to the public interest to disclose.
32. Schedule 1, s 1.6 provides:

Cabinet information

- (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) that is an official record of Cabinet; or
 - (c) that 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).
- (2) Subsection (1) does not apply to purely factual information that—
 - (a) is mentioned in subsection (1) (a); or

³ [Freedom of Information Act 2016 \(ACT\)](#) (FOI Act) s 35(1)(c).

(b) is mentioned in subsection (1) (b) or (c) and is a copy of, or part of, or contains an extract from, a document mentioned in subsection (1) (a);

unless the disclosure of the information would involve the disclosure of a deliberation or decision of Cabinet and the fact of the deliberation or decision has not been officially published.

(3) In this section:

Cabinet includes a Cabinet committee or subcommittee.

33. Section 72 of the FOI Act provides in an Ombudsman review, a person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

The submissions of the parties

34. In the decision notice, EPSDD stated:

Twenty-nine documents were identified to contain information that a Minister proposes to submit to Cabinet for its consideration. The information relates to multiple agencies' input regarding the Woolworths Hawker direct sale proposal and the Hawker Group Centre Stage 1 Site Investigation Report which was brought into existence for the purpose of providing advice to Cabinet. The need to preserve confidentiality of processes leading up to a Cabinet decision is highly important to allow for full and frank discussions between Cabinet members prior to a final decision being made. As such, the release of this information could reasonably be expected to prejudice a deliberative decision-making process of Cabinet in which the Minister proposes to submit.

35. In submissions to the Office dated 3 April 2024 EPSDD noted:

Section 266 of the Planning Act 2023 (the Act) restricts the grant of a lease by direct sale unless a determination on eligibility has been made by the Executive in accordance with the Planning (General) Regulations 2023 (the Regulations), the Minister in accordance with the Regulations or a decision by the Executive in accordance with section 266(2) of the Act.

The Woolworths Direct sale application is one that requires Executive approval under section 266(2). As indicated on page 3 of the Cabinet Book, these decisions are for Cabinet.

EPSDD is gathering information for the express purpose of providing information to Cabinet. The information provided ahead of the formal application was explicitly sought to help inform assessment of the direct sale application. The process of consulting directorates forms part of the process on informing Cabinet. Release of information could reveal advice to Cabinet and foreshadow a decision.

36. In the Ombudsman review application, the applicant stated:

The information which has been provided to Woolworths was provided in response to the application for the direct sale. The application is to be considered by Cabinet and information as to the suitability of the land will probably be provided in Cabinet.

I consider that the information contained in the documents sought will include in the main information that is factual. For example, the advice from the ACT Heritage Council would be to confirm whether the site is on the Heritage Register or had been nominated for inclusion on the Heritage Register and if not to provide information on what action to take in the event that heritage items are found if the site is developed. Such information is normal business for EPSDD and should not be defined as Cabinet in confidence.

It would not have been clear at the time the information was provided what advice will be provided to Government as part of a Cabinet process. The decision to exclude access to all of the document assumes that all of the information it contains will be provided to Cabinet, even information which is in the public domain. This creates the impression that the FOI process is being used to reduce transparency in Government's consideration of the CRC development proposal.

Nor is it clear whether the information contained in the documents has been considered by Cabinet and includes details about actual Cabinet deliberations or a decision and whether the release of the information would reveal that deliberation or decision. I contend that the information is for all intents and purposes in the main factual.

37. These submissions are discussed in more detail below.

Consideration

38. In the original decision, EPSDD decided documents 2-29 were contrary to the public interest information under Schedule 1, s 1.6(1)(a) of the FOI Act.

Information that a Minister proposes to submit to Cabinet for its consideration and that was brought into existence for that purpose—Schedule 1, s 1.6(1)(a)

39. Information is taken to be contrary to the public interest information if it is information that has been submitted to, or that a Minister proposes to submit, to Cabinet for its consideration and that was brought into existence for that purpose.

40. In the original decision, EPSDD considered documents 2-29 were contrary to the public interest information because the information relates to agencies input on Woolworths' direct sale proposal (Vision pack October 2023) and was brought into existence for the purpose of providing advice to Cabinet.
41. In submissions to the Office, EPSDD initially stated a decision had not yet been made regarding what advice (and supporting information) may need to form part of the future Cabinet package and therefore in their view it was appropriate for the Directorate to refuse the release of information until this determination has been made.
42. In further submissions to the Office, EPSDD advised noting the passage of time since the original decision, the progress of the direct sale application and the fact the direct sale application is of the kind that requires Executive approval under the *Planning Act 2023* (ACT) (the Planning Act) EPSDD could now confirm that a full Cabinet submission will be produced for Cabinet to consider the appropriate of the sale in due course.
43. EPSDD noted like other large direct sales of this nature, the Land Requests Advisory Committee circulation and responses will be attached to that submission.
44. I have reviewed an unredacted copy of documents 2-29, which comprise information provided to agencies and their feedback on Woolworths' initial direct sale application. I note this information was summarised and provided to Woolworths via email (document 2).
45. I have not identified any reference in the documents indicating the information was brought into existence for the purpose of being submitted to Cabinet for its consideration. Further, it is inappropriate to refuse access to information on the assumption information may be submitted to Cabinet for its consideration.

46. It is apparent Woolworths' initial proposal was circulated to agencies for their comment, and their comments were sent to Woolworths to assist them to prepare a revised proposal noting the concerns raised by those agencies.

47. In a Ministerial statement to the Legislative Assembly on 4 March 2025, the Minister for Planning provided an update to the Assembly about Woolworths' initial proposal and the feedback provided by agencies stating:⁴

One of the proponent-initiated proposals to be examined at the start of this term has been the Woolworths direct sale application at the Hawker shopping centre...

I wanted to update the Assembly that the government believes that the current proposal is not considered to have met the strategic objectives, policy setting or community benefit that we expect for key mixed-use commercial group centres. It also does not meet the outcomes outlined in my Statement of Planning Priorities, the district strategies and the government's 2024 election commitment related to an additional 30,000 dwellings by 2030, including more shop-top housing as part of centre revitalisation. The proposal is only for a two-storey retail/office development with basement parking and no associated residential development.

Last week, the government advised Woolworths of the above, allowing them an opportunity to consider a revised proposal that more closely aligns with the strategic objectives, policy settings and the community benefit expectations before a formal decision is made on the direct sale. EPSDD wrote to Woolworths to clarify the position and expectations outlined and offered to meet with the proponent in good faith to provide a reasonable opportunity for a revised proposal that more closely aligns with government and community expectations for the site. The directorate has also asked Woolworths to engage meaningfully with the community on any revised proposal.

48. I note an updated master plan has since been published by Woolworths.⁵

⁴ ACT Legislative Assembly, [Debates of the Legislative Assembly for the Australian Capital Territory, Daily Hansard \(4 March 2025\)](#) page 286.

⁵ [Woolworths is proposing to revitalise the Hawker shops.](#)

49. While EPSDD maintained documents 2-29 would likely be attached to a future Cabinet submission, I do not consider the fact that information might be submitted to Cabinet at some point for its consideration is sufficient to conclude the information was created for the dominant purpose of being submitted to Cabinet for its consideration.⁶
50. I note the requirement in the Planning Act that the planning authority must not grant a lease by direct sale unless the grant is in accordance with criteria prescribed by relevant regulation and the Executive approves the grant.⁷ I accept that the revised direct sale application and potentially advice from agencies on a revised proposal may be submitted to Cabinet for its consideration (noting the Minister's statement EPSDD is currently undertaking further assessments which are expected to be completed by 30 June 2025).⁸
51. EPSDD noted information was gathered for the express purpose of providing the information to Cabinet and the information provided ahead of the formal application was explicitly sought to help inform assessment of the direct sale application.
52. However, no additional information has been provided to support the position this information was brought into existence for the purpose of being submitted to Cabinet (e.g. correspondence with Minister, request from Cabinet, direction to create a Cabinet submission including this advice).

⁶ [Freedom of Information \(Volume 4 - Considering the public interest\) Guidelines 2023](#) at 5.9.

⁷ [Planning Act 2023 \(ACT\)](#) s 266.

⁸ ACT Legislative Assembly, [Debates of the Legislative Assembly for the Australian Capital Territory, Daily Hansard \(4 March 2025\)](#) page 287.

53. On the contrary, at the time the information was created and the time the access decision was made it had not been confirmed whether the advice in documents 2-29 would form part of a Cabinet submission.⁹ Particularly, I note the information was collated and provided to Woolworths in response to their initial proposal which the ACT Government has since asked Woolworths to significantly revise.

54. For these reasons, I am not satisfied that the agencies feedback on Woolworths' original proposal was brought into existence for the purpose of being submitted to Cabinet for its consideration.

55. I find documents 2-29 is not Cabinet information under Schedule 1, s 1.6 of the FOI Act.

Conclusion

56. For the reasons set out above in this decision, I set aside the original decision made by EPSDD. I make a substitute decision to give access to documents 2-29.

Iain Anderson

ACT Ombudsman

8 August 2025

⁹ *Jo Clay MLA and Environment, Planning and Sustainable Development Directorate [2025] ACTOFOI 6* (20 May 2025) at [31]-[34].