

Decision and reasons of Senior Assistant Ombudsman

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| Application number: | AFOI-RR/25/80003 |
| Applicant: | 'DU' |
| Respondent: | Chief Minister, Treasury and Economic Development Directorate |
| Respondent reference: | CMTEDDFOI 2024-273 |
| Date: | 24 October 2025 |
| Decision reference: | [2025] ACTOFOI 19 |
| Catchwords: | Freedom of Information Act 2016 – reasonable steps to identify all government information within scope – information not held by respondent. |

Decision

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 a decision by the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) on 10 October 2024 in response to a request for information related to a Sports and Needs Analysis for Woden, and in particular the Phillip Pool and Ice-Skating Centre.
3. For the reasons set out below, my decision is to **vary** the decision made by CMTEDD under s 82(2)(b) of the FOI Act that, in addition to the full release of one document and partial release of 7 documents, no Sports and Recreation Needs Analysis is held.

Background to Ombudsman review

4. Prior to the access application subject of this Ombudsman review, the applicant made several applications for access to information about the Woden Valley District Plans,¹ and changes related to the Phillip Pool and Ice-Skating Centre, including to the Environment, Planning and Sustainable Development Directorate (EPSDD)² on 8 March 2024, and to CMTEDD on 20 May 2024.
5. EPSDD made a decision on 18 April 2024 that no information was held³ and CMTEDD made a decision on 19 June 2024 that no information was held.⁴ These decisions are not the subject of this Ombudsman review but led to the applicant making the access application subject of this Ombudsman review.
6. Following further correspondence with both EPSDD and CMTEDD in response to their FOI access decisions, on 28 August 2024, the applicant contacted CMTEDD to ask about a Sports and Recreation Needs Analysis EPSDD had referred to in correspondence with the applicant.
7. On 28 August 2024, the applicant applied to CMTEDD for:

... all documentation (internal and external) including emails, on the Sports and Needs Analysis for Woden, which cited: [sic] contemporary trends in aquatic facility provision, usage data for local ACT Government pools, locality to other aquatic facilities, access and diversity requirements for sustainable pools (including recreational activities and program capacity) and overall aquatic facility provision in the Territory. Be provided to me which formed the Sports and Needs Analysis for Woden and Aquatics facilities which also relates to the Phillip Pool and Ice Skating centre.

¹ [District Strategies 2023 Volume 2 – District Strategies – Woden](#).

² On 1 July 2025, the [Administrative Arrangements 2025 \(No 1\)](#) commenced which abolished EPSDD and established the City and Environment Directorate (CED).

³ [EPSDD 24/024403](#).

⁴ [CMTEDDFOI 2024-176](#).

8. On 10 October 2024, CMTEDD identified 8 documents within the scope of the application and decided to grant full access to one document and partial access to 7 documents.⁵
9. The documents are email chains dated between 18 October and 24 October 2022 and refer to amendments to the Territory Plan to change the pool size requirements for an aquatic facility in Phillip. The documents do not include a Sports and Recreation Needs Analysis.
10. On 29 November 2024, the applicant applied for Ombudsman review of CMTEDD's decision. Due to an internal administrative oversight, the application was not correctly identified as an application for Ombudsman review until 22 January 2025.
11. On 22 January 2025, the delegate granted the applicant additional time to apply for Ombudsman review, under s 74(1)(b) of the FOI Act.
12. On 23 January 2025, the Office of the ACT Ombudsman (the Office) sought information from CMTEDD for the purpose of the review, including evidence of searches conducted by CMTEDD to identify relevant information.
13. On 11 February 2025, CMTEDD provided information relevant to the review to the Office.
14. On 30 September 2025, I provided my preliminary view to the parties in a draft consideration.
15. On the same day, the applicant provided their response to the draft consideration, including additional submissions.

⁵ [CMTEDDFOI 2024-273](#).

16. On 9 October 2025, CMTEDD confirmed they had no further submissions to make but noted the feedback to be more specific when stating that CMTEDD does not hold a particular document.

Delay

17. I acknowledge that this matter has been subject to delays during the Ombudsman review process.
18. I note the objects of the FOI Act include facilitating and promoting, prompt disclosure of government information, and I acknowledge that the delays are in contrast to the objects of the FOI Act.

Scope of Ombudsman review

19. In the application for review, the applicant questioned the absence of a Sports and Recreation Needs Analysis.
20. The applicant has not sought review of the decision by CMTEDD to give partial access to information.
21. The key issue to be decided in this Ombudsman review is whether CMTEDD has taken all reasonable steps to identify all government information within the scope of the access application, as it required to do so under s 34 of the FOI Act.
22. In making my decision, I have had regard to:
- the applicant's Ombudsman review application dated 29 November 2024 and response to the draft consideration dated 30 September 2025
 - the FOI access application dated 28 August 2024
 - CMTEDD's decision of 10 October 2024
 - CMTEDD's FOI processing file including records of searches

- an unredacted copy of the information identified within the scope of the access application
- the FOI Act, particularly ss 7, 34, 35 and 82
- the [Freedom of Information Guidelines](#) (FOI Guidelines) made under s 66 of the FOI Act, and
- relevant case law, including *AF and Community Services Directorate [2018] ACTOFOI 11*.

Relevant law

23. 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.⁶
24. Section 34(1) of the FOI Act provides that an agency or Minister deciding an access application must take reasonable steps to identify all government information within the scope of the application.
25. Section 35(1)(b) of the FOI Act provides that an access application may be decided by the respondent deciding that the information is not held by the respondent.
26. Section 35(2) of the FOI Act provides that an access application can be decided in more than 1 way.
27. Section 82(4) of the FOI Act provides that the Ombudsman may exercise any function given under the FOI Act to the agency or Minister for making the decision.

The submissions of the parties

28. In the decision notice, CMTEDD said:

⁶ Section 35(1)(c) of the [Freedom of Information Act 2016 \(ACT\)](#).

Searches of CMTEDD records have identified eight documents within the scope of your request.

29. In the Ombudsman review application, the applicant said:

To me all I was provided with were a document with emails between EPSDD and ACT Sports and Recreation from October 2022.

No Sports and Recreation needs analysis/report. No other documentation/reports that determined the change to the pool size or in recognition to changes to indoor pool community preferences.

30. In response to my draft consideration, the applicant submitted:

On the 25th of August 2025 the Minister for Sport and recreation Yvette Berry finally acknowledged that there was no 'Sports and recreation needs analysis' that determined, that a 25m indoor pool and associated pools would meet the needs of the Woden community. That is despite the Deputy director general Kareena Arthy stating that they had provided the information several times before. That is despite Executive branch manager of ACT Sports and recreation Rebecca Kelley stating, *"The analysis referred to was undertaken internally by Sport and Recreation and was then approved by EPSDD to be included in the Woden District Policy when the interim Territory Plan took effect as a reason to change the Phillip Pool site lease conditions in the new draft territory plan"*.

It should also be noted that there were no 'changes to indoor swimming pool community preferences' or contemporary trends in aquatic facility provision in any referenced documents that determined that a 25m indoor pool and associated pools would meet the needs of the Woden community.

The recommendation made on the Phillip site which was incorporated into the new territory, was predicated on false information which ultimately determined the private sale of the facility to a high rise housing developer. The decision was used by the developer to progress a development application which is now under consideration by EPSSD.

31. The applicant also included a response to a question taken on notice by Yvette Berry MLA during question time on 2 September 2025. In the response dated 26 September 2025, Ms Berry wrote:

The term "sport and recreation needs analysis" appeared in the 2023 consultation report to describe advice provided by Sport and Recreation. The advice was not the result of a formal assessment, but reflected the best available information at the time, drawing on sector knowledge and preliminary research about contemporary trends in aquatic facility provision, usage data for local ACT

Government pools, locality to other aquatic facilities, access and diversity requirements for sustainable pools (including recreational activities and program capability).

32. I have considered these submissions below.

Consideration

Preliminary issue - did the Sports and Recreation Needs Analysis exist?

33. A Sports and Recreation Needs Analysis evaluates community needs to determine the facilities, programs or services required to be provided.

34. The applicant had been advised by the ACT Government that a Sports and Recreation Needs Analysis had been undertaken by CMTEDD and approved by EPSDD before determining that a 25m pool and associated aquatic facilities would support the Woden community.

35. The applicant made several access applications to CMTEDD and EPSDD, seeking access to the Sports and Recreation Needs Analysis, as noted above at paragraph [4].

36. On 6 August 2025, during an inquiry into Appropriation Bill 2025–2026 and Appropriation (Office of the Legislative Assembly) Bill 2025–26 by the Select Committee on Estimates 2025–2026, Fiona Carrick MLA asked the Minister for Sport and Recreation, Yvette Berry MLA:⁷

Where is the Sports and Recreation Needs Analysis that determined that only a 25-metre pool and associated smaller pools would meet the need for the Woden, Weston Creek, Inner South catchment?

37. Ms Berry took the question on notice, and on 19 August 2025, provided the following answer:

The information is included in the CMTEDD Disclosure Log 2024 – Reference No. CMTEDDFOI 2024-273 ([2024-273.pdf](#)).

⁷ [Estimates QTON 276 ANSWER - CMTEDD ED - Sport and Recreation - Decision on 25 metre pool - CARRICK.](#)

38. Following a request for more information from the Chair of the Select Committee, Ed Cocks MLA, Ms Berry wrote to Mr Cocks and advised:⁸

Your letter seeks advice to the following questions.

1. Does a specific Sports and Recreation Needs Analysis document for the proposed 25m pool in Woden exist; or
2. Does the needs assessment referred to in the hearing consist solely of advice to EPSDD contained in emails or other communications discussing the appropriate pool size for Woden?

The answer to the questions is as follows:

1. No - background information is available here - [2024-273.pdf](#).
2. Yes.

39. I am satisfied that the Sports and Recreation Needs Analysis did not exist.

Identifying information within the scope of the application

40. The FOI Act requires that an agency or Minister must take 'reasonable steps' to identify all the government information within the scope of the access application.⁹

41. In *AF and Community Services Directorate*¹⁰ the Senior Assistant Ombudsman observed:

The FOI Act is silent on what constitutes 'reasonable steps'. The meaning of 'reasonable', in the context of searches for documents sought under FOI legislation, has been construed as not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as judged to be appropriate or suitable to the circumstances or purpose.¹¹

⁸ [Submission-013-Ms-Yvette-Berry-MLA.pdf](#).

⁹ Section 34(1) of the [FOI Act](#).

¹⁰ [\[2018\] ACTOFOI 11](#).

¹¹ *Ibid*, citing *Re Cristovao and Secretary, Department of Social Security* (1998) 53 ALD 138 and *De Tarle and Australian Securities and Investments Commission (Freedom of Information)* [2015] AATA 770.

42. What amounts to reasonable steps may vary in different circumstances. It would, however, include a search of electronic records and a manual search of physical records, where applicable.¹²
43. I have reviewed the evidence of searches provided by CMTEDD. Noting the evidence of searches by CMTEDD and the confirmation from Ms Berry that the Sports and Recreation Needs Analysis did not exist, I am satisfied CMTEDD took reasonable steps to identify all government information within the scope of the access application, as it is required to do so under s 34(1) of the FOI Act.
44. However, I am not satisfied that CMTEDD clearly articulated, in its decision notice, what information was not held.
45. In my view, I consider CMTEDD should have identified that it did not hold the Sports and Recreation Needs Analysis and consequently should have decided this part of the access application under s 35(1)(b) of the FOI Act.
46. The applicant identified the Sports and Recreation Needs Analysis in their access application and CMTEDD did not address this document in their decision notice. I am of the view that CMTEDD should have included in its decision notice that the document sought is not held by CMTEDD as the document does not exist.

Conclusion

47. I am of the view that CMTEDD took reasonable steps to identify all government information but did not adequately articulate that it did not hold the Sports and Recreation Needs Analysis.

¹² Clause 23 of the [Explanatory Statement](#) to the Freedom of Information Bill 2016 (ACT).

Decision

48. For the reasons set out above in this decision, I **vary** the respondent's decision under s 82(2)(b) of the FOI Act.

49. The effect of my decision will be that the access application will be decided in more than one way. In addition to the original decision by CMTEDD to give full access to one document and partial access to 7 documents, I have decided that the information sought is not held by CMTEDD by virtue of the Sports and Recreation Needs Analysis not existing.

Katrina Dwyer

Senior Assistant Ombudsman

24 October 2025