

Elizabeth Lee MLA and Chief Minister, Treasury and Economic Development Directorate [2022] ACTOFOI 6 (16 September 2022)

Decision and reasons for decision of ACT Ombudsman, Iain Anderson

Application Number	AFOI-RR/22/10007
Decision Reference	[2022] ACTOFOI 6
Applicant	Elizabeth Lee MLA
Respondent	Chief Minister, Treasury and Economic Development Directorate
Decision Date	16 September 2022
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> —deciding access—whether disclosure of information is contrary to the public interest—Cabinet information—whether information is purely factual

Decision

1. Under s 82(2)(b) of the FOI Act, I **vary** the decision of Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**), dated 8 March 2022.

Background of Ombudsman review

2. On 1 March 2022, the applicant applied to the respondent for access to:
... a copy of the Post Implementation Review report on Law Courts PPP, undertaken in 2020–2021.
3. On 8 March 2022, CMTEDD advised the applicant it had identified one document within the scope of the access application—being the *ACT Law Courts PPP Project Post Implementation Review Final Report (October 2021)* (**the PPP PIR report**)—and had decided to refuse access to this document in its entirety under s 35(1)(c) of the FOI Act.
4. On 17 March 2022, the applicant sought Ombudsman review of the respondent’s decision under s 73 of the FOI Act.

5. On 16 August 2022, I provided my preliminary views about the respondent's decision to the parties in a draft consideration.
6. Both the applicant and the respondent in this matter indicated that they had no further submissions to provide.

Information at issue

7. The information at issue in this Ombudsman review is that contained in the PPP PIR report.
8. The 2 issues to be determined in this Ombudsman review are:
 - whether the PPP PIR report is Cabinet information within the meaning of Schedule 1, s 1.6(1) of the FOI Act, and therefore “contrary to the public interest information” as defined in s 16 of the FOI Act—in which case, subject to the second issue below, access may be refused under s 35(1)(c), and
 - if the answer to the first question is yes, whether the PPP PIR report contains any “purely factual information” within the meaning of Schedule 1, s 1.6(2) of the FOI Act—in which case Schedule 1, s 1.6(1)(a) does not apply, and the “purely factual information” may be released notwithstanding s 35(1)(c).
9. 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
 - relevant merits review decisions and case law, including:
 - *Stanway and Queensland Police Service* [2017] QICmr 22, and
 - *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71.
10. I also had the benefit of reviewing an unedited copy of the PPP PIR report, together with the submissions provided by the applicant and respondent.

Relevant law

11. 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.

12. The expression “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.

13. 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 sought is “contrary to the public interest information”.

14. 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” is deleted.

15. Schedule 1 of the FOI Act sets out categories of information taken to be “contrary to the public interest information” for the purposes of the definition in s 16, and s 1.6 of Schedule 1 deals specifically with the category of Cabinet information.

16. Schedule 1 s 1.6 provides:

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.

The contentions of the parties

17. CMTEDD submitted¹:

The document was found to have been submitted to the Expenditure Review Committee of Cabinet (ERC) on 3 February 2022 and then to Cabinet on 16 February 2022 and was marked as 'Cabinet'. The line area responsible for the document confirmed that the document's primary purpose was to be considered by Cabinet. This is mentioned in the Capital Framework Post Implementation Review Guidelines (the Guidelines)

(https://www.treasury.act.gov.au/_data/assets/pdf_file/0007/1170979/1_pir_guidelines_2017.pdf).

Page 5 of the Guidelines state "The output produced is a Post Implementation Review Report. The length of report and level of detail shall be commensurate with the scope and complexity of the report, noting that the primary audience is the Budget Committee of Cabinet (BCC)." BCC functions are now undertaken by the (ERC). Additionally, page 8 states that "the Cabinet-in-Confidence reports will be issued for submission to the Budget Committee of Cabinet or a responsible Subcommittee of Cabinet."

As well as being classified as Cabinet-in-confidence, the ACT Law Courts PPP Post Implementation Review report also contains commercial-in-confidence information. Maintaining the confidentiality of Post Implementation Reviews encourages candid discussion and robust engagement through frank and fearless advice and feedback for consideration by Government. Full release of the report may impact relevant stakeholder's willingness to engage with the process, potentially reducing the effectiveness of future reviews.

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

The decision to refuse my application identifies the Post Implementation Review report on Law Courts PPP as a cabinet document, thus making its release contrary to the public interest under section 1.6. of Schedule 1 of the FOI Act.

The question is if the Post Implementation Review Report was prepared as a cabinet paper.

Considerations

Is the PPP PIR report Cabinet information within the meaning of Schedule 1, s 1.6(1) of the FOI Act?

19. The PPP PIR report is a Post Implementation Review (PIR) regarding the ACT Law Courts Public Private Partnership (PPP).

20. The purpose of a PIR is to evaluate project outcomes against the expectations set out in the business case.² This project is the first PPP the ACT Government has undertaken, resulting in direct questions regarding the findings of the review from the Legislative Assembly Standing Committee on Public Accounts.³ The PIR for this project was also the subject of attention from the media.⁴

¹ Letter from CMTEDD to ACT Ombudsman dated 22 March 2022.

² See <https://www.treasury.act.gov.au/infrastructure-finance-and-reform/the-capital-framework/post-implementation> accessed on 21 July 2022.

³ <https://www.hansard.act.gov.au/hansard/2021/comms/pac13a.pdf>

⁴ [Review into ACT law courts expansion will not be publicly released | The Canberra Times | Canberra, ACT](#)

21. Having regard to CMTEDD's submissions⁵, the information published in the Capital Framework⁶, and the nature and content of the PPP PIR report—including the “Sensitive: Cabinet” markings on the document—I am satisfied the PPP PIR report was submitted to Cabinet and was brought into existence for that purpose.⁷
22. Accordingly, for the purpose of this decision, I find the PPP PIR report is 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.

Does the PPP PIR report contain any “purely factual information” within the meaning of Schedule 1, s 1.6(2) of the FOI Act?

23. Having found the PPP PIR report is Cabinet information, it is necessary for me to consider if it contains any “purely factual information”.
24. The concept of purely factual information or material is well understood in the context of freedom of information. In *Parnell & Dreyfus and Attorney-General's Department* [2014] AICmr 71 at [38], Professor John McMillan, as Australian Information Commissioner, summarised the position as follows (in the context of considering the application of s 47C(2)(a) of the *Freedom of Information Act 1982* (Cth)):

The term ‘purely factual material’ (to which this exemption does not apply: s 47C(2)(a)) does not extend to factual material that is an integral part of the deliberative content and purpose of a document, or is embedded in or intertwined with the deliberative content such that it is impractical to excise it.
25. I considered the contents of the PPP PIR report to identify factual material and determine if any such factual material is an “integral part” of, or “embedded in or intertwined” with, the deliberative content of the report. In this regard, I proceed on the basis that the deliberative content of the report is that which goes to Cabinet’s evaluation of the ACT Law Courts PPP

⁵ See paragraph 17 above.

⁶ Page 5 of *The Capital Framework (TCF) Post Implementation Review (PIR) PIR Report Guidance Notes (Update 2.2 2017)* states: “The output produced is a Post Implementation Review Report. The length of report and level of detail shall be commensurate with the scope and complexity of the report, noting that the primary audience is the Budget Committee of Cabinet (BCC) [functions now undertaken by ERC.” Page 8 states: “the Cabinet-in-Confidence reports will be issued for submission to the Budget Committee of Cabinet or a responsible Subcommittee of Cabinet.” See https://www.treasury.act.gov.au/_data/assets/pdf_file/0007/1170979/1_pir_guidelines_2017.pdf accessed on 21 July 2022.

⁷ The decision in *Stanway and Queensland Police Service* [2017] QICmr 22 noted that an agency process for preparing information for a Minister to submit for Cabinet consideration will be sufficient to determine the documents have been brought into existence for the purpose of Cabinet consideration.

- project outcomes against the expectations set out in the original business case, and Cabinet’s consideration of lessons learnt which may assist future planning.
26. I find the parts of the PPP PIR report that specifically list physical features of the now completed construction process can be considered “purely factual information”. The number of courtrooms or other completed features reveal nothing deliberative for the purposes of Cabinet’s consideration and are an easily verifiable fact.
 27. I also note the presence of several published documents regarding the ACT Law Courts PPP project. These are accessible via the ACT Government Contracts Register and the specific webpage for the project on the ACT Treasury website. These documents are publicly accessible and therefore form part of the public record.
 28. On balance, however, I consider most of the information in the PPP PIR report is inextricably linked to Cabinet’s deliberations—specifically Cabinet’s evaluation of the outcomes of the ACT Law Courts PPP project against the expectations in the original business case (which is not publicly available), and Cabinet’s consideration of lessons learnt from the project—and therefore should be considered to be an “integral part” of, or “embedded in or intertwined” with, the deliberative content of the report. This includes specific project costs at a detailed level than the already public headline figure.
 29. For the purpose of this decision, I find such information is not “purely factual information” within the meaning of Schedule 1, s 1.6(2) of the FOI Act, and therefore remains Cabinet information within the meaning of Schedule 1, s 1.6(1)(a), which should be redacted before the remaining “purely factual information” is released.

Conclusion

30. Under s 82(2)(b), I vary the respondent's decision to give access to the information at issue under s 35(1)(a) of the FOI Act.
31. Some of the information at issue is contrary to the public interest information under Schedule 1, s 1.6(1)(a) and should be withheld from release.
32. Access is to be granted to the remainder of the information, being "purely factual information" for the purposes of Schedule 1, s 1.6(2)(a).

Iain Anderson
ACT Ombudsman

16 September 2022