

## **Elizabeth Lee MLA and Transport Canberra and City Services [2023] ACTOFOI 3 (16 January 2023)**

### **Decision and reasons for decision of ACT Ombudsman, Iain Anderson**

<b>Application number:</b>	AFOI-RR/22/10014
<b>Decision reference:</b>	[2023] ACTOFOI 3
<b>Applicant:</b>	Elizabeth Lee MLA
<b>Respondent:</b>	Transport Canberra and City Services
<b>Date:</b>	16 January 2023
<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. For the reasons set out below, I vary the decision of Transport Canberra and City Services (TCCS) dated 19 July 2022 under s 82(2)(b) of the *Freedom of Information Act 2016* (the FOI Act).

### **Background of Ombudsman review**

2. On 4 May 2022, the applicant applied to the respondent for access to:  
  
A copy of the Strategic Blueprint in connection with the ACTION Bus Network and integration of bus and light rail operation supplied to the Territory in 2016-17.
3. On 19 July 2022, TCCS advised the applicant it had identified one document as falling within the scope of the access application and decided to refuse access to this document in its entirety on the ground that the document is Cabinet information for the purpose of Schedule 1, s 1.6 of the FOI Act.

4. On 25 July 2022, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
5. On 21 December 2022, I provided my preliminary views to the parties in a draft consideration.
6. On 22 December 2022, TCCS indicated it accepted my draft consideration and had no further submissions to provide.
7. On 23 December 2022, the applicant indicated they accepted my draft consideration and had no further submissions to provide.

### **Information at issue**

8. The information at issue in this Ombudsman review is a document titled "ACT Buses Strategic Blueprint", which was attached to a Cabinet submission.
9. The 2 issues to be decided in this Ombudsman review are:
  - whether the ACT Buses Strategic Blueprint is Cabinet information within the meaning of Schedule 1, s 1.6(1) of the FOI Act, and therefore "contrary to the public interest information" as defined in s 16 of the FOI Act – in which case, subject to the second issue below, access may be refused under s 35(1)(c), and
  - if the answer to the first question is yes, whether the ACT Buses Strategic Blueprint contains any "purely factual information" within the meaning of Schedule 1, s 1.6(2) of the FOI Act – in which case Schedule 1, s 1.6(1)(a) does not apply, and the "purely factual information" may be released notwithstanding s 35(1)(c).
10. In making my decision, I have had regard to:
  - the applicant's access application and review application
  - the respondent's decision
  - the FOI Act, in particular Schedule 1, s 1.6
  - an unedited copy of the information at issue
  - relevant case law, including:
    - *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 6
    - *Jon Stanhope and ACT Health Directorate* [2020] ACTOFOI 22, and
    - *Parnell & Dreyfus and Attorney General's Department* [2014] AICmr 71.

## Relevant law

11. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.<sup>1</sup> This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.<sup>2</sup>
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 public interest test in s 17 sets out the process for balancing public interest factors favouring disclosure and nondisclosure respectively. This balancing test must be used to determine whether nondisclosure would be contrary to the public interest.
14. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information sought because the information sought is “contrary to the public interest information”.
15. Section 50 of the FOI Act applies if 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” is deleted.
16. Schedule 1 of the FOI Act sets out categories of information taken to be “contrary to the public interest information” for the purposes of the definition in s 16, and s 1.6 of Schedule 1 deals specifically with the category of Cabinet information.
17. Schedule 1, s 1.6 provides:

### **1.6 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).

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

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

- (2) Subsection (1) does not apply to purely factual information that—
- (a) is mentioned in subsection (1) (a); or
  - (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.

## The contentions of the parties

18. In its decision notice, the respondent said:

In reviewing the report, I consider that it includes information which is contrary to the public interest under Schedule 1, Section 1.6 of the Act.

The information includes deliberations and decisions of Cabinet and documents that have been prepared for consideration of Cabinet. As some of this information is not publicly known, release of this information would therefore impact the deliberative functions of Cabinet.

In reviewing these documents, I note the requirements of schedule 1 section 1.6(2) of the Act which states that the exemption for Cabinet Information does not apply to 'purely factual information' 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.

The term 'purely factual material' does not extend to factual material that is an integral part of the deliberative content and purpose of a document or is embedded in or intertwined with the deliberative content in such a manner that it is impractical to separate it from the other content.

I am satisfied that disclosure of such information contained in this document would be contrary to public interest pursuant to schedule 1 Section 1.6 of the Act.

19. In the application for Ombudsman review, the applicant said:

The request was refused, citing the Freedom of Information Act 2016 Schedule 1, 1.6 Cabinet information. However, under section 1.6 in the Act it states "(2) Subsection (1) does not apply to purely factual information".

The decision itself contains a quote identifying the document as purely factual.

## Considerations

20. I have considered an unedited copy of the information at issue together with the information provided by both parties.

*Is the ACT Buses Strategic Blueprint Cabinet information for the purpose of Schedule 1, s 1.6(1) of the FOI Act?*

21. The ACT Buses Strategic Blueprint is a document that had been prepared by Ernst & Young for TCCS under a contract to “provide strategic advisory services in connection with the ACTION bus network and integration of bus and light rail operations”.<sup>3</sup>
22. TCCS’ decision letter does not state which specific part of Schedule 1, s1.6(1) it is relying upon to classify the document as Cabinet information, with the decision-making reference to ss 1.6(1)(a) and 1.6(1)(d) of the FOI Act.
23. Having reviewed the information at issue, I find only Schedule 1, s 1.6(1)(a) can be relied upon to categorise this document as Cabinet information. Given that the onus of establishing that information is contrary to the public interest information lies with the party seeking to prevent disclosure under s 72 of the FOI Act, it is important that decision letters provide sufficiently clear and specific reasons why information is being withheld.
24. As the information at issue has been submitted to Cabinet for its consideration, the key question is whether it was brought into existence for the purpose of being considered by Cabinet.
25. I observed the presence of ‘Sensitive: Cabinet’ DLM markers on the document. While the presence of Sensitive Cabinet or Cabinet in Confidence DLM markers is itself not indicative of whether a document is a Cabinet document, it does speak to the intention at the time the information was created.<sup>4</sup>
26. In reviewing the contents of the information at issue, I found evidence of a clear intention that the document would be considered by Cabinet. The document itself notes, under the heading “Purpose of this document”, that: “This document sets a course of strategic actions for consideration by Cabinet”.
27. Given Cabinet consideration does not need to be the only purpose for creating the information, I am satisfied that this combination of factors is sufficient to categorise the information at issue as Cabinet information under Schedule 1, s 1.6(1)(a).<sup>5</sup>

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<sup>3</sup> [Contract - 2016.27950.210.](#)

<sup>4</sup> [4. Ombudsman Guidelines - Considering the public interest | ACT Ombudsman.](#)

<sup>5</sup> [4. Ombudsman Guidelines - Considering the public interest | ACT Ombudsman.](#)

*Does the ACT Buses Strategic Blueprint contain any “purely factual information” within the meaning of Schedule 1, s 1.6(2) of the FOI Act?*

28. Having found that the information at issue is Cabinet information, it is necessary for me to consider if it contains any purely factual information.
29. For the purposes of s 1.6(2) of the FOI Act, purely factual information is limited to basic factual information as opposed to advice or projections about future events.
30. The concept of purely factual information has been clearly laid out in the context of freedom of information – for example, in *Parnell & Dreyfus and Attorney General’s Department* [2014] ALCmr 71, which states:

The term ‘purely factual material’ (to which this exemption does not apply: s 47C(2)(a)) does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.
31. I have reviewed the contents of the information at issue, and I consider there is some information within the document that is purely factual in character and is not an integral part of the deliberative content of the document.
32. Section 50 of the FOI Act provides that a copy of a record should be provided to the applicant if it is practicable to give access with contrary to the public interest information removed. In this instance I have prepared a copy of the information at issue containing only the purely factual information which I find is suitable for release.

## **Conclusion**

33. For these reasons, my decision is to vary TCCS’ decision under **s 82(2)(b)** of the FOI Act, with the result that purely factual information may be released to the applicant.

**Iain Anderson**

**ACT Ombudsman**

**16 January 2023**