



Inquiry into Annual and Financial Reports 2024–25

Answer to question taken on notice

Asked by: Mr Andrew Braddock MLA

Addressed to: Mr Iain Anderson

In relation to: Cabinet privilege test

Hearing: 14 November 2025

Uncorrected Proof Transcript p 29

Transcript provided: 18 November 2025

Answer Due: 25 November 2025

Mr Anderson took on notice the following question:

MR BRADDOCK: Can I jump back in for supplementary? My apologies, Mr Werner-Gibbins. Of great interest to this assembly is the rulings of the independent legal arbiter, in terms of some of the order of production of documents that have gone through this place, we have(?) [01.48.25] just turned on this question. Are you applying the same test as the independent legal arbiter has been applying in terms of what is and is not cabinet confidence?

Mr Anderson: An excellent question. I am not sure.

Ms O'Connell: I do not know either, sorry.

MR BRADDOCK: You can take it on notice.

Mr Anderson: We will take that on notice. I mean, we are applying the legislation, and we have regard to jurisprudence about how to interpret the provisions in the legislation. That is the test that we are applying. I have not necessarily looked at the test that the independent legal arbiter is applying, but we will take that on notice.

ACT Ombudsman: The answer to the Member's question is as follows:

The ACT Ombudsman and Independent Legal Arbiter apply different tests under separate regimes when considering what is Cabinet in confidence information. While both tests involve consideration of whether access to information would be in the public interest, the Independent Legal Arbiter evaluates and reports on the validity of claims of privilege under the Standings Orders (e.g. public interest immunity, legal professional privilege).

In an Ombudsman review under the *Freedom of Information Act 2016* (ACT) (FOI Act), the Ombudsman considers whether government information is 'contrary to the public interest information' as defined in s 16 of the FOI Act (which contains some exceptions).

Contrary to the public interest information includes information taken to be contrary to the public interest to disclose under schedule 1 of the FOI Act. Schedule 1, s 1.6 of the FOI Act provides:

1.6 Cabinet information

(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.

As an example, it is possible the Chief Minister may make a claim of privilege under the Standing Orders in relation to a document within the terms of a production order on the basis disclosure of that information would reveal confidential Cabinet deliberations.

A respondent may decide to refuse access to information sought in an access application made under the FOI Act because the information is contrary to the public interest information under Schedule 1, s 1.6(1)(d) – information the disclosure of which would reveal any deliberation of Cabinet (other than through the publication of a Cabinet decision).

While the determination of the above examples may involve similar considerations, for example whether the information comprises Cabinet deliberations, the test are not the same.

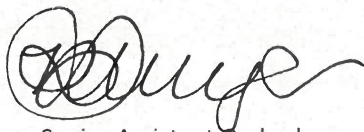
Key differences are:

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- The Independent Legal Arbiter assesses claims of privilege and weighs potentially competing public interests to report on whether those claims are valid under the Standing Orders.
- As Schedule 1 of the FOI Act sets out categories of information 'taken to be contrary to the public interest' to disclose, the Ombudsman assesses whether the contested Cabinet information falls within the meaning of Schedule 1, s 1.6 and not whether there are public interests favouring disclosure which may overcome the claim the information is contrary to the public interest to disclose.
- The FOI Act also contains exceptions where Cabinet information under Schedule 1, s 1.6 may not be taken to be contrary to the public interest to disclose including where:
 - o 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
 - o the information is purely factual information unless disclosure would involve the disclose of a deliberation or decision of Cabinet and the fact of the deliberation or decision has not been officially published.

Approved for circulation to the Standing Committee on the Integrity Commission and Statutory Office Holders

Signature:



Date:

24/11/2025

By Katrina Dwyer, Senior Assistant Ombudsman— Defence, Investigations, ACT and Legal