



Dear

I refer to your request under the *Freedom of Information Act 1989* (FOI Act) received by the Environment and Sustainable Development Directorate (ESDD) on 20 February 2014 seeking access to a list of homes in Canberra that contained loose-fill asbestos. You noted that the list was prepared for the Loose Asbestos Insulation Removal Program, which operated from 1988 to 1993 (the program). This request was transferred to the Chief Minister and Treasury Directorate (CMTD) which has responsibility for asbestos coordination across Government, including managing the legacy of the program.

Decision Maker

I am authorised under section 22 of the FOI Act to make decisions on access to documents held by CMTD and liability for charges.

Charges

Due to the time involved in processing the request, I have decided under section 29 of the FOI Act not to impose processing charges for this request.

Identification of Documents

The Office of Industrial Relations in CMTD is custodian of several lists identifying properties that were remediated under the program. Many lists were created some time ago as internal working documents for operational purposes, versions of lists have been revised and updated over time, including by the Asbestos Task Force in 2005-06. The accuracy of these lists cannot be fully guaranteed. The most accurate and up-to-date list of homes remains an internal working document, this list is under ongoing review and changes have been made this year. My decision outlined in this letter generally relates to all versions of the list.

Decision on access

I have determined that the lists are exempt from release under the FOI Act by operation of sections 34(1)(a), 36, 40(1)(d), 41(1) and 43(1)(c). These sections provide, relevantly, that:

34 Documents affecting relations with Commonwealth and States

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

36 Internal working documents

- (1) Subject to this section, a document is an exempt document if its disclosure under this Act—
 - (a) would disclose matter in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Territory; and
 - (b) would be contrary to the public interest.
- (2) In the case of a document of the kind referred to in section 8 (1), the matter referred to in subsection (1) (a) of this section does not include matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in section 8 (1).
- (3) This section does not apply to a document only because of purely factual material contained in the document.

40 Documents concerning certain operations of agencies

- (1) Subject to subsection (2), a document is an exempt document if its disclosure under this Act would, or could reasonably be expected to—
 - (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.
- (2) This section does not apply to a document the disclosure of matter in which under this Act would, on balance, be in the public interest.

41 Documents affecting personal privacy

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

43 Documents relating to business affairs etc

- (1) A document is an exempt document if its disclosure under this Act would disclose—

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

Reasons

My reasons for reaching this decision are set out below.

Background - The Program

I have included a number of fact sheets relating to the program that are also available at www.asbestos.act.gov.au. By way of background, from 1968 to 1978-79, pure loose-fill asbestos was sold predominantly by one local company ('Mr Fluffy') as ceiling insulation in the ACT. While there is evidence to suggest that this form of insulation was used in other Australian jurisdictions (and parts of the world), the extent of its use as a form of residential home insulation in the ACT, and the subsequent removal program, is considered unique.

In 1988, the Commonwealth Government (as then Government for the ACT) commenced a survey of all ACT houses built before 1980. Later that year, the Commonwealth Government announced a program to remove the loose-fill asbestos insulation from ACT houses at public expense. The Government initiated the removal program in the interest of public health. The ongoing responsibility for the removal program was transferred to the ACT Government with self-government in 1989.

Records indicate that asbestos insulation was removed from over 1,000 houses within the ACT. Throughout the program, and subsequently, a number of lists were developed of homes that had been identified as containing the insulation, and subsequently remediated.

Documents affecting relations with Commonwealth and States

When the program was officially transferred to the ACT Government a memorandum of understanding (MOU) was signed in which the Commonwealth agreed to indemnify the Territory against all future claims arising from the program. As you are aware, a number of homes were apparently missed under the program and since 2005 the ACT Government has expended over \$2 million in remediating these homes. The ACT Government has been seeking to enforce the provision of the MOU. Negotiations were progressing under the former Commonwealth Government, but appear to have stalled following the election. The Chief Minister is seeking to revive the negotiations with the current Government.

Given the status of the negotiations, I consider that disclosing many of the program files, including lists of houses could reasonably cause damage to relations between the Commonwealth and the ACT. I am concerned that releasing the lists publicly may generate unnecessary alarm (particularly among homeowners) which would affect the ACT's negotiating position with the Commonwealth. Heightened media interest and public angst could work against the ACT's negotiation position in this regard. The impact of this could reasonably result in rendering the conduct of the negotiations more difficult, substantial impairment of good working relations and hindering of cooperation.

My view must be balanced against the public interest. I consider that non-disclosure of the list is counterbalanced by Government policy that ensures those persons with an interest in the house are already informed (i.e. need to know basis). For instance, the Government has recently written to relevant home owners and occupiers reminding them the home was part of the program and the additional precautions that are required and requirements to inform agents, tenants and tradespeople. Legislation requires tradespeople to be trained in asbestos awareness and the Government undertakes ongoing asbestos awareness campaigns. Potential purchases are on notice through the contract of sales provisions and this is subject to a current review to ensure the contract of sale is clearer in this regard.

Internal working documents

As mentioned previously, the current list remains an internal working document. I am aware that section 36 does not apply to a document only because of purely factual material contained in the document. I am applying this exemption as I am aware that the lists were not produced to be released publicly, versions differ and may not account for all affected homes. The public interest test is dealt with below.

Substantial adverse effect on the proper and efficient conduct of agency operations

CMTD has policy responsibility for work health and safety and dangerous substances matters, including asbestos. The role of the Asbestos Coordinator also sits within CMTD, and has responsibility for, among other matters, managing houses that may continue to contain loose-fill asbestos insulation, despite the program.

I am concerned that release of the lists may have a substantial effect on the proper and efficient conduct of these operations as it may affect the willingness of owners to alert Government to the existence of 'missed homes' and in doing so may affect the capability to assemble data about the program.

While the program was widely considered a success it is possible that there are homes that were not identified. There should be no disincentive for homeowners to engage an assessor to confirm whether loose-fill asbestos insulation remains in a house, and similarly for those homeowners, tradespeople or assessors to inform government when this is suspected or confirmed. If disincentives, such as a public list, existed CMTD may be hindered in properly and efficiently undertaking its role of coordinating and managing responses to the identification of these homes due to an unwillingness to disclose its presence to the Government.

This also goes to the public interest which I must consider. While it is important that potential purchasers, tradespeople and owners of remediated homes are aware of the risks and additional precautions required, there is no need for the identification of the homes to be available to the general public.

I note that information about the status of a particular house is readily available to the owner, potential purchaser and tradespeople (on consent by the owner) through the building file. Potential purchasers are specifically provided with relevant information on the property through the lease conveyance inquiry, information on the contract of sale as well as through access to the building file.

I am also concerned that the lists are not exhaustive and should not be relied on as such. It is important that all homeowners and interested parties undertake their own enquiries and exercise due diligence when renovating or purchasing a property. Public release of a non-exhaustive list may act counter to this.

Personal information

The FOI Act defines 'personal information' as 'information or an opinion (including information forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

I am satisfied that information that a person is the owner or occupant of a house contained loose-fill asbestos and was cleaned during the program is personal information of the homeowner. The identity of the homeowner is not ascertainable from the list itself. However, the identity of the owner of any house listed may be readily obtained from other sources, including general knowledge and observation. Consequently, I consider that the release of the list amounts to an unreasonable disclosure of personal information about the homeowner and potentially other persons living in the house.

Business Affairs

It is likely that a number of the homes on the lists are rented as investment properties for the purpose of making a financial return for their lessor.

I am satisfied that information about whether the property contained loose-fill asbestos is information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, being information the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs.

Internal Review

You are entitled, under section 59 (1) of the Act, to request a review of my decision. This right of review extends to a review of the adequacy of the search for documents undertaken by the Directorate.

You have 28 days after receiving notice of my decision to ask for a review, or a further period as allowed by the Director-General.

Your request should be addressed to:

Director-General
Chief Minister and Treasury Directorate
GPO Box 158
CANBERRA ACT 2601

Complaints to the Ombudsman

Under section 54 of the Act, you may complain to the Ombudsman about administrative matters relating to the processing of your FOI request. There is no fee for making a complaint. The Ombudsman may conduct an independent investigation into your complaint. You can contact the Ombudsman either by telephone on 1300 362 072 or by writing to:

The Ombudsman
GPO Box 442
CANBERRA ACT 2601

Further information on the program

Should you wish, I am happy to discuss the program with you and assist in amending your request to more general information on the types of homes that were remediated under the program, including the age of homes, suburbs involved or any other non-identifying aspects.

Should you wish to discuss this or have any queries regarding this matter please contact me on 620 76003 or Fiona.barbaro@act.gov.au.

Yours sincerely



Fiona Barbaro
Director, Office of Industrial Relations
24 March 2014