

Decision and reasons of Senior Assistant Ombudsman

Application number:	AFOI-RR/25/80020
Applicant:	'DQ'
Respondent:	Justice and Community Safety Directorate
Participant:	Senior Member Hyman, ACT Civil and Administrative Tribunal
Respondent reference:	2025/2777
Date:	19 September 2025
Decision reference:	[2025] ACTFOI 14
Catchwords:	Freedom of Information Act 2016 – deciding access – whether information is contrary to the public interest information – Reveal the reason for a government decision and any background or contextual information that informed the decision – Prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act 2004 – Prejudice an agency's ability to obtain confidential information – Prejudice the management function of an agency or the conduct of industrial relations by an agency.

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. My decision is to **confirm** the Justice and Community Safety Directorate (JACS) decision dated 25 March 2025 under s 82(2)(b) of the FOI Act.

Background to Ombudsman review

3. On 10 February 2025, the applicant applied to JACS for access to the following information held by the ACT Civil and Administrative Tribunal (ACAT):

I am after member hymans qualifications to work as a member at acat. I understand you do not need a qualification of any kind to work at acat.

Can you forward member hyman's credentials to me for assessment? For example, does he have any recognised qualifications.

4. JACS conducted searches and located 2 documents within the scope of the request.
5. On 25 March 2025, JACS decided to refuse access to both documents in full because the information sought was contrary to the public interest information. For the purpose of the public interest test, JACS did not identify any factors favouring disclosure.
6. On the same date the applicant applied for Ombudsman review.
7. On 31 July 2025, I provided the parties with my draft consideration setting out my preliminary view.
8. On 31 July 2025, the participant advised they did not have any submissions to make in response to the draft consideration.
9. On 1 August 2025, JACS accepted the draft consideration and did not provide any submissions.
10. On 11 August 2025, the applicant requested, and was granted, additional time¹ to respond to the draft consideration. On 26 August 2025, the Office of the ACT Ombudsman (the Office) wrote to the applicant to request a response to the

¹ To 22 August 2025.

draft consideration by 29 August 2025, after which time a final decision would be made.

11. The applicant did not provide a response to the draft consideration.

Information at issue

12. The information at issue in this Ombudsman review is information about the education and work experience of a Senior Member of ACAT.

13. Document 1 is a selection report and document 2 is a curriculum vitae (CV).

14. The key issue to be decided in this Ombudsman review is whether the information at issue is contrary to the public interest information.

15. In making my decision, I have had regard to:

- the applicant's access application dated 10 February 2025
- JACS' decision of 25 March 2025 and additional submissions
- the applicant's Ombudsman review application dated 25 March 2025
- an unredacted copy of the information at issue
- the FOI Act, particularly ss 7, 16, 17, 35, 50, 72 and Schedule 2
- the *Information Privacy Act 2014* (IP Act)
- the *Human Rights Act 2004* (Human Rights Act)
- the Freedom of Information Guidelines (FOI Guidelines) made under s 66 of the FOI Act.

Relevant law

16. 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

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

17. 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
 - (b) the disclosure of which would, on balance, be contrary to the public interest under the test set out in section 17.
18. 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.
19. 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.
20. 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.
21. Schedule 2 of the FOI Act sets out the public interest factors which must be considered, where relevant, when determining the public interest.
22. 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

23. In the decision notice, JACS decided to refuse access to both documents in scope stating that on balance the 'information is not in the public interest to disclose'.
24. In relation to the Senior Member's personal information, JACS stated that release would prejudice their right to privacy under the Human Rights Act without providing any arguments or examples of how release of the education and work history would prejudice the right to privacy.
25. Regarding management functions of the agency and their ability to obtain confidential information, JACS stated:

The release of information related to the management of the recruitment processes such as his selection reports is deemed contrary to the public interest to release as it can reasonably be expected to prejudice the management function of JACS and the Attorney-General's Office (AGO) and undermine trust in the confidentiality of the recruitment process. I note that disclosure of this information would inhibit JACS and the AGO's ability to effectively complete such a process in the future and potentially serve to discourage suitable candidates from applying for roles.

26. The applicant did not provide any submissions in relation to the application for review.

Consideration

Public interest test

27. 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.

Factors favouring disclosure

28. In its original decision, JACS did not list any factors favouring disclosure however stated:

I have assessed the information against the factors favouring disclosure and factors favouring non-disclosure in Schedule 2. On balance, I have decided that the information is not in the public interest to disclose. I have included below the relevant factors for your information.

29. In my review, I identified the following factor favouring disclosure.

Reveal the reason for a government decision and any background or contextual information that informed the decision—Schedule 2, 2.1(a)(viii)

30. A factor favouring disclosure is where the information could reasonably be expected to reveal the reasons for a government decision and any background or contextual information.

31. I consider this factor is relevant in the circumstances as the disclosure of the information at issue would reveal background information that informed the decision to appoint a Senior Member of ACAT.

32. I note that decisions made by Senior Members of ACAT can significantly impact individuals and organisations, and such positions hold authority. Senior Members hold substantial power with their role in interpreting and applying law.
33. While release of the information would reveal the contextual information for selection of one Senior Member of ACAT, I find release would not reveal the broader appointment of ACAT members.
34. I attribute minor weight to this factor.

Factors favouring nondisclosure

35. JACS identified 3 factors favouring nondisclosure of the information at issue.

Prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act 2004—Schedule 2, s 2.2(a)(ii)

36. A factor favouring nondisclosure of information is where disclosure could reasonably be expected to prejudice the protection of an individual's right to privacy or any other right under the Human Rights Act.

37. In the decision notice, JACS stated:

The qualification details of Senior Member Mark Hyman is personal information, the release of which would prejudice his right to privacy under the Human Rights Act 2004.

38. Section 12 of the Human Rights Act states:

Everyone has the right—

- (a) not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have their reputation unlawfully attacked.

39. It does not provide a general right to privacy but can essentially be viewed as the right of an individual to preserve their personal sphere from interference from others.

40. In accordance with territory privacy principle (TPP) 6 within the IP Act if a public sector agency holds personal information about an individual that was collected for a particular purpose (the primary purpose), the agency must not use or disclose the information for another purpose (the secondary purpose) unless:
- the individual has consented to the use or disclosure; or
 - TPP 6.2 or TPP 6.3 applies in relation to the use or disclosure.
41. Under TPP 6.2, an agency may use or disclose information for a secondary purpose if the individual would reasonably expect the agency to use or disclose the information for the secondary purpose and this purpose is related to the primary purpose (for non-sensitive information).
42. I am satisfied the information at issue constitutes 'personal information' being information about an identified person. The information at issue does not include personal contact details or any sensitive information about the Senior Member.
43. I consider the information was collected for a particular purpose, being the re-appointment of the Senior Member. Further, I am satisfied that the Senior Member would not expect the agency to disclose their personal Information obtained for a recruitment process for a secondary purpose. I also do not consider the release of the personal information is related to the primary purpose.
44. I am satisfied that release of information about the qualifications and work experience of the senior sessional tribunal member would prejudice their right to privacy under the Human Rights Act.
45. Where an individual holds a significant position within an authority, this brings with it an understanding they will have a reduced expectation of privacy

where this intersects with the performance of their role. However, taking into consideration the TPP and the information was obtained through a selection process, I consider release of the information would be an unlawful or arbitrary interference with their privacy.

46. I note the information about whether a person has a tertiary qualification, and their work experience is not generally publicly available, this information appears in the information at issue because the Senior Member sought re-appointment.
47. I consider a candidate's education and skills is relevant to the assessment of whether that person is suitable for appointment to a public position. It is evident that Senior Member Hyman was deemed suitable for employment noting their current status as a Senior Sessional Member.³
48. I consider this factor applies to the educational and skill information of the Senior Member.
49. I consider this factor is also relevant in relation to the name and position of a person who provided a referee's report. I consider this individual would reasonably expect their personal information to only be used for the primary purpose of being a reference for the recruitment process, and further disclosure of this information would not be related to the recruitment process and likely amount to a breach of the TPPs.
50. I afford significant weight to this factor.

³ ACAT, [ACAT Members](#).

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

51. A factor favouring nondisclosure is where release of information could reasonably be expected to prejudice an agency's ability to obtain confidential information.
52. The ACT FOI Guidelines state this factor applies in situations where disclosure could reasonably be expected to discourage individuals from coming forward with relevant information and concerns, and/or negatively impact a 'free flow' of information to these agencies - either in relation to a particular case or generally.⁴
53. In the decision, JACS asserted disclosure would undermine trust in the confidentiality of the recruitment process and potentially serve to discourage suitable candidates from applying.
54. Given the fact that all the information at issue was obtained by JACS because of their application for re-appointment, it is reasonable to suggest the information provided by that senior member was in confidence.
55. Generally, individuals expect information provided to a potential employer as part of recruitment activities would only be used for that purpose.
56. I consider this factor is relevant in the circumstances as disclosure could prevent the agency from obtaining confidential information to be used in future recruitments.
57. However, I consider this factor is relevant to a limited degree, as it is reasonable to expect any person who wanted to be considered for the

⁴ [Freedom of Information \(Volume 4 - Considering the Public Interest\) Guidelines 2023](#) at [9.13].

employment within the agency would supply all necessary information that the agency required.

58. I attribute minor weight to this factor.

Prejudice the management function of an agency or the conduct of industrial relations by an agency—Schedule 2, s 2.2(a)(xv)

59. A factor favouring nondisclosure applies when disclosure could reasonably be expected to prejudice the management function of an agency or the conduct of industrial relations by an agency.

60. The management function of an agency includes activities such as recruitment, training, performance reviews, promotion, counselling, discipline, compensation and occupational health and safety.

61. In this case the function of an agency relates to the recruitment, collecting and assessing necessary documents, and conducting interviews.

62. The information at issue includes the education, work history and selection material for a role with ACAT.

63. In relation to document 1, I agreed this factor is relevant as this information includes detail about the recruitment process including comments about the candidate's interview performance, reference check and panel assessment.

64. I consider this part of the interview information is sensitive because it may disclose confidential information provided by a candidate. Release of the confidential information may damage the reputation of the agency and discourage people from applying for a job.

65. I attribute significant weight to this factor in respect of information provided for the purposes of a selection process and about the interview performance, reference check and panel assessment.

Balancing the factors

66. Having identified public interest factors favouring disclosure and factors favouring nondisclosure, I now must consider the public interest balancing test set out in s 17 of the FOI Act.
67. In this matter, I identified one factor favouring disclosure and afford minor weight to this factor.
68. I identified 3 factors favouring nondisclosure. I attribute significant weight to 2 factors and minor weight to one factor.
69. Balancing 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. 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 that disclosing the information has on the public interest.
70. The FOI Act has a pro-disclosure bias,⁵ 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'.⁶
71. My view is, on balance, that the factors favouring nondisclosure outweigh the factor favouring disclosure.

⁵ Section 17 of the [FOI Act](#).

⁶ [Explanatory Statement, Freedom of Information Bill 2016](#).

Conclusion

72. For the reasons set out above in this decision, I confirm JACS' decision under s 82(2)(a) of the FOI Act.

Katrina Dwyer

Senior Assistant Ombudsman

19 September 2025