

Decision and reasons for decision of Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10006
Decision reference:	[2023] ACTOFOI 8
Applicant:	'CB'
Respondent:	Major Projects Canberra
Agency reference:	MPCFOI 2022-27
Date:	3 May 2023
Catchwords:	<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. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the ACT *Freedom of Information Act 2016 (FOI Act)*.
2. For the reasons set out below, I have decided to **vary** the decision of Major Projects Canberra (**MPC**) dated 13 January 2023 under s 82(2)(b) of the FOI Act.

Background of Ombudsman review

3. On 9 December 2022, the applicant applied to the Transport Canberra and City Services Directorate (**TCCS**) for access to:

“The Light Rail Project Board meeting met on Wednesday 23 February 2022 to discuss, among other things, Light Rail Express Services. I seek access to all briefing material in support of that discussion at that meeting, and relevant minutes.”
4. On 12 December 2022, TCCS transferred the application to MPC under s 57 of the FOI Act.

5. On 13 January 2023, MPC informed the applicant 3 documents had been identified within the scope of the application:
 - document 1: minutes from the Light Rail Project Board meeting of 23 February 2022 (**minutes**)
 - document 2: a meeting paper from the Light Rail Project Board meeting of 23 February 2022 (**meeting paper**), and
 - document 3: a Cabinet submission regarding the Light Rail project (**Cabinet submission**).
6. The respondent provided partial access to the minutes and meeting paper and withheld access to the Cabinet submission entirely.
7. On 13 February 2023, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
8. On 30 March 2023, I provided my preliminary views to the parties in a draft consideration.
9. On 30 March 2023 and 5 April 2023, the applicant and MPC respectively indicated they accept my draft consideration and had no further submissions to provide.

Information at issue

10. The information at issue in this Ombudsman review is the information withheld by MPC.
11. The issues to be decided in this Ombudsman review are:
 - whether the information at issue 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), and
 - if the answer to the first question is yes, whether the information at issue 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).

12. 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
 - *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

13. Section 7 of the FOI Act provides every person with an enforceable right of access to government information.¹ This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.²

14. 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.

15. 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.³

16. 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

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

³ Schedule 1, s 1.6 of the FOI Act.

(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.

(3) In this section:

Cabinet includes a Cabinet committee or subcommittee.

The contentions of the parties

17. In its decision notice, MPC said:

Multiple documents have been identified as being within the scope of your request, however, these documents contain information that is considered to be contrary to the public interest under section 1.6 of Schedule 1 of the Act...

The information in these documents that you have requested falls within section 1.6 of the Act as it is information which has been commissioned to inform Cabinet to guide its decision making and assist in its deliberations. It is therefore exempt from release under the Act.

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

While I appreciate the partial release of the cabinet document, I remain keen to access the light rail information that was redacted from my initial request:

- *Folios 1-7, Project Board Minutes - Light Rail Project Board Meeting of 23 February 2022*
- *Folios 8-11, Project Board Paper - Item 12 - Board Paper - Light Rail Express Services.*

19. In further submissions to the Office, the applicant confirmed they also sought review of the decision to withhold the Cabinet submission in its entirety.

Consideration

Preliminary issue – scope

20. The original decision letter noted that portions of the minutes are outside the scope of the original access application. MPC refused access to these portions of the minutes on that basis.

21. Having reviewed an unredacted copy of the minutes against the scope of the original access application, I am satisfied that some of the information MPC excluded is in fact within scope because it reveals general information about the meeting the subject of the request.

22. I consider information in the minutes concerning matters not connected with the discussion of “Light Rail Express Services” at the meeting is not within scope.

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

23. I have considered whether each of the 3 documents containing the information at issue (refer paragraph 5 above) is Cabinet information within the meaning of Schedule 1, s 1.6 of the FOI Act.
24. I am satisfied that the Cabinet submission (document 3) 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” markings on the document, MPC’s submissions, and the express references in the meeting paper to the submission being intended for submission to Cabinet.⁴
25. The meeting paper (document 2) contains significant amounts of material taken from the Cabinet submission. I consider this material is contrary to the public interest to disclose under the Schedule 1, s 1.6(1)(c) of the FOI Act because it is an extract from the Cabinet submission.
26. I consider some parts of the minutes (document 1) that refer to the discussion of “Light Rail Express Services” are contrary to the public interest to disclose under Schedule 1, s 1.6(1)(d) of the FOI Act because the disclosure of those parts of the minutes would reveal deliberations of Cabinet, including by revealing significantly more material than is currently publicly available in connection with Cabinet consideration of the Light Rail Stage 2 project.⁵

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

27. Having found that:
- **all information** contained in the Cabinet submission (document 3), and
 - **some information** contained in the minutes (document 1) and the meeting paper (document 2),
- is Cabinet information for the purposes of Schedule 1, s 1.6(1) of the FOI Act, it is necessary for me to consider if any of that information is “purely factual information” for the purposes of Schedule 1, s 1.6(2) of the FOI Act.

⁴ 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.

⁵ In *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 6 the then ACT Ombudsman noted the importance of the fact that disclosure in that matter would not reveal more information than was publicly available at the time of the decision, and therefore could not be seen to be disclosing a deliberation or decision of Cabinet.

28. The concept of purely factual information or material is well understood in the context of freedom of information.
29. In *Parnell & Dreyfus and Attorney-General's Department*,⁶ Professor John McMillan, as Australian Information Commissioner, summarised the position as follows (in the context of considering the application of s 47C(2)(a) of the *Freedom of Information Act 1982* (Cth)):
- 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.
30. On balance, I consider the majority of the information at issue in these documents is deliberative in nature, either because it is of itself deliberative content concerning proposed courses of action and analysis of the Light Rail Stage 2 project, or it is factual but so inextricably linked to the deliberative content that it cannot be separated.
31. However, I consider a small amount of the information at issue in these documents – including background information in the meeting paper (document 2) and publicly available factual information in the Cabinet submission (document 3), which was not released by MPC in its original decision – is factual, does not contain or reveal deliberative content, and is not integral to or inextricably linked to deliberative content, so that it can properly characterised as “purely factual information” for the purposes of Schedule 1, s 1.6(2) of the FOI Act.

Conclusion

32. For these reasons, my decision is to vary CMTEDD's decision under **s 82(2)(b)** of the FOI Act.
33. Some of the information at issue is contrary to the public interest information under Schedule 1, s 1.6(a), (c) and (d) and should be withheld from release.
34. Access is to be granted to the remainder of the information, being “purely factual information” for the purposes of Schedule 1, s 1.6(2)(a) of the FOI Act.

David Fintan

Senior Assistant Ombudsman

3 May 2023

⁶ [2014] AICmr 71 at 38.