

‘BV’ and Environment, Planning and Sustainable Development Directorate [2022] ACTOFOI 10 (17 November 2022)

Decision and reasons for decision of Acting Senior Assistant Ombudsman, Susan Penn-Turrall

Application Number	AFOI-RR/22/10009
Decision Reference	[2022] ACTOFOI 10
Applicant	‘BV’
Respondent	Environment, Planning and Sustainable Development Directorate
Third Party	Master Builders Fidelity Fund
Decision Date	17 November 2022
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – identifying all government information within scope – meaning of government information – whether disclosure of information is contrary to the public interest – legal professional privilege – promote open discussion of public affairs and enhance the government’s accountability – prejudice trade secrets, business affairs or research of an agency or person

Decision

1. For the purpose of s 82 of the *Freedom of Information Act 2016 (ACT)* (**FOI Act**), I am a delegate of the ACT Ombudsman.
2. Under s 82(2)(b) of the FOI Act, I **vary** the decision of the Environment, Planning and Sustainable Development Directorate (**EPSDD**), dated 31 March 2022.

Background of Ombudsman review

3. On 3 January 2022, the applicant applied for access to information held by the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) under s 30 the FOI Act.

4. On 4 January 2022, the access application was transferred to EPSDD under s 57 of the FOI Act.
The access application was for:

The last 10 years of Annual Reports from the ACT Master Builders Fidelity Fund provided to the Minister. Under the Building (Prudential Standards) Determination, Reporting Obligations, Annual Reports, clause 55.
5. On 23 February 2022, EPSDD invited the Master Builders Fidelity Fund (**MBFF**) to provide its views on whether the information is contrary to the public interest information under s 38 of the FOI Act.
6. On 9 March 2022, the MBFF provided submissions to EPSDD objecting to the disclosure of the information.
7. On 31 March 2022, the EPSDD information officer informed the applicant that 17 documents had been identified within the scope of their request and they had decided to refuse access to these documents in their entirety under s 35(1)(c) of the FOI Act.
8. On 5 April 2022, the applicant applied for Ombudsman review of the EPSDD decision to refuse access to documents 1, 3, 4, 6, 8, 10 and 14.
9. On 8 April 2022, our Office requested information for the purpose of this review matter from the EPSDD. On 10 May 2022, our Office received the information from EPSDD.
10. On 16 May 2022, the MBFF applied to participate in this Ombudsman review matter under s 85(2) of the FOI Act. On 23 May 2022, the MBFF provided submissions to the Office.
11. Our Office attempted to assist the parties to resolve the matter informally under s 80A of the FOI Act, but this was unsuccessful.
12. On 18 July 2022, the applicant confirmed they do not seek review of EPSDD's decision in respect of the auditor's reports and independence declarations contained within documents 1, 3, 4, 8 and 14.
13. On 13 September 2022, the delegate provided their preliminary views about the respondent's decision to the parties in a draft consideration.
14. On 21 September 2022, the applicant accepted the draft consideration.
15. On 23 September 2022, the MBFF provided submissions in response to the draft consideration.
16. On 1 November 2022, the EPSDD provided submissions in response to the draft consideration. These submissions required careful consideration before making my decision.

Information at issue

17. The information at issue in this Ombudsman review is the information the applicant was refused access to under EPSDD's decision of 31 March 2022 (documents 1, 3, 4, 6, 8, 10 and 14) excluding the auditor's reports and the independence declarations contained in documents 1, 3, 4, 8 and 14 (**MBFF financial reports**).
18. The MBFF financial reports are provided to the Minister under clause 55 of the *Building (Prudential Standards) Determination 2005* (ACT) (**the Standards**).¹
19. The issue to be decided in this Ombudsman review is whether the MBFF financial reports are 'contrary to the public interest information' for the purpose of the FOI Act.
20. In making my decision, I have had regard to:
 - the applicant's access application and review application, including attached submissions
 - the respondent's decision of 31 March 2022 and further submissions received on 10 May 2022 and 31 October 2022
 - the submissions of the MBFF received on 23 May 2022 and 23 September 2022
 - the FOI Act, in particular ss 6, 7, 14, 16, 17, 35, 72, 77, 80, Schedule 1 and Schedule 2
 - the *Building Act 2004* (ACT) (**Building Act**) and the Standards
 - the *Evidence Act 2011* (ACT) (**Evidence Act**)
 - the *Territory Records Act 2002* (ACT) (**Territory Records Act**)
 - the *Administrative Arrangements 2022 (No 1)* (ACT) (**Administrative Arrangements**)
 - the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (**Self-Government Act**)
 - the *Public Sector Management Act 1994* (ACT) (**Public Sector Management Act**)
 - the *Insurance Act 1973* (Cth) (**Insurance Act**)
 - the respondent's FOI processing file relating to the access application
 - an unedited copy of the information at issue
 - relevant case law, including:
 - *'BS' and Chief Minister, Treasury and Economic Development Directorate* [2022] ACTOFOI 5 (19 May 2022)
 - *'BL' and Education Directorate* [2021] ACTOFOI 13 (29 October 2021)
 - *Alistair Coe and ACT Health Directorate* [2018] ACTOFOI 4 (5 September 2018)
 - *Dentsu X and Chief Minister, Treasury and Economic Development Directorate* [2019] ACTOFOI 7 (24 April 2019)

¹ [Clause 55 of the Prudential Standards](#).

- *N31ZEO and Department of Justice and Attorney-General; Queensland Newspapers Pty Ltd* (100101) 8 November 2013
- the Freedom of Information Guidelines (**FOI Guidelines**) made under s 66 of the FOI Act

Relevant law

21. 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.
22. '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.
23. 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.
24. 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.
25. Section 50 of the FOI Act applies if an access application is made for government information in a record containing information contrary to the public interest and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted.
26. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.
27. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose.
28. Schedule 2 of the FOI Act sets out a non-exhaustive list of public interest factors that must be considered, where relevant, when determining the public interest.

The parties' submissions

29. EPSDD identified one factor favouring disclosure and one factor favouring non-disclosure in the decision noticed dated 31 March 2022:

On balance, I have decided that the detriment caused by the release of this information, which may constitute a breach of confidence, outweighs any anticipated benefit provided by its release. Accordingly, I have decided to withhold from disclosure the documents in full.

30. In submissions to our Office the MBFF said:

The information requested (being the Financial Reports...) contains business secrets, financial information including pricing calculations, and other confidential information that would be detrimental to the interest of the MBFF if it were released...The documents requested contains confidential advice about pricing structures and formulas which, noting the uniqueness of the Fund, may be considered to be trade secrets and would be the intellectual property of the Actuary. These should not be disclosed to the public, with any potential or partial disclosure certain to be detrimental to the MBFF.

Both current and previous claims are also referred to in the Financial Reports/Statements. There are components of this information that are, in addition, considered to be subject to legal professional privilege. The release of this information would be considered to be a breach of the MBFF's legal professional privilege and may jeopardise the MBFF's ability to defend itself and/or its position in the future. This cannot be in the public interest (and, if it were concerning an individual, would certainly be contrary to the Human Rights Act 2004 (ACT))...Furthermore, the MBFF does not consider that this FOI Request meets the first hurdle of the public interest test, for the following reasons:

The release of the Financial Statements/Reports and Actuarial Reports is not going to assist in any informed debate on important issues or matters of public interest, as required by sub-clause (ii). The FOI Request refers to the amount of funds paid for management fees when compared to claims paid. The Trustees are aware of a perception amongst home-owners and previous claimants that the minimum statutory amount of \$85,000 is insufficient in today's market. That may indeed be the case and it is not disputed that this amount is important and likely a matter of public interest.

However, the release of the Financial Statements/Reports and Actuarial Reports will offer no assistance in such a debate. As Mr Harris stated in his appearance before the Standing Committee on Economic Development and Tourism, when discussing the Inquiry into Building Quality, the minimum amount payable is a matter for the ACT Government.

Before any steps are taken to increase this threshold, consideration ought to be given to the impact this will have on the market noting that all providers would factor the likely total amount of payouts, and therefore risk, into their pricing structure (a task that the Actuary performs). This increase in price will undoubtedly be passed on to the home-owner.

Similarly, sub-clause (iii) is irrelevant as the MBFF does not form part of government operations, and in particular, its Financial Statements/Reports and Actuarial Reports do not form part of government operations...

Sub-clause (iv) does not apply as no public funds are expended on the MBFF.

Sub-clause (v), (vi) and (vii) do not apply as the MBFF Trustees are not a government agency or public official.

No government information or decision-making analysis is contained in the Financial Statements/Reports or Actuarial Reports as set out in sub-clause (viii), and therefore no 'reason' for a government decision can be revealed by approving the FOI Request.

No basis or evidence has been provided that the information contained in the Financial Statements/Reports or Actuarial Reports meets the criteria set out in sub-clause (ix). Given that the reports are independently prepared by professional auditors and actuaries respectively, any suggestion of impropriety or errors would be dealt with expeditiously.

Sub-clause (x), (xi), (xii), (xv) and (xvi) are not applicable, *res ipsa loquitur*.

Sub-clause (xiii) and (xiv) are not applicable because the information requested does not, for example, include decision-making rationale that would assist a claimant (or the person making the FOI Request) in their pursuit of the administration of justice. Conversely, it would be validly argued by the MBFF that the release of such information would impede the ability of the MBFF to continue to fairly and equitably ensure that 'justice' is administered for future claimants to the MBFF.

As per sub-clause (a)(xi), the release of the information under the FOI Request would prejudice trade secrets, business affairs or research of an agency or person.

As per sub-clause (b)(ii), there is some material in the Financial Statements/Reports and Actuarial Reports that is considered to be subject to legal professional privilege....

The MBFF maintains that the disclosure of the entirety of the documents at issue would on balance, be contrary to the public interest test under the FOI Act. This position extends to all documents, not just those issued in the past several years.

The actuarial reports and audited financial statements contain information about fidelity fund certificates issued, potential legal claims (some of which have not been finalised and were only identified by the Trustees and professionals as possible claims), and other commercially sensitive information that may still be relevant to current commercial assessments. Further, these documents refer to specific clients of the Fund. This information was never intended to be made public.

31. These submissions are discussed in more detail below.

Preliminary issues

Whether EPSDD complied with its obligation to conduct reasonable searches

32. Section 34 of the FOI Act requires the respondent to an access application to 'take reasonable steps to identify all relevant information'.

33. In the Ombudsman review application, the applicant noted:

The inability to track down up to four out of 10 of the reports requested...Master Builders Fidelity Fund Financial Report for the Year Ended 30 June 2015...Master Builders Fidelity Fund Financial Report for the Year Ended 30 June 2016...Master Builders Fidelity Fund Financial Report for the Year Ended 30 June 2020. Ref 14: Master Builders Fidelity Fund Financial Report for the Year Ended 30 June 2019 - assuming this is for 2021 (noting date), otherwise question on whether EPSDD have found this report.

34. The schedule of documents provided with EPSDD's access decision described document 14 as 'Master Builders Fidelity Fund Financial Report for the Year Ended 30 June 2019'.² I have found document 14 contains references to the financial year ending 30 June 2021.

² EPSDD, Freedom of Information disclosure log (EPSDD reference: 22/00134) available here: <https://www.environment.act.gov.au/about-us/access-government-information/disclosure-log/disclosure-logs/epsdd-2200134>.

35. I have considered whether EPSDD have taken reasonable steps to identify the financial reports of the MBFF for the financial years ending 30 June 2015, 2016, and 2020.
36. As the FOI Act does not define 'reasonable steps', the scope of what is required will depend on the nature and subject matter of the request.³ For example, when searching for electronic records, reasonable steps would generally include using all mechanisms available to retrieve information stored electronically.⁴
37. The FOI Guidelines explain relevant factors in considering whether reasonable steps have been taken include:⁵
- the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it)
 - the agency's practices and procedures (including but not exclusive to information management)
 - other factors reasonably inferred from information supplied by the applicant including:
 - the nature and age of the requested document/s
 - the nature of the government activity the request relates to.
38. During this Ombudsman review, the Office sought further details from EPSDD about steps taken to identify the MBFF financial reports. EPSDD provided records to the Office displaying the results of searches within their electronic record management system, and internal and external consultation with ACT government officers.
39. EPSDD advised during the processing of the access application:
- Searches of our Electronic Records and Document Management System Objective were conducted using key words and phrases (results of searches were interrogated by both the Building Reform Team and Information Governance Team for relevance to the application).
 - The Information Governance Team consulted with Access Canberra as to whether those reports are held by the Construction Occupations Registrar or any business unit in Access Canberra.
 - Manual searches of Outlook and Objective were conducted by the Information Officer and the Building Reform team (the subject matter experts).
 - The Information Governance Team requested copies of the missing reports directly from the Master Builders Fidelity Fund.

³ [Explanatory Statement, Freedom of Information Bill 2016.](#)

⁴ [Explanatory Statement, Freedom of Information Bill 2016.](#)

⁵ [Ombudsman Freedom of Information Guidelines, Dealing with Access Applications](#) at 6.7.

40. EPSDD explained they had conducted additional searches for information regarding the MBFF (for a different access application involving similar subject matter⁶) and advised:
- The Building Reform Team conducted searches and collated information regarding Master Builders Fidelity Fund Reporting received by EPSDD. This information was provided to the Information Governance team on 11 July 2022. The information includes correspondence from various Ministers' offices providing copies of the Master Builders Fidelity Fund reporting to EPSDD.
 - The information was interrogated by the Information Governance Team for relevance to other access application being processed for the applicant and for the missing Annual Reports.
 - Objective document searches of Ministerial Files by year for phrase Fidelity Fund did not yield any additional documents
 - The missing Annual Reports or any correspondence relating to the receipt of these reports were not identified.
 - EPSDD has undertaken comprehensive searches across multiple areas, including engaging the agency administrator of the EPSDD's Electronic Content Management (ECM) system. Despite the level of data interrogation expertise applied to these searches, the relevant documents could not be located.
41. In response to the draft consideration, EPSDD submitted there is no evidence the EPSDD has ever held the missing reports. EPSDD stated because the information is required to be provided to the relevant Minister, it is plausible these financial reports were not passed onto EPSDD.
42. I note the access application was transferred to the EPSDD from CMTEDD under s 57 of the FOI Act. Once transferred, an application is taken to have been made to the transferee.⁷
43. If a respondent to an access application believes relevant information in the scope of the application may also be held by another agency or Minister, the respondent must give a copy of the application to the other entity.⁸
44. The intention of this provision is to facilitate cooperation between agencies and Ministers when responding to applications, to make it as easy as possible for entities to respond and get the information to applicants as quickly as possible.⁹
45. If the EPSDD believed the MBFF financial reports for the years ending 2015, 2016 and 2020 may have been held by the Minister, the EPSDD was obligated to give a copy of the access application to the Minister.

⁶ EPSDD, Freedom of Information Disclosure log (EPSDD reference 22/52495) available here: [EPSDD 22/52495 - Environment, Planning and Sustainable Development Directorate - Environment \(act.gov.au\)](https://www.act.gov.au/act-ombudsman/foi-log/2022/52495).

⁷ Section 57(3) of the FOI Act.

⁸ Section 58 of the FOI Act.

⁹ Explanatory Statement, Freedom of Information Bill 2016.

46. The trustees of an approved scheme are required to provide annual reports to the Minister in accordance with the Standards; where penalties apply under the Building Act for non-compliance.¹⁰ It is reasonable to expect the MBFF financial reports for the financial years ended in 2015, 2016 and 2020 existed, and were provided to the responsible Minister.
47. The MBFF financial report for the year ending 30 June 2015 should have been given to the Minister for Planning pursuant to the Administrative Arrangements 2015 (No 2) (ACT).
48. The MBFF financial report for the year ending 30 June 2016 should have been given to the Minister for Planning and Land Management, noting the allocation of responsibilities set out in the Administrative Arrangements 2016 (No 3).
49. The MBFF financial report for the year ending 30 June 2020 should have been given the Minister for Building Quality Improvement in accordance with the Administrative Arrangements 2020 (No 2).
50. A Minister in possession of government information relating to an agency the Minister is responsible for must, when no longer responsible for the agency, give the information to the agency.¹¹ I note this provision did not commence until 1 January 2018.
51. The Territory Records Act provides that an agency must make and keep full and accurate records of its activities.¹² An agency must also ensure the safekeeping and proper preservation of its records.¹³
52. I appreciate the logic of the applicant's submission that the MBFF's annual reports should be held by EPSDD, or the Minister for Sustainable Building and Construction as they are responsible for EPSDD in accordance with the Administrative Arrangements.¹⁴
53. While 2 of the 3 financial reports which were unable to be identified are over 5 years old (financial years ending 30 June 2015 and 30 June 2016), the financial report for the year ending 30 June 2020 is likely to be less than 2 years old. I have no evidence before me that the reports have been destroyed in accordance with record keeping requirements.

¹⁰ Section 104 of the Building Act.

¹¹ Section 102 of the FOI Act.

¹² Section 14 of the Territory Records Act.

¹³ Section 22 of the Territory Records Act.

¹⁴ [Schedule 1 of the Administrative Arrangements](#).

54. I note audited accounts of the MBFF were provided to the ACT Legislative Assembly following the Inquiry into Building Quality in the ACT by the Standing Committee on Economic Development and Tourism.¹⁵ However, I am unable to confirm whether the annual reports for the financial years ending 2015, 2016 and 2020 were provided.
55. Based on my examination of the evidence provided by the EPSDD, I do not consider that a direction to conduct a further search under s 80 of the FOI Act could reasonably be expected to lead to the production of additional information within the scope of the access application.
56. Having examined the records supplied by EPSDD, I note that searches have been undertaken in several possible locations, utilising a variety of methods. I am satisfied that the steps outlined by EPSDD were appropriate in the circumstances.

Government information

57. A decision to refuse to give access to government information is a reviewable decision.¹⁶
58. Government information means information held by an agency or Minister; but does not include information relating to a Minister's personal or political activities; or created or received by a Minister in the Minister's capacity as a member of the Legislative Assembly.¹⁷
59. In submissions to the Office, the MBFF said:

The information requested is not government information. The documents referred to under the FOI application are received by the Minister in the Minister's capacity as a member of the Legislative Assembly, as defined under section 14 of the Freedom of Information Act 2016 (ACT). But for the Minister's appointment as a Minister and a member of the Legislative Assembly, the documents requested in the FOI Request would not have been provided to the Minister.
60. The definition of government information is designed to be as expansive as possible to capture everything that one would ordinarily expect to be considered government information.¹⁸
61. I consider the financial reports do not relate to the Minister's personal or political activities, their participation in the Legislative Assembly (for example, committee papers) or the performance of their functions as a member of the Legislative Assembly.

¹⁵ [Standing Committee on Economic Development and Tourism, Inquiry into Building Quality Report 9, July 2020.](#)

¹⁶ Schedule 3, item 4 of the FOI Act.

¹⁷ Section 14 of the FOI Act.

¹⁸ [Explanatory Statement, Freedom of Information Bill 2016.](#)

62. The annual reports of the MBFF are given to the Minister because of their portfolio responsibilities, including the administration of the Building Act pursuant to the Administrative Arrangements made under the Self-Government Act and the Public Sector Management Act.¹⁹
63. I am satisfied the financial reports were received by the Minister in their capacity as the responsible Minister, as opposed to being received in their separate capacity as a Member of the ACT Legislative Assembly.
64. Accordingly, the requested information is government information under the FOI Act, and the decision to refuse to give access to this information is a reviewable decision.

Considerations

65. I have carefully considered an unedited copy of the MBFF financial reports together with the information provided by the applicant, respondent, and the MBFF.

Information that is taken to be contrary to the public interest to disclose under Schedule 1

66. Neither the applicant nor the respondent had suggested the MBFF financial reports are information which is taken to be contrary to the public interest under Schedule 1. However, the MBFF has referred to legal professional privilege under Schedule 1, s 1.2 of the FOI Act in submissions to this Office.

Legal professional privilege

67. Information that would be privileged from production in a legal proceeding is taken to be contrary to the public interest under the FOI Act.²⁰
68. The MBFF submitted the financial reports refer to previous, ongoing, or potential legal claims and any reference to legal claims in the MBFF financial reports should be considered information subject to legal professional privilege.
69. Section 118 of the Evidence Act is the provision a claim of privilege can rely on in the ACT. It provides:

Evidence must not be presented if, on objection by a client, the court finds that presenting the evidence would result in disclosure of—
 - (a) a confidential communication made between the client and a lawyer; or
 - (b) a confidential communication made between 2 or more lawyers acting for the client; or

¹⁹ Schedule 2, Part 2.6 of the Administrative Arrangements.

²⁰ Schedule 1, s 1.2 of the FOI Act.

- (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or someone else;
 - (d) for the dominant purpose of the lawyer, or 1 or more of the lawyers, providing legal advice to the client.
70. After reviewing a copy of the MBFF financial reports, I do not agree that disclosure would reveal a privileged communication or information which relates to the provision of legal advice.
71. I have no evidence before me that the MBFF financial reports contain actual communications with a legal adviser, or any information which would allow a person to infer the contents or nature of legal advice sought or given.
72. I consider the MBFF financial reports were created for the purpose of satisfying the obligation of the Trustees to give annual reports to the Minister in accordance with clause 55 of the Standards and not for the dominant purpose of providing legal advice.
73. For these reasons, I do not consider the MBFF financial reports are contrary to the public interest to disclose under Schedule 1, s 1.2 of the FOI Act. I now consider whether the MBFF financial reports are contrary to the public interest to disclose.

Public interest test

74. The test set out in s 17 of the FOI Act prescribes the following steps:
- (a) 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
 - (b) 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;
 - (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
 - (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;
 - (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.
75. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) of the FOI Act are considered.

Irrelevant factors

76. In submissions to this Ombudsman review, the applicant explained why they were seeking the MBFF financial reports.

77. In conducting the public interest test, I did not take into account any irrelevant factors which a decision-maker is prohibited from considering under s 17(2) of the FOI Act, including the applicant's identity, circumstances, or reason for seeking access to the information.²¹

Factors favouring disclosure

78. In deciding the access application, EPSDD identified one factor favouring disclosure.

Promote open discussion of public affairs and enhance the government's accountability

79. Of the factors favouring disclosure listed in Schedule 2, s 2.1 of the FOI Act, EPSDD considered that the information identified in scope of the access application would promote open discussion of public affairs and enhance the government's accountability.

80. The MBFF is a discretionary building industry fidelity fund established under a trust deed; and is an approved scheme for the purposes of the Building Act.²²

81. Fidelity funds provide limited insurance-like coverage for certain issues relating to residential building work, where the landowner is unlikely to be able to pursue other options due to a builder's death, disappearance, or insolvency.

82. When applying for a commencement notice for insurable residential building work, a licenced builder must include with their application either:²³

- A residential building insurance policy for the work; or
- A certificate issued by an approved insurer stating that the insurer has insured the work under a residential building insurance policy; or
- A fidelity certificate for the work issued by the trustees of an approved scheme.

83. As the MBFF is not an insurance scheme it is not subject to the Insurance Act or supervision by the Australian Prudential Regulation Authority (**APRA**).²⁴

84. In response to the draft consideration, the MBFF said they provide the service of a Mutual Benefit Fund direct to the public under the regulatory supervision of the relevant Minister noting:

- it is a not-for-profit organisation,
- it must make full provision from out of its own sole resources for all claims,

²¹ Section 17(2)(f) of the FOI Act.

²² Section 84 of the Building Act; [Building \(Approval of fidelity fund scheme\) 2002 \(ACT\)](#).

²³ Section 37(4)(c) of the Building Act.

²⁴ [Legislative Assembly for the ACT: 2002 Week 6 Hansard \(16 May\), Page 1776](#).

- it has an openly acknowledged discretion as to whether and what amounts it pays out, which is reflected in its Trust Deed.
 - subject to compliance with regulation, its Trustees have full discretion in arranging the management of the MBFF and are not subject to direction by any government office, including the relevant Minister.
85. The Building Act provides that the Minister may determine requirements (approval criteria) with which a fidelity fund scheme must satisfy to be an approved scheme.²⁵ The Minister may also determine prudential standards that must be complied with by an approved scheme.²⁶ The Standards are concerned with the sound financial management of a fidelity fund scheme.²⁷
86. Within 90 days after the end of each financial year, the Trustees of an approved scheme must provide to the Minister the following documents:²⁸
- (a) the annual accounts;
 - (b) each report and certificate of the actuary as required by the Act;
 - (c) each report and certificate of the auditor as required by the Act;
 - (d) a declaration by the trustees that, within the period of one month prior to the lodgement of the documents set out in clause 55(a), (b) and (c) with the Minister, the trustees have resolved that they are of the opinion that there are reasonable grounds to believe that the approved scheme will be able to meet its liabilities as and when they become due and payable;
 - (e) a declaration by the trustees that they have adopted and maintained a compliance plan for the approved scheme in accordance with clause 45 and have satisfied themselves as to the adequacy of, and their compliance with, the approved scheme's compliance plan;
 - (f) a list, signed and dated by two trustees, setting out any breach of the compliance plan that must be reported under clause 47 and 48; and
 - (g) a declaration by the trustees that they have adopted and maintained a contingency plan for the approved scheme in accordance with clause 50 and have satisfied themselves as to the adequacy of the approved scheme's contingency plan.
87. I consider that consumer protection mechanisms within the regulatory framework for insurable residential building work is a matter of public interest.
88. The Standards require annual reporting to the Minister to allow the government to monitor an approved scheme. For example, if a compliance issue is identified, the planning and land authority may issue a written notice to the trustees of an approved scheme requiring the trustees to comply with the Standards.²⁹

²⁵ Section 99 of the Building Act.

²⁶ Section 104 of the Building Act.

²⁷ [Explanatory Statement, Building \(Prudential Standards\) Determination 2005 \(ACT\)](#).

²⁸ [Explanatory Statement, Building \(Prudential Standards\) Determination 2005 \(ACT\)](#), clause 55.

²⁹ Section 105 of the Building Act.

89. I consider disclosure of the financial reports of the MBFF could enable a member of the public to scrutinise whether the Minister, the planning and land authority and EPSDD have been effectively performing regulatory functions.
90. I acknowledge release of the MBFF financial reports could promote open discussion of public affairs and enhance the government's accountability as disclosure would inform the public about the government's oversight of approved schemes in the Australian Capital Territory.
91. In *N31ZEO and Department of Justice and Attorney-General; Queensland Newspapers Pty Ltd*,³⁰ the Queensland Information Commissioner considered disclosure of information which would reveal how two agencies worked together in relation to alcohol-related violence at licenced premises would enhance accountability and promote public discussion about how those regulatory functions are performed.³¹
92. In this matter, I consider that disclosure would only inform the community about the financial information of the MBFF available to the government and would not reveal the assessment of the annual reports by the Minister, EPSDD or the planning and land authority in a regulatory context.
93. I find that this factor applies in relation to the MBFF financial reports in this Ombudsman review. I attribute minor weight to this factor.

Pro-disclosure bias

94. In addition to the factors favouring disclosure listed in Schedule 2, s 2.1, the FOI Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of representative democracy.³² This concept is promoted through the objects of the FOI Act.³³

Factors favouring nondisclosure

95. Of the factors favouring nondisclosure listed in Schedule 2, s 2.2, EPSDD identified one factor favouring non-disclosure.

³⁰ (100101) 8 November 2013.

³¹ *N31ZEO and Department of Justice and Attorney-General; Queensland Newspapers Pty Ltd*, para [31]-[35].

³² Section 17 of the FOI Act.

³³ Section 6(b) of the FOI Act.

Information could prejudice trade secrets, business affairs or research of an agency or person

96. A reasonable expectation that disclosure of information could prejudice the trade secrets, business affairs or research of an agency or person is a factor favouring nondisclosure under the FOI Act.³⁴ In this matter, it is the business affairs aspect which is relevant rather than trade secrets or research.

97. EPSDD's decision letter referred to paragraph [48] in *Alistair Coe and ACT Health Directorate*³⁵ which provides that:

The term 'business affairs', in the context of FOI legislation, has been interpreted to be 'the totality of the money-making affairs of an organisation or undertaking as distinct from its private or internal affairs'.³⁶

98. The EPSDD decision notice stated:

The information withheld from release could reasonably be expected to unfairly prejudice the business affairs of the third party by disclosing information and confidential advice regarding pricing structures and formulas used by the Master Builders Fidelity Fund. As one of two providers of home warranty insurance in the ACT, the release of their financial information would increase competitive pressures and provide a commercial advantage to existing and potential competitors which would be a detriment to the third party.

99. The FOI Guidelines provide that the sensitivity of business information is likely to depend on:³⁷

- the nature and detail of the information
- whether it is current or merely historical
- the nature and custom of the particular market

Nature and detail of the information

100. The annual accounts of the MBFF are prepared in accordance with the accounting standards applicable to a managed investment scheme registered under Chapter 5C of the *Corporations Act 2001* (Cth).³⁸

101. Generally, an annual financial report consists of a statement of financial position, statement of comprehensive income, statement of changes in equity, statement of cash flows and accompanying notes.

³⁴ Schedule 2, 2.2(a)(xi) of the FOI Act.

³⁵ [2018] ACTOFOI 4 (5 September 2018).

³⁶ See *Mangan and The Treasury* [2005] AATA 898, at [40], citing *Cockcroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd (party joined)* (1985) 12 ALD 462.

³⁷ [Ombudsman Freedom of Information Guidelines Considering the Public Interest](#) at 9.12.

³⁸ Definition of 'accounting standards' in the Standards.

102. Private businesses may publish or disclose financial information to fulfil reporting obligations or demonstrate financial performance or viability of the entity.³⁹ Certain companies must prepare annual financial reports and provide these reports to shareholders.⁴⁰

103. In '*BL' and Education Directorate*,⁴¹ the delegate did not accept the contention that release of the financial reports of Brindabella Christian College could reasonably be expected to prejudice business affairs on the basis that the reports are prepared in the knowledge that they are routinely and mandatorily published.⁴²

104. There is no legislative requirement for the MBFF, the Minister or EPSDD to publish or otherwise publicly report on compliance with the standards and the operations of fidelity fund schemes. I have considered that the MBFF financial reports are not prepared in the knowledge they would be publicly released.

105. In '*BS' and Chief Minister, Treasury and Economic Development Directorate*,⁴³ the delegate agreed that disclosure of information which reveals the specific value of premiums, total coverage, excess costs, and deductibles could enable other insurance companies to ascertain element of the relevant third parties' business model and operations.⁴⁴

106. In submissions to the Office, the MBFF said:

For example, the amount paid to the independent financial assessor is referenced in the Financial Statements. If the MBFF were to consider an open tender process in the near future for this function, having the total cost paid to the current independent financial assessor would be detrimental to the prospects of a fair and equitable procurement process for the MBFF and may jeopardise the integrity of the process.

107. Having examined the MBFF financial reports, I am satisfied disclosure would reveal total sums paid to the financial assessor for each respective financial year. Without any further information, for example a breakdown of pricing based on rates or services rendered, I do not accept the contention that disclosure of this specific information would prejudice a future procurement process.⁴⁵

³⁹ See Australian Securities and Investments Commission webpage for further information: <https://asic.gov.au/regulatory-resources/financial-reporting-and-audit/users-of-financial-reports/>.

⁴⁰ Section 314 of the *Corporations Act 2001* (Cth).

⁴¹ [2021] ACTOFOI 13 (29 October 2021).

⁴² *BL and Education Directorate [2021] ACTOFOI 13 (29 October 2021)* at [36].

⁴³ [2022] ACTOFOI 5 (19 May 2022).

⁴⁴ '*BS' and Chief Minister, Treasury and Economic Development Directorate [2022] ACTOFOI 5 (19 May 2022)*, [44].

⁴⁵ See *Alistair Coe and ACT Health Directorate [2018] ACTOFOI 4 (5 September 2018)*, at [49]. See also *Dentsu X and Chief Minister, Treasury and Economic Development Directorate [2019] ACTOFOI 7 (24 April 2019)* at [46].

108. In response to the draft consideration, the MBFF submitted the MBFF financial reports contain information about certificate fees, expected and potential claims, and assets indicating the number of claims which might be expected as a result of the previous five years of issued Fidelity Fund Certificates.

109. I have considered this submission and I accept the MBFF financial reports contain detail about their financial position and business operations which attracts some sensitivity and could reasonably be expected to prejudice the business affairs of the MBFF if disclosed.

Current or merely historical

110. The MBFF financial reports contain information about the financial position of the MBFF at the end of each financial year, where it is reasonable to conclude the older the information becomes, the less likely the information will reflect the MBFF's current financial position.

111. I acknowledge that information which relates to previous financial years can indicate trends or provide comparative metrics for performance indicators which still be current in terms of the business operations of the MBFF.

112. I note that documents 1, 3, 4, 6 and 8 are over 3 years old; and document 10 is over 2 years old. Document 14 was created less than 1 year ago.

113. In response to the draft consideration, the MBFF submitted:

In an extraordinarily hard commercial environment, all of the above information extending back at least five years, from a perspective of "trading history", is extremely sensitive and might cause extreme commercial harm if released.

114. I have considered this submission and ultimately decided in agreement with it. I consider the financial reports of the MBFF which are over five years old are merely historical as they are unlikely to reveal any relevant information about the business affairs of the MBFF.

115. I consider that the financial reports which are less than five years old are likely to contain information that is current, where disclosure is more likely to reveal sensitive financial information of the MBFF.

Nature and custom of the particular market

116. In submissions to the Office the MBFF said that:

Until 2019, a complying home warranty insurance policy or fidelity fund certificate was only available from two providers in the ACT – the MBFF and QBE. In 2019, QBE advised the ACT Government that they were intending to withdraw from providing home warranty insurance in the ACT. It is the understanding of the MBFF that following discussions, the ACT Government determined it appropriate to underwrite the policies subsequently issued by QBE. From a consumer or builder's perspective, very little changed as they continued to deal directly with QBE. However, from the perspective of the MBFF, the ACT Government, throughout their management of the home warranty insurance scheme, became a competitor of the MBFF. The market in the ACT remains a duopoly as of March 2022...

As with any duopoly market, it remains a concern to the MBFF that the market remain fair and equitable. It is therefore not at all appropriate that one participant in the duopoly, being the MBFF, be required to provide all Financial Reports...to the public at large....

117. The ACT Insurance Authority 2020-2021 annual report explains:⁴⁶

Commencing 12 March 2020, the Territory entered into a 3-year indemnity agreement with QBE to continue providing Builders Warranty Insurance to ACT builders with the Territory indemnifying QBE in respect of any claim losses. The Authority is currently administering the financial transactions relating to this agreement on behalf of the Territory. Under the agreement, the Authority receives premium revenue from QBE for any new policies written, QBE is paid a commission and receives fees for the administration of the claims management services it continues to provide.

118. I note that the MBFF is the only approved scheme currently operating in the ACT residential building insurance market, where information about how the scheme can operate is set out in the Standards.

119. Clause 32 of the Standards provides that:⁴⁷

The trustees of an approved scheme must ensure that the approved scheme is maintained solely for the following purposes:

- The provision of a fidelity certificate to an owner in accordance with the Building Act and the trust deed;
- The payment of an amount to an owner pursuant to a fidelity certificate
- Any other purpose that the Minister may determine in writing

120. Assets of the MBFF must be dealt with in accordance with the Standards and must only be applied to meet liabilities or expenses incurred for the purpose of maintaining the scheme; to make an investment in accordance with the Financial Management Guidelines; to pay a request made pursuant to a fidelity certificate, or other such purposes determine by the Minister in writing.⁴⁸

⁴⁶ [Australian Capital Territory Insurance Authority Annual Report 2020-2021](#), page 71.

⁴⁷ [Clause 32 of the Prudential Standards](#).

⁴⁸ [Clauses 33 – 40 of the Prudential Standards](#).

121. I note that the financial reports of QBE are publicly available.⁴⁹ The ACT Insurance Authority also publishes Builders Warranty Insurance financial performance information for transparency as the indemnity covers non-ACT government entities.⁵⁰

122. In response to the draft consideration, the EPSDD submitted:

While QBE publishes annual reports for their broader business, these reports do not contain specific details relevant to their ACT residential building insurance product...concerned about the potential competitive disadvantage that would be placed on the MBFF by the public release of their annual reporting and financial information as the same information is not made publicly available for QBE insurance under their reporting requirements.

123. I have considered this submission and I accept the release of financial information of a single competitor in a commercial environment involving only two entities would give the other a competitive advantage.

124. I have decided that this factor applies in relation to the MBFF financial reports. However, I attribute minor weight to documents 1, 3, 4 and 6 because I do not consider disclosure would reveal current financial information which would a detrimental effect on the MBFF.

125. In respect of documents 8, 10 and 14 I afford significant weight to this factor, as I conclude that it is reasonable to expect disclosure of sensitive financial information of the MBFF would prejudice the business affairs of the MBFF to a significant degree.

Balancing the factors

126. Having identified public interest factors favouring disclosure and factors favouring non-disclosure, I now must consider the public interest balancing test set out in s 17 of the FOI Act.

127. In this matter, I identified one public interest factor favouring disclosure applies being Schedule 2.1(a)(i) of the FOI Act, and I attributed minor weight to this factor.

128. I have also identified one public interest factor favouring non-disclosure applies being Schedule 2.2(a)(xi) of the FOI Act. I have attributed minor weight to this factor in respect of documents 1, 3, 4 and 6. I attributed significant weight to this factor in respect of documents 8, 10 and 14.

⁴⁹ Report on results and financial statements for the year ended 31 December 2021, QBE Insurance Group Limited, available here: <https://www.qbe.com/us/about-qbe/financial-reports>.

⁵⁰ [Australian Capital Territory Insurance Authority Annual Report 2020-2021](#), page 71.

129. 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 they have identified. The weight given to a factor will depend on the effect that disclosing the information would have on the public interest.
130. The FOI Act has a pro-disclosure bias, 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'.⁵¹
131. I am satisfied documents 1, 3, 4 and 6 are not contrary to the public interest information. This is because I attribute minor weight to the factor favouring disclosure and factored in the pro-disclosure bias in the FOI Act, whereas I have attributed minor weight to the factor favouring non-disclosure.
132. I am satisfied documents 8, 10 and 14 are contrary to the public interest information. This is because I attribute minor weight to the factor favouring disclosure and factored in the pro-disclosure bias in the FOI Act, whereas I have attributed significant weight to the factor favouring non-disclosure.

Conclusion

133. For the reasons set out above, I have decided to vary EPSDD's decision of 31 March 2022 under s 82(2)(b) of the FOI Act.
134. Documents 8, 10 and 14 are contrary to the public interest information about should be withheld from release.
135. The applicant is to be given access to documents 1, 3, 4 and 6.

Susan Penn-Turrall

Acting Senior Assistant Ombudsman

17 November 2022

⁵¹ [Explanatory Statement, Freedom of Information Bill 2016.](#)