

Our ref: 2020-100133

23 March 2020

[REDACTED]

By email to: [REDACTED]

Dear [REDACTED]

I refer to your email dated 2 March 2020 in which you made an access application for certain information under the *Freedom of Information Act 2016* (the FOI Act). With reference to a complaint you made to this Office (reference 2020-700118) your access application was expressed in the following way:

‘...all matters raised in my correspondence with your office. The correspondence covers, broadly, the obligation of the Ombudsman to investigate matters of administration concerning ACTEWAGL in all its legal forms (subsidiaries which ACTEWAGL is part owner directly or indirectly). This includes subsidiaries where there is any legal or financial obligation either created by statute or policy decision by ACTEWAGL or the ACT Government.

It also extends to the detailed grounds and reasons for the Ombudsman reaching the various decisions conveyed to me or otherwise that ACTEWAGL and all its subsidiaries are ‘outside’ the scope of your ACT or Commonwealth legislation.

Further, all documents describing the grounds and reasons you are relying on to say to me that ACTEWAGL is not subject to the ACT FOI legislation including why published Disclosure Statements by ACTEWAGL do not expressly suggest that it is subject to FOI legislation.

Further, any documents that exist regarding communication you have had with the ACT Administrative Tribunal or other area of the ACT Government or judiciary regarding their opinion that ACTEWAGL (itself or through its subsidiaries) is in fact subject to FOI legislation and within scope for the Ombudsman to investigate.

In addition please supply all documents relating to the following points that arise from your latest denial of responsibility:

- ❖ The link provided appears to relate to a matter involving the Opposition Leader Alistair Coe (reference unredacted)

<https://www.iconwater.com.au/~media/files/icon-water/about-us/budget-estimates-briefs-august-2018-foi---disclosure-log.pdf>

- ❖ There is no mention of Icon Distribution Investments Limited which is one of two subsidiaries established by Icon Water to meet obligations under the Territory-owned Corporations Act. While ActewAGL is not itself a subsidiary of Icon Water, you have omitted to say that ActewAGL is 50% owned by Icon Distribution Investments Limited and would therefore appear to be part of the subsidiary. Icon Water's website advises that Icon Distribution Investments Limited partners with Jemena Networks in the ActewAGL Distribution Partnership.

<https://www.iconwater.com.au/About-Us/Who-are-we.aspx>

- ❖ You also advise that you have looked into the set-up of these companies and concluded ActewAGL is not a subsidiary of Icon Water, however no explanation to support this conclusion is provided.

- ❖ A key question seems to be whether partnerships established with corporations and subsidiaries that are clearly subject to the FOI Act, are also subject to the FOI Act. If partnerships are not subject to the FOI Act, this could provide a means for Territory-owned corporations and subsidiaries to avoid their FOI Act obligations in relation to certain activities...'

This letter constitutes notice of my decision on your access application. The Ombudsman has appointed me as an information officer for the purposes of the FOI Act. This appointment authorises me to make this decision.

## **Decision**

I have identified nine documents falling within the scope of your access application. Under s 35(1)(c) of the FOI Act, I have decided to grant partial access to five of the requested documents because the relevant information is contrary to the public interest information. I have decided to grant full access to the remaining four documents. My reasons for this decision are set out in Attachment A to this letter.

Attachment B contains a schedule setting out the relevant documents.

## **Review rights**

### ***Ombudsman review***

Under s 73 of the FOI Act, you may apply in writing to this Office for a review of this decision. To do so, you should write to the Ombudsman requesting a review, to [actfoi@ombudsman.gov.au](mailto:actfoi@ombudsman.gov.au) or using the contact information set out at the foot of the first page of this letter.

The review application must be made within 20 working days after the day this decision is published in our disclosure log which is available at: <http://ombudsman.act.gov.au/contact-us/seeking-information/disclosure-log>. While no particular form is required to apply for review of this decision, we recommend that applicants use the form available at: <http://www.ombudsman.act.gov.au/Freedom-of-Information>.

***ACAT review***

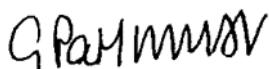
Should you be dissatisfied with this Office's review decision, you would be able to apply to the ACT Civil and Administrative Tribunal (ACAT) for review. Further information, including contact information for the ACAT, and information about how to make an application to the ACAT is available at: <https://www.acat.act.gov.au/>.

***Judicial review***

A further option for review of this decision may be available under the *Administrative Decisions (Judicial Review) Act 1989*. Advice about pursuing this option may be obtained from a qualified legal practitioner.

If you require clarification of any of the matters discussed in this letter you may contact me using the contact information set out at the foot of the first page of this letter.

Yours sincerely



Gregory Parkhurst  
Information Officer

## **ATTACHMENT A – Statement of reasons for decision**

### **Material taken into account**

In making my decision I had regard to the following:

- the terms of your access application,
- the information to which you sought access, and
- relevant provisions of the FOI Act.

### **Information taken to be contrary to the public interest**

Schedule 1 to the FOI Act sets out information the disclosure of which is taken to be contrary to the public interest.

### **Information subject to legal professional privilege Schedule 1 section 1.2**

I have deleted material from documents 1 to 5 in the schedule of documents, under Schedule 1 section 1.2 because the original record contained contrary to the public interest information.

Schedule 1 to the FOI Act sets out information the disclosure of which is taken to be contrary to the public interest. Under s 1.2, information that would be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege is information the disclosure of which is taken to be contrary to the public interest.

A document is exempt from production on the ground of legal professional privilege if all of the following apply:

1. there exists a lawyer-client relationship;
2. there have been confidential communications which are recorded in the document;
3. the communications were for the dominant purpose of providing legal advice or in the context of actual or anticipated legal proceedings; and
4. the privilege has not been waived.

The deleted material in each document was written by a lawyer in the Ombudsman's Legal Team, acting at the time in their capacity as a legal adviser for the Ombudsman. For this reason, I am satisfied that a lawyer-client relationship exists.

Documents 1, 3, 4, and 5 in the schedule of documents are emails. The dissemination limiting marker (classification) on each of those emails is 'Sensitive: Legal'. Relevant material in the attachment to document 1 and in document 2 in the schedule of documents is marked 'Legal advice – In confidence.' The signatory to the relevant document is a lawyer in the Ombudsman's Legal Team. There is a footnote at the end of the document which states that it may contain legally privileged information, and that disclosing its contents with a third party may result in privilege being lost. The footnote instructs that the contents of the document should not be disclosed without contacting the Ombudsman's Legal Team. These markings indicate that the document contains confidential legal advice.

Further relevant material in documents 1 and 2, and relevant material in documents 3, 4 and 5 is set out in italic font, and is prefaced by a statement that the relevant material consists of advice

provided by a Senior Legal Officer to an Investigation Officer in 2013 in relation to an issue arising in a particular complaint received by the Ombudsman.

The relevant material was prepared for the dominant purpose of providing in-house legal advice to certain staff working in the Ombudsman's office.

Legal professional privilege in the exempted material has not been waived. The exempted material has not been otherwise distributed or disclosed, and the Ombudsman has not publicly announced his reliance on the advice contained in the relevant documents.

The relevant information does not identify corruption or the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law.

In these circumstances, I have not allowed access to the relevant material contained in the requested documents on the grounds that its disclosure is taken to be contrary to the public interest.

**Attachment B – Schedule of documents**

<b>Schedule of documents for: [REDACTED]</b>				
<b>Ombudsman's reference: 2020 - 100133</b>				
<b>Item no.</b>	<b>File</b>	<b>Description</b>	<b>Date</b>	<b>Decision</b>
<b>1</b>		Ombudsman's internal email (plus 3 page attachment)	04-Feb-20	Deletions Schedule 1 s 1.2
<b>2</b>		Ombudsman's draft legal advice	03-Feb-20	Deletions Schedule 1 s 1.2
<b>3</b>		Ombudsman's internal email	5-Feb-20	Deletions Schedule 1 s 1.2
<b>4</b>		Ombudsman's internal email	5-Feb-20	Deletions Schedule 1 s 1.2
<b>5</b>		Ombudsman's internal email	6-Feb-20	Deletions Schedule 1 s 1.2
<b>6</b>	<b>2020-700118</b>	Ombudsman's print out of complaint record		Disclosed in full
<b>7</b>	<b>2020-500405</b>	Ombudsman's print out of complaint record		Disclosed in full
<b>8</b>	<b>2020-500405</b>	Ombudsman's internal email	12-Feb-20	Disclosed in full
<b>9</b>	2020-500405	Ombudsman's internal email	17-Feb-20	Disclosed in full

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**ATTACHMENT C – Relevant FOI Act provisions****16 What is *contrary to the public interest information*?**

In this Act:

***contrary to the public interest information*** means 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.

**50 Giving access – deletion of contrary to the public interest information**

(1) This section applies if—

- (a) an access application is made for government information in a record containing contrary to the public interest information; and
- (b) it is practicable to give access to a copy of the record from which the contrary to the public interest information has been deleted.

(2) Subject to section 35 (1) (e), the respondent must—

- (a) give access to a copy of the record; and
- (b) tell the applicant the original record contained contrary to the public interest information that has been deleted from the copy.

**Schedule 1 Information disclosure of which is taken to be contrary to the public interest**

(see s 16)

Information mentioned in this schedule is taken to be contrary to the public interest to disclose unless the information identifies corruption or the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law.

**Schedule 1 Information disclosure of which is taken to be contrary to the public interest****1.2 Information subject to legal professional privilege**

Information that would be privileged from production or admission into evidence in a legal proceeding on the ground of legal professional privilege.