



ACT
Government

Chief Minister and Treasury

Our ref: FOI CMTD 22/13-14

Dear

Freedom of Information Request – Asbestos Abatement Program

Thank you for your email of 22 April 2014 seeking internal review of a decision dated 24 March 2014 (the original decision) on your request for access under the *Freedom of Information Act 1989* (the Act) to the list of homes in Canberra that contained loose-fill asbestos as prepared for the Loose Asbestos Insulation Removal Program from 1988 to 1993 (the List).

I have undertaken the requested internal review in accordance with section 59 of the Act.

Scope of Request

I am satisfied that appropriate and thorough searches were undertaken by the Chief Minister and Treasury Directorate (CMTD) in preparing the original decision.

I note your request for internal review did not take issue with the original decision in relation to its definition of the scope of your request. I consider that definition to be appropriate, and have adopted it for the purposes of this decision.

I also note, despite comments in your email that had the original decision maker made contact with you, you "might have been able to clarify the scope of [your] request in such a way as to encourage the disclosure of at least some information", you have declined the offer made by me when we met on 7 May 2014 to recast your request for information in such a way as might alleviate the concerns outlined in the original decision and canvassed at our meeting.

Decision on Access

I have decided to affirm the original decision to deny access to the List on the grounds set out below.

I have decided to overturn all grounds for refusal of access set out in the original decision except for section 34 and section 41 of the Act.

AK

Section 34 – Documents affecting relations with Commonwealth and States

Section 34 of the Act relevantly provides:

- (1) Subject to subsection (2), a document is an exempt document if disclosure of the document under this Act—
 - (a) would, or could reasonably be expected to, cause damage to relations between the Territory and the Commonwealth or the Territory and a State; or
 - (b) would divulge information or matter communicated in confidence by or on behalf of the Commonwealth, a State or an authority of the Commonwealth or of a State to the Territory, to a Territory authority or to a person receiving the communication on behalf of the Territory or of a Territory authority.
- (2) This section does not apply to a document in respect of matter in a document the disclosure of which under this Act would, on balance, be in the public interest.

I affirm the original decision not to provide the List on the basis that to do so could reasonably be expected to cause damage to relations between the Territory and the Commonwealth.

The original decision outlines the history of the loose fill asbestos remediation program (the Program) which I adopt.

As you are aware, the Program was commenced by the Commonwealth before self-government, and transferred to the Territory at self-government. At the time a memorandum of understanding was signed in which the Commonwealth agreed to indemnify the Territory against future claims arising from the Program. There is an ongoing dialogue at ministerial and officials' levels between the Territory and the Commonwealth in relation to the Program and the costs of remediation.

I have decided that the disclosure of the List could reasonably be expected to cause damage to relations between the Territory and the Commonwealth. It is in my view demonstrably preferable for negotiations such as those relating to the Program and remediation costs to be conducted in confidence, and in this context, a decision by the Territory to release the List is likely to negatively impact those negotiations. Furthermore, I observe the maintenance of productive interjurisdictional working relationships is facilitated by officials being able to conduct discussions in confidence. Actions by officials that might be seen as bringing unnecessary public attention to complex and sensitive matters in my view risk undermining those relationships and the ability of the Territory to advance its interests in negotiations.

I would observe in this context that in pursuit of negotiations with the Commonwealth in relation to contaminated land more generally in the Territory, agreement was reached at head of agency level that it would be undesirable to play out negotiations in the media and that actions in this regard by either party would likely stall or derail those discussions.

It is also my view that actions on the part of Territory officials that might be seen as megaphone diplomacy or deliberately provocative in bringing attention to a particular issue is likely to hinder future cooperation by the Commonwealth in relation to the Program, and potentially prejudice the flow of information between jurisdictions.

I have decided that the restrictions in relation to material conveyed in confidence (s 34(1)(b)) are not applicable to your request.

In relation to the public interest considerations contained in section 34(2) of the Act, there are in my view compelling public interest arguments in favour of, and against, release of the List. Having decided that there is a reasonable likelihood of damage to relations with the Commonwealth should I decide to release the List, there needs to be some strong countervailing reason to justify disclosure.

The arguments in favour of release of the List include the extent to which there is public knowledge of the number of homes remediated under the Program; the Government's stance in relation to open government and release of information; creation of opportunities for higher awareness of the need for proper conduct of building works on Program homes; and provision of information to tradespeople and residents about Program homes.

Arguments against disclosure of the List include preservation of good will in negotiations with the Commonwealth in relation to the costs of remediation; possible damage to the value of individual homes; the extent to which individuals with a genuine interest in the property (for example potential purchasers) are already able to access information about a particular house; and the existence of training and other awareness raising programs for tradespeople in relation to asbestos.

Furthermore, the extent to which the recent letter from the Work Safety Commissioner to Program homes has identified a small number of errors in the List raises the prospect that release of the List may lead an individual either to wrongly assume their home is a Program home, or alternatively, that a home is not a Program home and proceed, for example, to undertake works without the benefit of an asbestos assessment. I note in this context, there has been a small number of "missed" homes identified since the Program and so publication of the List risks a definitive view being taken about an individual property in error.

I have decided, on balance, that the arguments in favour of release are more than outweighed by those in favour of the List being withheld, and so decline to release the List to you on that basis.

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Section 41 – Documents affecting personal privacy

Section 41 of the Act relevantly provides:

- (1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

The protections against the unreasonable release of personal information in the Act serve to protect information about a natural person whose identity can reasonably be ascertained from that information.

I have decided that it is reasonably possible to ascertain the identity of the owner of a property based on information contained in the List and that in all the context of this issue, to release the List would amount to an unreasonable disclosure of personal information. I am of the view that there is sufficient connection between an address and the owners to establish the address as personal information.

I have decided that given that it is already possible for individuals with a genuine interest in a particular property to ascertain whether or not it is a Program home (for example from information on the building file), the publication of the List in its entirety would unnecessarily involve the disclosure of personal information, and so can be viewed as an unreasonable disclosure of that information.

While the Act provides for a process of consultation where a decision maker is minded to consider the release of personal information, to consult more than one thousand individuals is impractical. I have therefore made my decision without undertaking a consultation process.

I note, however, that a number of recipients of the Work Safety Commissioner's letter to Program homes have specifically requested address details of Program homes not be made public when they have made contact with CMTD.

I have decided to decline to release the List to you for these reasons.

Review of this decision

My decision is appealable and under sub-section 60(1) of the Act. If you are dissatisfied with this decision you may apply to the ACT Civil and Administrative Tribunal for a review within 28 days of receipt of this letter.

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Further information may be obtained from the Tribunal at:

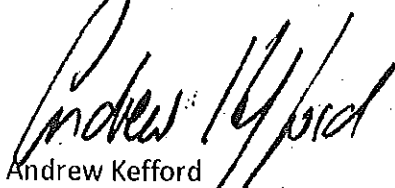
ACT Civil and Administrative Tribunal
Level 4, 1 Moore St
GPO Box 370
Canberra City ACT 2601
Telephone: (02) 6207 1740
<http://www.acat.act.gov.au/>

Under section 54 of the Act you also have the right to complain to the Ombudsman about the processing of your request. If you wish to lodge a complaint you should write to:

ACT Ombudsman
GPO Box 442
Canberra ACT 2601
<http://www.ombudsman.act.gov.au/>

Should you have any queries regarding this matter please contact me on 620 50213.

Yours sincerely



Andrew Kefford
Deputy Director-General Workforce Capability and Governance
14 May 2014