

BE and Justice and Community Safety Directorate [2021] ACTOFOI 1 (21 February 2021)

Decision and reasons for decision of Senior Assistant Ombudsman, Louise Macleod

Application Number	AFOI-RR/20/10057
Decision Reference	[2021] ACTOFOI 1
Applicant	BE
Respondent	Justice and Community Safety Directorate
Decision Date	21 February 2021
Catchwords	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – whether disclosure of information is contrary to the public interest – secrecy provision – prohibited by law – whether documents are in scope

Decision

1. For the purposes of s 82 of the *Freedom of Information Act 2016 (FOI Act)*, I am a delegate of the ACT Ombudsman.
2. Under s 82(2)(a) of the FOI Act, I **confirm** the decision of the Justice and Community Safety Directorate (**JACS**), dated 10 November 2020.

Background of Ombudsman review

1. On 19 October 2020, the applicant applied to JACS for access to:

A copy of the video from the CCTV camera in the main room of WCC WS1b recorded on 15th October 2020 from 12:00 to 21:30 ADST

2. On 26 October 2020, JACS acknowledged the applicant's request and confirmed the scope of the request.

3. On 10 November 2020, JACS advised the applicant it had identified CCTV footage as falling within the scope of the access application. JACS refused access to the footage in full. In making this decision, JACS relied on Schedule 1, s 1.14 the FOI Act.
4. On 23 November 2020, the applicant sought Ombudsman review of JACS' decision under s 73 of the FOI Act.
5. On 3 February 2021, I provided my preliminary views about JACS's decision to the parties in draft consideration. My preliminary view was to confirm the decision
6. On 4 February 2021, JACS advised they accepted the draft consideration and did not provide any further submissions.
7. On 4 February 2021, the applicant provided the following submissions:

This is a CRIMINAL ACT, possibly by a Corrections Officer (I.E. a public official).
Para 27 of the Draft refers:

Information captured by Schedule 1 is taken to be contrary to the public interest to disclose unless the information identifies corruption or the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law.

This negates Paras 28 and following; in fact it ENHANCES the issue of law enforcement in alerting ACTCS to the possibility of a criminal act by a Corrections Officer (See Para 29)

...

What is NOT visible is as important as what IS VISIBLE.

To undertake the act, if by someone coming in from outside, they will enter the Pod on the left hand side of the limit of the field of view and be at the doorway to Cell 4 on the right hand side of the limit of the field of view. The image will go from indistinct to indistinct BUT as the subject moves across the field of view, they would be clearly identifiable.

...

...if Joe E Blogs from the Fyshwick Daily Bugle wishes to access that CCTV footage, Section 222 is decidedly relevant but in this case, the requestor is me about movement in my home. One size does not fit all.

In short, Section 222 and Privacy is a red herring. I wish to see if a Public Official has transgressed the limits of his or her legal and official role. It is a matter of concern that ACTCS do not wish to release data that MAY or MIGHT clear a member of their staff.

Scope of Ombudsman review

8. The applicant is seeking the footage from a particular CCTV camera during a particular time period.

9. In their submission dated 30 November 2020, JACS advised the identified CCTV footage does not have visibility of the particular area the applicant wanted to access.
10. Having reviewed the footage, it appears this area is not clearly visible, however, the applicant advised they would like to proceed with this review. I note the applicant's submissions, dated 4 February 2021, in which they state 'what is not visible is as important as what is visible'.

Information at issue

11. The information at issue in this Ombudsman review is the CCTV footage identified by JACS.
12. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information at issue would be contrary to the public interest.
13. In making my draft consideration, I had regard to:
 - the applicant's access application and review application
 - JACS' decision regarding the initial access application
 - the FOI Act, in particular Schedule 1, s 1.3
 - the *Corrections Management Act 2007* (ACT) (the CM Act)
 - the applicant's submissions to my draft consideration
 - the respondent's FOI processing file relating to the access application
 - an unedited copy of the information at issue.

Relevant law

14. Section 7 of the FOI Act provides every person with 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.
15. 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.
16. 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.
17. Section 35(1)(c) of the FOI Act provides that 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.

18. 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.
19. Section 72 of the FOI Act provides that the person seeking to prevent disclosure of government information has the onus of establishing the information is contrary to the public interest information.
20. Schedule 1 of the FOI Act sets out categories of information that is taken to be contrary to the public interest to disclose.
21. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest.

The contentions of the parties

22. In its decision notice, JACS' said:

I have determined that the CCTV footage contains information that is taken to be contrary to the public interest to disclosure under Schedule 1 of the Act.

...

The release of the CCTV footage can reasonably be expected to prejudice the safe and proper operations of ACT Corrective Services (ACTCS) and I note that CCTV footage is considered protected information under the *Corrections Management Act 2007* (CM Act).

23. In the application for Ombudsman review, the applicant said:

In rejecting my FOI Request, I believe that JACSFOI has ignored the Public Interest Test in order to frustrate action against a person, Corrections Officer or Inmate for a criminal event.

24. These submissions are discussed in more detail below.

Considerations

25. I have carefully considered an unedited copy of the information at issue together with the information provided by the applicant and respondent.

Information that is taken to be contrary to the public interest to disclose under Schedule 1

26. JACS found the information sought is contrary to the public interest to disclose under Schedule 1 of the FOI Act.
27. Information captured by Schedule 1 is taken to be contrary to the public interest to disclose unless the information identifies corruption or the commission of an offence by a public official or that the scope of a law enforcement investigation has exceeded the limits imposed by law.

28. I considered the applicant's submission dated 4 February 2021. In effect, the applicant is submitting that the footage may or may not identify a corrections officer in the area at the time the applicant claims an offence may have been committed.
29. I do not accept the assertion that corrections officers being in the general vicinity around the cell, is itself an offence for the purposes of the exception outlined in Schedule 1. For the exception to apply, the footage would need to 'identify corruption or the commission of an offence by a public official', which in my view, is not the case.
30. Accordingly, I am satisfied it does not fall under the exceptions outlined in Schedule 1. As a result, provisions of Schedule 1 of the FOI Act may be relevant to the information at issue. Consequently, I will now consider whether the information at issue is contrary to the public interest information to disclose under Schedule 1 of the FOI Act.

Law enforcement or public safety information

31. In its decision, JACS considered whether the information at issue was law enforcement and public safety information under Schedule 1, s 1.14(f) and (i), stating:

CCTV is a lawful method used to monitor and manage the safety and security of detainees and staff within AMC and can assist in the investigation of an incident when it occurs. The release of CCTV footage can reasonably be expected to prejudice the safe and proper operations of ACT Corrective Services (ACTCS).

32. Schedule 1, s 1.14 provides

Information the disclosure of which, or could reasonably be expected to:

(f) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigation or dealing with a contravention or possible contravention of the law; or

...

(i) prejudice a system or procedure for the protection of people, property or the environment.

33. I accept that CCTV is a lawful method used to monitor and manage the safety of Alexander Maconochie Centre (AMC) staff and detainees. However, JACS did not establish that disclosure of the information at issue could reasonably be expected to prejudice the safe and proper operations of ACTCS, particularly as the location of the CCTV camera is known.

34. Accordingly, I do not consider the information at issue to be contrary to the public interest to disclose under Schedule 1, s 1.14 of the FOI Act.

Information disclosure of which is prohibited by law

35. Although JACS did not identify Schedule 1, 1.3 in its original decision, JACS identified this factor in its submission to this review. JACS stated:

CCTV footage is considered protected information under the CM Act and any unauthorised disclosure would constitute an offence to section 222(2) of the CM Act. For this reason the following Schedule 1 factor is also applicable:

Schedule 1, 1.3 Information disclosure of which is prohibited under law

(6) Any other information the disclosure of which is prohibited by a secrecy provision of a law.

36. I considered s 222(2) of the CM Act which provides:

A person to whom this section applies commits an offence—

(a) if the person—

(i) makes a record of protected information about someone else; and

(ii) is reckless about whether the information is protected information about someone else; or

(b) if the person does something that divulges protected information about someone else and is reckless about whether—

(i) the information is protected information about someone else; and

(ii) doing the thing would result in the information being divulged to someone else.

37. Protected information is defined in s 222(1) as information about a person that is disclosed to, or obtained by, a person because of the exercise of a function under the CM Act or the administration of that Act.

38. Given JACS' involvement in administering the CM Act and monitoring activities through CCTV, I consider s 222(1) to be applicable. Further, as the CCTV footage was obtained by JACS exercising functions under the CM Act, I consider it would be subject to the confidentiality provisions in s 222 in relation to the CCTV footage.

39. I note that various exceptions to the secrecy provision under s 222 exist, including where information is divulged by the person under the CM Act, or another territory law (see

s 222(3)(a)). Therefore a question arises as to whether these exceptions mean that disclosure is permitted under the FOI Act.

40. The applicant contends that s 222 of the CM Act is not applicable as the applicant is a detainee in the corrections centre where the CCTV footage is captured.
41. In my view, the exception in 222(3)(a) is not relevant in this matter. This is because the definition of a secrecy provision in Schedule 1, s 1.3(7)(b) of the FOI Act expressly states that a prohibition may be 'absolute or subject to stated exceptions or qualifications'. I do not consider the applicant being a detainee to which the CM Act applies, falls under any of the exceptions.
42. Accordingly, I consider the CCTV footage is protected information and disclosure would constitute an offence to section 222(2) of the CM Act. Therefore, I consider the footage to be contrary to the public interest to disclose on the basis it is prohibited by law.
43. As I consider the material should be not be disclosed under Schedule 1 of the FOI Act, I am not required to consider whether any Schedule 2 factors favouring disclosure or non-disclosure apply.

Conclusion

44. Under s 82(2)(a), I **confirm** JACS' decision to refuse access to the information at issue under s 35(1)(c) of the FOI Act.

Louise Macleod
Senior Assistant Ombudsman
21 February 2021