



[REDACTED]
[REDACTED]

9 May 2023

Dear [REDACTED]

Freedom of information application: access application decision notice

I refer to your access application made under the *Freedom of Information Act 2016 (FOI Act)*, dated 5 March 2023.

This application originally requested access to:

1. a copy of any executed joint venture agreement/s between Icon Water (or any of its subsidiaries) and Jemena Networks (ACT) Pty Ltd in respect of the ActewAGL Distribution Partnership (EvoEnergy) (**Category 1**)
2. a copy of any written agreement, memorandum of understanding etc. between Icon Water (or any of its subsidiaries) concerning the making of board appointments to the ActewAGL Distribution Partnership (EvoEnergy) (**Category 2**)

On 7 March 2023, Icon Water acknowledged receipt of your request.

On 21 March 2023, Icon Water corresponded with you and informed you about the publicly available material relating to the ActewAGL Joint Venture.

On 22 March 2023, and in light of Icon Water's correspondence informing you of the publicly available information, you responded indicating that you still intended to proceed with your access application as follows:

"I am still seeking copies of any actual joint venture agreement/s in respect of the ActewAGL Distribution Partnership, which I have not been able to locate publicly. I am also interested in any overarching arrangement/MoU/agreement between Jemena and Icon Water or its subsidiaries as regards the appointment of partnership directors. If it assists with narrowing the FOI request, I am not seeking any documents relating to specific appointments of individuals to the partnership board".

Icon Water undertook third party consultation with Jemena Networks (ACT) Pty Ltd (ACN 008 552 662), Jemena Ltd (ACN 052 167 405), ActewAGL Management and AGL Energy Limited (ACN 115 061 375) who are parties (or representative of parties) to the documents you requested.

On 20 April 2023 we wrote to you proposing to extend the time to make a decision on your application until 5 May 2023, to accommodate an extension of time for one of the third parties consulted.

On 22 April 2023, you provided your approval to the extension sought. Icon Water was required to provide a decision on your access application by 5 May 2023.

On 2 May 2023, we further proposed to extend the time to make a decision by a short period as there was a slight delay in receipt of a response from one of the third parties consulted. Thank you for providing your approval to allow me to make a determination on your application by 9 May 2023.

Authority

I am an information officer appointed by the Chief Executive Officer of Icon Water to make decisions about access to government information, in accordance with section 18 of the FOI Act.

Decision

Category 1

I have identified 2 documents falling within the scope of your access application for Category 1. These are outlined in the attached *Schedule of documents*.

For the reasons outlined in the attached *Reasons for decision*, I have decided to refuse access to these documents under section 35(1)(c) of the FOI Act. This is because, on balance, I am satisfied that disclosure of these documents would be contrary to the public interest.

Please also find relevant sections of the FOI Act attached.

Category 2

We did not identify any documents falling within the scope of your access application for Category 2.

Disclosure log

Under section 28 of the FOI Act, Icon Water maintains an online record of access applications called a disclosure log. Your original access application, my decision and any documents released to you in response to your access application will be published in the Icon Water disclosure log after 12 May 2023.

You may view the Icon Water's disclosure log at <http://www.iconwater.com.au/About/Contact-Us/Freedom-of-Information.aspx>.

Review rights

My decision on your access request is a reviewable decision as identified in Schedule 3 of the Act. You have the right to seek the ACT Ombudsman review of this outcome under section 73 of the Act within 20 working days from the day that my decision is published in Icon Water's disclosure log, or a longer period allowed by the Ombudsman.

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

Email (preferred): actfoi@ombudsman.gov.au
Post: The ACT Ombudsman
GPO Box 442
CANBERRA ACT 2601

More information about ACT Ombudsman review is available on the ACT Ombudsman website at: <http://www.ombudsman.act.gov.au/improving-the-act/freedom-of-information>.

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 processing of your request, or would like further information, please contact me on iconwater.secretariat@iconwater.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alison Pratt', written in a cursive style.

Alison Pratt
Information Officer

Schedule of documents

Michael Reedy

Document reference number	Page number	Date	Description	Decision	Category or Factor
1.	N/A	3/10/2000	Umbrella Agreement dated 3 October 2000 (including any amendments to the agreement)	Not release	ss 16(b), 17; Schedule 2, sections 2.2(a)(xi), 2.2(a)(xii), 2.2(a)(xiii)
2.	N/A	29/08/2000	Distribution Partnership Agreement dated 29 August 2000 (including any amendments to the agreement)	Not release	ss 16(b), 17; Schedule 2, sections 2.2(a)(xi), 2.2(a)(xii), 2.2(a)(xiii)

Reasons for decision

What you requested

1. a copy of any executed joint venture agreement/s between Icon Water (or any of its subsidiaries) and Jemena Networks (ACT) Pty Ltd in respect of the ActewAGL Distribution Partnership (EvoEnergy)
2. a copy of any written agreement, memorandum of understanding etc. between Icon Water (or any of its subsidiaries) concerning the making of board appointments to the ActewAGL Distribution Partnership (EvoEnergy)

What I took into account

In reaching my decision, I took into account:

- your original access application dated 5 March 2022.
- correspondence between you and Icon Water dated 21 March 2022 clarifying your request.
- the documents containing the information that falls within the scope of your access application
- consultation with Jemena Networks (ACT) Pty Ltd (ACN 008 552 663), ActewAGL Management and AGL Energy Limited (ACN 115 061 375) about information concerning them.
- consultations with agency officers about:
 - the nature of the documents; and
 - the agency's operating environment and functions.
- the FOI Act.
- the ACT Ombudsman FOI Guidelines.

Documents within the scope of your request

Document 1 within the scope of your request is the Umbrella Agreement dated 3 October 2000 (including any subsequent amendments to the agreement). This document is the overarching document regulating the joint venture agreement between Icon Water, Jemena Ltd, AGL Limited and other companies including to carry on a gas and electricity utility business based in the ACT area.

Document 2 within the scope of your request is the Distribution Partnership Agreement between Jemena Ltd and Icon Water for their wholesale gas and electricity distribution business in the ACT area.

Reasons for my decision

I am authorised to make decisions under section 18 of the FOI Act.

I have decided that all documents that contain the information you requested contain information that would, on balance, be contrary to the public interest to disclose under the test set out in section 17 of the FOI Act (which is attached below). My findings of fact and reasons are outlined below.

Factors favouring disclosure

The public interest test set out in section 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.

It is an object of the FOI Act pursuant to s 6(a) to provide a right of access to government information unless access to the information would, on balance, be contrary to the public interest. Documents are only exempt from disclosure if that disclosure would be contrary to the public interest.

There is a general public interest in the disclosure of government information. Further, the disclosure of the documents within the scope of your request may promote open discussion of public affairs (Schedule 2, section 2.1(a)(i)).

Factors favouring non-disclosure

For the reason below I am satisfied that the following factors favour non-disclosure of Documents 1 and 2, namely:

- Schedule 2, section 2.2(a)(xi) - disclosure could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person;
- Schedule 2, section 2.2(a)(xii) - disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information;
- Schedule 2, section 2.2(a)(xiii) - disclosure of the information could reasonably be expected to prejudice the competitive commercial activities of an agency.

Schedule 2, section 2.2(a)(xi)

Schedule 2, section 2.2(a)(xi) is a factor favouring nondisclosure if:

disclosure of the information could reasonably be expected to prejudice trade secrets, business affairs or research of an agency or person.

I am satisfied the disclosure of the information contained in both documents 1 and 2 could reasonably be expected to prejudice trade secrets and business affairs of Icon Water, Jemena Networks (ACT) Pty Ltd, AGL Energy Limited and other entities represented by ActewAGL Management.

The agreements contain trade secrets and/or confidential commercial information about the parties' business affairs because they go to fundamental aspects of the function and operation of the joint venture and identify details about the parties' business affairs including practices and knowledge in relation to joint venture risk and reward allocation and governance. The commercially confidential nature of the information contained in the agreements is underscored by the fact that the agreements are subject to a clause imposing an obligation of confidence.

By way of example (and without limitation), information contained in Documents 1 and 2 which concern the parties business affairs and/or trade secrets include:

- in relation to Document 1:
 - the terms on which parties to the joint venture are prepared to provide goods and service;
 - procedures relating to the valuation of assets and liabilities and payment arrangements in relation to disputes between joint venture partners;
 - the priority payment of debts; and
 - voting and decision making mechanism of the partnership;
- in relation to Document 2:
 - information relating to the tax affairs of the parties;
 - mechanisms for funding the joint venture and the ratios of contributions between the parties;
 - the ratios of profit and loss.

I am satisfied that disclosure of the documents could reasonably be expected to prejudice the business affairs of the parties and their trade secrets in the following ways:

- disadvantage the parties in relation to their competitors by disclosing their practices and know-how regarding joint venture risk and reward allocation, roles and responsibilities allocation and governance. Competitors could use this information to compete for securing future joint venture opportunities and to exploit existing joint venture arrangements;
- disadvantage the parties in relation to their ability to competitively and commercially negotiate future joint venture agreements because it would disclose to prospective joint venture partners the positions that the parties had been willing to take;
- disadvantage the parties in relation to their dealings with institutional customers and suppliers by enabling those entities to gain a better understanding of the general, legal, risk, governance and operational outcomes that each party has accepted contractually. This could be expected

to prejudice these parties in future negotiations by giving those institutional customers and suppliers an information advantage.

Schedule 2, section 2.2(a)(xii)

Schedule 2, section 2.2(a)(xi) is a factor favouring nondisclosure if:

disclosure of the information could reasonably be expected to prejudice an agency's ability to obtain confidential information

Icon Water is an agency for the purposes of the FOI Act. The parties have negotiated and entered into the agreements in reliance on confidentiality obligations in place during the joint venture negotiations and the information in the documents is subject to an obligation of confidence imposed by a clause of the agreement. Disclosure of Documents 1 and 2 would erode trust between Icon Water and the joint venture parties which would encourage other parties to those agreements to limit the confidential information they provide to Icon Water as a risk mitigation strategy. Third parties confirmed that this would be their position during consultation on your request.

On this basis, I am satisfied disclosure of the information contained in Documents 1 and 2 could reasonably be expected to prejudice Icon Water's ability to obtain confidential information.

Schedule 2, section 2.2(a)(xiii)

Schedule 2, section 2.2(a)(xiii) is a factor favouring nondisclosure if:

disclosure of the information could reasonably be expected to prejudice the competitive commercial activities of an agency

Disclosure of Documents 1 and 2 could reasonably be expected to materially prejudice Icon Water's ability to negotiate competitive joint venture agreements in the future. In particular, disclosure of Documents 1 and 2 would disclose the confidential and commercially negotiated outcomes that Icon Water is prepared to agree to and this information could be exploited by other prospective parties in any future negotiations. It would also create informational advantages for persons negotiating new contracts, which would reflect a distortion not found in the general market for electricity and gas supplies.

I am satisfied disclosure of the information contained in Documents 1 and 2 could reasonably be expected to prejudice the competitive commercial activities of Icon Water.

Consideration

When weighing up the public interest for and against disclosure under Schedule 2 of the FOI Act, I have taken into account relevant factors in favour of disclosure. In particular, I have considered the extent to which disclosure would promote the objects of the FOI Act and promote open discussion of public affairs and enhance the government's accountability. While these factors go some way to favouring disclosure in the public interest, I note that other factors which weigh in favour of disclosure in the public interest do not carry substantial weight in this instance. In particular, disclosure of Documents 1 and 2 is unlikely to go to matters of public debate on important issues (Schedule 2, section 2.1(a)(ii)) and are not related to effective oversight of public funds (Schedule 2, 2.1(a)(iv)).

By contrast, I am satisfied that the factors weighing in favour of non-disclosure are forceful and carry substantial weight. In particular, I am satisfied (as discussed above) that disclosure of Documents 1 and 2 could reasonably be expected to result in material prejudice to both the business affairs of the joint venture partners and Icon Water's competitive commercial activities and any future joint venture arrangements.

Furthermore, I am satisfied that disclosure of Documents 1 and 2 could reasonably be expected to prejudice Icon Water's ability to obtain confidential information and that this could have significant consequences for the proper functioning of the joint venture arrangement.

Based on the above, I have decided that in this instance, the public interest in disclosing the information in Documents 1 and 2 is outweighed by the public interest against disclosure because the disclosure of information could reasonably be expected:

- to prejudice Icon Water's competitive commercial activities and its ability to obtain confidential information in a material and substantial way of Icon Water;
- to prejudice the business affairs and trade secrets of the other parties to the agreements.

I am satisfied that the public interest is best served by the effective administration of the joint venture arrangement and that disclosure of Documents 1 and 2, would, for the reasons given above, be detrimental to the effective administration of the joint venture.

Conclusion

In conclusion, I have decided to refuse access to Documents 1 and 2 in the *Schedule of documents*.

Relevant sections of the FOI Act

Part 2 Objects and important concepts

6 Objects of Act

The objects of this Act are to—

- (a) provide a right of access to government information unless access to the information would, on balance, be contrary to the public interest; and
- (b) recognise the importance of public access to government information for the proper working of representative democracy; and
- (c) enable the public to participate more effectively in government processes and to promote improved decision-making within government; and
- (d) make the people and bodies that are responsible for governing the Territory more accountable to the public; and
- (e) ensure that, to the fullest extent possible, government information is freely and publicly available to everyone; and
- (f) facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of the maximum amount of government information; and
- (g) ensure that personal information held by the Territory is accurate, complete, up-to-date and not misleading.

7 Right of access to government information

- (1) Subject to this Act, every person has an enforceable right to obtain access under this Act to government information.
- (2) This section applies to information even if it came into existence before the commencement of this Act.

6 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.

17 Public interest test

- (1) An agency or Minister, in deciding whether disclosure of information would, on balance, be contrary to the public interest, must take 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.
- (2) The following factors must not be taken into account when deciding whether disclosure of information would, on balance, be contrary to the public interest:
 - (a) access to the information could result in embarrassment to the government, or cause a loss of confidence in the government;
 - (b) access to the information could result in a person misinterpreting or misunderstanding the information;
 - (c) the author of the information was (or is) of high seniority in an agency;
 - (d) access to the information could result in confusion or unnecessary debate;
 - (e) access to the information could inhibit frankness in the provision of advice from the public service;
 - (f) the applicant's identity, circumstances, or reason for seeking access to the information.

Schedule 2 Factors to be considered when deciding the public interest

(see s 17 (1))

2.1 Factors favouring disclosure in the public interest

The following are factors favouring disclosure in the public interest:

- (a) disclosure of the information could reasonably be expected to do any of the following:
 - (i) promote open discussion of public affairs and enhance the government's accountability;
 - (ii) contribute to positive and informed debate on important issues or matters of public interest;
 - (iii) inform the community of the government's operations, including the policies, guidelines and codes of conduct followed by the government in its dealings with members of the community;
 - (iv) ensure effective oversight of expenditure of public funds;
 - (v) allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or public official;
 - (vi) reveal or substantiate that an agency or public official has engaged in misconduct or negligent, improper or unlawful conduct or has acted maliciously or in bad faith;
 - (vii) advance the fair treatment of individuals and other entities in accordance with the law in their dealings with the government;
 - (viii) reveal the reason for a government decision and any background or contextual information that informed the decision;
 - (ix) reveal that the information was—
 - (A) incorrect; or
 - (B) out-of-date; or
 - (C) misleading; or
 - (D) gratuitous; or
 - (E) unfairly subjective; or
 - (F) irrelevant;
 - (x) contribute to the protection of the environment;
 - (xi) reveal environmental or health risks or measures relating to public health and safety;

- (xii) contribute to the maintenance of peace and order;
- (xiii) contribute to the administration of justice generally, including procedural fairness;
- (xiv) contribute to the administration of justice for a person;
- (xv) contribute to the enforcement of criminal law;
- (xvi) contribute to innovation and the facilitation of research;
- (b) the information is personal information of—
 - (i) the person making the request; or
 - (ii) a child and the information is to be given to the child's parent or guardian and the disclosure of the information to the child's parent or guardian is reasonably considered to be in the best interests of the child; or
 - (iii) a deceased person and the person making the request for the information is an eligible family member of the deceased person.

2.2 Factors favouring nondisclosure in the public interest

The following are factors favouring nondisclosure in the public interest:

- (a) disclosure of the information could reasonably be expected to do any of the following:
 - (i) prejudice the collective responsibility of Cabinet or the individual responsibility of members to the Assembly;
 - (ii) prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004*;
 - (iii) prejudice security, law enforcement or public safety;
 - (iv) impede the administration of justice generally, including procedural fairness;
 - (v) impede the administration of justice for a person;
 - (vi) prejudice the security or good order of a correctional centre;
 - (vii) impede the protection of the environment;
 - (viii) prejudice the economy of the Territory;
 - (ix) prejudice the flow of information to the police or another law enforcement or regulatory agency;
 - (x) prejudice intergovernmental relations;
 - (xi) prejudice trade secrets, business affairs or research of an agency or person;
 - (xii) prejudice an agency's ability to obtain confidential information;
 - (xiii) prejudice the competitive commercial activities of an agency;
 - (xiv) prejudice the conduct of considerations, investigations, audits or reviews by the ombudsman, auditor-general, integrity commission, integrity commission inspector or human rights commission;
 - (xv) prejudice the management function of an agency or the conduct of industrial relations by an agency;
 - (xvi) prejudice a deliberative process of government;
 - (xvii) prejudice the effectiveness of testing or auditing procedures;
 - (xviii) prejudice the conservation of any place or object of natural, cultural or heritage value, or reveal any information relating to Aboriginal or Torres Strait Islander traditional knowledge;
- (b) the information—

- (i) is personal information of a child and the disclosure of the information is reasonably considered not to be in the best interests of the child; or
- (ii) would be privileged from production in a legal proceeding on the ground of legal professional privilege; or
- (iii) is personal information of a deceased person and the person making the request is an eligible family member of the deceased person and the disclosure of the information could reasonably be expected to impact on the deceased person's privacy if the deceased person were alive; or
- (iv) is information disclosure of which is prohibited by an Act of the Territory, a State or the Commonwealth; or
- (v) is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct and disclosure of the information could prejudice the fair treatment of an individual.