



ACT
Government

Environment, Planning and
Sustainable Development

Phone: (02) 6207 1923

Reference: 23/025118



Dear 

Decision on Freedom of Information Access Application 23/025118

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 5 March 2023.

Specifically, you are seeking:

Copies of:

- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2003*
- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2004*
- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2005*
- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2006*
- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2007*
- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2008*
- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2009*
- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2010*
- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2011*

Copies of the following which were not located during the processing of FOI 22/00134:

- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2015*
- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2016*

Confirmation EPSDD holds a copy of

- *Master Builder's Fidelity Fund Financial Report for the Year Ended 30 Jun 2020*

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

In relation to the final point of your application, I can confirm the Minister for Sustainable Building and Construction and EPSDD hold a copy of the Master Builders Fidelity Fund Financial Report for the year ended 30 June 2020.

As third party consultation was undertaken, and with your agreement to an extension EPSDD must decide your application on or by 4 May 2023.

Searches Conducted

Section 34(1) of the Act requires the respondent to take reasonable steps to identify information that falls within the scope of the access application. I am satisfied that reasonable steps were taken to identify any information within scope of the application.

Comprehensive searches of EPSDD's Electronic Records and Document Management System (EDRMS) *Objective* for any document created since 1 January 2003 were conducted, using key words and phrases. Over 2600 search results were interrogated for relevance to your application. Searches for possible hardcopy files were also conducted. Three documents containing information within the scope of your application were identified.

There was no evidence found to confirm that EPSDD has ever held these documents. It is plausible that as the information is required to be provided by MBFF to the relevant Minister, not to EPSDD, that the information was not passed on to EPSDD. Based on this view, EPSDD contacted the Minister's office to see if they were able to identify the relevant reports. Searches were conducted by the office of the current Minister for Sustainable Building and Construction. The Minister's office advised that they were unable to locate the reports in questions and advised, that, to the best of their knowledge, the reports were not received as part of the Minister's induction when appointed as Minister for Sustainable Building and Construction in November 2020.

Section 58 of the Act states that if a respondent to an access application believes relevant information in the scope of the application may also be held by another agency or Minister, the respondent must give a copy of the application to the other entity. As the office of the Minister for Sustainable Building and Construction advised no documents were identified within scope, the application was not transferred.

Decision on Access

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.

I have decided to grant partial access to these three documents and, in accordance with section 50 of the Act, provide you with copies of documents with deletions applied to contrary to the public interest information.

My access decisions are detailed further in the following statement of reasons.

Material Considered and Third Party Consultation

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

- the FOI Act, particularly sections 6, 17, 38, 50, and Schedule 2
- the content of the documents that fall within the scope of your request
- the views of a third party consulted
- *Freedom of Information (Volume 4 – Considering the public interest) Guidelines 2020* ([NI2020-371](#))
- ACT Ombudsman review decision ([AFOI-RR/22/10009](#)) dated 17 November 2022.

In accordance with section 38 of the Act, as information within the documents may have been of concern to a third party, consultation was undertaken. The third party objected to release of the information in full. The third party's objections to disclosure of the information included the information being subject to legal professional privilege (Schedule 1, 1.2) and disclosure would prejudice their business affairs (Schedule 2, 2.2(a)(xi)).

I have determined, with the information available to me and provided in the third party's response that the information would not be privileged from production or admission into evidence in a legal proceeding on the grounds of legal professional privilege.

I have considered their objections to disclosure in relation to business affairs, this is addressed below when considering the public interest test.

As my decision is contrary to their objections, access to the documents is deferred pending the period allowed for the third party to seek a review of this decision with the ACT Ombudsman. You will be advised if an application for review of the decision is submitted.

Public Interest Considerations

My reasons for deciding not to grant access to certain components of some documents are as follows:

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 section 7, the Act). 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.

In assessing the public interest, I must apply the test outlined under section 17 of the Act which requires consideration of factors favouring disclosure, any favouring nondisclosure and the balance of those factors when considered cumulatively.

Factors Favouring Disclosure

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

- Schedule 2, 2.1(a)(i) – promote open discussion of public affairs and enhance government's accountability.

In making my decision I have taken into account the ACT Ombudsman's review decision ([AFOI-RR/22/10009](#)) dated 17 November 2022, which:

- a. acknowledges that the release of the MBFF financial reports could promote open discussion of public affairs and enhance the government's accountability as disclosure would inform the public about the government's oversight of approved schemes in the Australian Capital Territory; and
- b. considered the financial reports of the Master Builders Fidelity Fund (MBFF) which are over five years old are merely historical as they are unlikely to reveal any relevant information about the current business affairs of the MBFF.

I have given this factor significant weight.

Factors favouring Nondisclosure

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

- Schedule 2, 2.2(a)(ii) – prejudice the protection of an individual’s right to privacy or any other right under the *Human Rights Act 2004*.

Documents 1 and 3 relevant to your application contain personal information of individuals (names and signatures). I have considered how the public interest would be advanced by releasing this information in part or in whole. It is my view that the information if disclosed, could reasonably be expected to prejudice the protection of an individual’s right to privacy under section 12 of the *Human Rights Act 2004*. On balance, and the information available to me, I am satisfied that the disclosure of this personal information is not in the public interest and these redactions are of a minor nature. To provide you with the information that I have determined to be in the public interest to release, copies of documents 1 and 3 have been prepared with personal information redacted in accordance with section 50 and the Objects of the Act.

- Schedule 2, 2.2(a)(xi) – prejudice trade secrets, business affairs or research of an agency or person.

Objections raised by the third party include the information containing business secrets, financial information including pricing calculations and confidential advice which due to the uniqueness of the fund may be considered to be trade secrets.

I have considered the objections raised by the third party but have given this factor minor weight due to the age of the documents, as I do not consider that disclosure would reveal current financial or business information of the third party.

Charges

In accordance with section 107(2)(b) of the Act any charges applicable are waived.

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 the document schedule 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.

Publication of documents within scope of the application will be deferred pending the period allowed for the third party to submit a review of this decision to the ACT Ombudsman.

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

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 EPSDD Customer Service on (02) 6207 1923 and ask for the FOI team, or email to EPSDFOI@act.gov.au.

Yours sincerely



James Bennett
Information Officer
Executive Branch Manager, Building Reform, Unit Titles and Design Services
Environment, Planning and Sustainable Development Directorate

4 May 2023