

Determination

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

Applicant	[REDACTED]
Agency	SA Police
Ombudsman reference	2020/00403
Agency reference	20/1125
Determination	The determination of the agency is varied.

REASONS

Application for access

1. By application under the *Freedom of Information Act 1991* (the FOI Act) the applicant requested access from the agency to:

I am requesting the body cam video footage from both of the officer involved in my arrest. Only one was identified to me on my request by a number - 80639. I again ask for the second name and badge number, this was recorded on 13/1119 in Blyth St. next to the carpark entrance gate and then over to the cells. All footage pertaining to any interaction with me prior, during and after the actual hands on - to ground arrest is requested to be tendered. In addition to that, all and any records in any format show either of these police have ever been charges or accused of using unnecessary force with any member of the public previous to this date. Any and all additional notes or information provided to SAPOL personnel by any witness (police, court, sheriffs, or public) to the arrest including any intake notes, comments, records as provided by any and the arresting officer on my arrival at the cells, including my requests for a phone call and a lawyer. I also ask if any documentation / notes / video of the entire time spent in the cell and cell complex including all questions (medical, food and regarding was if I wanted bail) asked and answers recorded or entered into any computer system pertaining to this incident. Any and all video of me in Blyth street captured by the video camera mounted just inside the police property at any time on 13/11/19 and any other camera, including my attendance after leaving the hospital. Any notes/ records/ video including time stamps of the eventual car transfer of me to the Noarlunga Hospital by two SAPOL officers either SAPOL records or communicated to hospital staff on arrival.

Background

2. For ease of reference, procedural steps relating to the application and the external review are set out in Appendix 1.

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 4 August 2020. I informed the parties that subject to my receipt and consideration of submissions from the parties I proposed to vary the agency's determination.
5. The applicant provided oral submissions via phone call with my Legal Officer on 5 August 2020. The applicant requested that paragraph 50 in my provisional determination be removed from the final determination as it indicates that the applicant was only seeking a specific portion of the document, which the applicant advises is not correct.
6. Paragraph 50 was included in my provisional determination as an assurance to the applicant that the material I considered to be exempt was not, in my view, what the applicant was primarily interested in.
7. I formed this view having regard to multiple conversations between the applicant and my Legal Officer. The paragraph does not form part of my reasoning. Accordingly, I have no issue with removing this comment from my determination.
8. The applicant also stated during her phone call with my Legal Officer on 5 August 2020 that the dates provided in Appendix 1 are incorrect. Specifically, the applicant is certain that she received the internal review determination on the same day on which she lodged her application for internal review.
9. Having reviewed the copies of the applications and determinations as provided by the agency, I am satisfied that the dates as they appear in Appendix 1 are correct.
10. The agency advised via email dated 14 August 2020 that it had no further submissions to make.
11. In the course of my external review I also consulted with the interested party whose image can be seen and whose voice can be heard in the body cam footage. I advised in my provisional determination that in the event that the interested party consents to disclosure of his image and voice, that this would be sufficient to alter my views such that I would be satisfied that disclosure would not be unreasonable.
12. In a phone call with my Legal Officer on 4 August 2020, the interested party advised that he had no objection to disclosure of the portions of body cam footage which reveal his image and voice.
13. Accordingly, this determination is in the same terms as my provisional determination with the exceptions of:
 - paragraph 50 of my provisional determination being omitted from this determination
 - the body cam footage insofar as it relates to the interested party is not exempt pursuant to clause 6(1).

Relevant law

14. A person has a legally enforceable right to be given access to an agency's documents in accordance with the FOI Act.¹
15. 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.
16. Under section 48, the onus is on the agency to justify its determination 'in any proceedings'. This includes the external review process.
17. 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.
18. In its determination, the agency purported to rely upon clauses 6(1) and 12(1) of Schedule 1 of the FOI Act in refusing access to the documents. In its submissions to this Office, the agency also referred to clauses 4(2)(a)(v), 4(2)(a)(vi) and 4(3). I set all of these clauses out in full:

4—Documents affecting law enforcement and public safety

- (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.
- (3) A document is an exempt document if it is a document that was created by the former Bureau of Criminal Intelligence or has been created or is held by the State Intelligence Section of South Australia Police or any authority substituted for that body.

6—Documents affecting personal affairs

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

12—Documents the subject of secrecy provisions

- (1) A document is an exempt document if it contains matter the disclosure of which would constitute an offence against an Act.

19. Insofar as the agency has relied upon clause 12(1), section 45 of the *Police Complaints and Discipline Act 2016* (PCD Act) is also relevant. Section 45 provides:

45—Confidentiality

- (1) Except as required or authorised by this Act or by the Commissioner, the ICAC or the OPI, a person who is or has been engaged in the administration of this Act must not, directly or indirectly, disclose information in relation to or connected with a matter that forms or is the subject of a complaint, report, assessment or investigation under this Act. Maximum penalty: \$2 500 or imprisonment for 6 months.
- (2) Despite subsection (1), a person engaged in the administration of this Act may disclose information—
 - (a) for the purposes of the administration or enforcement of this Act; or
 - (b) for the purposes of a criminal proceeding or a proceeding for the imposition of a penalty; or

¹ *Freedom of Information Act 1991*, section 12.

- (c) for the performance of the functions of the Commissioner, the ICAC or the OPI under another Act; or
- (d) in accordance with an order of a court; or
- (e) if the information relates to the person and is disclosed by the person to a close family member of the person; or
- (f) as otherwise required or authorised by this or another Act.

Documents in issue

20. The documents in issue can be grouped into three categories: arrest documents, bodycam footage and complaint files.
21. By its determination the agency refused access to all of the documents which fell within the scope of the applicant's request. The determination was confirmed upon internal review.
22. In its submissions to this Office the agency revised its position, submitting that, excepting a small portion of one document, it did not consider the arrest documents to be exempt pursuant to any clause. The arrest documents were provided to the applicant on 14 July 2020.
23. The agency has also submitted that the body cam footage is only partially exempt. Having regard to the complexities surrounding the partial redaction of video footage, the applicant has not yet been provided with any of the body cam footage.
24. The agency maintains that the complaint files are exempt.
25. Accordingly, the documents in issue in this external review are:
 - the redacted portion of the Detainee Summary Report Custody form
 - the parts of the body cam footage considered to be exempt pursuant to clauses 6(1), 4(2)(a)(v) and 4(2)(a)(vi)
 - the complaint files.

Issues in this review

26. Having regard to the agency's determination and the exemption clauses provided in Schedule 1 of the FOI Act, it is for me to determine whether to confirm, vary or reverse the agency's determination in regards to the documents in issue.

Consideration

Arrest documents - Detainee Summary Report Custody form

27. The Detainee Summary Report Custody form has been partially released to the applicant on the basis that the redacted information is exempt pursuant to clause 4(3).
28. The agency has advised that the redacted information was created by the State Intelligence Section of South Australia Police (**SIS**) and was obtained from SIS for the purpose of incorporating the information into the Detainee Summary Report Custody form.
29. Noting that the information was obtained from SIS, it appears SIS not only created the information but also holds that information.
30. Accordingly, I am satisfied that the redacted information is exempt pursuant to clause 4(3).

31. All remaining arrest documents have been released to the applicant in full.

Body cam footage

32. There are two body cam footage videos (**the videos**). In its original determination the agency claimed the videos to be exempt in full on the basis of clause 12(1) in conjunction with section 45(1) of the PCD Act.
33. In its later submissions to this Office the agency revised its position stating that the videos are now considered to be partially exempt pursuant to clauses 6(1), 4(2)(a)(v) and 4(2)(a)(vi).
34. By email to the agency dated 24 July 2020 my Legal Officer sought clarification regarding the agency's changed position. The agency's response dated 28 July 2020 indicated that section 45(1) of the PCD Act was no longer considered to be applicable to the videos as the Office in Charge of the Internal Investigation Section, in accordance with the authority delegated to him by the Commissioner of Police, authorised the disclosure of the videos.
35. While section 45(1) of the PCD Act prevents disclosure of information 'in relation to or connected with' a complaint lodged under the PCD Act, and it is my view that the videos would fall within this category and therefore be exempt pursuant to clause 12(1), section 45(1) does allow for disclosure of information if authorised by the Commissioner of Police. Having regard to the agency's response to my Legal Officer dated 28 July 2020, I note that authorisation has been given to disclose the videos and therefore accept the agency's revised position in regards to the videos.
36. Noting that the rationale provided by the agency for refusing full access is the same for both videos, I have addressed the two videos together.

Clause 6(1)

37. The agency has claimed the videos to be partially exempt on the basis of clause 6(1) in respect to the image and voice of a present third party, whose image can be seen and whose voice can be heard in both of the videos.
38. The term 'personal affairs' is defined in section 4(1) of the FOI Act to include a person's financial affairs, criminal records, marital or other personal relationships, employment records, and personal qualities or attributes. However, the definition is not exhaustive. The term has been held to involve 'matters of private concern to an individual'² and the 'composite collection of activities personal to the individual concerned'³.
39. It is my view that all information which might directly or indirectly lead to the identification of any person, other than the applicant, would constitute that person's personal affairs. This may include images of an individual, audio of an individual's voice, images of a location closely associated with an individual (for example a person's home or work) and images of clothing worn by that individual. Accordingly, I am satisfied that the images of the third party and audio of his voice constitute his personal affairs.
40. Being satisfied that the videos contain information concerning the third party's personal affairs I now turn to whether disclosure would be unreasonable.

² *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Williams and Registrar of Federal Court of Australia* (1985) 8 ALD 219 and *Young v Wicks* (1985) 13 FCR 85 at 88-89.

³ *Commissioner of Police v District Court of New South Wales* (1993) 31 NSWLR 606, 625, citing *Re Wong and Department of Immigration and Ethnic Affairs* (1984) 2 AAR 208 at 210.

41. In *Treglown v SA Police* the South Australian District Court said that when interpreting 'unreasonable' in clause 6, a decision making is to consider:
- ...not merely the content of the information which is sought to be disclosed, although in some circumstances that may be sufficient, but, as well, its relationship with other material known to the applicant, its level of sensitivity, the attitude of the person affected by the disclosure, the circumstances in which the information was originally obtained, whether it was already known to the applicant, the nature of the applicant's interest in it and any disclosed intentions with respect to its use.⁴
42. In addition, unreasonableness has 'at its core, public interest considerations',⁵ such as the protection of personal privacy, the objects of the legislation being satisfied and ensuring transparency and accountability within representative government.
43. I am aware that the identity of the interested party is known to the applicant and that, noting that the applicant was the subject of both videos, disclosure of the interested party's personal affairs would not reveal any information not already known by the applicant.
44. However when considering whether disclosure of information concerning personal affairs would be unreasonable, the decision maker should bear in mind that disclosure under the FOI Act is unrestricted and, therefore, there is potential for disclosed documents to be disseminated to the world at large.⁶
45. As already covered, my Legal Officer sought the views of the interested party regarding disclosure of his personal information. The interested party confirmed that he consented to his image and voice being released in the context of the body cam footage.
46. In light of these submissions, I am satisfied that disclosure of the interested party's voice and image would not be unreasonable and that therefore those portions of the body cam footage are not exempt.

Clauses 4(2)(a)(v) and 4(2)(a)(vi)

47. The agency has claimed that the videos should be partially visually redacted in two places on the basis of clauses 4(2)(a)(v) and 4(2)(a)(vi). No exemption clause has been claimed in regards to the audio of either video. The agency has confirmed that the visual footage can be partially redacted by way of masking/pixelating the exempt material.
48. The agency has first stated that the videos should be partially redacted from the time the rear police station complex gate is opened until the time that the applicant steps into the cell complex. The agency proposes to redact the background footage but leave the footage of the applicant intact.
49. For the specified portions of the videos to be exempt pursuant to clause 4(2)(a)(v) they must contain matter the disclosure of which could be reasonably expected to endanger the security of a building, structure or vehicle. Disclosure must also, on balance, be contrary to the public interest.
50. I consider that the phrase 'could reasonably be expected' requires an objective assessment of whether it is reasonable, as opposed to irrational, absurd or ridiculous to

⁴ *Treglown v SA Police* [2011] SADC 139 (unreported, South Australian District Court, Judge Herriman, 20 December 2011), [133].

⁵ *Colakovski v Australian Telecommunications Corporation* (1991) 29 FCR 429 per Lockhard J at [438].

⁶ *'BA' and Merit Protection Commissioner* [2014] AICMR 9 [67].

expect that disclosure would have the effect anticipated.⁷ This expectation must be based on reason and not be 'fanciful, far-fetched or speculative'.⁸

51. In *Re Herbert and Ministry of Housing*,⁹ the WA Information Commissioner considered that disclosure of house plans could reasonably be expected to endanger the security of that property by facilitating burglaries. In the current matter, the relevant portions of the footage are in fact more detailed than a house plan. The background of the specified footage reveals not only the layout of the portrayed portion of the complex, but also specific additional aspects such as wall height and security camera location.
52. Additionally, the portrayed building is a police complex. Noting again that disclosure under the FOI Act should be regarded as potential disclosure to the world at large, I consider that disclosing the specified portion of footage could not only increase the risk of burglary but also other offences such as vandalism and trespass. In my view the need to preserve the security of a police complex is of great importance to ensure the effective completion of duties by police officers and general safety of the public.
53. The agency has also stated that the videos should be partially redacted inside the cell complex such that all written operational safety information as well as some specified vision of the police officers should be masked/pixelated.
54. Noting that the second proposed redaction relates to firearm handling and storage within the police complex, I am satisfied that if that information were disclosed it could reasonably be expected to prejudice systems or procedures for the protection of people.
55. In regards to the public interest required for clauses 4(2)(a)(v) and 4(2)(a)(vi), the agency has stated:

Should this portion of footage be made public it is the view that there would be a significant risk to the security of SAPOL employees, detainees and members of the public who may be on the premises at any given time.
56. I have identified the following factors in favour of disclosure:
 - achieving the objects of the FOI Act
 - increasing transparency in police processes surrounding arrest procedures.
57. Having regard to the agency's submissions, I have identified the following factors contrary to disclosure:
 - preserving the security of a police complex to ensure that police officers are able to effectively carry out their duties
 - protecting the safety of police officers and members of the public who have been detained or who may be on the premises at any given time
 - reducing the risk of an offence being committed such as burglary or vandalism.
58. In light of the factors above, I consider that the factors contrary to disclosure far outweigh those in favour of disclosure. I am satisfied that the two portions of footage as specified by the agency are exempt pursuant to clauses 4(1)(a)(v) and 4(1)(a)(vi).

Complaint files

59. The agency has claimed the complaint files to be fully exempt on the basis of clause 12(1), in conjunction with section 45 of the PCD Act. I consider it appropriate to address the complaint files collectively.

⁷ *Iplex Information Technology Pty Ltd v Department of Information Technology Services SA* [1997] 192 LSJS 54, 63-63.

⁸ *Konieczka v South Australia Police* [2006] SADC 134 at [14].

⁹ [2000] WAICmr 41 at [19]-[22].

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60. The complaint files have been compiled as a result of complaints which have been lodged pursuant to the PCD Act. As already covered, section 45(1) of the PCD Act prevents the disclosure of any information in relation to or connected with a matter the subject of a complaint under the PCD Act. The complaint files clearly fall within this category.
 61. Noting that the Commissioner has not authorised the disclosure of the complaint files and that none of the exceptions contained in section 45(2) are applicable, I am satisfied that disclosure of the complaint files would constitute an offence.
 62. The complaint files are therefore exempt pursuant to clause 12(1).

Comment

63. I consider it appropriate to briefly comment on the conduct of the agency.¹⁰ I emphasise that my view of the agency's conduct is not part of the reasoning for my determination.
64. In my view the agency did not give adequate consideration to its initial determination. It appears that, rather than identifying the documents within the scope of the applicant's request and then considering their exemption status, the agency reached its conclusion after simply considering the types of documents likely to be within scope. Multiple conversations with the agency indicate that it did not conduct a thorough search to locate the within scope documents until after the external review application had been lodged.
65. Although I ultimately agree with the views that the agency expressed in its determination, I do not consider that the way in which the agency reached those views is consistent with what is required of the agency pursuant to the FOI Act.
66. I am also of the view that greater effort should have been made at the time of the original determination to allow the applicant access to some of the documents. As I have covered, the agency revised its position, stating that it no longer considered the body cam footage and arrest documents to be exempt pursuant to clause 12(1) on the basis that authorisation had been given in accordance with section 45(1) of the PCD Act to release the documents. I query why the agency made no attempt to obtain that authorisation in the first instance.
67. It is also my view that the extensions sought by the agency in responding to this Office were inappropriately numerous and lengthy. Although I acknowledge that some of the delays could not have been avoided due to the contrasting interpretations of the legislation, several of the extensions were apparently sought for reasons already given for previous extensions.
68. I consider that the agency should have made greater effort to prioritise this matter, particularly after it became apparent that there was disagreement regarding the interpretation of the legislation and that there would be delays in processing this matter.
69. In light of my comment regarding the agency's conduct, it is my view that it is in the public interest to publish my determination pursuant to section 39(14) of the FOI Act.

Determination

70. In light of my views above, I vary the agency's determination in accordance with the agency's revised position as submitted to me in the course of this external review, with

¹⁰ *Freedom of Information Act 1991*, section 39(16).

the exception that the body cam footage insofar as it relates to the image and voice of the interested party is not exempt.

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

Wayne Lines
SA OMBUDSMAN

27 August 2020

APPENDIX 1

Procedural steps

Date	Event
17 December 2019	The agency received the FOI application dated 19 November 2019.
20 December 2019	The agency determined the application.
10 January 2020	The agency received the internal review application dated 10 January 2020.
24 January 2020	The agency confirmed the determination.
25 January 2020	The Ombudsman received the applicant's request for external review dated.
29 January 2020	The Ombudsman advised the agency of the external review and requested submissions and documentation.
13 February 2020	The agency provided the Ombudsman with its submissions and limited documentation.
18 February 2020	The Ombudsman requested that the agency provide the documents within the scope of the FOI application.
19 February 2020	The agency advised that it would not be providing the documents within the scope of the FOI application pursuant to section 45 of the <i>Police Complaints and Discipline Act 2016 (PCD Act)</i> .
21 April 2020	The Ombudsman advised the agency of his views that section 45 of the PCD Act does not prevent the agency from providing the documents to the Ombudsman for the purposes of conducting an external review and requested that the documents be provided by 6 May 2020.
30 April 2020	The agency sought an extension until 15 May 2020 to provide the documents. The extension was granted.
15 May 2020	The agency sought a further extension until 22 May 2020 to provide the documents. The extension was granted.
26 May 2020	The agency sought a further extension until 12 June 2020 to provide the documents. The extension was granted.
11 June 2020	The agency requested a meeting with the Ombudsman regarding the provision of the documents.
12 June 2020	The Ombudsman met with the agency regarding the provision of the documents. The agency provided the Ombudsman with a portion of the documents.
17 December 2019	The agency received the FOI application dated 19 November 2019.

20 December 2019	The agency determined the application.
10 January 2020	The agency received the internal review application dated 10 January 2020.
24 January 2020	The agency confirmed the determination.
25 January 2020	The Ombudsman received the applicant's request for external review dated.
4 August 2020	The Ombudsman issued his provisional determination and invited submissions from the parties.
4 August 2020	The third party provided his views regarding disclosure of his personal affairs.
5 August 2020	The applicant provided oral submissions in response to the provisional determination.
14 August 2020	The agency advised that it had no submissions to make in response to the provisional determination.