



OmbudsmanSA

DETERMINATION

External review pursuant to *Freedom of Information Act 1991*

Applicant: The Hon Dennis Hood MLC
Agency: Courts Administration Authority
Ombudsman reference: 2010/00127
Determination: The determination of the agency is confirmed

REASONS FOR DETERMINATION

Background

1. On 2 July 2010 the Hon Dennis Hood MLC made ten like applications under the *Freedom of Information Act 1991* (**the FOI Act**) to the Courts Administration Authority (**the CAA**). As an example, one of the applications is for:

Data containing each sentencing outcome imposed in cases where the offence of Rape (section 48 of the Criminal Law Consolidation Act 1935) was the primary offence mentioned on a complaint or information within the Magistrates and District Courts between 1 July 2008 and 1 July 2009, including the date of the sentence, penalty and judicial officer imposing the sentence.
2. Each application was for the same type of information albeit concerning a different offence.
3. Ms Louise Ciccozzi, an accredited FOI officer of the agency, determined Mr Hood's applications on 30 July 2009. Ms Ciccozzi determined that the data requested 'is information prepared by or on behalf of a court in relation to proceedings that have been heard before the court'. Therefore, Ms Ciccozzi determined to refuse access to the documents sought on the basis of clause 11 of Schedule 1 to the FOI Act, albeit she advised that judgments and sentencing remarks are available for view on the CAA's website.
4. Mr Hood applied for internal reviews of Ms Ciccozzi's determinations on 18 August 2009. In doing so he submitted that:
 - 'the information requested does not relate to the judicial functions of a court or tribunal, but rather seeks statistical information regarding sentencing outcomes';
 - his requests did not include the names of individual defendants, or the facts of any cases; and that
 - the CAA provided him with very similar information in the past.
5. On 7 September 2010 Mr Gary Thompson, the State Courts Administrator, determined the applications for internal review. Mr Thompson advised Mr Hood that, having considered clause 11 of Schedule 1 to the FOI Act and advice he had received from the Crown Solicitor's Office, he was satisfied that the information is exempt. He therefore confirmed Ms Ciccozzi's determinations.

6. Mr Hood applied to me for external reviews of Mr Thompson's determinations on 22 February 2010.

External review process

7. I received Mr Hood's applications for external review beyond the time limit imposed by the FOI Act. Section 39(3) of the Act provides that an application for external review must be made within 30 days after notice of the previous determination (in this case Mr Thompson's determination) was given to the applicant. However, I may, in my discretion, extend the time for making the application.
8. On 12 March 2010 I wrote to Mr Hood and asked him to explain the reasons for the delay, and to tell me why he thinks I should extend the time for him to make his applications. I set out a number of matters that I may consider relevant in deciding whether or not to exercise my discretion to grant an extension of time.¹ These include:
 1. the length of the delay;
 2. the explanation for the delay;
 3. any action taken to make the agency aware that its decision is being contested;
 4. the prejudice to the agency if an extension is granted;
 5. any hardship to the applicant if an extension is refused;
 6. any wider prejudice to the general public in terms of disruption to established practices; and
 7. the merits of the application.
9. I also noted that in Mr Thompson's determinations, Mr Hood was advised of his appeal rights under section 40(2)(a) of the FOI Act, but not of his right to external reviews under section 39 of the FOI Act. I therefore invited Mr Hood to advise me if he was misled by Mr Thompson's notification of his rights. I asked that Mr Hood's response be received by 25 March 2010.
10. On 18 March 2010 Mr Marc Marshall, an accredited FOI officer of the CAA, advised me that Mr Thompson's determinations contained attachments which explained the rights of an individual to external review following internal review. Note, I have recently been advised that the CAA has amended its determination template to include specific reference to review and appeal processes to remove any confusion regarding applicants' rights if they are aggrieved by determinations. I thank the CAA for their approach to this issue.
11. I did not receive a response from Mr Hood by 25 March 2010.
12. On 21 April 2010 I wrote to Mr Hood and advised that, as I did not receive a response from him, I declined to exercise my discretion under section 39(4) of the FOI Act. I also advised the CAA to this effect.
13. On 28 April 2010 I received a letter from Mr Hood dated 27 April 2010 in response to my letter dated 12 March 2010. Mr Hood apologised for his late response which was due to

¹ *Ulowski v Miller* [1968] SASR 277; *Hunter Valley Developments Pty Ltd and Others v Minister for Home Affairs and Environment* (1984) 58 ALR 305; *Comcare v A'Hearn* (1993) 45 FCR 441; *Conti v Secretary, Department of Family and Community Services* [2005] AATA 199 (Unreported, Senior Member Purcell, 4 March 2005); *Towie v Medical Practitioners Board of Victoria* [2004] VCAT 2545 (Unreported, Judge Dove, 17 December 2004).

the state election and staff absence. Mr Hood asked me to exercise my discretion under section 39(4) of the FOI Act because:

Mr Thompson did not advise me of my right for an external review by the Ombudsman; and further that very similar Freedom of Information requests have been answered in the past - indicating that the authority would not be prejudiced by the release of the updated information.

As a Member of the Legislative Council, this information is important in determining whether the Courts are imposing outcomes on offenders consistent with the range of penalties expected by Parliament. This data is not otherwise readily available or published in statistical form.

14. On 10 May 2010 I wrote to Mr Hood and the CAA and advised that, whilst I had not decided to exercise my discretion under section 39(4) of the FOI Act, I would conduct an initial examination into the merits of the matter.
15. Information relevant to my review was provided at a meeting between the CAA and my office on 24 May 2010. On 31 August 2010 I provided the CAA and Mr Hood with a provisional determination. Both were given the opportunity of making submissions, although neither chose to do so.

Determination

Extension of time - section 39(4) of the FOI Act

16. It is my view that I should extend the time for Mr Hood to make his applications for external review (up until and including the time I received them). I accept that an extension of over four months is on the long side. Moreover, I remain unconvinced that Mr Hood was actually misled by the fact that Mr Thompson's determination did not specifically advise Mr Hood of his right to apply for an external review (as distinct from an appeal). Nevertheless, it is a straightforward matter for agency determinations to comply with the requirements to correctly advise of review and appeal rights, rather than rely on attached documentation. Furthermore, I find that there is some interest in the merits of this matter, and I note that a previous application along the same lines achieved a favourable outcome for Mr Hood.
17. I therefore exercise my discretion under section 39(4) of the FOI Act in this manner.

Merits - exemption status

18. I am of the view that the documents sought by Mr Hood are exempt as claimed by the CAA, for reasons which will follow. Given, however, that similar such information has been released in the past, I have also explored whether I might offer reasons, as envisaged by section 39(12) of the FOI Act, why the agency might give access to the documents despite their exempt status. After careful consideration, I will decline from doing so.
19. Clause 11 of Schedule 1 to the FOI Act provides that:

A document is an exempt document if it contains matter-

- (a) relating to the judicial functions of a court or tribunal; or
- (b) prepared for the purposes of proceedings (including any transcript of the proceedings) that are being heard or are to be heard before a court or tribunal; or

- (c) prepared by or on behalf of a court or tribunal (including any order or judgment made or given by the court or tribunal) in relation to proceedings that are being heard or have been heard before the court or tribunal.

20. I have been provided with a sample of the information that was given to Mr Hood previously. It is in table format with columns for :

jurisdiction, judicial officer position, judicial officer name, file number, number of defendants, outcome (eg whether convicted, withdrawn, dismissed for want of prosecution), weeks of gaol sentenced, whether the sentence was suspended, period of any bond, amount of any fine imposed, amount of victims of crime levy, whether it was a global penalty, section of the criminal legislation, and description of the offence.

21. In essence, what the table contains is details of the outcome of each matter that came before the court with respect to various offences, including sentencing details. The finding of guilt and the subsequent sentencing of convicted persons clearly fall within the realm of 'judicial functions', and it is therefore not a long bow to conclude that these documents contain matter relating to the judicial functions of the relevant courts.

22. It is therefore my view that the documents sought by Mr Hood are exempt under clause 11(a) of Schedule 1 to the FOI Act.

23. In arriving at this conclusion it is irrelevant that:

- the judgments and sentencing remarks relating to the documents have been available for view on the CAA's website;
- the information within the documents has a statistical flavour, and does not disclose the identities of defendants nor the facts of individual cases; and
- the CAA has provided Mr Hood with similar information in the past.

24. These factors may, however, be relevant in other respects, namely whether there are reasons why the agency might consider giving access to the documents despite their exempt status.

25. Ordinarily, if information is publicly available, or has been publicly available in the past, one might be hard pressed to assert that the same information, although in another form and in another document, should not be made publicly available if requested. In this light it might be said that as individual cases have been publicly available, there is no compelling reason why the same information in these documents, although in a different form, could not also be made available.

26. On 23 August 2010 I spoke to Mr Thompson about the matter. He advised that the information given to Mr Hood previously was given in error, and the courts are firmly of the view that the earlier release should not be perceived as a precedent. The production of the particular information sought by Mr Hood in this application would require a new report to be written, and the documents actually sought by Mr Hood do not exist. This has resource implications. Under the current arrangements, the criminal justice statistics provided by the Office of Crime Statistics and Research (within the Attorney-General's Department), the Australian Bureau of Statistics, and through specialist researchers, provide more informed material than the basic data sought by Mr Hood. Furthermore, information of this

type has been misused in the past to criticise particular decisions without a full appreciation of the circumstances of those decisions.

27. Given my conclusions regarding the exemption status of the documents, it is not necessary for me to consider the points raised by Mr Thompson individually. Considered cumulatively, I decline to suggest that the CAA might consider exercising its discretion to release documents despite their exempt status.
28. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the determination of the agency, based on the circumstances existing at the time of review.
29. In light of my reasoning above, I confirm the agency's determination.

Right of Appeal

30. Any person aggrieved by my determination may appeal to the District Court of South Australia under section 40(2) of the FOI Act.
31. The CAA may also appeal against my determination, but only on a question of law and only with the permission of the court, under section 40(1) of the FOI Act.
32. Under section 40(3) of the FOI Act, any such appeals should be commenced within 30 days after receiving notice of my determination; or in the case of a person who is not given notice of my determination, within 30 days after the date of my determination

Richard Bingham
SA OMBUDSMAN

22 September 2010