



Katy Gallagher MLA

CHIEF MINISTER
MINISTER FOR HEALTH
MINISTER FOR REGIONAL DEVELOPMENT
MINISTER FOR HIGHER EDUCATION

MEMBER FOR MOLONGLO

Dear

I refer to your emails dated 3 and 8 April 2013 in which you request access to documents under the *Freedom of Information Act 1989 (FOI Act)*. You requested access to the following documents:

All correspondence between ACTEW Corporation and the Chief Minister's Office produced or held by the Chief Minister's Office from the period of March 10, 2013 to April 8[,] 2013 inclusive, relating to salaries and entitlements of executive staff in the ACTEW Corporation.

I have been authorised by the Chief Minister to make a decision in respect of your request for access to these documents.

All of the documents falling within the scope of your request are set out in the attached schedule.

New documents

My attention has also been drawn to two additional documents (21, 22) which fall within the scope of your request. As these documents involve third parties, I will contact them and as provided under the Act, seek their views in relation to their disclosure. Once I have received a response from the third parties involved, I will advise you formally of my decision.

Detailed decision

Documents referred to by number below refer to the number of the document in the schedule. I have decided to give access to some of the documents in full, some of the documents in part, and have decided to refuse access to some of the documents on the grounds that they are exempt documents under the FOI Act. My decision about each particular document is indicated, in summary, in the schedule.

The object of the FOI Act is set out in section 2. subsection 2(1) provides, in summary, that its object is to extend as far as possible, the right of the Australian community to access to information in the possession of the Territory subsection 2(2) provides that the provisions of

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601

Phone (02) 6205 0840 Fax (02) 6205 3030 Email: gallagher@act.gov.au Facebook: [KatyGallagherMLA](https://www.facebook.com/KatyGallagherMLA) Twitter: [@katyGMLA](https://twitter.com/katyGMLA)

the FOI Act shall be interpreted so as to further the objects set out in subsection 2(1) and to ensure that discretions conferred by the FOI Act are exercised as far as possible to facilitate and promote the disclosure of information. Additionally, section 13 provides, in summary, that nothing in the FOI Act is intended to prevent or discourage Ministers or agencies from giving access to documents, including exempt documents, otherwise than as required by the FOI Act where they can properly do so. It is clear that an approach that promotes openness and disclosure is required by the Act. In making my decision I gave considerable weight to this consideration.

A number of the documents that fall within the scope of your request contain personal information about third parties and it appeared to me that those third parties may reasonably wish to submit that those documents were exempt under section 41 of the FOI Act.

Additionally, a number of the documents also related to business affairs, and it appeared to me that certain people and organisations might reasonably wish to contend that those documents were exempt documents under section 43 of the FOI Act.

Accordingly, in respect of those documents containing personal information and/or relating to business affairs, I provided the affected third parties with an opportunity to make submissions on whether the documents were exempt documents under section 41 or section 43, as required by sections 27 and 27A of the FOI Act. I received submissions from each of the affected third parties, and have considered those submissions in deciding whether to grant you access to each document.

The test for whether a document is an exempt document under section 41 is whether its disclosure under the FOI Act would constitute an unreasonable disclosure of personal information about any person.

The test for whether a document is an exempt document under section 43 is whether its disclosure under the FOI would disclose –

- (a) trade secrets; or
- (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
- (c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs or an organisation or undertaking, being information –
 - i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or
 - ii) the disclosure of which under the FOI Act could reasonably be expected to prejudice the future supply of information to the Territory or an agency for the purpose of the administration of matters administered by an agency.

In relation to documents (1,2,3,4,7, 19) the third parties did not object to access being granted. I have decided that those documents are not exempt documents and therefore grant access to them.

The particular objections to the particular documents, and my decision about each one is set out briefly below.

Document 5

21/3/13. Third parties objected to release under S41 – significant breach of privacy, and S43 documents comprise part of company's business records.

Decision: Full release of correspondence only. Exempt attachments 5(a) and 5(b) as documents pertain to performance review of an individual employee which on balance would generally be expected to be treated as highly confidential and its disclosure to be an unreasonable breach of privacy. These documents also form part of the business records of the company. They would in my view be exempt under both S41 and S43 of the Act.

Document 6

25/3/13. One party objected in part to release of remuneration details citing S41 and S43 of the Act.

Decision: The contents of this document have been well ventilated in public, in the media and during recent Annual report hearings. On balance, I am not satisfied that disclosure under the Act would be unreasonable.

Document 8

28/3/13 Letter. Two parties partially objected in relation to the release of remuneration details.

Decision: I am not satisfied that disclosure under the Act would be unreasonable. The remuneration package details as set out in the document, consists of different components. The total value and many of the components of the package are already publicly known by virtue of being published in the employer's annual report, which was tabled in the ACT Legislative Assembly. There has also been further publication in a recent report by the Auditor –General (*Executive Remuneration disclosed in ACTEW Corporation Limited's (ACTEW) 2010-11 Financial Statements and Annual Report 2011. Report No. 2/2013*), specifically Table 4, p9).

In addition, the employee who objected to the release of the information has provided media interviews in which he discussed some details of his remuneration. Finally, the employer is a publicly owned company whose only shareholders are two Ministers. I consider it to be in the public interest that the information be publicly available. The third parties did not provide me with any reasons that might dissuade me from this view. I am not satisfied that the document is an exempt document, and access is granted.

Document 9

28/3/13 Attachment Minutes of meeting 179 of 1 July 2009 redacted. Two parties objected under S43 in relation to the documents being extracts of the company's records and should be treated as part of the business affairs of the company.

Decision: The document is minutes of meeting of the Board of ACTEW. At company board meetings business, commercial and financial information is discussed between board members, as is the usual course in most companies. The commercial value of such information could reasonably be expected to be lost if disclosed, and it could reasonably be expected that the organisation would be unreasonably adversely affected in respect of its business if disclosed. For example, a commercial competitor might be forewarned about strategic decisions or particular innovations made by the Board and recorded in the minutes. Board members should feel free, at board meetings, to discuss openly sensitive commercial

information without apprehension that their discussions might be released to the public under the FOI Act. For this reason I am satisfied that the document is exempt under section 43 and that access should not be granted.

Document 10

28/3/13 Attachment Minutes of meeting 188 of 1 July 2010 redacted. Two parties objected under S43 in relation to the documents being extracts of the company's records and should be treated as part of the business affairs of the company.

Decision: The document is minutes of meeting of the Board of ACTEW. At company board meetings business, commercial and financial information is discussed between board members, as is the usual course in most companies. The commercial value of such information could reasonably be expected to be lost if disclosed, and it could reasonably be expected that the organisation would be unreasonably adversely affected in respect of its business if disclosed. For example, a commercial competitor might be forewarned about strategic decisions or particular innovations made by the Board and recorded in the minutes. Board members should feel free, at board meetings, to discuss openly sensitive commercial information without apprehension that their discussions might be released to the public under the FOI Act. For this reason I am satisfied that the document is exempt under section 43 and that access should not be granted.

Document 11

28/3/13 Attachment Minutes of meeting 196 of 22 June 2011 redacted. Two parties objected under S43 in relation to the documents being extracts of the company's records and should be treated as part of the business affairs of the company.

Decision: The document is minutes of meeting of the Board of ACTEW. At company board meetings business, commercial and financial information is discussed between board members, as is the usual course in most companies. The commercial value of such information could reasonably be expected to be lost if disclosed, and it could reasonably be expected that the organisation would be unreasonably adversely affected in respect of its business if disclosed. For example, a commercial competitor might be forewarned about strategic decisions or particular innovations made by the Board and recorded in the minutes. Board members should feel free, at board meetings, to discuss openly sensitive commercial information without apprehension that their discussions might be released to the public under the FOI Act. For this reason I am satisfied that the document is exempt under section 43 and that access should not be granted.

Document 12

28/3/13 Attachment Minutes of meeting 206 of 27 June 2013 redacted. Two parties objected under S43 in relation to the documents being extracts of the company's records and should be treated as part of the business affairs of the company.

Decision: The document is minutes of meeting of the Board of ACTEW. At company board meetings business, commercial and financial information is discussed between board members, as is the usual course in most companies. The commercial value of such information could reasonably be expected to be lost if disclosed, and it could reasonably be expected that the organisation would be unreasonably adversely affected in respect of its business if disclosed. For example, a commercial competitor might be forewarned about strategic decisions or particular innovations made by the Board and recorded in the minutes. Board members should feel free, at board meetings, to discuss openly sensitive commercial information without apprehension that their discussions might be released to the public under

the FOI Act. For this reason I am satisfied that the document is exempt under section 43 and that access should not be granted.

Document 13

28/3/13 Attachment 2008-09 Priorities. A third party objected under S41 claiming this document concerns private affairs and their release would constitute a significant breach of privacy.

Decision: This document pertains to the performance review of an individual employee which on balance would generally be expected to be treated as highly confidential and its disclosure to be an unreasonable breach of privacy. These documents also form part of the business records of the company. They would in my view be exempt under both S41 and S43 of the Act.

Document 14

28/3/13 attachment 2009/2010 Performance Review. Two parties objected under S 41 claiming this document concerns private affairs their release would constitute a significant breach of privacy.

Decision: This document pertains to the performance review of an individual employee which on balance would generally be expected to be treated as highly confidential and its disclosure to be an unreasonable breach of privacy. These documents also form part of the business records of the company. They would in my view be exempt under both S41 and S43 of the Act.

Document 15

28/3/13 attachment 2010/11 Performance Review. Two parties objected under S 41 claiming this document concerns private affairs their release would constitute a significant breach of privacy.

Decision: This document pertains to the performance review of an individual employee which on balance would generally be expected to be treated as highly confidential and its disclosure to be an unreasonable breach of privacy. These documents also form part of the business records of the company. They would in my view be exempt under both S41 and S43 of the Act.

Document 16

28/3/13 attachment 2011-12 Performance Review. Two parties objected under S 41 claiming this document concerns private affairs their release would constitute a significant breach of privacy.

Decision: This document pertains to the performance review of an individual employee which on balance would generally be expected to be treated as highly confidential and its disclosure to be an unreasonable breach of privacy. These documents also form part of the business records of the company. They would in my view be exempt under both S41 and S43 of the Act.

Document 17

Review of the Managing Director's remuneration, April 2009, June 2009, and June 2010. (Egan and Associates). Three parties have objected to the release of these documents under S41 and S43. In relation to S41 the objection went to 'a breach of privacy' and under S43 the objection was on the basis of the documents being strictly confidential, including proprietary information and the subject of a confidentiality agreement between the company and Egan and Associates.

Decision: On balance, I find these documents to be exempt under S43 of the Act as they relate to the intellectual property of a company contracted to provide research to ACTEW on market rates for remuneration. In so doing I have formed the view that the information contained in the three reports has commercial value and that value could reasonably be expected to be destroyed or diminished if the information is disclosed. I have also given weight to the probability that the release of the three reports could be expected to unreasonably affect Egan and Associates adversely in relation to their business affairs.

Document 18

28/3/13. Letter from ACTEW Managing Director to Shareholders. Two parties objected under S43 on the basis that this document forms part of the business affairs of the corporation.

Decision: I have decided that the document is partially exempt under S 43; however, it is possible to delete from the document the information that makes it an exempt document in such a way that the document would not be misleading. Accordingly, I have decided to grant access to the document with those deletions, as provided for in section 21 of the FOI Act. In so doing, I believe that the information contained in the document is in the public interest for disclosure.

Document 20

5/4/13 Notice to shareholders from Michelle Norris of General Meeting of ACTEW Board. One objection was received based on S43 based on the view that the document forms part of the company's records and that they are not 'general correspondence' and are in fact a Notice of Meeting and agenda as required under the Corporations Act. In addition, that these documents form part of the company's records.

Decision: I agree that the documents are notifications as required under the Corporations Act, however I find that it would be overly narrow to decide that this document was exempt on this basis alone. The content of the document merely sets out the business of the meeting, which pertains to the request relating to remuneration setting for the Managing Director and associated issues for discussion with the Shareholders. These matters were the subject of media comment at the time of the meeting and will also be the subject of further reporting to the Legislative Assembly. As such I have determined that it is not an exempt document and should be fully released.

Right of Appeal

In relation to the documents that the third parties have submitted are exempt and should not be released, I am unable to provide copies of them to you until the third parties have had an opportunity to make an application to the ACAT for review. I am unable to provide you copies of the documents until after:

- (i) the time for the third parties to apply to the ACAT under section 69 (Review of certain decision in respect of documents relating to business affairs etc) or section 69A (Review of certain decisions about documents relating to personal information) ends and no application is made; or
- (ii) an application is made, but the ACAT—
 - (a) dismisses the application; or
 - (b) makes a decision in relation to the application in accordance with terms agreed by the parties; or
- (iii) an application is made and the ACAT confirms the decision in relation to the application.

The time within which the third parties must make an application to the ACAT is 28 days from receiving the Notice of Decision.

Additionally, if you do not agree with my decision, then you may apply to the ACAT for review.

The following notes are provided in accordance with section 25(1)(c) of the *Freedom of Information Act 1989* and regulation 7 of the *ACT Civil and Administrative Tribunal Regulation 2008*.

The review authority is the ACT Civil and Administrative Tribunal (Tribunal).

Location	Contact Details
ACT Civil and Administrative Tribunal Level 4, 1 Moore Street CANBERRA ACT 2601	Website: www.acat.gov.au Email: tribunal@act.gov.au Telephone: (02) 6207 1740 Facsimile: (02) 6205 4855 Post: GPO Box 370 CANBERRA ACT 2601

Powers of the Tribunal

The Tribunal is an independent body. It can review on their merits a large number of decisions made by ACT Government ministers, officials and statutory authorities.

In general, an application may be made for review of a decision

- (a) refusing to grant, or deferring, access to a document in accordance with a request;
- (b) refusing to allow a further period for making an application for internal review; or
- (c) relating to a charge or fee for processing a request or giving access to a document

The Tribunal has the power to decide any matter in relation to the request which could have been decided or could now be decided by the respondent to the original request for access. The Tribunal may not grant access to a document which it is satisfied is exempt.

Applications to the Tribunal

To apply for a review, obtain an application form from the Tribunal.

An application must be made within 28 days of receiving the Notice of Decision

Fees

Applications to the Tribunal, ordinarily require payment of a filing fee of not less than \$264.00 (the Tribunal Registry will advise of the current fee). You may apply to have the fee waived on the grounds of financial hardship, subject to approval of the Tribunal.

Costs

You will have to pay any costs involved in preparing or presenting your case.

The Tribunal has the power to award costs against a party including but not limited to:

- (a) expenses incurred by the successful party in the filing fee for the application;
- (b) costs incurred by one party associated with delay or obstruction by another party;
- (c) costs incurred by one party if another party contravenes an order of the Tribunal, provided the Tribunal considers it is in the interests of justice to make an award.

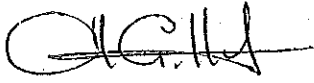
Procedures

The procedures of the Tribunal are outlined in its website. Contact the Tribunal Registry for alternative ways to access information about its procedures.

If you require further clarification on this matter, please feel free to contact me on 02 62050167 or by email: margaret.gillespie@act.gov.au.

Finally, I would like to thank you for your cooperation in this matter.

Yours sincerely



Margaret Gillespie
Chief of Staff
Office of the Chief Minister

30 April 2013