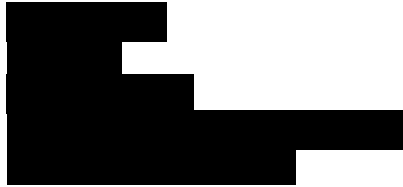


Our references: CIT FOI 2022–005



By email: 

DECISION ON YOUR ACCESS APPLICATION – CIT FOI 2022-005

I refer to the access application made under the *Freedom of Information Act 2016* (FOI Act) which was received by the Canberra Institute of Technology (CIT) via email on 9 June 2022. The application sought access to the following:

“all documents held by the Canberra Institute of Technology in relation to the awarding of contract 2022.GS3003590.220 to Think Garden”

Authority

I am a Senior Executive Officer appointed as a CIT Information Officer to make decisions about access to government information in accordance with section 18 of the FOI Act.

Third Party Consultation

In making this decision, consultation has been completed with relevant third parties in accordance with section 38 of the FOI Act. The views of these third parties were taken into account when making this decision.

Decision

A search of all CIT records has identified 123 documents containing information that is within the scope of your access application. I have decided not to grant access to any of the documents on the basis that their release is contrary to the public interest in accordance with section 16 and the test established under section 17 of the FOI Act. A schedule of the documents found in response to your access application is at [Attachment A](#)

My access decision is detailed further in the following statement of reasons provided in accordance with section 54(2) of the FOI Act.

Statement of Reasons

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

- Your original access application dated 8 June 2022.
- The documents that fall within the scope of your access application.
- The FOI Act.
- The ACT Ombudsman FOI Guidelines.
- Statements made by third parties identified for consultation.

Schedule 1 of the FOI Act provides a list of information that is taken to be contrary to the public interest. These provisions relate to categories of information which the government has deemed to be contrary to the public interest to disclose in all circumstances.

I have identified one category of document within the scope of your access application that falls within one of the categories outlined in Schedule 1 of the FOI Act.

Information Subject to legal professional privilege

A number of documents identified as being within the scope of your access application are either fully or partially comprised of information that I consider to be contrary to the public interest under section 1.2 of schedule 1 of the FOI Act. The identified documents contain requests for legal advice and subsequent copies of legal advice provided by the ACT Government Solicitor to the CIT. These documents are protected by professional legal privilege. This information can only be released if the parties involved expressly agree to waive that privilege. As the parties involved have not waived their rights to legal privilege, I am satisfied that the release of this information is not within the public interest to disclose.

Information Subject to Public Interest Test under Section 17(1) of the FOI Act.

For the remainder of the information, I am required to undertake a balancing of public interest factors. Section 17(1) of the FOI Act sets out the test to be applied to determine whether disclosure of information would be contrary to the public interest. As part of this process, I must consider the factors favouring disclosure and factors favouring non-disclosure. These factors are found in subsection 17(2) and Schedule 2 of the FOI Act. As a decision maker I am required apply the prescribed test to determine where, on balance, public interest lies. In the event, I am not satisfied that there is a public interest in releasing the requested information, section 35(1)(c) of the FOI Act permits me to refuse access.

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 in determining the 'public interest'.

Factors favouring disclosure:

I consider that the following factors favouring disclosure apply in relation to the requested documents.

- promote open discussion and accountability (section 2.1 (a)(i));
- contribute to positive and informed debate (section 2.1(a)(ii)); and
- oversight of expenditure of public funds (section 2.1(a)(iv)).

The release of the requested documents would promote open discussion and accountability by providing you with information about the procurement processes that were undertaken in relation to the decision to award contracts to ThinkGarden as part of CIT transformation activities. Specifically, the information contained in these documents includes information relating to commercial agreements between CIT and service providers, including details about the processes undertaken and decisions made as part of the procurement process for the provision of these services. I consider that release of this information would allow for a positive and informed public debate on CIT procurement processes which may improve accountability and transparency for future procurement actions. Acknowledging the importance of ensuring procurement achieves value for money. I consider these factors should be provided with a high weighting.

I further consider that release of the requested documents could reasonably be expected to ensure effective oversight of expenditure of public funds by providing information on how public money has been spent. The expenditure of public money should be undertaken in a manner that ensures value for money having regard to probity, ethical behaviour, management of risk and optimising whole of life costs. The release of the requested documents would allow for visibility of the procured services and expected outcomes from the ThinkGarden contract which would provide the public with an oversight of expenditure of public funds. I consider this factor should also be given a high weighting.

Overall, I consider each of these three factors in favour of release should be given significant weighting as part of the process to determine the public interest under section 17 of the FOI Act. I further note that the FOI Act contains a pro-disclosure bias, which requires me to undertake the public interest test with the view that government information should be available to the public unless there are compelling reasons not to do so.

Factors favouring non-disclosure

On 23 June 2022 the ACT Integrity Commission (the Commission) made a public announcement that it has commenced an investigation into “the circumstances surrounding the awarding of over \$8.5 million worth of consultancy contracts by the CIT to ThinkGarden and Redrouge Nominees Pty Ltd”. The Commission noted that the investigation will “ensure the integrity of [the] process”. No further information about the investigation has been provided publicly since this statement.

Having regard to the statement made by the Commission, the information contained in the documents subject to this request, and the views of the Commission consulted pursuant to section 38 of the FOI Act, I consider that the following factors favouring non-disclosure apply:

- prejudice security, law enforcement or public safety (section 2.2(a)(iii));
- prejudice the conduct of considerations and/or investigations by the Commission (section 2.2(a)(xiv));
- impede the administration of justice generally, including procedural fairness (section 2.2(a)(iv));
- impede the administration of justice for a person (section 2.2(a)(v)); and
- prejudice trade secrets, business affairs or research (section 2.2(a)(xi)).

As outlined in the factors favouring disclosure, the information contained in the requested document provide information in relation to the processes undertaken as well as other details about the awarding of the ThinkGarden and Redrouge Nominees Pty Ltd contracts by CIT. I am of the view that the information requested falls within the purview of the Commission's investigation and that releasing this information prior to the finalisation of this investigation will prejudice the investigation into this matter.

I consider that section 2.2(a)(iii) is a relevant factor in determining the public interest of the documents within the scope of your application as the release of the information contained within the documents could reasonably be expected to prejudice law enforcement activities.

The term 'law enforcement' is defined by the ACT Ombudsman in the Freedom of Information Guidelines as 'the enforcement of any Act, subordinate law, statutory instrument or the common law'. For this section to apply, as a decision maker I must be satisfied that the information has a connection with the criminal law or the processes of upholding or enforcing civil law or administering a law. This extends to agencies administering legislative schemes and requirements, monitoring compliance and investigating breaches. It has been publicly acknowledged that an investigation is being undertaken by the Commission into the process of awarding of contracts to ThinkGarden and Redrouge Nominees by CIT. I am further satisfied for the purposes of this section, that activity being undertaken by the Commission meets the definition of 'law enforcement'.

The second element which must be met for this factor to apply is that the release of the information could be reasonably expected to prejudice the ability for the Commission to undertake its law enforcement functions. The Commission's task is to decide whether a report of wrongdoing involves corruption, maladministration or conduct that poses a substantial and specific danger to public health or safety, or the environment. To effectively discharge this duty, the Commission requires unfettered access to all documents within the scope of the investigation it is undertaking. The ability for the Commission to obtain information that is not publicly available is a key enabler in determining if there has been wrongdoing in relation to the matter that is being investigated. I consider that releasing information within the scope of your request at this time would undermine the ability for the Commission effectively discharge its law enforcement duties, impacting on its ability to investigate the circumstances and identify any issues in the awarding of the contracts. Accordingly, I give this factor

very high weighting. I have also decided that this factor and its very high weighting, outweighs the sum of all factors favouring disclosure as previously described above.

In addition to prejudicing law enforcement activities, I also consider that the release of the information within the scope of your request would prejudice the investigation processes and considerations of the Commission. As outlined in my consideration of the prejudice of law enforcement activities factor, a key enabler for the Integrity Commission to investigate matters thoroughly is the ability to obtain documents, maintain a high degree of secrecy and undertake investigations covertly. In considering this factor, I note in the public announcement of 23 June 2022, the Commissioner expressly stated that:

“Commission investigations are almost always conducted covertly, particularly in their early stages. This minimises the risk of the investigation, or indeed the safety and reputation of witnesses and other persons of interest, being compromised”

The Commission further stated:

“I want to make it very clear to any persons who have received, or do receive, a summons to appear before the Commission and/or provide information as part of this investigation, that they must at all times adhere to the conditions of their summons, including any confidentiality requirements.

Failure to act in accordance with the conditions of a summons is a criminal offence and may result in a period of imprisonment.”

These statements made by the Commission as part of their media release on 23 June 2022 reiterate the importance of maintaining secrecy and confidentiality in relation to the ongoing investigation. Accordingly, I am satisfied that release of any information in relation to the ThinkGarden and Redrouge Nominees contracts would negatively impact the Commission’s ability to investigate the processes surrounding the awarding of these contracts as it would make information that is not publicly known available to the public, this information could then be used in a manner which could negatively impact the investigative processes being undertaken by the Commission. I am satisfied that this factor should also be given a very significant weighting.

The third and fourth factors I have identified as being relevant to determining the public interest relate to the prejudice that would occur to justice generally, including procedural fairness and prejudice of justice for a person (sections 2.2(a)(iv) and (a)(v)). The ACT Ombudsman’s Freedom of Information Guidelines state that these factors exist as there is a strong interest in promoting the administration of justice free from prejudice and interference. This was demonstrated in the ACT Ombudsman’s decision in *Daniella White and Canberra Health Services [2019] ACTOFOI 9 (5 June 2019)* where the ACT Ombudsman stated prejudice can occur in circumstances ‘where information would reveal unsubstantiated allegations before a formal investigation’.

I consider that the release of any information prior to the finalisation of the Commission’s investigation and any subsequent investigations or actions that may occur as a result of the Commission’s

investigation are likely to interfere with the ability of individuals involved to receive a fair and unbiased adjudication of matters currently being investigated. The release of the documents at this time would generate significant media attention, promoting public discussion and in circumstances where the individual's involved are unable to respond or participate in that debate. This may include information about unsubstantiated allegations. This debate creates a significant risk to the integrity of the current investigation as well as a risk to future or subsequent matters which could appear before a court, or tribunal, which could damage a person's position in these proceedings therefore interfering with the administration of justice generally. Accordingly, I consider this factor should be given a high weighting.

Finally, I consider the factor in relation to prejudicing the business affairs is relevant in determining the public interest for this application. 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. Contained in the documents within the scope of your application are tender documents which contain information about methodology and pricing structures for ThinkGarden and other companies that participated in the tender process. The release of this information would provide a commercial advantage to existing and potential competitors, in terms of them being able to establish their own pricing methodology, to protect or grow their market share, to the detriment of these businesses. This factor is of a high weighting.

Consideration of factors

Taking into account schedule 1 factors and the factors favouring disclosure and factors favouring non-disclosure under schedule 2 of the FOI Act I have determined that release of the requested information at this time would be contrary to the public interest. Therefore, I have decided pursuant to section 35(1)(c) of the FOI Act not to release any of documents found to be within the scope of your request. This decision does not prevent you from applying for the requested information following the completion of the Commission's investigation into these matters.

Charges

Pursuant to Freedom of Information (Fees) Determination 2018 processing charges are not applicable for this request because the total number of pages to be released to you is below the charging threshold of 50 pages.

Disclosure log

Section 28 of the FOI Act requires publication of access applications and any information subsequently released on CIT's disclosure log at: https://cit.edu.au/about/freedom_of_information/disclosure_log.

This access decision will be published online not less than with 3 days after the date of this decision.

Review rights

You may apply to the ACT Ombudsman to review my decision under section 73 of the FOI Act. An application for review must be made in writing within 20 days of my decision being published in the disclosure log on 13 September 2022.

You may submit a request for review of my decision to the ACT Ombudsman by writing in one of the following ways:

Email (preferred): actfoi@ombudsman.gov.au
Post: The ACT Ombudsman
GPO Box 442
CANBERRA ACT 2601

More information about ACT Ombudsman review is available on the ACT Ombudsman website at:
<http://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information>.

Yours sincerely



Steven Wright
A/g Executive Director, Corporate Services &
Information Officer

24 August 2022