

Decision and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/25/80032
Applicant:	'DL'
Respondent:	Chief Minister, Treasury and Economic Development Directorate
Participant:	Australian Carriage Driving Society Inc.
Respondent reference:	CMTEDDFOI 2025-081
Date:	18 July 2025
Decision reference:	[2025] ACTOFOI 8
Catchwords:	Freedom of Information Act 2016 – deciding access – whether information is contrary to the public interest information – promote open discussion of public affairs and enhance the government’s accountability – reveal the reason for a government decision and any background or contextual information that informed the decision – prejudice trade secrets, business affairs or research of an agency or person – prejudice an agency’s ability to obtain confidential information.

Decision

1. For the purpose of s 82 of the *Freedom of Information Act 2016* (FOI Act), I am a delegate of the ACT Ombudsman.

2. The applicant applied for access to correspondence between Access Canberra¹ and the Australian Carriage Driving Society Incorporated (**ACDS**) between 12 January 2024 and 28 February 2025 relating to complaints made by the applicant.
3. The applicant applied for review of the decision made by the Chief Minister, Treasury and Economic Development Directorate (**CMTEDD**) to refuse access to an email and attached letter from Access Canberra to ACDS (document 3).
4. I have decided to **set aside and substitute** CMTEDD's decision under s 82(2)(c) of the FOI Act. I have decided to give access to document 3 because this information is, on balance, not contrary to the public interest information.

Background to Ombudsman review

5. On 28 February 2025, the applicant applied to CMTEDD for access to:

...all correspondence (email, letters and other records) sent by Access Canberra to the Australian Carriage Driving Society Inc. (ACDS) between 12 January 2024 and 28 February 2025. I also request a copies of all correspondence (email, letters and other records) sent by the Australian Carriage Driving Society Inc. (ACDS) to Access Canberra between 12 January 2024 and 28 February 2025. This information is directly relevant to complaints made by me to the Office of Fair Trading and Compliance...
6. On 27 March 2025, CMTEDD contacted the ACDS to consult with them on the disclosure of information of concern to the ACDS (3 documents in total).
7. On 4 March 2025, the ACDS objected to the release of document 3 stating the applicant and the ACDS have been in a dispute for almost 3 years and the ACDS were not provided with an opportunity to respond to the issues raised in the letter before it was issued by Access Canberra.

¹ Prior to Machinery of Government changes that took effect on 1 July 2025, Access Canberra was part of the Chief Minister, Treasury and Economic Development Directorate.

8. On 6 May 2025, CMTEDD decided to grant partial access to 2 documents (documents 1 and 2) and refuse access to one document (document 3).
9. On 7 May 2025, the applicant applied for Ombudsman review of CMTEDD's decision.
10. On 9 May 2025, the applicant confirmed they were only seeking review of CMTEDD's decision to refuse access to document 3, as they did not contest CMTEDD's decision to refuse access to personal information contained within documents 1 and 2.
11. On 17 June 2025, I provided my preliminary view to the parties in a draft consideration.
12. On 18 June 2025, the applicant accepted the draft consideration.
13. On 25 June 2025, CMTEDD confirmed they did not object to the release of document 3.
14. On 26 June 2025, the ACDS objected to the draft consideration.

Information at issue

15. The information at issue in this Ombudsman review is document 3, which is an email and attached letter from Access Canberra, on behalf of the Registrar-General, to the ACDS dated 27 February 2025.
16. Documents 1 and 2 are not within the scope of this review. The only information within these documents CMTEDD refused access to is the personal information of third parties, which the applicant has confirmed they are not seeking.
17. In making my decision, I had regard to:
 - the FOI access application dated 28 February 2025

- the ACDS submissions to CMTEDD dated 4 April 2025 and submissions to our Office dated 23 May 2025, 30 May 2025 and 26 June 2025
- the applicant's Ombudsman review application dated 7 May 2025
- CMTEDD's decision of 6 May 2025, FOI processing file and additional submissions dated 16 May 2025
- an unredacted copy of document 3
- the [FOI Act](#), particularly ss 7, 9, 16, 17, 35, 50, 72 and Schedule 2
- the Freedom of Information Guidelines (FOI Guidelines) made under s 66 of the FOI Act
- the [Associations Incorporation Act 1991 \(ACT\)](#) and the [Associations Incorporation Regulation 2023](#), and
- case law including:
 - *Re Mangan and The Treasury* [\[2005\] AATA 898](#), and
 - *Village 25 Pty Ltd, Downer EDI Works Pty Ltd and Chief Minister, Treasury and Economic Development Directorate* [\[2024\] ACTOFOI 13](#) (26 July 2024).

Relevant law

18. Section 7 of the FOI Act gives every person an enforceable right of access to government information. This right is subject to other provisions of the FOI Act, including grounds on which access may be refused.²
19. Contrary to the public interest information is defined in s 16 of the FOI Act as:
- information—
- (a) that is taken to be contrary to the public interest to disclose under schedule 1;
- or

² [Freedom of Information Act 2016 \(ACT\)](#) (FOI Act) s 35(1)(c).

(b) the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17.

20. The public interest test set out in s 17 of the FOI Act involves a process of balancing public interest factors favouring disclosure against public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
21. Section 35(1)(c) of the FOI Act provides an access application may be decided by refusing to give access to the information sought because the information being sought is contrary to the public interest information.
22. Section 50 of the FOI Act applies if an access application is made for government information in a record containing 'contrary to the public interest information' and it is practicable to give access to a copy of the record from which contrary to the public interest information has been deleted.
23. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.
24. Section 72 of the FOI Act provides in an Ombudsman review, a person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.

The submissions of the parties

25. In the decision notice, CMTEDD stated:

I consider that release of the information contained in these documents may reasonably be expected to provide insight about decisions and processes put in place when dealing with the public.

Noting that the Act has an express pro-disclosure bias which reflects the importance of public access to government information for the proper working of a representative democracy, I must consider the above factors for disclosure against those factors favouring nondisclosure. However, in this case I do give significant weight to the factors for disclosure...

Schedule 2 section 2.2(a)(xi) allows for government information to be withheld from release if disclosure of the information could reasonably be expected to prejudice the trade secrets, business affairs or research of an agency or person. The information withheld from release could reasonably be expected to unfairly prejudice the business affairs and trade secrets of a third party, along with unwanted commercial implications. I apply moderate weight to this factor.

The ACT Government frequently deals with private third parties daily, and as such these parties should not be adversely impacted by the operations of the FOI ACT. It is understood the information in question was obtained in confidence and release of this information could reasonably be expected to limit the ability for the Government to gain trust in future dealings with incorporated associations, who often have limited resources and expect the government to work fairly in their best interests. I apply significant weight to this factor. When combined with factor 2.2(a)(xi), and balanced against those factors for release, I consider this information should not be disclosed.

26. In submissions to the Office dated 16 May 2025 CMTEDD noted:

I note that having reviewed the decision letter, while an explanation of how Section 2.2 (a)(xii) applies was included, the paragraph did not specifically state the section it was referring to, this was an oversight. The document this factor applies to is an email and correspondence to the ACDS from Access Canberra on behalf of the Registrar-General relating to a function under *the Associations Incorporation Act 1991*.

Third party consultation informed that the outcome of this process is under dispute and that they provided other grounds to withhold the information at this time.

27. In the Ombudsman review application, the applicant said:

The original request for documents were made following the conclusion of a complaint made by myself to the Office of Fair Trading and Compliance against an association (the Australian Carriage Driving Society Inc.) who are incorporated in the ACT...The documents requested are directly relevant to the complaint that I made.

The Freedom of information request schedule provided to me by the Department (Attachment 3) identifies that the requested documents were refused release as they were exempted under Sch 2 s2.2(a)(xi) and s2.2 (a)(xii) of the act.

The Sch 2 s2.2 (a)(xi) should not apply in this instance given that the third party is a not-for-profit association and the materials held within the requested documents do not include information such as trade secrets and research of an agency or person given they are directly relevant to the complaints made by me. As a member of the association I already have access to the business affairs of the association (minutes, policies, records etc.) so there should be no restriction on releasing this information to me.

Given the context of the exempt material is a matter of compliance, I believe that it is prejudicial to withhold this information from members of an association incorporated in the ACT.

The notice of decision also does not provide an explanation as to the basis for refusing the release under s2.2 (a)(xii) - disclosure of the information could reasonably be expected to do any of the following: prejudice an agency's ability to obtain confidential information.

At a minimum, the officer should provide detail on how this is justified. Regardless, I do not believe there is any basis for exemption under s2.2(a)(xii) given the release of information does not prejudice the agency's ability to obtain confidential information into the future.

28. When consulted by CMTEDD during the processing of the application, the ACDS submitted:

The ACDS submits that pages 118-121 of the folder should not be provided to the party who has made the application for information...As way of background, the applicants for information and the ACDS have been in a dispute for almost 3 years...

The letter referred to in 2 above received from Canberra is not accurate and therefore should not be released until further clarification is provided.

Furthermore, the ACDS was not provided with natural justice as several of the matters dealt with in the letter were based on information provided by the applicants without Access Canberra either contacting the ACDS for comment or the ACDS being able to comment on the contents of the letter in draft form before it was sent to the ACDS, which is the normal process when findings are made against a corporation...

Therefore, the ACDS requests that the documents in 1 and 2 above not be provided to the applicant until discussions are complete with Fair Trading & Compliance and the matters pertaining to those discussions be completed to both parties' satisfaction.

29. In response to the draft consideration, the ACDS submitted document 3 concerns complaints which were independently investigated and finalised with a finding the complaints were not substantiated, and release would disclose incorrect information which the ACDS was not afforded the opportunity to respond to before the letter was issued.

30. The ACDS also submitted release of the letter would re-agitate the complaint issues and due to the persistence of the applicant, there is a risk no-one would be willing to seek appointment as an executive of one of the state branches of the ACDS which may lead to the branch ceasing operations.
31. On 25 June 2025, CMTEDD confirmed a request from the ACDS to have the letter withdrawn was denied by Access Canberra.
32. These submissions are discussed in more detail below.

Consideration

33. The key issue to be determined in this Ombudsman review is whether the email and attached letter from Access Canberra to the ACDS is contrary to the public interest information.

Public Interest Test

34. To determine whether disclosure is contrary to the public interest, the FOI Act prescribes the following five steps:
 - identify any factor favouring disclosure that applies in relation to the information (a relevant factor favouring disclosure), including any factor mentioned in schedule 2, section 2.1
 - identify any factor favouring nondisclosure that applies in relation to the information (a relevant factor favouring nondisclosure), including any factor mentioned in schedule 2, section 2.2
 - balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure
 - decide whether, on balance, disclosure of the information would be contrary to the public interest
 - unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information.

35. I note in submissions to our Office, the ACDS suggested that the applicant may have had specific reasons to seek this information concerning their complaint about the ACDS.
36. I must not for the purpose of the public interest test take into account the applicant's identity, circumstances or reason for seeking access to the information when deciding whether disclosure of information would, on balance, be contrary to the public interest.
37. Further, I must not consider that access to information could result in a person misinterpreting or misunderstanding the information.³

Factors favouring disclosure

38. CMTEDD identified 2 factors favouring disclosure of document 3.

Promote open discussion of public affairs and enhance the government's accountability – Schedule 2, s 2.1(a)(i); reveal the reason for a government decision and any background or contextual information that informed the decision – Schedule 2, s 2.1(a)(viii)

39. A factor favouring disclosure is where disclosure of the information could reasonably be expected to promote open discussion of public affairs and enhance the government's accountability.
40. Another factor favouring disclosure is where disclosure could reasonably be expected to reveal the reasons for a government decision and any background information that informed the decision.
41. Noting the similarity of these factors in relation to the information at issue, I have considered these factors together.

³ [FOI Act](#) s 17(2).

42. CMTEDD explained these factors were relevant to the correspondence because release may reasonably be expected to provide insight about decisions and processes put in place when dealing with the public.
43. The ACDS is an incorporated association and listed as active on the public register.⁴ Access Canberra can conduct investigations into the affairs of an association if there are reasonable grounds for believing that an offence under the *Associations Incorporations Act 1991* (Associations Incorporations Act) has been committed, including following the receipt of a complaint.⁵
44. Access Canberra has different tools available to address non-compliance issues, including issuing warning letters or cautions.⁶
45. I consider these factors apply to document 3, as the correspondence was sent to the ACDS as a result of a complaint made to Access Canberra and in performance of their functions to administer and enforce the Associations Incorporations Act and Associations Incorporation Regulation 2023 (Associations Incorporation Regulation).
46. The correspondence sets out matters of concern, reminders about the responsibilities of the ACDS as an incorporated association and the outcome of the complaints being that the Registrar-General does not intend to take further action.
47. I note the letter refers to evidence received by Access Canberra supporting the concerns raised, however the letter does not include substantial detail about this evidence.

⁴ Access Canberra, Public Registers List, [Incorporated Associations](#).

⁵ [Associations Incorporation Act 1991 \(ACT\)](#) (Associations Incorporation Act) s101. See also Access Canberra, [Incorporated Associations, A guide to starting, operating, and closing an incorporated association in the ACT](#), page 23.

⁶ Access Canberra, [Regulatory Compliance and Enforcement Policy, June 2020](#).

48. The letter also does not expressly state offences have occurred, non-compliance was sustained or explain why the Registrar-General does not intend to take further action.
49. While release of the correspondence would demonstrate Access Canberra assessed the complaints and took the step of writing to the ACDS to remind them of their obligations, I find release would not significantly promote discussion of public affairs or the government's accountability in regulating incorporated associations.
50. Further, I consider release would not provide information about the basis for the Registrar-General deciding not to take further action.
51. I intend to attribute moderate weight to these factors.

Factors favouring nondisclosure

52. CMTEDD identified 3 factors favouring nondisclosure in the original decision. As the applicant is only seeking review of document 3 and does not seek personal information, I have identified 2 factors favouring nondisclosure of the document 3.

Prejudice trade secrets, business affairs or research of an agency or person – Schedule 2, s 2.2(a)(xi)

53. A factor favouring nondisclosure is where release could reasonably be expected to prejudice trade secrets, business affairs, or research of an agency or person.
54. CMTEDD identified release of the information relating to the ACDS could unfairly prejudice the business affairs and trade secrets of their organisation and incur unwanted commercial implications.
55. I am not satisfied that document 3 contains information that would prejudice the trade secrets of the ACDS.

56. While information in the correspondence relates to the operations of the ACDS, it concerns expected practices of an incorporated association in accordance with the requirements set out in the Associations Incorporation Act and Associations Incorporation Regulation, and not specifically related to carriage driving activities (e.g. voting on special resolutions, conflicts of interest and complaint handling).
57. The applicant expressed this factor should not apply to the letter because the ACDS is a not-for-profit association, and the information does not relate to their business affairs as it concerns complaints made by the applicant.
58. The ACDS as a registered incorporation charges membership fees and manages funds to develop and promote horse carriage driving. The ACDS runs competitions at national, state and local level and other events, and offers membership benefits.
59. The 'business affairs' of an organisation or undertaking are the 'totality of the money-making affairs...as distinct from its private or internal affairs.'⁷
I consider document 3 contains information concerning the business affairs of the ACDS as it concerns the actions taken by the regulator in response to allegations of non-compliance with the relevant law.
60. In submission to this Office, the ACDS advised they rely on volunteers to support the incorporation to hold events, participate in competitions and apply for executive roles. While the organisation is not-for-profit, there are other clubs and groups who offer similar activities in the area the ACDS operates.

⁷ *Re Mangan and The Treasury* [2005] AATA 898 at [40] citing *Cockcroft and Attorney-General's Department and Australian Iron and Steel Pty Ltd (party joined)* (1985) 12 ALD 462.

61. The ACDS noted the information in the letter concerns a complaint made by a member of the association. In accordance with their member protection policy, the ACDS endeavours to deal with complaints on a confidential basis and information about complaints will not be provided to another person without the complainant's consent (unless legally required to be disclosed).⁸
62. The ACDS expressed if information about the complaints were disclosed, this could impact on the willingness of volunteers to participate with the association, cause detriment to their ability to effectively resolve member disputes or otherwise negatively impact their reputation.
63. In this matter the complaints were raised by the applicant, and they expressed their desire to discuss the complaints and the letter at the annual general meeting of the ACDS (which has since occurred). It is apparent the applicant consented to the disclosure of their complaint to other members of the ACDS.
64. In response to the draft consideration, the ACDS submitted the applicant was not the only party to the complaints, and while they acknowledge the person to whom the complaints relate is not named, they are known to many people because of the actions of the applicant. The ACDS submitted members are entitled to rely on the Member Protection Policy and Privacy Policy to not have their names made public.
65. I note the letter contains a reference to a position within the ACDS where part of the complaint alleges the person in this position acted contrary to their obligations.

⁸ Australian Carriage Driving Society Incorporated, Member Protection Policy [8.2].

66. While some members of the ACDS may be able to identify this person with reference to their position and having received other details about the complaint, I do not consider release of the letter would include information about a person who is reasonably identifiable.
67. I note the complaint issues were alleged to have arisen in 2022 and 2023. Both the applicant and the ACDS have provided information to the Office that the composition of the Federal Council of the ACDS has substantially changed since the time the actions alleged to have occurred in the complaint took place (9 out of 10 members are different individuals).
68. The ACDS provided information to the Office about the handling of complaints made to the ACDS about the same matters which were raised with Access Canberra. The ACDS submits these complaints were finalised following investigation by an independent assessor who determined the complaints were not substantiated.
69. The ACDS notes the applicant has continued to pursue these complaints following the investigation and interaction with Access Canberra, and this could discourage potential volunteers or members seeking appointment to executive positions, thereby leading to a branch or branches of the ACDS ceasing operations.
70. I am not satisfied disclosure of the letter itself could reasonably be expected to result in the relevant ACDS branch folding because no one would be prepared to become an officer bearer out of fear of having to deal with complaints or personal repercussions (e.g. if legal action was taken in response to complaint issues).

71. While I acknowledge the ACDS' position release of the letter may re-agitate complaints that were finalised by the ACDS and Access Canberra, as discussed above, I am not able to take into account an applicant's reasons for seeking access to information in conducting the public interest test because it is irrelevant to the determination of whether information is in the public interest to disclose.
72. The ACDS is concerned release of the letter would reveal Access Canberra acted because of the complaint, and while no further action is proposed to be taken, as they were not given an opportunity to respond to the concerns in the letter it is inaccurate and would negatively impact the reputation of the ACDS if disclosed.
73. Having considered the contents of the letter, I accept release of the letter would confirm Access Canberra chose to issue a warning letter to the ACDS in response to the complaint. I note the letter does not include the ACDS' response to the complaint allegations, and while it is irrelevant whether the information could be misinterpreted or misunderstood, it presents information Access Canberra obtained from the applicant or general information about operations provided by the ACDS (as discussed below at [80]).
74. I accept release of the letter could potentially imply the ACDS has acted contrary to the requirements of an incorporated association which could reasonably be expected to have a negative impact on their reputation.
75. Noting the ACDS relies on volunteers to support its operations, disclosure of information which negatively impacts the reputation of the ACDS may result in volunteers being unwilling to take up executive positions, or participate with the ACDS due to perceived issues with the associations culture or compliance.

76. However, noting the Registrar-General does not intend to take further action against the ACDS, and the relevant complainant does not object to the release of information about their complaint, I am not persuaded disclosure could reasonably be expected to have a significant negative reputational or commercial impact on the ACDS.

77. I find this factor applies to document 3 and I attribute minor weight to this factor.

Prejudice an agency's ability to obtain confidential information – Schedule 2, s 2.2(a)(xii)

78. A factor favouring nondisclosure is where release of information could reasonably be expected to prejudice an agency's ability to obtain confidential information.

79. In the decision, CMTEDD stated the information in question was obtained in confidence and release could limit the ability of the government to gain trust in future dealings with incorporated associations. As noted at paragraph [13], in response to the draft consideration, CMTEDD confirmed they did not object to the release of document 3.

80. Following receipt of the complaint Access Canberra requested certain information from the ACDS which was provided voluntarily (copy of the ACDS constitution, current committee members and responsibilities, meeting minutes, explanation of voting system).

81. In response to the draft consideration, the ACDS stated Access Canberra did not request information about the complaint allegations and relied only on the information provided by the applicant.

82. I acknowledge if confidential information voluntarily supplied by an entity to a regulator was disclosed outside of the regulatory process this could potentially result in entities being less forthcoming in providing similar information in future.⁹
83. I note the Registrar-General has the power to require the production of an association's statements, reports and books,¹⁰ but neither the Associations Incorporation Act or Associations Incorporation Regulation appears to give the Registrar-General broad powers to compel the production of any information concerning disputes held by an incorporation association.
84. In this matter, the information about the compliance issues appears to have been obtained by Access Canberra from the complainant. It is not evident this information is confidential in nature, noting the applicant (who is the complainant) has advocated for the release of this information and intends to discuss their complaints with other members.
85. I do not consider disclosure of the correspondence would reveal the confidential information supplied by the ACDS to Access Canberra, noting the content of the letter refers only to the matters of concern raised by the complainant and ACDS records generally available to its members.
86. For this reason, I am not satisfied release of document 3 could reasonably be expected to impact on the ability of Access Canberra to obtain confidential information in relation to complaints made about incorporated associations.
87. I find this factor does not apply to document 3.

⁹ [Village 25 Pty Ltd, Downer EDI Works Pty Ltd and Chief Minister, Treasury and Economic Development Directorate \[2024\] ACTOFOI 13 \(26 July 2024\)](#) at [117]–[122].

¹⁰ [Associations Incorporation Act](#), ss 79 and 103.

Balancing the factors

88. Having identified public interest factors favouring disclosure and public interest factors favouring nondisclosure, I now must consider the public interest balancing test set out in s 17 of the FOI Act.
89. In this matter, I have identified 2 public interest factors favouring disclosure and I attribute moderate weight to both factors.
90. I have identified 2 public interest factors favouring nondisclosure, where I attribute minor weight to one factor and find the other factor does not apply to document 3.
91. Balancing the public interest factors is not simply a case of quantifying the number of relevant factors for disclosure and nondisclosure, with the higher quantity being considered in the public interest.
92. The decision-maker's task is to consider the relative importance and weight of each factor identified. The weight given to a factor will depend on the effect disclosing the information has on the public interest.
93. The FOI Act has a pro-disclosure bias, and as a result, the public interest test should not be approached on the basis that there are empty scales in equilibrium, waiting for arguments to be put on each side. Rather, the scales are 'laden in favour of disclosure.'¹¹
94. As I have found 2 factors favouring disclosure apply and attract moderate weight (in addition to the pro-disclosure bias) and found one factor favouring nondisclosure applies and given minor weight, on balance, it is in the public interest to disclose document 3.

¹¹ [Explanatory Statement, Freedom of Information Bill 2016.](#)

Conclusion

95. For the reasons set out above in this decision, I set aside the original decision made by CMTEDD. I grant access to document 3, being the email and letter sent from Access Canberra to the ACDS.

Katrina Dwyer

Senior Assistant Ombudsman

18 July 2025