

Our references: CIT FOI 2022–017 / 018



By email: 

#### **DECISION ON YOUR ACCESS APPLICATIONS – CIT FOI 2022-017 AND CIT FOI 2022-018**

I refer to the access applications made under the *Freedom of Information Act 2016* (FOI Act) which were received by the Canberra Institute of Technology (CIT) via email on 8 June 2022. These applications sought access to the following:

##### CIT FOI 2022-017

1. *All reports or presentations given to the CIT Board from August 2020 to date that include references to activities conducted by Patrick Hollingworth and associated companies (Patrick Hollingworth Trust and Red Rouge Nominees)*
2. *All communications between executive members in regards to re-negotiations of contracts awarded to Patrick Hollingworth and associated companies (Patrick Hollingworth Trust and Red Rouge Nominees) or requests to re-negotiate those contracts from August 2020 to date.*

##### CIT FOI 2022-018

1. *I write to request under the Freedom of Information Act 2016 a copy of any documentary evidence such as business cases, procurement plan minutes, tender evaluation reports or the approval of the tender evaluation reports in relation to contracts: CIT 2020.2147.220, CIT 2021.2706153 and CIT 2022.GS3003590.220*
2. *In addition, I would like to request any advice provided by the Government Procurement Board to CIT on the above mentioned contracts following any of the Board's assessments of the above contracts.*

In accordance with section 43(2) of the FOI Act, I have decided to deal with both your access applications, (CITFOI2022-017 and CITFOI2022-018) as one application as I am satisfied that the

applications are related and have been made by the same applicant. This letter provides my statement of reasons and decision for both of your access applications.

### ***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.

### ***Decision***

A search of all CIT records has identified 53 documents containing information that is within the scope of your access application. I have decided not to grant access to the identified documents 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. A schedule of documents found as part of the search process 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.
- 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. 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)); and
- 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 processes followed in the procurement of CIT 2020.2147.220, CIT 2021.2706153 and CIT 2022.GS3003590.220 including information about the *renegotiations of contracts awarded to Patrick Hollingworth and associated companies (Patrick Hollingworth Trust and Red Rouge Nominees)* and advice provided to CIT about these contracts. These documents would allow for a positive and informed public debate on this topic. The release of this information may improve accountability and transparency. I consider these factors should be provided with a medium weighting. I note to date there has been significant media interest in regard to these procurements.

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 and Redrouge Nominees Pty Ltd contracts 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 these factors in favour of release should be given a high 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”. 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 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 documents provides information about the procurement of services from ThinkGarden and Redrouge Nominees. I am of the view that the requested information falls within the purview of the Commission's investigation and therefore has evidentiary value to the Commission's investigation.

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 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 of the Commission to 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.

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 the factor in relation to prejudicing the business affairs is relevant in determining the public interest. 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 request are tender documents which contain information about methodology and deliverables for ThinkGarden and Redrouge Nominees. 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.

Accordingly, I am satisfied that release of the identified document, 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 and prejudice administration of justice for persons involved in this matter. I am satisfied that this factor should also be given a very significant weighting.

### Consideration of factors

Taking into account the factors favouring disclosure and factors favouring non-disclosure and having undertaken the test under section 17 of the 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](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](mailto: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  
1 September 2022