

Our reference: CITFOI 2022–021

[REDACTED]
[REDACTED]
[REDACTED]

By email: [REDACTED]

Dear [REDACTED]

DECISION ON YOUR ACCESS APPLICATION

I refer to your access application made under the *Freedom of Information Act 2016 (FOI Act)* received by the Canberra Institute of Technology (CIT) by email on 15 December 2022. This application sought access to the following information:

"From November 1, 2021 to December 15, 2022,

- 1. Any correspondence between CIT officials and Think Garden, in relation to a \$4.99m contract entered into for consultancy work with Think Garden.*
- 2. Any correspondence between CIT officials in relation to publicity or media coverage around discussions of Ms Cover's conduct, role as CEO and the Think Garden contract.*
- 3. Any correspondence between CIT officials and CEO Leanne Cover regarding her involvement in these contracts and arrangements for leave during investigations into the contract.*
- 4. Any correspondence between CIT officials in relation to CEO Leanne Cover and Patrick Hollingworth.*
- 5. Any correspondence between CEO Leanne Cover and Patrick Hollingworth.*
- 6. Any correspondence between CIT officials regarding a payout of Ms Cover's contract and / or her arrangements to leave her role as CEO.*
- 7. Any correspondence in relation to exit arrangements from the Think Garden contract."*

On 20 December 2022 you agreed to an extension of time for the completion of this request. The new due date was agreed to be 27 January 2023. In agreeing to this extension, it was noted that the CIT shutdown period commenced on 23 December 2022 and finished on 9 January 2023.

On 10 January 2023 [REDACTED] agreed to revise the scope for your application to:

- 1. "Any correspondence from 1 November 2021 to 15 December 2022 regarding Leanne Cover's current and future employment with CIT including information about termination of her employment contract.*
- 2. Any correspondence from 1 November 2021 to 15 December 2022 regarding the potential termination of the \$4.99m Think Garden contract."*

Authority

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

Decision

I have decided to refuse to confirm or deny the existence of government information pursuant to section 35(1)(e) the Act in relation to part one of your access application and to refuse to deal with the second part of your access application pursuant to section 35(1)(c) of the Act as I consider the information sought to be contrary to the public interest as it wholly comprises information which is taken to be contrary to the public interest under Schedule 1 of the Act.

Statement of Reasons

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

- Your original access application and refined scope of the access application.
- The FOI Act.
- The ACT Ombudsman FOI Guidelines.

Documents relating to Leanne Cover's current and future employment with CIT including information about termination of her employment contract

The documents you have requested in part one of your access application relate to the current and future employment of Leanne Cover, including information about potential termination of her employment contract with the ACT Government.

In considering the information requested as part of your access application, I have decided to refuse to confirm or deny the existence of any information relating to Ms Cover's employment as acknowledging if this information does or does not exist could potentially prejudice her right to privacy under the *Human Rights Act 2004*. Moreover, release of this information, should it exist, would be a breach of the Territory Privacy Principles as it would meet the definition of 'personal information' in accordance with section 8 of the *Information Privacy Act 2004*.

Section 35(1)(e) Act allows a decision maker to refuse to confirm or deny that information is held by an agency in circumstances where the mere acknowledgement that a particular document exists or denying it exists, will cause damage similar to disclosing the document itself.¹ An example of this could be the acknowledgement that an agency has a current warrant in connection with a specific business which would be sufficient warning to the business to modify their behaviour and possibly undermine an ongoing criminal investigation.²

¹ See Brooks and Secretary, Department of Defence (Freedom of information) [2017] AATA 258 (14 February 2017),

² ACT Ombudsman's Office FOI Guidelines, Dealing with access applications (February 2022), pg. 47.

There are two criteria which must be established before a section 35(1)(e) refusal may be applied. Firstly, the decision maker must establish that the information is contrary to the public interest³ and secondly, the information, if it did exist would, or could, be reasonably expected to:

- Endanger the life or physical safety of a person;
- Be an unreasonable limitation on a person's rights under the *Human Rights Act 2004*; or
- Significantly prejudice an ongoing criminal investigation.⁴

The term 'could reasonably be expected to' requires me to assess the likelihood of a predicted or forecast event. While I note the term "could" is less stringent than the word "would", there still needs to be a reasonable expectation that the forecast event would occur. In *Re News Corporation Limited v National Companies and Securities Commission*,⁵ it was noted that the mere possibility or chance does not qualify as a reasonable expectation. I have had regard to this requirement in making my decision in relation to this access application.

The first limb of section 35(1)(e) requires me to determine if release of the information requested would be contrary to the public interest. Section 17 of the Act prescribes the test that must be undertaken to determine the public interest. This requires me to consider the factors for and against disclosure as outlined in Schedule 2 of the Act.

Schedule 2.1 of the Act provides the factors to be considered in favour of disclosure, having considered these factors, I am satisfied that release of the information should it exist would:

- contribute to positive and informed debate⁶; and
- ensure effective oversight of expenditure of public funds⁷.

I consider that the requested information would contribute to positive debate about Leanne Cover's employment with the ACT Government including the oversight of public funds and it would provide details about her current employment status, leave entitlements and potential payouts should her contract be terminated. This information would provide information about potential financial liability for the ACT Government in relation to her executive employment contract. I consider there is public interest in the release of this information.

Having considered the factors favouring disclosure I must consider the factors in favour of nondisclosure. In reviewing the factors in favour of nondisclosure, I am satisfied that release of this information, should it exist would:

- prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004*⁸ section 2.2(a)(ii)

³ *Freedom of Information Act 2016*, s35(1)(e)(i).

⁴ *Freedom of Information Act 2016*, s35(1)(e)(ii).

⁵ (1984) 5 FCR 88.

⁶ *Freedom of Information Act 2016*, Sch 2, s 2.1(a)(ii).

⁷ *Freedom of Information Act 2016*, Sch 2, s 2.1(a)(iv).

⁸ *Freedom of Information Act 2016*, Sch 2, s 2.2(a)(ii).

The information requested, should it exist would relate to an individual's employment and would include matters such as performance, salary, and potential termination payouts and conditions. It is widely accepted that is a strong public interest in protecting an individual's privacy. The information requested in your access application, should it exist is not known or publicly available and potentially may not even have been made available to the individual to whom the information pertains. I consider that releasing this information, should it exist could prejudice Ms Cover's right to privacy in relation to her employment status and conditions.

Having considered the factors in favour of disclosure and nondisclosure, I consider that at this time, should this information exist the protection of Ms Cover's privacy outweighs the public interest in respect of her employment.

The second part of section 35(1)(e) requires me to consider the three additional factors as found in section 35(1)(e)(ii)(A), (B) and (C). On reviewing these factors, I find that there would be an unreasonable limitation on Ms Cover's right to privacy under the *Human Rights Act 2004*. Section 12 of the *Human Rights Act 2004* provides that everyone has the right 'not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily,' or to have their reputation unlawfully attacked. Arbitrary interference in someone's private or family life is interference that may be lawful, but is unreasonable, unnecessary and the degree of interference is not proportionate to the need⁹.

While I acknowledge there is interest in the employment status of Ms Cover as well as any potential termination of her contract, release of any information relating to her employment at this time would interfere with her private life and potentially that of her family. I consider this would be unreasonable, unnecessary and an arbitrary interference with Ms Cover's privacy. Subsequently I am satisfied that the conditions of section 35(e)(ii) have been met and that release of information within the scope of your access application if it does or does not exist would impact Ms Cover's right to privacy pursuant to section 12 of the *Human Rights Act 2004*.

Accordingly, I have decided to refuse to confirm or deny the existence of the information you have sought in part one of your access application under section 35(1)(e) of the Act.

Documents relating to regarding the potential termination of the \$4.99m Think Garden contract.

The second part of your access application you have sought information related to potential termination of the \$4.99m contract between CIT and Think Garden which was executed on 28 March 2022. Having reviewed the documents that are within the scope of your access application I have decided to refuse to deal with this application pursuant to section 35(1)(c) of the Act as all the documents found to be within the scope of your access application comprise information that I consider to be contrary to the public interest under section 1.2 of Schedule 1 of the Act.

⁹ ACT Human Rights Commission – Privacy and Reputation Factsheet - <https://hrc.act.gov.au/humanrights/guides-and-publications/detailed-information-enshrined-rights/privacy-and-reputation>.

Specifically, the information you have requested contain requests for legal advice, subsequent copies of legal advice and correspondence between parties and has been provided by the ACT Government Solicitor to the CIT on a confidential basis. It is accepted at common law that legal professional privilege applies to confidential communications between a lawyer and their client when the communication was made for the dominant purpose of providing legal advice or legal services in relation to existing or contemplated litigation¹⁰.

For a claim of legal profession privilege to be found, it must be demonstrated that:

1. there was a client-lawyer relationship
2. there was a confidential communication, and
3. the communication was made for the dominant purpose of obtaining or giving legal advice, or for use in existing or contemplated litigation.

Having reviewed the documents within the scope of your request I am satisfied that the information found attracts legal professional privilege and meet the three threshold requirements outlined above.

As it has been established these documents attract legal professional privilege, I am then required to determine if privilege has been waived. In accordance with the *Legal Services (General) Directions 2012*, legal professional privilege in relation to any document or advice provided in the course of any Territory legal work belongs to the Territory and may not be waived, except with the express approval of the Attorney-General, or the Chief Solicitor on the Attorney-General's behalf¹¹. I have confirmed that legal professional privilege has not been waived in relation to the information which you have requested. Accordingly, I am satisfied that the release of this information is not within the public interest to disclose.

Therefore, I have decided to refuse to deal with the second part of your access application pursuant to section 35(1)(c) of the Act.

Disclosure log

Please note that 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 means that if access to the information is granted, it will also be made publicly available on our website, unless the access application is an application for your personal, business, commercial, financial or professional information.

¹⁰ *Grant v Downs* (1976) 135 CLR 674.

¹¹ *Legal Services (General) Directions 2012*, Para 5.1.

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 9 February 2023.

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



Meghan Oldfield
Executive Director, Corporate Services & Information Officer
27 January 2023