



ACT
Government

Environment, Planning and
Sustainable Development

Phone: (02) 6207 1923
Reference: 23/030654

Dear [REDACTED]

Decision on Freedom of Information Access Application 23/030654

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 20 March 2023.

Specifically, you are seeking:

1. *Confirm with EPSDD if they have:*
 - *the original Trust Deed – 2002 (still current – we have a copy), or*
 - *a draft update forwarded last year (due to the concerns that we have raised regarding lack of complaints processes etc and not meeting the Approval Criteria).*
2. *A copy of any Compliance Plans (noting that under legislation, MBFF are required to provide the Govt any updates to the Compliance Plans)*
3. *A copy of any Contingency Plans (noting that under legislation, MBFF are required to provide the Govt any updates to the Contingency Plans)*
4. *A copy of the Procedures Manual is requested from the MBFF by the Review Team for the purposes of regulatory oversight of the Fund and we are informed when this is available.*

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

As third party consultation was undertaken EPSDD must decide your application on or by 11 May 2023.

In relation to point 1 of your application, I confirm that EPSDD holds a copy of the original Master Builders Fidelity Fund (MBFF) Trust Deed and a draft update.

In relation to point 4 of your application, the procedures manual is an internal document belonging to the MBFF. This document is not required to be provided to ACT Government and a copy of this document is not held by EPSDD. You may request a copy of this document directly from the MBFF.

Searches Conducted

Comprehensive searches were conducted and two documents containing information within the scope of your application were identified.

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 the two 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 the third parties consulted
- *Freedom of Information (Volume 4 – Considering the public interest) Guidelines 2020* ([NI2020-371](#))

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 disclosure of the information in full. The third party's objections to disclosure of the information included disclosure would prejudice their business affairs and the information being provided in-confidence.

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

As my decision is contrary to the third party's 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 components of the document 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.

I have given this factor significant weight as disclosure of this information 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.

Factors favouring Non-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, 2.2(a)(xi) – prejudice trade secrets, business affairs or research of an agency or person
- Schedule 2, 2.2(a)(xii) – prejudice an agency’s ability to obtain confidential information.

Under the *Building (Prudential Standards) Determination 2005*, an approved fidelity fund scheme is required submit a contingency plan with their application for approval, notify the Minister of any contingency events that will have a material adverse effect, amend the contingency as necessary and as circumstances change and provide the Minister with a copy of the new contingency plan within 14 days of it being signed by the trustees.

Under the *Building (Prudential Standards) Determination 2005*, an approved fidelity fund scheme is required to submit a compliance plan with their application, monitor the compliance plan at regular intervals (at least every 3 months), notify the Minister of any breach of the compliance plan that will have a material adverse effect, assess the adequacy of the compliance plan and advise the Minister at the end of the financial year of the adequacy of the plan and any breaches and if the plan is amended, provide the Minister with a copy of the new compliance plan within 14 days of it being signed by the trustees.

Consideration has been given to the intent that the information was provided by the third party without the anticipation of being disclosed and was provided with an expectation of confidence due to the commercial nature of the information. Whilst in some cases disclosure of information would be expected to prejudice an agency’s ability to obtain confidential information in future (Schedule 2, 2.2(a)(xii)), I have given little weight to this factor due to the requirements for the information to be provided to the Minister for Sustainable Building and Construction under the *Building (Prudential Standards) Determination 2005*.

In making my decision I have considered the sensitivity of the business information within the documents and deliberated on the nature and detail of the information, whether the information is current or historical and the nature of the particular market.

Some information within the documents includes information on how a fund operates and their internal practices relating to financial institution and data security. I have given weight to the detriment that could be caused by the disclosure of this information and the potential risks to the third party’s data security.

I have considered the age of the documents, whilst the documents are over 15 years old, they are still in use by the third party and considered current.

In making my decision I have determined that the information to be disclosed does not provide intricate detail of the third party's business procedures.

To provide you with the information that I have determined to be in the public interest to release, copies of some documents have been prepared with information redacted in accordance with section 50 and the Objects of the Act.

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 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, Housing and Design Services
Environment, Planning and Sustainable Development Directorate

// May 2023