

## Determination (Redacted)

### External review - section 39 *Freedom of Information Act 1991*

Agency	Department for Correctional Services
Ombudsman reference	2014/07824
Agency reference	CEN/14/0697
Determination	The determination of the agency is confirmed.

## REASONS

### Application for access

1. The applicant is serving a sentence of imprisonment for [a sex] offence and the cancellation of his parole. He is not currently eligible to apply for release on parole.<sup>1</sup>
2. The agency [has] assessed the applicant's risk of sexual reoffending.<sup>2</sup>
3. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:
  - 1) Mail records - incoming + outgoing [for a specified period].
  - 2) All assessments used to determine my level of re-offending risk (actuarials) etc. The department deemed me to be moderate to high risk of re-offending. I seek a copy of the assessment tools used to establish this risk profile.

### Background

4. For ease of reference, the procedural steps relating to the application are set out in the appendix.

### Jurisdiction

5. This external review is within the jurisdiction of the Ombudsman as a relevant review authority under section 39 of the FOI Act.

### Provisional determination

6. The Acting Ombudsman provided her tentative view about the agency's determination to the parties, by her provisional determination dated 24 November 2014. She informed the parties that subject to her receipt and consideration of submissions from the parties she proposed to confirm the agency's determination.
7. By letter dated 29 November 2014 the applicant queried the scope of my external review and sought further information. In addition, he requested a three-month

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<sup>1</sup> Letter to the Ombudsman from the Crown Solicitor's Office, on behalf of the agency, received on 24 October 2014.

<sup>2</sup> Letter to the Ombudsman from the Crown Solicitor's Office, on behalf of the agency, received on 24 October 2014.

extension to provide submissions in response to the provisional determination, as he did not have 'access to any resources' and 'in keeping with Natural Justice and Procedural Fairness'.

8. By letter dated 2 December 2014 the agency advised that it agreed with the reasons and outcome of the provisional determination, and did not intend to make any further submissions in response.
9. By letter dated 9 December 2014 the Acting Ombudsman responded to the applicant. Among other things, the Acting Ombudsman indicated that the final determination would not be made until after 5 January 2015, and invited the applicant to make any further submissions before that date. To date, however, no further submissions have been received from the applicant.
10. Accordingly, I have made this (my final) determination in the same terms as the provisional determination.

### Relevant law

11. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.<sup>3</sup>
12. The FOI Act provides that upon receipt of an access application, an agency may make a determination to refuse access where the documents are 'exempt'. Schedule 1 lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
13. The agency claims that the document in issue is exempt in its entirety as a document concerning the operations of agencies (clauses 16(1)(a)(i); 16(1)(a)(ii); and 16(1)(a)(iv),<sup>4</sup> each in conjunction with clause 16(1)(b), Schedule 1). The relevant parts of clause 16(1) provide:

A document is an exempt document if it contains matter the disclosure of which—

  - (a) could reasonably be expected—
    - (i) to prejudice the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or
    - (ii) to prejudice on the attainment of the objects of any test, examination or audit conducted by an agency; or ...
    - (iv) to have a substantial adverse effect on the effective performance by an agency of the agency's functions; ...and
  - (b) would, on balance, be contrary to the public interest.
14. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
15. Section 39(11) provides that the Ombudsman may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

<sup>3</sup> *Freedom of Information Act 1991*, section 12.

<sup>4</sup> The agency first raised clauses 16(1)(a)(ii) and 16(1)(a)(iv) during the external review.

## Document in issue

16. The agency identified two documents within the scope of the application:

Document 1 - mail records ... [for a specified period] (7 pages)

Document 2 - an assessment tool dated 1 April 2007 (48 pages).

17. The applicant limited his applications for review to the agency's refusal to release document 2.<sup>5</sup> Accordingly, only document 2 is in issue in my external review.<sup>6</sup>

## Issues in this review

18. It is for me to consider whether the agency has justified its determination to refuse access to document 2.

## Parties' submissions

### *The agency*

19. In its original determination, the agency offered the following reasons in support of its claim that document 2 was exempt:

Clause 16 is applied in circumstances when the release of information would render the method or procedure for the conduct of an examination by an agency ineffective. If disclosed, the information contained within this document would prejudice the effectiveness of procedures used by Correctional Services staff when undertaking their required functions. Therefore it would, on balance, be contrary to the public interest for this document to be released.

20. The agency did not provide any further reasons in its notice of determination following internal review.

21. By letters received on 24 October and 14 November 2014, the Crown Solicitor's Office (CSO) provided submissions on behalf of the agency.<sup>7</sup> They included the following reasons in support of the claims of exemption:

### *Clauses 16(1)(a)(i) and 16(1)(a)(ii)*

- the relevant 'test, examination or audit' is the assessment of a sex offender's risk of reoffending (**the test**)

### *Clause 16(1)(a)(i)*

- disclosure of document 2, 'either by identifying the particular assessment tool or its contents, could reasonably be expected to prejudice the effectiveness of the method or procedure of conducting the test'
  - the agency uses document 2 to measure a sex offender's risk factors, which may change over time
  - if document 2 is disclosed, the applicant will become aware of the 'matters that are considered to give rise to a risk of reoffending, the reason for particular questions being asked ... and how particular responses will be characterised in terms of risk'
  - consequently, the applicant could reasonably be expected to 'modify his responses to questions suggested by Document 2 ... to produce more favourable, but inaccurate, results in future assessments'

<sup>5</sup> Applications for internal and external review dated 6 August and 1 October 2014, respectively.

<sup>6</sup> By letter to the applicant dated 9 December 2014 the Acting Ombudsman further explained why the scope of the external review is limited to document 2.

<sup>7</sup> I have also had regard to additional, confidential submissions made by the CSO on the agency's behalf. I should avoid disclosing claimed exempt matter in my reasons: *Freedom of Information Act 1991*, section 39(15).

*Clause 16(1)(a)(ii)*

- disclosure of document 2 'could reasonably be expected to prejudice the attainment of the objects of any test ... conducted by the' agency
  - the object of the test is 'to assess the offender's risk of reoffending'
  - the results of the test are used to, among other things, assess an offender's treatment needs and the appropriate correctional facility in which to hold an offender

*Clauses 16(1)(a)(iv)*

- disclosure of document 2 could reasonably be expected to have a substantial adverse effect on the effective performance by the agency of its functions
  - it is 'vitally important aspect of its [the agency's] function' to be able 'to accurately and reliably assess an offender's risk factors'
  - the agency is responsible for, among other things, 'the care and management of prisoners, and their release on parole'
  - '[t]he test is crucial in ascertaining what rehabilitation is offered to prisoners'
  - the test 'is carried out at various junctures during a sex offender's incarceration'
- disclosure of document 2 'will significantly compromise the integrity of risk assessments'

*Clause 16(1)(b) - the public interest test*

- it would, on balance, be contrary to the public interest to disclose document 2 for a number of reasons, including the following:
  - the 'strong public interest in obtaining accurate assessments of an offender's risk of reoffending'
  - the agency 'considers that the assessment tool used represents world best practice in prison assessment. It is in the public interest that world best practice is used'
  - 'disclosure under the FOI Act is unconditional, once a document is available to the applicant it might be disseminated to the world at large'<sup>8</sup>

*Copyright*

- copying document 2 would infringe copyright.

*The applicant*

22. When applying for external review, the applicant provided the following submissions:

... They [the agency] will not even supply the name of the assessment tools.

I would suggest that there is some information even be it the title page that can be released.

**Consideration**

23. The terms 'tests', 'examinations', and 'audits' are not defined in the FOI Act or the *Acts Interpretation Act 1915*, and should be accorded their ordinary meaning.
24. The phrase 'could reasonably be expected' means that the claimed effect that disclosure of the documents would have is not 'fanciful, imaginary or contrived', or 'irrational, absurd or ridiculous'.<sup>9</sup>
25. The phrase 'prejudice the effectiveness of any method or procedure' in the context of clause 16(1)(a) has not been judicially interpreted. That said, the South Australian District Court has attributed the ordinary meaning to the words in a very similar phrase

<sup>8</sup> The agency cited *Treglown v SA Police* [2011] SADC 139 at [101] and *Bradshaw v SA Police* [2012] SADC 184 at [60] to [61].

<sup>9</sup> *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 63-64.

from clause 4(2)(a)(iii): 'prejudice the effectiveness of any lawful method or procedure'.<sup>10</sup> The court commented that '[p]rejudice will be caused to the relevant methods and procedures if disclosure of them would make them less useful ...'.<sup>11</sup>

... It is one thing for observers to deduce, with varying success from everyday experience media reports and other informal sources, what appear to be the methods and procedures employed by such agencies to achieve their objects, but it is quite another thing to have spelt out publicly from the agency's own documents ... what those methods and procedures are. The risk that they be less effective would seem to be increased if a person endeavouring to combat or evade them has authoritative knowledge of them.<sup>12</sup>

26. The phrase 'substantial adverse effect' is important when considering clause 16(1)(a)(iv). It is not defined in the FOI Act. The District Court has held that the phrase refers to an effect that is 'sufficiently serious or significant to cause concern to a properly informed reasonable person'.<sup>13</sup> The test 'is a high one'.<sup>14</sup>
27. Document 2 is an assessment tool. The name of the assessment tool appears on each page. It includes proposed questions and assessment methods.
28. If document 2 were to be released under the FOI Act there would be nothing to preclude the applicant from providing it to others; as the FOI Act does not restrict the way in which information released under the Act is used.
29. I am satisfied that releasing document 2 could reasonably be expected to prejudice:
  - the utility of future tests conducted by the agency, by enabling test subjects to provide answers that show them in a more favourable light
  - the attainment of the objects of future tests conducted by the agency, by hampering its ability to accurately assess offenders' risks of reoffending, as well as treatment and accommodation needs.
30. Public interest factors relevant to this matter include:
  - fulfilling the objects of the FOI Act
  - promoting transparency of the agency's risk assessment process, and assisting the applicant to understand how the agency has assessed his risk of reoffending
  - promoting accountability of the agency and its staff
  - the continuing relevance of the assessment tool to the agency
  - the agency being able to manage prisoners and accurately assess them, including their treatment needs and risks of reoffending.

Ensuring the agency's ongoing ability to manage and accurately assess prisoners are persuasive considerations. On balance, my view is that disclosure of document 2 would be contrary to the public interest.
31. I am satisfied that document 2 is exempt under clauses 16(1)(a)(i) and 16(1)(a)(ii), both with clause 16(1)(b).<sup>15</sup>
32. Given this, I see no reason to consider the agency's remaining claim of exemption.

<sup>10</sup> *Konieczka v South Australian Police* [2006] SADC 134 (Unreported, Judge Boylan, 8 December 2006), [15].

<sup>11</sup> *Konieczka v South Australian Police* [2006] SADC 134 (Unreported, Judge Boylan, 8 December 2006), [15].

<sup>12</sup> *Konieczka v South Australian Police* [2006] SADC 134 (Unreported, Judge Boylan, 8 December 2006), [15], citing *Re Nickelberg and Australian Federal Police* (1984) 6 ALN N176.

<sup>13</sup> *Konieczka v South Australian Police* [2006] SADC 134 (Unreported, Judge Boylan, 8 December 2006), [17], citing *Re Thiess and The Department of Aviation* (1986) 9 ALD 454, [24].

<sup>14</sup> *Konieczka v South Australian Police* [2006] SADC 134 (Unreported, Judge Boylan, 8 December 2006) [18].

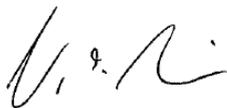
<sup>15</sup> I do not consider that it would be practicable to provide partial access to document 2, as envisaged by the *Freedom of Information Act 1991*, section 20(4).

## Determination

33. In light of my views above, I confirm the agency's determination.

## Comments

34. In my view, the reasons provided in the agency's notices of determination were inadequate. I remind the agency that it must engage in a 'public interest balancing process' in applying the public interest test.<sup>16</sup> Merely satisfying the initial criteria in an exemption clause with a public interest test under the FOI Act is not enough to satisfy the test that disclosure would, on balance, be contrary to the public interest.
35. Agencies should always turn their mind to the objects of the FOI Act, to extend as far as possible, the rights of the public to obtain access to information held by the government. This issue was discussed in the Ombudsman's recent FOI Audit.<sup>17</sup>



Wayne Lines  
**SA OMBUDSMAN**

16 January 2015

<sup>16</sup> *Iplex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.

<sup>17</sup> See 'An audit of state government departments' implementation of the *Freedom of Information Act 1991* (SA), May 2014, Part 7B, available at <http://www.ombudsman.sa.gov.au/wp-content/uploads/An-audit-of-state-government-departments-implementation-of-the-Freedom-of-Information-Act-1991-SA1.pdf>.

## APPENDIX - 2014/07824

### Procedural steps

Date	Event
3 July 2014	The agency received the FOI application dated 26 June 2014.
30 July 2014	The agency determined the application.
6 August 2014	The agency received the internal review application dated 1 August 2014.
8 August 2014	The agency acknowledged the application for internal review.
29 August 2014	The agency confirmed the determination.
2 September 2014	The applicant received the notice of determination following internal review dated 29 August 2014. <sup>1</sup>
1 October 2014	The Ombudsman received the applicant's request for external review dated 24 September 2014.
7 October 2014	The Acting Ombudsman: <ul style="list-style-type: none"> <li>acknowledged the application</li> <li>advised the agency of the external review and requested submissions and documentation.</li> </ul>
24 October and 14 November 2014	The Crown Solicitor's Office provided the Acting Ombudsman with the agency's submissions and documentation.
24 November 2014	The Acting Ombudsman issued her provisional determination and provided it to the parties.
4 December 2014	Ombudsman SA received a request from the applicant for an extension of time to respond to the provisional determination, along with additional information, by letter dated 29 November 2014.
5 December 2014	Ombudsman SA received a letter from the agency dated 2 December 2014 advising that it did not intend to make any further submissions in response to the provisional determination.
9 December 2014	The Acting Ombudsman responded to the applicant's letter dated 29 November 2014 (a courtesy copy of the response was provided to the agency).

<sup>1</sup> Letter to the Acting Ombudsman from the Crown Solicitor's Office, on behalf of the agency, received on 24 October 2014.