

ClubsACT and ACT Health Directorate [2021] ACTOFOI 3 (9 April 2021)**Decision and reasons for decision of ACT Ombudsman****Michael Manthorpe PSM**

Application Number	AFOI-RR/20/10035
Decision Reference	[2021] ACTOFOI 3
Applicant	ClubsACT
Respondent	ACT Health Directorate
Decision Date	9 April 2021
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – promote open discussion of public affairs and enhance the government’s accountability – reveal the reason for a government decision or any background or contextual information that informed the decision – individual’s right to privacy – trade secrets, business affairs and research – intergovernmental relations – a deliberative process of government

Decision

1. Under s **82(2)(b)** of the *Freedom of Information Act 2016 (ACT)*, I **vary** the decision made by the ACT Health Directorate (**Health**) on 21 July 2020 in respect of the applicant’s access application.

Background of Ombudsman review

2. On 29 May 2020, the applicant applied to Health for access to:

For the previous six weeks [commencing 17 April 2020],

- (a) all correspondence, emails, briefs, and written communication from Dr Kerryn Coleman, Chief Health Officer, ACT Health (or an Executive Assistant or Officer) to the Chief Minister for Health relating to restrictions on gambling during Covid-19.
 - (b) all Covid-19 related re-opening plans/submissions forwarded or presented to ACT Health made by Casino Canberra, ClubsACT, Canberra Community Clubs, the Australian Hotels Association and the TAB and any considerations/advice from ACT Health provided to those organisations or a relevant portfolio Minister e.g. the Attorney-General, Chief Minister or Minister for Health.
 - (c) any advice provided to ACT Health from the Australian Health Protection Principle Committee in relation to gambling.
3. On 21 July 2020, Health decided to grant partial access to all twelve documents it held within the scope of the access application.
4. In making its decision to refuse access to some of the information contained in each of the twelve documents, Health relied on:
 - Schedule 2, s 2.2(a)(ii): individual's right to privacy under the Human Rights Act
 - Schedule 2, s 2.2(a)(x) intergovernmental relations
 - Schedule 2, s 2.2(a)(xi) trade secrets and business affairs
 - Schedule 2, s 2.2(a)(xiii) competitive commercial activities of an agency
5. On 22 July 2020, the applicant applied for an Ombudsman review of Health's decision under s 73 of the FOI Act.
6. I provided my preliminary view to the parties in my draft consideration of 10 December 2020. My preliminary view was that access should be given to information that was refused on the basis of prejudice to individual privacy and some of the information about Tabcorp venue sizes which I did not agree could reasonably be expected to prejudice the trade secrets, business affairs or research of a person as Health had found.
7. I received Health's response to my draft consideration on 17 December 2020. Health did not make any further submissions in response and indicated it accepted my view as set out in my draft consideration.
8. My Office contacted ClubsACT on 6 January 2021, 11 January 2021 and 20 January 2021 to ensure it was aware it had an opportunity to make further submissions and that I would proceed to make my final decision in the absence of a response.
9. My Office received a response from Mr Gwyn Rees, CEO of ClubsACT on 12 January 2020, indicating his intention to make submissions, but I have not received any further submissions as at the date of my decision. Accordingly, I have proceeded to make my final decision and it is substantially consistent with my draft consideration. I have, however,

reconsidered the applicability of the intergovernmental relations and deliberative process of government factors which weigh, to varying degrees, against disclosure.

Information at issue

10. The information at issue in this review is all the information Health redacted from the twelve documents. Relevantly:
 - **Document 1:** one email and an attached summary of public health directions.
 - **Document 2:** two emails and attachments including a brief for the Chief Minister of the ACT, with information relating to community compliance with social distancing rules and information relating to the economic impact of public health measures.
 - **Document 3:** one email from the Australian Health Protection Principal Committee (AHPPC) to the ACT's Chief Medical Officer, one email from the ACT's Chief Medical Officer to the ACT Minister of Health and two attachments relating to recommendations to be considered by the National Cabinet.
 - **Document 4:** one email which refers to an agenda item for a National Cabinet meeting.
 - **Document 5:** an email from the AHPPC and an attached submission to the National Cabinet.
 - **Document 6:** an email from the CEO of ClubsACT and an attachment regarding proposed arrangements for the operation of gambling facilities.
 - **Document 7:** an email from the ACT Attorney-General to the ACT Minister of Health forwarding correspondence from Tabcorp to the ACT Government.
 - **Documents 8 to 12:** emails from the AHPPC sent to the ACT's Chief Medical Officer and an attached submission to the National Cabinet.
11. Documents 2, 4, 6 and 12 contain redactions that Health advised are personal information, the disclosure of which could reasonably be expected to prejudice an individual's right to privacy under the *Human Rights Act 2004* (ACT) (Human Rights Act).
12. Documents 1, 3, 4 and 5 contain redactions that Health decided could reasonably be expected to prejudice intergovernmental relations.
13. Document 7 contains redactions that Health consider would prejudice the trade secrets, business affairs or research of a person.
14. The issue to be decided in this review is whether the information that Health refused to give access to is in fact contrary to the public interest information.
15. In deciding this matter, I had regard to:

- the applicant's access application and review application
- Health's decision notice
- the FOI Act, in particular ss 7, 9, 17, 50, Schedule 2, s 2.1 and 2.2
- Health's FOI processing file in relation to the access application
- an unedited copy of the information at issue
- relevant cases, including: *Taggart and Queensland Police Service*,¹ *MBA Group Training Limited and Chief Minister, Treasury and Economic Development Directorate*,² *Peter Gerard Cannon and Australian Quality Egg Farms Limited*,³ *Cockroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd*,⁴ *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate*,⁵ *Queensland Newspapers and Department of Justice and Attorney-General; Carmody (Third Party)*,⁶ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs*,⁷ and 'VT' and *Commonwealth Ombudsman*.⁸

Relevant law

20. 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.
21. 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 s 17.
22. The public interest test set out in s 17 involves a process of balancing public interest factors favouring disclosure against factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.

¹ [2015] QICmr 16.

² [2020] ACTOFOI 19.

³ (1994) 1 QAR 491.

⁴ (1986) 64 ALR 97.

⁵ [2018] ACTOFOI 3.

⁶ [2016] QICmr 23.

⁷ (1993) 1 QAR 60.

⁸ [2020] AICmr 51.

23. Section 50 of the FOI Act provides that, where practicable, access to information within a record containing some contrary to the public interest information should be given with contrary to the public interest information deleted.
24. Section 72 of the FOI Act provides that a party seeking to prevent disclosure of government information bears the onus of establishing that information is contrary to the public interest information.
25. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

The contentions of the parties

26. In its decision notice, Health said:

The information that has been redacted in documents at reference 2-12 are related to a staff contact details of non-government third parties. On balance, I determined the information identified is contrary to the public interest and I have decided not to disclose this information.

Document at reference 7 includes information related to business affairs and competitive commercial activity of a non-government third party and I determined the information identified is contrary to the public interest and I have decided not to disclose this information.

Document at reference 1, 3-5 and 8-12 include information that was considered as part of a deliberative process of the Australian Health Protection Principal Committee and the release of this information would prejudice the intergovernmental relationship between the ACT Government and the Department of Health.

27. The applicant did not make submissions relating to particular sections of the documents, but contended that, broadly, the public interest was best-served by access to government information illuminating the reasons for government decision-making and enhancing transparency where decisions are made in relation to public health issues.
28. I have addressed these submissions in greater detail in my considerations.

Considerations

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

29. Neither party to this Ombudsman review submitted that the information sought contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the

FOI Act. Therefore, for the information at issue to be contrary to the public interest information disclosure, it must, on balance, be contrary to the public interest under the test set out in s 17 of the FOI Act.

Public interest test

30. To determine whether disclosure is contrary to the public interest, s 17 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

31. I do not consider any irrelevant factors I am prohibited from considering arise in this review.⁹

Factors favouring disclosure

32. Schedule 2, 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure.

33. I have decided that two of the factors favouring disclosure listed in Schedule 2, 2.1 of the FOI Act are relevant.

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

34. Schedule 2, 2.1(a)(i) provides that a factor favouring the disclosure is if the information would promote open discussion of public affairs and enhance the government's accountability.

35. Both parties to this review advised this a relevant factor favouring disclosure in this review.

⁹ Section 17(2) of the FOI Act.

36. I agree it is a relevant factor. I note there has been discussion of the impact of public health restrictions on gaming facilities in the ACT and coverage of the issue in the media,¹⁰ and the disclosure of the information at issue could reasonably be expected to promote and better inform this discussion.

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

37. Schedule 2, 2.1(a)(vii) provides that a factor favouring disclosure is if the information would reveal the reason for a government decision and any background or contextual information that informed the decision.

38. Both parties to this review advised this a relevant factor favouring disclosure in this review. I agree this is a relevant factor, as the information at issue provides background and contextual information relating to the ACT Government's decision to impose restrictions on gambling venues, including ClubsACT venues.

Pro-disclosure bias

39. The FOI Act also requires that I observe a pro-disclosure bias in administering the Act. This bias reflects the importance of public access to government information for the proper working of representative democracy.¹¹ This concept is promoted through the objects of the FOI Act.¹²

40. For these reasons, I am satisfied that disclosure of the information at issue could reasonably be expected to promote the objects of the FOI Act and the two relevant factors favouring disclosure in this review.

Factors favouring nondisclosure

41. Four factors favouring nondisclosure are relevant in this review. Disclosing the information at issue could reasonably be expected to prejudice an individual's right to privacy, the trade secrets, business affairs and research of an agency or person and a deliberative process of government. I have also considered the applicability of the intergovernmental relations factor.

An individual's right to privacy

¹⁰ See for example reporting in the [Canberra Times](#), by the [Australian Broadcasting Corporation](#) and on the [CityNews](#) website.

¹¹ Section 17 of the FOI Act.

¹² Section 6(b) of the FOI Act.

42. Finding that disclosure could reasonably be expected to prejudice an individual's right to privacy under the *Human Rights Act 2004* (ACT) (Human Rights Act) weighs against disclosure under the FOI Act.

43. Section 12 of the Human Rights Act protects individuals' privacy insofar as:

Everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.¹³

44. Health made redactions in all documents (except for document 1) which relied on it finding that disclosure could reasonably be expected to prejudice an individual's right to privacy.

45. Documents 2, 4, 6, 7, 8, 9, 10, 11 and 12 contain personal information of individuals including:

- mobile numbers of ACT Government staff
- names and phone numbers of non-government staff, and
- information about members of the AHPPC.

46. In *Taggart and Queensland Police Service*, the Queensland Information Commissioner found that disclosing names and day-to-day work duties of public servants could not reasonably be expected to prejudice an individual's right to privacy.¹⁴ Individuals are acting in the public rather than the private sphere when they are employed as public servants.

47. However, disclosing a person's mobile telephone number could reasonably be expected to enable intrusion upon their privacy, for instance by contacting them outside their place of work. I therefore accept that the factor in Schedule 2, s 2.2(a)(ii) weighs against the disclosure of mobile telephone numbers.

48. While *Taggart and Queensland Police Service* was decided having regard to public employees, I do not accept that disclosing the names of private individuals inherently prejudices their right to privacy under the Human Rights Act. For instance, a private individual who is identifiable to the public at large or a section thereof will probably not suffer prejudice to their privacy merely by disclosure of their name and place of employment being disclosed. In *MBA Group Training Ltd and Chief Minister, Treasury and Economic Development Directorate*, I decided that an employee of MBA Group Training whose day-to-day duties involved promoting apprenticeship opportunities to members of the public could not reasonably be expected to experience

¹³ Section 12 of the Human Rights Act.

¹⁴ [2015] QICmr 16 at [17].

interference with their right to privacy merely by having their name and employment by MBA Group Training published in documents subject to an access application.¹⁵

49. I do not think it reasonable to expect that Tabcorp employees responsible for liaising with government on social distancing restrictions could reasonably be expected to have their right to privacy interfered with because their personal information is disclosed. By participating in discussion with the government about the efficacy of restrictions and risk management by gaming venues during the Covid-19 pandemic, I consider those individuals are participating in a public matter that is outside the private sphere.
50. The identities of recipients of AHPPC emails who are not ACT government officials are out of scope and should therefore be redacted, so I do not need to consider whether this factor applies to their names.

Trade secrets and business affairs

51. Finding that disclosure of information could reasonably be expected to prejudice the trade secrets or business affairs of Tabcorp would weigh against the disclosure of that information under Schedule 2, s 2.2(a)(xi) of the FOI Act.
52. In previous decisions, I interpreted the term ‘trade secrets’ to apply when:
- A substantial element of secrecy... exist[s], so that, except by the use of improper means, there would be difficulty in acquiring the information.¹⁶
53. In previous decisions, the term ‘business affairs’ has been interpreted to mean:
- the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs.¹⁷
54. Health submitted this factor applies to document 7. Document 7 comprises an email from the ACT Attorney-General to the ACT Health Minister. This includes an attachment of correspondence from Tabcorp to the ACT Government titled ‘Tabcorp’s protocols and plan for the safe re-opening of ACT TAB agencies.’
55. The information at issue, being the redacted sections of this document, can be divided into two categories. The first category is information relating to the size of Tabcorp venues. The second

¹⁵ *MBA Group Training Ltd and Chief Minister, Treasury and Economic Development Directorate* [2020] ACTOFOI 19 at [65].

¹⁶ *Peter Gerard Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491 at [43], citing *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37.

¹⁷ *Cockroft and Attorney-General’s Department and Australian Iron Steel Pty Ltd* (1986) 64 ALR 97, 106.

category is information about Tabcorp's financial arrangements, strategies, perceptions of the gambling industry and related industries and employee duties in the management of Tabcorp venues.

56. Regarding the first category, I am not satisfied the disclosure of information about the size and layout of Tabcorp venues could reasonably be expected to prejudice Tabcorp's trade secrets or business affairs. Tabcorp is a third party which Health consulted under s 38 of the FOI Act. I reviewed Tabcorp's submissions to Health. I am not satisfied that disclosing information about the size and capacity of Tabcorp venues would disadvantage Tabcorp over its competitors. I consider the size and layout of venues may be ascertained by any person attending a venue. The features of a venue are too overt to be a trade secret. Insofar as they may relate to the money-making enterprise, I am not satisfied that disclosure of this information would prejudice Tabcorp.
57. The second category of information includes Tabcorp's observations about the gambling market, revenues, retail venues, fee arrangements with pubs and clubs, as well as its security arrangements. I find that disclosure of this information could potentially prejudice Tabcorp's money-making affairs.
58. I find the trade secrets and business affairs factor is relevant to the redacted sections of document 7. I afford it significant weight, as it relates to the second category of information, being information that could potentially prejudice Tabcorp's money-making affairs. However, I find this factor does not apply to the first category of information, being information relating to the physical size and layout of Tabcorp venues.

Intergovernmental relations

59. A reasonable expectation that disclosure could prejudice intergovernmental relations weighs against disclosure.
60. In previous decisions,¹⁸ I have interpreted this factor to mean:
- the public interest in protecting confidential communications between State and another government where disclosure could reasonably be expected to prejudice relations between the two governments.¹⁹
61. Health submitted prejudice to intergovernmental relations could reasonably be expected to flow from the disclosure of documents 3, 4, 5 and 8, 9, 10, 11 and 12.

¹⁸ *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2018] ACTOFOI 3 at [30].

¹⁹ *Queensland Newspapers and Department of Justice and Attorney-General; Carmody (Third Party)* [2016] QICmr 23 [220].

62. I considered the information at issue and the response provided by the Commonwealth Department of Health (the Department), a third party consulted about the information at issue.
63. The Department responded to this invitation with the view that:
- The documents contain information which, if disclosed, would prejudice intergovernmental relations. The release of this information could reasonably be expected to cause damage... as the information would disclose confidential communications... Release of the documents could also adversely affect the ability for the ACT and Commonwealth to participation (sic) in important channels like the AHPPC, and to negotiate and communicate in the future.
64. The Department submitted the documents they were consulted about were drafted for submission to National Cabinet on 6 May 2020. The Department's assertion appears to be that disclosing the information at issue in documents 3, 4, 5, 8, 9, 10, 11 and 12 could effectively disclose confidential communications between the Commonwealth and the ACT Government and this could detrimentally affect their ability to negotiate and communicate in future.
65. My preliminary view was to accept this assertion and afford considerable weight to this factor in relation to documents 8, 9, 10, 11 and 12. I did not consider it should be afforded weight in relation to documents 3, 4 and 5 because the communications are intragovernmental in nature. Given that Health accepted my draft consideration, I am satisfied documents 3, 4 and 5 could not reasonably be expected to prejudice intergovernmental relations.
66. I find the Department's response overstates the effect on the public interest that can reasonably be expected to flow from disclosure. I expect prejudice to flow from disclosure, but I disagree about how much prejudice is reasonable to expect in this matter. I accept that disclosure of the information could reasonably be expected to displease the Commonwealth and in doing so I rely on the evidence before me that the Department objected to disclosure. On the other hand, I do not accept that it is reasonable to expect that the ACT would not be able to participate in the AHPPC in the future or negotiate or communicate with the Commonwealth on other, unrelated matters. On balance, I find it is reasonable for me to expect that disclosure of information in documents 8, 9, 10, 11 and 12 is likely to affect relations between the governments to a moderate extent. Accordingly, I have reduced the amount of weight I have afforded to this factor from the amount of weight I gave it in my draft consideration, in relation to documents 8, 9, 10, 11 and 12. My decision is that I should place more moderate weighting on this factor.

A deliberative process of government

67. Another factor favouring nondisclosure is that information could reasonably be expected to prejudice a deliberative process of government. This factor refers to:

thinking processes- the process of reflection, for example, upon the wisdom or expediency of a proposal, a particular decision or a course of action.²⁰

68. Documents one to five includes communication between the ACT's Chief Medical Officer and ACT Health Minister regarding restrictions on gambling. As these restrictions are one subset of broader restrictions contemplated or implemented by the ACT Government in response to the COVID-19 pandemic, most of the information in these documents is out of scope of the initial access application.

69. Regarding the information that related to gambling restrictions, I accept that the purpose of each communication is to advise the ACT Health Minister on possible courses of action in response to the public health risk posed by the pandemic.

70. I agree with the Australian Information Commissioner's view with respect to deliberative processes of government:

[a] document must be considered in the context in which it was created.²¹

71. In *'VT' and Commonwealth Ombudsman*,²² this reasoning contributed to the Information Commissioner's finding that a document recommending multiple options for the Ombudsman's consideration, but which 'did not constitute the Ombudsman's final view', may fall under the deliberative process factor.

72. The question is whether the disclosure of the information at issue could reasonably be expected to prejudice a deliberative process of the ACT Government. The relevant deliberative process being the ACT's Chief Medical Officer's suggestions on possible courses of action for determination by the ACT Health Minister.

73. Documents 8, 9, 10, 11 and 12 are documents which have come within the scope of the request because they were provided to the ACT Government for consideration and policy advice. They do not constitute the government's final view. I find the information at issue in those documents could therefore reasonably be expected to prejudice the ACT government's deliberative process

²⁰ *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at [28]-[29].

²¹ *'VT' and Commonwealth Ombudsman* [2020] AICmr 51 at [70].

²² *'VT' and Commonwealth Ombudsman* [2020] AICmr 51 at [70].

as it continues to manage and deliberate about the Territory's response to the pandemic. I have decided that such prejudice could reasonably be expected to have a considerable effect on that deliberative process.

Balancing the factors

74. Having identified two public interest factors favouring disclosure and having regard to the pro-disclosure bias that I am required to administer the Act with, I have considered the balancing of the public interest in relation to the information at issue.
75. In this review, I have identified two public interest factors favouring disclosure and four public interest factors favouring nondisclosure.
76. I note that balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being considered to represent the public interest. My task as the decision-maker is to consider the relative importance and weight of each factor they have identified. The weight given to a factor will depend on the effect that disclosure could reasonably be expected to have on the public interest.
77. The FOI Act also has a pro-disclosure bias, and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side, rather the scales are 'laden in favour of disclosure'.²³

Information that was redacted on the basis of a reasonably expectation of prejudice to an individual's right to privacy

78. The personal information contained in the information at issue could reasonably be expected to promote both factors favouring disclosure. I find I should afford these factors significant weight with respect to the names and work contact details of both public officials and officials of private companies having dealings with the government. I find I should afford this factor little weight with respect to the mobile telephone numbers of individuals, because I do not consider mobile telephone numbers could reasonably be expected to promote open discussion, enhance government's accountability or reveal the reasons for a government decision or any background or contextual information regarding a decision.
79. I afford the protection of an individual's right to privacy little weight with respect to the names and work contact details of public officials and officials of private companies having dealings

²³ Explanatory Statement, [Freedom of Information Bill 2016](#) (ACT) 13.

with the government. The identities of persons providing information to government about gambling venues' abilities to comply with social-distancing restrictions is information the disclosure of which could not reasonably be expected to prejudice the right to privacy those persons enjoy under the Human Rights Act. An open source search identifies relevant individuals as employees of relevant companies, which suggests their names and employers is information already in the public domain.

80. In my discussion of this factor in this review, I pointed out the similarity with my decision in MBA.²⁴ As I afforded no weight to the protection of personal privacy in respect of the individual's name in that review, I do not consider I should afford any weight to the names of individual employees shown to be liaising with government by the information at issue in this review. However, I find that disclosing individuals' mobile telephone numbers could reasonably be expected to prejudice their right not to have their privacy interfered with unlawfully or arbitrarily.
81. For this reason, I find the names and work contact details of all individuals in the information at issue should be disclosed in the public interest, but that all mobile telephone numbers are contrary to the public interest information and should not be disclosed.

Information that was redacted on the basis of a reasonable expectation of prejudice to trade secrets and business affairs

82. I find the information at issue in document 7, relating to the size and layout of Tabcorp venues, could not reasonably be expected to promote the factors favouring disclosure. As I noted, these features are overt and ascertainable by members of the public. I do not afford the factors favouring disclosure any weight in respect of this information.
83. I also do not accept that disclosing the information could reasonably be expected to prejudice Tabcorp's business affairs. Given s 72 places the onus on Tabcorp to demonstrate why this information is contrary to the public interest information and I am not satisfied the onus has been discharged, I propose this information should be disclosed.
84. I have decided the other information at issue in document 7, relating to the gambling market, revenues, fee arrangements and security arrangements of Tabcorp could reasonably be expected to promote the two pro-disclosure factors I have identified to a moderate extent. I therefore afford each factor moderate weight.

²⁴ MBA Group Training Limited and Chief Minister, Treasury and Economic Development Directorate [2020] ACTOFOI 19.

85. However, I also accept that disclosing this information could reasonably be expected to harm Tabcorp's business affairs. Accordingly, I afford greater and overriding weight to the factor favouring nondisclosure in Schedule 2, s 2.2(a)(xi). I propose this information should remain redacted.

Information that was redacted on the basis of a reasonable expectation of prejudice to intergovernmental relations

Documents 1, 3, 4 and 5

86. The information at issue in these documents, could reasonably be expected to promote both public interest factors favouring disclosure which I have identified in this review.

87. As I stated in my preliminary view, I do not find it reasonable for me to expect this information to prejudice intergovernmental relations. Health has not presented additional evidence in response. The documents are *intra*-governmental communications.

88. I do however, find that the information in these documents could reasonably be expected to prejudice a deliberative process of government. I am satisfied that the prejudice could be real and serious, although probably not severe. On balance, I find that the extent to which it could reasonably be expected to prejudice a deliberative process of government means it is contrary to the public interest to disclose.

Documents 8, 9, 10, 11 and 12

89. The information at issue in these documents, could reasonably be expected to promote both public interest factors favouring disclosure, that I have identified in this review.

90. I find that disclosure of the information at issue could reasonably be expected to prejudice a deliberative process of government, by exposing suggested policy approaches put to government for consideration. I consider that I should afford this factor a medium amount of weight.

91. I also accepted that disclosure of the information at issue could reasonably be expected to prejudice intergovernmental relations to a moderate degree. I have decided that the information at issue in documents, 8, 9, 10, 11 and 12 could reasonably be expected to prejudice a deliberative process of government to such a degree that I should afford this factor considerable weight.

92. On balance, I find that the public interest in preventing prejudice to a deliberative process and intergovernmental relations outweighs the public interest factors that I can reasonably expect

disclosure to promote. My decision is that the information at issue in documents 8, 9, 10, 11 and 12 is contrary to the public interest to disclose.

Conclusion

93. Under s **82(2)(b)** of the FOI Act, I **vary** Health's decision to refuse access to the information at issue under s **35(1)(c)** of the FOI Act.
94. The dial-in details on any meeting invitations are out of scope and do not need to be disclosed to the applicant. I have also already determined that the names of other recipients of emails from the AHPPC are out of scope.
95. The applicant should be given access to:
 - information that was refused on the basis of prejudice to an individual's right to privacy, except for any mobile telephone numbers regardless of whom they belong to, and
 - information relating to the physical size and layout of Tabcorp venues.
96. I find that all other refusal of access was correctly decided upon by Health, but that the decisive factor weighing against disclosure is prejudice to a deliberative process of government rather than prejudice to intergovernmental relations.

Michael Manthorpe PSM
ACT Ombudsman
9 April 2021