



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 2021-227

Information to be published	Status
1. Access application	Published
2. Decision notice	Published
3. Documents and schedule	N/A
4. Additional information identified	No
5. Fees	N/A
6. Processing time (in working days)	18
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 re ACT-held documents re National Cabinet 6 August 2021
Date: Thursday, 2 September 2021 4:44:34 PM

CAUTION: This email originated from outside of the ACT Government. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Good afternoon,

I seek access under the Freedom of Information Act to the following document/s held by the Chief Minister, Treasury and Economic Development Directorate:

Minutes of the 6 August 2021 meeting of the group known as National Cabinet. This request includes any minutes the ACT Government holds but received from the Commonwealth, and also any minutes generated by the ACT Government of the meeting in question.

To be clear, this request does **not** include a full transcript or full recording of the meeting.

My phone and postal address details are below, but the most convenient method for FOI-related correspondence is email [REDACTED]

Kind regards,





ACT
Government

Chief Minister, Treasury and
Economic Development

Our ref: CMTEDDFOI 2021-227



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 2 September 2021, in which you sought access to:

- Minutes of the 6 August 2021 meeting of the group known as National Cabinet. This request includes any minutes the ACT Government holds but received from the Commonwealth, and also any minutes generated by the ACT Government of the meeting in question.

Authority

I am an Information Officer appointed by the Director-General of CMTEDD 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 on your access application by 30 September 2021.

Decision on access

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

I have decided to refuse access to all identified documents as I consider them to be contrary to the public interest information under schedule 1 and contain information that would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the Act.

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

Material considered

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

- the Act, particularly Schedule 1 section 1.2 and Schedule 2, and
- the content of the documents that fall within the scope of your request.

Exemption claimed

My reasons for deciding not to grant access to the identified documents and components of these documents are as follows:

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

Schedule 1 of the Act covers information disclosure of which is taken to be contrary to the public interest. Information mentioned in this schedule is taken to be contrary to the public interest to disclose unless the information identifies corruption or the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law.

One of the identified documents are entirely composed of, or contain information that is, considered to be contrary to the public interest under schedule 1 section 1.2 of the Act.

Schedule 1 section 1.2 of the Act states:

Information that would be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege.

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 non-disclosure.

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 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'.

Factors favouring disclosure in the public interest under Schedule 2.1:

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

(b) Schedule 2.1(a)(ii) contribute to positive and informed debate on important issues or matters of public interest.

The information at issue relates to a matter of public interest and could contribute to informed debate. I consider the extent to which disclosure of the information could promote this public interest factor is moderate.

Schedule 2, s 2.1(a)(viii) reveal the reason for a government decision and any background or contextual information that informed the decision.

As a rapidly evolving public health emergency the Australian Health Protection Principal Committee (AHPPC), National Cabinet and jurisdictional governments publicly provided

information that was being updated constantly in multiple different ways. Therefore, the value of releasing National Cabinet discussion papers (including minutes of meetings) for this purpose is greatly diminished. I consider the extent to which disclosure of the information could promote this public interest factor is moderate.

Schedule 2, s 2.1(a)(xi) reveal health risks or measures relating to public health and safety.

The information relates to health risks and measures relating to public health and safety. However, as much as the information is surpassed by publicly available information, the extent to which the public interest factor could be promoted is essentially mitigated. On balance, I give this factor low weight.

Factors favouring nondisclosure in the public interest under Schedule 2.2:

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

(x) prejudice intergovernmental relations,

(xii) prejudice an agency's ability to obtain confidential information, and

(xvi) prejudice a deliberative process of government.

Schedule 2, 2.2(a)(x) prejudice intergovernmental relations.

The release of AHPPC meeting papers could reasonably be expected to damage the intergovernmental relationships between the ACT Government and other jurisdictions. All jurisdictions maintain an expectation that the information be managed in a confidential manner. The documents containing the information are clearly marked accordingly and discussions between jurisdictions reinforce these expectations. Some of the information is sensitive and is not publicly available and releasing this information is inconsistent with the expectation of other jurisdictions and would damage intergovernmental relations concerning health matters. It is reasonable to expect other jurisdictions' future confidence that their information will be held confidentially will be based on experience (irrespective of the sensitivity of the information released). Accordingly, I give this factor substantial weight.

Schedule 2, 2.2(a)(xii) prejudice an agency's ability to obtain confidential information.

National Cabinet minutes are a record of information communicated in confidence between governments of each jurisdiction in response to the coronavirus public health emergency. There is a mutual expectation of confidentiality of shared information amongst National Cabinet members, in particular noting that this information is classified committee-in-confidence and is not publicly available information.

As National Cabinet documents retain their confidentiality it is reasonable to expect that other jurisdictions will be reluctant to prepare (or contribute to) written documents containing confidential material that will be provided to National Cabinet that may be made public via Freedom of Information requests. As a result, it is reasonable to expect that there could be a much greater dependence on information being conveyed orally in private conversations at National Cabinet, which would inhibit the availability of confidential information to CMTEDD and the ACT Government as a whole. I give this matter substantial weight.

Schedule 2, 2.2(a)(xvi) prejudice the deliberative process of government.

Without the free flow of confidential written information (generally provided in advance of meetings) CMTEDD's ability to appropriately consider and brief relevant ACT officials on these matters will be adversely affected. Furthermore, to some degree the quality of discussion and consideration of these complex matters at National Cabinet will be compromised and the deliberative processes of government will be adversely affected. There could be a significant adverse impact on Australian society if there is any diminution in National Cabinet's capacity to consider these matters thoroughly and comprehensively. Accordingly, I give this matter substantial weight.

CMTEDD still considers the following factor relevant, Schedule 2, 2.2(a)(ix) prejudice the flow of information to a regulatory agency. These types of forums are a unique opportunity for cross jurisdictional collaboration and provide the ability for better health outcomes and innovation. It is reasonable to expect other jurisdictions' future interaction and willingness to contribute innovative solutions to health challenges may be diminished if these cannot be confidentially considered by experts in the field.

The ACT FOI Act is legislation that is passed by the ACT Legislative Assembly and is administered with a pro-disclosure bias and discretions given under it are exercised as far as possible in favour of disclosing government information. The FOI Act defines government information and under that definition the information in question is certainly held by the Directorate. However, the Territory is not able to legislate the disclosure of another Government's information and the use of ACT legislation to subvert or undermine the legislation of another jurisdiction would create an unintended consequence that may have significant ramifications regarding the sharing of information in future.

Additionally, I note that the ACT Ombudsman has ruled on a very similar case and determined that while there were relevant public interest factors for release, Mr Michael Manthorpe PSM stated:

"On the other hand, I considered that I should afford considerable weight to the public interest factor which seeks to prevent prejudice to intergovernmental relations."

And:

"I considered that intergovernmental relations should be the decisive factor with respect to most of the information at issue. I decided to afford this factor overriding weight..."

Charges

Pursuant to *Freedom of Information (Fees) Determination 2017 (No 2)* processing charges are not applicable for this request because no pages are being released to you.

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 and my decision in response to your access application will be published in the CMTEDD disclosure log after 6 October 2021. Your personal contact details will not be published. You may view CMTEDD disclosure log at <https://www.cmtedd.act.gov.au/functions/foi>.

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 published in CMTEDD disclosure log, 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
Level 4, 1 Moore St
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,



Katharine Stuart
Information Officer
Information Access Team
Chief Minister, Treasury and Economic Development Directorate
28 September 2021