

'BH' and Transport Canberra and City Services

Decision and reasons for decision of Acting Senior Assistant Ombudsman Symone Andersen

Applicant:	'BH'
Respondent:	Transport Canberra and City Services
Application number:	AFOI-RR/21/10015
Decision date:	26 August 2021
Catchwords:	<i>Freedom of Information Act 2016 (ACT)</i> – deciding access – information is not held by respondent

Decision

1. I am a delegate of the ACT Ombudsman for the purposes of s 82 of the *Freedom of Information Act 2016 (ACT) (FOI Act)*.
2. Under s **82(2)(c)** of the FOI Act, I have decided to **set aside** the decision of Transport Canberra and City Services (**TCCS**), dated 25 March 2021 and **substitute** my decision that TCCS does not hold information under s **35(1)(b)** of the FOI Act.

Background of Ombudsman review

3. On 18 February 2021, the applicant applied to TCCS seeking access to:

The outward, forward-facing camera of BUS 384 on 5 February 2021.

For the period immediately prior to BUS 384 entering the intersection of Bindubi and Redfern Streets (in between Cook and Aranda) on 5 February 2021, until BUS 384 exits the same intersection; and

If BUS 384 went through the above intersection on multiple occasions during 5 February 2021, a copy of the footage from BUS 384 immediately prior to BUS 384 entering the above intersection until exits the same intersection around 2pm on 5 February 2021.

4. On 25 March 2021, the TCCS Information Officer decided not to disclose one document which it considered was in the scope of the application. In deciding to refuse access, TCCS relied on Schedule 1, s 1.14(1)(i) of the FOI Act. While access was formally refused, TCCS permitted the applicant to view the information in person and facilitated this.

5. On 22 April 2021, the applicant applied for Ombudsman review of TCCS' decision under s 73 of the FOI Act.
6. On 10 August 2021, I provided each party with my preliminary view, which was that the decision should be set aside and substituted for a decision that TCCS does not hold information. I will address the reasons for my preliminary view in the reasons I give in this notice, because in this case my decision is consistent with my preliminary view.
7. On 16 August 2021, TCCS wrote to me advising that it accepted the preliminary view in my draft consideration.
8. The applicant did not make submissions in response to my draft consideration.

Relevant law

9. Every person enjoys an enforceable right of access to government information.¹ However, this right is subject to provisions of the FOI Act which give grounds for refusing access to information when it is not in the public interest to disclose it.²
10. Section 35(1)(b) applies when a respondent does not hold any information within the scope of an access application.
11. When conducting a review, the Ombudsman may set aside and substitute the decision made by the respondent.³

Contentions of the parties

12. TCCS decided that information fitting the description in the access application would be contrary to the public interest information under Schedule 1, s 1.14(1)(i) of the FOI Act.
13. The effect of this provision is to say that information that could reasonably be expected to prejudice a system or procedure for the protection of people, property, or the environment is taken to be contrary to the public interest information.
14. The applicant's application for Ombudsman review contended that:

We were told the front facing CCTV capturing the critical moment of impact was non-operational at the time of the incident. The missing recording is especially concerning given the accident could have resulted in a double fatality or serious injury...

¹ Section 7 of the FOI Act.

² Section 35(1)(c) of the FOI Act.

³ Section 82(2)(c) of the FOI Act.

The reasoning of the decision-maker is flawed, and the current explanations for the camera not being operational is not technically credible. I doubt the camera would spontaneously automatically resume operation immediately after a serious accident while being non-operational immediately prior to the accident.

15. On 28 April 2021, TCCS was notified this review had commenced. On 5 May 2021, TCCS submitted that:

... the failure... in this instance, was not identified until after the incident when the bus had returned to the depot and footage was retrieved. While the cause of the failure was unknown, I can confirm that the error can only be corrected at a depot and not by the driver on board. It appears that the error was temporarily resolved on its own shortly after the incident. Despite recovery attempts, no footage from the camera in issue was captured.

16. On 21 May 2021, two ACT Ombudsman staff inspected the footage recorded by all of the bus' cameras before, during and after the period in question. They observed that there was no recording made by the forward facing camera while the bus was in the intersection of Bindubi Street and Redfern Street.
17. On 24 May 2021, the case officer managing this review wrote to the applicant advising that there was no information within the scope of the access application and that it was therefore unlikely that a review would lead to information being disclosed.
18. The applicant corresponded with the case officer in writing and by telephone on 28 May 2021. Essentially, the applicant maintains that I should find that the camera was operational or, alternatively, that TCCS should explain why it was not.
19. On 6 June 2021, the applicant wrote to our Office again. On this occasion, the applicant contended:

Based on our viewing of the footage, it is clear that the outward forward facing camera was displaying images after the impact, and it is also clear that the same camera was not displaying images prior to impact. In light of this inconsistent display of images from the relevant camera, in my view, it would be reasonable to interpret the word 'immediately' in my FOI request to mean 5 minutes before, and 5 minutes after, impact.

Relevant considerations

20. Section 34(1) of the FOI Act requires:

An agency or Minister deciding an access application must take all reasonable steps to identify all government information within the scope of the application.

21. The applicant's contentions ask me to go beyond the remit of the FOI Act. The assessment under the FOI Act is, firstly, what information does the agency hold, and secondly, is there any good reason why the information should not be disclosed. I am not tasked with forming a view on *whether* the camera *should have been* working or *why* it was not working except where this is relevant for evidentiary purposes.

22. As I have noted, the evidence before me is the formal correspondence from TCCS and the observations of ACT Ombudsman staff who conducted an inspection of the footage. I also had regard to the absence of any other contradictory evidence. On the balance of probabilities, I am satisfied that the fair conclusion for me to draw is that the camera was not operational and did not record any information while the bus was in the intersection of Bindubi Street and Redfern Street.

23. As for the applicant's submission that the word 'immediately' was too narrowly construed by TCCS' Information Officer, I am not persuaded. To begin with the application is unambiguous about where the scope ends because it says 'until BUS 384 exits' the intersection.

24. The word 'immediately' is defined in the Macquarie Dictionary as 'without lapse of time, or without delay; instantly; at once'. I consider that in this context the appropriate approach is to consider perhaps ten or twenty seconds prior to entering the intersection but not five minutes. In any event, the technical failure means that there was no footage recorded in the several minutes prior to the bus entering the intersection.

25. The applicant may well believe that they meant five minutes, but the meaning of the word as it shapes a respondent's obligations under the FOI Act is a question of law and not fact. The applicant cannot retrospectively amend the meaning of the application.

Conclusion

26. TCCS ought to have decided it did not hold any information within the scope of the access application. By considering other footage from different cameras, and by allowing the applicant to view that footage, TCCS went beyond the formal requirements of the FOI Act. This reflects considerable effort on the part of TCCS to promote the broader objects of the FOI Act and is commendable.
27. However, separately from that, the applicant applied for an Ombudsman review and I am tasked with re-making the decision anew. The appropriate decision is that TCCS does not hold any information within the scope of the application.

Symone Andersen
Acting Senior Assistant Ombudsman
26 August 2021