

‘BU’ and ACT Health Directorate [2022] ACTOFOI 9 (4 November 2022)**Decision and reasons for decision of Senior Assistant Ombudsman, David Fintan**

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| Application Number | AFOI-RR/22/10010 |
| Decision Reference | [2022] ACTOFOI 9 |
| Applicant | ‘BU’ |
| Respondent | ACT Health Directorate |
| Decision Date | 4 November 2022 |
| Catchwords | <i>Freedom of Information Act 2016 (ACT) – deciding access – relationship with Health Records (Privacy and Access) Act 1997 (ACT) – identifying all government information within scope – whether disclosure of information is contrary to the public interest – Cabinet Information – whether information is purely factual – promote open discussion of public affairs and enhance the government’s accountability – contribute to positive and informed debate on important issues or matters of public interest – prejudice intergovernmental relations – prejudice the protection of an individual’s right to privacy or any other right under the Human Rights Act 2004 (ACT)</i> |

Decision

1. For the purpose of s 82 of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. Under s 82(2)(b) of the FOI Act, I **vary** the decision of the ACT Health Directorate (**ACTHD**), dated 16 March 2022.

Background of Ombudsman review

3. On 14 February 2022, the applicant applied under s 30 of the FOI Act to the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) for access to:

'The ACT's own version of NSW's Covid 19 weekly surveillance report. (the ACT version is scant on detailed information) It would include the following information. 1 Jan 2020 to 15 June 2021 (Pre delta) PCR Tests Hospitalised Admitted to ICU Deaths PCR Tests 16 June 2021 to 25 Nov 2021 (Delta) PCR Tests Hospitalised Admitted to ICU Deaths PCR Tests 26 Nov 2021 to 22 Jan 2022 (Omicron) PCR Tests Hospitalised Admitted to ICU Deaths PCR Tests A table with the below information: 3 Doses 2 Doses 1 Dose No dose Under investigation Vaccination Status of Covid 19 cases in the ACT Total Cases of Covid 19 in the ACT Hospitalised (% of total cases) of cases in the ACT Hospitalised and in ICU (% of total cases) of cases in the ACT Death (% of total cases) of cases in the ACT Also I would like access to the age range of the cases who died and whether they died in a hospital and/or aged care facility'.
4. On 15 February 2022, the access application was transferred to ACTHD under s 57 of the FOI Act.
5. On 16 March 2022, ACTHD refused access to 52 documents in their entirety under s 35(1)(c) of the FOI Act.
6. On 7 April 2022, the applicant applied for Ombudsman review of ACTHD decision to refuse access to the documents.
7. On 18 May 2022, ACTHD notified the applicant that 4 additional documents had been found. The ACTHD made a further decision to refuse access to these documents in their entirety under s 35(1)(c) of the FOI Act.¹ The ACTHD provided an amended schedule correcting the dates of the information and excluding an irrelevant document which did not fall within the scope of the request.²
8. On 13 September 2022, the delegate provided their preliminary views about the respondent's decision to the parties in a draft consideration.
9. On 23 September 2022, the applicant accepted the draft consideration and did not provide any additional submissions.
10. On 4 October 2022, the respondent provided submissions in response to the draft consideration. These submissions required careful consideration before making a final decision.

¹ Section 36 of the FOI Act.

² ACTHD decision notice to review applicant dated 18 May 2022.

Information at issue

11. The information the applicant was refused access to in ACTHD's decisions of 16 March 2022 and 18 May 2022 (a total of 56 documents) is the information at issue in this review.
12. Documents 1-56 are reports titled "COVID-19 Public Health Monitoring Report for the Security and Emergency Management Committee" (**SEMC Public Health Report**). I note document 52 is a duplicate of document 22.
13. The issue to be decided in this Ombudsman review is whether the information is 'contrary to the public interest information' for the purpose of the FOI Act.
14. In making my decision, I have had regard to:
 - the applicant's access application and review application
 - the respondent's decision of 16 March 2022 and 18 May 2022 and further submissions received on 3 August 2022 and 4 October 2022
 - the FOI Act, in particular ss 6, 7, 9, 12, 14, 16, 17, 35, 37, 50, 72, Schedule 1 and Schedule 2
 - the *Health Records (Privacy and Access) Act 1997* (ACT) (**Health Records Act**)
 - the Explanatory Memorandum to the Health Records (Privacy and Access) Bill 1997 (**Health Records Bill**)
 - the *Human Rights Act 2004* (ACT) (**Human Rights Act**)
 - the *Information Privacy Act 2014* (ACT) (**Information Privacy Act**)
 - the *Legislation Act 2001* (ACT) (**Legislation Act**)
 - an unedited copy of the information at issue
 - the ACT Cabinet Handbook
 - relevant merits review decisions and case law, including:
 - *Hudson, as agent for Fencray Pty Ltd, and the Department of the Premier, Economic and Trade Development* (1993 S0053, 13 August 1993)
 - *Dreyfus and Secretary Attorney-General's Department (Freedom of Information)* [2015] AATA 962 (14 December 2015)
 - *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 6 (26 February 2019)
 - *William Summers and Department of the Prime Minister and Cabinet (Freedom of information)* [2022] AICmr 59 (12 August 2022)
 - *Jon Stanhope and Environment, Planning and Sustainable Development Directorate* [2021] ACTOFOI 2 (9 April 2021)
 - the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act.

Relevant law

15. Section 7 of the FOI Act gives every person an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.
16. Contrary to the public interest information is defined in s 16 of the FOI Act as:
information—
 - (a) that is taken to be contrary to the public interest to disclose under schedule 1; or
 - (b) the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17
17. The public interest test set out in s 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest. Where necessary, this test requires me to:
 - 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 2.2,
 - 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 would be contrary to the public interest, allow access to the information.
18. Section 35(1)(c) of the FOI Act provides that an access application may be decided by refusing to give access to the information because the requested information is contrary to the public interest information.
19. 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 the contrary to the public interest information has been deleted.
20. Subject to s 35(1)(e), access must be given to the copy and the respondent must tell the applicant the original record contained contrary to the public interest information that has been deleted.

21. 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.
22. Schedule 1 of the FOI Act sets out categories of information taken to be contrary to the public interest information for the purpose of the definition in s 16.
23. Schedule 1 s 1.6 of the FOI Act deals with the category of Cabinet information:

1.6 Cabinet information

(1) Information—

- (a) that has been submitted, or that a Minister proposes to submit, to Cabinet for its consideration and that was brought into existence for that purpose; or
- (b) that is an official record of Cabinet; or
- (c) that is a copy of, or part of, or contains an extract from, information mentioned in paragraph (a) or (b); or
- (d) the disclosure of which would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision).

(2) Subsection (1) does not apply to purely factual information that—

- (a) is mentioned in subsection (1) (a); or
 - (b) is mentioned in subsection (1) (b) or (c) and is a copy of, or part of, or contains an extract from, a document mentioned in subsection (1) (a);
- unless the disclosure of the information would involve the disclosure of a deliberation or decision of Cabinet and the fact of the deliberation or decision has not been officially published.

(3) In this section:

Cabinet includes a Cabinet committee or subcommittee.

24. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

The parties' submissions

25. The ACTHD decision notice dated 16 March 2022 said:

I have decided to refuse access to 52 documents. These documents are wholly comprised of information classified as Cabinet documents, and under Schedule 1.6 (1) Cabinet Information, they are taken to be contrary to the public interest to release. Schedule 1.6(1) provides that Cabinet Information is information that:

- Schedule 1.6 (1)(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; and
- Schedule 1.6 (1)(b) that is an official record of Cabinet; and
- Schedule 1.6 (1)(d) the disclosure of which would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision).

The information sought, officially titled 'COVID-19 Public Health Monitoring Report for SEMC', have been prepared for the Security and Emergency Management Committee (SEMC) to monitor the COVID-19 situation in the ACT and take necessary actions where required. The SEMC is a committee of Cabinet, and therefore considered as Cabinet under *Schedule 1.6 (3) Cabinet includes a Cabinet committee or subcommittee*. As such, these documents are classified as Cabinet documents for the purpose of all subsections of Schedule 1.6.

26. The ACTHD decision notice dated 18 May 2022 said:

Following the amended schedule, I have decided to refuse access to 56 documents. These documents are wholly comprised of information classified as Cabinet documents, and under Schedule 1.6 (1) Cabinet Information, they are taken to be contrary to the public interest to release.

These reports identified as part of this application have been developed for the sole purpose of assisting Cabinet in decision making in relation to the ongoing management of the COVID-19 pandemic. These reports include detailed epidemiological data, which in many cases includes small numbers, which may be potentially identifiable if publicly released.

ACTHD has released shorter data reports daily and weekly throughout the pandemic, and these have been made available on the COVID-19 website. I also note that, since your original application, ACTHD has commenced publishing detailed weekly epidemiological information.

Privacy protection obligations are imposed on ACTHD and its personnel by the ACT Human Rights Act 2004, the ACT's Privacy Principles, and the Health Records (Privacy and Access) Act 1997. The Privacy Principles contained within Schedule 1 of the Health Records Act sets out limits to the use and disclosure of personal health information, and a key obligation imposed by those principles is that personal health information and a person's health status should not be released without the consent of the patient (or a legal guardian).

Staff at ACTHD balance the importance of transparency and the need to provide detailed information to the community with the legal and ethical obligations to respect patient confidentiality. This can sometimes be achieved through the release of de-identified information, but this can be particularly difficult in the ACT due to the Territory's population size and a smaller number of deaths and hospitalisations compared to larger jurisdictions. In particular, data on hospitalisations, vaccination status and deaths can be associated with individuals. ACTHD has carefully balanced these concerns in considering what information can be made publicly available.

27. The applicant's review application said:

I would like to request a review of a decision based by ACT Health NOT to release 52 documents that I believe is wholeheartedly in the public interest to be seen by everyone who wants to see it. ACT Health, who have encouraged the vast majority of people in the ACT to be vaccinated should release how effective vaccination has actually been instead of keeping the information to themselves. An open debate should be actively pursued when civil liberties have been curtailed after we needed only two weeks to 'flatten the curve'.

28. In response to the draft consideration, ACTHD submitted that:

I have reviewed your reasoning and the Directorate supports the redactions proposed by the Ombudsman under Schedule 1 s 1.6(1)(a) and (b) of the FOI Act (non-factual information). However, upon further re-examination of the material, ACT Health has identified further information within the documents not deemed purely factual within the meaning of Schedule 1 s 1.6(2) of the FOI Act. This information includes predictions about future events and statements that could be construed as advice, opinion, or commentary. It is proposed that these sections are redacted as access to this information would be contrary to public interest under Schedule 1 s 1.6 (1)(a) and (b) of the FOI Act.

In addition, the Directorate is also seeking to make further redactions to the documents on the following grounds:

- under Part 2, section 12 of the FOI Act, relating to release of identifying information under the Health Records (Privacy and Access) Act 1997; and
- information relating to data from other jurisdictions not in scope of the original request, the release of which may prejudice intergovernmental relations under Schedule 2.2 (a)(x) of the FOI Act.

29. These submissions are discussed in more detail below.

Preliminary issues

Relationship with Health Records (Privacy and Access) Act 1997

30. The FOI Act does not apply to information in a health record under the Health Records Act.³

31. In response to the draft consideration ACTHD said:

Release of health information

The Directorate is seeking to redact sections of these documents where the information could be considered personally identifiable as per Part 2, section 12 of the Act. The Directorate proposes to redact information relating to case numbers, deaths or other statistics where:

- they have been published alongside demographic details such as age, gender, work or school location or indigenous status, and
- the numbers cited are small enough to be potentially identifiable (< 5), particularly within venues which are attended regularly (eg, schools, childcare centres etc, rather than retail stores).

The Directorate proposes that release of this information would be contrary to Part 2, section 12 of the FOI Act, which states that the FOI Act does not apply to information in a health record under the *Health Records (Privacy and Access) Act 1997*.

32. A health record means any record, or any part of a record, held by a health service and containing personal information; or containing personal health information.⁴

33. The Health Records Act defines personal information as, in relation to a consumer, information about that person where their identity is apparent.⁵ The Explanatory Memorandum to the Health Records Bill clarifies the meaning of 'apparent' in this context – stating personal information is defined as any information about the consumer where he or she **can be identified**⁶ (my emphasis).

34. Personal health information means any personal information relating to the health, an illness, or a disability of the consumer; or collected by a health service in respect of those items.⁷

35. To determine whether the SEMC Public Health Reports contain any information in a health record, I have considered whether it is possible to clearly identify a particular person. An individual's identity will be apparent where it can be determined from the information itself, for example by inclusion of their name, date of birth or residential address.

³ Section 12 of the FOI Act.

⁴ Meaning of 'health record', Dictionary, Health Records Act.

⁵ Meaning of 'personal information', Dictionary, Health Records Act.

⁶ Explanatory Memorandum to the Health Records Bill.

⁷ Meaning of 'personal health information', Dictionary, Health Records Act.

36. I accept that parts of the information at issue is about the health and illness of individuals, held in ACTHD records. Further, I accept it is possible an individual's identity could be reasonably ascertained from the information, and I have considered this issue further below in applying the public interest test.
37. However, I am not satisfied that disclosure of this information would involve the disclosure of information in a health record under the Health Records Act, as I am not persuaded the identity of those individuals is apparent from the information.
38. Accordingly, the FOI Act applies to the information at issue.

Scoping

39. In response to the draft consideration, ACTHD said:

The Directorate is seeking to redact aspects of these documents that the Directorate considers out of scope of the original request. The applicant sought access to ACT specific information and statistics. The documents under consideration include statistics relating to the public health situation in other states and territories at different points in time.

40. Having regard to the wording of the access application, I do not consider the information requested is limited to ACT specific information. The applicant sought an ACT report similar to the NSW COVID-19 weekly surveillance reports, including certain data regarding COVID-19 related hospitalisations in the ACT.
41. The access application did not expressly exclude information about COVID-19 in other states and territories, or the exclusion of any comparable data not included in the NSW report. In my view, the request should be interpreted as an application for the reports in their entirety.
42. For this reason, I find that information relating to the public health situation in other states and territories contained in the SEMC Public Health Reports falls within the scope of the access application.

Considerations

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

43. ACTHD decided the entirety of the information at issue – that is, all 56 SEMC Public Health Reports – were taken to be contrary to the public interest to disclose because it is Cabinet information under Schedule 1, s 1.6(1)(a), (b) and (d) of the FOI Act.
44. I have identified parts of the information at issue which is taken to be contrary to the public interest to disclose under Schedule 1, s 1.4 of the FOI Act.

45. The FOI Act also contains an exception to Schedule 1, if information identifies corruption, the commission of an offence by a public official, or that a law enforcement investigation has exceeded lawful limits. I am satisfied this exception is not relevant in this matter.

Schedule 1, s 1.6(1)(a) – information submitted or proposed to be submitted to Cabinet

46. Information 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 is taken to be contrary to the public interest to disclose under Schedule 1, s 1.6(1)(a) of the FOI Act.

47. The ACT Cabinet Handbook provides that:⁸

The Security and Emergency Management Committee (SEMC) provides strategic direction to the ACT Government's preparations for emergencies under an all-hazards planning framework. SEMC meets on an 'as required' basis, with security briefings to be provided to Cabinet at least twice a year. SEMC decisions do not require further endorsement by Cabinet. SEMC comprises all ministers and Directors-General. Subject to a relevant item of business being on the SEMC agenda, the following senior officials are normally also in attendance:

- i. the Chief Police Officer, ACT Policing
- ii. the Commissioner of the Emergency Services Agency
- iii. the Chief Health Officer
- iv. senior officials

48. I am satisfied the SEMC, as a Cabinet committee, falls within the definition of Cabinet under Schedule 1, s 1.6(3) of the FOI Act.

49. I note, except in one instance, the SEMC Public Health Reports state the Chief Health Officer (**CHO**) is the author; and the CHO may attend SEMC meetings.⁹ I have also considered that a number of reports contain references to the SEMC (for example, "ACT COVID-19 CASE SEMC Report", "ACT Security and Emergency Management Committee of Cabinet (SEMC) report").

50. In submissions to the Office, ACTHD said:

The SEMC Public Health Reports were submitted to SEMC to inform and discuss the public health emergency response. The SEMC Public Health Reports were only brought into existence to inform SEMC of the current epidemiological situation and discussion on the appropriateness of the public health emergency response and restrictions, and served no other purpose.

51. Based on my examination of the SEMC Public Health Reports, I consider the intention at the time the reports were created was to inform SEMC about the COVID-19 public health emergency noting its role in providing strategic direction on emergency preparation.

⁸ ACT Cabinet Handbook available here: [ACT Cabinet Handbook](#), page 10.

⁹ One SEMC Public Health Report lists Vanessa Johnson as the author of the report (Document 25).

52. Having regard to the nature and content of the SEMC Public Health Reports, I am satisfied they were submitted to SEMC and were brought into existence for consideration by SEMC.
53. Accordingly, I find the SEMC Public Health Reports are Cabinet information within the meaning of Schedule 1, s 1.6(1)(a) of the FOI Act, and therefore “contrary to the public interest information” as defined in s 16 of the FOI Act, subject to any exclusion of “purely factual information” as discussed below.

Schedule 1, s 1.6(1)(b) – official record of Cabinet

54. Information that is an official record of Cabinet is taken to be contrary to the public interest to disclose under Schedule 1, s 1.6(1)(b) of the FOI Act.
55. The term ‘official record of Cabinet’ is not defined in the FOI Act, but this Office considers this term to include Cabinet submissions, briefing notes, agendas, notebooks, minutes, and decisions.¹⁰

56. The ACT Cabinet Handbook provides that:¹¹

Cabinet documents are strictly confidential and are the property of the ACT Government. Confidentiality is protected in the following ways... Cabinet documents (including drafts and attachments) must contain the appropriate Dissemination Limiting Marker (CABINET)...

The DLM CABINET must, at a minimum, be applied to any document including (but not limited to) business lists, minutes, submissions, memoranda and matters without submission that is or has been:

- > submitted or proposed to be submitted to Cabinet
- > official records of Cabinet
- > any other information that would reveal the deliberations or decisions of Cabinet.

57. I have not observed a Cabinet dissemination limiting marker (**DLM**) on the SEMC Public Health Reports. In *Jon Stanhope and Environment, Planning and Sustainable Development Directorate*, the then Ombudsman considered that a DLM is indicative and not determinative; and the absence of a DLM will not disqualify Schedule 1, s 1.6 from applying.¹²
58. I note that Cabinet Decision summaries available on CMTEDD’s open access information webpage indicate that SEMC “...noted the situation update on novel coronavirus (COVID-19) ...”.¹³ As discussed above, I am satisfied the reports were submitted to SEMC and are official records of Cabinet.

¹⁰ [Ombudsman Freedom of Information Guidelines, Considering the Public Interest](#) at 6.9.

¹¹ ACT Cabinet Handbook available here: [ACT Cabinet Handbook](#), page 3 and 28.

¹² *Jon Stanhope and Environment, Planning and Sustainable Development Directorate* [2021] ACTOFOI 2 (9 April 2021) at [31].

¹³ [Cabinet decision summary for the week of 4 May 2020](#), Cabinet date: Tuesday, 5 May 2020, COVID-19 situation update Minute number: 20/215/SEMC.

59. I therefore also find the SEMC Public Health Reports are Cabinet information within the meaning of Schedule 1, s 1.6(1)(b) of the FOI Act (in addition to Schedule 1, s 1.6(1)(a) per paragraph 53 above), and therefore “contrary to the public interest information” as defined in s 16 of the FOI Act, subject to any exclusion of “purely factual information” as discussed below.

Schedule 1, s 1.6(1)(d) – deliberations of Cabinet

60. The disclosure of information which would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision) is taken to be contrary to the public interest to disclose under Schedule 1, s 1.6(1)(d) of the FOI Act.

61. The FOI Guidelines explain:¹⁴

This includes information that would disclose matters that were actively discussed by Cabinet – as opposed to a report or submission that was simply received by Cabinet. As explained by Forgie DP in *Re Toomer*, the deliberations of Cabinet ‘are its thinking processes, be they directed to gathering information, analysing information or discussing strategies’.

62. In *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate*, the then Ombudsman said:¹⁵

The information sought is a standalone document that summarises the processes and results of consultation activities. I accept that Cabinet would be informed by the results of the consultation, and that Cabinet may then deliberate on the options available to it. However, I consider that there is nothing in the information sought, or in CMTEDD’s submissions that indicate that its disclosure would disclose a deliberation or decision of Cabinet.

63. The SEMC Public Health Reports were prepared to inform SEMC about the current epidemiology situation for discussion on the appropriateness of the public health emergency response. However, I am not satisfied disclosure of the SEMC Public Health Reports would automatically reveal any Cabinet deliberations.

64. In *William Summers and Department of the Prime Minister and Cabinet*, when considering the meaning of Cabinet deliberations in the *Freedom of Information Act 1982* (Cth), the Freedom of Information Commissioner said:¹⁶

...The operation of s 34(3) in relation to a document submitted to Cabinet is not attracted simply because the contents of the document can be said to pertain to (in the sense of align with) the subject matter of a Cabinet deliberation. Rather, it must be shown that careful thought and discussion had taken place in Cabinet, and disclosure of the document would reveal those thoughts and discussions.

¹⁴ [Ombudsman Freedom of Information Guidelines, Considering the Public Interest](#) at 6.9.

¹⁵ *Alistair Coe and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 6 (26 February 2019), [31]-[33].

¹⁶ *William Summers and Department of the Prime Minister and Cabinet* (Freedom of information) [2022] AICmr 59 (12 August 2022), para [35].

65. Based on my examination of the information at issue, disclosure of the SEMC Public Health Reports would not reveal information about any consultation, discussion, engagement, consideration, debate, or analysis by Cabinet.
66. The SEMC Public Health Reports do not contain information about Cabinet processes or specific issues for SEMC consideration and deliberation.¹⁷ I consider the information does not incorporate or refer to other Cabinet deliberations or decisions not officially published.
67. My view is Schedule 1, s 1.6(1)(d) of the FOI Act does not apply to the information at issue as disclosure would not reveal any deliberation of Cabinet.

Do the SEMC Public Health Reports contain any “purely factual information” within the meaning of Schedule 1, s 1.6(2) of the FOI Act?

68. Having found the 56 SEMC Public Health Reports is Cabinet information under Schedule 1, s 1.6(1)(a) and (b) of the FOI Act, it is necessary for me to consider whether any of that information is “purely factual information”.
69. Information is not taken to be contrary to the public interest to disclose under Schedule 1 s 1.6(1)(a) or (b) if it is “purely factual information” unless its release would involve the disclosure of a deliberation or decision of Cabinet, and the fact of the deliberation or decision has not been officially published.
70. While the term “purely factual information” is not defined in the FOI Act, the FOI Guidelines explain this would include basic factual information – as opposed to matters of argument, discussion of a matter which is the specific subject of a cabinet submission, advice, or a projection / prediction about future events.¹⁸
71. In *Hudson and Department of the Premier, Economic and Trade Development*, the Queensland Information Commissioner said:¹⁹

My task then is to determine which parts of the matter contained in the Cabinet submission comprise merely factual matter (i.e. that which is only, or purely, or no more than, factual matter), adopting a common sense approach to the task of characterising matter as factual matter or otherwise according to its substantial nature or character...I think it is safe to say that merely factual matter is generally to be distinguished from matter expressing the opinions and recommendations of individual Ministers on policy issues and policy options requiring Cabinet determination. Factual matter which merely provides the factual background, or informs Cabinet of relevant facts, so as to assist its deliberations on policy issues, will generally constitute “merely factual matter”.

¹⁷ *Vicki Dunne and ACT Health Directorate* [2019] ACTOFOI 18 (31 October 2019), para [32].

¹⁸ [Ombudsman Freedom of Information Guidelines, Considering the Public Interest](#) at 6.9.

¹⁹ *Hudson (as agent for Fencray Pty Ltd) and Department of the Premier, Economic and Trade Development* (1993) 1 QAR 123, at [61].

72. In submissions to our Office, ACTHD said:

The FOI Act does not define 'purely factual information' although it is relevant to note that the ACT Legislative Assembly adopted the definition of Cabinet information from the *Freedom of Information Act 1989* (Cth). Of some relevance, the Commonwealth Freedom of Information Guidelines explain:

Purely factual material includes material such as statistical data, surveys and factual studies. A conclusion involving opinion or judgement is not purely factual material. For example, a projection or prediction of a future event would not usually be considered purely factual²⁰

The SEMC Public Health Reports represent the Chief Health Officer's conclusion on the public health situation and include predictions about future events in the modelling. While some of the information may be considered statistical, the Chief Health Officer has prepared the information in such a way as to inform SEMC on the epidemiological situation, inform discussion on the appropriateness of public health emergency response and restrictions, and predictions for the future. The modelling and views expressed within the reports also informed on possible hospital impacts to assist in preparedness.

73. I do not accept ACTHD's submission that the SEMC Public Health Reports contain no purely factual information by virtue of the fact those reports reflect the CHO's conclusion on the public health situation which necessarily involved their opinion or judgement.

74. In *Dreyfus and Secretary Attorney-General's Department*,²¹ the Associate summarised considerations made in *Harris v Australian Broadcasting Corporation & Ors*:²²

The Full Court considered what constitutes 'purely factual material'. Their Honours discussed the difference between deliberative material and a deliberative process and the fact that in the latter case, a factual summary prepared to aid the resolution of a difficult complex question would be within an exemption for a deliberative process. Their Honours concluded that a summary may be classed as purely factual material but may also be of a character as to disclose a process of selection involving opinion, advice or recommendation. Their Honours said that '*a conclusion which involves opinion, advice or recommendation for the purposes of the deliberative process may well prevent material from being purely factual and render it exempt*' (at 155). In that regard, as is pointed out in *Re Chapman* (at 151), the issue may not be able to be determined by reference only to the content of the document but by reference also to the context which formed part of the deliberative or consultative process.

75. I accept parts of the SEMC Public Health Reports include information about modelling and projections concerning COVID-19. I also accept parts of the SEMC Public Health Reports contain advice and commentary of the CHO based on their opinion and interpretation of the public health situation in the ACT.

²⁰ [Freedom of Information Guidelines](#) issued by the Information Commissioner under s 93A of the *Freedom of Information Act 1982* (Cth) at [5.77].

²¹ *Dreyfus and Secretary Attorney-General's Department* (Freedom of Information) [2015] AATA 962 (14 December 2015), at [49].

²² *Harris v Australian Broadcasting Corporation and Ors* [1984] FCA 8.

76. In response to the draft consideration, ACTHD proposed additional deletions to a copy of the SEMC Public Health Reports, being information about predictions of future events; and statements that could be construed as advice, opinion, or commentary. I have considered this submission and ultimately decided in agreement with it.
77. For the purpose of this decision, I find this information is not “purely factual information” within the meaning of Schedule 1, s 1.6(2) of the FOI Act, and therefore is Cabinet information taken to be contrary to the public interest to disclose.
78. A significant proportion of the SEMC Public Health Reports contain statistical epidemiological data which has been subsequently published by ACTHD and CHO,²³ and I consider this statistical information to be “purely factual information” for the purposes of Schedule 1, s 1.6(2).
79. Further, parts of the SEMC Public Health Reports contain factual statements and basic factual information that simply describes or presents a situation or circumstance. I also consider this information to be “purely factual information” for the purposes of Schedule 1, s 1.6(2).
80. Based on my examination of the SEMC Public Health Reports, I do not consider disclosure of this “purely factual information” would reveal Cabinet deliberations or information about any decisions of Cabinet.

Schedule 1, s 1.4 – Sensitive Information

81. Sensitive information is taken to be contrary to the public interest to disclose under Schedule 1, s 1.4, if its disclosure would be unreasonable. The definition of sensitive information used in the FOI Act dictionary is provided for in s 14 of the Information Privacy Act:

sensitive information, in relation to an individual, means personal information that is—

- (a) about the individual's—
 - (i) racial or ethnic origin; or
 - (ii) political opinions; or
 - (iii) membership of a political association; or
 - (iv) religious beliefs or affiliations; or
 - (v) philosophical beliefs; or
 - (vi) membership of a professional or trade association; or
 - (vii) membership of a trade union; or
 - (viii) sexual orientation or practices; or
 - (ix) criminal record; or
- (b) genetic information about the individual; or
- (c) biometric information about the individual that is to be used for the purpose of automated biometric verification or biometric identification; or
- (d) a biometric template that relates to the individual.

²³ See [ACT COVID-19 statistics - COVID-19](#) webpage and [Chief Health Officer Update on Status of Public Health Emergency webpage](#).

82. I am satisfied parts of the SEMC Public Health Reports contain sensitive information about individuals who are reasonably identifiable. To determine whether disclosure of the sensitive information would be unreasonable, I have considered the circumstances in which the information was collected by ACTHD.
83. The Information Privacy Act contains the Territory Privacy Principles (TPP), which govern public sector agencies' collection, management, use and disclosure of personal information.
84. A public sector agency must not collect sensitive information about an individual unless they consent and the information is reasonably necessary for, or directly related to, 1 or more of the agency's functions or activities.²⁴
85. If sensitive information was collected for a particular purpose, the agency must not use or disclose the information for another purpose (secondary purpose), unless the individual provides consent, or another exception applies.²⁵
86. If the individual would reasonably expect the agency to disclose the sensitive information for the secondary purpose, and the secondary purpose is directly related to the primary purpose, the agency can disclose the information²⁶.
87. The sensitive information was collected by ACTHD for the purpose of managing the public health response to COVID-19. I do not consider that a person would reasonably expect their sensitive information to be disclosed to a third party for a purpose unrelated to COVID-19 management.
88. While I do not consider that detriment is unlikely to result from disclosure, the information is not well known or publicly available. In these circumstances I conclude release of the information at issue would involve the unreasonable disclosure of sensitive information.
89. I find that parts of the SEMC Public Health Reports contains sensitive information which would be unreasonable to disclose within the meaning of Schedule 1, s 1.4 of the FOI Act, and therefore this information is "contrary to the public interest information" as defined in s 16 of the FOI Act.

²⁴ Information Privacy Act, Schedule 1, Part 1.2, TPP 3.3(a).

²⁵ Information Privacy Act, Schedule 1, Part 1.3, TPP 6.1.

²⁶ Information Privacy Act, Schedule 1, Part 1.3, TPP 6.2(a)(i).

90. I now consider whether the remaining information – that is, the balance of information in the SEMC Public Health Reports which is not taken to be contrary to the public interest to disclose under Schedule 1 – is contrary to the public interest to disclose.

Public interest test

91. The test set out in s 17 of the FOI Act prescribes the following 5 steps:²⁷

- (a) 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;
- (b) 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 2.2;
- (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
- (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;
- (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.

92. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.

Irrelevant factors

93. In submissions to this Ombudsman review, the applicant explained why they were seeking the information at issue.

94. In conducting the public interest test, I did not have regard to any of the irrelevant factors which a decision-maker is prohibited from considering under s 17(2) of the FOI Act, including the applicant's identity, circumstances, or reason for seeking access to the information.²⁸

Factors favouring disclosure

95. In deciding the access application, ACTHD did not identify any factors favouring disclosure.

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

96. The impact of the COVID-19 public health emergency is a matter of public interest. The ACTHD oversees the Territory's public health system, and the public has a clear interest in ACTHD's strategic management of the health and wellbeing of the community.

²⁷ Section 17(1) of the FOI Act.

²⁸ Section 17(2)(f) of the FOI Act.

97. Disclosing the information prepared by ACTHD for SEMC could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability by revealing information about ACTHD response to COVID-19.
98. I have given significant weight to this factor, noting the substantial interest in the government's accountability in respect of a public health emergency.
99. In respect of the disclosure of the parts of the SEMC Public Health reports that contain certain personal information of individuals, I consider that release would reveal significantly less information about COVID-19 management. Disclosure of this information would not achieve the same level of open discussion or enhancement of the government's accountability. I attribute minor weight to this factor in respect of this information.

Contribute to positive and informed debate on important issues or matters of public interest

100. A reasonable expectation that disclosure of information could contribute to positive and informed debate on important issues or matters of public interest favours disclosure under the FOI Act.²⁹
101. I have identified that this factor is a relevant consideration in this matter as release of information about the COVID-19 situation could facilitate discussion and consideration of the public health emergency and inform debate on public health restrictions and measures.
102. I have given significant weight to this factor having regard to the considerable public interest in the COVID-19 public health response.
103. However, I consider that release of parts of the SEMC Public Health Reports containing certain personal information would not greatly inform debate on these issues, and for this reason I attribute minor weight to this factor in respect of this information.

Pro-disclosure bias

104. In addition to the non-exhaustive factors favouring disclosure listed in Schedule 2, s 2.1, the FOI Act is intended to be administered with a pro-disclosure bias and relevant discretions be exercised as far as possible in favour of disclosing government information.³⁰ This concept is promoted through the objects of the FOI Act.³¹

Factors favouring nondisclosure

²⁹ Schedule 2, section 2.1(a)(ii) of the FOI Act.

³⁰ Section 9 of the FOI Act.

³¹ Section 6 of the FOI Act.

105. The ACTHD decision notice did not identify any factors favouring non-disclosure. In further submissions to this Office, ACTHD said that disclosure of information relating to other jurisdictions may prejudice intergovernmental relations under Schedule 2, s 2.2(a)(x).

Intergovernmental relations

106. A reasonable expectation that disclosure could prejudice intergovernmental relations favours nondisclosure under the FOI Act.³²

107. In response to my draft consideration ACTHD submitted:

Release of this information without prior consultation with other states and territories risks damaging the relationship of the ACT with other state and territory governments, who may be less willing to provide information to the ACT in future, particularly to support Government decision making in relation to future pandemic responses. Schedule 2.2 (a)(x) of the FOI Act lists the possible prejudicing of intergovernmental relations as a factor favouring the nondisclosure of information. The Directorate is therefore proposing to redact all statistics relating to other states and territories.

108. I have considered that the information identified by ACTHD about other states and territories is information made publicly available by those respective governments. I do not consider disclosure of information which is in the public domain is likely to harm or otherwise cause damage to the relationship between Australian governments.

109. I have no evidence before me that the information concerning the COVID-19 situation in other states and territories was received in confidence; or any information which confirms release of this information without agreement would have consequential impacts.

110. In my view, ACTHD has not discharged the onus imposed by s 72 of the FOI Act and established that release of the information could reasonably be expected to prejudice intergovernmental relations.

Information could prejudice the protection of an individual's right to privacy

111. A reasonable expectation that disclosure could prejudice an individual's right to privacy under the Human Rights Act is a factor favouring nondisclosure under the FOI Act.³³ I have identified that this factor applies in relation to part of the SEMC Public Health Reports.

112. Section 12 of the Human Rights Act provides:

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

³² Schedule 2, s 2.2(a)(x) of the FOI Act.

³³ Schedule 2, s 2.2(a)(ii) of the FOI Act.

113. The personal information contained in the SEMC Public Health Reports does not include certain identifying information for example names, date of birth and residential addresses.

114. However, I consider it is possible an individual's identity could be reasonably be ascertained from the residual information because of the context in which the information appears and the inclusion of specific details about the individuals.

115. In considering whether the disclosure of this information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act, relevant matters include any detriment that disclosure may cause, the nature of the information, and the circumstances in which the information was collected.

116. TPP 6.1 provides that an agency must not use or disclose personal information about an individual that was collected for a particular purpose for another purpose (*secondary purpose*) without consent, or unless one of the exceptions in TPP 6.2 or 6.3 apply.

117. TPP 6.2(a) applies if:

The individual would reasonably expect the public sector agency to use or disclose the information for the secondary purpose and the secondary purpose is—

- (i) if the information is sensitive information—directly related to the primary purpose; or
- (ii) if the information is not sensitive information—related to the primary purpose

118. The personal information was collected by ACTHD for the purpose of monitoring and evaluating the COVID-19 situation, including by analysing case clusters, transmission events and hospital admissions. I note this information does not include sensitive information.³⁴

119. In these circumstances, I do not consider that an individual would reasonably expect their personal information to be disclosed to a third party for a purpose unrelated to the management of the COVID-19 public health response.

120. I have identified parts of the SEMC Public Health Reports which would disclose incidental personal information of particular individuals which is unrelated to COVID-19. Having regard to the nature of this information, I consider its disclosure would an arbitrary interference with those individual's privacy. I attribute significant weight to this factor in respect of this information contained in documents 22, 40 and 52.

³⁴ As defined in the Information Privacy Act.

121. Parts of the SEMC Public Health Reports includes COVID-19 incident data and the numbers of cases associated with certain COVID-19 case clusters. Some of this information has been published by ACTHD in COVID-19 updates. I do not consider detriment would result from disclosure noting the limited personal information included. I have given minor weight to this factor in respect of documents 4, 36, 37, 38 and 39.

122. The SEMC Public Health Reports also contains personal information concerning transmission events occurring in schools involving school aged children. I consider this information is not otherwise well known or publicly available; and includes detail about the movement and activities of those individuals. I attribute significant weight to this factor in respect of this information contained in documents 43, 44, 45, 46 and 47.

Balancing the factors

123. In making my decision, I have identified two factors favouring disclosure and one factor favouring non-disclosure in addition to the pro-disclosure bias.

124. I have given significant weight to the two factors favouring disclosure, as release of the information at issue could promote these public interest factors. However, I have attributed minor weight to these factors in respect of the parts of the SEMC Public Health Reports containing personal information.

125. I have considered one factor favouring nondisclosure, in that I have afforded minor weight to the factor concerning the protection of an individual's right to privacy in respect of the personal information included in documents 4, 36, 37, 38 and 39. I have attributed significant weight to this factor in respect of the personal information within documents 22, 40, 43, 44, 45, 46, 47 and 52.

126. 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 in the public interest. The decision-maker's task 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 disclosing the information would have on the public interest.

127. The FOI Act 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'.³⁵

³⁵ [Explanatory Statement, Freedom of Information Bill 2016](#).

128. I am satisfied in respect of certain personal information in documents 22, 40, 43, 44, 45, 46, 47 and 52, that on balance the public interest factors favouring non-disclosure outweigh the public interest factors favouring disclosure.

129. In respect of the remaining information, I am satisfied that, on balance, the public interest factors favouring disclosure outweigh the public interest factors favouring non-disclosure.

Conclusion

130. For the reasons set out above, I have decided to vary ACTHD's decision of 16 March 2022 and 18 May 2022 under s 82(2)(b) of the FOI Act.

131. The following information in the SEMC Public Health Reports is contrary to the public interest information and should be withheld from release:

- Cabinet information, being the advice and opinions of the CHO and information about COVID-19 modelling and projections, under Schedule 1, s 1.6(1)(a) and (b) of the FOI Act.
- Sensitive personal information about an individual which would be unreasonable to disclose under Schedule 1, s 1.4.
- Personal information within documents 22, 40, 43, 44, 45, 46, 47 and 52 in relation to which release would prejudice the protection of an individual's right to privacy under Schedule 2, s 2.2(ii) of the FOI Act.

132. The applicant is to be given access to the remainder of the information at issue.

David Fintan
Senior Assistant Ombudsman

4 November 2022