



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 2023-296

Information to be published	Status
1. Access application	Published
2. Decision notice	Published
3. Documents and schedule	N/A
4. Additional information identified	No
5. Fees	N/A
6. Processing time (in working days)	23
7. Decision made by Ombudsman	Confirmed
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]
To: [Lhuede, Nick](#)
Cc: [REDACTED]; [CMTEDD.FOI](#); [BPC](#); [AC, EPD Customer Services](#)
Subject: Application for government information regarding [REDACTED] made pursuant to the Freedom of Information Act 2016 (ACT) [REDACTED]
Date: Wednesday, 16 August 2023 4:44:13 PM
Attachments: [image001.png](#)
[2021.04.01 - ERO.pdf](#)
[2021.12.17 - NOI.pdf](#)
[2023.04.10 - Email from Registrar.pdf](#)

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Dear Construction Occupation Registrar

Application for government information regarding [REDACTED] made pursuant to the Freedom of Information Act 2016 (ACT)

We act for the [REDACTED]

(Property).

This email is an application under section 30 of the Freedom of Information Act 2016 (ACT) (**FOI Act**) for the following government information:

1. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:
 - a. the **attached** emergency rectification order in relation to the Property dated 1 April 2021 (**ERO**); and
 - b. the **attached** notice of intention to make a rectification order in relation to the Property dated 17 December 2021 (**NOI**);
2. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decisions recorded in the contents of the **attached** email dated 10 April 2023, being the decisions:
 - a. not to issue a rectification order in relation to the Property; and
 - b. that the ERO and associated propping on the Property must remain in place until such time as the defects are rectified;
3. all government information which the Construction Occupation Registrar's office received, created or considered, following the site visits at the Property on:
 - a. 4 February 2021;
 - b. 28 March 2022; and
 - c. 5 June 2023; and
4. any other government information which the Construction Occupation Registrar's office received, created or considered on and from 17 December 2021 to date, in relation to the ERO or NOI.

In the above request, 'government information' means any document recording government information, including emails, letters, file notes, diary notes, calendar notes, reports, minutes of meetings, and includes documents in draft form.

Notices under the FOI Act in relation to this application should be sent to the following email addresses:



We are happy to provide any additional information to assist with the actioning of the above request, if required by the information officer.

Best regards



From: [REDACTED]
To: [CMTEDD.FOI](#)
Cc: [REDACTED]
Subject: RE: CMTEDDFOI 2023-296 - Application for government information regarding [REDACTED] made pursuant to the Freedom of Information Act 2016 (ACT) [REDACTED]
Date: Friday, 25 August 2023 4:19:50 PM
Attachments: [image001.png](#)
[2021.04.01 - ERO.pdf](#)
[2021.12.17 - NOI.pdf](#)
[2023.04.10 - Email from Registrar.pdf](#)

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Dear Information Access Team

We refer to your email below dated 22 August 2023.

We confirm that the information we are requesting does not contain the personal information of the [REDACTED], as that term is defined in the FOI Act.

[REDACTED] does not have any objections to any redactions considered necessary being made to any personal details of individuals (such as names, phone numbers and personal addresses).

In relation to the scope of the request, we are instructed that the [REDACTED] agrees to the removal of category 4 in our original request of 16 August 2023, such that the scope of the request is now as follows:

1. *all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:*
 - a. *the **attached** emergency rectification order in relation to the Property dated 1 April 2021 (**ERO**); and*
 - b. *the **attached** notice of intention to make a rectification order in relation to the Property dated 17 December 2021 (**NOI**);*
2. *all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decisions recorded in the contents of the **attached** email dated 10 April 2023, being the decisions:*
 - a. *not to issue a rectification order in relation to the Property; and*
 - b. *that the ERO and associated propping on the Property must remain in place until such time as the defects are rectified;*
3. *all government information which the Construction Occupation Registrar's office received, created or considered, following the site visits at the Property on:*
 - a. *4 February 2021;*
 - b. *28 March 2022; and*
 - c. *5 June 2023.*

In the above request, 'government information' means any document recording government information, including emails, letters, file notes, diary notes, calendar notes, reports, minutes of meetings, and includes documents in draft form.

We would be grateful for your confirmation as to whether the above refinement materially reduces the volume of the documents falling within the scope of the request.

We look forward to your reply.

Best regards

From: CMTEDD FOI <CMTEDDFOI@act.gov.au>

Sent: Tuesday 22 August 2023 04:33 PM

To [REDACTED] >

Cc: CMTEDD FOI <CMTEDDFOI@act.gov.au>; [REDACTED]
[REDACTED]

Subject: CMTEDDFOI 2023-296 - Application for government information regarding [REDACTED]
[REDACTED] made pursuant to the Freedom of Information Act 2016 (ACT) [REDACTED]

Good afternoon [REDACTED] and [REDACTED],

I refer to your email below.

Section 160 of the *Legislation Act 2002* states:

“160 References to people generally

(1) In an Act or statutory instrument, a reference to a **person** generally includes a reference to a corporation as well as an individual.”

Can you please confirm that the information your requesting does not contain the personal information of the [REDACTED] ?

Your requested information is as follows:

“Application for government information regarding [REDACTED] made pursuant to the Freedom of Information Act 2016 (ACT)

We act for the [REDACTED]
[REDACTED] (Property).

This email is an application under section 30 of the Freedom of Information Act 2016 (ACT) (FOI Act) for the following government information:

1. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:
 - a. the **attached** emergency rectification order in relation to the Property dated 1 April 2021 (ERO); and

Section 30(3) has been cited below as the reason for suspending our client's FOI request. That section applies only if the application is for '*personal information*'.

The definition of '*personal information*' in the FOI Act refers to information or an opinion about an '*individual*'.

The term '*individual*' is not defined in the FOI Act.

Under the dictionary in the *Legislation Act 2001 (Legislation Act)*, '*individual*' means a natural person.

Section 144 of the Legislation Act provides that a definition used in its dictionary applies to all Acts and statutory instruments. Accordingly, the definition of '*individual*' applies to the FOI Act.

Our client is not a natural person. Our client is the [REDACTED], which is a corporation created by operation of section 8 of the Unit Titles (Management) Act 2011.

Given that our client is not a natural person, our client's application cannot be characterised as an application for '*personal information*' within the meaning of the FOI Act.

For the reasons above, section 30(3) does not apply to our request, and there is no requirement for our client to provide any authorisation pursuant to section 30(3). Any purported suspension of our client's application in reliance upon section 30(3) is without basis.

Accordingly, we request that the application continue to be processed, on the basis that the request was made on 16 August 2023.

Best regards



From: CMTEDD FOI <CMTEDDFOI@act.gov.au>

Sent: Friday 18 August 2023 10:50 AM

To: [REDACTED] >

Cc: [REDACTED]

[REDACTED] CMTEDD FOI <CMTEDDFOI@act.gov.au>; BPC <BPC@act.gov.au>; AC, EPD Customer Services <ACEPDCustomerServices@act.gov.au>; Lhuede, Nick <Nick.Lhuede@act.gov.au>

Subject: RE: Application for government information regarding [REDACTED] made pursuant to the Freedom of Information Act 2016 (ACT) [REDACTED]

Dear [REDACTED]

I refer to your *Freedom Of Information Act 2016* (the Act) access application, below. This has been allocated reference Number CMTEDDFOI 2023-296.

This is not a valid application under section 30(3) of the Act and processing is suspended. Section 30(3) states:

(3) If the application is for access to personal information about the applicant, the application must also include—

(a) evidence of identity for the applicant; and

(b) if an agent is acting for the applicant—evidence of the agent's authorisation and evidence of identity for the agent.

Examples—agent's authorisation

1 the ACAT order appointing the agent as the applicant's guardian

2 the client agreement authorising a lawyer to act for the applicant

Your email included attachments, but none of the attachments were an authority to act for and consent to share information with the [REDACTED] or copies of identity documents.

Please provide document in compliance with section 30(3) of the Act before we can commence processing your application on behalf of your clients.

The documents can be emailed to: CMTEDDFOI@act.gov.au

Kind regards

Information Access Team

Phone: 02 6207 7754 | CMTEDDFOI@act.gov.au

Chief Minister, Treasury and Economic Development Directorate | **ACT Government**

220 London Circuit, Canberra City | GPO Box 158 Canberra ACT 2601 | www.act.gov.au

From: [REDACTED] >

Sent: Wednesday, 16 August 2023 4:42 PM

To: Lhuede, Nick <Nick.Lhuede@act.gov.au>

Cc: [REDACTED]

[REDACTED]; CMTEDD FOI <CMTEDDFOI@act.gov.au>; BPC <BPC@act.gov.au>; AC, EPD Customer Services <ACEPDCustomerServices@act.gov.au>

Subject: Application for government information regarding [REDACTED] made pursuant to the Freedom of Information Act 2016 (ACT) [REDACTED]

You don't often get email from [REDACTED]. [Learn why this is important](#)

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Dear Construction Occupation Registrar

Application for government information regarding [REDACTED] made pursuant to the Freedom of Information Act 2016 (ACT)

We act for [REDACTED]

(Property).

This email is an application under section 30 of the Freedom of Information Act 2016 (ACT) (**FOI Act**) for the following government information:

1. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:
 - a. the **attached** emergency rectification order in relation to the Property dated 1 April 2021 (**ERO**); and
 - b. the **attached** notice of intention to make a rectification order in relation to the Property dated 17 December 2021 (**NOI**);
2. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decisions recorded in the contents of the **attached** email dated 10 April 2023, being the decisions:
 - a. not to issue a rectification order in relation to the Property; and
 - b. that the ERO and associated propping on the Property must remain in place until such time as the defects are rectified;
3. all government information which the Construction Occupation Registrar's office received, created or considered, following the site visits at the Property on:
 - a. 4 February 2021;
 - b. 28 March 2022; and
 - c. 5 June 2023; and
4. any other government information which the Construction Occupation Registrar's office received, created or considered on and from 17 December 2021 to date, in relation to the ERO or NOI.

In the above request, 'government information' means any document recording government information, including emails, letters, file notes, diary notes, calendar notes, reports, minutes of meetings, and includes documents in draft form.

Notices under the FOI Act in relation to this application should be sent to the following email addresses:

[REDACTED]

We are happy to provide any additional information to assist with the actioning of the above request, if required by the information officer.

Best regards

[REDACTED]





ACT
Government

Chief Minister, Treasury and
Economic Development

Our ref: CMTEDDFOI 2023-296



**FREEDOM OF INFORMATION REQUEST - NOTICE OF INTENTION TO REFUSE TO DEAL
WITH YOUR ACCESS APPLICATION**

I am writing to advise you that I intend to refuse to deal with your access application made under the *Freedom of Information Act 2016* (FOI Act) received by the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) on 16 August 2023, in which you sought access to:

1. *all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:*
 - a. *the **attached** emergency rectification order in relation to the Property dated 1 April 2021 (ERO); and*
 - b. *the **attached** notice of intention to make a rectification order in relation to the Property dated 17 December 2021 (NOI);*
2. *all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decisions recorded in the contents of the **attached** email dated 10 April 2023, being the decisions:*
 - a. *not to issue a rectification order in relation to the Property; and*
 - b. *that the ERO and associated propping on the Property must remain in place until such time as the defects are rectified;*
3. *all government information which the Construction Occupation Registrar's office received, created or considered, following the site visits at the Property on:*
 - a. *4 February 2021;*
 - b. *28 March 2022; and*
 - c. *5 June 2023; and*

4. *any other government information which the Construction Occupation Registrar's office received, created or considered on and from 17 December 2021 to date, in relation to the ERO or NOI.*

In the above request, 'government information' means any document recording government information, including emails, letters, file notes, diary notes, calendar notes, reports, minutes of meetings, and includes documents in draft form.

On 23 August 2023, you rescoped the request to request the following:

1. *all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:*
 - a. *the attached emergency rectification order in relation to the Property dated 1 April 2021 (ERO); and*
 - b. *the attached notice of intention to make a rectification order in relation to the Property dated 17 December 2021 (NOI);*
2. *all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decisions recorded in the contents of the attached email dated 10 April 2023, being the decisions:*
 - a. *not to issue a rectification order in relation to the Property; and*
 - b. *that the ERO and associated propping on the Property must remain in place until such time as the defects are rectified;*
3. *all government information which the Construction Occupation Registrar's office received, created or considered, following the site visits at the Property on:*
 - a. *4 February 2021;*
 - b. *28 March 2022; and*
 - c. *5 June 2023.*

In the above request, 'government information' means any document recording government information, including emails, letters, file notes, diary notes, calendar notes, reports, minutes of meetings, and includes documents in draft form.

Authority

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

Why I intend to refuse your request

I intend to refuse to deal with your access application, under section 43(1)(a) of the FOI Act, because:

- dealing with the application would require an unreasonable and substantial diversion of resources pursuant to section 44(1)(a) of the FOI Act, and

- the resources required does not justify the public interest, refer section 44(1)(b) of the FOI Act; and
- the access application is expressed to relate to government information of a kind that is taken to be contrary to the public interest to disclose under Schedule 1 of the FOI Act.

Schedule 1, section 1.1A of the FOI Act - Information in possession of a court or tribunal

(1) *Information in the possession of a court or tribunal unless the information is administrative in nature.*

(2) *In this section:*

court includes—

- (a) *a registry or other office of a court or tribunal; and*
- (b) *the staff of the registry or office.*

Information within scope of your request relates to proceedings at ACT Civil and Administrative Tribunal (ACAT): [REDACTED] v *Construction Occupations Registrar*. Accordingly, leave is required by the Registrar of ACAT, and is available for a fee. Further information is available on ACAT's website, here: <https://www.acat.act.gov.au/what-to-expect/litigation-search-and-file-inspections#How-to-inspect-documents-on-an-ACAT-case-file>

Schedule 1, section 1.2 of the FOI Act - Information subject to legal professional privilege

Information within scope of your request is information that would be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege.

I understand on 22 August 2023 one of my team contacted your office to seek a rescope of this request. Your office responded on 25 July 2023 and you rescoped the application.

After your agreed rescope, this application would still require a large portion of available FOI resources to process this request. This request is large in volume, and complex in that many line areas would need to be consulted, in addition to potential third parties. At least one of the third parties would require extensive consultation due to the volume of material that could reasonably be of concern to them if released. Further refining the scope is likely to have a processing time of over 40 hours' work, including time spent considering which of the documents are within scope of the refined scope.

The current revised scope is quite wide, including requesting in parts 1-3 of the revised scope "*all government information*" that was considered as well as requesting copies of documents "*in draft form*". A wide reading of this scope would also include publicly available information, such as legislation and case law, which is an additional ground for refusal under section 45(a).

Furthermore, some of the material on file is **already available to the applicant** [REDACTED] [REDACTED] Documents considered within scope of your request were provided by your office with your request as attachments to the request. However, the revised scope did not exclude these documents. These last two factors include

additional grounds for refusal under sections 43(1)(d) (and sections 45(a) and 45(c) of the FOI Act).

Balancing the public interest that would be advanced by processing this request in its current form, I have concluded that it does not justify the resources required to complete it. This is contrary to the objects of the FOI Act, including under section 6(f): “facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of the maximum amount of government information.”

Consultation Period

Section 46(1) of the Act requires CMTEDD to provide you with the opportunity to amend your application before a decision to refuse to deal with your request can be made. The time allowed for you to amend your request under section 46(4)(a) is 10 working days.

We would welcome your input, however, if no response is received from you by **19 October 2023**, I intend to refuse to deal with your application under section 43(1)(a) of the Act.

Should you have any queries in relation to your request please contact the CMTEDD FOI team by telephone on 6207 7754 or by email at CMTEDDFOI@act.gov.au.

Yours sincerely,



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

5 October 2023

From: [REDACTED]
To: [CMTEDD FOI](#)
Cc: [REDACTED]
Subject: RE: CMTEDDFOI 2023-296- Notice of Intention to Refuse to Deal with your Access Application [REDACTED]
Date: Thursday, 12 October 2023 11:10:36 AM
Attachments: [image001.png](#)
[12.10.23 - L - Letter to CMTEDD.pdf](#)

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Dear Information Access Team

Please find **attached** our letter of today's date, for your attention.

Kind regards

[REDACTED]

From: CMTEDD FOI <CMTEDDFOI@act.gov.au>

Sent: Thursday 5 October 2023 01:27 PM

To: [REDACTED]
[REDACTED]

Cc: CMTEDD FOI <CMTEDDFOI@act.gov.au>

Subject: CMTEDDFOI 2023-296- Notice of Intention to Refuse to Deal with your Access Application

Good afternoon

Please see the attached decision letter relating to your recent Freedom of Information request, related to your clients [REDACTED]

Regards

Freedom of Information Coordinator | Information Access Team

Phone: 02 6205 1324 | Email: CMTEDDFOI@act.gov.au

Corporate | Chief Minister, Treasury and Economic Development Directorate | ACT Government

Level 5, 220 London Circuit, Canberra ACT 2601 | GPO Box 158 Canberra ACT 2601 | act.gov.au



[REDACTED]

12 October 2023

BY EMAIL: CMTEDDFOI@act.gov.au

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

Dear Ms Hotham

CMTEDDFOI 2023-296

[REDACTED]

We refer to the above access application dated 25 August 2023 (**FOI Request**) pursuant to the *Freedom of Information Act 2016 (Act)*, and your letter dated 5 October 2023 which notified us of your intention to refuse to deal with the FOI Request.

1. Basis for refusal to deal with FOI Request

- 1.1 The stated basis for why you intend to refuse to deal with the FOI Request is section 43(1)(a) of the Act, which permits a refusal if dealing with the application would require an unreasonable and substantial diversion of the CMTEDD's resources, the mandatory criteria for which are specified in section 44.
- 1.2 Under section 44 of the Act, dealing with an application is taken to require an unreasonable and substantial diversion of the respondent's resources only if both:
- (a) the resources required would substantially inhibit the ability of the respondent to exercise its functions; and
 - (b) the extent to which the public interest could be advanced by giving access to the information does not justify the use of the required resources.
- 1.3 We understand from your letter that the reasons why you intend to refuse to deal with the FOI Request are that:
- (a) dealing with the application would require an unreasonable and substantial diversion of resources;
 - (b) the resources required does not justify the public interest in the giving of access to the information;
 - (c) the FOI Request relates to information taken to be contrary to the public interest to disclose under Schedule 1 of the Act, namely:
 - (i) information in possession of a court or tribunal (Section 1.1A); and
 - (ii) information subject to legal professional privilege (Section 1.2);
 - (d) it is large in volume (no particulars are provided);
- [REDACTED]
- [REDACTED]
- [REDACTED]

- (e) many line areas would need to be consulted, in addition to potential third parties (no particulars are provided);
- (f) a wide reading of the scope could potentially include publicly available information such as legislation and case law; and
- (g) some of the material on file is already available to our client, but the FOI Request did not expressly exclude such material.

1.4 However, your letter does not provide details of the bases on which you have formed the views that:

- (a) processing the FOI Request would substantially inhibit the exercise of the CMTEDD's functions; and
- (b) the public interest which would be advanced by processing the FOI Request does not justify the use of the required resources (noting that it makes no comment on the factors which favour disclosure).

2. Amendment of scope of FOI Request

2.1 Notwithstanding that the grounds for any potential refusal under section 43(1)(a) of the Act are not apparent, with a view to addressing the reasons stated for your intention to refuse to deal with the FOI Request, we are instructed that our client would be agreeable to amending the scope of the FOI Request to seek all government information which meets the following criteria:

- (a) the information was received, created or considered between **17 December 2021** and **23 March 2023** by:
 - (i) Richard Muir, the Deputy Construction Occupations Registrar who signed the notice of intention dated 17 December 2021 to make a rectification order in relation to the Property (**NOI**) (copy **enclosed**); and/or
 - (ii) the Construction Occupations Registrar; and
- (b) the information relates to, or was relied upon in the making of, the decision not to make a rectification order in relation to the Property.

2.2 The amended scope would exclude government information which:

- (a) relates only to the emergency rectification order dated 1 April 2021;
- (b) is in the possession of the ACT Civil and Administrative Tribunal in relation to proceeding AT 37/2021;
- (c) is subject to legal professional privilege;
- (d) is publicly available (including legislation and case law);
- (e) is in draft form; and/or
- (f) is identical to the documents which accompanied the FOI Request (including the NOI).

2.3 In the above scope, 'government information' would mean any document recording government information, including emails, letters, file notes, diary notes, calendar notes, reports and minutes of meetings.

2.4 The amended scope would:

- (a) reduce the scope of the documents sought, and consequently the volume of documents;
- (b) reduce the relevant parties (including line areas) who are required to be consulted;
- (c) expressly exclude documents which may be caught by the stated exclusions in Schedule 1 of the Act; and

- (d) expressly exclude documents which are publicly available or already available to our client.

3. Disclosure is in the public interest

3.1 Our client submits that the disclosure of the government information falling within this amended scope would be in the public interest for the following reasons:

- (a) the disclosure would promote, and be consistent with, the objects of the Act stated in section 6, namely:
 - (i) the provision of a right to access to government information (unless on balance this would be contrary to the public interest);
 - (ii) recognition of the importance of public access to government information for the proper working of representative democracy;
 - (iii) enabling the public to participate more effectively in government processes and to promote improved decision-making within government;
 - (iv) ensuring that, to the fullest extent possible, government information is freely and publicly available to everyone; and
 - (v) facilitating and promoting, promptly and at the lowest reasonable cost, the disclosure of the maximum amount of government information;
- (b) the disclosure would be consistent with section 9 of the Act, which expressly states the intention of the Legislative Assembly that the Act be administered with a pro-disclosure bias and discretions given under it being exercised as far as possible in favour of disclosing government information;
- (c) the disclosure would be consistent with section 10 of the Act, which expressly states that the Act is not intended to prevent or discourage agencies or Ministers from publishing or giving access to government information (including contrary to the public interest information) otherwise than under the Act;
- (d) the information sought is not 'contrary to the public interest information' as defined in section 16 of the Act, and thus this test does not apply to the criteria in section 44(1)(b) (which is stated to be *'the extent to which the public interest would be advanced'*);
- (e) to the extent the test in section 17 of the Act in deciding the public interest is required to be engaged:
 - (i) factors in Schedule 2 section 2.1(a) in favour of disclosure are satisfied, including (without limitation):
 - (A) contributing to positive and informed debate on important issues or matters of public interest;
 - (B) informing 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; and
 - (C) revealing the reason for a government decision and any background or contextual information that informed the decision; and
 - (ii) none of the factors in Schedule 2 section 2.2 in favour of non-disclosure apply.

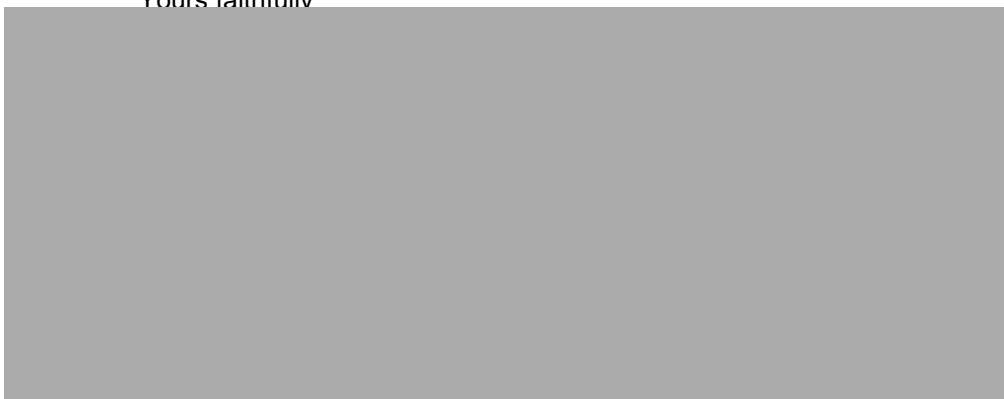
4. Next steps

4.1 We would be grateful if you could confirm whether the amended scope would sufficiently address the reasons given as why you intend to refuse to deal with the FOI Request. In light of the 'consultation period' defined in section 46 of the Act, we request that you provide the requested confirmation by **Monday 16 October 2023**.

- 4.2 For the avoidance of doubt, the purpose of this correspondence is to seek to consult with you pursuant to section 46(1)(b) of the Act, with a view to working with the CMTEDD to understand and address its concerns with the FOI Request. Until our consultation with you has concluded, the above is not to be taken as an amended application within the meaning of section 46(2) of the Act.
- 4.3 Our client reserves its rights, including to make an amended application or seek the Ombudsman's review of any refusal of the FOI Request.

We look forward to your reply.

Yours faithfully





ACT
Government

Chief Minister, Treasury and
Economic Development

Our ref: CMTEDDFOI 2023-296



FREEDOM OF INFORMATION DECISION

I am writing to advise you that I intend to refuse to deal with your access application made under the *Freedom of Information Act 2016* (FOI Act) received by the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) on 16 August 2023, in which you sought access to:

1. *all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:*
 - a. *the **attached** emergency rectification order in relation to the Property dated 1 April 2021 (ERO); and*
 - b. *the **attached** notice of intention to make a rectification order in relation to the Property dated 17 December 2021 (NOI);*
2. *all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decisions recorded in the contents of the **attached** email dated 10 April 2023, being the decisions:*
 - a. *not to issue a rectification order in relation to the Property; and*
 - b. *that the ERO and associated propping on the Property must remain in place until such time as the defects are rectified;*
3. *all government information which the Construction Occupation Registrar's office received, created or considered, following the site visits at the Property on:*
 - a. *4 February 2021;*
 - b. *28 March 2022; and*
 - c. *5 June 2023; and*

4. *any other government information which the Construction Occupation Registrar's office received, created or considered on and from 17 December 2021 to date, in relation to the ERO or NOI.*

In the above request, 'government information' means any document recording government information, including emails, letters, file notes, diary notes, calendar notes, reports, minutes of meetings, and includes documents in draft form.

On 23 August 2023, you rescoped the request to request the following:

1. *all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:*
 - a. *the attached emergency rectification order in relation to the Property dated 1 April 2021 (ERO); and*
 - b. *the attached notice of intention to make a rectification order in relation to the Property dated 17 December 2021 (NOI);*
2. *all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decisions recorded in the contents of the attached email dated 10 April 2023, being the decisions:*
 - a. *not to issue a rectification order in relation to the Property; and*
 - b. *that the ERO and associated propping on the Property must remain in place until such time as the defects are rectified;*
3. *all government information which the Construction Occupation Registrar's office received, created or considered, following the site visits at the Property on:*
 - a. *4 February 2021;*
 - b. *28 March 2022; and*
 - c. *5 June 2023.*

In the above request, 'government information' means any document recording government information, including emails, letters, file notes, diary notes, calendar notes, reports, minutes of meetings, and includes documents in draft form.

On 5 October 2023, you were provided with a letter notifying you of my intention to refuse to deal with your access application, with a response due by 19 October 2023. On 12 October 2023 you provided a response letter containing 13 pages, requesting a response by 16 October 2023, being two working days after CMTEDD's receipt of your letter dated 12 October 2023.

On 18 October 2023 your office contacted my office by phone, and sent a follow-up email related to a conversation had with a Freedom of information Officer noting CMTEDD had received your letter.

Having reviewed your letter, dated 12 October 2023, I note that you have provided a revised scope, under s 46(2) of the Act. Your response included a four page letter from

you and a letter attachment dated **17 December 2021**, from the Deputy Construction Registrar, sent to a third party.

The further revised scope is as follows:

“2.1 Notwithstanding that the grounds for any potential refusal under section 43(1)(a) of the Act are not apparent, with a view to addressing the reasons stated for your intention to refuse to deal with the FOI Request, we are instructed that our client would be agreeable to amending the scope of the FOI Request to seek all government information which meets the following criteria:

*(a) the information was received, created or considered between **17 December 2021 and 23 March 2023** by:*

*(i) Richard Muir, the Deputy Construction Occupations Registrar who signed the notice of intention dated 17 December 2021 to make a rectification order in relation to the Property (NOI) (copy **enclosed**); and/or*

(ii) the Construction Occupations Registrar; and

(b) the information relates to, or was relied upon in the making of, the decision not to make a rectification order in relation to the Property.

2.2 The amended scope would exclude government information which:

(a) relates only to the emergency rectification order dated 1 April 2021;

(b) is in the possession of the ACT Civil and Administrative Tribunal in relation to proceeding AT 37/2021;

(c) is subject to legal professional privilege;

(d) is publicly available (including legislation and case law);

(e) is in draft form; and/or

(f) is identical to the documents which accompanied the FOI Request (including the NOI).

2.3 In the above scope, 'government information' would mean any document recording government information, including emails, letters, file notes, diary notes, calendar notes, reports and minutes of meetings.”

Authority

I am an Information Officer appointed by the Director-General of CMTEEDD 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, CMTEEDD was required to provide a decision on your access application by 6 October 2023. On 5 October 2023, you were sent a notice of intention to refuse to deal with the Application under section 46(1)(a). Under section 46(4)(a) of the Act a consultation period of 10 working days was provided with a response due by 19 October 2023.

Decision on access

I have decided to refuse to deal with your application under section 43(1)(a) of the Act as it is an unreasonable and substantial diversion of resources.

We have been reviewing the material within scope of both your original request, amended scope and the further amended scope provided in our response letter. I have decided to refuse to deal with your application under section 44 of the Act. Section 44(1) of the Act states:

For section 43(1)(a), dealing with an access application would require an unreasonable and substantial diversion of the respondent's resources only if—

(a) the resources required to identify, locate, collate and examine any information held by the respondent, including the resources required in obtaining the views of relevant third parties under section 38, would substantially inhibit the ability of the respondent to exercise its functions; and

(b) the extent to which the public interest would be advanced by giving access to the information does not justify the use of the required resources.

It is my view that the further revised scope, from your letter dated 12 October 2023, appears to require reviewing all the material received within the original scope and cross-referencing the six types of excluded material listed in point 2.2 of that letter to remove the material within scope. This includes hundreds of emails and document attachments. Notwithstanding many of these documents are already available to your client. It is my opinion that the further revised scope widens the scope of the requested information to re-introduce point 4 of your original request, creating additional work to remove the information within scope.

It is our estimate that this would equate to over 40 hours work to process your application, including conducting extensive third-party consultation. There are over 200 documents, such as building plans, emails, reports (some between 100-300 pages each), pictures and emails related to this request.

Furthermore, with the revised scope, material is on file which is usually available for a fee, such as development applications and site plans, and can be refused under section 45(g) of the Act.

We note that you are acting for [REDACTED]

[REDACTED] However, you have not provided any documentation that indicates consent to share information/Authority to act on behalf of your client, which would have extensively reduced the work involved in processing this information. I note that my office has requested this information from you via email correspondence dated 18 August 2023, 22 August 2023, and your reply of 25 August 2023. Without this information, all individuals of the building will need to be treated as third parties for consultation purposes.

Much of the information is already available to your client, under section 44(f) of the Act, including correspondence and copies of reports, that do not justify public resources being spent to re-provide the information under the Act.

This application involves dealing with a large volume of information, the application is complex in subject matter and there is extensive third-party consultation required under section 38 of the Act.

Third party consultation would be complex due to the nature of the material, including extracting relevant pages of reports for third-party consultation and providing to individual unit owners, increasing the total number of third-party consultations. This includes thousands of pages of documents, which are large also in file size.

Initial searches appeared to contain seven third parties. However, after reviewing the material, there are: at a minimum eight third parties, excluding the total numbers of individual unit owners that would also need to be consulted as a third party due to properties being identified within the information.

In your response of 12 October 2023, you stated that you are of the view that there are no Schedule 2, Section 2.2 factors that apply, favouring nondisclosure under the Act. However, having examined the material relevant to your request which includes (but is not limited to) the names of individuals with complaint information, details related to Emergency Rectification orders, circumstances relevant to the non-compliance and information that is commercially sensitive, I am of the view that the below factors favouring nondisclosure apply.

Factors favouring nondisclosure (Schedule 2.2(a))

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

(ii) *Prejudice the protection of an individual's right to privacy or other rights under the Human Rights Act 2004.*

(xi) *Prejudice trade secrets, business affairs or research of an agency or person.*

I am satisfied this material is personal information for the purposes of schedule 2, section 2.2(a)(ii) of the Act. I have also considered the impact that releasing this information would have on those identified. Individuals who have provided personal information to the ACT Government for the purposes of corresponding about concerns relating to potential breaches under the ACT's *Construction Occupations (Licencing Act) 2004* are entitled to expect that their personal information will be dealt with in a manner that protects their privacy.

I am of the view that the release of this information may prejudice the protection of the individuals' right to privacy under the *Human Rights Act 2004*, particularly section 12, and I am not satisfied that releasing the information and prejudicing their right to privacy is in the public interest.

I have also considered the impact of disclosing information which relates to business affairs. In the case of *Re Mangan and The Treasury* [2005] AATA 898 the term 'business affairs' was interpreted as meaning 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'. Schedule 2 section 2.2(a)(xi) allows for government information to be withheld from release if

disclosure of the information could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person.

I find that disclosing the information that is contained in the material of each business could have unreasonable adverse effect on the businesses involved and third parties may have concerns about publicly disclosing commercial in confidence information under the Act that may contain commercially sensitive information. I am satisfied that the release of information from third party businesses could be expected to have an adverse effect of having a business' name, reputation or standing in the community damaged if they are associated with any alleged wrongdoing.

Section 12 of the Human Rights Act provides that:

Everyone has the right—

- (a) Not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and*
- (b) Not to have his or her reputation unlawfully attacked.*

Applying section 12 of the *Human Rights Act 2004*, individual unit owners may object to the public release of information that may impact the commercial value of their properties, and therefore have the right to be consulted individually under the Act. Businesses, and individual workers for those businesses, may object to the material being publicly released where it may impact on their reputation relating to works carried out containing defects.

Applying the public interest test, I find the scope as provided, or any of the revised forms, does not justify the use of public resources. The scale of information and work required, does not justify the use of public resources, especially in circumstances where extensive third-party consultation is required and much of the information is available to the applicant. In making this determination I have considered decisions made by the ACT Ombudsman where excessive third-party consultation has been found as a factor.

Balancing the public interest that would be advanced by processing this request in its current form, I have concluded that it does not justify the resources required to complete it.

Charges

Pursuant to *Freedom of Information (Fees) Determination 2017 (No 2)* processing charges are not applicable for this request as no information is being released to you.

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 released to you in response to your access application will be published in the CMTEDD disclosure log 3 days after the date of my decision. Your personal contact details will not be published.

You may view CMTEDD disclosure log at <https://www.cmtedd.act.gov.au/functions/foi>.

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 on CMTEDD disclosure log, 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

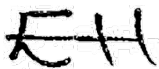
ACT Civil and Administrative Tribunal (ACAT) Review

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
Allara House
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 the Information Access Team by telephone on 02 6207 7754 or email CMTEDDFOI@act.gov.au.

Yours sincerely,



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

19 October 2023

Decisions and reasons of Acting Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10047
Applicant:	Owners Corporation of Units Plan No 3637
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Respondent reference:	CMTEDDFOI-2023-296
Date:	19 August 2024
Decision reference:	[2024] ACTOFOI 14
Catchwords:	<i>Freedom of Information Act 2016</i> – consulting applicant before refusing to deal with certain applications – unreasonable and substantial diversion of resources required to deal with application – extent to which public resources would be advanced

Decision

1. For the purpose of s 82 of the *Freedom of Information Act 2016* (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. For the reasons set out below, the decision of Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) to refuse to deal with the application made on 19 October 2023 is confirmed under s 82 (2)(a) of the *Freedom of Information Act 2016* (**FOI Act**).
3. I have made this decision because I am satisfied that dealing with this application would require an unreasonable and substantial diversion of CMTEDD's resources.

Background of Ombudsman review

4. The applicant applied for Ombudsman review of a decision made by the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) to refuse to deal with the application on the ground dealing with the application would require an unreasonable and substantial diversion of resources.
5. On 16 August 2023, MinterEllison, acting for the Owners Corporation of Units Plan No 3637 (**applicant**) applied to CMTEDD for:
 1. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:
 - a) the attached emergency rectification order in relation to the Property dated 1 April 2021 (**ERO**); and
 - b) the attached notice of intention to make a rectification order in relation to the Property dated 17 December 2021 (**NOI**);
 2. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decisions recorded in the contents of the attached email dated 10 April 2023, being the decisions:
 - a) not to issue a rectification order in relation to the Property; and
 - b) that the ERO and associated propping on the Property must remain in place until such time as the defects are rectified;
 3. all government information which the Construction Occupation Registrar's office received, created or considered, following the site visits at the Property on:
 - a) 4 February 2021;
 - b) 28 March 2022; and
 - c) 5 June 2023; and
 4. any other government information which the Construction Occupation Registrar's office received, created or considered on and from 17 December 2021 to date, in relation to the ERO or NOI.
6. On 18 August 2023, CMTEDD contacted the applicant to request evidence of identification and MinterEllison's authorisation because the application was for access to personal information.¹ The applicant responded stating as the

¹ [Freedom of Information Act 2016](#) (**FOI Act**) s 30(3).

applicant is a corporation, the application did not involve personal information.

7. On 22 August 2023, CMTEDD wrote to the applicant to clarify if the scope of the application included personal information and request a reduction in scope.
8. On 25 August 2023, the applicant confirmed the scope of their application did not include the personal information of members of the Owners Corporation and advised the scope of their application is as follows:
 1. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decision to make:
 - b) the attached emergency rectification order in relation to the Property dated 1 April 2021 (**ERO**); and
 - c) the attached notice of intention to make a rectification order in relation to the Property dated 17 December 2021 (**NOI**);
 2. all government information which the Construction Occupation Registrar's office received, created or considered, in relation to the decisions recorded in the contents of the attached email dated 10 April 2023, being the decisions:
 - a) not to issue a rectification order in relation to the Property; and
 - b) that the ERO and associated propping on the Property must remain in place until such time as the defects are rectified;
 3. all government information which the Construction Occupation Registrar's office received, created or considered, following the site visits at the Property on:
 - a) 4 February 2021;
 - b) 28 March 2022; and
 - c) 5 June 2023.
9. On 5 October 2023, CMTEDD wrote to the applicant notifying of their intention to refuse to deal with the application and advised the consultation period would end on 19 October 2023.
10. On 12 October 2023, the applicant advised they wished to consult with CMTEDD on the application including on the following proposed amended application:

- (a) the information was received, created or considered between 17 December 2021 and 23 March 2023 by:
 - (i) Richard Muir, the Deputy Construction Occupations Registrar who signed the notice of intention dated 17 December 2021 to make a rectification order in relation to the Property (**NOI**) (copy enclosed); and/or
 - (ii) the Constructions Occupations Registrar; and
- (b) the information relates to, or was relied upon in the making of, the decision not to make a rectification order in relation to the Property.

The amended scope would exclude government information which:

- a) relates only to the emergency rectification order dated 1 April 2021
 - b) is in the possession of the ACT Civil and Administrative Tribunal in relation to proceeding AT 37/2021;
 - c) is subject to legal professional privilege;
 - d) is publicly available (including legislation and case law);
 - e) is in draft form; and/or
 - f) is identical to the documents which accompanied the FOI Request (including the NOI).
11. On 18 October 2023, the applicant contacted CMTEDD to again advise they wished to consult with CMTEDD before a decision is made.
 12. On 19 October 2023, CMTEDD decided to refuse to deal with the application on the ground dealing with the application would require an unreasonable and substantial diversion of CMTEDD's resources.
 13. On 9 November 2023, the applicant applied for Ombudsman review of CMTEDD's decision.
 14. On 6 December 2023, CMTEDD provided relevant information to the Ombudsman and made additional submissions about why the proposed amended application at [10] would not remove the ground for refusal.
 15. On 16 February 2024, CMTEDD's additional submissions to the Ombudsman responding to the issues raised in the review application were shared with the applicant.

16. On 22 February 2024, the applicant provided further submissions to the Ombudsman. On 23 February 2024, these submissions were sent by the Ombudsman to CMTEDD in an attempt to assist with informal resolution.
17. On 5 March 2024, CMTEDD provided a response to the applicant's further submissions to the Ombudsman. As it was evident that an informal resolution would not be successful, the Ombudsman proceeded to form its preliminary view of the substantive issues.
18. On 12 July 2024, I, as Acting Senior Assistant Ombudsman, provided the parties with my preliminary view set out in a draft consideration. The draft consideration included all matters that I relied on in forming my view and both parties were given an opportunity to provide a response.
19. On 18 July 2024, CMTEDD accepted the draft consideration.
20. On 19 July 2024, the applicant provided additional submissions to the Ombudsman in response to the draft consideration.

Preliminary issue – Requirement to consult with the applicant

21. In the review application, the applicant submitted CMTEDD did not comply with the obligation to consult with the applicant prior to deciding to refuse to deal with the application; and made the decision before the end of the consultation period.
22. Before refusing to deal with an access application, the respondent is required to notify the applicant of its intention to refuse to deal with the application; and give the applicant a reasonable opportunity to consult with the respondent and negotiate or refine the scope of the application.²

² [FOI Act](#) s 46.

23. The consultation period is the period of 10 working days starting on the day after the day the notice was given under section 46(1)(a), or any longer period agreed between the parties before or after the end of the 10 working days.³
24. An agency must consider any submissions made or information provided by the applicant during the consultation period before deciding to refuse the request.⁴
25. In the notice of 5 October 2023, CMTEDD told the applicant of the intention to refuse to deal with the application on the ground the application would require an unreasonable and substantial diversion of resources and advised the period for consultation. I consider the notice issued by CMTEDD was sufficient.
26. In this matter, the consultation period began on 6 October 2023 – the day after the day the notice of intention to refuse was given to the applicant. As the parties did not agree to extend the consultation period, the final day of the consultation period was 19 October 2023 (i.e. the 10th working day).
27. Both parties acknowledge there was contact between CMTEDD and the applicant prior to the decision being made on 19 October 2023, specifically the applicant's letter of 12 October 2023 and a phone call on 18 October 2023.
28. However, CMTEDD did not respond in writing to the applicant's proposed amended application of 12 October 2023, during the consultation period and the applicant did not submit an amended application at that time.
29. The applicant submits that had consultation between the applicant and respondent occurred, the applicant would have been able to ascertain relevant information, such as the volume of request and hours of work

³ [FOI Act s 46\(4\)](#).

⁴ [Explanatory Statement, Freedom of Information Bill 2016](#).

required to review government information against the proposed amended application. Neither of these were provided to the applicant before a decision was made.

30. I accept giving the applicant a reasonable opportunity to consult with the respondent would generally involve communication between the parties about the ground for refusal, and how an applicant could make an amended application that would remove the ground for refusal.
31. I consider further consultation may have benefitted the applicant, and CMTEDD could have proposed an extension of the consultation period for the purpose of responding to the applicant's letter of 12 October 2023.
32. Where it was apparent the proposed amended application would not have removed the ground for refusal, CMTEDD should have considered if any further information could be provided to the applicant to assist them to make an amended application.⁵
33. I agree CMTEDD did not engage with the applicant in writing about the proposed amended application and concluded the consultation period on the 10th working day. I note the applicant provided additional information during the consultation period, which was considered by CMTEDD in making the decision.
34. For the purpose of this review, the Ombudsman has facilitated consultation between the parties on the ground of refusal by sharing the additional submissions of both parties with each other.

⁵ [*Justin Warren and Department of Human Services \(Freedom of information\) \[2019\] AICmr 22*](#), [40].

35. The applicant maintains they have not submitted an amended application but sought to clarify the scope of their application. CMTEDD maintains in any event, the proposed revised scope would not remove the ground for refusal.
36. It is my view that section 46 requirements were not properly complied with by CMTEDD and their consultation with the applicant was insufficient.
37. In their response of 19 July 2024 to my draft consideration, the applicant submitted there was no evidentiary basis for my preliminary view that even if CMTEDD had consulted the applicant on the potential revised scope, this would not have changed CMTEDD's refusal to deal with the application. The applicant submitted consultation would have allowed for an understanding of documents sought which would not have resulted in a refusal to deal with the application.
38. As part of an attempt of informal resolution, the Ombudsman facilitated a consultation process between the applicant and CMTEDD. Submissions received as part of this Ombudsman review were shared between parties and the parties' positions have not changed. I therefore confirm my view that even if CMTEDD had properly complied with the requirements of section 46, it is unlikely to have changed CMTEDD's refusal to deal with the appl
39. As such, the remainder of this review has focused on the substance of the issues.

Scope of Ombudsman review

40. The key issue to be decided in this Ombudsman review is whether dealing with the application would involve an unreasonable and substantial diversion of resources.
41. In making my decision, I have had regard to:
 - the applicant's access application and review application

- the respondent's decision of 19 October 2023
- submissions made by the applicant and respondent in the course of this review
- the FOI Act, in particular ss 6, 7, 35, 38, 43, 44 and 46
- the Freedom of Information Guidelines made under s 66 of the FOI Act, and
- relevant case law including:
 - [*Justin Warren and Department of Human Services \(Freedom of information\)* \[2019\] AICmr 22](#)
 - [*Daniel Burdon and Suburban Land Agency* \[2019\] ACTOFOI 12](#)
 - [*Cainfrano v Director General, Premier's Department* \[2006\] NSWADI 137](#)
 - [*Langer and Telstra Corporation Ltd* \[2002\] AATA 341](#)
 - [*Elizabeth Lee MLA and Chief Minister, Treasury and Economic Development Directorate* \[2023\] ACTOFOI 12](#)

Relevant law

42. Section 7 of the FOI Act gives every person an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.
43. A respondent may decide an access application by refusing to deal with an access application wholly or in part if dealing with the application would require an unreasonable and substantial diversion of the respondent's resources (ss 35(1)(d), 43(1)(a) and 44 of the FOI Act).
44. Section 44 of the FOI Act provides:
- ... dealing with an access application would require an unreasonable and substantial diversion of the respondent's resources only if:

- a) the resources required to identify, locate, collate and examine any information held by the respondent, including the resources required in obtaining the views of relevant third parties under section 38, would substantially inhibit the ability of the respondent to exercise its functions; and
- b) the extent to which the public interest would be advanced by giving access to the information does not justify the use of the required resources.

45. Where a respondent considers some or all of the information applied for is not contrary to the public interest information, but disclosure may reasonably be expected to be of concern to a person or another entity, the respondent is required to take reasonable steps to consult the relevant third party under s 38 of the FOI Act.

The submissions of the parties

46. In the decision notice, CMTEDD estimated dealing with the application would require the examination of over 200 documents (some between 100–300 pages each), extensive third-party consultation with at least 8 third parties (excluding unit owners) and involve more than 40 hours of processing time.
47. CMTEDD noted while the applicant had identified a list of information which is irrelevant to the scope of the application (see [10]), the resources required to deal with the application were not reduced because additional work would be required to cross reference and remove the irrelevant material.
48. CMTEDD identified the information requested contains the names of individuals with complaint information, details related to the emergency rectification orders, circumstances relevant to the non-compliance and information which is commercially sensitive.
49. CMTEDD has submitted the information requested is likely to also be of concern to individual property owners where third-party consultation would be required, as the applicant had not provided evidence of authority to act for these individuals, or consent to receive their personal information.

50. CMTEDD explained the extent to which the public interest would be advanced did not justify the use of the resources required to deal with the application as this information is likely to be determined to be contrary to the public interest information, or already available to the applicant.
51. In their Ombudsman review application, the applicant said CMTEDD did not explain how the diversion of the estimated resources would substantially inhibit the ability of CMTEDD to exercise its functions; and did not appropriately consider how the public interest might be advanced by release of the requested information.
52. The applicant submitted as consultation did not occur, the estimates arrived at by CMTEDD did not accurately reflect what resources would be required to deal with the application to provide relevant information in scope.
53. For example, the applicant has submitted the information which is responsive to the application must have been received, created, or considered either by the Construction Occupations Registrar or the Deputy in the specified period; and secondly the information relates to, or was relied upon in, making the decision not to make a rectification order.
54. The applicant submits CMTEDD did not take into account the second limb of the clarified scope and for this reason the estimate of resources is greater than what is actually required.
55. The applicant also submitted third party concerns made by the respondent are not justified as personal information was excluded from the scope of their application.
56. These submissions are discussed in more detail below.

Consideration

Resources required to deal with the application (section 44(1)(a))

57. CMTEDD decided the resources required to identify, locate, collate, and examine any information held by CMTEDD (including third party consultation) would substantially inhibit the ability of CMTEDD to exercise its functions.
58. The option to decide not to deal with an access application because it would require an unreasonable and substantial diversion of resources seeks to ensure the capacity of respondents to discharge their normal functions is not undermined by processing unreasonably burdensome access applications.
59. There is no set level of information and processing time that should be considered to result in an unreasonable and substantial diversion of resources—the assessment must be made on a case-by-case basis by the decision-maker.
60. The former Senior Assistant Ombudsman, in *Daniel Burdon and Suburban Land Agency*,⁶ considered a non-exhaustive list of factors relevant when making an assessment of what constitutes an unreasonable and substantial diversion of resources:
- the terms of the request, especially if the request was expressed globally
 - the demonstrated importance of the documents
 - the size of the respondent and extent of its resources
 - the respondent's estimate of number of documents, pages, processing time and cost

⁶ [Daniel Burdon and Suburban Land Agency \[2019\] ACTOFOI 12](#) at [38] (**Burdon**) citing [Cainfrano v Director General, Premier's Department \[2006\] NSWADT 137](#) at [62]-[63].

- the reasonableness of the initial assessment and whether the applicant has been cooperative in refining the scope, and
 - whether the processing time is more than 40 hours' work.
61. The former Senior Assistant Ombudsman found it was not necessary that respondents demonstrate that processing an access application would require such resources so as to disrupt the delivery of its primary business functions; rather, the question is whether processing the access application would unreasonably and substantially divert the resources of the respondent.⁷
62. The weight of opinion expressed by the Administrative Appeals Tribunal is that a diversion of an agency's resources will be 'substantial' if the diversion can be described as being 'real or of substance' rather than 'large'. This view was expressed by Deputy President Forgie in *Langer and Telstra Corporation Ltd* [2002] AATA 341 and most recently adopted and applied by Deputy President Boyle in *Cambridge; Chief Executive Officer, Services Australia and (Freedom of Information)* [2021] AAT 1142.
63. I accept the terms of the request used by the applicant captures a broad range of information concerning the decision not to make a rectification order in relation to a particular property.
64. For example, CMTEDD has identified the scope of information sought captures information about building approvals, development applications, defects register, occupancy certificates and review of building plans in relation to the property.
65. In response to the draft consideration, the applicant submitted CMTEDD's estimates of the resources required to deal with the application did not consider the fact the volume of information to be assessed would be reduced

⁷ [Burdon](#) at [42].

by the exclusion of information is irrelevant to the scope of the application, namely elements covered by the 'second limb' of the application.

66. While I accept the applicant attempted to narrow the scope of their request by listing categories of irrelevant information that could be excluded, I consider that it would still require examination of all information which was received, created, or considered by the decision-makers within the specified period to locate information in scope and exclude irrelevant information. As such, it would not reduce the resources needed to consider the request.
67. For example, it would not be possible for CMTEDD to identify information which relates only to the emergency rectification order dated 1 April 2021 or in the possession of the ACT Civil and Administrative Tribunal (**ACAT**) without examining the contents of those records or cross-referencing.
68. During the course of the review CMTEDD provided an updated estimate of the volume of information (from its earlier assessment of over 200 documents with some between 100–300 pages). The new assessment was that 309 documents comprising 2,420 pages of material would need to be examined (excluding development applications; and documents covered by legal professional privilege or before the Administrative and Civil Appeals Tribunal).
69. I note that the applicant has requested particulars of the documents CMTEDD estimated it would need to be assessed. However, CMTEDD requested the schedule compiled for the purpose of calculating file size and estimating the resources required to decide the application not be shared with any other party, noting the information included third party personal information. For this reason, the schedule has not been provided to the applicant.

70. CMTEDD estimated they would need to consult at least 8 third parties on 2420 pages of information (potentially involving 19360 pages to send the binder of documents to each third party) taking approximately 3226 hours. CMTEDD noted that on further review potentially 62 third parties may need to be consulted (individual owners of 56 units, one additional property owner, three Ministers, and agents of the Owner's Corporation, and a builder).
71. I acknowledge the applicant's position that the individual unit owners are members of the Owner's Corporation who is the applicant; and the applicant has not sought personal information for the purpose of their application.
72. Although the applicant had advised that personal information could be redacted, this does not necessarily negate the need to consult with third parties who are not the unit owners.
73. While I consider there could be ways for CMTEDD to more effectively target the consultation, I nonetheless agree that extensive third-party consultation would be required with at least 7 third parties, as release of information about the actions of the regulator concerns their business affairs (i.e. as these third parties operate within the construction / property industry).
74. CMTEDD processed the most access applications across the ACT directorates in the last financial year.⁸ On average, around 30 active applications are managed between 5 staff within the CMTEDD's FOI team. I note that while CMTEDD is not a small directorate in terms of staff, it has many disparate functions.
75. My view is the time and human resources estimated to deal with this application are of such substance it would have a real impact on the ability of

⁸ [A report on the operation of the Freedom of Information Act 2016 for 2022-23, ACT Ombudsman, page 8.](#)

CMTEDD to effectively process FOI applications and exercise its other functions if these resources were diverted.

76. I believe the volume of work, time required to complete the application and size of the directorate to be a fair estimate of resources required to deal with this application.

77. Accordingly, I consider the diversion of the resources required to deal with the application would substantially inhibit the ability of CMTEDD to exercise its functions.

The extent to which the public interest would be advanced (section 44(1)(b))

78. CMTEDD decided the extent to which the public interest would be advanced by giving access to the requested information does not justify the use of the required resources.

79. CMTEDD identified two factors favouring non-disclosure under Schedule 2, being ss 2.2(a)(xi) (prejudice trade secrets, business affairs or research of an agency or person) and 2.2(a)(ii) (prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004*) for the purpose of assessing the extent to which the public interest would be advanced. I acknowledge the applicant's view that this assessment does not equate to a public interest test for the purpose of section 17.

80. As set out in the Explanatory Statement for the Freedom of Information Bill 2016:⁹

In considering whether the use of what might otherwise be an unreasonable level of resources is justified, the decision maker must assess the extent to which the public interest would be advanced 'in granting' the request. That is if the information were to be granted to the community to what degree would the public interest be advanced and is that proportionate to the level of public resources that would need to be invested in processing the request?

⁹ [Explanatory Statement, Freedom of Information Bill 2016.](#)

It must also be remembered that at this stage in the process where all the information has not been identified it is neither required nor possible to apply a full clause 17 analysis of the public interest. The question to be resolved is whether the potential advancement of the public interest in granting the information referred to in the request justifies the level of resources required to process the request.

81. The FOI Act must be applied with a view to facilitating and promoting the disclosure of the maximum amount of government information, promptly, and at the lowest reasonable cost.¹⁰ This is particularly relevant when considering the amount of resourcing a respondent should reasonably be expected to allocate to the processing of an access application.¹¹
82. The information requested concerns a decision made by the Deputy Construction Occupations Registrar to not issue a rectification order. I note information about this decision was provided to the applicant by email dated 10 April 2023.
83. I accept the information sought concerns an ongoing dispute regarding rectification works, where the information relates to government action which affects a group of individuals.
84. While release of the information may provide greater insight into the decision-making process, there is no evidence before me that release of the information would otherwise advance the public interest.
85. The applicant submitted that the draft consideration gave insufficient weight to the advancement of the public interest as, in the applicant's view, releasing the information would further an understanding of whether the regulator has properly discharged its statutory duties and functions.
86. I concede that granting access to information may be used to further scrutinize the action or inaction of a regulator. Nonetheless, I note that

¹⁰ [FOI Act](#) s 6.

¹¹ [Elizabeth Lee MLA and Chief Minister, Treasury and Economic Development Directorate \[2023\] ACTOFOI 12](#) at [40].

information relevant to the decision was previously made available to the applicant. I am not satisfied there is sufficient evidence before me that release of the information at issue would reveal deficiencies in the conduct of the regulator.

87. I am not persuaded the potential extent to which the public interest would be advanced in giving access to the requested information justifies the use of the required resources.

Conclusion

88. I am satisfied that CMTEDD's dealing of this application would substantially divert their resources under s 44(1)(a) and find the extent to which public interest would be advanced under s 44(1)(b) of the FOI Act is minimal and does not justify the use of resources.

89. For the reasons set out above in this decision, I confirm CMTEDD's decision of 19 October 2023.

Georgia Ramsay

Acting Senior Assistant Ombudsman

19 August 2024