

***Alistair Coe and Chief Minister, Treasury and Economic  
Development Directorate [2019] ACTOFOI 6 (26 February 2019)***

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

Application Number:	AFOI-RR/18/30009
Decision Reference:	[2019] ACTOFOI 6
Applicant:	Mr Alistair Coe MLA
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Decision Date:	26 February 2019
Catchwords:	<i>Freedom of Information Act 2016 (ACT) – deciding access – whether disclosure of information is contrary to the public interest – cabinet information – purely factual information.</i>

**Decision**

1. Under s 82(1)(c) of the ACT *Freedom of Information Act 2016* (FOI Act), I set aside the decision of Chief Minister, Treasury and Economic Development Directorate (CMTEDD) of 12 September 2018, with respect to the information sought in this review, a document relating to the Canberra Technology Park. I substitute my decision that the information sought is not contrary to the public interest information.
2. CMTEDD must now give the applicant access to an unedited copy of the information sought.

## Scope and background of Ombudsman review

3. On 15 August 2018, Mr Alistair Coe MLA (the applicant) applied to CMTEDD for access to all surveys and polls commissioned by the ACT Government since 1 January 2017.
4. On 12 September 2018, CMTEDD advised the applicant that it had identified eight documents falling within the scope of the access application. CMTEDD decided to give the applicant access to six documents in full, one document in part and refused access to the remaining document.
5. On 14 September 2018, the applicant applied for Ombudsman review of CMTEDD's decision to refuse access to one document, relating to the Canberra Technology Park,<sup>1</sup> insofar as it relates to, or contains, purely factual information such as datasets and survey questions.
6. In making its decision, CMTEDD relied on the information sought being Cabinet information that is taken to be contrary to the public interest to disclose under Schedule 1, s 1.6 of the FOI Act.
7. On 18 October 2018, CMTEDD submitted to this Ombudsman review that disclosure of the information sought would also be contrary to the public interest as disclosure would prejudice:
  - deliberative processes of government (Schedule 2, s 2.2(xvi)), and
  - the economy of the Territory (Schedule 2, s 2.2(viii)).
8. We provided CMTEDD with preliminary views about its decision in a draft consideration dated 13 December 2018. In response, CMTEDD maintained that the information sought is Cabinet information that is contrary to the public interest to disclose under Schedule 1, s 1.6. CMTEDD submitted that the information sought was brought into existence for Cabinet and forms part of the deliberative process of Cabinet.
9. Accordingly, the issue to be decided in this Ombudsman review is whether giving the applicant access to the information sought would be contrary to the public interest.
10. In making my decision, I have had regard to:
  - the applicant's application for Ombudsman review
  - CMTEDD's decision

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<sup>1</sup> Identified by CMTEDD as document number 8 on its Freedom of Information Request Schedule. CMTEDD has refused access to this document in full.

- the FOI Act, in particular ss 7, 16, 17, 35, 72, Schedule 1 and Schedule 2
- relevant case law,
- an unedited copy of the information sought, and
- the submissions of the parties.

## Relevant law

11. 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.
12. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information because it is contrary to the public interest information.
13. Contrary to the public interest information is defined in s 16 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. Information that is taken to be contrary to the public interest to disclose under Schedule 1 includes 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) 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);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.<sup>2</sup>

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<sup>2</sup> Schedule 1, s 1.6.

15. The public interest test set out in s 17 involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
16. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

## The contentions of the parties

17. CMTEDD found that the information sought is contrary to the public interest information under Schedule 1, s 1.6 because:
  - it contains information prepared and brought into existence for consideration by Cabinet
  - any purely factual information contained in the document forms an integral part of deliberative content, and
  - any analysis and views in the document would be robbed of their essential meaning without incorporation of this information.
18. In submissions to this Ombudsman review, CMTEDD contends that the information sought is also contrary to the public interest to disclose as disclosure would prejudice:
  - a deliberative process of government (Schedule 2, s 2.2(xvi)), and
  - the economy of the Territory (Schedule 2, s 2.2(viii)).
19. In support of its submissions, CMTEDD contends the information sought relates to the future use of ACT Government land and buildings, and disclosure could impact that process.
20. CMTEDD further contends that the ACT Government has selectively released some information related to the Canberra Technology Park already, thereby balancing disclosure with the need to maintain confidentiality during ongoing government deliberations.
21. The applicant submits that the information sought is purely factual in nature and any survey results, datasets or opinions gathered through public consultation is not binding on Government and would not disclose the deliberations of Cabinet.

22. Further, the applicant contends that even though the information sought has been considered by Cabinet, survey results can be read in isolation without disclosing the deliberations of Cabinet and without robbing the information of its essential meaning.

## Considerations

23. I have examined an unedited copy of the information sought. It comprises a summary of the community consultation process undertaken for the future use of the Canberra Technology Park site, including the consultation activities and feedback gathered.

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

24. For the information sought to be taken to be contrary to the public interest to disclose under Schedule 1, s 1.6, as CMTEDD has found, disclosure of the information sought must be Cabinet information.
25. Under Schedule 1, s 1.6(1), Cabinet information is 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).
26. However Schedule 1, s 1.6(2) contains a relevant exception, in that purely factual information is not contrary to the public interest to disclose where it is mentioned in:
- information that has been submitted, or that a Minister proposes to submit to Cabinet, and that was brought into existence for that purpose,<sup>3</sup> and
  - where disclosure would not disclose a deliberation or decision of Cabinet and the fact of the deliberation or decision has not been officially published.<sup>4</sup>

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<sup>3</sup> Schedule 1, s 1.6(2)(a).

<sup>4</sup> Schedule 1, s 1.6(2).

27. CMTEDD contends that the information sought is Cabinet information on all of the grounds in Schedule 1, s 1.6(1) because, in essence, it was brought into existence for consideration by Cabinet, and disclosure would reveal an integral part of the deliberative content of Cabinet.
28. It is not in dispute that the information sought was prepared and brought into existence for consideration by Cabinet, making it Cabinet information for the purpose of Schedule 1, s 1.6(1)(a). It is not necessary therefore to consider whether Schedule 1, s 1.6(1)(b) and (c) apply.
29. It is also not in dispute that the information sought is purely factual information. In its response to the draft consideration, CMTEDD accepts that the information sought is purely factual information, however, it contends that disclosure would reveal an integral part of the deliberative content of Cabinet.
30. Therefore, the issue to resolve is whether disclosing the information sought would disclose a deliberation or decision of Cabinet, so as to amount to Cabinet information under Schedule 1, s 1.6(1)(d), and so that the purely factual information exception to s 1.6(1)(a) does not apply.
31. The information sought is an attachment to a Cabinet Submission which has been provided to our Office for this review. Although not within the scope of the access application or this review, it is apparent, and not disputed, that the Cabinet Submission was created for a deliberative purpose.
32. The information sought is a standalone document that summarises the processes and results of consultation activities. I accept that Cabinet would be informed by the results of the consultation, and that Cabinet may then deliberate on the options available to it. However, I consider that there is nothing in the information sought, or in CMTEDD's submissions that indicate that its disclosure would disclose a deliberation or decision of Cabinet.
33. Further, I am satisfied that the information sought, if disclosed, would not reveal in substance more information than is already publicly available. CMTEDD acknowledges the consultation on the future use of the site, and has published a 'What We Heard' report, available from the YourSay website.<sup>5</sup>

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<sup>5</sup> <[https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/9115/3794/3399/What\\_We\\_Heard\\_Report\\_-\\_Canberra\\_Technology\\_Park\\_002.pdf](https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.act-yoursay.files/9115/3794/3399/What_We_Heard_Report_-_Canberra_Technology_Park_002.pdf)>, accessed 5 December 2018.

34. For these reasons, I consider that disclosure of the information sought would not disclose a deliberation or decision of Cabinet, any more than has already been disclosed by CMTEDD in its reasons for its decision, and that the purely factual information exception in Schedule 1, s 1.6(2) applies. Therefore the information sought is not Cabinet information as defined by Schedule 1, s 1.6(1).

*Public interest test*

35. I will now apply the public interest test to consider the additional public interest factors raised by CMTEDD during the course of this Ombudsman review.

36. To determine whether information is, on balance, contrary to the public interest to disclose, s 17(1) of the FOI Act prescribes the following five steps:

- (a) identify any factor favouring disclosure that applies in relation to the information (a *relevant factor favouring disclosure*), including any factor mentioned in schedule 2, section 2.1;
- (b) identify any factor favouring nondisclosure that applies in relation to the information (a *relevant factor favouring nondisclosure*), including any factor mentioned in schedule 2, section 2.2;
- (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
- (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;
- (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.

37. In addition, the irrelevant factors listed in s 17(2) must not be taken into account when applying the public interest test.

*Irrelevant factors*

38. I have noted the irrelevant factors listed in s 17(2) and am satisfied that I have not considered any irrelevant factors in this case. I have specifically turned my mind to two factors that might appear to apply:

- that access to the information could result in a person misinterpreting or misunderstanding the information (s 17(2)(b)), and
- that access could inhibit frankness in the provision of advice from the public service (s 17(2)(e)).

39. I have not had regard to these factors in making my decision.

*Factors favouring disclosure*

40. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. Of the factors favouring disclosure listed in Schedule 2, s 2.1, I consider that disclosure could reasonably be expected to:

- promote open discussion of public affairs and enhance government accountability,<sup>6</sup> and
- contribute to positive and informed debate on important issues or matters of public interest.<sup>7</sup>

41. In relation to both factors, I consider that disclosing the contents of the information sought would contribute to open discussion and informed debate. There is a public interest in the results of the community consultation on the future use of the Canberra Technology Park site. This includes survey results and views expressed in submissions and other consultation activities.

42. In addition to the factors referred to above, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of a representative democracy.<sup>8</sup> This concept is promoted through the objects of the FOI Act.<sup>9</sup>

43. I am satisfied that these are relevant considerations favouring disclosure in this case, and in the interests of enhancing transparency and accountability, I afford them significant weight.

*Factors favouring nondisclosure*

44. As discussed above,<sup>10</sup> CMTEDD submits that there are two factors favouring nondisclosure in this case, that disclosure could reasonably be expected to prejudice:

- a deliberative process of government,<sup>11</sup> and

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<sup>6</sup> Schedule 2, s 2.1(a)(i).

<sup>7</sup> Schedule 2, s 2.1(a)(ii).

<sup>8</sup> See s 9 of the FOI Act.

<sup>9</sup> See s 6(b) of the FOI Act.

<sup>10</sup> At [18].

<sup>11</sup> Schedule 2, s 2.2 (xvi).

- the economy of the Territory.<sup>12</sup>

45. CMTEDD contends that the matters addressed in the information sought have not yet been finalised, and disclosure could impact on the processes relating to the future use of ACT Government land and buildings.
46. I accept that there is an ongoing process of government consideration for the use of the Canberra Technology Park site which will impact on future commercial arrangements entered into by the ACT Government. I do not, however, agree with CMTEDD that disclosing the information sought could reasonably be expected to have a prejudicial impact on the government's ability to fully consider and deliberate the future use of the site or any commercial negotiations.
47. Further, the information sought contains purely factual information about the processes and outcomes of a community consultation activity, and it does not appear to reveal anything further about possible future uses of the Canberra Technology Park site that is not already publicly available.
48. I am not satisfied that disclosure could reasonably be expected to prejudice any deliberative process of government or the economy of the Territory.
49. In this Ombudsman review, CMTEDD bears the onus of establishing that the information sought is contrary to the public interest information.<sup>13</sup> It has not discharged its onus in that regard.
50. For these reasons, there are no relevant factors favouring nondisclosure in this case.

*Balancing the factors*

51. As I have not identified any public interest factors favouring nondisclosure, I am satisfied that, on balance, giving the applicant access to the Canberra Technology Park report would not be contrary to the public interest.

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<sup>12</sup> Schedule 2, s 2.2(viii).

<sup>13</sup> See s 72 of the FOI Act.

## Conclusion

52. The Canberra Technology Park report is not contrary to the public interest information for the purposes of s 16 of the FOI Act.

Michael Manthorpe  
ACT Ombudsman  
26 February 2019