

Decision and reasons of Acting Senior Assistant Ombudsman

Application number:	AFOI-RR/23/10046
Applicant:	'DC'
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Third party:	Freshford Equestrian Centre
Respondent reference:	CMTEDDFOI 2023-225
Date:	12 July 2024
Decision reference:	[2024] ACTOFOI 11
Catchwords:	<i>Freedom of Information Act 2016</i> – deciding access – whether information is contrary to the public interest information – Reveal the reason for a government decision and any background or contextual information that informed the decision – Prejudice an agency's ability to obtain confidential information – Prejudice the flow of information to the police or another law enforcement or regulatory agency – prejudice trade secrets, business affairs or research of an agency or person

Decision

1. I am a delegate of the ACT Ombudsman for the purpose of s 82 of the *Freedom of Information Act 2016* (**FOI Act**).
2. The applicant applied for Ombudsman review of the Chief Minister, Treasury and Economic Development Directorate's (**CMTEDD**) decision to refuse access to information about an environmental authorisation issued under the [Environment Protection Act 1997](#) (**EP Act**).

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3. My decision is to **set aside** CMTEDD's decision under s 82(2)(c) of the FOI Act and make a **substitute** decision that the applicant be given access to a document comprising a compilation of emails about virgin excavated natural material (**VENM**) requests and clearances issued by the Environment Protection Authority (**EPA**).

Background to Ombudsman review

4. On 27 June 2023, the applicant applied to the Environment Protection and Sustainable Development Directorate (**EPSDD**) for access to information about a standard environmental authorisation (**authorisation 1098**).¹
5. The authorisation permitted the acceptance of more than 100m³ of soil for placement at 291 Paddys River (**the site**) subject to conditions.
6. Specifically, the applicant sought:
 - *...Confirmation that all material transferred to site is Virgin Excavated Natural Material (VENM) as defined in the Authorisation No. 1098.*
 - *Copies of all inspection reports the Environment Protection Authority has carried out that all necessary measures have been taken to protect the natural environment as stated in item 2 in Authorisation.*
 - *Copies of all plant and equipment maintenance reports as required in item 3 of Authorisation.*
 - *Evidence that the authorisation holder has minimised emissions during the material transfer process as required in item 4 of Authorisation.*
 - *Evidence that the authorisation holder has complied with all relevant Australian standards, guidelines, Industry Codes of Practice and policies for the material transfer process as required in item 5 of Authorisation.*
 - *Evidence that the authorisation holder has complied with petroleum Product Storage standards for the material transfer process as required in item 6 of Authorisation.*

¹ [Access Canberra, Environmental Protection Authorisation Search – Freshford Equestrian Centre – authorisation 1098 \(6 May 2024\).](#)

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- *Copies of notifications if the Authorisation holder has reported incidents of environment harm on site during the material transfer process as required in item 7 of Authorisation.*
 - *Copies of records if any pollution complaints have been received by the Authorisation holder or the EPA as required by item 8 of Authorisation.*
 - *Confirmation that the Authorisation holder notified the EPA of the responsible employees or agents as required by item 11 of Authorisation and provide copies of those written notifications.*
 - *Confirmation that a copy of Authorisation No. 1098 and any amends were kept on site.*
 - *Confirmation that no waste material was incinerated on site as required item 13 of Authorisation.*
 - *Confirmation the authority holder kept and maintenance all records for this Authorisation and copies of any EPA requests for these(sic) documents*
 - *...Air pollution...Copy of the approved Environmental Management Plan (EMP) and confirmation it has been complied with...*
 - *...Soil Placement...Copies of confirmations the material transferred are Virgin Excavated Natural Material (VENM)*
 - *...Soil Placement...Copies of all records of material transferred, including but not limited to(sic)...Source of material...Type of material...Quantity of material...Who delivered the material...EPA approval number where applicable...*
 - *...Movement of Soil...Confirmation that all material transferred was NOT from identified areas of concern or areas of unexpected finds identified for contamination...*
 - *...Remediation...Confirmation that disturbed areas have been restored and re-vegetated.*
7. The application was transferred to CMTEDD under s 57 of the FOI Act.
8. On 31 July 2023, CMTEDD asked the applicant for an extension of time and notified the applicant the timeframe was also likely to be extended due to third party consultation.
9. On 1 August 2023, the applicant agreed to an extension of time of 30 working days.

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10. On 7 September 2023, CMTEDD notified the applicant the timeframe was extended an additional 15 working days as third-party consultation was required with 10 third parties.
11. On 20 September 2023, CMTEDD consulted with Freshford Equestrian Centre (**Freshford**) (the holder of authorisation 1098) as a relevant third party.
12. On 28 September and 4 October 2023, Freshford provided submissions objecting to the release of the information on which it was consulted on the grounds the information is of a commercial nature and contains personal contact details. Freshford also identified that the release of specific information about works undertaken on the site (suppliers, volume, remediation) could be detrimental to Freshford in the context of a commercial dispute.
13. On 13 October 2023, CMTEDD identified 4 documents and decided to give the applicant access in part to document 2; and refuse access to documents 1, 3 and 4 on the ground the information is contrary to the public interest information. CMTEDD located no information for items 3, 8 and 13 of the application.
14. On 30 October 2023, the applicant applied for Ombudsman review of CMTEDD's decision.
15. On 1 November 2023, our Office wrote to the applicant to commence informal resolution.² On 2 November 2023, the applicant suggested the review could be resolved in part by providing access to information on the quantity of fill material that was transferred to the site.

² [FOI Act](#) s 80A.

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16. On 21 November 2023, Freshford applied to participate in the Ombudsman review. On 24 November 2023, the delegate agreed to Freshford participating in the Ombudsman review.³
17. On 6 December 2023, the applicant confirmed they were not seeking access to contractor details and commercial arrangements.
18. On 10 January 2024, the applicant reiterated they were only seeking access to the quantity of material transferred to the site since 2017.
19. On 12 February 2024, the applicant confirmed they were not seeking access to personal details of the authorisation holder, and submitted the quantity and location of source material is not commercially sensitive.
20. During informal resolution, our Office identified documents setting out the results of a review of an environmental authorisation are of the kind available for inspection under the EP Act.⁴ Document 2 is a copy of 2 reviews of the authorisation 1098 dated 27 July 2019 and 11 February 2021.
21. On 16 February 2024, CMTEDD provided the applicant with an edited copy of document 2 with only the personal contact details of the Freshford representative and the signatures of EPA staff deleted.
22. On the same day, Freshford made additional submissions objecting to the release of information about the volume and source location of the material transferred to the site.
23. On 20 February 2024, the applicant provided further submissions about why information about the volume or source location of fill is not commercially sensitive. At this time, our Office ceased informal resolution activities.

³ [FOI Act](#) s 77.

⁴ [Environment Protection Act 1997](#) (**EP Act**) s 19.

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24. On 25 June 2024, the delegate provided their preliminary view to the parties in a draft consideration.

Information at issue

25. The information at issue in this Ombudsman review is contained in a single document comprising emails between the EPA and third parties about VENM requests and clearances for placement of soil at the site (**VENM emails**).⁵

26. The VENM emails contain the upper limit of VENM which is approved to be transferred from the source site to the site (i.e. includes information about the volume and source location of fill).

27. As discussed above, the applicant has confirmed they are not seeking review of the decision to refuse access to the personal information of the authorisation holder; contractor details or commercial information.

28. The key issue to be decided in this Ombudsman review is whether the VENM emails are 'contrary to the public interest information' for the purposes of the FOI Act.

29. In making my decision, I have had regard to:

- the applicant's access application, review application and additional submissions
- the respondent's decision made on 13 October 2023
- the submissions of Freshford to CMTEDD and additional submissions to the Office of the ACT Ombudsman (**the Office**)

⁵ This Ombudsman review is limited to information contain within document 1. Information within document 3 relevant to the review is duplicated in document 1. An edited copy of document 2 was provided during informal resolution. Document 4 does not contain information relevant to the review.

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- the FOI Act, in particular sections 7, 16, 17, 35, and Schedule 2
- the EP Act
- the respondent's FOI processing file relating to the access application
- the Freedom of Information Guidelines made under s 66 of the FOI Act; and
- relevant case law including:
 - ['CQ' and Education Directorate \[2023\] ACTOFOI 25 \(30 November 2023\)](#)
 - [Manteena Commercial Pty Ltd and Education Directorate \[2022\] ACTOFOI 1 \(4 February 2022\)](#).

Relevant law

30. Section 7 of the FOI Act gives every person an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.
31. Contrary to the public interest information is defined in s 16 of the FOI Act as:
- information—
- (a) that is taken to be contrary to the public interest to disclose under schedule 1; or
 - (b) the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17.

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32. The public interest test set out in s 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
33. Section 35(1)(c) of the FOI Act provides an access application may be decided by refusing to give access to the information sought because the information being sought is contrary to the public interest information.
34. Section 50 of the FOI Act applies if an access application is made for government information in a record containing contrary to the public interest information and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted.
35. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.
36. The acceptance of more than 100m³ of soil for placement on land by a lessee or occupier of land in the River Corridor zone is a class A activity.⁶ The EP Act provides a person must not conduct certain prohibited activities unless the person holds an environmental authorisation in relation to that activity.⁷ A person must not contravene an environmental authorisation.⁸ The authority must review a standard environmental authorisation granted for an unlimited period at least once within 5 years after it comes into effect and in each further 5-year period during which it continues to have effect.⁹

⁶ [EP Act](#) Sch 1.2, item 7.

⁷ [EP Act](#) s 42.

⁸ [EP Act](#) s 45.

⁹ [EP Act](#) s 57.

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37. VENM means excavated natural material (for example, clay, gravel, sand, soil and rock) that is not mixed with any other waste and that:¹⁰

- has been excavated from areas that are not contaminated: as a result of industrial, commercial, mining or agricultural activities; with manufactured chemicals; that does not contain sulphidic ores or soils; and does not contain naturally elevated levels of certain contaminants, or
- consists of excavated natural materials that meet such criteria as may be approved by the EPA.

The submissions of the parties

38. CMTEDD decided to refuse access to the VENM emails because disclosure would, on balance, be contrary to the public interest. CMTEDD’s decision notice said:

“...Businesses working with Access Canberra have the right to expect that their business affairs will not be prejudiced by participating in regulatory activities in cooperation with a government agency. Businesses provide their information to government authorities and entities in good faith and if confidentiality is not maintained, businesses may be less willing to participate in future exercises due to concerns that this information may be disclosed in a way that is prejudicial to their business...

I note that the disclosure of a large quantity of the documents in scope, could potentially cause damage to the business’ reputation and impact the competitive commercial activities of the business. These materials contain information about their business, internal operations processes, and responses to compliance activities. This is a serious issue and I weight this provision substantially.

Lastly, the release of information concerning business operations and compliance could reasonably impact on the competitive commercial activities of the business. The release of information could reasonably impact on the competitive commercial activities of the business as it would disclose information which could

¹⁰ EPSDD, [Environmental Standards: Assessment and Classification of Liquid and Non-Liquid Wastes \(July 2021\)](#).

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provide advantage to competitors and future or prejudice the ACT government's ability to obtain this type of cooperation in the future..."

39. In submissions their submissions to CMTEDD and the Office, Freshford stated:

VENM certificates are a useful source of information used within the industry for commercial benefit to those seeking to calculate royalty payments for upcoming tenders and also to potential litigants...

In the civil industry, companies tender to have access to the material and its subsequent removal and disposal for a fee.

As such releasing the original location of the material and the volume will effectively enable any competitor to gain a business insight on competitors turnover and advantage for future tenders.

In this particular case, it would provide commercial in confidence information on our private business arrangements with our contractors.

By knowing the volumes and locations of the sites will enable competitors to establish who won which tender/site and for how much....

40. In submissions to our Office, the applicant said:

"...Nothing therein justifies the withholding of details relating to the volume of fill transported to the site under the consent issued by the ACT Government. Specifically:

1. *The use of fill material (whether for 'roads and tracks' or 'erosion control') is not in question under the FOI process, rather it is the volume of fill; and*

2. *It is inconceivable that the mere knowledge of fill volumes would deliver a commercial or competitive benefit to others, and a complete falsehood to suggest that the disclosure of volumes under FOI would expose the authorisation holder to third party compensatory claims.*

Further, in seeking to construct an argument based on sensitivity of the requested information, the authorisation holder has misconstrued the dynamics of the civil contracting market. Civil contractors are fully aware of the current and future construction sites that will generate fill export, and the resulting fill volumes are readily calculable not only from publicly available DA plans, but also from detailed construction tender documentation issued broadly to the civil contracting market. The information relating to source sites and fill volumes is not sensitive to a contractor, and any suggestion to the contrary is disingenuous.

In contrast to the tenuous claims of the authorisation holder, there is public interest in the disclosure of the requested information. It will allow judgements to be made on the appropriateness or otherwise of processes and consents managed by the ACT Government in relation to fill delivered to the site controlled by the authorisation holder..."

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41. These submissions are discussed in more detail below.
42. None of the parties made submissions in response to the draft consideration.

Consideration

43. I have carefully reviewed an unredacted copy of the VENM emails and the information provided by the parties to assess whether the information is contrary to the public interest information.

Public interest test

44. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:
 - identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in schedule 2, section 2.1
 - identify any factor favouring nondisclosure that applies in relation to the information (a relevant factor favouring nondisclosure), including any factor mentioned in schedule 2, section 2.2
 - balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure
 - decide whether, on balance, disclosure of the information would be contrary to the public interest
 - unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

Factors favouring disclosure

45. In its original decision, CMTEDD identified one factor favouring disclosure of the information sought.

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46. I note information about the reviews of the environmental authorisation were provided during informal resolution, and the applicant has confirmed certain information is irrelevant to the scope of this review. For this reason, I do not consider any other factors favouring disclosure of the VENM emails apply.

Reveal the reason for a government decision and any background or contextual information that informed the decision (Schedule 2, s 2.1(a)(viii))

47. CMTEDD identified one factor favouring disclosure, where release would reveal background and contextual information about the administration and decision-making process involved in environmental reviews handled by Access Canberra.

48. I agree this factor is relevant to the VENM emails, as disclosure would reveal detail about the VENM clearance process, including the consideration of the source location and determination by the EPA the soil is VENM.

49. I consider information about environmental protection and waste management regulation are matters of public interest.

50. I agree substantial weight should be afforded to this factor, as disclosure would reveal decisions made by the EPA and information directly relevant to the assessment of soil for placement at the site.

Factors favouring nondisclosure

51. In its original decision, CMTEDD identified 4 factors favouring nondisclosure of the information in documents 1 to 4.¹¹

¹¹ [FOI Act](#) Sch 2, s 2.2(a)(ii); (ix); (xi) and (xii).

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52. In making my decision I find only 3 factors favouring nondisclosure apply to the VENM emails, as the applicant has confirmed they are not seeking access to the personal information of the authorisation holder, contractor details or commercial arrangements (i.e. disclosure of the remaining information is not reasonably expected to prejudice the protection of an individual's right to privacy or any other right under the [Human Rights Act 2004](#)).

53. I have outlined my view of these 3 factors below.

Prejudice an agency's ability to obtain confidential information (Schedule 2, s 2.2(xii))

54. A factor favouring nondisclosure is where disclosure could reasonably be expected to prejudice an agency's ability to obtain confidentiality information.

55. The information in the VENM emails was provided to the EPA by third parties for the purpose of obtaining VENM clearances for material to be placed at the site; and to comply with reviews of the environmental authorisation.

56. In *'CQ' and Education Directorate*, the Senior Assistant Ombudsman found release of information provided by a private entity to a regulator would not have any material adverse effect on the ability of the regulator to receive confidential information; particularly where certain information is to be made available on request.¹²

57. The EPA advises a VENM clearance request must include the block, section, division, and district detail of the site and include the estimated volume of material to be excavated and removed from the site.¹³

¹² ['CO' and Education Directorate \[2023\] ACTOFOI 25](#), [67].

¹³ [Access Canberra, Virgin Excavated Natural Material \(VENM\) Information Sheet \(July 2022\)](#).

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58. I do not consider the information provided to the EPA by Freshford, its representative or third-party contractors was provided on a confidential basis. The VENM emails do not contain a reference to a mutual understanding or obligation of confidentiality or limits on dissemination.
59. I do not consider release of the VENM emails would impact on the EPA's ability to receive confidential information for the purpose of VENM clearance approvals or management of environmental authorisations.
60. I attribute no weight to this factor.

Prejudice the flow of information to the police or another law enforcement or regulatory agency (Schedule 2, s 2.2(a)(ix))

61. A factor favouring nondisclosure is where disclosure could reasonably be expected to prejudice the flow of information to the police or another law enforcement or regulatory agency.
62. Those responsible for waste material generated by excavation (**spoil**) must ensure all spoil is disposed of lawfully.¹⁴
63. The EPA advises individuals can check the EPA's records on the source site by emailing the site's details and requesting a VENM clearance via email to environmental.standards@act.gov.au.¹⁵
64. As discussed above, there are legislative requirements for the EPA to review environmental authorisations and restrictions on placement of more than 100m³ of soil in the River Corridor area.

¹⁴ [Access Canberra, 'Spoil Management in the ACT' \(July 2022\).](#)

¹⁵ [Access Canberra, 'Spoil Management in the ACT' \(July 2022\).](#)

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65. While I acknowledge the information was provided to the EPA as part of the regulatory process, I do not consider release of this information would affect the willingness of entities to provide relevant information to the EPA. It is a requirement to request VENM clearances for material to be defined as VENM.
66. I attribute no weight to this factor.

Prejudice the business affairs of third parties (Schedule 2, s 2.2(a)(xi))

67. A factor favouring nondisclosure is where disclosure could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person. In this matter, it is the business affairs aspect which is relevant.
68. Freshford submitted disclosure of the VENM emails would prejudice their business affairs (and the business affairs of their contractor) because information about the volume and source location of VENM would allow competitors who supply VENM to gain unfair advantage.
69. Freshford explained the volume and source location of VENM is commercially valuable as it relates to calculations made by contractors to estimate volume of VENM available from a source site. Freshford explained contractors rely on their expertise to make these calculations and assess project scope.
70. I note a person may apply to the authority to exclude information provided to the authority in relation to a review of an environmental authorisation from being made available for inspection, if disclosure would reveal a trade secret or would reasonably be expected to adversely affect the person in relation to their lawful business affairs.¹⁶ I understand this has not occurred in relation to the VENM emails.

¹⁶ [EP Act](#) s 21.

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71. The applicant maintains the source location and volume of the VENM material is not commercially sensitive because volume is readily calculable from publicly available sources, including development applications.
72. In *Manteena Commercial Pty Ltd and Education Directorate*, the acting Senior Assistant Ombudsman found revealing the price offered by an entity in a tender process would prejudice their business affairs as disclosure could potentially allow other competitors to ascertain important elements of its business model and operations.¹⁷
73. I note the VENM emails do not contain information about pricing, or the fee structure used by the contractor or agreed to by Freshford for placement of soil at the site. The VENM emails do contain information about the source location of VENM and the estimated volume of material to be transported.
74. I agree disclosure of information about source location and volumes of VENM which may be generated could reveal some insight into the operations of a contractor in the waste management industry.
75. However, I do not consider this information is necessarily commercially sensitive. For example, it is evident a site involving the construction of a property will result in some excavation where details of the soil to be removed may be available in a development application (e.g. depth, height, and width of utility channels). It is a legislative requirement for soil to be managed appropriately, and there are disposal options managed by the ACT government including fees which are publicly available.¹⁸

¹⁷ [Manteena Commercial Pty Ltd and Education Directorate \[2022\] ACTOFOI 1 \(4 February 2022\)](#), [70].

¹⁸ [Transport Canberra and City Services, Recyclopaedia – Soil and Lawn Turf, Disposal Options](#).

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76. Disclosure of the information in the VENM emails would not reveal how the contractor prepared their estimate of volume of material available at the source location. I note release would not reveal the actual volume of VENM transferred to the site but contains the upper limit of VENM the EPA approved could be transferred from a source location to the site.
77. Even in circumstances where release of the VENM emails would enable a competitor to ascertain the total volume of material transferred to the site, or the availability of VENM from a source location, it is not clear how this information alone could result in a commercial advantage.
78. I consider release of the VENM emails would provide limited insight into the operations of Freshford and their contractors, as release would only reveal detail about the upper limit of VENM approved to be placed at the site from particular source locations.
79. I do not consider release of this information could negatively affect the ability of the contractor to obtain further work, negotiate prices or contracts, or sustain profitability.
80. I note Freshford has raised in submissions their concern release of the VENM emails could result in detriment to their business affairs as disclosure may give rise to additional claims for compensation resulting from a commercial dispute.
81. I do not consider there is a reasonable basis to conclude release would have this affect noting the VENM emails do not contain financial information. I note the applicant has not sought information about commercial arrangements or contractor details.
82. I attribute no weight to this factor.

Balancing the factors

83. Having identified public interest factors favouring disclosure and factors favouring nondisclosure, I now must consider the public interest balancing test set out in s 17 of the FOI Act.
84. In this matter, I identified one public interest factor favouring disclosure of the VENM emails and attributed significant weight to this factor.
85. I identified 3 public interest factors favouring nondisclosure of the VENM emails and attributed no weight to these factors.
86. Balancing public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being considered in the public interest. The decision-maker's task is to consider the relative importance and weight of each factor identified. The weight given to a factor will depend on the effect that disclosing the information has on the public interest.
87. The FOI Act has a pro-disclosure bias,¹⁹ and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side. Rather, the scales are 'laden in favour of disclosure'.²⁰

¹⁹ [FOI Act s 17](#).

²⁰ [Explanatory Statement, Freedom of Information Bill 2016](#).

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88. Having afforded significant weight to one factor favouring disclosure (and taking into account the pro-disclosure bias) and no weight to factors favouring nondisclosure, on balance, disclosure of the VENM emails would not be contrary to the public interest.

Conclusion

89. For the reasons set out above, my decision is to **set aside** CMTEDD's decision of 13 October 2023. In its place, I **substitute** a decision the applicant should be given access to an edited copy of document 1 with irrelevant information deleted under s 82(2)(c) of the FOI Act.

Georgia Ramsey

Acting Senior Assistant Ombudsman

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