



**ACT**  
Government

Environment, Planning and  
Sustainable Development

Phone: (02) 6207 1923  
Reference: 22/159835

## Decision on Freedom of Information Access Application 22/159835

I refer to your application made under section 30 of the *Freedom of Information Act 2016* (the Act) received by the Environment, Planning and Sustainable Development Directorate (EPSDD) on 13 December 2022, in which you sought access to documents relating to the review of the ACT Heritage Council.

Specifically, you are seeking:

*“...the recent Nous Group report into the ACT Heritage Council.”*

With extensions to the decision due date, EPSDD must decide your application on or by 24 February 2023.

### Decision on Access

I am an Information Officer appointed under section 18 of the Act to deal with access applications made under art 5 of the Act.

In response to your application, one document relevant to your application was identified. I have included as **Attachment A** to this decision the document schedule which provides a description of the document that falls within the scope of your application and the access decision for this document.

For the reason set out below, I have decided to grant partial access to the document and, in accordance with section 50 of the Act, provide you with a copy of the document with deletions applied to contrary to the public interest information, and 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.

### Material Considered

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

- the FOI Act, particularly sections 6, 16, 17, 38 and schedules 1 and 2
- the content of the documents that fall within the scope of your request
- the *Human Rights Act 2004*
- the views of third parties consulted

- ACT Ombudsman Freedom of Information (Volume 4 - Considering the public interest) Guidelines 2020 (NI2020-371)
- information already publicly available:  
[https://www.environment.act.gov.au/\\_data/assets/pdf\\_file/0005/2113547/act-heritage-council-review-report-summary-2022.pdf](https://www.environment.act.gov.au/_data/assets/pdf_file/0005/2113547/act-heritage-council-review-report-summary-2022.pdf)

### **Public Interest Considerations**

The Act recognises the right of every person to obtain access, under its provisions, to government information (see section 7, the Act). As an Information Officer, I am required to allow access to information subject to the Act, unless disclosure would be contrary to the public interest.

Section 16 of the Act defines *contrary to the public interest* to mean either information:

- that is taken to be contrary to the public interest to disclose under Schedule 1 of the Act or
- the disclosure of which would, on balance be contrary to the public interest under the test set out in section 17.

### **Information Disclosure – Contrary to the Public Interest under Schedule 1 of the Act**

Schedule 1 of the Act recognises a range of information that 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.

Schedule 1, section 1.6 of the Act provides:

*(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*

The *Review of the ACT Heritage Council – Report for internal use* (document 1) is the outcome of the interim review of the state of the Heritage Council by Nous Group, which was commissioned by EPSDD on behalf of the Minister for Heritage. The report was

submitted to Cabinet for consideration. It is an official record of Cabinet and its disclosure is taken to be contrary to the public interest under schedule 1, 1.6(1).

For the purposes of schedule 1, 1.6(2) of the Act, purely factual information is limited to basic factual information as opposed to advice or opinion. I have reviewed the contents of the report, and I consider there is some information within the document that is purely factual in character and is not an integral part of the deliberative content of the document.

I have also decided to disclose information within the report which has already been publicly released under the *Review of the ACT Heritage Council – Public Report*.

To provide you with the information that I have determined to be in purely factual information, a copy of the report has been prepared with the contrary to the public interest information redacted in accordance with section 50 of the Act.

### **Information Disclosure – Schedule 2 of the Act**

In assessing whether disclosure of the information identified in relation to your application would, on balance be contrary to the public interest, I must apply the test outlined under section 17 of the Act.

This requires consideration of factors favouring disclosure, any factors favouring nondisclosure and the balance of those factors when considered cumulatively. Unless, on balance disclosure would be contrary to the public interest, access to the information must be allowed.

In applying the public interest test to the information identified in relation to your application, I have determined that disclosure of the information could reasonably be expected to do the following:

- Schedule 2, 2.1(a)(ii) – contribute to positive and informed debate on important issues or matters of public interest
- Schedule 2, 2.1(a)(iii) - inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community
- Schedule 2, 2.1(a)(viii) – reveal the reason for a government decision and any background or contextual information that informed the decision.

Collectively, these factors demonstrate that the release of the requested information may assist in the understanding of government decisions, inform the community of the government's operations and contribute to informed debate on a matter of public interest due to the role and purpose of the ACT Heritage Council in its duties under the *Heritage Act 2004*.

I have also determined that there are number of factors favouring non-disclosure:

- Schedule 2, 2.2(a)(ii) – disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004*
- Schedule 2, 2.2(a)(vii) – disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information

- Schedule 2, 2.2(a)(xv) – disclosure of the information could reasonably be expected to prejudice the management functions of an agency or the conduct of industrial relations by an agency
- Schedule 2, 2.2(b)(v) – the information is about the unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct and disclosure could prejudice the fair treatment of an individual

#### Right to privacy and fair treatment

The information within the scope of your application is of a delicate nature as it relates to the experiences of individuals in an environment where working relationships had become strained.

The report and other documents contain personal information, including names, contact details, personal opinions and/or unsubstantiated allegations of improper conduct by individuals. Individuals are entitled to expect that the personal information they have supplied as part of this process will be dealt with in a manner which protects their privacy and reputation.

The Act provides that *personal information* means ‘information or an opinion (including information forming part of a database), whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion’. In some of the documents, individuals are not identified by their names or positions. However, due to the small cohort of people involved in the matter, it is not difficult to identify these individuals.

I note that the disclosure of information about agency staff will not generally be considered to prejudice the protection of the individual’s right to privacy where the information is wholly related to the individual’s routine day-to-day work activities. However, in this case, the report and other documents captured by your application are not routine day-to-day work but rather came into existence following a workplace complaint.

Disclosing the information would prejudice the protection of an individual’s right to privacy and a person’s right under section 12 of the *Human Rights Act 2004* to not to have their privacy interfered with unlawfully or arbitrarily and to not have their reputation unlawfully attacked.

Schedule 2, 2.2(b)(v) of the Act supports nondisclosure if the information about unsubstantiated allegations of improper conduct and disclosure could prejudice the fair treatment of an individual, noting that allegations are considered unsubstantiated where they have not been the subject of court proceedings or proceeding by a relevant tribunal or regulatory body.

Based on the information above and the consideration given to the views of the individuals consulted, I have given the factors in schedule 2, 2.2(a)(ii) and 2.2(b)(v) substantial weight. I have determined that protecting an individual’s right to privacy and fair treatment outweighs the benefit of public debate in this case, particularly as a modified version of the report has already been released to the public.

Under the *Work Health and Safety Act 2011*, I have a statutory obligation to consider and maintain the health, safety and wellbeing of the EPSDD's employees. I consider that release of certain information in this instance could reasonably be expected to result in a risk to those employees' psychological health.

Prejudice the management functions and ability to obtain confidential information

I have determined that disclosure of the information sought could reasonably be expected to prejudice the management function of EPSDD, and its ability to obtain confidential information.

The information supplied to Nous Group by officers of EPSDD and the ACT Heritage Council members was communicated and received under an implied understanding that the information would be kept confidential.

The report was treated in strict confidence and special arrangements were put in place to restrict access to files to a limited and small group of officers and executives within EPSDD. When consulted on the report, members of the council and Heritage Unit employees were reminded of their statutory obligations to not disclose confidential information. The implication of confidentiality allowed participants of the review the ability to provide frank and honest feedback regarding the relationships and behaviours of the parties involved, without fear of reprisal.

The Directorate has embarked on a review of the ACT's heritage arrangements. The Minister for Heritage has advised former members of the council that she would highly value their engagement in the review given they will have important perspectives to bring to the discussion. Disclosing the confidential information may discourage former members of the council from participating in the review.

Disclosure of the information could also reasonably be expected to discourage other ACT Government employees or statutory office holders from cooperating in, or being able to exhibit the same level of candour, in a complaint assessment or similar review process, if they believe that the information they provide could be disclosed in response to an access application under the FOI Act.

Deliberative process of government

Although the information in the report is taken to be contrary to the public interest under schedule 1, 1.6 (as discussed above), I note that the report contains opinions, possible mitigation strategies and recommendations about the ACT Heritage Council. While the review of the council is still underway, disclosing this information could have the potential to inhibit an agency decision-maker or prejudice the integrity of the decision-making process. Though there is public interest in the outcomes of the review and how this will affect the Canberra community, disclosure of the information during these early stages would be expected to impede the effective process of the review and prejudice a deliberative process of government (schedule 2, 2.2(a)(xvi)).

I have not approached balancing these factors lightly, I support the pro-disclosure bias of the Act which reflects the importance of public access to government information for the

proper working of representative democracy. I have given significant weight to the factors favouring disclosure, particularly where disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.

I am satisfied, on balance, the public interest factors favouring nondisclosure, and particularly the substantial public interest in enabling EPSDD to receive and assess workplace complaints confidentially, outweigh the public interest factors favouring disclosure at this time.

### **Charges**

In accordance with the *Freedom of Information (Fees) Determination 2018* no charges are applicable to this application.

### **Online Publication**

Under section 28 of the Act, EPSDD maintains an online record of access applications called a disclosure log. Your original access application, this decision and documents released will be published in the EPSDD disclosure log no earlier than three days after you receive this decision. Your personal contact details will not be published.

You may view the EPSDD disclosure log at

<https://www.environment.act.gov.au/about-us/access-government-information/disclosure-log>

### **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 the disclosure log, or a longer period allowed by the Ombudsman. For more information and the application form for Ombudsman review, please visit:

[https://www.ombudsman.act.gov.au/\\_data/assets/pdf\\_file/0026/79190/Apply-for-Ombudsman-review.pdf](https://www.ombudsman.act.gov.au/_data/assets/pdf_file/0026/79190/Apply-for-Ombudsman-review.pdf)

Alternatively, you may write to the Ombudsman at:

The ACT Ombudsman

GPO Box 442

CANBERRA ACT 2601

Via email: [actfoi@ombudsman.gov.au](mailto: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  
Allara House

15 Constitution Avenue  
GPO Box 370  
CANBERRA CITY ACT 2601

Telephone: (02) 6207 1740  
<http://www.acat.act.gov.au/>

**Further Information**

If you have any queries concerning the Directorate's processing of your request, or would like further information, please contact EPSDD Customer Service on (02) 6207 1923 and ask for the FOI team, or email to [EPSDFOI@act.gov.au](mailto:EPSDFOI@act.gov.au).

Yours sincerely



Bren Burkevics  
Information Officer  
Executive Group Manager, Environment, Heritage and Water

24 February 2023