

***Sarah Curnow and ACT Health Directorate [2021] ACTOFOI 7***  
**(29 July 2021)**

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

<b>Application Number</b>	AFOI-RR/20/10058
<b>Decision Reference</b>	[2021] ACTOFOI
<b>Applicant</b>	Sarah Curnow
<b>Respondent</b>	ACT Health Directorate
<b>Decision Date</b>	29 July 2021
<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 – legal professional privilege – promote open discussion of public affairs and enhance government’s accountability – contribute to positive and informed debate on important issues or matters of public interest – allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official – reveal the reason for a government decision and any background or contextual information that informed the decision – reveal environmental or health risks or measures relating to public health and safety – intergovernmental relations – deliberative process of government – agency’s ability to obtain confidential information

## **Decision**

1. Under s 82(2)(b) of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**), I **vary** the decision of the ACT Health Directorate (**the AHD**) dated 3 December 2020.

## **Background of Ombudsman review**

2. On 15 October 2020, Sarah Curnow (**the applicant**) lodged an access application under s 30 of the FOI Act. The application sought:

Australian Health Protection Principal Committee papers by or circulated to the Chief Health Officer, or their representative, between 1 May and 31 July 2020 concerning the following matters in Victoria:

- Contact tracing
  - Testing approaches
  - Hotel quarantine
  - Elimination/suppression strategies
  - Public Health workforce capacity.
3. On 3 December 2020, the AHD decided to refuse access to 73 documents, which it had identified as coming within the scope of the request.
  4. On 4 December 2020, I received an application from the applicant seeking my review of the decision under s 74 of the FOI Act.
  5. On 22 April 2021, the AHD identified a 74<sup>th</sup> document and decided to refuse access to it on the same basis.
  6. I provided my preliminary views to the parties in a draft consideration on 26 March 2021. My preliminary view was that the AHD had not discharged the onus borne under s 72, which required that it establish the information was contrary to the public interest information.
  7. On 25 May 2021, I received an application from the Commonwealth Department of Health (**CDoH**), under s 77(2) of the FOI Act, requesting that it be able to participate in the review. My Office decided to allow the CDoH to participate in the review under s 77(3) of the FOI Act on 8 June 2021.
  8. Similarly, on 8 June 2021, I received an application from the Victorian Department of Health (**VDoH**) under s 77(2) of the FOI Act requesting that it be able to participate in the review. My Office decided to allow the VDoH to participate in the review under s 77(3) of the FOI Act on 8 June 2021.
  9. The applicant made submissions on 4 December 2020 and then, in response to my draft consideration, on 31 March 2021.

10. The CDoH made submissions on 11 June 2021 and, on 28 June 2021, provided me with an annotated copy of documents with suggested redactions.
11. The VDoH made submissions on 11 June 2021 and, on 30 June 2021, provided me with an annotated copy of documents with suggested redactions.

## Relevant law

12. Every person enjoys a right of access to government information.<sup>1</sup> However, the FOI Act creates an exception to this right because it allows for refusal of access to information that is ‘contrary to the public interest information’.<sup>2</sup>
13. The FOI Act defines ‘contrary to the public interest information’<sup>3</sup> as either:  
  
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. A party seeking to prevent disclosure of government information bears the onus of establishing that it is contrary to the public interest information.<sup>4</sup>
15. Moreover, the FOI Act contains a clear statement on behalf of the Legislative Assembly, requiring that:  
  
... this Act be administered with a pro-disclosure bias and discretions given under it be exercised as far as possible in favour of disclosing government information.<sup>5</sup>
16. Schedule 1 of the FOI Act lists categories of information which are taken to be contrary to the public interest information, while Schedule 2 lists public interest factors weighing both in favour of and against disclosure. These factors must be balanced to determine whether information is contrary to the public interest.<sup>6</sup>

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

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

<sup>3</sup> Section 16(a) of the FOI Act.

<sup>4</sup> Section 72 of the FOI Act.

<sup>5</sup> Section 9 of the FOI Act.

<sup>6</sup> Section 17 of the FOI Act.

## Information at issue and issue to be decided

17. Accordingly, the information at issue in this review is all of the information that the AHD refused the applicant access to.
18. In making my decision, I need to determine whether the information at issue is contrary to the public interest information. Unless I am satisfied the information at issue *is* contrary to the public interest information, I must decide that the applicant should be given access to it.
19. In making my decision, I had regard to:
  - the FOI Act, in particular ss 6, 7, 9 and 72
  - the applicant's original access application, review application and submissions, including submissions responding to my draft consideration
  - the AHD's decision letter and letters to me before and after my draft consideration, which included submissions
  - responses the CDoH and the VDoH provided to the AHD, when it conducted third party consultation before making its original decision
  - submissions provided by the CDoH
  - submissions provided by the VDoH
  - the *Evidence Act 2011 (ACT)* (Evidence Act)
  - relevant cases, including: *Re Jane Suzanne Arnold on behalf of Australians of Animals v Queensland; the Australian National Parks and Wildlife Service*,<sup>7</sup> *Attorney-General's Department v Cockroft*,<sup>8</sup> *Dan Conifer and National Disability Insurance Agency*,<sup>9</sup> *Jon Stanhope and Chief Minister, Treasury and Economic Development Directorate*.<sup>10</sup>

## Reasons for the AHD's decision

20. In the decision notice dated 3 December 2020, the AHD decided that Schedule 2, ss 2.1(a)(i) and (ii) were applicable factors favouring disclosure in the public interest. These factors are the promotion of open discussion of public affairs and enhancement of

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<sup>7</sup> [1987] FCA 148.

<sup>8</sup> (1986) 64 ALR 97.

<sup>9</sup> [2020] AICmr 33.

<sup>10</sup> [2020] ACTOFOI 24.

government's accountability, as well as contribution to positive and informed debate on important issues or matters of public interest.

21. In deciding to refuse access to all of the in-scope information, the AHD's Information Officer said:

Prior to the COVID-19 outbreak, the Australian Health Protection Principal Committee (AHPPC) was a pre-existing body under the Council of Australian Government. When the National Cabinet for Australia's Coronavirus Response (National Cabinet) was established, documents prepared by AHPPC, including meeting minutes, were thereafter treated as Cabinet-in-Confidence.

All documents... include meeting papers which were designed to provide advice and guidance on the deliberative process of the AHPPC with State Governments and the Commonwealth Government. ACTHD is not the author of these documents but is privy to hold this information due to its representation at this Committee.

## Reasons for my draft consideration

22. I provided my preliminary views to the parties in a draft consideration on 26 March 2021. My preliminary view was that the AHD had not discharged the onus borne under s 72, which required that it establish the information was contrary to the public interest information.
23. Specifically, I found that the following factors favoured disclosure:
- Schedule 2, s 2.1(a)(i) – promote open discussion of public affairs and enhance the government's accountability
  - Schedule 2, s 2.1(a)(ii) – contribute to positive and informed debate on important issues or matters of public interest
  - Schedule 2, s 2.1(a)(v) – allow or assist enquiry into possible deficiencies in the conduct or administration of an agency or public official
  - Schedule 2, s 2.1(a)(viii) – reveal the reason for a government decision and any background or contextual information that informed the decision
  - Schedule 2, s 2.1(a)(xi) reveal... health risks or measures relating to public health and safety.
24. My preliminary view was that I should afford the first two factors considerable weight and the subsequent three factors moderate weight.

25. The submissions made by the CDoH and the VDoH, in response to my draft consideration, did not raise any objection to my findings regarding these factors. The CDoH and the VDoH argued instead that I should give overriding weight to the factors favouring non-disclosure.
26. The submissions I received in response to my draft consideration from the AHD did argue that I had afforded too much weight to the factors favouring disclosure. The AHD submitted that:
- Schedule 2, s 2.1(a)(i) should receive no weight because government accountability in the FOI Act refers to the ACT Government and the information at issue relates to events in Victoria
  - Schedule 2, s 2.1(a)(ii) should receive moderate weight
  - Schedule 2, s 2.1(a)(v) should receive no weight because ‘no decision, action or inaction of the ACT Government flowed from the information and it is difficult to conceive how release of information will allow or assist inquiry into possible deficiencies in the conduct or administration of an ACT Government agency or ACT Government public official.’
  - Schedule 2, s 2.1(a)(viii) should receive moderate weight, as the fact that information was provided to the public in the form of updates diminishes the value of releasing the information at issue, which is of a similar nature.
  - Schedule 2, s 2.1(a)(ix) should receive low weight as the fact that information about health risks was provided to the public in the form of updates diminishes the value of releasing the information at issue, which is of a similar nature.
27. I will address these submissions in my considerations of each applicable factor below.
28. In my draft consideration, I did not accept that disclosure could reasonably be expected to prejudice:
- Schedule 2, s 2.2(a)(x) intergovernmental relations
  - Schedule 2, s 2.2(a)(xii) an agency’s ability to obtain confidential information
  - Schedule 2, s 2.2(a)(xvi) a deliberative process of government.
29. First, in my draft consideration, I expressed the view that the AHD had not discharged the onus imposed by s 72 of the FOI Act in establishing that disclosure could reasonably be expected to prejudice intergovernmental relations.

30. Second, my preliminary view was that I could not reasonably expect prejudice to an agency's ability to obtain confidential information, unless the information at issue is confidential. As my view was that the AHD had not discharged the onus imposed by s 72 of the FOI Act in establishing that disclosure could reasonably be expected to prejudice intergovernmental relations, I rejected the applicability of this factor.
31. Third, my preliminary view was that disclosing the information at issue in this matter could not reasonably be expected to prejudice a deliberative process of government because I was not satisfied that the information was not already publicly available.

## Considerations

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

32. At the time of my draft consideration, no party had suggested the information at issue is information that is taken to be contrary to the public interest under Schedule 1. However, in response to my draft consideration, the AHD referred to Schedule 1, s 1.6 of the FOI Act.
33. The CDoH also contended that information in document 38 is contrary to the public interest under Schedule 1, s 1.2 of the FOI Act.

### Cabinet information

34. While the AHD's decision notice of 3 December 2020 referred to the treatment of information as 'Cabinet-in-Confidence', it did not purport to refuse access based on Schedule 1, s 1.6. Instead, AHD relied on Schedule 2 factors, which it balanced as per the test in s 17.
35. AHD's submissions, in response to my draft consideration, contained the following statement:
- The FOI Act clearly articulates the deliberative information of Cabinet is taken to be contrary to the public interest to disclose under Schedule 1.6
36. In its decision notice of 3 December 2020, the AHD noted that the ACT Territory Records Office:

... confirmed that National Cabinet documents do not routinely become ACT Cabinet documents unless they are presented to the ACT Cabinet however, not to subvert another jurisdiction's legislation, [AHD] considers that the release of this confidential and sensitive information would prejudice intergovernmental relations...

37. The decision of 3 December 2020 was for this reason based on balancing Schedule 2 factors, including intergovernmental relations, rather than on the applicability of a Schedule 1 factor.
38. The AHD was advised that National Cabinet documents are not routinely ACT Cabinet documents and the AHD's decision did not find that Schedule 1, s 1.6 applied to the information at issue. Given that the AHD has not subsequently been able to point me to any legal authority supporting the alternative view it now seeks to raise, I am not satisfied that the onus imposed by s 72 has been discharged. The AHD has not established that the information at issue is contrary to the public interest under Schedule 1, s 1.6.

#### Legal professional privilege

39. Information that would be privileged from production in a legal proceeding is taken to be contrary to the public interest under the FOI Act.<sup>11</sup>
40. Section 118 of the Evidence Act establishes:

Evidence must not be presented if, on objection by a client, the court finds that presenting the evidence would result in disclosure of—

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between 2 or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer, or someone else;

for the dominant purpose of the lawyer, or 1 or more of the lawyers, providing legal advice to the client.

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<sup>11</sup> Schedule 1, s 1.2 of the FOI Act.



41. In the CDoH's response to my draft consideration, it was submitted that document 38 (at pages 163 and 164) contains information that would be privileged from production in a legal proceeding.
42. Considering this submission, I re-examined document 38 and I accept that the second agenda item is information that would be privileged from production in a legal proceeding under s 118(c) of the Evidence Act. It is therefore taken to be contrary to the public interest information.

#### *Public interest test*

43. Having decided that the only information at issue which is taken to be contrary to the public interest is the information in document 38, which falls under Schedule 1, s 1.2, I then considered whether the balancing test set out in s 17(1) of the FOI Act renders any of the information at issue contrary to the public interest information.
44. To determine whether information is contrary to the public interest information, the FOI Act prescribes the following five steps:
  - 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;
  - 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 2.1;
  - balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
  - decide whether, on balance, disclosure of the information would be contrary to the public interest;
  - unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

#### *Irrelevant factors*

45. There is an additional required step under s 17, which is ensuring that I do not take into account any of the specified irrelevant factors.

46. In response to my draft consideration, the VDoH submitted that ‘where information that has been shared with the AHPPC has become public, this has caused confusion and interfered with the [VDoH’s] response to the pandemic.’
47. Section 17(2)(b) of the FOI Act prohibits me from considering whether access to the information at issue could result in misinterpretation or misunderstanding of that information.
48. Similarly, s 17(2)(d) of the FOI Act prohibits me from considering whether access to the information could result in confusion or unnecessary debate.
49. Accordingly, I have not considered whether the information is information that is likely to be confusing, misinterpreted, misunderstood or provoke unnecessary debate.
50. Similarly, the VDoH made comments on the annotated copy of documents I received that demonstrated some of the redactions it was seeking were invalid because they were based on irrelevant factors.
51. Where a redaction was sought by the VDoH on the basis that disclosure could lead to misinterpretation, misunderstanding, confusion or provoke unnecessary debate, I decided that the redaction cannot be supported because I cannot consider those submissions under the FOI Act.

#### *Factors favouring disclosure*

52. Five factors favouring disclosure are relevant to this review. These are:
  - Schedule 2, s 2.1(a)(i) – promote open discussion of public affairs and enhance the government’s accountability
  - Schedule 2, s 2.1(a)(ii) – contribute to positive and informed debate on important issues or matters of public interest
  - Schedule 2, s 2.1(a)(v) – allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official
  - Schedule 2, s 2.1(a)(viii) – reveal the reason for a government decision and any background or contextual information that informed the decision
  - Schedule 2, s 2.1(a)(xi) – reveal... health risks or measures relating to public health and safety.

53. The AHD's original decision identified the first two of these factors, but it did not indicate that any consideration had been given to the appropriate weighting for them.

Promote open discussion of public affairs and enhance the government's accountability

54. A reasonable expectation that disclosure could promote open discussion of public affairs and enhance the government's accountability favours disclosure under the FOI Act.<sup>12</sup>
55. In my draft consideration, I found that the information at issue could reasonably be expected to promote this public interest factor by enabling members of the public to discuss the public health situation in Victoria during the period in scope.
56. In response to my draft consideration, the AHD submitted that 'the government' referred to in the FOI Act is the ACT Government. It argued that because the ACT Government is not mentioned in the information at issue, the information could not reasonably be expected to enhance the government's accountability. It therefore submitted that this factor should receive no weight. This was in contrast to the AHD's original finding, in its decision of 3 December 2020, which submitted that this factor was applicable.
57. I accept that 'the government' in Schedule 2, s 2.1(a)(i) of the FOI Act is the ACT Government. However, I do not accept that this factor lacks relevance.
58. Broadly, the position of the AHD, CDoH and the VDoH is that the sharing of information, including the information at issue, is of critical importance because it informs government responses to COVID-19. The ACT Government has certainly taken steps in response to COVID-19 and, in doing so, has seemingly relied on information it has received from other jurisdictions. The ability of people who live in the ACT to access information that has influenced ACT Government decision-making could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability to a degree that warrants moderate weight in this review.

Contribute to positive and informed debate on matters of public interest

59. A reasonable expectation that disclosure could contribute to positive and informed debate on a matter of public interest favours disclosure under the FOI Act.<sup>13</sup>

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<sup>12</sup> Schedule 2, s 2.1(a)(i) of the FOI Act.

<sup>13</sup> Schedule 2, s 2.1(a)(ii) of the FOI Act.

60. In my draft consideration, I found that the information at issue could reasonably be expected to promote this public interest factor by shedding light on Victorian public health during the period in scope. However, I observed that much of the information was publicly available and that this factor should only receive moderate weight as a result.
61. In response to my draft consideration, the AHD agreed that this factor is applicable and should receive moderate weight.

Allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official

62. A reasonable expectation that disclosure could allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official favours disclosure under the FOI Act.<sup>14</sup>
63. In my draft consideration, I found that the information at issue could reasonably be expected to promote this public interest factor to a considerable degree.
64. In response to my draft consideration, the AHD submitted that I should reconsider this finding because
- no decision, action or inaction of the ACT Government flowed from the information and it is difficult to conceive how release of the information will allow or assist inquiry into possible deficiencies in the conduct or administration of an ACT Government agency or ACT Government public official [because] [t]he ACT Government is not mentioned or referred to in the information... and because of the nature of the information... and its relationship to the ACT Government.
65. I observed in my draft consideration that I am not required to make a finding about whether there is a deficiency in public administration. The factor recognises that the opportunity to inquire into whether there are deficiencies is, in itself, in the public interest, and fundamentally important for government accountability and transparency in a representative democracy.
66. Information provided to the ACT Government to inform its public health response during the period in scope could reasonably be expected to assist a person inquiring into any

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<sup>14</sup> Schedule 2, s 2.1(a)(v) of the FOI Act.

possible deficiencies in the AHD's conduct or administration of various matters, including travel restrictions on persons entering the ACT. I do accept that there is no specific evidence of any deficiency. My decision is to find that this public interest factor could only reasonably be expected to be advanced in a general sense and therefore to only a moderate degree.

Reveal the reason for a government decision and any background or contextual information that informed the decision

67. A reasonable expectation that disclosure could reveal the reason for a government decision and any background or contextual information that informed the decision favours disclosure under the FOI Act.<sup>15</sup>
68. In my draft consideration, I noted that the information at issue is information about the public health situation in Victoria during the period in scope, which was relied on by the AHPPC when assessing the national relevance of the situation. I commented on the factor recognising the importance of transparency and the *opportunity to observe* the government decision-making process, including information relied on to make decisions. This opportunity is of fundamental importance for the proper working of a representative democracy and the FOI Act recognises this in its objects. My preliminary view was that disclosure of the information at issue could reasonably be expected to promote this public interest factor to a considerable degree.
69. In response to my draft consideration, the AHD submitted that:
- the AHPPC, National Cabinet and jurisdictional governments publicly provided information that was being updated constantly in multiple different ways. Therefore, the value of releasing information in AHPPC discussion papers for this purpose is greatly diminished.
70. In my view, this line of reasoning should not be preferred over that which I expressed in my draft consideration, having regard to the objects of the FOI Act. First, the FOI Act gives a general right of access to government information and does not create an exception in circumstances where the government considers that it has provided suitable summaries in public updates. I therefore do not accept that the value of the information is diminished per se. My preliminary view was that I should afford this factor moderate

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<sup>15</sup> Schedule 2, s 2.1(a)(viii) of the FOI Act.

weight. I consider that this strikes a suitable balance between the fact that much of the information would be known to the public and the overarching importance of supporting transparency.

#### Reveal health risks or measures relating to public health and safety

71. A reasonable expectation that disclosure could reveal health risks or measures relating to public health and safety favours disclosure under the FOI Act.<sup>16</sup>
72. In my draft consideration, I noted that the information at issue is information about the public health situation in Victoria during the period in scope. I found it reasonable to expect that disclosure could promote this public interest factor. I commented that the pandemic is an ongoing public health situation and the information is current in its general applicability to the COVID-19 virus and the way the government implements measures to protect public health and safety.
73. In response to my draft consideration, the AHD submitted that the importance of this public interest factor was ‘superseded’ and ‘essentially mitigated’ by information the government has made public.
74. In my view this submission is flawed. I do not see any basis, nor has the AHD referred me to one, for the proposition that the FOI Act may be ‘superseded’ or ‘essentially mitigated’ and it would seem to me that interpreting it in this way is inconsistent with its objects. The parties seeking to prevent disclosure themselves submit that the information at issue includes information about the risks to public health posed by COVID-19 and the stakes are therefore high. The public have a right of access to information that is not limited to information disclosed in material released and managed carefully by government. In my view, disclosure of the information at issue, which includes information about hotel quarantine, the infectiousness of COVID-19, potential measures for the prevention of its transmission and public compliance with restrictions could reasonably be expected to promote this public interest factor to a considerable degree.

#### *Factors favouring non-disclosure*

75. Three factors favouring nondisclosure are relevant to this review. These are:

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<sup>16</sup> Schedule 2, s 2.1(a)(xi) of the FOI Act.

- Schedule 2, s 2.2(a)(x): prejudice intergovernmental relations
- Schedule 2, s 2.2(a)(xii): prejudice an agency's ability to obtain confidential information
- Schedule 2, s 2.2(a)(xvi): prejudice a deliberative process of government.

Preliminary issue: 'identifying information'

76. Some of the annotations made by the CDoH and the VDoH, which were included in the annotated copy of documents, were accompanied by comments indicating an objection to disclosure of 'identifying information'.
77. Identifying information is not exempt under the ACT FOI Act. In my view, the information identified by the CDoH and the VDoH as 'identifying information' is not sufficiently identifying that it would raise any Schedule 2 factors. Accordingly, the redactions proposed on pages 6, 16, 284 and 291 of the annotated copy of documents cannot be permitted.

Intergovernmental relations

78. A reasonable expectation that disclosure could prejudice intergovernmental relations favours non-disclosure under the FOI Act.<sup>17</sup>
79. In my draft consideration I commented that I was not satisfied disclosure could reasonably be expected to prejudice intergovernmental relations. I said this because much of the information at issue seemed, on its face, to be publicly available.
80. I referred to the Federal Court of Australia's observation that this factor necessitates more than 'a State to indicate disagreement with the policy of the Act and claim, therefore, that a disclosure of particular documents could reasonably be expected to damage relations.'<sup>18</sup> The test is rather whether the decision-maker reaches a conclusion based on the evidence in all the circumstances of the matter.<sup>19</sup>

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<sup>17</sup> Schedule 2, s 2.2(a)(x) of the FOI Act.

<sup>18</sup> *Re Jane Suzanne Arnold on behalf of Australians of Animals v Queensland; the Australian National Parks and Wildlife Service* [1987] FCA 148 at [48] (Burchett J).

<sup>19</sup> *Re Jane Suzanne Arnold on behalf of Australians of Animals v Queensland; the Australian National Parks and Wildlife Service* [1987] FCA 148 at [39] (Burchett J).

81. This is consistent with the view taken by Bowen CJ and Beaumont J in *Attorney-General's Department v Cockroft* ('*Cockroft*') when considering the phrase 'reasonably be expected' to be an objective test which:

... require[s] a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous...<sup>20</sup>

82. I also had regard to the Australian Information Commissioner's decision in *Dan Conifer and National Disability Insurance Agency*. In that decision, the Commissioner said:

There must be real and substantial grounds for expecting the damage to occur which can be supported by evidence or reasoning. There cannot merely be an assumption or allegation that damage may occur if the document were released.<sup>21</sup>

83. My draft consideration referred to my comments in *Jon Stanhope and Chief Minister, Treasury and Economic Development Directorate*. In that matter, I found that:

... for the intergovernmental relations factor to apply, I consider it must involve confidential communications the disclosure of which could reasonably be expected to prejudice relations by, for instance, leading to a loss of trust and cooperation between agency officers.<sup>22</sup>

84. Given that, in my draft consideration, I was not satisfied that the information was confidential, I was unable to find that the AHD had discharged the onus imposed by s 72 of the FOI Act.

85. In response to my draft consideration, I received written submissions, including one sworn statement of evidence, from several senior public officials which attested to the prejudice to intergovernmental relations that could reasonably be expected to flow from disclosure.

86. The AHD provided me with submissions from Ms Cross, its Director-General and Ms Croke, the Deputy Director-General of Policy and Cabinet at the Chief Minister, Treasury and Economic Development Directorate.

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<sup>20</sup> *Attorney-General's Department v Cockroft* (1986) 64 ALR 97 at 106.

<sup>21</sup> *Dan Conifer and National Disability Insurance Agency* [2020] AICmr 33 at [18].

<sup>22</sup> *Jon Stanhope and Chief Minister, Treasury and Economic Development Directorate* [2020] ACTOFOI 24 at [54].



87. Ms Cross' submission was that:

If the information in papers provided in confidence is released unilaterally by a jurisdiction... rather than through agreement with the providing jurisdictions, then jurisdictions will be more guarded in contributing information in writing to these committees.

The use or release of another jurisdiction's information without agreement has in the past had a very real impact on interjurisdictional relations and the sharing of information. It is difficult to imagine that the same consequences would not flow from the release of this information. The issue jurisdictions will consider as they move forward in sharing information is not whether the same or similar information has been previously published, it is whether information provided in confidence will potentially be released without the agreement of the providing jurisdiction.

88. Ms Croke's submission was that:

... [The] model necessitates the sharing of often sensitive and confidential information where consensus may not have been met as well as expert advice. Release of such materials would be contrary to the public interest having been provided in confidence... and their release could jeopardise the ability of the ACT to work with the Commonwealth, states or territories in future.

89. The CDoH supplied me with the sworn evidence of Ms Street, First Assistant Secretary, Office of Health Protection and Response in the CDoH. Ms Street's opinion is that the 'understanding of confidentiality' shared by AHPPC participants would be damaged significantly by disclosure of the information at issue. Ms Street's evidence refers to a specific observation of a jurisdiction becoming reluctant towards sharing information after information was 'potentially inadvertently disclosed'. I found this observation to be particularly compelling.

90. The VDoH submissions contended that:

It is highly likely that Chief Health and Medical Officers, and other invited AHPPC members, would significantly curtail their contributions at AHPPC discussions if it was subjected to FOI regimes.

91. In contrast, the applicant submits that:

... it is implausible to suggest that senior public health officers such as those who are members of AHPPC would in the future downplay or withhold critical public health information such as this in their discussions with the Committee... for fear that it may subsequently be disclosed. Members of

AHPPC are highly qualified servants of science... They work in a world where the free flow of public health information is both ubiquitous and vital... It beggars belief that such officers would not be forthcoming simply because they believed their material may become public.

92. In my view, the applicant's submissions do not sufficiently take into account sensitivities that could arise in the context of intergovernmental information sharing. The submissions of Ms Cross and Ms Croke and sworn evidence of Ms Street is that disclosure could reasonably be expected to affect the willingness of states and territories to share information.

*Has the applicant been heard on this issue?*

93. When responding to my draft consideration, the applicant also requested an opportunity to respond to other submissions or evidence adduced by the parties seeking to prevent disclosure.
94. My Office wrote to the applicant on 18 June 2021 and confirmed that such an opportunity would be given, but only if new issues were raised which were likely to prove persuasive or indeed decisive.
95. Other than the ADH's reference to Schedule 1, s 1.6, which I refused to accept, the parties seeking to prevent disclosure raised no new issues. Instead, the arguments made by the parties seeking to prevent disclosure were based on the applicability of the intergovernmental relations factor. This was the central issue in my draft consideration as well.
96. The applicant was afforded two opportunities to contend with the argument that disclosure could reasonably be expected to prejudice intergovernmental relations. The first was in the submissions they included with their application for review. The second was in their response to my draft consideration.
97. I therefore turned my attention to whether the applicant had been given an opportunity to be heard on this issue and decided that they had. I considered the observations of Middleton and Wigney JJ in the Federal Court that 'there would be no practical injustice' in proceeding to a decision without further consultation in circumstances where no new issue had been raised.<sup>23</sup>

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<sup>23</sup> *Snedden v Minister for Justice* [2014] FCAFC 156 at [201].

98. I am satisfied that there is no new, persuasive material which the applicant could be expected to provide regarding the intergovernmental relations factor. In this case, as in FOI reviews generally, the applicant had to make submissions without viewing the information at issue. Their submissions correctly anticipated the position which the parties seeking to prevent disclosure took and put a competing case to me. In the circumstances, I proceeded to make my decision satisfied that I had understood and considered the competing arguments in full.
99. The parties objecting to disclosure submitted that I should confirm the AHD's decision and find that all the information at issue is contrary to the public interest information. In the alternative, if I did not confirm the AHD's decision, they submitted that information which is not public, or the communication of which is not public, should not be disclosed. I received an annotated copy of documents from the CDoH and the VDoH with proposed redactions. I am willing to accept the majority of these proposed redactions. The annotated documents altered the original page numbers because documents 7, 57, 58, 59, 60, 61 and 67 were removed because the parties submit that no suitable redactions could be made and that access should be refused to all of the information in these documents. Original document numbers remain the same as in the original decision.
100. The intergovernmental relations objection includes documents 7, 57, 58, 59, 60, 61 and 67 in their entirety, on the basis that these are National Cabinet documents. The intergovernmental relations objection also includes the redactions proposed by the CDoH and the VDoH in the remaining documents. I accept that disclosing the information in documents 7, 57, 58, 59, 60, 61 and the redacted parts of the remaining documents would prejudice intergovernmental relations by undermining the trust on which the exchange of this information depended.
101. However, a small number of the redactions proposed by the VDoH in the remaining documents were based on irrelevant factors. These include redactions proposed by the VDoH on the following pages of the annotated documents:
- Page 41, except for the top line.
  - Page 60.
  - Page 71-279.
102. Where the basis for the proposed redaction is an irrelevant factor, I am not satisfied that I could reasonably expect disclosure to prejudice intergovernmental relations, other than

in the way that I am unable to consider under s 17(2), and accordingly I do not consider that this information has been shown to be contrary to the public interest to disclose.

#### Agency's ability to obtain confidential information

103. A reasonable expectation that disclosure could prejudice an agency's ability to obtain confidential information favours non-disclosure under the FOI Act.<sup>24</sup>
104. The effect on the public interest, which it is submitted will flow from disclosure, is identical to that which is said will harm intergovernmental relations. I therefore considered the public interest in preventing prejudice to intergovernmental relations as the factor which I should consider weighing in respect of this reasonable expectation.

#### Deliberative process of government

105. A reasonable expectation that disclosure could prejudice a deliberative process of government favours non-disclosure under the FOI Act.<sup>25</sup>
106. In my draft consideration, my view was that I was not satisfied that this factor is applicable.
107. In response to my draft consideration, the AHD submitted that 'the government' referred to in the FOI Act is the ACT Government. It argued that because the ACT Government is not mentioned in the information at issue, the information could not reasonably be expected to enhance the government's accountability. I accept that 'the government' is indeed a reference to the ACT Government. Similarly, I consider that the relevant government is the ACT Government and its deliberative process.
108. The AHD submitted that disclosure could prejudice the free flow of information, which could in turn prejudice the deliberative process of the ACT Government. I therefore considered the factors of intergovernmental relations and agency's ability to obtain confidential information and weighed them. I therefore do not consider that any additional weight should be given to this factor because the factual expectation relied upon is the same as I have already accepted in considering previous factors.

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<sup>24</sup> Schedule 2, s 2.2(a)(xii) of the FOI Act.

<sup>25</sup> Schedule 2, s 2.2(a)(xvi) of the FOI Act.

### *Balancing the factors*

109. As required under s 17, I identified the relevant public interest factors weighing in favour of, and against, disclosure. Below, I set out my balancing of these factors.
110. In this review, I found that the information at issue could reasonably be expected to promote five public interest factors. I found that disclosure could promote open discussion of public affairs and enhance the government's accountability to a moderate degree. I found that disclosure could contribute to positive and informed debate on a matter of public interest to a moderate degree. I found that disclosure could allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official to a moderate degree. I found that disclosure could reveal the reason for a government decision and any background or contextual information that informed the decision to a considerable degree. I found that disclosure could reveal health risks or measures relating to public health and safety to a considerable degree.
111. On the other hand, I considered that I should afford considerable weight to the public interest factor which seeks to prevent prejudice to intergovernmental relations.
112. Having regard to the submissions of the parties, including the submissions of Ms Cross and Ms Croke and the sworn evidence of Ms Street, as well as the annotated copy of the information at issue prepared by the CDoH and the VDoH, I considered that intergovernmental relations should be the decisive factor with respect to most of the information at issue. I decided to afford this factor overriding weight in relation to the redactions proposed by the CDoH and the VDoH, with some exceptions. The exceptions are redactions proposed by the VDoH at p 41, 60, 71-279, which rely on irrelevant factors relating to misinterpretation, misunderstanding, confusion or provoke unnecessary debate.

### **Conclusion**

113. My decision is to **vary** the decision of the AHD under s 82(2)(b) of the FOI Act.

114. Information in document 38 is taken to be contrary to the public interest to disclose under Schedule 1, s 1.2 of the FOI Act.
115. Access should be refused to the entirety of documents 7, 57, 58, 59, 60, 61 and 67 because disclosing them could reasonably be expected to prejudice intergovernmental relations to a considerable degree.
116. Access should also be refused to the information which the CDoH and the VDoH proposed redacting in the annotated copy of the information at issue given to me, except for the following sections, which should be disclosed to the applicant:
- Redactions proposed by the VDoH in the annotated documents at p 41 (except for the top line), 60 and 71-279.
  - Redactions proposed in the annotated documents on pages 6, 16, 284 and 291 that refer to 'identifying information', as there is no public interest factor to support the proposed redactions.

Michael Manthorpe PSM  
ACT Ombudsman  
29 July 2021