

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2015293
Decision Ref: D0082016**

Participants:

Seven Network (Operations) Limited
Complainant

- and -

Department of Corrective Services
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – CCTV footage referred to in a security report – clause 5(1)(h) – whether disclosure could reasonably be expected to facilitate the escape of any person from lawful custody or endanger the security of any prison.

Freedom of Information Act 1992 (WA): sections 30(f), 74, 76 and 102(1); Schedule 1, clauses 5(1)(a), 5(1)(b), 5(1)(g), 5(1)(h) and 5(4).

Apache Northwest Pty Ltd v Department of Mines and Petroleum [2011] WASC 283

BGC (Australia) Pty Ltd v Fremantle Port Authority (2003) 28 WAR 187

Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550

Re MacTiernan and Department of the Premier and Cabinet [2010] WAICmr 2

Re Ravlich and Minister for Regional Development; Lands [2009] WAICmr 9

DECISION

The agency's decision is varied. I find that:

- The CCTV footage described at paragraph 21(i) of my Reasons for Decision is not exempt under clause 5(1)(h) of Schedule 1 to the *Freedom of Information Act 1992* (WA); and
- The CCTV footage described at paragraphs 20, 21(ii) and 21(iii) of my Reasons for Decision is exempt under clause 5(1)(h) of Schedule 1 to the *Freedom of Information Act 1992* (WA).

Sven Bluemmel
INFORMATION COMMISSIONER

30 May 2016

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Corrective Services (**the agency**) to refuse Seven Network (Operations) Limited (**the complainant**) access to documents under the *Freedom of Information Act 1992* (WA) (**the FOI Act**). In particular, the complaint relates to the agency's decision made in respect of the CCTV footage referred to in a document described by the agency as a Security Report BUNB2015050019.

BACKGROUND

2. On 18 June 2015, the complainant applied to the agency under the FOI Act for access to 'any documents including reports, ministerial briefing notes, photos and/or CCTV relating to items that have been thrown over the fence at West Australian prisons or detention centres, since 1 June 2014...'.
 3. By notice of decision dated 13 August 2015 the agency decided to give access to certain documents and to give access to edited copies of documents on the basis that the deleted information was exempt under clause 5(1) of Schedule 1 to the FOI Act.
 4. The agency did not specify on which paragraph from (a) to (h) of clause 5(1) it relied to assert that the deleted information was exempt under that clause. However, the agency maintained that the deleted information was exempt because 'any matter that may reveal a confidential source, impair the effectiveness of methods of detection of contraband or endanger the security of the prison is deemed to be exempt'.
 5. The decision did not refer to CCTV footage.
 6. On 20 August 2015 the complainant applied for internal review of the agency's decision on the basis that it did not identify CCTV footage. By letter dated 4 September 2015 the agency provided a decision on internal review.
 7. The internal review decision noted that the agency had located the requested CCTV footage. The agency claimed that the CCTV footage was exempt under clauses 5(1)(a), (b), (g) and (h). The agency submitted that 'disclosure of this record could compromise procedures for securing the prison and could reasonably be expected to impact safe and secure behaviour around the prison and therefore endanger the public'.
 8. The decision on internal review sets out two conflicting positions with respect to the applicable public interest considerations. At page one of the decision the agency states:

Since the onus is on the applicant to establish that disclosure would, on balance, be in the public interest (section 102) and your letter dated 20 August 2015 does not make a compelling case that this material is in the public interest...in my view all the requested CCTV material is exempt.
 9. At page 2 of the decision the agency submits that 'the clause 5(1) exemption is not subject to a public interest limitation'.

10. Later in this decision, I have discussed when I am required to take into account public interest considerations as set out in clause 5(4).
11. By letter dated 14 September 2015 the complainant applied to me for external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

12. Following receipt of the complaint, the agency produced copies of the disputed documents and its FOI file maintained in respect of the access application.
13. Following a review of all the relevant information, my Legal Officer wrote to the agency seeking further information about its decision. The agency responded and provided submissions in support of its claim that the disputed documents were exempt under clause 5(1)(h).
14. The agency did not maintain its claim that the disputed documents were exempt under clauses 5(1)(a), (b) and (g). Therefore, it was not necessary for me to consider those claims.
15. On 24 February 2016, I provided the parties with my preliminary view of this complaint. On the information then before me, it was my preliminary view that:
 - the camera footage stored on file PTZ 4 (**the first footage**) is exempt under clause 5(1)(h) of Schedule 1 to the FOI Act and the agency's decision to refuse the complainant access to the first footage is justified; and
 - the camera footage stored on files PTZ 5 and Zone f 3 (**the second footage**) is not exempt under clause 5(1)(h) of Schedule 1 to the FOI Act and the agency's decision to refuse the complainant access to the second footage is not justified.
16. In response to my preliminary view, the agency maintained that the second footage was exempt under clause 5(1)(h). On 14 March 2016 and 29 March 2016 the agency provided further submissions concerning the second footage.
17. The complainant initially indicated by email dated 29 February 2016 that it accepted my preliminary view. However, on 19 April 2016 the complainant submitted that I should consider a decision of the Department of Justice New South Wales dated 24 March 2016 under the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**). The decision by the Department of Justice New South Wales gave the complainant access to footage concerning an attempt to introduce contraband into a correctional facility. The complainant also provided an email link to a story shown on television by the complainant that included that footage provided to the complainant.
18. Given the matters set out in the preceding paragraph, I understand that the complainant does not now accept my preliminary view.

THE DISPUTED DOCUMENTS

19. The disputed documents are the relevant parts of the first footage and the second footage.
20. The relevant part of the first footage is the camera footage stored on file PTZ 4.
21. The relevant part of the second footage is the camera footage stored in files as follows:
 - (i) File PTZ 5: From 1.12 to 1.24 minutes.
 - (ii) File PTZ 5: From 21.45 to 23.30 minutes.
 - (iii) File Zone f 3: From 1.50 to 2.55 minutes and 3.18 to 3.28 minutes.

The agency's decisions

22. I consider that the agency's initial notice of decision is defective because it did not comply with section 30(f) of the FOI Act. Those deficiencies are remedied to a degree by the decision on internal review. However, the latter decision also lacks sufficient detail to comply with section 30(f).
23. Section 30 of the FOI Act sets out the details that must be included in an agency's notice of decision given to an access applicant. In cases where an agency decides to refuse access to a document, section 30(f) provides that the agency must include the following details in its notice of decision:
 - the reasons for the refusal;
 - the findings on any material questions of fact underlying those reasons; and
 - reference or references to the material on which those findings were based.
24. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision to refuse access to the requested documents is justified.
25. Although the decision on internal review cites clauses 5(1)(a), (b), (g) and (h), it does not, in relation to each subclause, set out the reasons for the refusal, the findings on any material questions of fact underlying those reasons and reference or references to the material on which those findings were based.
26. Therefore, I consider that the agency's decision failed to comply with section 30 of the FOI Act because it lacked the relevant information set out above.
27. The former Information Commissioner noted in *Re Ravlich and Minister for Regional Development; Lands* [2009] WAICmr 9 at [10]-[19] that if an agency gives an applicant a notice of decision that does not contain sufficient findings of fact and a clear statement of the basis on which an exemption is claimed, it is unlikely that the applicant will have a clear understanding of the reasons why access is refused and why the requirements of any exemption clause or clauses are satisfied. Only if applicants understand all of the elements involved in applying a particular exemption and why access is refused are they in a position to decide whether to accept the decision or to test it by way of external review on complaint to the Information Commissioner.

CLAUSE 5 – LAW ENFORCEMENT

28. The agency claims that the disputed documents are exempt under clause 5(1)(h) of Schedule 1 to the FOI Act.

29. To the extent that it is relevant, clause 5 provides as follows:

(1) Matter is exempt if its disclosure could reasonably be expected to –

...

(h) facilitate the escape of any person from lawful custody or endanger the security of the prison.

...

(4) Matter is not exempt matter under subclause (1) or (2) if -

(a) it consists merely of one or more of the following -

(i) information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;

(ii) a general outline of the structure of a programme adopted by an agency for dealing with any contravention or possible contravention of the law; and

(iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law; and

(b) its disclosure would, on balance, be in the public interest.

The complainant's submissions

30. The complainant's submissions are set out in its application for internal review dated 20 August 2015; its application for external review dated 14 September 2015 and in an email dated 19 April 2016. In summary, the complainant submits as follows:

- The report that refers to CCTV footage observes that there was 'clear footage of a person throwing a package over the perimeter fence' into a specific area of the prison.
- There has been no subsequent arrest so there would be no legal impediment to the release of the footage and the footage makes it difficult to identify the relevant persons, eliminating privacy concerns.
- There is no security risk as the use of CCTV and its location is not secret.
- Disclosure of the disputed documents promotes accountability and transparency.

- The agency claims that disclosure of the disputed documents is not in the public interest. However, this kind of footage has been provided under FOI legislation in other jurisdictions.
31. As observed at [17], the complainant also relies on a decision by the Department of Justice New South Wales under the GIPA Act and the associated footage that was included in a television broadcast by the complainant. The complainant submitted that this material was relevant to my decision in this matter.

The agency's submissions

32. The agency's submissions are set out in its decision dated 13 August 2015 and its decision on internal review dated 4 September 2015. The agency has also provided submissions dated 20 January 2016, 1 February 2016, 14 March 2016 and 29 March 2016. In summary, the agency submits as follows:
- Disclosure of the disputed documents would reveal aspects of the agency's security system for detecting unlawful activity at the prison. Specifically, disclosure could reasonably be expected to compromise the ability of the agency to detect the introduction of contraband into the prison.
 - Disclosure of the disputed documents would compromise procedures for securing the prison and could reasonably be expected to impact safe and secure behaviour around the prison and therefore endanger the public.

Consideration – clause 5

33. Clause 5(1) provides that matter is exempt if its disclosure 'could reasonably be expected to' have the consequences set out in the relevant subclauses of 5(1). In *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2011] WASC 283, which was upheld on appeal, Edelman J of the Supreme Court of WA said at [50], in effect, that the term 'could reasonably be expected to' should have its plain meaning. In particular he said that 'the best approach to [such provisions] is simply to ask whether disclosure 'could reasonably be expected to' have the relevant effect', rather than trying to paraphrase the term using different language.
34. Section 76(5) of the FOI Act requires me to include in my decision on a complaint the reasons for that decision, the findings on any material questions of fact underlying those reasons and reference to the material on which those findings were based. However, section 74(2) places an obligation on me '... not to include exempt matter ... in a decision on a complaint or in reasons given for the decision'.
35. The Supreme Court in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 556-557 recognised the difficulties faced by complainants and the constraints placed on the Information Commissioner by the FOI Act but took the view that section 90 – and by implication section 74 – should be construed strictly according to its tenor.
36. Taking into account the provisions of section 76(5) and section 76(8), I have endeavoured, within the constraints imposed upon me by section 74, to give the reasons for my decision and the evidence before me which supports those reasons. However, I

am prevented from discussing, other than in general terms, the information on which my decision is based because to do so would be a breach of my obligations under section 74(2).

37. I do not consider that the limits imposed by section 74 results in a denial of natural justice to the complainant.
38. In *Re MacTiernan and Department of the Premier and Cabinet* [2010] WAICmr 2 at [21], I observed that the obligations imposed by the FOI Act on the Information Commissioner to preserve the confidentiality of exempt matter seek to ensure that matter which is asserted to be exempt from disclosure may be scrutinised and examined by an officer quite independent of the agency claiming the exemption - namely, the Information Commissioner, or on appeal, the Supreme Court.
39. As Heenan J in *BGC (Australia) Pty Ltd v Fremantle Port Authority* (2003) 28 WAR 187 at [16] noted:

*That this security and examination of material, in order to protect the confidentiality of the material if the claim is justified, must be conducted without disclosure to the applicant, its counsel or solicitors is one example of these rare instances in which a party to litigation is deprived of full access to all material documents. However, this is not an isolated exception, and policy considerations which have prompted its acceptance, have been recognised in other areas of the law such as the power of a court to inspect documents in respect of which a claim for legal professional privilege has been made, or to scrutinise material relied upon for the issue of a search warrant, or to inspect documents for which a claim of public interest immunity has been asserted, without disclosing them to the party seeking inspection – see *Sankey v Whitlam* (1978) 142 CLR 1 at 46 and 110. None of these examples constitutes any denial of natural justice because, if the claim for privilege, confidentiality or public interest immunity is justifiably made, the party seeking to inspect the documents has no right of any kind to do so. Justice is achieved and the law applied in these situations by an examination of the documents by an independent officer or court acting on settled principles.*

40. The complainant relies on a decision of an agency in New South Wales to give the complainant access to camera footage. In summary, that decision describes the footage disclosed to the complainant as follows:

Record 3 is footage of an individual throwing contraband over the wall of a correctional facility. Record 7 is footage of individuals with contraband being apprehended by correctional officers in the external grounds of the correctional facility. The offenders are described as approaching the external fence line of the centre but you cannot see any structures of the centre...Records 9 to 11 are footage taken on a hand-held camera that show what happened after the individuals seen in Record 7 were apprehended. All of the footage is taken in the external grounds of the centre.

41. The decision relied on by the complainant is not a determination by a court or tribunal. It is also a decision made under legislation that involves different considerations to the matters I must consider under the FOI Act. As a result, I give little weight to that

decision. In any event, I understand that the decision dealt with footage that showed only the external grounds of the correctional facility and a wall of that facility.

42. I have considered the information before me and I have carefully reviewed the CCTV footage comprising the disputed documents. Given the character of the footage, I am limited in describing how its disclosure could reasonably be expected to have the consequences described by the agency, without disclosing matter that is claimed to be exempt.
43. I am not satisfied that disclosure of the part of the CCTV footage described at paragraph 21(i) could reasonably be expected to endanger the security of the prison. That footage was captured from cameras that, in my view, are easily discernible from the exterior of the prison. In addition, I consider that the locations captured are obvious from outside the prison. As a result, I am not persuaded that footage is exempt under clause 5(1)(h).
44. However, I consider that disclosure of the parts of the CCTV footage described at paragraphs 20, 21(ii) and 21(iii) could reasonably be expected to endanger the security of the prison. That is because disclosure could reasonably be expected to compromise the agency's systems for the detection and prevention of the introduction of contraband into the prison.
45. I have formed this view taking into consideration factors such as camera angles, footage quality and camera location. Based on all of these factors, I am satisfied that the parts of the CCTV footage described at paragraphs 20, 21(ii) and 21(iii) are exempt under clause 5(1)(h).
46. Clause 5(4) provides that matter is not exempt under clause 5(1) if it consists of the kinds of information described in clauses 5(4)(a)(i) to 5(4)(a)(iii) and its disclosure would, on balance, be in the public interest, as provided by clause 5(4)(b). The terms of clause 5(4) are set out at paragraph 29.
47. I am satisfied that the disputed documents do not have the character described in clause 5(4)(a). Therefore, it is not necessary for me to consider whether disclosure of parts of the CCTV footage described at paragraphs 20, 21(ii) and 21(iii) would, on balance, be in the public interest.

CONCLUSION

48. I find that:
 - (i) The CCTV footage described at paragraph 21(i) is not exempt under clause 5(1)(h) of Schedule 1 to the FOI Act and
 - (ii) The CCTV footage described at paragraphs 20, 21(ii) and 21(iii) is exempt under clause 5(1)(h) of Schedule 1 to the FOI Act.
