



ACT
Government

Chief Minister, Treasury and
Economic Development

Freedom of Information Publication Coversheet

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

FOI Reference: CMTEDDFOI 2023-182

Information to be published	Status
1. Access application	Published
2. Decision notice	Published
3. Documents and schedule	Published
4. Additional information identified	Yes
5. Fees	N/A
6. Processing time (in working days)	34
7. Decision made by Ombudsman	N/A
8. Additional information identified by Ombudsman	N/A
9. Decision made by ACAT	N/A
10. Additional information identified by ACAT	N/A

From: [REDACTED]
Sent: Sunday, 21 May 2023 12:28 PM
To: CMTEDD FOI
Subject: Mills Oakley investigation review

Caution: This email originated from outside of the ACT Government. Do not click links or open attachments unless you recognise the sender and know the content is safe. Learn why this is important<<http://www.act.gov.au/emailsecurity>>

Good morning,

I have viewed an act government document "mills Oakley investigation review - pink frosting"
Could I request access to this document, I have been informed that the terms of reference state this document be made publicly available, however I have failed to find it online.

[REDACTED]
[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

FREEDOM OF INFORMATION REQUEST

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 **21 May 2023**, in which you sought access to:

“a copy of the “Mills Oakley Investigation Review – Pink Frosting.”

Authority

As an appointed Information Officer under section 18 of the Act, I am authorised to make a decision on access or amendment to government information in the possession or control of CMTEDD.

Timeframes

In accordance with section 40 of the Act, CMTEDD was required to provide a decision within 20 working days. Due to third party consultation process, an additional 15 working days were applied. Therefore, a decision and response are due on **11 July 2023**.

Decision on access

Searches were completed for relevant information and two documents were identified that fall within scope of your request. I have decided to grant **partial access** to these documents. I have decided to refuse access to some information as I consider it to be information that would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the Act.

I have included as **Attachment A** to this decision the document schedule. This provides a description of the access decision for the document. The corresponding material is released to you as **Attachment B** to this letter.

In accordance with section 54(2) of the Act a statement of reasons outlining my decisions is below.

Statement of Reasons

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

- the Act;
- the content of the documents that fall within the scope of your request;
- the views of a third party;
- the *Human Rights Act 2004*.

Exemption claimed

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

The public interest information under schedule 1 of the Act

Schedule 1.2 - Information subject to legal professional privilege -

The documents within scope of your request contain some information that is subject to legal professional privilege and the occurrence of this specific information in these documents has been redacted pursuant to section 1.2 of the Act.

Under this provision, information that would be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege is exempt from release.

The public interest information under schedule 2 of the Act

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

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.

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 this document is within the ‘public interest’.

Factors favouring disclosure in the public interest:

(a) *disclosure of the information could reasonably be expected to do any of the following:*

(iii) inform the community of the government’s operation, including policies, guidelines and codes of conduct followed by the government in its dealings with members of the community.

I note that the documents within scope of this request may inform the community of the government’s operations and provide contextual information about a government process and its dealing with members of the community. I have applied some weight to this factor.

Factors favouring nondisclosure in the public interest:

(a) *disclosure of the information could reasonably be expected to do any of the following:*

(ii) prejudice an individual’s right to privacy or any other right under the Human Rights Act 2004;

(xi) prejudice trade secrets, business affairs or research of an agency or person;

(xiii) prejudice the competitive commercial activities of an agency.

Having reviewed the document, I consider that the protection of an individual's right to privacy, especially in the course of dealings with the ACT Government is a significant factor as the parties involved have provided their personal information. When considering the information and factors in favour of nondisclosure, I have considered the personal information, (that is not already in the public domain), and business information contained in the documents. I consider it unreasonable to release information that could identify the details of the person or persons that have been in contact or provided works for the ACT Government. I believe the release of this information may prejudice the protection of these individuals' right to privacy or any other right under the *Human Rights Act 2004*. I am satisfied that this factor favouring nondisclosure should be afforded significant weight as it relates to the individuals' privacy.

When considering the information and factors in favour of nondisclosure, I have considered the business information contained in the documents. Businesses working with Access Canberra have the right to expect that their business affairs will not be prejudiced by providing services to a government agency. The release of information could reasonably impact on the competitive commercial activities of the business as it would disclose methodology which could provide an advantage to their competitors; the release of this information could prejudice the ACT government' ability to secure these types of services in the future. As such, I have chosen to not release this information.

Having applied the test outlined in section 17 of the Act and deciding that release of personal information contained in the documents is not in the public interest to release, I have chosen to redact this specific information in accordance with section 50(2). Noting the pro-disclosure intent of the Act, I am satisfied that redacting only the information that I believe is not in the public interest to release will ensure that the intent of the Act is met and will provide you with access to the majority of the information held by CMTEDD within the scope of your request.

Charges

Processing charges are not applicable for this request because the number of pages to be released to you is below the charging threshold of 50 pages.

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 after 14 July 2023. Your personal contact details will **not** be published. You may view CMTEDD disclosure log at <https://www.cmtedd.act.gov.au/functions/foi/disclosure-log-2023>

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, 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
15 Constitution Avenue
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 me by telephone on 6207 7754 or email CMTEDDFOI@act.gov.au.

Yours sincerely,



Emma Hotham
Information Officer
Information Access Team
Chief Minister, Treasury and Economic Development Directorate

11 July 2023



ACT
Government

Chief Minister, Treasury and
Economic Development

FREEDOM OF INFORMATION REQUEST SCHEDULE

WHAT ARE THE PARAMETERS OF THE REQUEST	Reference NO.
A copy of the Mills Oakley Investigation Review - Pink Frosting.	CMTEDDFOI 2023-182

Ref No	Page number	Description	Date	Status	Reason for Exemption	Online Release Status
1	1-41	Investigation Report	25/03/2021	Partial	Sch 1 s1.2 Sch 2 s2.2 (a)(ii) Sch 2 s2.2 (a)(xi) Sch 2 s2.2 (a)(xiii)	Yes
2	42-43	Annexure A – Terms of Reference	-	Partial	Sch 1 s1.2 Sch 2 s2.2 (a)(xi) Sch 2 s2.2 (a)(xiii)	Yes

Total No of Docs

2

Investigation Review

**Review of Access Canberra Investigation of
alleged breaches of Australian Consumer
Law by Canberra business trading as Pink
Frosting**

25 March 2021

Sch 2.2(a)(ii)

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Ref: AZKC/7147725

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1 Executive Summary of Review

Instructions

- 1.1 On 8 December 2020, Mills Oakley was engaged by Mr David Snowden, Executive Group Manager, Regulatory Compliance, Access Canberra, to conduct a review of an investigation conducted by Access Canberra in respect of a large number of complaints giving rise to alleged breaches of the Australian Consumer Law (**ACL**) by Pink Frosting - ABN 93 566 091 207, (**Pink Frosting**), operated by a Ms Louise Curtis, under the auspices of a company called 86 Candles Pty Ltd.
- 1.2 For ease of reference, from this point forward we refer to:
- (a) the review we have been instructed to conduct as **the Review**;
 - (b) the investigation conducted by Access Canberra in respect of Pink Frosting as **the Investigation**; and
 - (c) The Terms of Reference (**TOR**) for the Review were received by us via email on 8 December 2020. A copy of the TOR is at **Annexure A** to this report.

Approach to Review and Scope of Process

- 1.3 In line with the TOR, we have assessed and reviewed the conduct of the Investigation primarily with reference to the Accountability Commitment (particularly the Regulatory Compliance and Investigation (**RCI Policy**) and the Regulatory Compliance and Enforcement (**RCE Policy**) and relevant investigation standards (particularly the Investigations Standard and the Investigations Manual). We refer to these policies and standards collectively as **the Relevant Guidance and Requirements** from this point forward.
- 1.4 The scope of the Review, as set out in the TOR, was to look at all aspects of the handling of the Investigation including the:
- (a) receipt and initial assessment of the complaints;
 - (b) investigation process and timeliness; and
 - (c) decision to close the matter.
- 1.5 The TOR particularly required us to:
- (a) Assess the conduct of the investigation by Access Canberra against its *Accountability Commitment* and relevant investigation standards and laws, including its management, oversight and timeliness;
 - (b) Assess the sufficiency of engagement with Pink Frosting by Access Canberra during the investigation process; and
 - (c) Recommend any changes or improvement to investigation practices by Access Canberra relating to alleged breached of the Australian Consumer Law.
- 1.6 Additionally, we assessed and reviewed Access Canberra's engagement with the media in the course of its conduct of the Investigation (given that this was one of the primary contentious issues raised by Ms Curtis).

Overview of Key Findings of the Review

- 1.7 The manner in which the Investigation was carried out conformed and complied with the pertinent parts of the Relevant Guidance and Requirements. The process was also

- otherwise conducted in a proper and appropriate manner. Consequently, Pink Frosting was, in our view, treated fairly in the course of the process followed to carry out the Investigation.
- 1.8 Particularly, the enquires we conducted to carry out the Review did not reveal any evidence to establish that the decision to initiate the Investigation, or that the way in which it was conducted, were motivated by an improper purpose or were vexatious in nature. Rather, given the volume of consumer complaints that were made in respect of Pink Frosting, it was entirely appropriate for Access Canberra to conduct a formal investigation into the relevant matters and to make the enquiries that it did in the course of conducting the process.
- 1.9 However, there were, with the benefit of hindsight, elements of the process that could have been conducted better. Particularly, the effectiveness of the Investigation was compromised by a failure to transition the process that was being conducted from an initial approach of monitoring, reviewing and attempting to conciliate the complaints to a formal investigation at an earlier point in time.
- 1.10 The primary impact of the issue referred to above was that Access Canberra was not able to progress the Investigation within an appropriate timeframe to its final stage; being to: put the issues arising from the complaints to Pink Frosting; request that it provide a response; review the response; and, make findings and conclude the Investigation (including making a decision about what action, if any, was to be taken in respect of the findings resulting from the Investigation).
- 1.11 As a result of the above, the Investigation was not conducted in a timely way.
- 1.12 We also note that the effectiveness and timeliness of the Investigation process was severely hampered by the lack of engagement with the process by Pink Frosting, for example, the consistent failures by it to respond sufficiently to the requests for information made by Access Canberra and attend scheduled meetings. This issue was compounded by a failure by Access Canberra to press Pink Frosting to provide the required information and investigate the complaints more intensively.

Detail of Key Findings of the Review

Conduct of Investigation

- 1.13 The actions and process employed by Access Canberra to carry out the Investigation were in line with the Relevant Guidance and Requirements. However, as discussed above, the process had two primary failings, being:
- (i) a failure to progress the process to its final stage in a timelier way; and,
 - (ii) a failure to press Pink Frosting for information that was required and to investigate the complaints more fully.

We note that these two issues are discussed in detail at paragraphs 5.74 to 5.77 and paragraphs 5.78 to 5.81 of this report below.

- 1.14 Additionally, there was a failure to clearly document all of the decisions made and actions taken in the course of the Investigation.

Oversight of Investigation

- 1.15 There is nothing in the materials that we have reviewed to suggest that the process was not conducted with an appropriate degree of oversight. Rather, it appears that the individuals responsible for investigating the complaints appropriately sought and received

the input and direction of their managers (including, as the matter escalated, senior members of Access Canberra).

- 1.16 However, there isn't always clear documentation to show that all of the relevant requirements contained in the Relevant Guidance and Requirements, including the relevant quality assurance requirements, were complied with.

Timeliness of Investigation

- 1.17 As discussed in the overview of our findings above, the process followed to carry out the Investigation did not fully transition, from being focussed on monitoring and attempting to resolve complaints via conciliatory methods, to a formal investigation focussed on obtaining relevant evidence, putting that evidence to the respondent for response and the finalising the process by making findings and implementing a sanction as appropriate.
- 1.18 As also discussed in this report above, this failure to move to a formal investigation process resulted in a subsequent failure to take the actions that were required to move the Investigation to an end stage within a reasonable timeframe.
- 1.19 As a result of the above, the Investigation ran from April 2018 until August 2020 (that is, nearly two and a half years), until it was, in our view appropriately, concluded on the basis that there was no longer any utility in pursuing it.
- 1.20 For the reasons discussed above, we do not consider that the Investigation was conducted in a timely way.

Engagement with Pink Frosting

- 1.21 Access Canberra made numerous attempts to engage with Pink Frosting throughout the process. We therefore do not consider that there was any issue with the frequency of Access Canberra's engagement with Pink Frosting over the course of the Investigation.
- 1.22 Pink Frosting was, generally, not cooperative with the Investigation process, even in the period before January 2019 (when, as discussed in this report below, it disengaged from the process entirely), in that it did not, on a number of occasions, meet with or provide information to Access Canberra when requested to do so.
- 1.23 In our view, Access Canberra could have (noting that it is often easier to assess such matters in hindsight than at the time the relevant events are occurring) pressed Pink Frosting harder to meet and/or provide relevant information to it to aid its investigations and consequently progress the matter more quickly.
- 1.24 It is also the case that there was a level of ambiguity in the formal communications with Pink Frosting that likely did not assist in making the nature of the process clear to Ms Curtis. She may consequently have been less motivated to comply with requests for information and attend meetings than she might have been if it there was a greater level of clarity regarding the fact that a formal investigation was being undertaken that may result in, potentially serious, adverse findings and enforcement action being taken.

Engagement with the Media

- 1.25 In our view the comments made to the media by Access Canberra were appropriate. We agree with, as we understand it, Access Canberra's primary rationale for making the comments, being that it was important for the sake of ensuring that the public maintained confidence in Access Canberra that some comment was made to the media to confirm that it was investigating the significant number of complaints that had been received.
- 1.26 We note in respect of the above that there was nothing in the comments made by Access Canberra to the media to imply that Pink Frosting or Ms Curtis had been guilty of any

wrongdoing. Rather, the comments were limited to confirming that an investigation was being undertaken.

Recommendations

1.27 We recommend that Access Canberra:

- (a) Implement a method to identify the need to seek expert advice and guidance regarding potential complexities in an investigation at as early a stage in the process as possible.
- (b) Implement measures to ensure that investigations progress through their stages of competition in a timely way, and particularly that processes move to their final stages in a timely manner. This may entail making relevant amendments to the Relevant Guidance and Requirements.
- (c) Consider undertaking a review of its current resourcing arrangements to ensure that there is sufficient internal capacity to appropriately resource investigations (and particularly complex matters, such as the Investigation).
- (d) Consider how it may be able to mitigate against the impact of unexpected staff absences on investigations (for example, by maintaining a register of casual investigators who could be called upon to provide cover for staff who are unexpectedly absent for significant periods, or in periods of unusually high workload).
- (e) Consider establishing (if not already in place and if budget permits) a roster of external investigators who can assist with overflow work, or with particularly complex matters that cannot be dealt with by the static internal team of investigators.
- (f) Review all policies relevant to investigatory work in light of the outcomes of the Review, and also with a view to updating relevant terminology and references to reflect the current structure of the organisation (and particularly the Standard for Conducting Major Investigations (the **Major Investigations Standard**)).

Sch 1 1.2, Sch 2.2(a)(xi), Sch 2.2(a)(xiii)

Sch 1 1.2, Sch 2.2(a)(xiii), Sch 2.2(a)(xi)

Sch 1 1.2, Sch 2.2(a)(xiii), Sch 2.2(a)(xi)

Sch 1 1.2, Sch 2.2(a)(xiii), Sch 2.2(a)(xi)

Sch 1 1.2, Sch 2.2(a)(xiii), Sch 2.2(a)(xi)

Sch 1 1.2, Sch 2.2(a)(xiii), Sch 2.2(a)(xi)

Sch 1 1.2, Sch 2.2(a)(xi), Sch 2.2(a)(xiii)

Terms of Reference

Review into an Investigation undertaken by Access Canberra regarding alleged breaches of the *Australian Consumer Law* by a registered Canberra business known as Pink Frosting

Contents	Context
1. Title	Review into an Investigation undertaken by Access Canberra regarding alleged breaches of the <i>Australian Consumer Law</i> by a registered Canberra business known as Pink Frosting
Sch 1 1.2, Sch 2.2(a)(xiii), Sch 2.2(a)(xi)	
3. Context	The alleged conduct occurred between April 2018 and August 2020. The investigation commenced in April/May 2018 and concluded in September 2020.

<p>4. Objective of the Review</p>	<p>The objectives of this Review are to:</p> <ol style="list-style-type: none"> 1. assess the conduct of the investigation by Access Canberra against its <i>Accountability Commitment</i> and relevant investigation standards and laws, including its management, oversight and timeliness 2. assess the sufficiency of engagement with the Trader by AC during the investigation process, and 3. recommend any changes or improvements to investigation practices by Access Canberra relating to alleged breaches of the ACL. <p>A draft report should be provided for comment by Access Canberra prior to a Final Report being received.</p> <p>A Final Report should be provided to the Head of Access Canberra by no later than 1 March 2021.</p> <p>The final report should be provided in a format where the Executive Summary and any Key Findings can be made public.</p>
<p>5. Reasons for Review</p>	<p>The review is being sought as part of Access Canberra’s continuous improvement process as part of its <i>Accountability Commitment</i> framework.</p> <p>The need to evaluate the management and oversight process of the handling of the investigation has been identified in light of:</p> <ul style="list-style-type: none"> • the length of the investigation undertaken by Access Canberra • the number of complaints relating to this investigation • significant social media commentary and mainstream media attention, some of which was critical of the investigation process <p>The review is to provide external assurance to Access Canberra about its investigation process, standards and conduct, noting that this matter was never concluded through a court process.</p>
<p>6. Scope</p>	<p>The scope of the Review is look at all aspects of the handling of the investigation including:</p> <ul style="list-style-type: none"> • the receipt and initial assessment of the complaints investigation process, • the investigation process and timeliness, and • decision to close the matter.