



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 2023-258

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	Waived
6. Processing time (in working days)	44
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: FOI Request-CMTEDDFOI 2023-258
Date: Thursday, 27 July 2023 3:27:36 PM

Good afternoon,

[REDACTED] I write to request, under the *Freedom of Information Act 2016*, copies of the following documents:

1. Any emails, documents, briefs, reports, text messages, records of meetings (including date, place, time and minutes), and records of phone calls (including date, place, time and minutes), between the Chief Minister, the Public Sector Standards Commissioner, and the Head of Service, and their offices, from January 2021 to present, regarding the current Fair Trading Commissioner, Ms Derise Cubin.

Kind regards,





ACT
Government

Chief Minister, Treasury and
Economic Development

Our ref: CMTEDDFOI2023-258



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 27 July 2023. In your request you sought access to the following information:

1. *Any emails, documents, briefs, reports, text messages, records of meetings (including date, place, time and minutes), and records of phone calls (including date, place, time and minutes), between the Chief Minister, the Public Sector Standards Commissioner, and the Head of Service, and their offices, from January 2021 to present, regarding the current Fair Trading Commissioner, Ms Derise Cubin.*

Authority

I am an Information Officer appointed by the Director-General under section 18 of the Act to deal with access applications made under Part 5 of the Act.

Timeframes

In accordance with section 40 of the Act, CMTEDD is required to provide a decision within 20 working days of the access application being received. An extension of 15 working days was added to the timeframe request to undertake third party consultation. A decision and response are due on 28 September 2023.

Decision on access

Searches were completed for relevant documents and two documents were identified that fall within the scope of your request.

I note that information captured under **CMTEDDFOI 2023-161** also contained information relevant to this request, however as this has already been responded to and the decision for that material is publicly available on the CMTEDD Disclosure Log, that information has not been duplicated for this FOI response.

I have included as **Attachment A** to this decision the schedule of relevant documents. This provides a description of each document that falls within the scope of your request and the access decision for each of those documents.

I have decided to grant full access to one document and partial access to the other document. My access decisions are detailed further in the following statement of reasons and 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 views of consulted third parties
- the *Human Rights Act 2004*.

Exemptions 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
- 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 included below the factors relevant to my decision on access.

Contrary to the public interest information under schedule 1 of the Act

I have determined that none of the material within the scope of your request contains information that is taken to be contrary to the public interest to disclose under Schedule 1 of the Act.

Information that would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the Act

Public Interest

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.

Factors favouring disclosure in the public interest (Schedule 2 section 2.1):

Taking into consideration the information contained in the documents 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 these documents is within 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;*
- (ii) contribute to positive and informed debate on important issues or matters of public interest;*
- (viii) reveal the reason for a government decision and any background or contextual information that informed the decision.*

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. Noting the sustained interest in this matter, the release of the documents identified will provide some contextual and background information.

I am satisfied there is public interest in the release of this information and have placed considerable weight on the above factors. However, this factor is to be balanced against the factors favouring nondisclosure.

Factors favouring nondisclosure in the public interest (Schedule 2 section 2.2):

(a) disclosure of the information could reasonably be expected to do any of the following:

(xiv) prejudice the conduct of considerations, investigations, audits or reviews by the ombudsman, auditor-general, integrity commission, integrity commission inspector or human rights commission.

(b) The information –

(v) is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct and disclosure of the information could prejudice the fair treatment of an individual.

I consider that the release of some of the information within document 2 has the potential to undermine a potential investigation and may contain unsubstantiated allegations. Whilst I note that there is a considerable amount of information already within the public domain regarding this matter, I am mindful that the release of this information could undermine any current or future investigative work that may be undertaken, as such I have balanced this factor strongly in favour of nondisclosure.

Having applied the test outlined in section 17 of the Act and deciding that release of information that could undermine investigative processes and relates to unsubstantiated allegations contained in the documents 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 I believe is not in the public interest to release will ensure that the intent of the Act has been met.

Charges



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 provided 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
15 Constitution Avenue
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 read 'EH'.

Emma Hotham
Information Officer
Information Access Team
Chief Minister, Treasury and Economic Development Directorate
27 September 2023



ACT
Government

Chief Minister, Treasury and
Economic Development

FREEDOM OF INFORMATION REQUEST SCHEDULE

WHAT ARE THE PARAMETERS OF THE REQUEST

Reference NO.

Any emails, documents, briefs, reports, text messages, records of meetings (including date, place, time and minutes), and records of phone calls (including date, place, time and minutes), between the Chief Minister, the Public Sector Standards Commissioner, and the Head of Service, and their offices, from January 2021 to present, regarding the current Fair Trading Commissioner, Ms Derise Cubin.

CMTEDDFOI 2023-258

Ref No	Page number	Description	Date	Status	Reason for Exemption	Online Release Status
1	1-2	Email chain - FW: Request for advice	29/11/2022	Full		Yes
2	3-4	Email - Correspondence to Kathy Leigh from the ACT Public Sector Standards Commissioner - CM2022/6588 Attachment letter	22/12/2022	Partial release	Sch 2.2 (a)(xiv) Sch 2.2 (b)(v)	Yes
Total No of Docs						
2						

From: [Kalleske, Sarah](#)
To: [McPhee, Ian \(Commissioner\)](#)
Cc: [Lakey, Cara](#)
Subject: FW: Request for advice
Date: Tuesday, 29 November 2022 9:05:00 PM
Attachments: [FW assurance controls in place.msg](#)
[Letter to S Rattenbury MLA dated 7 November 2022.pdf](#)
[Correspondence attached to Letter to R Rattenbury dated 7 November 2022.pdf](#)
[Eastwoods Legal - Letter to Derise Cubin re Pink Frosting - dated 26 October 2022.pdf](#)
[RE Please provide explanation - Commissioner for Fair Trading.msg](#)
[Standard operating procedure relating to special arrangements for Acting Commissioner for Fair Trading.pdf](#)
[FW Please provide explanation - Commissioner for Fair Trading.msg](#)
[FW FW Fair Trading Commissioner.msg](#)
[Louise Curtis 86 Candles Pty Limited - conflict of interest - Derise Cubin.msg](#)
[FW Derise Cubin - Conflict of Interest.msg](#)

Importance: High

OFFICIAL: Sensitive

Hi Ian

Can you please action appropriately and prepare advice/briefing for Kathy?

Sarah

Duplicate

Duplicate

From: "ACT Public Sector Standards Commissioner"
Sent: 22/12/2022 5:25 PM
To: "Leigh, Kathy" <Kathy.Leigh@act.gov.au>
Subject: Correspondence to Kathy Leigh from the ACT Public Sector Standards Commissioner - CM2022/6588
Attachments: PSSC letter to HoS - Complaint by Louise Curtis.pdf

OFFICIAL: Sensitive

Good afternoon Ms Leigh

Commissioner McPhee has asked me to provide you with a copy of the attached correspondence which relates to a complaint matter regarding the Fair Trading Commissioner.

Regards

ACT Public Sector Standards Commissioner – Mr Ian McPhee AO PSM

ACT Government Level 5, 220 London Circuit, Canberra City ACT 2601 | GPO Box 158 Canberra ACT 2601 |

www.act.gov.au

OFFICIAL: Sensitive

TRIM No: CM2022/6588

Ms Kathy Leigh
Head of Service
ACT Public Service
GPO Box 158
CANBERRA ACT 2601

Kathy.Leigh@act.gov.au

Dear Ms Leigh

Complaint regarding Fair Trading Commissioner

On 29 November 2022, the ACT Attorney-General, Mr Shane Rattenbury MLA, sought our advice regarding allegations made by Louise Curtis. Ms Curtis claims that a conflict of interest concerning the Fair Trading Commissioner has not been appropriately managed.

Sch 2.2(a)(xiv); Sch 2.2(b)(v)

I have suggested the Office of the ACT Government Solicitor would be best placed to provide Mr Rattenbury advice on responding to the relevant legal enquiries his office has received.

I will advise you of the outcome of enquiries undertaken in due course.

Yours sincerely,



Ian McPhee
ACT Public Sector Standards Commissioner
22 December 2022