

Decision and reasons of ACT Ombudsman

Application number:	AFOI-RR/25/80002
Applicant:	Jo Clay MLA
Respondent:	Environment, Planning and Sustainable Development Directorate
Respondent reference:	24/123399
Date:	20 May 2025
Decision reference	[2025] ACTOFOI 6
Catchwords:	Freedom of Information Act 2016 – deciding access – whether information is contrary to the public interest information – information that a Minister proposes to submit to Cabinet for its consideration and that was brought into existence for that purpose – information the disclosure of which would reveal Cabinet deliberations – purely factual information.

Decision

1. The applicant applied for Ombudsman review of a decision made by the Environment, Planning and Sustainable Development Directorate (EPSDD) to refuse to give access to a ministerial briefing and attachment because the information is Cabinet information.
2. For the reasons set out below, I have decided to **set aside the decision and make a substitute decision** under s 82(2)(c) of the *Freedom of Information Act 2016* (ACT) (FOI Act):

- refusing access to information that I consider to be Cabinet information because it is information the disclosure of which would reveal Cabinet deliberations (Sch 1, s 1.6(1)(d)), and
- granting access to information that is Cabinet information, but which is purely factual information, and information that I consider is not Cabinet information.

Background to Ombudsman review

3. On 13 November 2024, the applicant applied to EPSDD for:
 "...the brief titled 'Thoroughbred Park Advice – Development Options.'"
4. On 20 December 2024, EPSDD decided to refuse access to 2 documents within scope on the ground the information is Cabinet information.
5. On 21 January 2025, the applicant applied for Ombudsman review of EPSDD's decision.
6. On 17 April 2025 I provided the parties with my draft consideration setting out my preliminary view.
7. On 6 May 2025 the respondent accepted my preliminary view and did not provide any further submissions.
8. The applicant did not provide any response to the draft consideration.

Information at issue

9. The information at issue in this Ombudsman review is 2 documents comprising a ministerial brief and attachment sent to the Chief Minister, Deputy Chief Minister, and Minister for Planning by EPSDD titled "Thoroughbred Park Advice – Development Options".
10. The key issue to be decided in this Ombudsman review is whether the information in these 2 documents is Cabinet information within the meaning

of Schedule 1, s 1.6(1) of the FOI Act, and therefore taken to be "contrary to the public interest information" – in which case, subject to the issue below, access may be refused under s 35(1)(c).

11. The secondary issue to be decided in this review is whether the ministerial brief and attachment contain "purely factual information" within the meaning of Schedule 1, s 1.6(2) of the FOI Act.

12. In making my decision, I have had regard to:

- the applicant's access application and review application
- EPSDD's decision dated 20 December 2024, and additional submissions of 10 February 2025
- the FOI Act, in particular Schedule 1, s 1.6
- the Ombudsman's Freedom of Information Guidelines issued under s 66 of the FOI Act (FOI Guidelines)
- an unredacted copy of the ministerial brief and attachment
- relevant case law, including:
 - *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [\[2019\] ACTOFOI 6](#) (26 February 2019)
 - *Jon Stanhope and ACT Health Directorate* [\[2020\] ACTOFOI 22](#) (12 November 2020) ('Stanhope')
 - *Elizabeth Lee MLA and Transport Canberra and City Services* [\[2023\] ACTOFOI 3](#) (16 January 2023)
 - *Parnell & Dreyfus and Attorney-General's Department* [\[2014\] ALCmr 71](#) (30 July 2014) ('Parnell & Dreyfus').

Relevant law

13. 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.¹
14. Furthermore, s 9 of the FOI Act expressly provides it is the intention of the Legislative Assembly the FOI Act be administered with a pro-disclosure bias and discretions given under the FOI Act should be exercised as far as possible in favour of disclosing government information.
15. Section 35(1)(c) of the FOI Act provides 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".
16. "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.
17. Section 50 of the FOI Act provides if an access application is made for 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 the "contrary to the public interest information" has been deleted, the respondent must give access to a copy of the record and advise the applicant the original record contained such information which has been deleted from the copy.
18. 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

¹ [Freedom of Information Act 2016 \(ACT\)](#) (FOI Act) s 35(1)(c).

s 16. Schedule 1, s 1.6 deals specifically with the category of 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).

(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.

19. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of the government information has the onus of establishing the information is "contrary to the public interest information".

Submissions of the parties

20. In the decision notice, EPSDD said:

In reviewing these documents, I consider they contain information which has been developed as part of the Cabinet consideration process and are directly related to the deliberation and considerations of Cabinet.

The two documents identified within the scope of your application, the brief in question and its corresponding attachment were developed at the request of Cabinet while considering a Cabinet submission. The content in these documents convey the active discussions and subsequent Cabinet deliberations regarding the

government's involvement in land development options for Thoroughbred Park. This information is an integral part of Cabinet's thinking processes which have accordingly shaped the deliberations of Cabinet. The need to preserve confidentiality of processes leading up to Cabinet decisions is highly significant to allow for full and frank discussions between Cabinet members, prior to a final decision being made.

I have considered whether the information includes any "purely factual information" within the meaning of Schedule 1, s 1.6(2) of the Act, and am satisfied that any information within the document that is purely factual in character is an integral part of the deliberative content of the documents and intertwined with the deliberative content in such a manner that it is impractical to separate it from the other content.

21. On 10 February 2025, EPSDD provided further submissions stating:

Information provided by Directorate on matters that will need to go before Cabinet for a decision forms part of the Cabinet package. As highlighted by the FOI applicant, it has not yet been determined what advice (and therefore supporting material) may need to form part of the future Cabinet package, and therefore it is appropriate for the Directorate to refuse the release until this determination has been made. Further to this, the brief in question was specifically developed at the request of Cabinet following their consideration of Submission 24/141 – Canberra Racing Club proposal to redevelop Thoroughbred Park.

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

... At some stage a submission will be made to Government, possibly through a Cabinet process, that provides advice on the Canberra Racing Club (CRC) redevelopment proposal.

The information contained in the document sought will include information that is factual – such as land use; advice as to whether any changes to the zoning is required and the process of amending the Territory Plan. Such information is normal business for EPSDD and should not be defined as Cabinet in confidence.

The document may offer opinions as to possible planning and development outcomes for the site and what zoning provisions best suit the proposed development. Possible impacts such as increased traffic, utilisation of public transport, building heights, types of housing, noise, sewerage, water, gas, electricity, flooding, impacts on community infrastructure (such as schools) may also be covered. It may also offer an opinion as to what changes would reduce any impacts. EPSDD provides this information on a regular basis as part of its normal operations if developers/builders are seeking input as part of the design process.

Further, it is not clear at this stage what advice will be provided to Government as part of a Cabinet process. The decision to exclude access to all of the document assumes that all of the information it contains will be provided to Cabinet, even information which is in the public domain. This creates the impression that the FOI

process is being used to reduce transparency in Government's consideration of the CRC development proposal.

23. These submissions are discussed in more detail below.

Consideration

24. I have read and examined an unredacted copy of the ministerial brief and attachment together with the submissions of both parties set out above.

25. EPSDD decided the brief and attachment was information which is proposed to be submitted to Cabinet for its consideration and was brought into existence for that purpose (Schedule 1, s 1.6(1)(a)); and that release of the information would reveal Cabinet deliberations (Schedule 1, s 1.6(1)(d)).

Information that a Minister proposes to submit to Cabinet for its consideration and that was brought into existence for that purpose – Schedule 1, s 1.6(1)(a)

26. The brief and attachment has been provided to, and considered by, the Chief Minister, Deputy Chief Minister and Minister for Planning (noting the relevant signatures on this document).

27. While the documents do not contain any reference indicating it has been submitted to Cabinet, or was brought into existence for that purpose, EPSDD has submitted the briefing was developed at the request of Cabinet.

28. Cabinet has previously agreed to the establishment of the 'Thoroughbred Park Housing and Revitalisation Steering Committee' comprising senior officials to consider the Canberra Racing Club's proposal to redevelop Thoroughbred Park and support Cabinet's consideration of issues and key considerations relating to the proposed redevelopment.²

² Chief Minister, Treasury and Economic Development Directorate, Open Government, [Cabinet decision summaries for the week of 18 March 2024 \(Minute number: 24/141/CAB\)](#).

29. I accept the brief contains development options and has a 'Cabinet' dissemination limiting marker (DLM) as required by the ACT Cabinet Handbook for any document that 'has been or proposed to be submitted to Cabinet'.³
30. While the presence of a 'Cabinet' DLM marker is not indicative of whether a document is a Cabinet document, it does speak to the intention at the time the information was created.⁴
31. Part of the brief and the entirety of the attachment clearly detail options and advice to be considered in relation to the proposed redevelopment of the site. I agree this information was likely requested by Cabinet to inform consideration of the redevelopment of Thoroughbred Park.
32. However, I do not consider there is sufficient evidence to enable me to be satisfied that this information is proposed to be submitted to Cabinet, or was brought into existence for that purpose (Schedule 1, s 1.6(1)(a)).
33. While development options and advice may need to go before Cabinet for its consideration and decision at some point, EPSDD has confirmed it has not yet been determined what information may need to form part of the future Cabinet package.
34. For this reason, I am not satisfied the brief (including attachment) was brought into existence for the purpose of being submitted to Cabinet for its consideration.
35. In my draft consideration I invited EPSDD to provide a copy of the request Cabinet made to develop the briefing in support of the position that the

³ [ACT Cabinet Handbook](#) pg. 40.

⁴ [Freedom of Information \(Volume 4 - Considering the Public Interest\) Guidelines 2023](#) [5.9].

entirety of the briefing and attachment was brought into existence to be submitted to Cabinet for its consideration.

36. In response to the draft consideration, EPSDD did not provide a copy of this request.

***Information the disclosure of which would reveal Cabinet deliberations –
Schedule 1, s 1.6(1)(d)***

37. Given 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 the decision letter provides sufficiently clear and specific reasons why information is being withheld.
38. In my view, EPSDD has not sufficiently explained how disclosure of the entirety of the brief and attachment would reveal any deliberation of Cabinet under Schedule 1, s 1.6(1)(d).
39. In Stanhope, the Ombudsman explained: ⁵
- I consider there to be a distinction between information that would reveal the confidential deliberations of Cabinet and information that may inform members of Cabinet before deliberations take place. This distinction is accounted for in the Act which provides that Cabinet submissions that were brought into existence for the purpose of shaping discussion are contrary to the public interest to disclose under Schedule 1, s 1.6(1)(a).
40. In this matter, I accept that the brief (including attachment) was likely brought into existence in response to a request from Cabinet, even if, as explained above, it is not evident that the brief was brought into existence for the purpose of being submitted to Cabinet.
41. For this reason, I am satisfied elements of the brief (including attachment) that include the provision of advice on the substance and merits of different options for redevelopment would reveal the confidential deliberations of

⁵ Jon Stanhope and ACT Health Directorate [\[2020\] ACTOFOI 22](#) [30].

Cabinet, to the extent that it contains advice and information presented by EPSDD, at the request of and in response to deliberations of Cabinet.

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

42. Information is not Cabinet information if it is 'purely factual information' unless disclosure of the factual 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.

43. The concept of purely factual information has been clearly laid out in the freedom of information context in a variety of cases where it was distinguished from advice or projections about future events.⁶

44. In *Parnell & Dreyfus*, the potential deliberative content of factual information was discussed in detail, and it was said:⁷

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 such that it is impractical to excise it.

45. The decision-maker must identify such information and explain how it is connected with the deliberation and determine that it is impractical to excise it, in order to find the information is Cabinet information despite being factual material. and not subject to this exception.

46. In the decision notice, EPSDD acknowledges the documents contain purely factual information but states this information is an integral part of the deliberative content of the documents in such a manner that it is impractical to separate it from the other content. As noted above, EPSDD has not

⁶ *Elizabeth Lee MLA and Transport Canberra and City Services* [2023] ACTOFOI 3 (16 January 2023) at [29].

⁷ *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71 (30 July 2014)

described how release of the purely factual information would reveal Cabinet deliberations (as opposed to deliberative content generally).

47. I have identified information which I consider has been brought into existence at the request of Cabinet, however I consider part of this information is purely factual information the disclosure of which would not reveal Cabinet deliberations.
48. Part of the redevelopment options and related advice contain information about the statutory process required to amend the Territory plan, and information about duration, ownership and zoning of certain leaseholds.⁸
49. Noting Cabinet has established a steering committee for the redevelopment of Thoroughbred Park and redevelopment options have not yet been presented to Cabinet, I do not consider release of purely factual information about the site and planning laws would reveal Cabinet deliberations, or deliberations which have not been officially published.
50. In my draft consideration, I also invited ESPDD to make further submissions on whether any of the information proposed to be released should be considered contrary to the public interest information under s 16(1)(b) because disclosure would on balance be contrary to the public interest information under the test set out in s 17 of the FOI Act.
51. EPSDD did not provide any further submissions in response to the draft consideration.

Conclusion

52. For the reasons set out above, I **set aside the decision and make a substitute decision** under s 82(2)(c):

⁸ See *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate [2019] ACTOFOI 6* (26 February 2019) at [47]. See also *Planning Act 2023 (ACT)* Chapter 5.

- refusing access to information that I consider to be Cabinet information because it is information the disclosure of which would reveal Cabinet deliberations (Sch 1, s 1.6(1)(d)), and
- granting access to information that is Cabinet information, but which is purely factual information, and information that I consider is not Cabinet information.

Iain Anderson

ACT Ombudsman

20 May 2025