



ACT
Government

Environment, Planning and
Sustainable Development

Phone: (02) 6207 1923
Reference: 23/121729

Dear [REDACTED]

Decision on Freedom of Information Access Application 23/121729

I refer to your application made under section 30 of the *Freedom of Information Act 2016* (the FOI Act) received by the Environment, Planning and Sustainable Development Directorate (EPSDD) on 24 November 2023,

Specifically, you are seeking:

1. *The making of the Planning (Exempt Development) Regulation 2023*
2. *The decision for the Planning (Exempt Development) Regulation 2023 to commence on the 27 November 2023*
3. *The decision to update the ACT Legislation Register to reflect the commencement date of 27 November 2023, including the date on which the ACT Legislation Register website was updated to reflect this commencement date.*

With an extension to the decision due date, EPSDD is required to decide your application on or by 16 February 2024. I am an Information Officer appointed under section 18 of the Act to deal with access applications made under part 5 and now write to provide notice of my decision in relation to your application.

Decision on access

In response to your application, comprehensive searches were conducted and 35 documents containing information within the scope of your application were identified.

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

In considering your application, I have taken the following into account:

- the FOI Act, particularly sections 6, 17, 50 and schedules 1 and 2
- the content of the documents that fall within the scope of your request;
- the *Freedom of Information (Volume 4 – Considering the public interest) Guidelines 2023* (Notifiable Instrument [NI2023-751](#))
- the *Human Rights Act 2004*; and
- Parliamentary Counsel's Office's Drafting Legislation and Working with PCO Guidance Document.

I have decided to:

- grant **full** access to 11 documents

- grant **partial** access to five documents
- **refuse** access to 19 documents and
- refuse to deal with parts of your application under sections 43(1)(d) and 45(a) of the Act.

Under section 43(1)(d) of the Act, a respondent agency may refuse to deal with an access application wholly or in part if the government information is already available to the applicant. Section 45 sets out the circumstances in which government information is already available to the applicant. These circumstances include where the government information is publicly available. Where the information in scope is publicly available weblinks have been provided on the document schedule (**Attachment A**).

The documents released to you by my decision are provided at **Attachment B** to this letter.

Public interest considerations

Information disclosure – schedule 2 of the Act

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

Section 16 of the Act relevantly 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, 1.2 provides that disclosure of information is taken to be contrary to the public interest if the information would be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege.

It is considered to be in the public interest that a client can make full and frank disclosure to their legal practitioner, who in turn can then fully advise them and represent them. As a result, a person can rely on legal professional privilege to resist providing information, which would disclose confidential communicates made in the context of a legal practitioner-client relationship.

The guidance material developed by the Parliamentary Counsel's Office (PCO), [Developing Legislation and Working with PCO](#), highlights that the relationship between PCO and an agency in developing legislation, is analogous of a lawyer and client. Communications between parties are subject to legal professional privilege to ensure confidential information is not disclosed or discussed with anyone outside of the government.

Having carefully reviewed the draft Planning (Exempt Development) Regulations, correspondence between agency staff and PCO's drafters and consultation correspondence, I am satisfied that an independent legal practitioner and client relationship existed, the communication was made for the purpose of giving or receiving legal advice and the information was provided on a confidential basis. Therefore, their disclosure is contrary to the public interest in accordance with schedule 1, 1.2 of the Act.

I am satisfied that disclosure of the information would not reveal 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.

Document 30 includes information submitted for consideration by Cabinet. This information is taken to be contrary to the public interest as the information was submitted to Cabinet (or is an extract of information submitted to Cabinet) under schedule 1, 1.6(1)(a) and (c).

Document 30 includes information relating to a Cabinet decision which was not published. Disclosure of the information would reveal any deliberation of Cabinet (other than through the official publication of a Cabinet decision) this information is taken to be contrary to the public interest under schedule 1, 1.6(1)(d).

Information Disclosure – Schedule 2 of the Act

In assessing whether disclosure of the remaining information identified in relation to your request 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 favouring nondisclosure and the balancing 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 documents 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; and
- 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 public understanding of government decisions and provide insights as to the context for them, promoting transparency and accountability.

I have however, also determined that there are number of factors favouring nondisclosure:

- 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*; and

Documents 1, 4 and 14 contain the personal information of ACT public servants (mobile number and signature). I am satisfied that the factors in favour of release can still be met while protecting the personal information of the individuals involved. I have therefore weighed the factor for non-disclosure more highly than the factor in favour of release in this instance. As a result, I have decided that release of this information could prejudice the employee’s right to privacy under the *Human Rights Act 2004*. Having applied the test outlined in section 17 of the Act and deciding that release of 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) of the Act.

Right to review

Information regarding your right to review of this decision, the processing and publication of your request and this decision are set out at **Attachment C**.

Yours sincerely



Ben Green
Information Officer
Executive Group Manager, Planning and Urban Policy

16 February 2024



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Decision Notice Fact Sheet

Online publication

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

The EPSDD disclosure log at the following link:

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

Ombudsman review

Decisions on access requests are reviewable decisions 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 a 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/accountability-and-oversight/freedom-of-information/foi-complaints-and-reviews>

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/>

Further information

If you have any queries concerning the Directorate's processing of your request, or would like further information, please contact EPSDFOI@act.gov.au or call (02) 6207 1923 and ask for the Information Governance team.