



ACT
Government

Chief Minister, Treasury and
Economic Development

Freedom of Information Disclosure Log Publication Coversheet

The following information is provided pursuant to section 28 of the *Freedom of Information Act 2016*.

Application Details	
Ref. No.	CMTEDFOI 2023-437
Date of Application	15 December 2023
Date of Decision	14 March 2024
Processing time (in working days)	40
Fees	Waived
Decision on Access	Refusal
Information Requested (summary)	Documents considered for a decision to refuse a Controlled Activity Order for a car park located at car park on Block 23 Section 41 Lyneham, including complaints.
Publication Details	
Original application	<input checked="" type="checkbox"/> Published <input type="checkbox"/> N/A
Decision notice	<input checked="" type="checkbox"/> Published <input type="checkbox"/> N/A
Documents and schedule	<input type="checkbox"/> Published <input checked="" type="checkbox"/> N/A
Decision made by Ombudsman	N/A
Additional information identified by Ombudsman	N/A
Decision made by ACAT	N/A
Additional information identified by ACAT	N/A

From: [REDACTED]
To: [CMTEDD FOI](#)
Subject: FOI Request - application for a controlled activity order - car park on Block 23 Section 41 Lyneham
Date: Friday, 15 December 2023 2:07:22 PM
Attachments: [image001.png](#)

Dear Freedom of Information Officer – CMTEDD

I would like to request access to documents, including correspondence, emails, briefings by Access Canberra regarding:

- An application for a controlled activity order relating to a car park on Block 23 Section 41 Lyneham and the decision to refuse the application.

If you have any enquiries can you please contact my office at [REDACTED] or 6250131.

Kind regards,





FREEDOM OF INFORMATION REQUEST – NOTICE OF DECISION

I refer to your application under section 30 of the *Freedom of Information Act 2016* (the Act), received by the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) on 15 December 2023, in which you sought access to information about a controlled activity order. Specifically, you requested:

“...documents, including correspondence, emails, briefings by Access Canberra regarding:

- *An application for a controlled activity order relating to a car park on Block 23 Section 41 Lyneham and the decision to refuse the application.”*

On 31 January 2024 your office was contacted to clarify the scope. On that date your office confirmed by phone the following scope:

“All information considered in making the decision to refuse the application for a controlled activity order relating to a car park on Block 23 Section 41 Lyneham. This includes information considered by Access Canberra when making the decision, such as consults and complaints. The application itself and the lease and sub-lease are not required.”

On 1 February 2024, your office confirmed agreement by email to the above revised scope and in that email provided the additional scope interpretation information as follows:

“...the application we are not after is the one submitted by the Lyneham Community Association at the end of 2022.”

Authority

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

Timeframes

In accordance with section 40 of the Act, CMTEDD is required to provide a decision on your access application within 30 days. Under section 41 of the Act the respondent can ask the applicant for an additional amount of time. I note you agreed to an extension to **22 February 2024**, which is a 12-working day extension for CMTEDD to decide this application. You were then advised that third-party consultation was required under

section 38 of the Act and 15 working days was added, with a response due by **14 March 2024**.

Search for documents and material considered

Thorough searches for records in the directorate were undertaken to identify and locate any documents within scope of your request.

These searches identified documents within the scope of your request held by CMTEDD which included emails, letters, draft documents, reports and records were identified as relevant to your application.

Decision on access

I have decided to **refuse** access to documents within scope of your request.

Statement of Reasons

In accordance with section 54(2) of the Act a statement of reasons outlining my decisions is below. In reaching my access decisions, I have taken the following into account:

- the Act
- the information that falls within the scope of your request
- third party views
- ACT Ombudsman guidelines
- Information publicly available
- *Lyneham Community Association Inc v Act Planning And Land Authority & ORS* (Administrative Review) [2024] ACAT 16

As a decision maker, I am required to determine whether the information within scope is in the public interest to release. To make this decision, I am required to:

- assess whether the information would be contrary to public interest to disclose as per **Schedule 1** of the Act.
- perform the public interest test as set out in section 17 of the Act by balancing the factors favouring disclosure and factors favouring non-disclosure in **Schedule 2** of the Act.

Scope of your request

Searches were undertaken and after rescoping your application, records containing the application for a controlled activity order are determined to be outside the scope of your requested information (out of scope).

Some information within your requested scope included information that was published on Environment, Planning and Sustainable Development Directorate's (EPSDD) disclosure log, with case reference number EPSDD 19/20355. This can be found here:

<https://www.environment.act.gov.au/about-us/access-government-information/disclosure-log/disclosure-logs/epsdd-1928355>

During the period between receiving your request, rescoping and a decision being made on your FOI access application, I note that the ACT Civil and Administrative Tribunal (ACAT) published reasons for a decision in *Lyneham Community Association Inc v Act Planning and Land Authority & ORS* (Administrative Review) [2024] ACAT 16 (the LCA case). In this case at paragraph 13, the joint reasons by Senior Member M Orlov and Senior member G Trickett state:

“The effect of section 351(4) of the PD Act [Planning and Development Act] and section 303 of the Planning and Development Regulation 2008 (repealed) is that ACTPLA is taken to have refused to make a controlled activity order applied for under section 350 of the PD Act if it fails to decide the application before the end of 20 working days after the end of the 10-working day period allowed for a written response to the show 4 cause notice. The time for ACTPLA to decide the application by the LCA expired on 22 June 2023. ACTPLA failed to decide the application within the prescribed time and, therefore, is taken to have refused to make a controlled activity order on 23 June 2023.”

The joint decision in the LCA case also provides additional background information commencing at paragraph 81, which I believe goes some way to addressing the information required under your request, namely the background why an application for a controlled activity order was refused. The ACAT decision may be accessed here:

<https://www.acat.act.gov.au/decisions/lyneham-community-association-inc-v-act-planning-and-land-authority-and-ors-administrative-review-2024-acat-16>

Exemptions claimed

Schedule 1 of the Act: Information taken to be contrary to the public interest.

My reasons for deciding not to grant access to the documents and components of these documents are as follows:

- *Section 1.14 - Law enforcement or public safety information.*

I have decided to refuse access in whole, to documents that contain information that can identify confidential sources of information related to investigation of possible contraventions of the law and would be reasonable be expected to be prejudicial to lawful methods or procedures for protecting public safety including revealing sources of confidential information. This includes complaint information.

Please note that the LCA case is under appeal. In this respect, the Acting Justice Ainslie-Wallace made orders on 6 February 2024, in the ACT Supreme Court of Appeal and issued a stay for matter CA/2/2024 *Brindabella Christian Education Ltd ACN 100 229 669 trading as Brindabella Christian College v Lyneham Community Association Inc & Ors*.

Therefore, at this time, the material is exempt from release under schedule 1, s 1.14(1)(e) of the Act which states that disclosure of the information could reasonably be expected to “prejudice a person’s fair trial or the impartial adjudication of a matter before a court or tribunal.”

In these circumstances, the disclosure of the information may reduce the effectiveness of a court’s power to make suppression or non-publication orders, reveal information that may enable a witness to alter his or her evidence, or undermine the witness’ credibility by creating the perception he or she may have altered his or her evidence, prematurely reveal an aspect of a party’s case that the party would not otherwise be required to disclose in preparation for the trial or adjudication.

Public Interest Test

The Act has a presumption in favour of disclosure. As a decision maker I am required to decide where, on balance, public interest lies. As part of this process, I must consider factors favouring disclosure and nondisclosure.

In *Hogan v Hinch* (2011) 243 CLR 506, [31] French CJ stated that when ‘used in a statute, the term [public interest] derives its content from “the subject matter and the scope and purpose” of the enactment in which it appears’. Section 17(1) of the Act sets out the test, to be applied to determine whether disclosure of information would be contrary to the public interest. These factors are found in subsection 17(2) and Schedule 2 of the Act.

Schedule 2: Factors to be considered when deciding the public interest.

Taking into consideration the information contained in the documents found to be within the scope of your request, I have identified that the following public interest factors are relevant to determine if release of the information contained within these documents is within the ‘public interest’.

Factors favouring disclosure (Schedule 2, section 2.1 of the Act of the Act)

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

- *Section 2.1(a)(i) - promote open discussion of public affairs and enhance the government’s accountability.*
- *Section 2.1(a)(ii) - contribute to positive and informed debate on important issues or matters of public interest.*
- *Section 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.*
- *Section 2.1(a)(viii) - reveal the reason for a government decision and any background or contextual information that informed the decision.*

The release of this information could reasonably help to create positive and informed discussions and enhance the government’s accountability related to approvals for the use of public land. I consider that disclosing the contents of the information sought could reasonably contribute to discussion of public affairs. The release of information would also provide insight into processes undertaken with regards to business activities related to building and certification activities undertaken by the ACT Government.

I note the information relates to government decisions, impacting on the private sector, such as the decision to issue certificates of occupancy. I am satisfied that this is a relevant consideration favouring disclosure in this case, and in the interests of enhancing open discussion. I have placed some weight on the above factors favouring disclosure. The release of this information can reasonably be expected to provide some background and context into the administration and decision-making process relating to compliance activities handled by CMTEDD. However, these factors are required to be balanced against those factors favouring nondisclosure.

Factors favouring non-disclosure (Schedule 2, section 2.2 of the Act)

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

- *Section 2.2(a)(ii) - prejudice the protection of an individual’s right to privacy or any other right under the Human Rights Act 2004.*
- *Section 2.2(a)(xi) - prejudice trade secrets, business affairs or research of an agency or person.*

- *Section 2.2(a)(xii) - prejudice an agency's ability to obtain confidential information.*
- *Section 2.2(a)(xvi) - prejudice a deliberative process of government.*
- *Section 2.2(b)(iv) - the information is information disclosure of which is prohibited by an Act of the Territory, a State or the Commonwealth.*

Having reviewed the documents within the scope of your request, I have given stronger weight to the above factors favouring nondisclosure. As the proceedings are currently before the ACT Supreme Court of Appeal and a stay has been issued, releasing information may be a contravention of the *Supreme Court Act 1933*.

Under the section 17 public interest test, the factors for nondisclosure in the public interest outweigh the factors for disclosure. Furthermore, I find that the material is exempt from release under schedule 1, s 1.14(e) of the Act. Therefore, I refuse to give access to documents within your requested scope under section 35(1)(c) of the Act because the information is contrary to the public interest information.

Charges

Under section [REDACTED] of the Act, a fee must be waived if [REDACTED]. As such, any fees applicable under the Act and the *Freedom of Information (Fees) Determination 2018* are waived.

Online publishing – Disclosure Log

Under section 28 of the Act, CMTEDD maintains an online record of access applications called a [disclosure log](#).

Your original access application and my decision will be published on the CMTEDD disclosure log. Your personal contact details will not be published.

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 provided to you, or a longer period allowed by the Ombudsman.

We recommend using this form [Applying for an Ombudsman Review](#) to ensure you provide all of the required information. 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
GPO Box 370
Canberra City ACT 2601
Telephone: (02) 6207 1740
<http://www.acat.act.gov.au/>

Should you have any queries in relation to your request please contact the Information Access Team by telephone on 6207 7754 or email CMTEDDFOI@act.gov.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'K Stuart', written in a cursive style.

Katharine Stuart
Information Officer
Chief Minister, Treasury and Economic Development Directorate

14 March 2024