



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 2023-269

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)	32
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: CMTEDDFOI 2023-269
Date: Thursday, 3 August 2023 6:21:02 PM

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Good afternoon

I make the following freedom of information request:

I request please all communication from the Chief Minister and the Head of Service to Walter Sofronoff KC between August 2 and August 3 (inclusive) and I request please all correspondence from Walter Sofronoff KC to the Chief Minister and the Head of Service over the same timeframe.

Given this request is in the general public interest and in the interest of a substantial section of the public, I request all charges for its fulfilment be waived.

If there is any pertinent information that would assist me in refining the scope of the request, please do not hesitate to contact me on the details below.

Notices and communication relating to this FOI request can be supplied to this email address.

Sincerely

[REDACTED]





ACT
Government

Chief Minister, Treasury and
Economic Development

Our ref: CMTEDD FOI 2023-269



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 **3 August 2023**. Specifically, you have sought access to the following information:

"I request please all communication from the Chief Minister and the Head of Service to Walter Sofronoff KC between August 2 and August 3 (inclusive) and I request please all correspondence from Walter Sofronoff KC to the Chief Minister and the Head of Service over the same timeframe."

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 are due on **14 September 2023**. Following third-party consultation, in accordance with section 38 of the Act, the due date is now **6 October 2023**.

Decision on access

Searches were completed for relevant information and two documents were identified that fall within scope of your request. I have decided to grant access in full to one document and partial access to the other document as I consider the disclosure of some information contained within it 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 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:

(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 documents 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 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 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,



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.

..... all communication from the Chief Minister and the Head of Service to Walter Sofronoff KC between August 2 and August 3 (inclusive) and I request please all correspondence from Walter Sofronoff KC to the Chief Minister and the Head of Service over the same timeframe.

CMTEDDFOI 2023-269

Ref No	Page number	Description	Date	Status	Reason for Exemption	Online Release Status
1	1	Letter from the Chief Minister and Minister Rattenbury	3 August 2023	Full		Yes
2	3-4	Letter from Walter Sofronoff KC	Undated	Partial	Sch 1, 1.4	Yes
Total No of Docs						
2						

Andrew Barr MLA

Chief Minister
Treasurer
Minister for Climate Action
Minister for Economic Development
Minister for Tourism

Member for Kurrajong

Shane Rattenbury MLA

Attorney-General
Minister for Consumer Affairs
Minister for Water, Energy and Emissions Reduction
Minister for Gaming

Member for Kurrajong

Mr Walter Sofronoff KC
Chair, Board of Inquiry – Criminal Justice System
PO Box 1429, Canberra, ACT, 2601
3 August 2023

Dear Mr Sofronoff

Disclosure of Report of the Board of Inquiry into the Criminal Justice System

We are writing regarding the disclosure of the Report of the Board of Inquiry into the Criminal Justice System. Findings of the report are published in today's media.

Following advice from the ACT public service, we would appreciate your earliest possible response to the following questions:

1. Did you provide copies of the report to anybody other than the ACT Chief Minister?
2. If so, to whom were those copies provided, when, and on what basis?
3. If copies were provided to anybody other than the Chief Minister, under what authority where those copies provided?

You will appreciate that your response will inform the Government's public comment and responses to media inquiries.

Yours sincerely



Andrew Barr MLA
Chief Minister



Shane Rattenbury MLA
Attorney-General

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Mr Shane Rattenbury MLA
Attorney-General
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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