

Decision and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/24/10014
Applicant:	'DI'
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Respondent reference:	CMTEDDFOI-2024-076
Date:	27 November 2024
Decision reference:	[2024] ACTOFOI 19 (27 November 2024)
Catchwords:	<i>Freedom of Information Act 2016</i> – cabinet information – purely factual information

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. For the reasons set out below, the decision of Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) dated 18 April 2024 is **confirmed** under s 82(2)(a) of the FOI Act.

Background of Ombudsman review

3. On 3 March 2024, the applicant applied to CMTEDD for access to:

... all documents related to the decision made by the ACT Government to introduce the Ride-Share (Uber and other operators) system in the Territory. The documents requested might include Government meetings briefs and recommendations, Government decisions, consultations with individual transport stakeholders and transport industry members, transport industry expertise and other related and important papers.

4. On 18 April 2024, CMTEDD identified 3 documents within the scope of the request and refused access to all 3 documents.
5. On 2 May 2024, the applicant applied for Ombudsman review under s 73 of the FOI Act.
6. On 23 August 2024, following informal resolution conducted under s 80A of the FOI Act, information identified as “purely factual information” was released to the applicant with the agreement of CMTEDD.
7. On 4 October, the acting Senior Assistant Ombudsman provided the parties with their preliminary view set out in a draft consideration. The draft consideration included all matters that the Acting Senior Assistant Ombudsman relied on in forming their view and both parties were given an opportunity to provide a response.
8. On 11 October 2024, CMTEDD accepted the draft consideration.
9. The applicant did not provide a response to the draft consideration.

Information at issue

10. The information at issue in this review is 3 documents totalling 436 pages relating to the decision made by the ACT Government to introduce the Ride-Share (Uber and other operations) system in the ACT. It does not include the “purely factual information” released to the applicant following informal resolution.
11. The 3 documents are from Cabinet file 15/459/CAB: the Cabinet decision, final submission, and draft of the submission.
12. The questions to be answered in this Ombudsman review are:
 - Whether the information at issue is Cabinet information for the purpose of Schedule 1, s 1.6(1) of the FOI Act, and therefore “contrary to the public interest information”, as defined in s 16(1)(a) of the FOI Act?

- If the answer to the first question is yes, whether the information at issue is “purely factual information”, within the meaning of Schedule 1, s 1.6(2) of the FOI Act?
13. If the information at issue is Cabinet information, access may be refused under s 35(1)(c). However, if the information is Cabinet information but also “purely factual information” then that information may be released notwithstanding s 35(1)(c).
14. In making my decision, I have had regard to:
- the applicant’s access application and review application
 - the respondent’s decision
 - the ACT FOI guidelines, a notifiable instrument under s 66 of the FOI Act
 - 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*](#)
 - [*Elizabeth Lee MLA and Chief Minister, Treasury and Economic Development Directorate \[2022\] ACTOFOI 6*](#)
 - [*Stanway and Queensland Police Service \[2017\] QICmr 22*](#)
 - [*Parnell & Dreyfus and Attorney-General’s Department \[2014\] AICmr 71.*](#)

Relevant law

15. Section 7 of 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.¹
16. Contrary to the public interest information is defined in s 16(1) of the FOI Act as:
 - (1) For this Act, information is **contrary to the public interest information** if—
 - (a) it is taken to be contrary to the public interest to disclose under schedule 1; or
 - (b) disclosing the information would, on balance, be contrary to the public interest under the test set out in section 17.
17. 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(1)(a), and schedule 1, s 1.6 deals specifically with the category of Cabinet information.
18. Schedule 1, s 1.6 provides:
 - (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
 - (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);

¹ Section 35(1)(c) of the [FOI Act](#).

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

19. In its decision notice, CMTEDD said:

All the identified documents are entirely composed of, or contain, information that is considered to be contrary to the public interest under schedule 1 of the Act.

1.6 Cabinet information

Information 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 and information the disclosure of which would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision).

The purpose of this exemption is to maintain the confidentiality of the Cabinet process and to uphold the principle of collective ministerial responsibility. The documents that you have requested fall within section 1.6 of the Act as they contain information which has been commissioned by the Cabinet to guide it in its decision making and to assist it in its deliberations. They are therefore exempt from release under the Act.

20. In their application for Ombudsman review, the applicant said they seek review of the decision made by CMTEDD on 18 April 2024 to refuse access to the information they had requested in their application dated 4 March 2024. The applicant advised the decision was wrong because they do not believe the information sought is contrary to the public interest under Schedule 1, s 1.6 of the FOI Act.

Consideration

Cabinet information (Schedule 1, s 1.6(1))

21. I have considered whether each of the 3 documents is taken to be contrary to the public interest information to disclose under Schedule 1, s 1.6 of the FOI Act. In doing so I have considered an unredacted copy of the information at issue, together with information provided by both parties.

Document 1: "Cabinet file 15/459/CAB Decision

22. I consider the Cabinet decision document to be Cabinet information under Schedule 1, s 1.6(1). The document clearly details recommended reforms, information considered by Cabinet, and the decision agreed to by Cabinet as part of the implementation of Ride-Share in the ACT.

23. While the presence of Sensitive Cabinet or Cabinet in Confidence dissemination limiting markers (**DLMs**) of itself is not determinative of whether a document is a Cabinet document, it does speak to the intention at the time the information was created.² I observed the presence of "Cabinet Decision: Do Not Copy" and "Cabinet in Confidence" DLMs on the document. In addition, the document was stored in a file marked "Cabinet in Confidence" with the additional annotation that:

This file contains CABINET PAPERS and is to be securely handled and stored in accordance with the Cabinet Handbook. Cabinet papers must only be circulated to officials with a genuine need to know their content.

24. These markings provide a clear intent the document is an official record of Cabinet within the meaning of Schedule 1, s 1.6(1)(b) of the FOI Act.

² [Considering the public interest test | OAIC](#)

Document 2: "Cabinet file 15/459/CAB Decision – Final submission

25. I consider this document to be Cabinet information for the purpose of Schedule 1, s 1.6(1)(a).
26. I identified the DLMs "for Cabinet", and "Cabinet submission" and the document was stored in the same file as Document 1. This denotes the intention of the document that it is to be considered by Cabinet. This intention is reinforced within the document under the heading "purpose".
27. One of the attachments to the submission is a report prepared by the Centre for International Economics (**CIE**) for CMTEDD and marked with "commercial in confidence" throughout its content.
28. As the information 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.
29. Under its Executive Summary headline, the document notes "the CIE has developed an ACT On-Demand Transport Model to allow for the evaluation of alternative possible policy scenarios for on-demand transport in the ACT."
30. In reviewing the contents of the information, I found indicators of a clear intent that the document would be considered by Cabinet. 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).

31. I am satisfied that the Cabinet submission is a document brought into existence for the purpose of Cabinet consideration as per Schedule 1, s 1.6(1)(a) of the FOI Act. I have reached this finding having considered the content of the material, the presence of "Cabinet" DLMs on the document, CMTEDD's submissions and the express references in the document to the submission being intended for submission to Cabinet.³

Document 3: "Cabinet file 15/459/CAB Decision – Draft document"

32. This document is an exposure draft circulated within the Cabinet Liaison Network prior to settling the final Cabinet submission. The draft submission itself is a duplicate of the final submission, with the addition of tracked formatting and grammar changes.
33. Information within the document otherwise remains the same as that discussed in paragraphs [22] – [28] and therefore, I consider that Schedule 1, s 1.6(1)(a) applies.
34. Document 3 also includes emailed responses from directorates in response to the circulation of the draft submission. It is clear that this communication is in response to the consultation on the submission and is to assist with the preparation of the submission for Cabinet and I consider that Schedule 1, s 1.6(1)(a) applies.

³ The decision in [Stanway and Queensland Police Service \[2017\] QICmr 22](#) noted that an agency process for preparing information for a Minister to submit for Cabinet consideration will be sufficient to determine the documents have been brought into existence for the purpose of Cabinet consideration.

Purely factual information (Schedule 1, s 1.6(2))

35. Having decided that all information contained within the documents is taken to be contrary to the public interest to disclose under Schedule 1, s 1.6 of the FOI Act, I have considered whether the information includes any “purely factual information” within the meaning of Schedule 1, s 1.6(2) of the FOI Act.
36. 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.
37. I have not identified any additional purely factual information within the documents.

Conclusion

38. For these reasons, my decision is to **confirm** the decision under s 82(2)(a) of the FOI Act.

David Fintan
Senior Assistant Ombudsman
27 November 2024