

**PRELIMINARY DECISION**

**ON STANDING**

<b>File No.</b>	F20/15-16
<b>Complainant</b>	Charlie Phillips
<b>Respondent</b>	Northern Territory Electoral Commission
<b>Second Respondent</b>	Foundation 51 (represented by Graeme Lewis)
<b>Date of Decision</b>	7 July 2017
<b>Hearing Number</b>	4 of 2017
<b>Type of Complaint</b>	Freedom of Information Complaint section 103 of the <i>Information Act</i>
<b>Decision Maker</b>	Brenda Monaghan

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## Decision on Preliminary Issue of Standing

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 in question were held by the First Respondent as a result of his investigation into alleged breaches of the *Electoral Act* by Foundation 51 Pty Ltd. 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.
2. 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 *Information Act* (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.
3. The focus of this preliminary decision is whether Foundation 51 Pty Ltd or 'the Foundation 51 undertaking' (the current Second Respondent) or Mr Graeme Lewis should be accepted as valid respondents whose submissions and evidence should be considered by me when making a final decision on the release of documents to the Complainant.

## Historical Summary

4. A brief historical summary is a necessary background to a consideration of the preliminary issue. Foundation 51 Pty Ltd ACN 135 369 569 was voluntarily deregistered on 13 May 2015. At the time of deregistration, Mr Graeme Lewis was the sole director and shareholder of the company.
5. On 22 October 2015, an application was made by the Complainant to the First Respondent under section 18 of the *Information Act* (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 came from many sources including correspondence to and from the First Respondent's office, media releases, legal advices and documents received from the files of Foundation 51 Pty Ltd during the investigation by the First Respondent of alleged breaches of the *Electoral Act* by the company. The First Respondent assessed which documents should be released to the Complainant on public interest grounds and whether such release should be in full or in part.

7. In making a decision regarding access, section 30 of the *Information Act* (the Act) requires a public sector organisation to consult with third parties whom they consider might be affected by the intended release of information relating to them. As a result, in late 2015, the First Respondent consulted with Maleys, the lawyers for the former Foundation 51 Pty Ltd, and other entities and persons before releasing to the Complainant 972 pages in full and 15 pages in part. The First Respondent refused to release other documents however on the basis that they were exempt under Part 4 Division 2 and Division 3 of the Act.
8. Between 30 March 2016 and 1 April 2016, a section 103 complaint to the Information Commissioner (the Commissioner) was received from the Complainant via email in 4 parts relating to different classifications of documents. The 4 complaints were accepted by a delegate of the Information Commissioner (the Delegate) under s106 of the Act as a single complaint about the First Respondent's decision to refuse the Complainant access to the documents. The 4 categories of complaint referred to above were retained by the Delegate however as a means of identifying the various sources and types of documents being considered as part of the investigation under the Act.
9. All relevant documents were sought by the Delegate from the First Respondent to enable the complaint to be investigated in accordance with s110 of the Act. The documents in Complaint 1 are no longer sought by the Complainant. The specific documents that relate to this Preliminary Decision on standing are identified in Complaint 2 and Complaint 3.
10. Complaint 2 seeks certain documents originating from the files of Foundation 51 Pty Ltd and received by the First Respondent pursuant to a Section 217 Notice issued under the Electoral Act. These documents were presentations or reports of research projects undertaken by or on behalf of Foundation 51 Pty Ltd on a variety of topics as follows:

File	Folios	Description
Section 217 Notice	1-83	Presentation - NT Education Research 2013: Kormilda College Interim Report
	84-97	Presentation – Australia has a role to play in delivering resources, food and energy at 'peak humanity'
	98-125	F51 Research Projects - Australian Defence Force – <i>The makeup and change of Defence in the Territory as a result of the White Paper</i> Social Media – <i>Its changing nature and opportunities for business</i>
	126-137	F51 Research Projects – 10 Years of Crime in the Territory – <i>How it has changed and what it costs business and the community</i> Demographics – <i>Darwin and Palmerston 1996-2006</i>

	138-162	F51 May 2010 – Enterprise 2.0 Guide – <i>How blogs, instant messaging and wikis can be applied to business today</i> Membership Details – <i>How to become a Member of Foundation 51</i> Biographies: Guest Speakers – <i>John Winston Howard and Andrew Forrest</i> Foundation 51 Update – <i>A report on the Foundation's activities and forthcoming projects</i>
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11. During the investigation by the Delegate, further documents (4 DVDs) were identified that were also sought by the Complainant as follows:

- a. DVD titled: *Foundation 51 26 March 2012-Hon Ian McFarlane MP (Shadow Resources Minister) and Andrew N Liveris (Dow Chemicals)*
- b. DVD titled: *Foundation 51-Presenters John Howard, Andrew Forrest, Terry Mills*
- c. DVD titled: *Foundation 51 Luncheon Event August 14<sup>th</sup>, Guest Speaker Mark Textor*
- d. DVD titled: *Luncheon Event 12 June 2009, Research Papers –Social Marketing & the ADF, Guest Speaker- the Hon Peter Costello MP.*

12. *Complaint 3* seeks various financial statements relating to the Second Respondent as follows:

File	Folios	Description
Section 217 Notice	173-275	Bank Statements – Foundation 51 Pty Ltd – 22 June 2010 to 7 July 2014
	276-297	Ledger Entries - Foundation 51 Pty Ltd – Year 2010 to 7 July 2014
	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)
	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
	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)
	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)

13. Submissions were received from the First Respondent on 26 May 2016 raising as a preliminary issue the standing of Foundation 51 Pty Ltd as a third party to the proceedings on the basis that it had been voluntarily deregistered on 13 May 2015 and no longer existed. The Complainant also challenged the ability of Mr Graeme Lewis, a former director and shareholder of the deregistered company, to continue to speak on its behalf in this matter. The Delegate obtained submissions from the parties on the question of the standing of Foundation 51 Pty Ltd as a third party.
14. On 20 June 2016, the Delegate referred to section 30(2)(e) of the Act and made a decision that 'the Foundation 51 undertaking' was a respondent to the proceedings and that Mr Lewis spoke on its behalf. At the same time, the Delegate rejected the view that the deregistered Foundation 51 Pty Ltd or Mr Graeme Lewis personally had standing as a respondent.
15. The investigation proceeded with submissions received on substantive issues from Mr Lewis on behalf of 'the Foundation 51 undertaking'. 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.
16. 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.
17. On 29 August 2016, I issued formal Directions to progress the matter to hearing. Those directions included a timeline for the receipt of submissions and sworn documentary evidence. Parties were also given an opportunity to request a formal hearing in person as opposed to a 'hearing on the papers'. No submissions were received requesting a hearing in person. Finally, the parties were directed to provide details of any matters that required consideration by the Hearing Commissioner as a preliminary issue.
18. On 29 September 2016, a statutory declaration was received from Graeme Lewis on behalf of both Foundation 51 and also on his own behalf. On the same date, submissions and sworn evidence were received from the First Respondent. On 24 October 2016, submissions and sworn evidence were received from the Complainant who again challenged the standing of Foundation 51 to be a party to these proceedings and submitted that this should remain a preliminary issue to be considered by the Hearing Commissioner.

19. The timeframe for submissions in reply from Foundation 51 was extended to enable a decision to be made by me on another preliminary issue (delivered on 6 January 2017) and to give Mr Lewis further time to make more detailed submissions on the question of the standing of Foundation 51 as a party, which I confirmed to the parties was still a live issue before me. On 4 February 2017, Mr Lewis provided some further submissions on both the question of standing and on substantive matters.

## Consideration of Issues

20. The Delegate made a decision on 20 June 2016 to accept 'the Foundation 51 undertaking' as a third party respondent under section 30(7) of the Act, and to allow Mr Lewis to speak for the undertaking. She dismissed Mr Lewis' alternative claim that the deregistered company was a respondent or that Mr Lewis was 'a person aggrieved' who should have standing in his own right in this matter.

### *Should the Delegate's Decision on Standing be Reconsidered?*

21. Section 121(1) of the Act provides that subject to Division 2 (Procedure for Hearings), the Commissioner may determine the procedures for conducting a hearing and may give directions about those procedures. After considering the hearing brief, including the *prima facie* decision, and the later submissions and sworn evidence received from the parties, I am of the view that the question of standing and identity of the Second Respondent needs to be reconsidered. This is particularly so as this issue has again been raised as an issue by the Complainant and should rightly be addressed<sup>1</sup>. As a result, the preliminary issue to be considered in this decision is whether Foundation 51 Pty Ltd, 'the Foundation 51 undertaking' and/or Mr Graeme Lewis personally should have standing as a respondent in these proceedings.
22. On occasion, the standing of a 'person aggrieved' by an administrative decision has been considered prior to the decision maker viewing any of the evidence in dispute.<sup>2</sup> On other occasions, the question has been considered at the same time as the merits of the case.<sup>3</sup> In this matter, it was necessary for me to consider the evidence, including the documents in dispute, to decide whether Mr Lewis might rightly claim that release of any or all of the information would be an unreasonable interference with his privacy under section 56 of the Act. Following this consideration, I am now able to make a decision on standing as a preliminary issue in the hearing before proceeding in a separate decision to consider the substantive issues.

### *Power to Review Delegate's decision*

23. The Delegate was the recipient of a formal delegation of powers by the Commissioner in accordance with section 89(1) of the Act. The delegation included the power of investigation under section 110 of the Act and the powers in section 87 '*that are necessary and convenient for the performance or his or her functions under this Act or any other Act*'.

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<sup>1</sup> *Tasmanian Wilderness Society Inc v Fraser* (1982) 56 AU R 763, 766; *R v Public Vehicles Licensing Appeal Tribunal of Tasmania, ex parte Australian National Airlines Pty Ltd* (1964) 113 CLR 207

<sup>2</sup> *Executive Council of Australian Jewry v Olga Scully* (1997) HREOCA 59

<sup>3</sup> *Tooheys Ltd v Minister for Business and Corporate Affairs* 36 ALR 64 at 79-80

24. The primary role of the Delegate in this matter was to investigate the complaint and decide whether there was sufficient *prima facie* evidence to substantiate it in accordance with section 110(3) of the Act. As the statutory decision maker, the Delegate considered it necessary to also make a decision on the standing of Foundation 51 Pty Ltd and Mr Lewis in these proceedings.
25. In my role as the Commissioner, I am able to reconsider a decision made by the Delegate. The *Interpretation Act* provides guidance on the delegation issue as follows:
- a. S46A(3) of the *Interpretation Act* states that '*if a power or function is delegated under an Act, the power or function is, when exercised or performed by the delegate, to be taken to be exercised or performed by the person who delegated it.*'
  - b. S46A(4) states that '*the delegation of the power or function under an Act does not prevent the exercise of the power or performance of the function by the person who delegated it.*'
  - c. S43 of the *Interpretation Act* states that '*Where an Act confers a power to take an action or make, grant or issue a statutory instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to repeal, rescind, revoke, amend or vary any such action or instrument.*
  - d. S17 of the *Interpretation Act* defines statutory instrument as '*an instrument of a legislative or administrative character.*'
26. The application of the above provisions in the *Interpretation Act* to this circumstance of delegation confirms my ability to reconsider the Delegate's decision and to *repeal, rescind, revoke, amend or vary* it as if it were my own decision. Despite the fact that Foundation 51 Pty Ltd or the 'Foundation 51 undertaking' have been considered a valid third party respondent to date, there are sound reasons in this case for reconsidering this issue, particularly noting the passage of time since the Delegate's decision was made and the impact that may have on matters. A decision as to the standing of those persons who are parties to a proceeding is an issue of fundamental importance to a fair hearing process. Where the issue is in dispute, what basis could there be for retaining someone as a respondent once it becomes clear that they should not be? To continue to allow them to play a significant role in influencing the final decision is a factor that that should be considered by the Hearing Commissioner, either as a preliminary issue or as part of the hearing process.

#### *Submissions Made by the Parties on Standing.*

27. Both the Complainant<sup>4</sup> and the Second Respondent<sup>5</sup> made submissions on the question of standing. The First Respondent submitted that it was necessary for the

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<sup>4</sup> Submissions were most recently made on standing by the Complainant in a statutory declaration dated 20 October 2016

<sup>5</sup> Submissions were made on standing by the Second Respondent dated 29 May 2016, statutory declaration dated 29 September 2016 and email dated 13 November 2016



Commissioner to consider the validity of standing of the Second Respondent in this matter but elected not to make submissions on the issue of standing itself.

28. Submissions from Mr Lewis regarding the status of Foundation 51 Pty Ltd and/or 'the Foundation 51 undertaking' were as follows:

- a. The status 'deregistered' under Corporations Law in no way diminishes the right of the company or its officers in relation to the exemptions provided in the *Information Act*.
- b. Whilst the company may be currently deregistered under Australian Securities and Investment Commission (ASIC) rules, it can and almost certainly will be reinstated (ASIC information Sheet 4) once the commercial business model can be revisited, and legal matters including certain defamation cases are concluded.
- c. 'Standing' is undeniable. It revolves around the status of the company Foundation 51 Pty Ltd, and Mr Lewis' position as a Director of the company. In both issues, the property in the papers is either with the company, or failing that probability, with Mr Lewis as the director.
- d. The company remains deregistered, and there is no question that this status will remain until the company is in a position to resume its commercial activities. Its business plan remains valid, and its activities remain such that clients would again commission the company in market and other commercial research when or if the company is reinstated.
- e. ASIC have indicated to Mr Lewis that reinstatement can occur simply when certain fees are paid, but it is a certain fact that the release of commercial-in-confidence material relating to client affairs will absolutely and finally destroy any opportunity for the company, and Mr Lewis as a Director, to resume the former business activities. This would clearly be a grossly unfair and unintended consequence of the release of the papers, and such release would unquestionably cause significant financial damage both to the company, its Director and to clients of the company.
- f. Foundation 51 Pty Ltd formerly had a very clear competitive position in the Darwin business community and this will be resumed in due course. However, this intended reinstatement of the company would be seriously and absolutely unreasonably disadvantaged by the release of any or all documents of a commercial nature, and any disclosure beyond that already completed in accordance with the *Electoral Act* should not occur.

29. Submissions from Mr Lewis regarding his status as a former director and shareholder and 'a person aggrieved' were as follows:

- a. In this entire matter, Mr Lewis is a person directly involved in the affairs of the company and a person who would be seriously aggrieved by the release of these sensitive commercial documents to the complainant, and by extension to the media and the public.

- b. The company's previous relationship and Mr Lewis' current personal relationship with the many clients of the company mandated that Mr Lewis act prudently and confidentially in all commercial and policy matters of the company and as a Director, Mr Lewis submits that the intellectual property contained in many, if not all of the documents in person vests in him personally, since by definition a company cannot 'own' such property.
  - c. In an email dated 13 November 2016, Mr Lewis stated 'As to the matter of standing, I repeat that that matter revolves around the status of the company Foundation 51 Pty Ltd, and my position as a Director of the company. In both issues, the property in the papers is either with the company, or failing that probability, with me as the director, and "standing" is undeniable.'
  - d. Disclosure of the documents would be an unreasonable interference with Mr Lewis' privacy.
30. Submissions from the Complainant regarding the status of Foundation 51 Pty Ltd and/or 'the Foundation 51 undertaking' were as follows:
- a. When the Electoral Commissioner made his decision not to release the relevant government information, Foundation 51 had been deregistered and remains the same.
  - b. How can a deregistered entity that no longer operates be exposed to unreasonable disadvantage within the meaning of the Act?
  - c. Paragraph 6 of Mr Lewis' statutory declaration also states that "Foundation 51 **formerly** had a very competitive position...." (the Complainant's emphasis). Again this begs the question posed above.
  - d. 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.
31. Submissions from the Complainant regarding the status of Mr Lewis personally were as follows:
- a. With respect to Mr Lewis' statement in paragraph 11 of his statutory declaration that disclosures 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 makes reference to the information not interfering with the privacy of any individual.
  - b. This could be tested again by perusal of each separate item of government held information subject to the relevant provisions of the Act.

*Does Foundation 51 Pty Ltd have standing?*

32. The first submission of Mr Lewis is that he speaks on behalf of Foundation 51 Pty Ltd ACN 135 369 569 (the company). The company was voluntarily deregistered on 13 May 2015, well before this FOI application was made. Under s601AD of the *Corporations Act 2001 (Cth)*, a company ceases to exist on deregistration and at law cannot be a respondent to proceedings under the Act as if it were still in existence.
33. Mr Lewis' submission that the status 'deregistered' under the Corporations Law in no way diminishes the right of the company or its officers in relation to the exemptions provided in the *Information Act* is simply not correct. Once a company is deregistered, any former office holders lose their right to be involved in litigation on behalf of the company or to purport to speak for the company. For these reasons, Mr Lewis in his role as a former shareholder and director in the company cannot speak to protect the company's interests in this matter as if the company still existed or as if he still controlled its assets or its decision-making.
34. I do not accept Mr Lewis' submission that property rights in the papers remains either with the company or with Mr Lewis as the director. Once deregistered, all the company's property (other than any property held by the company on trust) vests in ASIC which has all the powers of an owner over property on the same property rights that the company itself held (s601AD(2),(3)&(4) of the *Corporations Act 2001 (Cth)*).
35. Noting their interest, I contacted ASIC seeking clarification as to whether they wished to be consulted as a third party and confirmed my query in writing on 26 May 2017 as follows:

**From:** Brenda Monaghan  
**Sent:** Wednesday, 26 April 2017 2:56 PM  
**To:** property.law@asic.gov.au  
**Subject:** Request for advice from NT Information Commissioner - Attention Denise Kelly

Dear Denise,

Thankyou for speaking to me earlier this week. I am currently considering a Freedom of Information complaint under the Information Act (NT) from a person seeking financial and other documents from a proprietary company (Foundation 51 Pty Ltd ACN 135 369 569) that was voluntarily deregistered on 13 May 2015. There appears to be no current application by any former company officer to seek reinstatement of the company but a former director of the company has objected to the release of company documents and has sought to speak on behalf of the de-registered company.

At law, I am aware that the company no longer exists as a legal entity and that the former director cannot speak for the company in legal proceedings. I note however that all relevant property (including financial and business records) has vested in ASIC although such property is not physically held by ASIC. In these circumstances, could you please advise whether ASIC takes any interest in this matter. The disputed company documents are 'government information' in the possession of the Electoral Commissioner (NT) as a result of an investigation he conducted into alleged breaches by the company of the Electoral Act. As such, they are subject to the FOI process.

I am assuming that ASIC has no interest in this matter and leaves it to past officers of the company or persons aggrieved to seek reinstatement of the company if they wish to be

heard. I write however to ensure that my assumption is correct. If not, then ASIC can seek to be joined as a third party under s30 of the Act (below) or as a 'person aggrieved' under s103 if they want to be heard. If you have an interest, then I am required to consult with you and seek your views before deciding on the release of any documents to the Complainant.

The third party provisions in the Information Act state:

**INFORMATION ACT - SECT 30**  
**Information about third parties**

- (1) *For this section, information is about a third party if disclosure of the information might:*
  - (a) *prejudice inter-governmental relations between an Australian body politic and a body politic overseas or between 2 or more bodies politic in Australia or in the Territory; or*
  - (b) *be an interference with a person's privacy; or*
  - (c) *disclose information about an Aboriginal sacred site or Aboriginal tradition; or*
  - (d) *disclose information obtained by a public sector organisation from a business, commercial or financial undertaking that is:*
    - (i) *a trade secret; or*
    - (ii) *other information of a business, commercial or financial nature and the disclosure is likely to expose the undertaking unreasonably to disadvantage.*
- (2) *The public sector organisation must not decide to provide access to information about a third party unless the organisation has sought the views of the third party, the third party being:*
  - (a) *if the disclosure would prejudice inter-governmental relations between 2 or more bodies politic – each of those bodies politic; or*
  - (b) *if the disclosure would be an interference with a person's privacy:*
    - (i) *the person whose privacy would be interfered with; or*
    - (ii) *if that person is a child, has a disability or is deceased – a person who under section 155 may make a complaint on that person's behalf; or*
  - (c) *if information about an Aboriginal sacred site would be disclosed – the Aboriginal custodians of the site; or*
  - (d) *if information about Aboriginal tradition would be disclosed – the community or group to whom the tradition belongs; or*
  - (e) *if information obtained from a business, commercial or financial undertaking would be disclosed – that undertaking.*
- (3) *The public sector organisation may decide to provide access to the information even though:*
  - (a) *the third party's views were unable to be obtained after all reasonable attempts were made to do so; or*
  - (b) *the third party did not respond to a request for his or her views within 30 days after receiving the request; or*
  - (c) *the third party expressed the view that the organisation should not provide access to the information.*
- (4) *The public sector organisation must notify the third party in writing of its decision about the application.*
- (5) *The notices of decision under subsection (4) and section 20 are to include a statement to the effect that access will be provided:*
  - (a) *30 days after the third party receives the notice of decision; or*

(b) if within that 30-day period the third party makes a complaint to the Commissioner about the decision – subject to the Commissioner's determination of the complaint, after that determination is made.

(6) If the third party is aggrieved by the decision of the public sector organisation to provide access to the information, the third party may make a complaint to the Commissioner about the decision within the 30-day period mentioned in subsection (5) and Parts 7 and 7A apply (with the necessary changes) as if the third party had made a complaint under section 103 and the organisation and the applicant were the respondents.

(7) If the public sector organisation refuses to provide access to the information, for a complaint made by the applicant under section 103 in connection with that refusal, Parts 7 and 7A apply (with the necessary changes) as if the organisation and the third party were the respondents.

(8) All notices that the Commissioner is required to give to the complainant under Part 7 as applied by subsection (6) or (7) must also be given to the respondents.

The matter is now at hearing stage so I would very much appreciate your response at your earliest convenience.

Thankyou again for your assistance and feel free to ring me for any further information.

Regards

Brenda Monaghan

Commissioner, Information & Public Interest Disclosures

36. In response to my request for clarification, correspondence was received from ASIC dated 4 May 2017 confirming their position on these issues as follows:

Our Reference:  
15327/17



Dear Ms Monaghan

**FOUNDATION 51 PTY LTD ACN 135 369 569 (DEREGISTERED) (the company)  
Freedom of Information Hearing (the proceeding)**

I refer to your correspondence of 26 April 2017. ASIC understands a complaint has been made under the Information Act (NT) from a person seeking access to documents purportedly belonging to the company, currently in the possession of the Electoral Commissioner NT (the documents). You advised the documents fall within the category of "government information" and are subject to the FOI process.

**Effect of deregistration**

I confirm the company was deregistered on 13 May 2015. Generally, as a result of deregistration:

- a) all property the company held on trust at deregistration belongs to the Commonwealth

- b) all non-trust property the company owned at deregistration belongs to ASIC
- c) ASIC is the only party legally able to deal with the company's property.<sup>1</sup>

### **ASIC's position**

I also confirm that ASIC has no interest in this matter and does not wish to be joined as a third party.

ASIC has no direct knowledge of the company's affairs or the circumstances or background of this matter.

ASIC does not intend taking any steps on behalf of the company to assert, exercise, enforce or waive any rights the company may have regarding the release of the documents.

If the former officeholder wishes to assert an interest in the matter, then he must firstly reinstate the company. If ASIC reinstatement is not available then the former director of the company will need to obtain a court order for the company's reinstatement under s601AH(2) of the Act.<sup>2</sup>

1. There are exceptions e.g. secured parties are entitled (under their security) and Land Titles Registrars have some powers (under their State legislation), to deal with the company's property despite deregistration.
2. More information about company reinstatements can be found in ASIC's Regulatory Guide 83 and/or by searching 'company reinstatement' on ASIC's website – [www.asic.gov.au](http://www.asic.gov.au)

### **ASIC's policy regarding books and records of the company generally**

For completeness I advise that ASIC does not take possession of a deregistered company's books. Nor does it grant access to a deregistered company's books in another party's possession. This is because:

- a) while ASIC may be vested with a company's books due to deregistration, it has no specific knowledge of their existence and the circumstances surrounding their creation
- b) the documents may be the subject of legal professional privilege and it is not appropriate for ASIC – who is a stranger to the matter – to determine whether or not the nature of those documents is such as to attract the privilege
- c) it is ASIC's policy to neither assert nor waive privilege on behalf of deregistered companies (to the extent that privilege vests in ASIC)
- d) other remedies are available and more appropriate (e.g. service of a subpoena on the party in actual possession of the documents and/or reinstatement of a deregistered company).

Finally, ASIC does not object to parties seeking a court order that:

- e) the documents sought do not attract legal professional privilege
- f) the party in possession produce the documents to the applicant.

A copy of this letter may be provided to the any other parties involved in the matter so they are aware of ASIC's position.

ASIC has no further interest in the matter.

Yours sincerely

Denise Kelly

Analyst

Property Law Group

Tel: 07 3867 4889 / [Email: denise.kelly@asic.gov.au](mailto:denise.kelly@asic.gov.au)

37. The correspondence from ASIC confirms my view of the law that a deregistered company has no standing to become a party to an FOI complaint and a former director cannot purport to speak for such a company<sup>6</sup>.

*Does the 'Foundation 51 Undertaking' have standing?*

38. The next consideration is the one proposed by the Delegate in her decision dated 24 June 2016 that the wording of section 30 allows for an entity to be consulted that falls within the description of 'a business, commercial or financial undertaking.' The Delegate's reasoning was expressed as follows:

The *Information Act* contemplates a complaint process involving parties that are not technically legal persons. It dispenses with the *Interpretation Act* position that legal persons can include corporations and bodies politic and restricts the status to individuals. It also creates its own definitions of 'public sector organisation' and 'third parties'. It is not clear whether such entities have appeal rights to the Supreme Court under s129, which only refers to 'a person', but the Act contemplates in a general sense that such entities are parties during the complaint and hearing process.

Section 30(2) defines a number of different entities as third parties, including: (e) *if information obtained from a business, commercial or financial undertaking would be disclosed- that undertaking.*

No definition is provided in the Act of what an 'undertaking' might be, and there appears to be no common legal or community understanding of the term. It might be described as an 'enterprise' or 'project'. However, the wording of the section seems to indicate an intention to capture commercial endeavours regardless of their legal structure. The OAIC Guidelines in the Commonwealth's equivalent to the commercial-in-confidence exemption states that an '*undertaking need not be a legal person.*'

39. The Delegate noted that a query may arise over whether Foundation 51 as an undertaking currently exists. The Delegate stated that she was not sure; strictly speaking that its continuation was necessary for the purposes of standing, although she considered it would be pivotal to establishing relevant exemptions. The Delegate noted that there was no evidence provided that upon deregistering the company, Mr

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<sup>6</sup> A similar decision was reached by the Information Commissioner (WA) in *Re Post Newspaper Pty Ltd and Town of Cottesloe* [2013] WAIC mr27 at paragraph 17 where the Commissioner stated: *It subsequently came to my attention that another of the third party companies, information about whose business, professional, commercial or financial affairs appeared to be contained in the disputed documents, has been deregistered and, as a result, it is not possible to obtain information or receive submissions from that third party company in respect of this matter.*

Lewis continued to carry on the same enterprise (in a same or different name), hosting events, obtaining fees from members and conducting consultancy work.

40. The Delegate's understanding at the time of her preliminary decision on standing was that Foundation 51 had existed for a number of years, that it had been deregistered for only a year, that it was now in the process of seeking reinstatement and that Mr Lewis continued to have relationships with Foundations 51's clients that could result in future consultancy work of a similar nature. In these circumstances, the Delegate was willing to infer that Foundation 51 was an undertaking with enough present relevance to be a third party within the meaning of s30(2)(e) of the Act.

41. The Delegate went on to consider who should speak for the undertaking. She noted that Mr Lewis was the person who organised Foundation 51's activities, that he was always a director and shareholder and that he was the sole director and shareholder for some time prior to deregistration. News coverage of Foundation 51 featured his name and photograph. Mr Lewis stated that he was the person who speaks for Foundation 51, that he had taken steps to have the company reinstated and no one else was claiming to speak for the company. For these reasons, The Delegate formed the view that Mr Lewis was an individual that represents the undertaking that formerly conducted its affairs as Foundation 51 Pty Ltd.

42. Butterworths Concise Australian Legal Dictionary<sup>7</sup> defines *undertaking* as:

*1-A formal promise. For Example, a promise to a court to act or refrain from acting in a particular manner: or*

*2-A business.*

The general dictionary meanings of *undertaking* are generally broad in scope to cover both a current enterprise and a pledge, promise or guarantee to do something in the future.<sup>8</sup>

43. I have no evidence that Mr Lewis or anyone else is currently active in conducting any of the types of endeavours formerly undertaken by the company such as research or consultation, and in fact Mr Lewis' evidence would tend to suggest that this is not the case as he speaks more to future plans than the present. I have no evidence to find that there is any current venture or enterprise that could be considered a business, commercial or financial undertaking.

44. As regards an undertaking (such as a pledge, promise or guarantee) to do something in the future, the Delegate in her *prima facie* decision in June 2016 placed some reliance on the initial steps being taken by Mr Lewis at that time to enquire about the

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<sup>7</sup> Third Edition published 2004

<sup>8</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&qsn=&form=QBRE&sp=-1&pq=dictionary+free+online+undertaking&sc=0-34&sk=&cvid=9B2CD854575C41A681FF0726C5E01036&adlt=strict>



process for reinstatement of the company, together with his sworn evidence that this would occur. It gave her some confidence that Mr Lewis' statement that he was going to reinstate the company was more than a mere assertion.

45. One year on, there is no evidence before me of any further steps taken by Mr Lewis or anyone else to progress reinstatement of the company either through ASIC or through a court process or to commence a similar enterprise. Mr Lewis states that '*once the commercial business model can be revisited and certain legal matters including certain defamation cases are concluded, the company will almost certainly be reregistered*' but provides nothing more to give me any confidence that after two years post deregistration, this will in fact happen.
46. Taking note of such matters as the considerable lapse of time since deregistration with no attempt made to reinstate, the negative media regarding the relationship between the former Foundation 51 and the CLP and the fact that it was ultimately found to be a 'related entity' for the purposes of the *Electoral Act*, I do not have great confidence in the continued assertion by Mr Lewis that he still intends to apply for reinstatement of the company. To my mind, assertions alone are not evidence.<sup>9</sup> In these circumstances, I do not consider that there exists 'a business, commercial or financial undertaking' that has standing as a respondent in this matter and Mr Lewis as a former director does not have standing to speak for an undertaking that does not exist.

#### *Mr Lewis as a Person Aggrieved*

47. Section 103(1) of the Act enables 'a person aggrieved by a decision of a public sector organisation' to make a complaint to the Information Commissioner. Mr Lewis submits that he is a 'person aggrieved' under the Act. The definition of 'person aggrieved' has been widely interpreted in various proceedings to be broader than a person with a legal interest but not so broad that any member of the public can seek a legal review. In Tooheys Case<sup>10</sup>, Ellicot J of the Federal Court of Australia stated:

*The question whether an applicant is a person aggrieved is one of mixed law and fact and in many cases would best be determined at a final hearing when all the facts are before the court and the court has the benefit of a full argument on the matter. This is so in this case.*

*....The words "a person who is aggrieved" should not in my view be given a narrow construction. They should not, therefore, be confined to persons who can establish that they have a legal interest at stake in the making of the decision. It is unnecessary and undesirable to discuss the full import of the phrase. ....This doesn't mean that any member of the public can seek an order of review. I am satisfied however that it at least covers a person who can show a grievance which will be suffered as a result of*

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<sup>9</sup> In Tooheys case (supra at page 80), Ellicot J commented as follows when considering the question of standing of a 'person aggrieved': '.....Needless to say if I felt that its claim was frivolous or "colourable" (to use the description of Gibbs J. (as he then was) in Robinson's case (*Robinson v. Western Australian Museum* (1977) 138 C.L.R. 283 at 302) I could readily find that its grievance was no different to that which other members of the public have.

*the decision complained of beyond that which he or she has as an ordinary member of the public. In many cases that grievance will be shown because the decision directly affects his or her existing or future legal rights. In some cases however the effect may be less direct. It may affect him or her in the conduct of a business or may, as I think is the case here, affect his or her rights against third parties (cf Robinson v. Western Australian Museum (1977) 138 C.L.R. 283).*

48. The simple fact that Mr Lewis is a former director and shareholder of the company, (and at the end, the sole director and shareholder) is not sufficient for me to consider him a 'person aggrieved' such that he should have standing as a respondent in this matter. He must show that his interests are likely to be prejudicially affected by release of the documents to the Complainant.
49. Mr Lewis submits that releasing the documents in question to the Complainant will be an interference with his privacy. If standing is granted, section 56(1)(a) of the Act provides that information may be exempt under section 50 (the public interest test) if disclosure of the information would be an unreasonable interference with a person's privacy. The definition of 'Privacy' in section 4 of the Act 'means privacy with respect to personal information'. 'Personal Information' is defined in section 4 as 'government information from which a person's identity is apparent or is reasonably able to be ascertained.'
50. In order to decide whether the release of various documents might cause an interference with Mr Lewis' privacy such that he should be granted standing, I have viewed the documents that are sought by the Complainant in this FOI application. Apart from the documents contained in the Schedule titled *Complaint 4*<sup>11</sup>, most of the disputed documents were received from the former Foundation 51 Pty Ltd during the investigation undertaken by the First Respondent. They all relate to company business.
51. A number are financial documents such as financial statements, bank account statements and ledger entries. Only one of these documents contains personal information about Mr Lewis and that is a Director's declaration for the 2011 Financial Statement for the company which is signed by him. If this document is ultimately released, the signature may be redacted by me as a general identity fraud prevention measure but I do not consider that a release of this company document which includes Mr Lewis' name in his role as a director could be seen as an interference with his privacy. Further, he would have no basis to argue a section 56(1)(a) exemption that disclosure in these circumstances would be an unreasonable interference with his privacy.
52. There are other documents in dispute that identify Mr Lewis. They are contained in video footage of Mr Lewis contained in the following records:
- a. DVD titled: *Foundation 51 26 March 2012-Hon Ian McFarlane MP (Shadow Resources Minister) and Andrew N Liveris (Dow Chemicals)*

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<sup>11</sup> Complaint 4: concerned the involvement of Elizabeth 'Libby' Gladwin in the First Respondent's investigation. Refer page 4 of this decision.

- b. DVD titled: *Foundation 51-Presenters John Howard, Andrew Forrest, Terry Mills*
- c. DVD titled: *Foundation 51 Luncheon Event August 14<sup>th</sup>, Guest Speaker Mark Textor*
- d. DVD titled: *Luncheon Event 12 June 2009, Research Papers –Social Marketing & the ADF, Guest Speaker- the Hon Peter Costello MP.*

53. In the footage, Mr Lewis is the facilitator at various Foundation 51 events where he introduces various speakers and makes general comment about Foundation 51. Mr Lewis is clearly identifiable in the footage and these images and audio fall within the definition of 'personal information' in Section 4 of the Act. I do not consider however that Mr Lewis can argue an interference with his privacy if ultimately these DVDs are released. Mr Lewis was speaking at these events as the director/ public officer for Foundation 51 Pty Ltd rather than in any personal capacity. He disclosed no personal or sensitive information about himself. The taped events were by invitation but some were attended by large numbers of members and supporters of Foundation 51. The events were video-taped and the DVDs were available for purchase, presumably to members and supporters.
54. Mr Lewis was a well-known spokesperson for the former Foundation 51 Pty Ltd and his name was often publicly linked to the company in the media. I can see nothing in this footage giving rise to a conclusion that to provide copies to the Complainant would interfere with Mr Lewis' privacy such that he should be considered a 'person aggrieved' with standing to argue a section 56(1)(a) exemption. This does not mean that I intend to release these documents as that decision must be made taking into account the submissions of the First Respondent for refusing their release on public interest grounds. The current question is whether Mr Lewis has standing as an individual on privacy grounds and I think not.
55. Mr Lewis put forward a further submission that he personally owns the intellectual property in the documents in question. S106AD of the *Corporations Act* states that ASIC owns any property owned by the company at the time of deregistration. Mr Lewis has no actual rights to any intellectual property that may once have belonged to Foundation 51 Pty Ltd. Had the company been successfully reinstated, his rights as a shareholder would have meant that such a claim was possible but not in the present circumstances.
56. Mr Lewis submits that he is a 'person aggrieved' on the basis that his personal relationships with many clients of the company required that he act prudently and confidentially in all commercial and policy matters and that the release of these sensitive commercial documents would have a serious impact upon him. There is no evidence provided as to how and why these relationships with various persons will be impacted upon if the disputed documents are released and I am not persuaded on the evidence that they will be. It is difficult to place much weight on this submission to allow Mr Lewis standing as an individual when the actions he took that might be disclosed in some of the documents were the actions of a company officer and the corporate events he facilitated were not convened to discuss highly confidential matters but to provide research and guest speakers of interest to Foundation 51 members and supporters. After inspecting the disputed documents, it is my view that any reputational

damage caused to Mr Lewis will not be caused by their release but perhaps by other factors such as the negative media coverage about Foundation 51 that has already occurred. Once again, this comment should not be taken as an intention to release the disputed documents but to explain my finding that I do not consider that Mr Lewis has standing as an individual and a 'person aggrieved' in this particular circumstance.

### **Decision on Standing**

57. On the evidence before me, none of the following are found to have standing as respondents in this matter:

- a) Foundation 51 Pty Ltd;
- b) 'the Foundation 51 Undertaking' or
- c) Graeme Lewis as an individual.

"The Foundation 51 undertaking' is removed as a party to the proceedings.

58. The hearing between the Complainant and the First Respondent will proceed as a hearing on the papers to consider the substantive issue i.e. a review of the decision of the First Respondent to refuse release of the specified documents to the Complainant. A decision on these matters is expected to be released in the near future.