



ACT
Government

Chief Minister, Treasury and
Economic Development

Freedom of Information Publication Coversheet

The following information is provided pursuant to section 28 of the *Freedom of Information Act 2016*.

FOI Reference: CMTEDDFOI 2023-304

Information to be published	Status
1. Access application	Published
2. Decision notice	Published
3. Documents and schedule	Published
4. Additional information identified	No
5. Fees	N/A
6. Processing time (in working days)	17
7. Decision made by Ombudsman	N/A
8. Additional information identified by Ombudsman	N/A
9. Decision made by ACAT	N/A
10. Additional information identified by ACAT	N/A

From: [REDACTED]
To: [CMTEDD FOI](#)
Subject: Re: Walter Sofronoff letter
Date: Monday, 28 August 2023 7:52:15 AM

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Please confirm receipt of this email

On Thu, 24 Aug 2023 at 2:38 pm, [REDACTED] wrote:


Good afternoon,

I am seeking access to a letter that Walter Sofronoff sent to the ACT Government in late July/early August outlining his decision to leak his own report to the media.

I understand you have a large number of FoI lodged re this previously and I am seeking your agreement in providing the document to me at the same time it is provided to other applicants.

Background here:

<https://www.news.com.au/national/courts-law/walter-sofronoff-kc-reveals-why-he-provided-own-report-to-journalists/news-story/5016aac72083cc970c411662631001dd>





ACT
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Economic Development

Our ref: CMTEDD FOI 2023-304



FREEDOM OF INFORMATION REQUEST

I refer to your application under section 30 of the *Freedom of Information Act 2016* (the Act), received by the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) on **24 August 2023**. Specifically, you have sought access to the following information:

" I am seeking access to a letter that Walter Sofronoff sent to the ACT Government in late July/early August outlining his decision to leak his own report to the media."

Authority

As an appointed Information Officer under section 18 of the Act, I am authorised to make a decision on access or amendment to government information in the possession or control of CMTEDD.

Timeframes

In accordance with section 40 of the Act, CMTEDD is required to provide a decision within 30 working days. Therefore, a decision and response is due on **6 October 2023**.

As you referenced in your request, this information has been subject to other freedom of information applications. As third-party consultation was already underway for this information, an additional 15 working days as per section 40 has not been added to the timeframe of this response.

Decision on access

Searches were completed for relevant information and one document was identified that falls within scope of your request. I have decided to grant **partial access** to this document as I consider the disclosure of some information is contrary to public interest.

I have included as **Attachment A** to this decision the document schedule. This provides a description of the access decision for the documents. The documents released to you are provided as **Attachment B** to this letter.

In accordance with section 54(2) of the Act a statement of reasons outlining my decisions is below.

Statement of Reasons

In reaching my access decisions, I have taken the following into account:

- the Act;

- the content of the documents that fall within the scope of your request;
- the ACT Ombudsman Guidelines dealing with access applications;
- the views of third parties;
- the *Human Rights Act 2004*;
- the *Information Privacy Act 2014* (ACT)

Exemption claimed

As a decision maker, I am required to determine whether the information within scope is in the public interest to release. To make this decision, I am required to:

- assess whether the information would be contrary to public interest to disclose as per Schedule 1 of the Act, and
- perform the public interest test as set out in section 17 of the Act by balancing the factors favouring disclosure and factors favouring non-disclosure in Schedule 2.

I have determined that some of the information within the scope of your application contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the Act.

1.4 Sensitive information

Information the disclosure of which would involve the unreasonable disclosure of sensitive information about any individual (including a deceased person).

The information that has been redacted contains information about a person that is personal, private and sensitive. I am of the view that the disclosure of this information would be unreasonable as the release of this information has the potential to cause harm to that individual.

The public interest information under schedule 2 of the Act

The Act has a presumption in favour of disclosure. As a decision maker I am required to decide where, on balance, public interest lies. As part of this process, I must consider factors favouring disclosure and nondisclosure.

In *Hogan v Hinch* (2011) 243 CLR 506, [31] French CJ stated that when ‘used in a statute, the term [public interest] derives its content from “the subject matter and the scope and purpose” of the enactment in which it appears’. Section 17(1) of the Act sets out the test, to be applied to determine whether disclosure of information would be contrary to the public interest. These factors are found in subsection 17(2) and Schedule 2 of the Act.

Taking into consideration the information contained within the document found to be within the scope of your request, I have identified that the following public interest factors are relevant to determine if release of the information contained within this document is within the ‘public interest’.

Factors favouring disclosure in the public interest:

- (a) *disclosure of the information could reasonably be expected to do any of the following:*
- (i) *promote open discussion of public affairs and enhance the government’s accountability;*
 - (viii) *reveal the reason for a government decision and any background or contextual information that informed the decision;*
 - (xiii) *contribute to the administration of justice generally, including procedural*

fairness.

Having considered the factors identified as relevant in this matter, I consider that release of the information within the scope of the request may promote open discussion of public affairs and enhance the government's accountability. The release of the document identified will provide contextual information to the public regarding Mr Sofronoff's decision to release the report to selected journalists.

I am satisfied that these factors favouring disclosure carry considerable weight. Noting that the public interest test does not apply to information that is already subject to schedule 1, as this information is already taken to not be in the public interest to release. I did not identify any additional factors for non-release.

Having considered relevant factors under Schedule 1 and applied the test outlined in section 17 of the Act and deciding that release of sensitive personal information contained in the document is not in the public interest to release, I have chosen to redact this specific information in accordance with section 50(2).

Noting the pro-disclosure intent of the Act, I am satisfied that redacting only the information that is not in the public interest to release will ensure that the intent of the Act has been met.

Charges

Processing charges are not applicable for this request because the documents being released to you are less than 50 pages.

Online publishing – Disclosure Log

Under section 28 of the Act, CMTEDD maintains an online record of access applications called a disclosure log. Your original access application, my decision and documents released to you in response to your access application will be published in the CMTEDD disclosure log. Your personal contact details will not be published. You may view CMTEDD disclosure log at <https://www.cmtedd.act.gov.au/functions/foi/disclosure-log-2023i>.

Ombudsman Review

My decision on your access request is a reviewable decision as identified in Schedule 3 of the Act. You have the right to seek Ombudsman review of this outcome under section 73 of the Act within 20 working days from the day that my decision is sent to you, or a longer period allowed by the Ombudsman.

We recommend using this form [Applying for an Ombudsman Review](#) to ensure you provide all of the required information. Alternatively, you may write to the Ombudsman at:

The ACT Ombudsman
GPO Box 442
CANBERRA ACT 2601

Via email: actfoi@ombudsman.gov.au

ACT Civil and Administrative Tribunal (ACAT) Review

Under section 84 of the Act, if a decision is made under section 82(1) on an Ombudsman review, you may apply to the ACAT for review of the Ombudsman decision. Further information may be obtained from the ACAT at:

ACT Civil and Administrative Tribunal

GPO Box 370

Canberra City ACT 2601

Telephone: (02) 6207 1740

<http://www.acat.act.gov.au/>

Should you have any queries in relation to your request please contact me by telephone on 6207 7754 or email CMTEDDFOI@act.gov.au.

Yours sincerely,

A handwritten signature in black ink, appearing to be the initials 'EH'.

Emma Hotham

Information Officer

Chief Minister, Treasury and Economic Development Directorate

18 September 2023



ACT
Government

Chief Minister, Treasury and
Economic Development

FREEDOM OF INFORMATION REQUEST SCHEDULE

WHAT ARE THE PARAMETERS OF THE REQUEST

Reference NO.

I am seeking access to a letter that Walter Sofronoff sent to the ACT Government in late July/early August outlining his decision to leak his own report to the media.

CMTEDDFOI 2023-304

Ref No	Page number	Description	Date	Status	Reason for Exemption	Online Release Status
1	1-3	Letter from Walter Sofronoff KC	Undated	Partial	Sch 1, 1.4	Yes
Total No of Docs						
1						

WALTER SOFRONOFF QC

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Chief Minister
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CANBERRA ACT 2601

Mr Shane Rattenbury MLA
Attorney-General
ACT Legislative Assembly
London Circuit
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CANBERRA ACT 2601

Dear Chief Minister and Attorney-General

I refer to your letter of today's date.

You have asked me whether I have provided copies of the report to anyone other than the Chief Minister. I provided a copy of the report to Ms Janet Albrechtsen and to Ms Elizabeth Byrne. Both those names are undoubtedly known to you. Each of them was given a copy upon an express agreement by them that the copy was embargoed until the government had published it. I furnished a copy of the report to Mr Leon Zwier, the solicitor for Ms Brittany Higgins. I gave it to him on his undertaking not to publish its contents to anybody, including his client. The copies were given to Ms Albrechtsen and to Mr Zwier on Sunday 31 July 2022. The copy was given to Ms Byrne yesterday.

You have asked me "under what authority where (*sic*) those copies provided". The direct and succinct answer to that question is that I furnished those copies under my authority as chair of the inquiry under the following provisions:

Section 13: Except as otherwise provided by this Act, an inquiry must be conducted in such manner as the board determines.

Section 18: In conducting an inquiry, a board -

- (a) ...
- (b) ...
- (c) may do whatever it considers necessary or convenient for the fair and prompt conduct of the inquiry.

In relation to Mr Zwier, s 26A(1) is also material. It provides: The board must not include a comment in a report of an inquiry that is adverse to an entity who is identifiable from the report unless the board has, before making the report, given the entity a copy of the proposed comment and a written notice under subsection (2).

You have not asked me what were my reasons for giving copies to these three people but I think that it would assist you for me to state them.

The *Inquiries Act 1991* establishes a system for the holding of an inquiry established by the executive and, consistently with traditional approaches elsewhere, the statute requires - as a fundamental premise - that any such inquiry be conducted in public unless there is good reason

not to do so. The assumption of publicity also attaches to documents that are tendered. Sections 21(2), 21(4), 14B and 38 make that clear.

This traditional approach that is reflected in the ACT statute is grounded in experience that has taught that one of the great virtues of a public inquiry under statute, compared to the other forms of machinery of government policy making, is that those forms necessarily involve confidentiality but public inquiries take the community into their confidence.

Some inquiries, like the present one, may be dominated by sectional interests, such as the interest of the AFP in the present inquiry to maintain its good name. It is only the openness of the inquiry process, demonstrating its striving for open-mindedness and evidence based conclusions and criticisms, that ensures that any ensuing report is taken more seriously than policy decisions based upon other mechanisms. Even the use of techniques such as advertising to inform or educate the public can be problematical because these can be seen as politically tendentious. Also the interactions between ministers and journalists can sometimes be criticised as the product of a too-close mutually advantageous transactional relationship.

Consequently, governments such as your own in this case, rightly regard public inquiries as a sound means to educate the public about, or in anticipation of, political action.

These beneficial purposes are served when an inquiry is able to promote interest and discussion and when it can serve a mediating role between the community and the government.

The relationship of an inquiry such as mine with the community is, therefore, a vital aspect of an inquiry. There are only two ways in which an inquiry can engage with the community. One of these is to hold hearings in public, as the Act requires. However, the bulk of the community cannot be expected to attend or watch daily hearings and cannot be expected to be able to crystallise an opinion about what are issues thus presented. That essential part of the work of an inquiry can only be achieved by means of forming relationships of trust with journalists.

During the whole course of this inquiry several journalists sought access to me and counsel assisting, wishing to obtain information. It would have been wrong to deny them. Like anybody else, the chair of an inquiry cannot affect what journalists write. However, it is within the power of an inquiry head to ensure that what is written is written upon a true factual and conceptual basis. Indeed, I hold the firm view that it would be a failure of performance of my function if I did not, myself and by my counsel assisting, form appropriate relationships with journalists in order to serve the statutory purpose of public education and involvement.

My conversations with journalists for this purpose have all be conducted upon the basis that I was never speaking for publication. I made it perfectly clear that the only things that I would say for publication would be the words I spoke at public hearings and the words contained in my report. By way of background information, I sometimes told journalists what appeared to me to be the issues that would arise on the following day's hearing. Sometimes, the discussions were more general, such as concerning the conceptual interplay between the function of prosecutor and the function of investigative police.

My previous experience, as well as my experience in this inquiry, has led me to conclude that it is possible to identify journalists who are ethical and who understand the importance of their role in the conduct of a public inquiry. I have not had my trust betrayed nor have I had any reason to be disappointed. The outcome of this process of professional engagement with journalists has been that, on the whole, stories about the inquiry have been on point and informative. They have been supportive of my work - that is to say, the work that the government has instigated for its purposes. There was an exception when particular journalists abused the privilege of access to documents on our website to write a scurrilous story. I conducted a public hearing to deal with this matter and such conduct was not repeated.

In relation to the report specifically, as I have said, I gave a copy of the report to Ms Albrechtsen and Ms Byrne upon their undertaking not to use the information until after the government published the report, whenever that might be. The giving of the report on that basis served the same purpose as every one of my interactions with journalists. It served to ensure that, when the government published the report, those two journalists would be in a position swiftly and promptly to write and broadcast stories that would have as their foundation a true appreciation of the result of the work of the commission. You will observe that the furnishing of copies on this basis was limited to two journalists. Each of these were professionals who, I judged, would not take the serious step of betraying my trust by behaving unprofessionally.

Ms Albrechtsen informed me by telephone that she had obtained a copy of my report from another source and that she regarded herself as being at liberty to write about its contents. I have no reason to believe that she was lying to me.

The content of Ms Maiden's story implies to me that she has been given the benefit of a disclosure of part of the report. I presume that if she had the whole of it, her story would have been of wider scope.

Sch 1 1.4

Mr Zwier read the report and called me to say that he had no objection. I have no doubt at all that he did not breach his undertaking.

I trust that this assists you in your consideration of the problems that have been caused by today's publication. Please do not hesitate to write to me or to call if I can serve you further.

Yours sincerely



WALTER SOFRONOFF KC

cc: Ms Helen Banks
Ms Genevieve Cuddihy
Ms Erin Longbottom
Mr Joshua Jones