

'AC' and Justice and Community Safety Directorate [2018] **ACTOFOI 5 (10 October 2018)**

Decision and reasons for decision of Senior Assistant Ombudsman, Paul Pfitzner

Application Number:	AFOI-RR/18/30002
Decision Reference:	[2018] ACTFOI 5
Applicant:	'AC'
Respondent:	Justice and Community Safety Directorate
Decision Date:	10 October 2018
Catchwords:	<i>Freedom of Information Act 2016</i> — deciding access — whether disclosure of information is contrary to the public interest — right to privacy — administration of justice for a person.

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016* (FOI Act).
2. Under s 82(1)(a) of the FOI Act, I confirm the decision of the Justice and Community Safety Directorate (JACS) of 26 March 2018.
3. With the exception of the information already disclosed to the applicant, the information in the Initial Classification and Placement documents of the other detainees is contrary to the public interest information for the purposes of s 16 of the FOI Act.

Scope and background of Ombudsman review

4. The applicant is a detainee in the Alexander Maconochie Centre (AMC).
5. On 11 October 2016, the applicant was involved in an incident at the AMC involving two other detainees (the incident).
6. On 27 February 2018, the applicant applied to JACS for access to all documents relating to the incident including any closed-circuit television (CCTV) footage, documents about the detainee classification of applicant and the other detainees involved (the other detainees), and any relevant AMC policies and procedures.
7. On 26 March 2018, JACS decided to give the applicant access to some of the information sought, with deletions applied to information considered to be contrary to the public interest to disclose. In making its decision, JACS relied on the following public interest considerations:
 - law enforcement and public safety (Schedule 1, s 1.14, Schedule 2, s 2.2(a)(iii) of the FOI Act)
 - personal privacy (Schedule 2, s 2.2(a)(ii))
 - impeding the administration of justice for a person (Schedule 2, s 2.2(a)(v)), and
 - prejudice to the security and good order of a correctional centre (Schedule 2, s 2.2(a)(vi)).
8. On 19 April 2018, the applicant applied for Ombudsman review of JACS' decision under s 73 of the FOI Act.
9. On 29 June 2018, JACS offered to facilitate a controlled viewing of the CCTV footage under s 222(5) of the *Corrections Management Act 2007*.
10. On 5 July 2018, the applicant accepted JACS' offer, and agreed that a controlled viewing of the CCTV footage would remove that information from the scope of this Ombudsman review. Accordingly, I will not consider the CCTV footage any further in this Ombudsman review.
11. On 5 July 2018, the applicant advised that he was still seeking access to the security classification of the other detainees, as he was of the view that he had been wrongly placed with detainees of a higher security classification than himself.
12. In seeking access to the other detainees' classifications, I understand that the applicant is not merely seeking the classification recommendation, but also the two broader security classification assessments of the other detainees.

13. During the course of this Ombudsman review, JACS submitted a copy of its FOI processing file, including an unedited copy of three 'Initial Classification and Placement' documents (the classification documents).
14. Of the classification documents, one relates to the applicant (the applicant's classification document) and two relate to the two other detainees involved in the incident (the other detainees' classification documents).
15. In its decision, JACS largely gave the applicant access to the information contained in the applicant's classification document.
16. JACS also gave the applicant partial access to the other detainees' classification documents, with much of the content deleted as contrary to the public interest information. It is this deleted content in the other detainee's classification documents (the information sought) that the applicant is still seeking access to.
17. I provided my preliminary views on JACS' decision to the parties in my draft consideration dated 3 September 2018. Neither party elected to provide further submissions in response to my draft consideration.
18. The issue to be decided in this Ombudsman review is whether giving the applicant access to the information sought would be contrary to the public interest.
19. In making my decision, I have had regard to:
 - the applicant's application for Ombudsman review
 - JACS' decision
 - the FOI Act, in particular ss 7, 16, 17, 35 and Schedule 2
 - the *Human Rights Act 2004* (Human Rights Act), in particular s 12
 - JACS' FOI processing file relating to the access application, in particular an unedited copy of the classification documents
 - relevant case law, in particular '*Q' and Department of Human Services*¹ and *Willsford and Brisbane City Council*,² and
 - the submissions of the parties.

¹ [2012] AICmr 30.

² (1996) 3 QAR 368 (Willsford).

Relevant law

20. 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.
21. Section 35(1)(c) of the FOI provides that an access application may be decided by refusing to give access to the information because it is contrary to the public interest information.
22. Contrary to the public interest information is defined in s 16 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.
23. The public interest test set out in s 17 involves a process of balancing the public interest factors favouring disclosure against the public interest factors favouring nondisclosure to decide whether, on balance, disclosure would be contrary to the public interest.
24. In this Ombudsman review, the applicant is seeking information about the other detainees. However, the FOI Act provides significant protections restricting the disclosure of personal information.
25. The FOI Act defines 'personal information' as:
information or an opinion (including information forming part of a database), whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.³
26. Schedule 2 of the FOI Act sets out the public interest factors that must be considered, where relevant, when determining the public interest and contains an explicit recognition of the public interest in protecting human rights, including the right to privacy.⁴

³ See Dictionary to the FOI Act 'personal information'. This definition excludes some information of an officer of an agency, or a staff member of a Minister.

⁴ FOI Act Schedule 2, s 2.2(a)(ii). See also, Explanatory Statement, Freedom of Information Bill 2016 (ACT) 6.

The contentions of the parties

27. In its reasons for decision, JACS said:

I place significant weight on the protection of people's privacy and detainees' safety, and not prejudicing the current security measures and law enforcement. However, this is balanced by the partial release of documents ... towards not prejudicing the advancement of fair treatment of individuals and contributing to the administration of justice for a person.

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

The primary purpose of the material requested under the FOI to JACS is to determine if [the applicant] has a cause of action in respect to damages arising from any negligence or breach of duty of care on part of the AMC and the correctional officers.

Considerations

29. The information sought is information about the other detainees, including the other detainees' answers to personal questions, given to JACS for the purpose of assessing the other detainees' security classification in the AMC.⁵

30. The applicant knows the identity of the other detainees involved in the incident, and is seeking the information sought to obtain information about those detainees. Therefore, even if the other detainees' names were edited from the other classification documents, I consider that the applicant would be able to identify the other detainees from the remaining information.

31. I am satisfied that the information sought is the personal information of the other detainees.

32. I now need to consider the tests in the FOI Act to decide whether the information sought is contrary to the public interest information.

Public interest test

33. To determine whether information is, on balance, contrary to the public interest to disclose, s 17(1) prescribes the following five steps:

- (a) 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;
- (b) 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;

⁵ Including: physical and mental health, criminal history, cultural background, disabilities, family, friends, financial situation and prior employment information.

- (c) balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
- (d) decide whether, on balance, disclosure of the information would be contrary to the public interest;
- (e) unless, on balance, disclosure would be contrary to the public interest, allow access to the information subject to this Act.

34. In addition, there is an initial step of ensuring that none of the irrelevant factors listed in s 17(2) are considered.

Irrelevant factors

35. I have noted the irrelevant factors listed in s 17(2) and I am satisfied that I have not considered any irrelevant factors in this case.

Factors favouring disclosure

36. Schedule 2, s 2.1 of the FOI Act contains a non-exhaustive list of public interest factors favouring disclosure. Of the factors favouring disclosure listed in Schedule 2, s 2.1, I consider that only one is relevant in this Ombudsman review. Disclosure could reasonably be expected to contribute to the administration of justice for a person.⁶

37. The applicant contends:

In circumstances where initiating Court proceedings and issuing Notices of Production would allow us to obtain the requested material in any event, the withholding of this information ... is clearly the wrong decision and will unduly prejudice [the applicant's] fair treatment and access to justice, especially in circumstances where [sic] costly litigation should be avoided and the ACT Government should act as a model litigant.

⁶ FOI Act Schedule 2, s 2.1(xiv).

38. The public interest in disclosing information that could contribute to legal proceedings was considered by the Queensland Information Commissioner in *Willsford and Brisbane City Council*.⁷

In that case, the Commissioner said:

it should be sufficient to found the existence of a public interest consideration favouring disclosure of information held by an agency if an applicant can demonstrate that –

- (a) loss or damage or some kind of wrong has been suffered, in respect of which a remedy is, or may be available under the law
- (b) the applicant has a reasonable basis for seeking to pursue the remedy, and
- (c) disclosure of the information held by the agency would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available, or worth pursuing.⁸

39. I consider that the Commissioner's discussions in *Willsford* are relevant to this Ombudsman review.

40. The applicant submits that he is seeking to determine whether he 'has a cause of action in respect to damages arising from any negligence or breach of duty of care on the part of the AMC and the correctional officers'. In these circumstances, I accept that the information sought might, in the absence of any other information, assist the applicant to evaluate whether the remedy is available or worth pursuing.

41. However, it is my view that the applicant could reasonably determine whether he has a cause of action, and evaluate whether the remedy is available or worth pursuing, through the information that has already been provided to him, particularly the controlled viewing of the CCTV footage that our Office facilitated.

42. In *'Q' and Department of Human Services*,⁹ the Australian Information Commissioner considered that 'access to documents through FOI is not intended to replace the discovery process in courts and tribunals, which supervise the provision of documents to parties in matters before them'.¹⁰

43. I agree with the Commissioner's position and conclude it applies equally in this Ombudsman review.

⁷ (1996) 3 QAR 368.

⁸ *Willsford*, above n 2 at [17]. This decision has been followed and discussed in subsequent cases. See: *Beale and Department of Community Safety* [2012] QICmr 15 and *1OS3KF and Department of Community Safety* [2011] QICmr 48.

⁹ [2012] AICmr 30.

¹⁰ [2012] AICmr 30 at [17].

Factors favouring nondisclosure

44. Schedule 2, s 2.2 of the FOI Act contains a non-exhaustive list of public interest factors favouring nondisclosure. Of those factors, JACS has identified that 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.¹¹
45. I agree with JACS that this is the relevant public interest factor favouring nondisclosure in relation to the information sought.¹²
46. The other detainees provided their information for the purposes of their AMC assessment. The information is detailed and highly personal. For this reason, I am satisfied that there is a strong public interest in protecting the privacy of the other detainees and their personal information.

Balancing the factors

47. For the reasons I have given above, I give only limited weight to the administration of justice for the applicant as a public interest factor favouring disclosure of the information sought.
48. Given the information sought is personal information, and considering the circumstances in which it was collected, I consider that the public interest in protecting the personal privacy of the other detainees should be given significant weight as a factor in favour of nondisclosure.
49. I am satisfied that, on balance, the public interest factor favouring nondisclosure outweighs the public interest factor in favour of disclosure.
50. Giving the applicant access to the information sought would, on balance, be contrary to the public interest.
51. The information sought, that JACS has found to be contrary to the public interest to disclose, is contrary to the public interest information for the purposes of s 16 of the FOI Act.

¹¹ JACS' Freedom of Information Request Schedule at reference 3-4 identifies that JACS' reason for the 'non-release' of the information sought is 'Schedule 1, 1.14(c), (d), (i)', and 'Schedule 2, 2.2(a)(ii) prejudice the protection of an individual's right to privacy or any other right under the *Human Rights Act 2004*'.

¹² See: FOI Act Schedule 2, s 2.2(ii); Human Rights Act s 12.

Other considerations

52. JACS found the other classification documents contain information that is taken to be contrary to the public interest to disclose on the basis that it is law enforcement or public safety information under Schedule 1, ss 1.14(c), (d) and (i) of the FOI Act.
53. As I have already found that giving access to the other classification documents would, on balance, be contrary to the public interest under s 16(b) of the FOI Act, it is unnecessary for me to consider whether giving access to this same information would also be taken to be contrary to the public interest under s 16(a) and Schedule 1 of the FOI Act.

Conclusion

54. Giving the applicant access to the information sought would, on balance, be contrary to the public interest. I confirm JACS' decision to refuse access under s 35(1)(c) of the FOI Act.

Paul Pfitzner
Senior Assistant Ombudsman
10 October 2018