

***Giulia Jones and Chief Minister, Treasury and Economic Development
Directorate [2021] ACTOFOI 5 (19 May 2021)***

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

Application Number	AFOI-RR/21/10001
Decision Reference	[2021] ACTOFOI 5
Applicant	Giulia Jones MLA
Respondent	Chief Minister, Treasury and Economic Development Directorate
Decision Date	19 May 2021
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – cabinet information

Decision

1. Under s 82(2)(a) of the *Freedom of Information Act 2016 (FOI Act)*, I confirm the decision of the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**), dated 9 December 2020.

Background of Ombudsman review

2. On 11 November 2020, the applicant applied to the respondent for access to:

the final copies of the incoming minister briefs following the 2020 ACT Election. This request includes, but is not limited to, briefs prepared for potential Liberal ministers.
3. On 9 December 2020, CMTEDD advised the applicant that it had identified 100 documents as falling within the scope of the access application. The respondent gave the applicant access to

two documents in full, 50 documents in part and refused access to 48 documents in full.

In making its decision, CMTEDD stated that the documents contain information that would, on balance, be contrary to the public interest to disclose under Schedule 1, 1.6 of the FOI Act or under the test set out in section 17 of the FOI Act.

4. On 5 January 2021, the applicant sought Ombudsman review of the respondent's decision under s 73 of the FOI Act.
5. On 14 April 2021, I provided my preliminary views about the respondent's decision to the parties in a draft consideration.
6. On 22 April 2021, the applicant advised they would not be making any further submissions in response to my draft consideration.
7. On 23 April 2021, the respondent advised they accepted my draft consideration and would not be making any further submissions.

Information at issue

8. In their request for review, the applicant provides:

I am seeking a review of the decision to redact documents 51 and 52, which contain information about election commitments made during the campaign. I am seeking a review of this decision because I believe [the decision maker] erred in finding that these documents required a near full redaction.

I do not believe that the redactions of documents 51 and 52, containing information about election commitments made during the election campaign, are necessary. These election commitments are public commitments made by candidates and their parties during their election campaigns.

9. Accordingly, the information at issue in this Ombudsman review is the information that was withheld from disclosure in documents 51 and 52 by virtue of CMTEDD's decision.
10. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information at issue would be contrary to the public interest.
11. In making my decision, I 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(1)(a)

- relevant case law, including *Parnell & Dreyfus and Attorney-General's Department*,¹ and *Stanway and Queensland Police Service*²
- the respondent's FOI processing file relating to the access application
- an unedited copy of the information at issue.

Relevant law

12. 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.
13. 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.
14. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information sought because the information being sought is contrary to the public interest information.
15. Section 50 of the FOI Act applies if an access application is made for government 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 contrary to the public interest information has been deleted.
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.
17. Schedule 1 of the FOI Act sets out categories of information that are taken to be contrary to the public interest to disclose.

¹ [2014] AICmr 71.

² [2017] QICmr 22.

The contentions of the parties

18. In its decision notice, the respondent said:

Documents 51 and 52 contain information about election commitments made during the election campaign... In reviewing these documents, I consider they contain information which is contrary to the public interest under Schedule 1, section 1.6 of the Act as this information was provided with the intention it would be presented to Cabinet. Section 1.6 of Schedule 1 of the Act allows material prepared for consideration by Cabinet a later date to be withheld from release.

...

While commitments made during the election are publicly available, documents 51 and 52 contain additional information about each commitment including costs, risks, budget and implementation options which is not publicly known. Release of this information would therefore impact the deliberative functions of Cabinet.

19. In their application for Ombudsman review, the applicant said:

Policy costs, risks, budget and implementation options are discussed at length within parties' policy submissions that have been submitted to CMTEED under the *Election Commitments Costings Act 2012*. The public, which voted on these election commitments, has a right to know whether the briefs contain information which challenge, question or confirm the policy costs, risks, budget and implementation options contained within these publicly committed proposals.

...

I do not believe these documents should be prevented from release... unless there has been substantive Cabinet debate or deliberation on these briefs that would prevent release, rather than these briefs merely being marked as intended for Cabinet. If documents 51 and 52 have not been subject to substantive Cabinet debate or deliberation, then they ought to be released on public interest grounds.

20. These submissions are discussed in more detail below.

Considerations

21. I carefully considered an unedited copy of the information at issue together with the information provided by the applicant and respondent.

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

22. The respondent found that the information sought is contrary to the public interest information to disclose under Schedule 1 of the FOI Act.

23. The applicant contends the information at issue is not contrary to the public interest information and should be disclosed on public interest grounds.
24. Information mentioned in Schedule 1 is taken to be contrary to the public interest to disclose unless the information identifies corruption or the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law.
25. I reviewed the information at issue, and I am satisfied it does not fall under the exceptions outlined in Schedule 1. The information at issue does not identify corruption, an offence, or misuse of power in a law enforcement investigation. As a result, provisions of Schedule 1 of the FOI Act may be relevant to the information at issue. I will now proceed to consider whether the information at issue is contrary to the public interest information to disclose under Schedule 1 of the FOI Act.

Cabinet information

26. Cabinet information is defined in Schedule 1, s 1.6 of the FOI Act as:
 - (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 (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).
27. CMTEDD submits:

Documents 51 and 52 are comprised of information about electoral commitments including projected costs, risks, potential budget and implementation options which is not publicly known and were prepared as a bureaucratic assessment of the election commitments and provided as advice for the consideration of Cabinet at a later date.
28. While a more detailed submission on each election promise is likely to be developed for consideration by Cabinet, the information contained in documents 51 and 52 are a precis of the key issues that will be included in each submission. It is therefore possible that Cabinet could consider an issue based purely on the information contained in these documents. The key issue

I must consider in this case is whether the relevant intention (that the documents be submitted to Cabinet), existed at the time the documents were created.

29. CMTEDD notes the documents were prepared on a Cabinet-in-Confidence template, indicating at the time of creation it was intended that the information would form part of Cabinet deliberations.

30. In their application for Ombudsman review, the applicant submitted:

I note that in his decision, (decision maker) stated that these briefs have been prepared “with the intention it would be presented to Cabinet” and therefore decided not to grant access. I do not believe these documents should be prevented from release for this reason unless there has been substantive cabinet debate or deliberation on these briefs that would prevent release, rather than these briefs merely being marked as intended for Cabinet. If documents 51 and 52 have not been subject to substantive cabinet debate or deliberation, then they ought to be released on public interest grounds.

31. The applicant contends that unless there has been a substantive Cabinet debate or deliberation on the documents, disclosure should not be restricted under the Cabinet exemption. I note that marking documents as ‘Cabinet’ is not a determinative factor. In this case, however, having reviewed a copy of the documents at issue, I consider the substantive nature of the material demonstrates a forthcoming consideration by Cabinet.

32. I refer to the wording of s 1.6(1)(1)(a) which states ‘or that a minister proposes to submit, to Cabinet for its consideration and that *was brought into existence for that purpose*’ (emphasis added). Whether the intention was for the information to be submitted to Cabinet is a question of fact to be determined by the decision-maker. I considered CMTEDD’s submissions, including that there was a reasonable possibility Cabinet would have considered the specific information in the documents.

33. In *Stanway and Queensland Police Service*,³ the Assistant Information Commissioner, held that whilst the relevant intention would normally need to be that of the Minister, where there is an agency process for preparing information for a Minister to submit for Cabinet consideration, information prepared in accordance with that process will have been brought into existence for the purpose of Cabinet consideration. In my view, the documents in this matter were prepared

³ [2017] QICmr 22 at [40].

using such an agency process and were brought into existence for the purpose of consideration by Cabinet.

34. Accordingly, I do not accept the applicant's contention that the documents should be released on the basis there was no substantive deliberation by Cabinet of the documents.
35. To that end, I consider the documents are Cabinet documents for the purposes of Schedule 1, s 1.6 of the FOI Act.
36. Schedule 1, s 1.6(2) states the exemption for Cabinet Information does not apply to purely factual information. The respondent states:

In the case of *Parnell & Dreyfus and Attorney-General's Department*,⁴ the Australian Information Commissioner stated that 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 in such a manner that it is impractical to separate it from the other content. The decision maker considered that the purely factual information within the (sic) documents 51 and 52 was an integral part of the deliberative content and the documents would be robbed of their essential meaning without incorporation of this material.

37. I agree with the respondent, insofar as the purely factual material within the documents is an integral part of the deliberative material and the value of the documents would be severely hindered without it. Furthermore, as identified in *Parnell & Dreyfus and Attorney-General's Department*, the factual material within the documents is so intertwined with any remaining material that it would be impractical to separate. As such, I do not consider any factual material to itself be exempt from the Cabinet exemption under Schedule 1, s 1.6(2) of the FOI Act.
38. As no exception applies, my view is that the information at issue is exempt from disclosure under Schedule 1, 1.6(a) of the FOI Act.
39. On 20 January 2021, CMTEDD submitted that disclosure of the information at issue would also be contrary to the public interest as disclosure would prejudice the deliberative process of government (s 2.2 xvi) of the FOI Act.
40. As I have already determined the information is Cabinet information for the purposes of Schedule 1, s 1.6(1)(a) of the FOI Act, I am not required to consider whether any Schedule 2 factors apply.

⁴ [2014] AICmr 71.

Conclusion

41. Under **s 82(2)(a)** of the FOI Act, I **confirm** the respondent's decision to refuse access to the information at issue under **s 35(1)(c)** of the FOI Act.

Michael Manthorpe PSM
ACT Ombudsman
19 May 2021