

[REDACTED]

Via email: [REDACTED]

Dear [REDACTED]

### **FREEDOM OF INFORMATION (FOI) REQUEST**

I refer to your access application, noting [REDACTED], received by the Education Directorate (the Directorate) on 12 November 2020, in which you sought access to *information relating to the procurement of construction services by the Australian Capital Territory, as represented by the ACT Education Directorate*. Your request is specifically for :

*[Your Point 6.] In relation to the **Campbell School Procurement**, [REDACTED] seeks access to:*

*(a) The following documents relating to [REDACTED] expression of interest dated 27 August 2019, tender dated 23 January 2020 and best and final offer tender dated 5 May 2020:*

*(i) Correspondence (including emails, letters, text messages etc), diary notes, file notes or other records of conversations (including by phone) and minutes of meetings between any of the following:*

- Major Projects Canberra and its staff including officers, employees, contractors and agents, including but not limited to members of the Tender Evaluation Team;*
- The ACT Education Directorate and its staff including officers, employees, contractors and agents, including but not limited to the Executive Branch Manager – Infrastructure and Capital Works, the Executive Group Manager – Business Services and the Director-General, including any persons acting in those roles;*
- External organisations, consultants and contractors with which Major Projects Canberra and the ACT Education Directorate consulted or otherwise engaged;*
- The Minister for Education and Early Childhood Development, and their staff including officers, employees, contractors and agents;*

- (ii) Documents including but not limited to briefs, de-briefs, evaluation reports, assessments, reviews, memoranda or the like prepared by the ACT Education Directorate and / or Major Projects Canberra;
- (b) Any documents relating to the decision by the ACT Education Directorate and / or Major Projects Canberra to introduce the Best and Final Offer Request for Tender into the tender process;
- (c) Any documents relating to the recommendations of the ACT Education Directorate and / or Major Projects Canberra regarding the preferred tenderer;
- (d) Any documents relating to the decision by the Director-General of the ACT Education Directorate or responsible delegate to:
- (i) Award the contract to Lendlease;
- (ii) To not award the contract to [REDACTED]; and
- (e) Any documents relating to the decision for the tender debrief to be provided by the ACT Education Directorate to [REDACTED] without Major Projects Canberra's involvement or attendance.

[Your Point 7.] In relation to the **Throsby School Procurement**, [REDACTED] seeks access to:

- (a) The following documents relating to [REDACTED] expression of interest dated 12 September 2019 and tender dated 12 March 2020:
- (i) Correspondence (including emails, letters, text messages etc), diary notes, file notes or other records of conversations (including by phone) and minutes of meetings between any of the following:
- Major Projects Canberra and its staff including officers, employees, contractors and agents, including but not limited to members of the Tender Evaluation Team;
  - The ACT Education Directorate and its staff including officers, employees, contractors and agents, including but not limited to the Executive Branch Manager – Infrastructure and Capital Works, the Executive Group Manager – Business Services and the Director-General, including any persons acting in those roles;
  - External organisations, consultants and contractors with which Major Projects Canberra and the ACT Education Directorate consulted or otherwise engaged; and
  - The Minister for Education and Early Childhood Development, and her staff including officers, employees, contractors and agents.

- (ii) Documents including but not limited to briefs, de-briefs, evaluation reports, assessments, reviews, memoranda or the like prepared by the ACT Education Directorate and / or Major Projects Canberra;
- (b) Any documents relating to the recommendations of the ACT Education Directorate and / or Major Projects Canberra regarding the preferred tenderer; and
- (c) Any documents relating to the decision by the Director-General of the ACT Education Directorate or responsible delegate to:
  - (i) Award the contract to Icon SI; and
  - (ii) To not award the contract to [REDACTED].

It is noted that you have requested to be provided with access to electronic records of the requested information.

The Directorate's consideration of the relevant sources of records for your application contact led us to contact Major Projects Canberra (MPC). On 19 November 2020, under section 57 of the Act, a partial transfer of your request was made to Major Projects Canberra, which means that MPC will be responding to you in relation to the information they hold.

On 20 November 2020 you agreed via email to a reduction of the scope to exclude:

- a) Documents that were either sent to [REDACTED], or sent by [REDACTED] and
- b) Drafts of documents, other than in relation to paragraphs 6(c) and (d) and 7(b) and (c) of the application.

I am an Information Officer appointed by the Director-General under section 18 of the FOI Act to deal with access applications made under Part 5 of the Act.

A decision on your access application was due by 10 December 2020. However, in line with section 40 of the Act, on 3 December 2020 we reached agreement on a revised decision date of Friday 29 January 2021. This revised date took account of the additional 15 working days allowed for third party consultation under section 38 of the Act, and the impacts of the traditional standdown period at the end of the year to [REDACTED] and the Directorate. On 22 January 2021 you agreed to a further change to the due date to 12 February 2021. Thank you for your consideration in relation to the deadline for the decision as we have worked through the large number of records and pages collated for your request. Your agreement to the requested extensions is appreciated.

### **Decision on access**

Searches were completed for relevant records and 73 records have been identified that fall within the scope of your request

I have included as Attachment A to this decision the schedule of relevant records relating to the Campbell Primary procurement process and Attachment C is the schedule of records relating to

the Throsby Primary and Pre School procurement process. The schedules provide a description of each record and my access decision.

My decision in relation to the records relevant to your request is summarised as follows:

- full release of 14 records;
  - partial access to 51 records; and
  - non-release of 8 records.
- Note: Additional redactions have been applied to the records prior to publication the disclosure log in accordance with Section 28(6)(b) of the Act**

Record that are not released or are partially released contain information that I have decided:

- is taken to be contrary to the public interest to disclose in accordance with section 16 and Schedule 1 of the Act; or
- would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the Act; or
- is outside of the scope of your request.

Where possible, access has been granted to information on a partial release basis with deletions applied under section 50 of the Act to remove the information that is deemed contrary to the public interest to disclose or is outside of scope, which allows for the remainder of the record to be released.

My access decisions are detailed further in the following statement of reasons.

The records released to you are provided at [Attachment B](#) for Campbell Primary and [Attachment D](#) for Throsby Primary and Pre School, noting there are a number of records that reference both which are not duplicated in both sets of records.

### **Material considered**

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

- the FOI Act, particularly sections 16, 17 and 50, and schedules 1 and 2;
- the content of the records that fall within the scope of your request;
- the views of third parties consulted; and
- the *Human Rights Act 2004*

### **Reasons for decision**

My reasons for deciding to not grant access to whole or part records are as follows:

#### Information that is taken to be contrary to the public interest

Information that is taken to be contrary to the public interest to disclose applies to information that is subject to legal professional privilege as specified at Schedule 1, 1.2 of the Act. Records containing information covered by legal professional privilege are either not released or have had the information deleted to enable the remaining content to be released.

### Information that would, on balance, be contrary to the public interest

Section 17 of the Act requires a public interest test to be applied to determine if information would, on balance, be contrary to the public interest to disclose. The public interest test involves the identification of factors favouring disclosure and non-disclosure, the balancing of those factors, and a decision whether, on balance, disclosure of the information would be contrary to the public interest.

As education facilities and government decisions relating to high value expenditure are matters of public interest, I have decided that the factors favouring disclosure are that disclosure of the information could reasonably be expected to:

- Promote open discussion of public affairs and enhance the government's accountability (Schedule 2, 2.1(a)(i));
- Contribute to positive and informed debate on important issues or matters of public interest (Schedule 2, 2.1(a)(ii));
- Ensure effective oversight of expenditure of public funds (Schedule 2, 2.1(a)(iv)); or
- Allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official (Schedule 2, 2.1(a)(v))
- Reveal the reason for a government decision and any background or contextual information that informed the decision.

I have decided that the factors favouring non-disclosure as listed at Schedule 2.2 of the Act are that disclosure of the information could reasonably be expected to:

- Prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act 2004 (Schedule 2, 2.2(a)(ii));
- Prejudice trade secrets, business affairs or research of an agency or person (Schedule 2, 2.2(a)(xi));
- Prejudice the competitive commercial activities of an agency (Schedule 2, 2.2(a)(xiii)); or
- Prejudice a deliberative process of government; (Schedule 2, 2.2(a)(xvi)).

I have considered the factors favouring disclosure and the factors favouring non-disclosure.

I place significant weight on the right to privacy of individuals and their right to have their personal information protected. I have decided that the third party's right to privacy in relation to the personal information of their employees, and in agreement with their expressed desire to maintain their confidentiality, has a higher standing of public interest not to disclose, than the public interest in disclosing this information. Consequently, information relating to persons, or information that could enable the persons to be identified, has been deleted from the information being provided to you.

I also place significant weight on the rights of third party organisations to have their business affairs, trade secrets, and commercial interests protected, as well as the potential negative impact that could arise for the Directorate from the release of such information as those organisation may be less inclined to do business with the Directorate in the future. Therefore, I have decided to delete this information from the records released to you.

Some records contain information that are working notes by individuals that were compiled as part of a panel decision process; however, they do not present the collective decision that was made by the panel. For example, the assessments by individual panel members of responses to the Request for Expression of Interest or Best and Final Offer processes. I have decided that these form part of the deliberative process that led to the panel's decision and that this outweighs the factors favouring disclosure for these records.

#### Information that is outside of scope

Some of the records contained information that was outside of the scope of your request, and this has been deleted from the records being provided to you.

#### **Charges**

I have decided to not impose fees in relation to your request in consideration of your agreement to extend the processing time and as the number of pages released has significantly reduced from the Directorate's early consideration of records that would be in scope, including a large number of duplicate records.

#### **Online publishing – disclosure log**

Under section 28 of the Act, the Directorate maintains an online record of access applications called a disclosure log. Information about your request, my decision and records released to you in response to your access application will be published in the Directorate's disclosure log between three and 10 working days after a decision on access has been provided to you. Your personal and business information will not be published.

You may view the Directorate's disclosure log at  
[https://www.education.act.gov.au/about\\_us/freedom\\_of\\_information/disclosure-log](https://www.education.act.gov.au/about_us/freedom_of_information/disclosure-log).

#### **Ombudsman review**

My decision on your access request is a reviewable decision as identified in Schedule 3 of the Act. You have the right to seek Ombudsman review of this outcome under section 73 of the Act within 20 working days from the day the decision is provided to you.

If you wish to request a review of my decision you may write to the Ombudsman at:

The ACT Ombudsman  
GPO Box 442  
CANBERRA ACT 2601

Email: [actfoi@ombudsman.gov.au](mailto:actfoi@ombudsman.gov.au)

#### **ACT Civil and Administrative Tribunal (ACAT) review**

Under section 84 of the Act, if a decision is made under section 82(1) on an Ombudsman review, you may apply to the ACAT for review of the Ombudsman decision.

Further information may be obtained from the ACAT at:

ACT Civil and Administrative Tribunal  
Level 4, 1 Moore St  
GPO Box 370  
Canberra City ACT 2601

Telephone: (02) 6207 1740  
<http://www.acat.act.gov.au/>

If you have any queries concerning the Directorate's processing of your request, or would like further information, please contact the Directorate's FOI team on 02 6205 0720 or email [EducationFOI@act.gov.au](mailto:EducationFOI@act.gov.au).

Yours sincerely



Paula Murray  
Information Officer

12 February 2021