

Determination

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

Applicant	Mr [REDACTED]
Agency	Department for Correctional Services
Ombudsman reference	2015/05502
Agency reference	[REDACTED]
Applicant reference	[REDACTED]
Determination	The determination of the agency reversed.

REASONS

Application for access

1. The applicant is an inmate of Yatala Labour Prison (YLP).
1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant's solicitors requested access from the agency to:

CCTV footage from the cell of [REDACTED] in G Division at Yatala Labour Prison on [REDACTED] of an incident sometime between 1.00 pm and 4.00 pm resulting in [REDACTED] being gassed and forcibly removed from the cell.
2. For ease of reference, the procedural steps relating to the application are set out in the appendix.

Jurisdiction

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

Provisional determination

4. I provided my tentative view about the agency's determination to the parties, by my provisional determination dated 1 October 2015. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to reverse the agency's determination.
5. The agency provided submissions in response. I have considered these submissions in this determination.

Relevant law

6. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
7. 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 of the FOI Act lists various exemption clauses which may be claimed by an agency as a basis for refusing access.
8. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
9. 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.

Documents in issue

10. Initially, the agency identified only one document within the scope of the application, which it claimed was exempt under the FOI Act. However, upon undertaking the internal review, the agency identified a total of four documents as being within the scope of the application:
 - 1) DVD [REDACTED]/2015
 - 2) CCTV [REDACTED]/2015: 1330 -1445 hours
 - 3) CCTV [REDACTED]/2015: 1455 -1530 hours
 - 4) CCTV [REDACTED]/2015: 1449 - 1500 hours
11. I note that document 1 is not CCTV footage. Instead it consists of film taken by an agency staff member using a hand-held video camera. 'CCTV footage' means film footage obtained by means of closed circuit television. Therefore, I take the view that document 1 is not within the scope of the application. Accordingly, I do not have jurisdiction to consider the document in my external review.
12. The agency has chosen not to adopt this interpretation of the application and has included document 1 in its review considering that it is film footage and it does relate to the incident in question. The Applicant may choose to make a fresh application in relation to document 1. Subject to the outcome of my view, the Agency might consider release of the document outside of the FOI process.
13. Documents 2, 3 and 4 are the documents in issue in my review (**the documents**).
14. The agency has claimed that the documents are exempt in their entirety as documents:
 - affecting law enforcement and public safety (clauses 4(2)(a)(v) and (vi), with clause 4(2)(b), Schedule 1), or
 - concerning the operations of an agency (clause 16(1)(a)(iv), with clause 16(1)(b), Schedule 1).
15. According to the agency, both exemptions apply to document 4, whereas for documents 2 and 3, only the exemption under clause 4(2) applies.

¹ Freedom of Information Act 1991, section 12.

16. In relation to documents 2 and 3, the agency has offered to allow the applicant's solicitors to view them without providing a copy of them.

Issues in this review

17. I must consider whether the agency has justified its determination to refuse access to the documents in issue. The provisions relied on by the agency are set out below.
18. Clauses 4(2)(a)(v) and (vi), with clause 4(2)(b), provide:
- (2) A document is an exempt document if it contains matter the disclosure of which—
 - (a) could reasonably be expected—
 - ...
 - (v) to endanger the security of any building, structure or vehicle; or
 - (vi) to prejudice any system or procedure for the protection of persons or property
 - and
 - (b) would, on balance, be contrary to the public interest.
19. Clause 16(1)(a)(iv), with clause 16(1)(b), provide:
- (1) A document is an exempt document if it contains matter the disclosure of which—
 - (a) could reasonably be expected—
 - ...
 - (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.

Consideration

20. The applicant did not provide any submissions in support of his application.
21. The agency submitted that:
- the applicant is kept in custody at YLP [REDACTED]
 - G-Division of YLP is the State's highest security facility
 - on the morning of [REDACTED] 2015, the applicant exhibited threatening and abusive behaviour in his cell in G-Division and refused to comply with directions given by correctional officers
 - after several attempts to obtain compliance were unsuccessful, the Emergency Response Group (the ERG) was deployed to extract the applicant from his cell
 - the ERG is a group of specially trained correctional officers, trained in the use of force, and are used in any high risk incidents in every correctional institution in South Australia
 - shortly before 3.00 pm on [REDACTED] 2015, the ERG administered capsicum spray in the applicant's cell and extracted him
 - document 4 contains footage of the corridor near the applicant's cell and 'contains information relevant to the integrity, security and safety of G-Division'

and 'information relating to the sensitive and confidential processes and procedures' engaged by the ERG that are designed to ensure the safety and security of prisoners and staff

- the document reveals the particular tactics and processes implemented by the ERG in situations that require forced removal of a prisoner and the use of chemical agents, including how many team members are used and their positions and movements at various times
- the ERG tactics and processes have developed over a substantial period of time and apply to all prisons managed by the agency
- if those tactics and processes become known by prisoners they may attempt to counteract or anticipate the actions of the ERG resulting in a need for the tactics and processes to be redeveloped
- documents 2 and 3 contain footage from the CCTV camera located inside the applicant's cell and 'contain information relevant to the integrity, security and safety of G-Division'. Out of an abundance of caution, having regard to section 39(15) of the FOI Act, I have refrained from reproducing the detail of the agency's submissions in relation to this point. This has meant that I am unable to set out all of my reasoning
- all documents contain design and security features inside G-Division and disclosure of any of the documents could reasonably be expected to compromise the security of G-Division or prejudice the agency's systems and procedures for the protection of persons in G-Division and the building
- disclosure of the documents would provide 'criminal entities' with design and security features within G-Division and endanger the security of the prison and any persons within the building
- for this same reason, building design and security plans of correctional institutions are not available in the public domain
- in addition, disclosure of document 4 could reasonably be expected to have a substantial adverse effect on the effective performance by the agency of its function of ensuring the safety, security and integrity of G-Division
- the documents show the procedures used to manage a prisoner's behaviour for the protection of the prisoner, agency staff and medical staff
- compromising the confidentiality of the agency's systems and procedures would have a substantial adverse effect on the performance of the agency's functions, which includes maintaining the good order of the prison and the welfare of prisoners and employees
- there is a public interest in the agency managing the prison in such a way that security is not breached, thereby avoiding any risk to public safety
- on balance, disclosure of any of the documents would be contrary to the public interest as release pursuant to the FOI Act is considered to be 'release to the world at large'.

22. In response to the provisional report, the agency provided me with a statement by Mr Mike Reynolds, Director Safety and Security Services. He has set out his observations of the footage contained in each document and expressed his views as to how disclosure of the documents may compromise the prison's security and procedures. I have considered his observations and views in this determination.

The Exemptions

23. Both exemptions relied upon require consideration of whether the disclosure 'could reasonably be expected' to have the relevant effect. This involves an objective judgment of what are the reasonable, as distinct from irrational, absurd or ridiculous,

consequences of disclosure². The expectation must be based on reason and not be 'fanciful, far-fetched or speculative'³.

Clause 4

24. Having viewed the footage in each document, I am prepared to accept that they contain information in terms of the layout of the G-Division cells and building, security mechanisms and security processes and procedures. However, I am not persuaded by the agency's submissions that disclosure could reasonably be expected to endanger the security of the prison building or structure [subclause 4(2)(a)(v)] or prejudice the system used by the agency within G-Division to manage a prisoner's behaviour for the protection of the prisoner, agency staff and medical staff [subclauses 4(2)(a)(vi)].
25. In particular, and taking into account Mr Reynolds observations:
- I do not accept that the footage in document 4 of the corridor near the applicant's cell contains information relevant to the integrity, security and safety of G division (indeed nothing that could not be gleaned by any person physically present in that area)
 - I am not persuaded that a prisoner experiencing forced removal or the use of chemical agents would not be able to identify (and recount to other prisoners) how many team members were involved, and their positions and movements at various times
 - I am of the view that an effective ERG system will safeguard against a prisoner being aware in advance of the tactics and processes it uses in a forced extraction manoeuvre (for example, by having back up tactics and processes and a variety of team formations and procedures) and that disclosure of the documents will not diminish the ERG's capacity to utilise the advantage of surprise if it needs to
 - I am not persuaded that even if a prisoner was fully aware of the ERG's tactics, equipment and processes, he could do anything to evade an extraction or make it more difficult so as to prejudice the protection of the ERG team members, any other person or property
 - the agency has not provided any detailed information as to what is involved in redeveloping tactics and processes
 - for reasons advised in paragraph 21 above, I will not engage in the detail of the submissions relating to documents 2 and 3, but I am not persuaded that these documents contain information that if disclosed could reasonably be expected to endanger the security of the prison building or prejudice any system or procedure for the protection of persons or property. I note that these submissions are undermined somewhat by the agency's offer to allow the applicant an opportunity to view these documents.

Clause 16

26. Clause 16(1)(a)(iv) requires consideration of whether the effect is 'substantial'. This requires an assessment of gravity and whether the effect is 'sufficiently serious or significant to cause concern to a properly informed reasonable person'⁴.
27. The agency has claimed this exemption in respect of document 4 only.

² *Attorney-General's Department v Cockcroft* (1986) 10 FCR, 180, 190.

³ *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111, 123; *Iplex Information Technology Pty Ltd v Department of Information Technology Services* [1997] SADC 3618; (1997) LSJS 54, 64; *Konieczka v South Australia Police* [2006] SADC 134 [14].

⁴ *Harris v Australian Broadcasting Corporation* (1983) 50 ALR 551, 564; *Konieczka v South Australia Police* [2006] SADC 134 [17].

28. The agency submits that disclosure of document 4 could potentially disrupt the ERG's tactics and processes and this would affect their operation in all of South Australia's prisons. The agency has outlined the adverse effect as comprising:
- a. the exposure to risk of harm that is likely to follow disclosure given that the ERG team's methodology and equipment will be able to be studied and exploited by a person not willing to comply with its directions
 - b. the need to review the ERG team's tactics and equipment including the carrying out of further risk assessments
 - c. the possibility of having to employ alternative, more invasive security equipment that puts staff and persons at greater risk of harm.
29. For me to be satisfied that document 4 is exempt under clause 16, I need to be satisfied that the disclosure could be reasonably expected to have 'a substantial adverse effect on the effective performance by an agency of the agency's functions'. Even if disclosure led to the ERG having to review and adjust its processes for managing prisoner behaviour, I do not see this as particularly significant or serious and I do not see it as seriously impacting on the agency's performance of its functions of maintaining security and good order within a prison. I am of the view that no matter what knowledge a person has of the ERG's tactics and equipment, the capacity of a person to exploit that knowledge to thwart or impede the actions of several well trained and well equipped staff in the relatively confined space of the G-Division corridor is extraordinarily limited.

The Public Interest

30. In addition, both exemptions apply only where disclosure would be contrary to the public interest. Assessing whether disclosure would be contrary to the public interest requires the objective balancing of factors relevant to that public interest⁵.
31. Section 23(2)(f)(i) of the FOI Act provides that agencies must address the public interest test in exemption clauses and provide their reasons why disclosure would be contrary to the public interest in their determinations:
- (f) if the determination is to the effect that access to a document is refused—
 - (i) the reasons for the refusal, including—
 - (A) the grounds for the refusal under section 20(1); and
 - (B) if a ground for the refusal is that the document is an exempt document—the particular provision of Schedule 1 by virtue of which the document is an exempt document and, if under the provision disclosure of the document must, on balance, be contrary to the public interest in order for the document to be exempt, the reasons why disclosure of the document would be contrary to the public interest; and
 - (ii) the findings on any material questions of fact underlying the reasons for the refusal, together with a reference to the sources of information on which those findings are based
32. This does not mean merely showing that there is something adverse to the public interest likely to flow from disclosure of the document, but that on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure.⁶

⁵ *Ipex Information Technology Pty Ltd v Department of Information Technology Services* [1997] SADC 3618; (1997) LSJS 54, 70-1; *Zeltouneh v SA Police* [2015] SADC 34 [62].

⁶ *Ipex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54, 70.

33. The District Court in *Everingham v Director-General of Education* said that in assessing the applicability of the public interest test:

In each case the documents must be viewed in the light of all relevant circumstances, their contents and purposes assessed, and that done, the question of balance decided.⁷

34. I refer back to the comments made in the former Ombudsman's 2014 Audit Report that:

Many of the agencies' determinations provided to the audit did not comply with the requirement in section 23(2)(f) to show the reasons for their claim that disclosure of the requested documents would, on balance be contrary to the public interest.⁸

35. In this case, the agency has identified that there is a public interest in the agency maintaining (a) the security and good order of the State's prison facilities, (b) the safety and effectiveness of the ERG team and (c) the safety of persons held within those prisons. I accept that they are public interest considerations. However, having looked at the footage contained in each document and having considered Mr Reynolds' statement, I am not persuaded that disclosure of the documents will affect the agency's ability to maintain the security and good order of the State's prisons or the safety and effectiveness of the ERG team or the safety of persons held within the prisons.
36. Furthermore, the agency has not provided reasons in either its determination or submissions to me that show that it has considered the relevant factors or how it found on balance that disclosure would be against the public interest.
37. In my view, factors relevant to the public interest in this review include:
- the public interest in:
 - fulfilling the objects of the FOI Act, in particular promoting openness
 - individuals receiving fair treatment in accordance with the law and having access to what is recorded about them (in particular having regard to the agency's Mission identified within its published Strategic Plan to contribute to public safety through the safe, secure and humane management of offenders⁹)
 - ensuring transparency within representative government (including where correctional officers are public officers and subject to particular conduct standards and the agency has adopted 'values' including integrity, accountability and respectful behaviours¹⁰)
 - Parliament's intention that discretions under the FOI Act be exercised, as far as possible, in a way that favours disclosure without infringing personal privacy¹¹
 - the sensitivity of the information contained in the documents
 - the level of risk to public safety if the documents were disclosed
 - the importance of the documents' confidentiality to the agency's capacity to maintain security and good order within the prison.
38. The agency has not made adequate submissions to address the relevant public interest considerations as required by the FOI Act or current case law and has not satisfied me that disclosure of the documents would, on balance, be contrary to the public interest.

⁷ *Everingham v Director-General of Education*, D2959 (Unreported, District Court of South Australia, Judge Bowering, 13 November 1992). The court was considering clause 9(1)(b) of Schedule 1 of the FOI Act.

⁸ Ombudsman SA, *An audit of state government agencies' implementation of the Freedom of Information Act 1991(SA)* (May 2014) Ombudsman SA < <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>>., 72, [263].

⁹ Department for Correctional Services Strategic Plan 2014-2017: http://www.corrections.sa.gov.au/_files/f/3120/2014-17%20DCS%20Strategic%20Plan.pdf

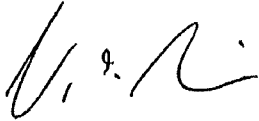
¹⁰ Department for Correctional Services Strategic Plan 2014-2017.

¹¹ Section 3A(1)(b), FOI Act.

39. Therefore it is my view that clauses 4(2)(b) and 16(1)(a) and (b) do not apply to prevent release of the documents.

Determination

40. In light of my views above, I reverse the agency's determination.

A handwritten signature in black ink, appearing to read 'W. Lines', written in a cursive style.

Wayne Lines
SA OMBUDSMAN

2 December 2015

APPENDIX

Procedural steps

Date	Event
30 March 2015	The agency received the FOI application dated 25 March 2015
5 June 2015	The agency determined the application
19 June 2015	The agency received the internal review application dated 17 June 2015
9 July 2015	The agency varied the determination
15 July 2015	The Ombudsman received the applicant's request for external review dated 9 July 2015
16 July 2015	The Ombudsman advised the agency of the external review and requested submissions and documentation
25 August 2015	The agency provided the Ombudsman with its submissions and documentation and indicated that further submissions would be provided
8 September 2015	The Ombudsman enquired of the agency whether additional submissions would be provided in support of its determination
1 October 2015	The Ombudsman issued his provisional determination
6 October 2015	By letter dated 2 October 2015, the applicant's solicitors advised that it would like opportunity to respond to the agency's submissions if they caused the Ombudsman to alter his view expressed in the provisional determination
9 November 2015	By letter dated 6 November 2015, the agency provided the Ombudsman its response to the provisional determination