

## **Decisions and Reasons for Decision**

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**Application Number:** F20/15-16

**Applicant:** Charlie Phillips

**Respondent:** Northern Territory Electoral Commission

**Second Respondent:** Foundation 51

**Date of Decision:** 29 August 2017

**Hearing Number:** 3 of 2017

## **Contents**

Background.....	3
History of Application .....	3
Complaint to the Information Commissioner .....	4
The Information Act.....	5
The Documents Refused under the Section 57 Exemption.....	6
Submissions on Section 57 .....	11
The First Respondent’s Submissions: .....	11
The Complainant’s Submissions .....	15
Consideration of Issues.....	18
Section 50 considerations.....	30
Decision .....	34

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## **Background**

1. The hearing in this matter relates to a complaint made by Mr Charlie Phillips (the Complainant) to the Information Commissioner regarding the refusal of the Northern Territory Electoral Commission (the First Respondent) on public interest grounds to provide the Complainant with certain government information. The documents sought were those held by the First Respondent as a result of his investigation into alleged breaches of the *Electoral Act* by Foundation 51 Pty Ltd.
2. The Complainant no longer seeks documents from the Australian Electoral Commission (the former Third Respondent) and the latter has already been removed as a party to these proceedings.
3. Further, in a preliminary decision dated 17 July 2017, I decided that the Second Respondent, Foundation 51 Pty Ltd did not have standing to be a respondent as the company was voluntarily deregistered on 13 May 2015 and was no longer in existence. I also found that there was no Foundation 51 '*business, commercial or financial undertaking*' in existence that had standing to be a third party respondent under section 30(7) of the *Information Act* (the Act). Finally, I decided that Mr Graeme Lewis, a former director and shareholder of Foundation 51 Pty Ltd had no standing in this particular matter as '*a person aggrieved*' under section 103 of the Act. This leaves the First Respondent as the only respondent in these proceedings.
4. The focus of this decision is a review of the First Respondent's decision to refuse the Complainant access to certain documents on the grounds that they are exempt from release in the public interest. Noting the date of receipt of the complaint by the Information Commissioner, the relevant legislative provisions that apply to this application are those in the Act prior to the amendments introduced in the *Information Amendment Act (No. 2) 2015 (Act No. 29, 2015)* and commenced on 1 May 2016.

## **History of Application**

5. On 22 October 2015, an application was made by the Complainant to the First Respondent under section 18 of the Act to access government information held by the First Respondent following their investigation into alleged breaches of the *Electoral Act* by Foundation 51 Pty Ltd. The First Respondent is a public sector organisation for the purposes of the Act.
6. Following acceptance of the FOI application, the First Respondent located the documents in his possession that he considered to be within the scope

of the Complainant's request. The documents had originally come from many sources including correspondence to and from the First Respondent's office, media releases and legal advice. Documents had also been received from Foundation 51 Pty Ltd in response to a section 217 notice served on the company during the investigation by the First Respondent of alleged breaches of the *Electoral Act* by Foundation 51 Pty Ltd.

7. Following an assessment of the documents received and a third party consultation process, the First Respondent decided which documents should be released to the Complainant on public interest grounds and whether such release should be in full or in part. The Complainant was formally advised of the First Respondent's decision by letter dated 3 February 2016. Attached to the letter of decision was a detailed schedule (the Schedule) disclosing to the Complainant all of the relevant documents in the First Respondent's possession and clarifying which documents had been refused and what exemptions were relied on.
8. As a result of his decision, the First Respondent released 1043 page in full, 15 pages in part and refused access in full to 840 pages<sup>1</sup>. The Complainant sought a review of this decision and on 30 March 2016, the First Respondent exercised his statutory right and refused to review his decision on the basis that the Complainant's request was out of time (section 39(2) of the Act).
9. A complaint was made by the Complainant to the Information Commissioner (the Commissioner) under section 103(1) of the Act seeking external review of the First Respondent's decision refusing him access to the disputed documents.

## **Complaint to the Information Commissioner**

10. Between 30 March 2016 and 1 April 2016, the section 103 complaint was received via email by the Commissioner in 4 parts relating to different classifications of documents sought. Complaint 1, which sought documents relating to the Australian Electoral Commission, has been withdrawn. Complaint 4, which sought documents relating to the engagement of E Gladwin, has also been withdrawn<sup>2</sup>. This leaves the documents sought in Complaints 2 and 3 for consideration by me. These documents were received from Foundation 51 Pty Ltd by the First Respondent in response to the section 217 Notice.
11. To date, the folio numbers used by the First Respondent in the Schedule have been retained to assist the parties in identifying the documents being considered. For ease of identification in this decision, I have retained the identifying information of each document from the Schedule but I have also

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<sup>1</sup> Statutory Declaration of Mr Iain Loganathan dated 29 September 2016 at paragraph 3.

<sup>2</sup> Refer statutory declaration of the Complainant dated 20 October 2016.

provided each document that is still sought by the Complainant with a letter from **A** to **U** and will refer to them by these letters.<sup>3</sup>

12. When the complaint was first received by my office, all relevant documents were sought from the First Respondent by the Delegate to enable the complaint to be investigated in accordance with section 110 of the Act.
13. On 20 June 2016, the Delegate made a decision that Foundation 51 was a '*business, commercial or financial undertaking*' under section 30(2)(e) of the Act and was entitled to be a third party respondent to the proceedings under section 30(7) of the Act. Mr Lewis was found to have standing to speak on the undertaking's behalf. At the same time, the Delegate decided that neither the deregistered Foundation 51 Pty Ltd nor Mr Graeme Lewis personally had standing as a respondent.
14. The investigation concluded on 24 June 2016 when the Delegate made a decision under s110 of the Act that there was sufficient *prima facie* evidence to substantiate the complaint. The matter progressed to compulsory mediation on 20 July 2016 which was unsuccessful in resolving all issues between the parties and a hearing brief was prepared and was referred to me as the Hearing Commissioner.
15. On 29 August 2016, I issued formal Directions to progress the matter to hearing. All submissions were received by 4 February 2017 and on 7 July 2017, a decision was made by me on the preliminary issue of the standing of Foundation 51 Pty Ltd or a 'Foundation 51 undertaking' or Mr Graeme Lewis personally to be a respondent in these proceedings, reversing the earlier decision made by the Delegate<sup>4</sup>.

## **The Information Act**

16. The long title of the Act commences '*An Act to provide for public access to information held by the public sector...*' The Objects of the Act in section 3 include an object '*creating a general right of access to information held by public sector organisations limited only in those circumstances where the disclosure of particular information would be contrary to the public interest because its disclosure would have a prejudicial effect on essential public interests or on the private and business interests of persons in respect of whom information is held by public sector organisations.*'<sup>5</sup>

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<sup>3</sup> For further detail see the Tables of Documents sought on pages 6.7 and 8 of this decision.

<sup>4</sup> See paragraph 13 above

<sup>5</sup> section 3(1)(a)(ii) of the Act.

17. As the *Information Act* is considered ‘beneficial legislation’, provisions such as section 3, should be given a generous interpretation that would further, rather than hinder free access to information<sup>6</sup>.
18. Part 4, Divisions 2 and 3 of the Act set out the exemptions that can be relied on by a public sector organisation objecting to the release of information to a Complainant. Under section 125 of the Act, the onus is not on a Complainant to persuade a public sector organisation (or the Commissioner on external review) why documents should be released to them. Instead, the onus is on the public sector organisation (i.e. the First Respondent) to decide on the balance of probabilities (and to persuade me on external review) that certain exemptions apply.
19. The effect of section 125 is that if a public sector organisation cannot establish the particular elements of an exemption, then it is not open to them to refuse a complainant access to the documents sought. Even where third party consultation is possible, the public sector organisation must make the final decision on whether or not to release the documents in question. The organisation can inform itself from the third party consultation but the decision on release remains theirs, subject of course to external review under the provisions of the Act.

## **The Documents Refused under the Section 57 Exemption**

20. The Complainant seeks from the First Respondent a number of documents that were refused to him on the basis that they were exempt under section 57 of the Act. These documents **A** to **U** were received by the First Respondent from Foundation 51 Pty Ltd in response to an Investigation Notice served on the company in August 2014 pursuant to section 217 of the *Electoral Act*.
21. Documents **A** to **K** are identified in Complaint 2 as follows:

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<sup>6</sup> Victorian Public Service Board v Wright (1986) 160 CLR 145

File	Document ID	Folios	Description	Exemption
Section 217 Notice	<b>A</b>	1-21	Report on Voting Trends	s57
	<b>B</b>	22-83	Presentation - NT Education Research 2013: Kormilda College Interim Report (Crosby Textor)	
	<b>C</b>	84-97	Presentation – Australia has a role to play in delivering resources, food and energy at ‘peak humanity’	s57
	<b>D</b>	98-106	F51 Research Projects - Australian Defence Force – <i>The makeup and change of Defence in the Territory as a result of the White Paper</i>	s57
	<b>E</b>	107-125	Social Media – <i>Its changing nature and opportunities for business</i>	
	<b>F</b>	126-131	F51 Research Projects – 10 Years of Crime in the Territory – <i>How it has changed and what it costs business and the community</i>	s57
	<b>G</b>	132-137	Demographics – <i>Darwin and Palmerston 1996-2006</i>	
	<b>H</b>	138-156	F51 May 2010 – Enterprise 2.0 Guide – <i>How blogs, instant messaging and wikis can be applied to business today</i>	s57
	<b>I</b>	157-158	Promotional Document with Membership Application Information	
	<b>J</b>	159-160	Biographies: Guest Speakers – <i>John Winston Howard and Andrew Forrest</i>	
	<b>K</b>	161-162	Foundation 51 Update – <i>A report on the Foundation’s activities &amp; cover sheet</i>	

22. During the investigation by the Delegate, further documents (4 DVDs) were identified as having been provided by Foundation 51 Pty Ltd to the First Respondent but they were not specifically considered by him in his decision-making.

23. The definition of 'government information' under the Act is: *a record held by or on behalf of a public sector organisation and includes personal information*<sup>7</sup>

24. A 'record' under the Act 'means recorded information in any form (including data in a computer system) that is required to be kept by a public sector organisation as evidence of the activities or operations of the organisation, and includes part of a record and a copy of a record'<sup>8</sup>

25. The DVDs provided to the First Respondent by Foundation 51 Pty Ltd relate to the *Electoral Act* investigation being undertaken by the First Respondent and fall within the definition of a record held by him. Subject to the exemptions, these DVDs are able to be accessed by the Complainant via the Act.

26. The DVDs are identified as follows:

Document ID	Format	Description
L	DVD	<b>title:</b> <i>Foundation 51 26 March 2012-Hon Ian McFarlane MP (Shadow Resources Minister) and Andrew N Liveris (Dow Chemicals)</i>
M	DVD	<b>title:</b> <i>Foundation 51-Presenters John Howard, Andrew Forrest, Terry Mills</i>
N	DVD	<b>title:</b> <i>Foundation 51 Luncheon Event August 14<sup>th</sup>, Guest Speaker Mark Textor</i>
O	DVD	<b>title:</b> <i>Luncheon Event 12 June 2009, Research Papers –Social Marketing &amp; the ADF, Guest Speaker- the Hon Peter Costello MP.</i>

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<sup>7</sup> Section 4 of the *Information Act*

<sup>8</sup> Section 4 of the *Information Act*



27. Documents **P** to **U** are identified in Complaint 3 as follows:

<b>Document ID</b>	<b>File</b>	<b>Folios</b>	<b>Description</b>	<i>Exemption</i>
<b>P</b>	s 217 Notice	173-275	Bank Statements – Foundation 51 Pty Ltd – 22 June 2010 to 7 July 2014	57
<b>Q</b>		276-297	Ledger Entries - Foundation 51 Pty Ltd – Year 2010 to 7 July 2014	57
<b>R</b>		298-307	Financial Statements – Foundation 51 Pty Ltd – For year ended 30 June 2014 (Balance Sheet, Profit & Loss Statement, Detailed Profit & Loss Statement, Notes to the Financial Statements, Directors' Declaration and Compilation Report)	57
<b>S</b>		308-321	Financial Statements – Foundation 51 Pty Ltd – For year ended 30 June 2013 (Balance Sheet, Profit & Loss Statement, Detailed Profit & Loss Statement, Notes to the Financial Statements, Directors' Declaration and Compilations / report	57
<b>T</b>		322-332	Financial Statements – Foundation 51 Pty Ltd – For year ended 30 June 2012 (Balance Sheet, Profit & Loss Statement, Detailed Profit & Loss Statement, Notes to the Financial Statements, Directors' Declaration and Compilation Report)	57
<b>U</b>		333-342	Financial Statements – Foundation 51 Pty Ltd – For year ended 30 June 2011 (Balance Sheet, Profit & Loss Statement, Detailed Profit & Loss Statement, Notes to the Financial Statements, Directors' Declaration and Compilation Report)	57

28. The Second Respondent refused the Complainant access to documents **A** to **K** and **P** to **U** on the basis of the commercial and business information exemption contained in section 57 of the Act. Documents **L** to **O**, although not specifically considered by him should be included as part of the same bundle of documents as they relate to the business of the former Foundation 51 Pty Ltd and were provided to the First Respondent in response to the section 217 Notice.

29. Section 57 of the Act states:

***Commercial and business information, research, examination papers***

(1) *Information may be exempt under section 50 if disclosure of the information would disclose information obtained by a public sector organisation from a business, commercial or financial undertaking that is:*

- (a) a trade secret; or*
- (b) other information of a business, commercial or financial nature and the disclosure is likely to expose the undertaking unreasonably to disadvantage.*

(2) *To decide whether disclosure of information is likely to expose an undertaking unreasonably to disadvantage, a public sector organisation may have regard to the following considerations:*

- a) whether the information is generally available to the undertaking's competitors;*
- b) whether the information would be exempt under this Part if it had been brought into existence by a public sector organisation;*
- c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking;*
- d) whether there are any considerations in the public interest in favour of disclosure that outweigh considerations of competitive disadvantage to the undertaking (for example, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls);*
- e) any other considerations that in the opinion of the public sector organisation are relevant.*

(3) *Information may be exempt under section 50 if disclosure of the information would disclose:*

- (a) a trade secret of a public sector organisation; or*
- (b) information about a public sector organisation that is engaged in trade or commerce where the information is of a business, commercial or financial nature and the disclosure is reasonably likely to expose the organisation unreasonably to*

*disadvantage; or*

*(c) the results of scientific or technical research undertaken or being undertaken by a public sector organisation where:*

*(i) the research could lead to a patentable invention; or*

*(ii) the disclosure of the results in an incomplete state is reasonably likely to expose a business, commercial or financial undertaking unreasonably to disadvantage; or*

*(iii) the disclosure of the results before completion of the research is reasonably likely to expose the public sector organisation unreasonably to disadvantage; or*

*(d) an examination paper, a paper submitted by a student in the course of an examination, an examiner's report or any other similar document where the uses to which the paper, report or other document have not been completed.*

*(4) Information mentioned in subsection (1) is not exempt under section 50 if a period of 5 years has elapsed since the information was obtained by the public sector organisation.*

*(5) Information mentioned in subsection (3) is not exempt under section 50 if a period of 5 years has elapsed since the information came into existence.*

*(6) The Commissioner may, if of the opinion that it is in the public interest to do so, extend the period mentioned in subsection (4) or (5) on one or more occasions and on each such occasion for a limited, specified period or for an unlimited period.*

## **Submissions on Section 57**

30. The views of Foundation 51 Pty Ltd cannot be taken into account as neither the company nor a 'Foundation 51 undertaking' exist.<sup>9</sup>

### **The First Respondent's Submissions:**

31. In a written submission supported by a sworn statutory declaration of Mr Iain Loganathan, Electoral Commissioner (NT), dated 29 September 2016, stated as follows:

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<sup>9</sup> See my preliminary decision in this matter dated 17 July 2017.

6) *Both these complaints relate to information obtained by the Commission from Foundation 51, using its powers under section 217 of the Electoral Act:*<sup>10</sup>

7) *This was the first occasion on which the Commission had exercised its investigatory powers under sections 216 or 217*<sup>11</sup>: *As was there stated, there is no precedent as to what information collected through the exercise of the demand powers would be made public. When information is obtained from individuals or corporate entities under these sections, the Commission is of the view that the information is obtained for a specific purpose that is, for the investigation, and should not be used or disclosed for any other purpose.*

8) *The Commission relies on the decision in Johns v Australian Securities Commission [1993] HCA 56; (1993) 178 CLR 408. There is a discussion of that case in paragraph 84 of the Prima Facie Decision*<sup>12</sup>. *I submit that that discussion does not do the relevant principles justice. It is accepted that there is no statutory obligation under the Electoral Act, whereas there was such an obligation binding on ASIC in the Johns case. However, there is a binding obligation of confidentiality contained in paragraph 14.1 of the Code of Conduct, Employment Instruction 12 applicable to public service officers. That paragraph is in the following terms:*

*Use of information acquired in the course of employment Disclosure of information acquired in the course of employment*

*14.1. A Public Sector Officer must not disclose information or documents acquired in the course of his or her employment, other than as required by law or where proper authority has been given."*

9) *On the present facts, the authority given to the Commission under the Electoral Act is to use material obtained under the notice for purposes of an investigation, and related purposes within the Electoral Act. Those must also be taken to be the purposes of Foundation 51 in responding to the notice. Another source of authority is necessary to permit use for other purposes.*

10) *These facts are clearly within the Johns principle which does not permit use without authority, other than for the purpose for which*

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<sup>10</sup> Loganathan statutory declaration, 29 September 2016, paragraph 9

<sup>11</sup> Loganathan statutory declaration, 29 September 2016, paragraph 10.

<sup>12</sup> The Delegate noted at paragraph 84 of her prima facie decision: *I have read the case of Johns referred to and did not find it of particular assistance in this matter, given that the First Respondent was under no statutory obligation to conduct his investigation in confidence. Section 9 of the Information Act, which provides that in the event of a conflict between legislation, the Information Act prevails, would also suggest that disclosure of the information in this case is not constrained by any obligations of confidentiality imposed by the Electoral Act (were any to exist). The documents are government information, notwithstanding they may have been collected for a particular purpose, and hence are subject to the 'freedom of information' regime set out in the Information Act.*

information is collected. It does not matter whether a confidentiality obligation is in the Electoral Act (the OIC having said, correctly, that it was not contained in that legislation) or elsewhere. In addition, the relevant rule does not depend on the terms of legislation.

11) As was said by Dawson J in *Johns*:

*"There is also a general rule that where a body has statutory powers to compel the provision of information to it, it should not disclose the information except for the purposes for which the powers were conferred ((35) Marcel v. Commissioner of Police (1992) Ch 225; Morris v. Director of the Serious Fraud Office (1993) 3 WLR 1.). Any other approach in relation to information gleaned under compulsion would encroach further than necessary upon the right of the individual to treat as confidential information in his or her possession."*

12) I accept that disclosure under the Act is a proper exception to the rule in *Johns*, as the OIC states in paragraph 84 of the *Prima Facie* Decision.

13) However, the OIC has taken no account of this general rule in the context of applying the Act itself. For example, the circumstances in which the information was provided and the *Johns* general rule are relevant other considerations within section 57 (2) (e) of the Act. It is not to the point that they **may** be overridden by factors making for disclosure under the Act, a point that is not in doubt. The present point is that the OIC did not take these matters into account at all in determining that very issue of disclosure/exemption.

14) On the basis of the submissions in paragraphs 9 to 13 above, the Commission submits that the material in question is properly exempt under section 50. The additional factors set out in those paragraphs, which were not considered in the *Prima Facie* decision, tip the balance of the public interest against disclosure: see further, paragraphs 15 to 23 below.

15) The information which was obtained concerned the business, financial and commercial operations of Foundation 51. It was regarded as sensitive by the undertaking and was not in the public domain, nor likely to be put in the public domain by the undertaking<sup>13</sup>

16) The Commission takes the same approach to the information provided to the accounting firm that does the compliance review of political donations. Whilst the returns and report by the accounting firm are placed on the website, all source documentation received is not publically available: <sup>14</sup>

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<sup>13</sup> Loganathan statutory declaration, 29 September 2016, paragraph 12.

<sup>14</sup> Loganathan statutory declaration, 29 September 2016, paragraph 14.

17) *The outcome of the Commission's investigation is in the public domain. All returns received, that contain details of revenue sources for Foundation 51, are on the Commission's website.*<sup>15</sup>

18) *While Foundation 51 and its representatives are better placed to argue the extent to which disclosure would expose them unreasonably to disadvantage, the Commission considers that disclosure would result in unreasonable disadvantage as set out in s.57(1)(b) of the Information Act. The additional material that would be disclosed is insufficient to tip the public interest in favour of disclosure, given also the submissions in paragraphs 7 to 14 above.*

19) *I consider it unreasonable disadvantage and not in the public interest for the purposes of section 57 of the Act, given the disclosure of the affairs of Foundation 51 that is already in the public domain, to disclose the private information referred to in paragraph 40 of the Prima Facie Decision and in the table in paragraph 36. In particular, bank statements are quintessentially matters of confidence and private concern, and there would need to be powerful reasons in any case to give over a person's (or entity's) banking records. The same is true of financial statements of a proprietary limited company (which are not on public registers), which is the present case.*

20) *In addition, most of the public interest factors identified in paragraph 88<sup>16</sup> of the Prima Facie Decision apply. The matter stated there in the first bullet point is the subject of specific evidence.<sup>17</sup> The second, third and fourth bullet points are either facts apparent to the parties and the OIC, or else, are statements of principle. The Commission cannot comment on the fifth bullet point.*

21) *If Foundation 51 through its legal representatives agrees to the release of the information, then the Commission would not apply the exemption in section 57(1)(b).*

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<sup>15</sup> Loganathan statutory declaration, 29 September 2016, paragraph 15.

<sup>16</sup> The Delegate noted at paragraph 88 of her prima facie decision: *By contrast, the following factors may tell against disclosure if the First or Second Respondent can establish their factual basis:*

- *challenges to the First Respondent in obtaining relevant evidence in future investigations of breaches of the Electoral Act if this information is disclosed;*
- *the Second Respondent has filed declarations of donations as though it were an associated entity, and hence has substantially mitigated any breach that may have occurred;*
- *the principle of freedom of political association and the extent to which this might be infringed through public scrutiny of the internal documents of Foundation 51;*
- *classification in the Information Act itself of information about a person's political opinions, philosophical beliefs, and membership of a political association as being sensitive information which warrants greater protection under the Information Privacy Principles;*
- *the extent to which there was an understanding by the persons involved in Foundation 51, a private organisation, that their activities and discussions would be kept confidential or private.*

<sup>17</sup> Loganathan statutory declaration, 29 September 2016, paragraph 13.

22) *The material was obtained by the Commission in 2015 and as such, sub-section 57(4) does not preclude the application of the exemption.*

23) *The confidence of individuals and entities in the Commission and its ability to appropriately protect the information obtained under section 217 would be undermined if disclosure occurred under the Information Act: see also the Code of Conduct referred to in paragraph 8 above.*

## **The Complainant's Submissions**

32. The Complainant's statutory declaration dated 20 October 2016 made the following submissions that section 57 should not apply to exempt this information:

- 2) *"The Electoral Commissioner's decision not to release Government held information in relation to Foundation 51 Pty. Ltd. (Foundation 51) relies on the application of section 57(1)(b) of the Information Act (the Act).*
- 3) *Matters relevant to section 57(1)(b) are set out in paragraphs 33 — 92 of the prima facie decision of the Information Commissioner's delegate on 24 June 2016 which found there was sufficient evidence to substantiate the complaint.*
- 4) *Our submissions that section 57 of the Act should not apply are set out in paragraphs 41 and 42 of the prima facie decision.*
- 5) *The submissions speak for themselves. In summary they rest on two fundamental considerations:*
  - i. *How can a deregistered entity that no longer operates be exposed to unreasonable disadvantage within the meaning of the Act?*
  - ii. *There are compelling reasons in the public interest for the release of the Foundation 51 information held by the Electoral Commission (see the public interest considerations we advanced mentioned in paragraphs 33 — 92 of the prima facie decision).*
- 6) *When the Electoral Commissioner made his decision not to release the relevant Government held Information Foundation 51 had been deregistered and that remains the case.*

- 7) *Although paragraphs 1, 5 and 7 of his statutory declaration state that he is a Director of Foundation 51, in paragraph 5 Mr Lewis confirms that the company remains deregistered.*<sup>18</sup>
- 8) *Paragraph 6 of Mr Lewis' statutory declaration also states that "Foundation 51 **formerly** had a very clear competitive position" (our emphasis).*
- 9) *Again, this begs the question posed in paragraph 5(i) above.*
- 10) *The Information Commissioner may wish to consider this as a threshold issue to be resolved before consideration of the public interest arguments set out in our submissions.*<sup>19</sup>
- 11) *With respect to Mr Lewis' statement in paragraph 11 of his statutory declaration that disclosure would be an unreasonable interference with his privacy, the Information Commissioner's attention is drawn to paragraphs 89 — 91 of the prima facie decision which make reference to the information not interfering with the privacy of any individual.*
- 12) *This could be tested again by perusal of each separate item of Government held information subject to the relevant provisions of the Act*
- 13) *In paragraph 10 of his statutory declaration the Electoral Commissioner states that the subject information provided by Foundation 51 was obtained pursuant to his investigative powers under sections 216 and 217 of the Electoral Act.*
- 14) *Following on from this, the Commissioner argues that the information should not be disclosed for any purpose, other than his investigation.*
- 15) *We say that the Commissioner's view is not consistent with the Act when considered as a whole, and if taken to its logical conclusion would exempt from disclosure a broad range of information held by Government Agencies contrary to the intention of the Parliament.*
- 16) *It is not irrelevant, that unlike the exemptions for inquiries conducted by statutory authorities such as the Auditor-General, Commissioner for Public Interest Disclosures and the Ombudsman, a similar exemption has not been enacted for the Electoral Commission.*

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<sup>18</sup> The statutory declaration of Mr Lewis was considered by me in the Preliminary Decision with respect to the question of standing. Any evidence of Mr Lewis on behalf of Foundation 51 or himself has not been considered in this decision on whether or not the documents are exempt.

<sup>19</sup> See my Preliminary Decision on standing dated 7 July 2017



17) *In paragraphs 18 and 19 of his submission of 29 September 2016 the Electoral Commissioner asserts that disclosure of the subject information would unreasonably disadvantage Foundation 51 and not be in the public interest.*

18) *But the Commissioner does not provide in depth rationale for these conclusions, particularly how much weight he has given to the compelling public interest considerations in favour of disclosure advanced in our submissions.*

19) *The argument made in paragraph 23 of the Commissioner's submission that disclosure of the subject information would undermine the operation of section 217 of the Electoral Act is speculative and unproven.*

20) *Based on the above considerations, we say that the Commissioner has not satisfied the onus and burden of proof provisions set out in section 125 of the Act, namely:*

*"If the matter complained of at a hearing is a decision by the respondent to refuse access to government information, the respondent must prove on the balance of probabilities:*

- (a) that the information is exempt under Part 4 (Exemptions in the public interest); or*
- (b) that the complainant is not entitled to access under the Act.*

33. Paragraph 4 of the Complainant's statutory declaration above refers to earlier submissions made by the Complainant in the prima facie decision regarding the application of section 57 in this matter. Those submissions were:

43) *The Complainant made the following submissions that s 57 should not apply to exempt this information:*

- 'Disclosure would not have, and would not expose Foundation 51 unreasonably to disadvantage.'*
- 'Foundation 51 does not have a competitive position. Foundation 51 held a privileged position based on its exclusive associated entity arrangement with the CLP.'*

44) *'Public interest considerations in favour of disclosure outweigh considerations of competitive disadvantage. The public's right to know about the operation of our democracy and its vital institutions – such as the Northern Territory Electoral Commission and the Australian Electoral Commission - is consistent with the Information Act and should be given very*

*strong weight in deciding whether the subject documentation above should be released. Release of the relevant government held information is consistent with the Objects of the Act set out in section 3 and the general principles of accountability enumerated in Section 10. Public interest considerations in favour of release of the subject documents also include serious community concern about the operations of Foundation 51 and protracted and substantial media coverage about the probity and modus operandi of the Foundation. This media coverage is on the public record but samples could be provided if they will assist your deliberations. We say that in this particular case, there are strong public interest considerations in favour of disclosure that outweigh those against disclosure.'*

## **Consideration of Issues**

*Documents must be from a business, commercial or financial undertaking (section 57(1))*

34. Excluding trade secrets, section 57(1) of the Act states that documents may be exempt under the public interest test (s50) if the information in question would:

- disclose information obtained by a public sector organisation
- from a business commercial or financial undertaking
- where the information is of a business commercial or financial nature;

and the disclosure is likely to expose the undertaking unreasonably to disadvantage.

35. Whilst I have already decided that there is no current Foundation 51 entity or undertaking, there is no dispute that Documents **A** to **U** were obtained by a public sector organisation (the First Respondent) from Foundation 51 Pty Ltd when the company was in existence.

36. The next question is whether Foundation 51 Pty Ltd was a business, commercial or financial undertaking. The company was described by its representatives in several promotional documents and media articles. An early promotional brochure (already released by the First Respondent to the Complainant<sup>20</sup>) described Foundation 51 Pty Ltd as follows:

- *It is a subscription-based organisation that provides its Members a service.*
- *The commercial research, reports and information gathering activities of Foundation 51 together with the involvement of its members will enable many business entities to obtain open access to sensitive commercial research materials with both economic and taxation advantages.*

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<sup>20</sup>See folios 73-76 of EOP0078

- *It will conduct eight research programs throughout the next 12 months, the first two will be presented at their next forum. Members are invited to submit research project proposals for topics of interest to them and their business.*
- *The published papers of the research work will be made available to Foundation 51 Members.*
- *Foundation 51 is unique in that it offers business a real look into the minds of the people of the Territory and undertakes professional research that benefits all stakeholders in Foundation 51.*

The brochure states the purpose of Foundation 51 as:

- *To strengthen and support liberal and conservative politics in the Territory, through connecting with business to foster debate on important issues confronting the Territory.*
- *It is a unique organisation that brings together political leaders and business leaders to form a partnership designed to bring substantial benefits to all Territorians.*
- *The innovative structure of Foundation 51 includes traditional networking events with prominent politicians and other high profile speakers, regular communiques on matters of importance and political updates and for the first time it also offers business the opportunity to become involved in high level, comprehensive research projects.*
- *Foundation 51 provides business and community leaders with unprecedented access to market, political and commercial research, driven by an Executive Director and Research Director.*

37. The brochure included a membership form and provided detail on what various categories of members would receive for their money including:

- *Personal monthly update newsletters from the [then] Leader of the Opposition; and*
- *Briefings on policy development by Country Liberals Shadow Ministers*

38. In other documents, the business of Foundation 51 Pty Ltd was described in similar terms as providing targeted research on business and political matters and networking opportunities with high profile community leaders including liberal politicians and influential business operators for a membership (and other) fees<sup>21</sup>. After perusing the content of the documents **A** to **U** and the folio of documents provided to me by the First Respondent, I accept that Foundation 51 Pty Ltd was ‘a business, commercial or financial undertaking.’ The documents include presentations, research projects, payments from members in the form of membership fees and documents relating to services provided to them (e.g. ‘networking events’) including details of payments for external consultants who were engaged to conduct

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<sup>21</sup> For example Document I at page 6 of this decision

political and business research, the results of which were provided to members and others.

39. Section 57(1)(b) of the Act requires consideration of whether the disclosure of information of a business, commercial or financial nature is likely to expose the undertaking unreasonably to disadvantage. Noting the broad definition and the broad business objectives contained in the promotional and other material received from Foundation 51 Pty Ltd, I am satisfied that each of the documents **A** to **U** falls with the definition '*information of a business, commercial or financial nature.*'

40. In considering whether disclosure of these documents is likely to expose the undertaking unreasonably to disadvantage, I have had regard to section 57(2) factors as follows:

- Whether the information is generally available to the undertaking's competitors (section 57(2)(a));
- What harm might be caused to the competitive position of the undertaking by disclosure (section 57(2)(c))
- Whether there are any considerations in the public interest in favour of disclosure that outweigh considerations of competitive disadvantage to the undertaking (section 57(2)(d))
- Any other considerations that in the opinion of the First Respondent are relevant.(section 57(2)(e))

Whether the information is generally available to the undertaking's competitors (section 57(2)(a)):

41. In my preliminary decision, I concluded that there was no Foundation 51 entity or undertaking currently in existence. I noted that the general dictionary meaning of *undertaking* is broad in scope to cover both a current enterprise and a pledge, promise or guarantee to do something in the future.<sup>22</sup> I had evidence of neither before me. For the purposes of the application of s57 to the facts before me, the undertaking in question is a past undertaking.

42. The business, commercial and financial documents of a proprietary company are not generally available publicly, including to competitors, unless the company is required to publish them or it elects to make them available. That was not the case here. The documents **A** to **U** were required

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<sup>22</sup>For example, an online dictionary defines *undertaking* as:

a) a formal pledge or promise to do something: "I give an undertaking that we shall proceed with the legislation" (synonyms: pledge · agreement · promise · oath · covenant · vow ·)

b) a task that is taken on; an enterprise: "a mammoth undertaking that involved digging into the side of a cliff face" (synonyms: enterprise · venture · project · campaign · scheme · plan ·)

<http://www.bing.com/search?q=dictionary+free+online+undertaking&q=n&form=QBRE&sp=-1&pg=dictionary+free+online+undertaking&sc=0-34&sk=&cvid=9B2CD854575C41A681FF0726C5E01036&adlt=strict>

to be provided to the First Respondent in response to a section 217 Notice under the *Electoral Act* and are only being sought by the Complainant because they have become 'government information' that is subject to the *Information Act*.

43. A related question is whether Foundation 51 Pty Ltd had competitors and if the answer is yes, whether it still has them. A competitor is: *Any person or entity which is a rival against another. In business, a company in the same industry or a similar industry which offers a similar product or service.*<sup>23</sup>
44. The business of Foundation 51 was a 'niche' market in the Northern Territory which at face value offered members a blend of business and political research papers, presentations and networking opportunities with business analysts, conservative politicians and business leaders. There were undoubtedly businesses which could provide a similar service with respect to the provision of political and business research. However, there is no evidence before me of any similar business that was or is delivering services in the NT such as networking opportunities with conservative politicians and business leaders. Further, noting that the First Respondent's investigation ultimately concluded that Foundation 51 Pty Ltd was a related entity to the Country Liberal Party (CLP) for the purposes of the *Electoral Act*, there is no evidence of any business competitors who were or are providing indirect financial support to the CLP
45. Most significantly, subsequent to Foundation 51 Pty Ltd providing the documents to the First Respondent, the company was voluntarily deregistered and there is no evidence that it is continuing its business model via another undertaking. In fact, it appears that Foundation 51 Pty Ltd had ceased trading even before deregistration. An ABC media transcript dated 10 October 2014 states: *A private company that the Northern Territory Opposition claims is a slush fund for the Country Liberals is being wound up. The director of Foundation 51, Graeme Lewis, declined to be interviewed by the ABC but in a statement he said that the company business had been trashed by mischievous media attention and its business has ceased totally.*<sup>24</sup>
46. In these circumstances, even if businesses exist that offer some or all of the services offered by Foundation 51 Pty Ltd, it would be hard to apply to them the description 'competitor' when the company in question no longer exists and is no longer competing.
47. The Complainant submits that '*Foundation 51 does not have a competitive position. Foundation 51 held a privileged position based on its exclusive associated entity arrangement with the CLP.*' As there is no evidence that

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<sup>23</sup> <http://www.businessdictionary.com/definition/competitor.html>

<sup>24</sup> See Folio EX0048/02, page 261 of Brief of Evidence of First Respondent.

any other associated entity performed a similar function, there is truth in this observation.

48. After considering the documents and the submissions, I accept that the Foundation 51 business, commercial and financial information in question is not generally available but I do not consider that there are any relevant competitors to benefit from it. For these reasons, I do not consider that section 57(2)(a) applies in this matter.

What harm might be caused to the competitive position of the undertaking (section 57(2)(c))

49. The Complainant submits that Foundation 51 Pty Ltd has no competitive position. I agree with his submission and no evidence has been provided by the First Respondent to persuade me otherwise. How can a deregistered company that has not been trading for two years or more have a competitive position? They do not deliver a product or service, nor is there any possibility of rivalry with any other business. For these reasons, I do not consider that section 57(2)(c) applies in this matter.

Any other considerations that in the opinion of the public sector organisation are relevant (section 57(2)(e))

50. Section 57(2)(e) requires me to consider whether there are any other considerations that in the opinion of the First Respondent are relevant to the decision whether or not to exempt the documents in the public interest.
51. I take account of the submissions made by the First Respondent outlined in this decision at paragraph 31. The First Respondent's comments about the Johns<sup>25</sup> decision are noted and I agree that the circumstances that necessitated the First Respondent obtaining the information from Foundation 51 Pty Ltd are a relevant consideration to be taken into account in the public interest. It is accepted that the First Respondent sought information from Foundation 51 Pty Ltd for a particular purpose (i.e. an investigation into their status as a related entity under the *Electoral Act*, which they denied.) I imagine that FOI requests seeking information from the First Respondent occur rarely. It may well never have occurred to the First Respondent that these documents might be accessible to the public through FOI and he may well have assumed that such documents would remain confidential.
52. Although he is not required to maintain confidentiality under the *Electoral Act* when conducting an investigation, the First Respondent relies on Paragraph 14.1 of the NT Public Sector Code of Conduct which states:

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<sup>25</sup> Johns v ASC [1993]HCA 56, (1993) 178 CLR 408

*A Public Sector Officer must not disclose information or documents acquired in the course of his or her employment, other than as required by law or where proper authority has been given.*

53. In accordance with the Code of Conduct, the First Respondent would normally treat information of this nature confidentially and only release the information that was necessary for dealing with his investigation and related purposes.
54. It is accepted that information provided to the First Respondent for a particular purpose would not generally be used for another unrelated purpose. There are exceptions however and one is when that other purpose is authorised by law. Paragraph 14.1 of the Code of Conduct acknowledges this fact.
55. The reality of a freedom of information request is that the First Respondent is required by law to disclose government information held by him to the Complainant unless one of the exemptions applies. This includes the financial, commercial and business information received by him from Foundation 51 Pty Ltd in this matter.
56. I accept that at least some of the company documents may well have been considered sensitive by them and would not have been voluntarily made public- particularly, I would suggest, the financial statements. Against that submission is the fact that the company no longer exists and there are no ongoing business interests that require protection from competitors - the principal focus of the section 57 exemption.
57. The First Respondent submits that the relevant information regarding returns received by him that contain details of revenue sources for Foundation 51 are now on the Commission's website. For this reason, he submits that there is no public interest consideration that requires more information to be provided. An opposing consideration is the need for transparency in matters involving the public interest such as political donations and compliance with the *Electoral Act*. It is publicly known that Foundation 51 Pty Ltd denied and continued to object to the proposition that they were a related entity for the purposes of the *Electoral Act*. The issue was played out in the local media for many months. Ultimately following an investigation, the First Respondent concluded that Foundation 51 Pty Ltd was a related entity and referred the matter to Police for criminal investigation.
58. The First Respondent submits that the additional material that would be disclosed is insufficient to tip the public interest in favour of disclosure. This may be the case, but it is not the test under the Act which requires

that government information to be released unless an exemption applies. In fact, if the additional information is of little consequence, then it would be less likely to be protected by an exemption and would be more likely to be released.

59. The First Respondent submits that disclosure of this information may jeopardise the Commission's ability to obtain similar information for future investigations on a voluntary basis. I accept that this is a relevant consideration and that past history supports a view that most businesses will provide their information voluntarily to the First Respondent. However, it is also relevant that the First Respondent does have powers under section 217 of the *Electoral Act* and related offence provisions to require compliance if an undertaking is reluctant to comply.

60. It is noted that the Act exempts disclosures and investigations under the *Public Interest Disclosure Act* and complaints, investigations and related processes under both the *Ombudsman Act* and the *Anti-Discrimination Commission Act*<sup>26</sup> Also, information is exempt under section 44 if it is obtained or created in the course of an action that is in the nature of an investigation, audit or inquiry by the Children's Commissioner, the Health and Community Services Complaints Commissioner, the Auditor-General, a Board or Commissioner appointed under the Inquiries Act and a commission of inquiry established under the Local Government Act<sup>27</sup> It is assumed that the investigations undertaken by the First Respondent are not exempt from the Act because that was Parliament's intention - perhaps because of the need for electoral processes to not only be transparent but be seen to be transparent.

61. The First Respondent is like any other 'public sector organisation' under the Act and a guarantee of confidentiality with respect to another's entity's documents should be cautiously given where a subsequent FOI application may require their release or partial release.

Whether there are any considerations in the public interest in favour of disclosure that outweigh considerations of competitive disadvantage to the undertaking (for example, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls) (section 57 (2)(d));

62. This consideration once again assumes that publication of the documents of the undertaking would cause some competitive disadvantage to the undertaking. This is not the case on the facts before me for reasons already outlined. However, it remains a worthwhile exercise to consider and

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<sup>26</sup> Section 49B, 49C and 49D of the Act.

<sup>27</sup> Section 49.



comment on each document sought as regards its age and content, including the sensitivity of the information it contains.

**Document A:**

63. Document **A** is a *Report on Voting Trends*. It is dated March 2014 and contains research findings based on a telephone survey conducted in mid-March 2014 in preparation for the by-election in the seat of Blain. Although such material would normally be considered sensitive and confidential, the passage of time since the by-election means that its sensitivity is highly questionable.

64. General comment supporting such a conclusion was made by the legal representative for Foundation 51 Pty Ltd in his letter of response to the section 217 Notice, which has already been released to the Complainant by the First Respondent.<sup>28</sup> In the letter, Peter Maley advised: *Our corporate client Foundation 51 Pty Ltd now produces the most recent material for the Blain by-election. Our client confirms that other polling data was obtained in previous situations however given its relatively short life span and that the polling data is usually relevant for a particular event their useful life quickly comes to an end and polling material is generally discarded or destroyed.* There is nothing in the age or content of this document that would support its exemption from disclosure in the public interest.

**Document B:**

65. This document is an *Interim Report on Kormilda College* prepared for Foundation 51 Pty Ltd by research strategists Crosby Textor, and dated June 2013. Its stated aim is *'to provide Kormilda College with public opinion-based insights to better understand the views of Darwin parents on schools and the college and to inform their strategy/tactics to achieve community support and consideration.'* The age of the research and the relatively general nature of the information contained in the report means in my view it could be disclosed without causing substantial harm to the competitive position (if any) of the undertaking (if any). This is particularly the case in circumstances where the challenges facing Kormilda College have been the subject of public debate in recent years and one would assume that the content of this document would be of mainly historical interest. There is nothing in the age, content or sensitivity of this document that would support its exemption from disclosure in the public interest.

66. Similarly, Document **C** is a PowerPoint presentation from Bernard Salt KPMG dated 6 August 2010 and titled *'Australia has a role to play in delivering resources, food and energy at peak humanity'*. There appears to

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<sup>28</sup> Correspondence from Maley Burrows to the NTEC dated 17 September 2014 (373-375 of Complaint 2)

be nothing commercially sensitive in this presentation and the content is very broad. A search of the internet discloses very similar presentations done by Mr Salt in 2010 that are publicly available<sup>29</sup>. There is nothing in the age, content or sensitivity of this document that would support its exemption from disclosure in the public interest.

67. Similar comments can be made about documents **D,E,F,G** and **H**. They are research papers which were commissioned by Foundation 51 Pty Ltd in or about 2010 and went to all the members.<sup>30</sup> All are of a general nature and the research is based on publicly available material. For example:

- a. Document **D** is a research project titled *–Foundation 51 Australian Defence Force ‘the makeup and change of Defence in the Territory as a result of the White Paper (2009)’* It contains a summary of material that is publicly available.
- b. Document **E** is titled *Social Media-Its Changing Nature and Opportunities for Business*. It is a general paper on the benefits to business offered by social media. It appears to be prepared and based on publicly available material.
- c. Document **F** is titled *Demographics of Darwin and Palmerston (1996-2006)*. It is prepared and based on publicly available material.
- d. Document **G** is titled *10 years of crime in the Territory-(1996-2006)-how it has changed and what it costs business and the community*. It is prepared and based on publicly available material and contains nothing confidential.
- e. Document **H** is dated May 2010 and titled: *Enterprise V2-How blogs, instant messaging and wikis can be applied to business today*. It contains basic information on what were then new technologies and contains nothing sensitive or confidential.

68. With the passage of time since these research projects were done, there is nothing in the content of these documents that would support their exemption from disclosure in the public interest.

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<sup>29</sup> Regional Development Australia National Forum  
[www.barossa.org.au/home/publications-and-reports/rda-national-forum/.../30](http://www.barossa.org.au/home/publications-and-reports/rda-national-forum/.../30)  
and [http://www.acpet.edu.au/uploads/files/conference/2010/presentations/ACPET%20-%20Bernard%20Salt%20-%20handout\\_9594905\\_1%28Client-Job%29.PDF](http://www.acpet.edu.au/uploads/files/conference/2010/presentations/ACPET%20-%20Bernard%20Salt%20-%20handout_9594905_1%28Client-Job%29.PDF)

<sup>30</sup> See Section 217 Notice File at Folio 161.

## **Documents I, J and K**

69. Document **I** is a promotional pamphlet. It appears to have been prepared and provided to attendees at the May 2010 Function at which John Howard and Andrew Forrest were guest speakers. It outlines the stated purpose for Foundation 51 Pty Ltd which is described as a mixture of networking and research, private briefings and member forums. It also provides detail of the membership structure and cost (i.e. the two tiers of membership and what is provided to members) and includes a membership application form. It appears to be carefully written for public dissemination and there is nothing in the content of this document that would support its exemption from disclosure in the public interest.

70. Documents **J** contains two short biographies for guest speakers Andrew Forrest and John Howard at the May 2010 function. These materials appears to be carefully written for public dissemination and there is nothing in the content of these documents that would support their exemption from disclosure in the public interest.

71. Document **K** is titled *Foundation 51 Update* and is signed by James Lantry and Graeme Lewis as Directors and provided to attendees at the May 2010 function. The one page document outlines the projects undertaken by Foundation 51 Pty Ltd during its inaugural year 2009-2010. The document summarises the 'extensive research programme' undertaken in 2009 and provided to members. It notes the major networking events including high profile speakers. The document advises the date of the next membership forum '*where we'll conduct an open discussion on the Country Liberal's Plan towards future planning developments for the greater Darwin area and to enable members to provide input into the future research projects of Foundation 51*'. It notes a forthcoming event and names a prominent person who has agreed to be a Foundation 51 director. Document **K** also includes a cover page for the function. There is nothing in the age or content of this document that would support its exemption from disclosure in the public interest.

72. It is also relevant that a 10 page document titled *A summary providing details of all activities undertaken by F51 Pty Ltd between 1 July 2010 and 30 June 2014* has already been already released to the Complainant by the First Respondent in full.<sup>31</sup> There is no good reason in the public interest for releasing this document and for not releasing Documents **I, J** and **K**

## **Documents L, M, N and O.**

73. These documents are DVDs of Foundation 51 events such as luncheons and seminars at which conservative politicians (e.g. John Howard and Peter

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<sup>31</sup> Section 217 Notice file at folio 163-172

Costello), business leaders (e.g. Andrew Liveris, CEO of Dow Chemicals and Andrew Forrest) and political analysts (e.g. Mark Textor) addressed members and guests about issues of relevance to the NT and Australia. They were introduced by local politicians (e.g. Terry Mills) and Graeme Lewis as spokesperson for Foundation 51. While some speakers might on occasion have disclosed their views on political issues, they are the same views that they disclosed publicly in many other forums. Further, the recordings do not disclose any personal information about anyone that would cause an interference with their privacy if the documents were released. For example, strategic analyst Mark Textor provided feedback from a telephone survey conducted before the Blain by election in 2010. All of the views he expressed were the views of those polled, not Mr Textor's personal views.

74. Some comments made could be viewed as evidence of a relationship between Foundation 51 and the Country Liberal Party. Many of those views are also expressed in other documents already released by the First Respondent and their content would not be grounds in any event to refuse release. In fact, in some cases, these comments might well support release on the grounds of the importance of transparency and accountability in political matters. In short, there is nothing in the age, content or sensitivity of this document that would support its exemption from disclosure in the public interest.

#### **Documents P,Q,R,S,T and U**

75. These documents are the Bank Statements, Ledger entries and Financial Statements of Foundation 51 Pty Ltd for the financial periods June 2010 to July 2014. Normally they would be confidential documents of the company and would be considered sensitive. In the circumstances of a freedom of information request when they are defined as 'government information' held by the First Respondent, they will only be exempt from release if they are covered by one of the exemptions under the Act. Despite their age, these documents would generally be categorised as sensitive such that they would only be released if the public interest considerations outweighed the private interests of the company.
76. In this case, the added consideration is that the company no longer exists and the information '*could be disclosed without causing substantial harm to the competitive position of the undertaking*' as it appears to have no competitive position to protect. I have viewed these documents and have formed the view that there is nothing in their age or content that would support their exemption from disclosure in the public interest.
77. In her prima facie decision at paragraph 87, the Delegate outlined a number of public interest considerations that generally favoured release of the documents in question. They were:

- *‘that it is in the public interest for breaches of the Electoral Act to be dealt with reasonably transparently, and the extent to which this has not occurred given there has been no ability for the public to see the evidence, process, or reasoning involved in determining that the Second Respondent was an associated entity, and in determining what actions should be taken as a result;*
- *that the lack of transparency arguably undermines public confidence in the process of Electoral Act investigations and/or the democratic process generally;*
- *related to the previous factor, the Electoral Act itself makes no provision that such investigation processes be conducted confidentially, which suggests there is nothing to negate the general principles of transparent government and open justice with respect to such investigations;*
- *similarly, the Information Act does not include the First Respondent or its investigations in the exemptions provided for various investigatory bodies;*
- *the extent to which disclosure of the documents would enable the public to have an informed debate about whether regulation of political parties, donations, and associated entities is achieving its objectives, and whether the structure used by [Foundation 51] is adequately addressed by statute;*
- *the lack of evidence that [Foundation 51] imposed obligations on its numerous members to keep the information it distributed confidential;*
- *the extent to which disclosure of the documents in this case would enable the public to better understand the policy development processes of and influences on a major political party in the NT, given that political parties are a significant feature of our democratic process;*
- *disclosure of this information may assist compliance with the Electoral Act by providing an incentive for associated entities (or bodies which operate in close relationship with political parties) to proactively declare any association, knowing the truth will become a matter of public knowledge;*
- *related to the previous factor, a lack of other deterrents for breaching the Electoral Act in current regulatory practices;*
- *the current lack of commercial value in the information in dispute, given the passage of time.*

78. These considerations encompass and expand on the considerations raised by the Complainant at paragraph 32 in seeking release of Documents **A** to **U**. They raise valid issues to be taken into account, particularly in these circumstances where I have found that the release of the documents will cause the deregistered Foundation 51 Pty Ltd no competitive disadvantage.

## Section 50 considerations

Section 50 states:

### **50 Exemption**

*(1) Government information mentioned in this Division is exempt only if it can be shown that, in the particular case, it is not in the public interest to disclose the information.*

*(2) To show that, in a particular case, it is not in the public interest to disclose government information, the following matters are irrelevant:*

*(a) the possibility that the disclosure may result in embarrassment to, or a lack of confidence in, the Territory Government or a public sector organisation;*

*(b) the possibility that the applicant may misunderstand the information disclosed.*

79. In [\*McKinnon v Secretary, Dept of Treasury\* \(2006\) 228 CLR 423; 91 ALD 516; \[2006\] HCA 45](#) Gleeson CJ and Kirby J of the High Court commented any assessment of what is in the public interest must commence with a consideration of the statutory scheme as a whole, at [5]:

Inevitably, it will involve a judgment as to where the public interest lies. Such judgment, however, is not made in a normative vacuum. It is made in the context of, and for the purposes of, legislation which has the object described above, which begins from the premise of a public right of access to official documents, and which acknowledges a qualification of that right in the case of necessity for the protection of essential public interests (s 3(1)(b)).<sup>32</sup>

80. When introducing the *Information Act*, then Attorney-General Toyne discussed in the Second Reading Speech an intention to create a public interest test that was drafted broadly to adapt to different circumstances, but which allowed more information to be disclosed than in some other jurisdictions:

*The majority of exemptions are contained within Division 3 where the decision-maker is required to consider, in each individual case, whether it is not in the public interest to disclose the information. This is a more liberal application of the public interest test than in some jurisdictions which require a showing that disclosure is in the public interest. Under the Information Bill, this information will only be exempt if it can be shown*

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<sup>32</sup> cited with approval in Lobo and Dept. of Immigration and Citizenship (2011) 124 ALD 238; [2011] AATA 705 at [236].

*in a particular case that it is not in the public interest to disclose the information.*

*Our application of the public interest test is consistent with the idea that government should be open and accountable, not one where an applicant must satisfy the need for the information to be released. Some submissions received requested that the public interest test be defined. However, the absence of a definition is by design and not by neglect. Public interest tests are a feature of a number of areas of law - for example defamation law, competition policy and industrial relations law. Contempt law is a good example of a public interest defence. For example, in *Hinch and Macquarie Broadcasting Holdings Limited v The Attorney-General for the State of Victoria*, in a case involving well known broadcaster Derryn Hinch, it was necessary for the High Court to balance the public interest in the discussion of public affairs with the public interest in ensuring that a person received a fair trial. The courts and legislatures have been careful not to enter into attempts to define what is meant by 'the public interest' because the concept, by necessity, will be different in particular contexts and at particular times.*

81. The relevant Object in the Act that promotes transparency and openness is considered at paragraph 16 and a number of public interest factors raised by the parties both for and against release of the documents have already been considered in this decision. I do not intend to reiterate in detail all earlier discussions but I confirm that I have taken into account all submissions on public interest considerations for and against disclosure.
82. In this case, the fact that Foundation 51 Pty Ltd no longer exists is a significant factor in my decision-making generally and particularly where section 57 is concerned. It differentiates this case from others where business undertakings may have current and legitimate business interest to protect.
83. In favour of disclosure, I take particular note of the reality that releasing the documents sought is highly unlikely to expose the undertaking unreasonably to disadvantage. Further, after reviewing the content of the documents, I do not consider that there are privacy considerations regarding individuals mentioned in those documents that need to be considered.
84. I have considered all submissions and the comments made by the Delegate in her Prima Facie Decision for and against release. In favour of release, I also take particular note of the Complainant's submissions<sup>33</sup> that:

*-Public interest considerations in favour of disclosure outweigh considerations of competitive disadvantage. The public's right to know about the operation of our democracy and its vital institutions – such as the Northern Territory Electoral Commission and the Australian Electoral Commission - is consistent with the Information Act and should be given very strong weight in deciding whether the subject documentation above should be released.*

*-Release of the relevant government held information is consistent with the Objects of the Act set out in section 3 and the general principles of accountability enumerated in Section 10.*

*-Public interest considerations in favour of release of the subject documents also include serious community concern about the operations of Foundation 51 and protracted and substantial media coverage about the probity and modus operandi of the Foundation. This media coverage is on the public record but samples could be provided if they will assist your deliberations. We say that in this particular case, there are strong public interest considerations in favour of disclosure that outweigh those against disclosure.....we say there are compelling public interest considerations in relation to the transparency of our NT democracy, the operations of its institutions and compliance with disclosure laws which substantially outweigh considerations of competitive disadvantage – should they exist in this case.*

85. The fact that specific issues have at times captured the interest of the public or the politicians does not automatically mean that there are legitimate reasons supporting their disclosure through Freedom of Information. As has been said many times, 'of interest to the public' does not always equate to 'the public interest.' However, I consider that there is a significant public interest in transparency on issues regarding political donations and the relationship between political parties and associated entities. It is also vital that public confidence is maintained in the process of *Electoral Act* investigations and in the democratic process generally. These issues are of current public interest not only in the NT but in jurisdictions across Australia, including at the Federal level. The fact that there is a public interest in informed political debate was recognised by the High Court in *Lange v ABC* (1997) 189 CLR 520:

*Accordingly, this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society*



*are advanced by discussion – the giving and receiving of information – about government and political matters.*

Open disclosure of relevant material to allow scrutiny and informed debate is a major consideration that underpins one of the principal Objects of the Act.

86. However, the First Respondent argues that the public interest factors opposing disclosure outweigh those supporting it. I note his submissions that have been considered in detail above. I also note that the Delegate in her prima facie decision raised a number of relevant issues that do not support disclosure as follows:

- *challenges to the First Respondent in obtaining relevant evidence in future investigations of breaches of the Electoral Act if this information is disclosed;*
- *the Second Respondent has filed declarations of donations as though it were an associated entity, and hence has substantially mitigated any breach that may have occurred;*
- *the principle of freedom of political association and the extent to which this might be infringed through public scrutiny of the internal documents of Foundation 51;*
- *classification in the Information Act itself of information about a person's political opinions, philosophical beliefs, and membership of a political association as being sensitive information which warrants greater protection under the Information Privacy Principles;*
- *the extent to which there was an understanding by the persons involved in Foundation 51, a private organisation, that their activities and discussions would be kept confidential or private.*

87. The First Respondent submits that the public now has access to the information contained in the returns published on its website and that the Complainant and in turn the public generally need know no more than this. He submits that the further documents sought will add little to their understanding of the issues. I acknowledge some truth in the First Respondent's submission. Further, there is already a large amount of information regarding the relationship between Foundation 51 and the CLP both in the Complainant's possession and in the public arena to inform proper debate. This information has come from a number of sources including the documents already released by the First Respondent to the Complainant through Freedom of Information.

88. However, there are valid opposing arguments in support of release. Representatives for the deregistered company publicly denied and continued to deny the relationship between Foundation 51 Pty Ltd and the CLP. That denial and failure to lodge the necessary 'related entity' returns required by the *Electoral Act* made an investigation by the First Respondent

necessary, which in turn culminated in the matter being referred to the police for a criminal investigation. This in turn resulted in a referral of the matter by Police to the DPP who ultimately decided not to prosecute on public interest grounds, noting that the required 'related entity' returns had by that stage been lodged with the First Respondent.

89. It should be noted that the decision of the DPP not to prosecute in the public interest and my decision on whether or not to release documents in the public interest are two separate and distinct decisions necessitating consideration of different issues.

90. The 'media story' regarding Foundation 51 has not only caught the public's attention but it has raised legitimate questions of public interest. The need for informed debate around this issue in the NT will require participants to have some confidence that they have the full story. In circumstances where the release of a document is unlikely to impact upon the business of the undertaking in question, I consider the need for transparency favours release.

91. In summary, I have considered the requirements of section 57 and section 50 of the Act and have assessed the evidence and submissions made by both parties. I have decided that the factors for disclosure in the public interest outweigh the factors against disclosure.

## **Decision**

Under section 114 of the *Information Act*, I set aside the First Respondent's decision dated 3 February 2016 refusing the Complainant access to Documents **A** to **U** on the basis that the documents are not exempt under section 57 of the Act. The First Respondent must now give the Applicant a copy of the documents.

A handwritten signature in blue ink, appearing to be 'B. Monaghan', written over a horizontal dotted line.

Brenda Monaghan  
**Information Commissioner**  
29 August 2017