

Our reference: AFOI-RR/24/80001

4 December 2024

Nikki Pulford
Information Officer
Infrastructure Canberra
via email: MPCFOI@act.gov.au icbr.foi@act.gov.au

Dear Nikki Pulford

Reviewable decision notice – Ombudsman review

I am writing in relation to the application for Ombudsman review received by the Office of the ACT Ombudsman on 14 June 2024. The applicant sought review of an access decision made by Major Projects Canberra (MPC) (reference No: MCPFOI2024/08) under the *Freedom of Information Act 2016* (ACT) (FOI Act).

On 30 September 2024 the Ombudsman provided his view to the parties in a draft consideration and gave the parties an opportunity to provide submissions.

On the same date the applicant accepted the draft consideration.

On 11 October 2024 you rejected the draft consideration and provided Submissions in support of the original decision. claiming that the subject document contains information that will be *'utilised in future confidential deliberations of Cabinets and in the procurement process for Light Rail Stage 2B'*.

The Ombudsman has finalised this Ombudsman review with a formal decision to set aside and substitute the original decision made by the respondent on 21 May 2024 under s 82(2)(c) of the FOI Act.

The Ombudsman has decided to give access to the subject documents as they are not the information contrary to the public interest information.

I have enclosed a copy of the decision with this notice provided under s 71(5) of the FOI Act (reviewable decision notice).

The review decision will be published on the ACT Ombudsman website on or after 9 December 2024 on our Review Decisions webpage available here:

<https://ombudsman.act.gov.au/accountability-and-oversight/freedom-of-information/foi-review-decisions>.

Review options

ACT Civil and Administrative Tribunal review

If you are not satisfied with the decision, you may apply to the ACT Civil and Administrative Tribunal (ACAT) for review.

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An application to the ACAT must be made within 20 working days after the date that the Ombudsman's decision is published, or within any longer period allowed by the ACAT (please note fees and time limits apply).

For information on how to seek review of a government decision, more information is available on the ACAT website here: <https://www.acat.act.gov.au/case-types/review-of-act-government-decisions>.

You can contact ACAT by phone on (02) 6207 1740 or by email to tribunal@act.gov.au.

Judicial review

A further option for review of the decision may be available under the *Administrative Decisions (Judicial Review) Act 1989* (ACT).

You may wish to seek independent legal advice from a qualified legal practitioner about further review options. You can use the ACT Law Society website 'Find a Lawyer' to search for practitioners in the ACT available here: <https://www.actlawsociety.asn.au/find-a-lawyer>.

Contact

If you have any questions, you can contact our team by phone (10AM to 4PM Monday to Friday AEST) on (02) 5117 3650 and selecting option 3 or by email to: actfoi@ombudsman.gov.au.

Yours sincerely,

Elena Elagina

Merits Review Officer
Freedom of Information
Defence, Investigations, ACT & Legal

Decision and reasons of ACT Ombudsman

Application number:	AFOI-RR/24/80001
Applicant:	Schedule 2.2(a)(ii)
Respondent:	Major Projects Canberra
Respondent reference:	MPCFOI 2024/08
Date:	2 December 2024
Decision reference:	[2024] ACTOFOI 20
Catchwords:	Freedom of Information Act 2016 – deciding access – reasonable searches – whether information is contrary to the public interest information – Cabinet information.

Decision

1. The applicant applied for Ombudsman review of a decision made by Major Projects Canberra (MPC) on 21 May 2024 to refuse to give access to reports about the assessment of an extension of the Light Rail to Mawson because the information is Cabinet information.
2. My decision is to **set aside** the primary decision made by MPC under s 82(2)(c) of the FOI Act. I do not consider the information is Cabinet information under Schedule 1, s 1.6 of the FOI Act.
3. I make a **substitute** decision the information is not contrary to the public interest information and access be given to the applicant.

Background to Ombudsman review

4. On 28 March 2024, the applicant applied to MPC for:

Any reports or studies commissioned by the ACT Government which assess the viability and benefits of extending the light rail to Mawson.
5. On 21 May 2024, MPC decided to refuse access to 2 documents identified within the scope of the application.
6. On 14 June 2024, the applicant applied for Ombudsman review of MPC's decision.
7. On 26 June 2024, MPC provided the Ombudsman with information relevant to the review.
8. On 8 July 2024, MPC provided the Ombudsman with additional submissions objecting to the release of the information under Schedule 1, s 1.6(1)(d) of the FOI Act.
9. On 1 August 2024, the Ombudsman provided a summary of MPC's submissions of 8 July 2024 to the applicant.
10. On 28 August 2024, MPC provided the Ombudsman with a copy of the Cabinet minute (21/212/CAB).
11. On 30 September 2024, my draft consideration was sent to the parties. On the same date the applicant accepted my preliminary view.
12. On 11 October 2024, MPC responded to my draft consideration and provided submissions.

Preliminary issues – reasonable searches

13. Respondents deciding an access application must take reasonable steps to identify all government information within the scope of the application.¹

¹ [Freedom of Information Act 2016 \(ACT\)](#) (FOI Act) s 34(1).

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14. In the Ombudsman review application, the applicant raised the fact that other information held by MPC should have been identified within the scope of the application. The applicant explained information published in response to a different access application refers to documents about the viability of a light rail extension to Mawson.²
15. In submissions to the Ombudsman, MPC explained the additional documents referred to by the applicant are business cases prepared by MPC that did not fall within the scope of information 'commissioned' by the ACT Government.
16. I agree with MPC's submission the additional documents referred to by the applicant do not fall within the scope of the application.

Information at issue

17. The information at issue in this Ombudsman review is 2 reports prepared for MPC which assess an extension of the light rail to the suburb Mawson (Mawson extension reports).
18. The key issue to be decided in this Ombudsman review is whether the Mawson extension reports are contrary to the public interest information, and specifically, whether the Mawson extension reports are Cabinet information under Schedule 1, s 1.6 of the FOI Act.
19. In making my decision, I have had regard to:
 - the applicant's access application, Ombudsman review application and submissions
 - the respondent's decision of 21 May 2024, FOI processing file, additional submissions of 8 July 2024 and response to the draft consideration of 11 October 2024

² The applicant referred to documents 9 and 14 listed in the schedule of documents available on the MPC FOI Disclosure log: [MPCFOI2022/08](https://www.mpc.gov.au/foi-disclosure-log).

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- the FOI Act, particularly ss 16, 35 and Schedule 1, s 1.6
- the Freedom of Information Guidelines (FOI Guidelines) made under s 66 of the FOI Act
- relevant case law including:
 - [*Jon Stanhope and ACT Health Directorate* \[2020\] ACTOFOI 22 \(12 November 2020\)](#) (*Stanhope*)
 - [*Rex Patrick and Department of the Prime Minister and Cabinet \(No. 2\) \(Freedom of information\)* \[2022\] AICmr 66 \(14 October 2022\)](#) (*Rex Patrick*)
 - [*Toomer and Department of Agriculture, Fisheries and Forestry and Ors* \[2003\] AATA 1301 \(18 December 2003\)](#) (*Toomer*).

Relevant law

20. 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.³
21. Section 35(1)(c) of the FOI Act provides an access application may be decided by refusing to give access to the information sought because the information being sought is contrary to the public interest information.
22. 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

³ [FOI Act](#) s 35(1)(c).

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under the test set out in section 17.

23. Schedule 1 of the FOI Act sets out categories of information taken to be contrary to the public interest to disclose. Cabinet information under schedule 1, section 1.6 is:

(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. Section 72 of the FOI Act provides in an Ombudsman review, a person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

The submissions of the parties

25. In the decision notice, MPC said:

The information in these documents is considered Cabinet information within section 1.6 of the Act as it is information which has been commissioned to inform Cabinet to guide its decision making and assist in its deliberations.

26. In submissions to the Ombudsman, MPC explained:

The VLC and ARUP reports were used to inform Cabinet Submission 21/212⁴...tabled on 29 July 2021...the implementation of an extension to Mawson is subject to further Cabinet deliberations and the information contained in these reports will be used to guide those deliberations...

As the Light Rail Project is subject to ongoing planning, Federal Government and National Capital Authority input it would be inappropriate to prejudice any future Cabinet deliberations at this stage of the project...the release of this information is therefore a matter for Cabinet once an official decision is made....

Any purely factual information that is not contained in the Cabinet Submission 21/212 is nonetheless an integral part of the deliberative content and purpose of the documents.

27. In the Ombudsman review application, the applicant said:

The documents identified should be published in part or in full as the factors favouring disclosure likely outweigh favours favouring nondisclosure. Of the documents identified it is unclear what cabinet sensitivity exists given the stated government position in response to parliamentary questions on notice (QON 1701) that the current Woden Light Rail project will end in Woden, not Mawson.⁵

Other light rail documents relating to sections of the project which were not pursued have been published, including extensive documentation considering an extension from the City to Russell –TCCS FOI 23-082⁶ and MPCFOI2023/07⁷.

Some information identified in document 1 “VLC – ACT Light Rail Stage 2 Mawson Extension” is already public. VLC, one of the listed contractors, published some of this information themselves.⁸

Further, a Mecone study investigating housing in the corridor has included the Mawson extension. (Canberra Light Rail Stage 2B Urban Infill Capacity Assessment).⁹

⁴ See statement of reasons for the decision not to publish a summary of the Cabinet decision – [Open access – reasons for withholding access \(Cabinet decision 21/212/CAB\)](#).

⁵ [Legislative Assembly for the Australian Capital Territory, Question – Light rail \(No. 1701\)](#).

⁶ [Transport Canberra and City Services, Freedom of Information disclosure log, FOI reference 23-082](#).

⁷ [Major Projects Canberra, Freedom of Information disclosure log, FOI reference MPCFOI2023/10](#).

⁸ [Veitch Lister Consulting \(VLC\) ACT Light Rail Stage 2 Mawson Extension](#).

⁹ [Mecone, Canberra Light Rail Stage 2B Urban Infill Capability Assessment, December 2021](#).

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Documents relating to the project are in the public interest, particularly as they form a shared commitment of the Parliamentary and Governing Agreement¹⁰ and in the most recent update were listed as underway. (PAGA Update 2023)¹¹.

Consideration

28. MPC decided to refuse to give access to the Mawson extension reports on the basis disclosure of this information would reveal deliberations of Cabinet (other than through the official publication of a Cabinet decision).¹²
29. Initially, MPC submitted disclosure of the Mawson extension reports would prejudice future Cabinet deliberations, noting the information in the reports will be used to guide those deliberations and the Light Rail project is subject to ongoing planning.
30. In response to the draft consideration, MPC clarified their position explaining the process is ongoing and requires further Cabinet deliberations and the information within the subject document will be the basis of further submissions and advice as the project progresses.
31. Further, MPC stated the information is a matter for Cabinet until an official decision is made and release would reveal the deliberations of Cabinet in this complex ongoing project.
32. The former ACT Ombudsman in *Stanhope*¹³ said:

I consider there to be a distinction between information that would reveal the confidential deliberations of Cabinet and information that may inform members of Cabinet before deliberations take place. This distinction is accounted for in the Act which provides that Cabinet submissions that were brought into existence for the

¹⁰ [Legislative Assembly for the Australian Capital Territory, Parliamentary and Governing Agreement, 10th Legislative Assembly.](#)

¹¹ [ACT Government, Media release, Parliamentary and Governing Agreement Annual Update, 22 December 2023.](#)

¹² [FOI Act Sch 1 s 1.6\(1\)\(d\).](#)

¹³ [Jon Stanhope and ACT Health Directorate \[2020\] ACTOFOI 22 \(12 November 2020\)](#) at [30].

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purpose of shaping discussion are contrary to the public interest to disclose under Schedule 1, s 1.6(1)(a).

33. Former Deputy President Forgie in *Toomer*¹⁴ said:

Taking its deliberations first, this means that information that is in documentary form and that discloses that Cabinet has considered or discussed a matter, exchanged information about a matter or discussed strategies. In short, its deliberations are its thinking processes be they directed to gathering information, analysing information or discussing strategies. They remain its deliberations whether or not a decision is reached.

34. Former Freedom of Information Commissioner Leo Hardiman PSM KC in *Rex Patrick* (considering the *Freedom of Information Act 1982* (Cth)) said:¹⁵

In other words, the contents of a document do not automatically gain the status of a Cabinet deliberation or decision by virtue of them having been submitted to and considered by Cabinet. Nor do they gain that status by reason of a public statement disclosing that they have been considered by Cabinet. Rather, it is necessary to consider whether the contents of the document include details of an actual Cabinet deliberation or decision and, if so, whether disclosure of the document (or any relevant part of it) would reveal that Cabinet deliberation or decision.

In other words, the operation of s 34(3) does not turn simply on whether material in the document was considered by Cabinet but, rather, whether material in the document records in some way the actual deliberations or thinking processes of Cabinet itself.

35. I accept the Mawson extension reports informed a submission to Cabinet (21/212/CAB) but the reports themselves were not submitted to Cabinet for its consideration.

36. I am not satisfied the Mawson extension reports contain information about Cabinet's analysis of the issues raised in the Cabinet submission, discussion about the information in the reports, or consideration of proposed options.

¹⁴ [Toomer and Department of Agriculture, Fisheries and Forestry and Ors \[2003\] AATA 1301 \(18 December 2003\)](#) at [88].

¹⁵ [Rex Patrick and Department of the Prime Minister and Cabinet \(No. 2\) \(Freedom of information\) \[2022\] AICmr 66 \(14 October 2022\)](#) at [86].

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37. As identified by MPC in their response to the draft consideration, the content of the reports is technical advice and analysis about a light rail proposal and does not include any information about what Cabinet intends to do with the information or its connection to the Cabinet submission.
38. For information to be Cabinet Information for the purpose of Schedule 1, s 1.6(1)(d), disclosure of the information would need to reveal any deliberations of Cabinet which have occurred and does not apply where release may prejudice future or ongoing deliberations.
39. Following a Cabinet decision, information must be published as open access information.¹⁶ MPC advised the Chief Minister decided not to publish a summary of the Cabinet decision and triple bottom line assessment for this decision because this information was determined following a public interest test to be contrary to the public interest information.¹⁷
40. I note the ACT Government is collecting feedback on the proposed expansion to Mawson via an interactive Light Rail Map.¹⁸ I also note the applicant's submission the Legislative Assembly previously agreed to assess the viability and benefits of extending the Light Rail to Mawson as part of the Stage 2B business case.¹⁹
41. While a summary of the related Cabinet decision has not been officially published, I do not accept release of information which informed a Cabinet submission (and may inform ongoing Cabinet deliberations) without more would reveal any actual Cabinet deliberations. I do not consider disclosure of the Mawson extension reports would reveal any deliberation of Cabinet.

¹⁶ [FOI Act](#) s 23(b)(i) meaning of 'open access information of a Minister'.

¹⁷ [Open access – reasons for withholding access \(Cabinet decision 21/212/CAB\)](#).

¹⁸ [Canberra's Light Rail Network, Indicative Mawson Extension](#).

¹⁹ [Legislative Assembly for the Australian Capital Territory, Parliamentary and Governing Agreement, 10th Legislative Assembly](#).

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42. In the draft consideration, the ACT Ombudsman invited parties to make submissions on whether the information would be contrary to the public interest following a public interest test.²⁰ No additional information was received about potential factors which may apply to the Mawson extension reports. MPC has not met the onus this information is contrary to the public interest information.

Conclusion

43. For the reasons set out above, I set aside the decision made by MPC under s 82(2)(c) that the Mawson extension reports are contrary to the public interest information under Schedule 1, s 1.6(1)(d) of the FOI Act. I make a substitute decision to give access to the Mawson extension reports.

Iain Anderson
ACT Ombudsman
2 December 2024

²⁰ [FOI Act](#) s 17.