

Our reference: CIT2022–006

[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 9 June 2022. In your application you requested CIT provide you with the following information:

“a copy of any board minutes, agendas, and accompanying papers, to do with the search, selection and appointment of current Chief Executive Officer of Canberra Institute of Technology - Leanne Cover.”

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.

Third Party Consultation

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

Decision

A search of all CIT records has identified 12 documents containing information that is within the scope of your access application. I have decided not to grant access to the identified document on the basis that its release is contrary to the public interest in accordance with the test established under section 17 of the FOI Act.

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.
- 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.

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.

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)).

A factor favouring disclosure of information under Section 2.1(a)(i) exists where that disclosure could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability. In the case of *BA and Merit Protection Commissioner* [2014] ALCmr 9 the Commonwealth Information Commissioner noted that "there is strong interest in fairness and integrity of public sector selection processes". I consider that release of the documents found to be within the scope of your request will promote discussion and accountability in relation to the processes undertaken as part of the appointment of current Chief Executive Officer of Canberra Institute of Technology - Leanne Cover. I provide this factor a significant weighting.

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”. On 24 August 2022, the Commission informed the Select Committee on Estimates 2022-23 that the investigation was ongoing, with more than one million documents needing to be reviewed and about 20 witness examinations needing to occur.

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)); and
- impede the administration of justice for a person (section 2.2(a)(v))
- Prejudice the protection of an individual’s right to privacy or other right under the *Human Rights Act 2004*.

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. 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 documents and potential witnesses. 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 relating to the awarding of the contracts. In coming to this conclusion, I note that while an investigation is ongoing, especially in the early parts of the investigation, the scope may evolve and information that may seem innocuous has the potential to become critical later. Accordingly, I give this factor very high weighting.

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. The strict confidentiality regime adopted by the Commission is important because it reduces the chance of evidence being lost, concealed, or destroyed, or witnesses colluding. Further, to ensure that there is no contamination or interference with the evidence of any witnesses summonsed by the Commission, it is vital that no parallel ‘investigations’ are conducted in the public domain, which might be caused by the disclosure of the information. I also afford this factor 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 investigation and any subsequent investigations or actions that may occur as a result of the Commission's investigation are likely to interfere with the right of the 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. Moreover, the release of this information may allow members of the public to identify potential witnesses resulting in intrusions to that individual's privacy. These circumstances create 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. In addition, the release of this information is highly likely to damage a person's position in these proceedings or future proceedings as well as impacting their rights under the *Human Rights Act 2004*. I consider this factor should be given a high weighting.

Finally, I consider that the factor favouring non-disclosure on the basis of the personal privacy is relevant in determining the public interest for this request. In reviewing the documents that are within the scope of your access application, I have identified a personal mobile number of a CIT staff member is included in the footer of some of the documents. I am not satisfied there is any public interest in releasing this personal number.

Consideration of factors

I am satisfied that release of the identified documents, 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 and which may have evidentiary value at a later date. This information could be used in a manner which could negatively impact the investigative processes, being undertaken by the Commission and prejudice administration of justice for persons involved in this matter. I have therefore decided not to release any information within the scope of your request.

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.

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 14 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

25 August 2022