



## Decision and Reasons for Decision

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**Application Number:** 2006/F0171 and 2006/F0175

**Applicant:** Scott

**Respondent:** Queensland Corrective Services

**Decision Date:** 29 May 2007

**Catchwords:** **FREEDOM OF INFORMATION** - section 42(1)(g) of the *Freedom of Information Act 1992* (Qld) - matter relating to law enforcement and public safety - closed circuit television footage - potential risk to correctional centre security

**FREEDOM OF INFORMATION** - section 44(1) of the *Freedom of Information Act 1992* (Qld) - matter affecting personal affairs - audio intercom recordings - personal affairs of other prisoners

**FREEDOM OF INFORMATION** - sufficiency of search - handheld video recording - released to applicant - allegation of missing footage - retention and disposal procedures

**FREEDOM OF INFORMATION** - sufficiency of search - correctional officer reports - use of force - compliance with reporting procedures

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## Reasons for Decision

### Background

1. The applicant in these external reviews is a prisoner. This decision deals with two applications for external review, namely, review no. 171/06 made on 19 March 2006 and review no. 175/06, made on 22 February 2006.
2. Table 1 sets out the details of the applicant's freedom of information (FOI) access applications which are the subject of these reviews.

Table 1		
External review (ER) no.	Date of ER application	Documents sought in FOI access applications
171/06	19.03.06	<ol style="list-style-type: none"> <li>1. Video footage of the hallway attached to cells in POD 1 of the Maximum Security Unit (MSU) of Arthur Gorrie Correctional Centre (AGCC) on 15.01.06 from 7.00am to 1.30pm</li> <li>2. Video footage of cell 6 and cell 6 air lock in POD 1 of the MSU from the AGCC on 15.01.06 from 7.00am to 6.00pm</li> <li>3. Audio recordings via intercom from the MSU of AGCC from 15.01.06</li> <li>4. All video footage and documents relating to a breach dated 15.01.06</li> <li>5. All video footage and audio recordings from the hand held video camera that was used on 02.12.05 in the MSU of AGCC.</li> </ol>
175/06	22.02.06	<ol style="list-style-type: none"> <li>1. Video footage of cell 6 and cell 6 air lock in POD 1 of the MSU of AGCC from 6.00am to 6.00pm on 02.12.05</li> <li>2. The audio recording via intercom from the MSU of AGCC for 02.12.05</li> <li>3. All the video footage from a hand held video camera that was used on 02.12.05</li> <li>4. Video footage of the Detention Unit Cell that the applicant was held in from 6.00am to 6.00pm on 02.12.05</li> <li>5. All reports relating to an incident occurring on 02.12.05</li> <li>6. The full names of all Corrective Services Officers that were working in the MSU of AGCC on 02.12.05.</li> </ol>

3. The external review applications arise out of a failure by Queensland Corrective Services (QCS) to make a decision on the applicant's initial FOI applications within the time specified by the *Freedom of Information Act 1992* (Qld) (FOI Act).
4. Within 14 days of receipt of each FOI application, QCS wrote to the applicant to advise that:

*The department is currently processing a large number of applications under the Freedom of Information Act 1992 (the FOI Act). As a consequence the department may experience some difficulty in providing you with a decision within the time frame required by the Act.*

*I apologise for any inconvenience this may cause however, please be assured that your application will be processed as soon as possible.*

5. In respect of the application which is the subject of external review no. 175/06, QCS also informed the applicant that an application fee was payable in order to process item 6 of his application because the documents to which he sought access did not concern his personal affairs.
6. By letter dated 19 December 2005, the applicant contested the decision of QCS to impose an application fee with respect to this item on the basis that the documents related to his personal affairs because the officers working in the MSU on 2 December 2005 were involved in an incident with the applicant.
7. By letter dated 18 January 2006, Ms P Law of QCS informed the applicant of her decision that an application fee was not payable in respect of item 6 of his application but did not express a decision on the remainder of the applicant's FOI application.
8. Having received no further correspondence on these applications, the applicant applied to this Office for external review on 22 February 2006 (review no. 175/06) and 19 March 2006 (review no. 171/06). Therefore, these applications seek external review of the deemed refusal by QCS to provide access to documents sought by the applicant. That is, QCS has failed to make a decision within the time specified by the FOI Act.
9. Notwithstanding the applications for external review, QCS proceeded to issue decisions on the FOI applications and by letter dated 23 March 2006, Ms V Young of QCS, informed the applicant of her decision in respect of these two applications. By letter dated 28 March 2006, Ms Young issued a further decision on the application which is the subject of external review no. 175/06. As these decisions were given outside the timeframe required by the FOI Act, they had no effect on the processing of the applicant's external reviews.
10. For the purposes of this decision, it is important to identify that the AGCC is privately managed and operated by GEO Group Australia Pty Ltd (GEO) under contract to QCS. QCS has informed this Office, in the context of previous external reviews, that pursuant to this contract, all documents prepared by GEO in managing and dealing with offenders in AGCC are documents '*in the possession or under the control*' of QCS for the purposes of section 7 of the FOI Act. In this decision, where a document has been created by GEO, I have referred to it as a document created by AGCC.

#### **Steps taken in the external review process**

11. Following receipt of these external review applications, this Office consulted QCS in order to:
  - confirm whether QCS intended to rely upon the exemption claims set out in Ms Young's letters dated 23 March 2006 and 28 March 2006 for the purpose of these reviews
  - obtain submissions from QCS on any further exemptions it wished to claim over the documents in issue pursuant to the FOI Act
  - obtain copies of the documents in issue held by QCS
  - request further searches be undertaken for documents responsive to the applicant's FOI applications.
12. This Office also corresponded with the applicant during this review in order to clarify the scope of his applications and seek his agreement on methods of dealing with these

reviews. By letter dated 13 February 2007, this Office sought submissions from the applicant as to:

- whether he agreed to this Office dealing with his request in item 4 of external review no. 171/06 as part of one of his later external review applications (namely, external review no. 210055 dated 13 September 2006) in light of duplication of these requests
- whether the release of documents by QCS pursuant to Ms Young's letter dated 28 March 2006 resolved items 5 and 6 of external review no. 175/06

13. By letter dated 22 February 2007, the applicant:

- agreed to my proposal of dealing with item 4 of external review no. 171/06 as part of a duplicate request in external review no. 210055
- submitted that the handheld video camera footage sought in both reviews did not form part of the Security Management System of the MSU at AGCC
- submitted that the audio and video recordings sought in these applications do not qualify for exemption under the FOI Act
- queried whether section 29(4) of the FOI Act was in force, in its current form, as at the date of his initial FOI applications
- raised sufficiency of search issues with respect to items 5 and 6 of external review no. 175/06.

14. On 6 March 2007, QCS informed this Office that it wished to rely on the exemption claims set out in Ms Young's letter of 23 March 2006 in these external reviews, namely section 29(4) and section 42(1)(g) of the FOI Act. Additionally, QCS sought to rely on the reasons for decision outlined in Ms Young's letter as its submissions in these reviews. I have accepted the reasons for decision outlined in Ms Young's letter dated 23 March 2006 as QCS's submissions in these reviews.

15. By letter dated 2 March 2007, I informed the applicant that section 29(4) of the FOI Act was in force at the time he made his initial FOI applications as it came into force on 1 September 2005 and therefore, possibly had application to these reviews.

16. By letter dated 15 March 2007, QCS advised that in respect of the audio intercom recordings held in response to the applicant's FOI applications, it relied upon section 44(1) and section 42(1)(h) of the FOI Act in refusing access to these recordings, subject to its claim under section 29(4) of the FOI Act.

17. On 27 March 2007, I informed QCS of my preliminary view that it was not entitled to refuse to deal with the applicant's FOI applications pursuant to section 29(4) of the FOI Act and that therefore, it was required to deal with them under Part 3 of the FOI Act. Ms P Law, Acting Manager, Freedom of Information and Privacy, QCS, accepted my preliminary view on this point and in light of it:

- identified the documents in issue QCS held in response to these two reviews
- provided this Office with copies of those documents
- claimed that the video recordings held by QCS qualified for exemption under section 42(1)(g) of the FOI Act
- claimed that the audio recordings held by QCS qualified for exemption under section 44(1) and alternatively, section 42(1)(h) of the FOI Act.

18. On 4 April 2007, QCS informed this Office that it had located the 2 December 2005 handheld video recording sought by the applicant in these reviews. QCS advised that

it did not consider any FOI Act exemption provision applied to this recording and therefore, would send a full copy of the recording to the applicant immediately. On 5 April 2007, a staff member of this Office viewed a copy of this handheld video recording.

19. By letter dated 5 April 2007, I informed the applicant of my preliminary view on these reviews as set out in Table 2 below.

Table 2	
External review no.	Preliminary view
171/06	<ul style="list-style-type: none"> <li>• Disclosure of the VHS video tapes held by QCS could reasonably be expected to endanger the security of the MSU of the AGCC and therefore, they qualify for exemption under section 42(1)(g) of the FOI Act</li> <li>• the cassette tape held by QCS is <i>prima facie</i> exempt from disclosure because the audio intercom recordings contain information relating to the shared personal affairs of the applicant and other MSU prisoners which is inextricably linked and cannot be severed. It would not, on balance, be in the public interest to disclose those recordings and therefore, they are exempt under section 44(1) of the FOI Act</li> <li>• the handheld video recording for 2 December 2005 is no longer in issue as it has been released in full.</li> </ul>
175/06	<ul style="list-style-type: none"> <li>• Disclosure of the VHS video tapes held by QCS could reasonably be expected to endanger the security of the MSU of the AGCC and therefore, they qualify for exemption under section 42(1)(g) of the FOI Act</li> <li>• the cassette tape held by QCS is <i>prima facie</i> exempt from disclosure because the audio intercom recordings contain information relating to the shared personal affairs of the applicant and other MSU prisoners which is inextricably linked and cannot be severed. It would not, on balance, be in the public interest to disclose these recordings and therefore, they are exempt under section 44(1) of the FOI Act</li> <li>• the handheld video recording for 2 December 2005 is no longer in issue as it has been released in full</li> <li>• QCS does not have in its possession or under its control any further reports relating to the 2 December 2005 incident or documents setting out the names of Corrective Services officers working in the MSU of the AGCC on 2 December 2005. Also, the searches undertaken by QCS in an effort to locate the documents have been reasonable in the circumstances of this case.</li> </ul>

20. By letter dated 16 April 2007, and received in this Office on 19 April 2007, the applicant advised that he was awaiting the return of a copy of his file from his solicitors. By letter dated 20 April 2007, I confirmed the due date of 24 April 2007 for the applicant to respond to my preliminary view and invited him to submit a written request to this Office if he required an extension of time.
21. By facsimile dated 23 April 2007, the applicant informed this Office that he had received a copy of his file from his solicitors and sought an extension of time within which to respond to my preliminary view dated 5 April 2007. By return facsimile, I granted the applicant an extension of time until 30 April 2007.

22. By letter dated 29 April 2007 the applicant provided submissions in response to my preliminary view and documents in support of his contentions. In his letter, the applicant:
- accepted my preliminary view with respect to item 6 in external review no. 175/06
  - contested the remaining aspects of my preliminary view on these reviews
  - relied upon his submissions dated 2 January 2007 and 23 April 2007 provided to this Office on external review no. 2005/F0674 with respect to the application of section 42(1)(g) of the FOI Act to video recordings located by QCS on these reviews
  - submitted that some footage was missing from the handheld video recording provided to him by QCS.
23. In light of the applicant's contentions with respect to the handheld video recording, on 4 May 2007, I requested QCS to:
- review the original handheld recording to determine if it contained the missing footage specified by the applicant and/or
  - conduct further searches for any additional tapes containing the missing footage.
24. On 8 May 2007, Ms Young of QCS informed this Office that she had reviewed the original handheld recording and identified the footage which the applicant contended was missing from the copy of the recording provided to him. On this date, I:
- requested Ms Young to make a further copy of the recording (containing the allegedly missing footage) and send it to the applicant immediately
  - informed the applicant that a second copy of the recording was being sent to him by QCS
  - requested the applicant to respond with any further submissions or withdraw his application in respect of the handheld video recording by 11 May 2007.
25. By facsimile dated 9 May 2007, the applicant informed me that he had not yet received the second copy of the handheld recording and that he would contact me as soon as he had received and viewed this recording.
26. By letter dated 10 May 2007 and received by this Office on 15 May 2007, the applicant advised that he had viewed the second copy of the handheld video recording. In this letter the applicant:
- advised that the second copy contained additional footage to the first copy of the handheld video recording
  - contended that certain footage was still missing from the second copy
  - requested QCS provide him with a complete copy of the recording.
  - enclosed the second copy of the handheld video recording provided to him by QCS for my consideration.
27. On 15 May 2007, I contacted QCS to request that the copy of the handheld video recording held by the QCS FOI Unit (QCS recording) be forwarded to this Office so that its footage could be compared with that contained on the copy provided to this Office by the applicant.
28. On 17 May 2007, a staff member viewed the QCS recording and the copy provided to this Office by the applicant.

29. On 22 May 2007, I asked QCS to confirm whether the QCS recording was the original version. On this date, QCS confirmed that the QCS recording was a copy and that the original footage was contained on an eight millimetre tape that was used in the handheld video recorder during the recording process. In light of this explanation, I requested QCS to conduct searches for the original eight millimetre tape.
30. On 23 May 2007, QCS informed this Office that it had conducted searches of its files for the eight millimetre tape but could not locate it. As a result, QCS then asked AGCC to conduct searches of its records for the eight millimetre tape. My findings with respect to this recording are set out at paragraphs 77-85 of this decision.
31. In making this decision, I have taken into account the following:
- the applicant's two initial FOI access applications made in December 2005 and January 2006
  - applications for external review dated 22 February 2006 and 19 March 2006
  - records of telephone consultations held between staff members of this Office and QCS between April 2006 and May 2007
  - correspondence (including email correspondence) between staff members of this Office and QCS exchanged between April 2006 and May 2007
  - the applicant's submissions to this Office dated 22 February 2007
  - the applicants submissions dated 29 April 2007
  - relevant parts of the applicant's submissions dated 2 January 2007 and 23 April 2007 provided to this Office on external review no. 2005/F0674
  - the documents in issue held by QCS
  - QCS Safety and Security Procedure – Use of Force (version 00)
  - applicable provisions of the FOI Act and relevant case law.

### **Matter in issue**

32. Table 3 sets out the documents remaining in issue in these reviews by reference to item numbers in the initial FOI access applications. This table should be read in conjunction with Table 1 which appears on page two of this decision.

<b>Table 3</b>	
<b>External review no.</b>	<b>Documents in issue</b>
171/06	<ul style="list-style-type: none"> <li>• All video and audio recordings sought in items 1-3</li> <li>• The handheld video recording sought in item 5</li> </ul>
175/06	<ul style="list-style-type: none"> <li>• All video and audio recordings sought in items 1-2 and 4</li> <li>• The handheld video recording sought in item 3</li> <li>• All paper documents sought in item 5</li> </ul>

33. For the purpose of these reviews, I have dealt with the applicant's request in item 5 of external review no. 171/06 and item 3 of external review no. 175/06 together as both requests sought access to a copy of the handheld video camera recording of an incident which occurred on 2 December 2005 in the MSU of AGCC.

## Findings

### Video recordings

34. QCS located all closed circuit television (CCTV) recordings sought by the applicant in these reviews. These recordings are contained on VHS video tapes as set out in the table below:

Table 4		
External review no.	VHS video tapes held by QCS	Items which these documents respond to in FOI applications
171/06	<ul style="list-style-type: none"> <li>video tape containing footage of hallway attached to Pod 1 cells in the MSU at AGCC on 15 January 2006</li> <li>video tape containing footage of cell 6, Pod 1 in the MSU at AGCC on 15 January 2006</li> <li>video tape containing footage of air lock to cell 6, Pod 1 in the MSU at AGCC on 15 January 2006.</li> </ul>	<p>Item 1</p> <p>Item 2</p> <p>Item 2</p>
175/06	<ul style="list-style-type: none"> <li>video tape containing footage of cell 6, Pod 1 in the MSU at AGCC on 2 December 2005</li> <li>video tape containing footage of air lock to cell 6, Pod 1 in the MSU at AGCC on 2 December 2005</li> <li>video tape containing footage of detention unit cell in the MSU at AGCC on 2 December 2005.</li> </ul>	<p>Item 1</p> <p>Item 1</p> <p>Item 4</p>

35. As stated in paragraph 17 of this decision, QCS contends that the recordings it holds in response to these reviews qualify for exemption under section 42(1)(g) of the FOI Act. As set out in paragraph 14 of this decision, the reasons given by Ms Young in her letter dated 23 March 2006 have been accepted as the submissions of QCS for the purpose of these reviews.

### Section 42(1)(g) of the FOI Act

36. Section 42(1)(g) of the FOI Act provides as follows:

#### 42 Matter relating to law enforcement or public safety

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

...

(g) endanger the security of a building, structure or vehicle; or

...

37. The nature of the test imposed by the phrase '*could reasonably be expected to*' was analysed by the Information Commissioner in *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (B), (at pp.339-341 paragraphs 154-160), by reference to relevant Federal Court decisions interpreting the identical phrase as used in exemption provisions of the *Freedom of Information Act 1982* (Cth). Those observations are also relevant here. In particular, the Information Commissioner said in *B* (at pp.340-341, paragraph 160):

*The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely*



*speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*

38. The ordinary meaning of the word 'expect' which is appropriate to its context in the phrase 'could reasonably be expected to' accords with the following dictionary meanings: 'to regard as probable or likely' (Collins English Dictionary, Third Aust ed); 'regard as likely to happen; anticipate the occurrence ... of' (Macquarie Dictionary, 2nd ed); 'Regard as ... likely to happen; ... Believe that it will prove to be the case that ...' (The New Shorter Oxford English Dictionary, 1993).
39. For the purpose of these reviews, I must therefore be satisfied that disclosure of the CCTV video recordings could reasonably be expected to endanger the security of the MSU in order for these recordings to qualify for exemption under section 42(1)(g) of the FOI Act.

#### **Application of section 42(1)(g) of the FOI Act**

40. QCS has submitted that the VHS video tapes listed in Table 4 of this decision qualify for exemption under section 42(1)(g) of the FOI Act because they form part of the Security Management System of the MSU which aims to 'maintain security, prevent escapes and provide a safe and secure environment for staff, prisoners and visitors'. QCS considers that release of the video tapes would adversely impact upon the ability of AGCC to monitor, evaluate and analyse matters involving the critical management of dangerous offenders.
41. QCS's objection to the release of these video tapes is also based on the potential for 'blind spots and security system weaknesses' to be revealed and the associated risk this would pose for the security of the MSU and its surveillance system. QCS considers that by releasing these tapes, the footage could be 'misused, potentially aiding in the execution of an escape attempt, a hostage-taking incident or a disturbance in the MSU' and would 'undermine the fundamental purpose of the system which is to aid staff in maintaining the good order and security of the correctional facility'.
42. In any case in which reliance is placed on section 42(1)(g) of the FOI Act, the crucial judgment to be made is whether or not the prejudicial consequences contemplated by the terms of the exemption provision **could reasonably be expected** to follow, as a consequence of disclosure of the particular matter in issue. There may be instances where the nature of the matter in issue is such that it is self-evident that its disclosure could reasonably be expected to have the consequences contemplated by section 42(1)(g) of the FOI Act. Ordinarily however, in an external review, it will be incumbent on the agency to explain the precise nature of the prejudice that it expects to be occasioned by disclosure of the particular matter in issue, and to satisfy me that the expectation of prejudice is reasonably based.
43. In many instances, I will not be able to refer in my reasons for decision to the precise nature of the apprehended prejudice (as to do so would subvert the reasons for claiming an exemption in the first place). However, I must, in any event, be satisfied that the agency has discharged its onus under section 81 of the FOI Act of establishing all requisite elements of the test for the exemption (see *Prisoner's Legal Service Inc v Queensland Corrective Services Commission*, 27 March 1997, No. 97004 at paragraph 20).
44. With respect to the video recordings held by QCS and the exemption claim under section 42(1)(g) of the FOI Act, the applicant relies upon the relevant parts of his

submissions dated 2 January 2007 and 23 April 2007 provided to this Office on external review no. 2005/F0674 in the context of similar matter in issue.

45. In his letter dated 2 January 2007, the applicant argued in favour of the release of the video recordings and provided reasons why he considered they do not qualify for exemption under section 42(1)(g) of the FOI Act. Specifically, the applicant submitted that:
  - it is not the recording mechanism itself that deters prisoners from attempting to escape, assaulting staff, taking a hostage or creating any other disturbance within the MSU, but the presence of corrective service officers (CSOs) in the facility
  - viewing brief images on each of the 17 cameras in Pod 1 of the MSU could not *'reasonably be expected to facilitate an escape attempt, an assault on staff, a hostage-taking incident or a disturbance within the MSU'*
  - due to the fact that correctional officers can control what camera is recorded, the system is unpredictable and therefore knowledge of the system would not endanger the security of the MSU
  - the security system for the MSU is in place to protect prisoners as well as staff and visitors, and as such prisoners should be able to have access to the recordings made as part of that security system.
46. In his letter dated 23 April 2007, the applicant submitted that it was not reasonable to expect an unlawful act could occur as a result of viewing the video recordings. He provided documents relating to offences committed by prisoners while in custody and submitted that these offenders had not viewed CCTV footage prior to committing the offences. The applicant argued that as these offences had not been caused by viewing CCTV footage, the release of the recordings could not reasonably be expected to cause further offences. In addition the applicant submitted that:
  - the CSOs prevent prisoners from committing unlawful acts, not the CCTV security system
  - the recordings establish misconduct by the CSOs and this is why QCS are unwilling to release them.
47. I note that the applicant's allegation of misconduct by CSOs may raise a public interest consideration in terms of establishing accountability of CSOs. However, in applying section 42(1)(g) of the FOI Act, there is no requirement for a decision maker to take into account public interest considerations, unless the exception in section 42(2) of the FOI Act applies. That section provides:
  - (2) Matter is not exempt under subsection (1) if—
    - (a) it consists of—
      - (i) matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law; or
      - (ii) matter containing a general outline of the structure of a program adopted by an agency for dealing with a contravention or possible contravention of the law; or
      - (iii) a report on the degree of success achieved in a program adopted by an agency for dealing with a contravention or possible contravention of the law; or
      - (iv) a report prepared in the course of a routine law enforcement inspection or investigation by an agency whose functions include that of enforcing the law (other than the criminal law or the law relating to misconduct under the Crime and Misconduct Act 2001); or

- (v) a report on a law enforcement investigation that has already been disclosed to the person or body the subject of the investigation; and  
 (b) its disclosure would, on balance, be in the public interest.

48. I am satisfied that the video recordings do not fall within the terms of section 42(2) of the FOI Act. Accordingly, there is no requirement for me to take into account public interest considerations in applying section 42(1)(g) of the FOI Act to the matter in issue in these reviews.
49. For the purposes of these reviews, a staff member of this Office viewed a sample of each of the video tapes held by QCS. The video tapes contain CCTV footage of the applicant in his cell, the air lock to his cell, the hallway attached to Pod 1 cells and the detention unit in the MSU of the AGCC for various dates as listed in Table 4 of this decision.
50. As stated in paragraph 43 of this decision, I am unable to refer to the precise nature of the apprehended prejudice that would result from the release of this footage as to do so would subvert the reason for claiming the exemption in the first place. Notwithstanding, I am satisfied that disclosure of this footage, which shows the method and time of MSU staff movement and certain security measures taken by MSU staff, could reasonably be expected to endanger the security of the MSU. My finding on this point is also based on the risk of an escape attempt, hostage taking incident or disturbance within the MSU that is posed by release of this footage. Based on examination of this footage and the submissions made by the applicant and QCS, I am satisfied that the CCTV footage is of such a nature that its disclosure could reasonably be expected to adversely affect the security and good order of the MSU.
51. Accordingly, I find that disclosure of the VHS video tapes containing CCTV footage located by QCS on these reviews could reasonably be expected to endanger the security of the MSU of AGCC and that they therefore, qualify for exemption under section 42(1)(g) of the FOI Act.

### **Audio intercom recordings**

52. QCS located all audio intercom recordings sought by the applicant in these reviews. These recordings are contained on cassette tapes as set out in the table below:

<b>Table 5</b>		
<b>External review no.</b>	<b>Cassette tapes held by QCS</b>	<b>Items which these documents respond to in FOI applications</b>
171/06	Audio intercom recording for 15 January 2006 from MSU in AGCC	Item 3
175/06	Audio intercom recording for 2 December 2005 from MSU in AGCC	Item 2

53. In a letter to this Office dated 15 March 2007, QCS described these recordings as follows:

*The audio recording[s] sought by the applicant [are] the recording[s] of the activation of the Jaques intercom system within the prisoner cell when contact is made via the intercom system between the offender and staff of the Unit. The recordings are made onto 2 hour audio tapes. The voices on the tape[s] are random and there is no time stamping system on the analogue audio tape[s] to enable the identification of which*

*prisoner has activated the intercom at what time or to indicate the recording of significant events.*

54. QCS refused to release these cassette tapes to the applicant on the basis that the recordings contained on the tapes qualify for exemption under section 44(1) of the FOI Act because they contain information relating to the 'shared personal affairs' of the applicant and other prisoners in the MSU which are inextricably linked and cannot be severed. In addition, QCS has relied on section 42(1)(h) of the FOI Act on the basis that disclosure of the information contained in the recordings could reasonably be expected to prejudice a system or procedure for the protection of persons, property or environment.

**Section 44(1) of the FOI Act**

55. Section 44(1) of the FOI Act provides:

**44 Matter affecting personal affairs**

*(1) Matter is exempt matter if its disclosure would disclose information concerning the personal affairs of a person, whether living or dead, unless its disclosure would, on balance, be in the public interest.*

56. In applying section 44(1) of the FOI Act, the first question to ask is whether disclosure of the matter in issue would disclose information concerning the personal affairs of a person other than the applicant for access. If that is the case a public interest consideration favouring non-disclosure is established, and the matter in issue will be exempt, unless there are public interest considerations favouring disclosure which outweigh all public interest considerations favouring non-disclosure.
57. In *Re Stewart and Department of Transport* (1993) 1 QAR 227 (*Re Stewart*), the Information Commissioner discussed in detail the meaning of the phrase 'personal affairs of a person' (and relevant variations) as it appears in the FOI Act (see pp.256-257, paragraphs 79-114). In particular, the Information Commissioner said that information concerns the 'personal affairs of a person' if it concerns the private aspects of a person's life and that, while there may be a substantial grey area within the ambit of the phrase 'personal affairs', that phrase has a well accepted core meaning which includes:
- family and marital relationships
  - health or ill health
  - relationships and emotional ties with other people
  - domestic responsibilities or financial obligations
58. In *Re Stewart*, the Information Commissioner also confirmed the approach taken in *Re Lapidos and Office of Corrections (No.2)* (unreported, Jones J, 19 February 1990) that information concerning what happens to a prisoner while in prison concerns the 'personal affairs' of a prisoner.
59. Whether or not matter contained in a document comprises information concerning an individual's personal affairs is a question of fact, to be determined according to the proper characterisation of the information in question.

### Application of section 44(1) of the FOI Act

60. A staff member of this Office has listened to each cassette tape located by QCS on these reviews. I am satisfied that the information contained in the recordings can properly be characterised as information concerning the personal affairs of the applicant and other MSU prisoners.

61. In *B* the Information Commissioner discussed the concept of information concerning 'shared personal affairs', and the application of section 44(1) of the FOI Act to such information (see pp. 343-345 and paragraphs 172-178). At paragraph 176, the Information Commissioner said:

*Where... the segment of matter in issue is comprised of information concerning the personal affairs of the applicant which is inextricably interwoven with information concerning the personal affairs of another person, then:*

- (a) severance in accordance with s.32 is not practicable;*
- (b) the s.44(2) exception does not apply; and*
- (c) the matter in issue is prima facie exempt from disclosure to the applicant according to the terms of s.44(1), subject to the application of the countervailing public interest test contained within s.44(1).*

62. In his submissions dated 29 April 2007, the applicant submits that:

- the conversations on the audio intercom recordings are not '*inextricably intertwined*' because they are not recorded over the top of one another or simultaneously as contemplated by the Information Commissioner in *B*
- matter concerning his personal affairs contained on the audio intercom recordings is not exempt under section 44(1) of the FOI Act because it falls within section 44(2) of the FOI Act and can therefore, be extracted from the section 44(1) matter pursuant to section 32 of the FOI Act
- conversations involving him are easily identifiable because CSOs only ever refer to him by his full name, not nicknames and he refers to the main CSO as 'boss'.

63. To support his submissions and to assist in identifying matter on the audio intercom recordings solely relating to his personal affairs, the applicant provided this Office with reports relating to the 15 January 2006 breach and 2 December 2005 incident. The applicant submits that the following matters are discussed on the audio intercom recordings and can be extracted from the tapes pursuant to section 32 of the FOI Act:

- the subject matter of the 15 January 2006 breach regarding provision of breakfast to prisoners by CSOs and the applicant's confrontation with a CSO regarding milk
- the recording of the 2 December 2005 incident which involved the applicant being moved from his cell to the detention unit in the MSU of AGCC.

64. Section 32 of the FOI Act provides:

**32 Deletion of exempt matter**

*Subject to section 35, if—*

- (a) an application is made for access to a document containing exempt matter (including a document that is the subject of a certificate under section 36, 37, 42 or 42A); and*
- (b) it is practicable to give access to a copy of the document from which the exempt matter has been deleted; and*

(c) it appears to the agency or Minister concerned (whether from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to such a copy;  
the agency or Minister is to give access accordingly.

65. I have considered the supporting documentation provided by the applicant with respect to the audio intercom recordings. I am not satisfied that the applicant has sufficiently particularised the nature of the recorded matter relating to the 15 January 2006 breach and 2 December 2005 incident as set out in paragraph 63 of this decision that may be contained on the audio intercom recordings for these dates. From the applicant's submissions, it is unclear whether the applicant is directly involved in any of the alleged conversations or whether he is the subject matter of the conversations between other individuals. Nor am I satisfied that the subject matter of the 15 January 2006 breach and 2 December 2005 incident or the factors set out in paragraph 62 of this decision conclusively identify matter contained on the audio intercom recordings which solely relates to the applicant's personal affairs.
66. Accordingly, I am satisfied that the information contained on the recordings concerns the personal affairs of other prisoners. My finding is based on the following factors:
- it is not possible to conclusively identify conversations in which the applicant is a party on the dates in question
  - prisoners and officers rarely refer to each other by name when using the intercom system and if names are used, they are often only first names or 'nicknames'
  - the time of day of the recordings cannot be identified due to the analogue nature of the recording system
  - the quality of the recordings is very poor and the voices on the recordings are difficult to understand due to the high level of background noise and echoing.
67. While I acknowledge that the applicant may be a participant in conversations on the intercom recordings (although this had not been conclusively demonstrated) and therefore, the contents of these conversations would already be known to him, I must nevertheless also have regard to the principle that disclosure under the FOI Act is considered to be disclosure to the 'world at large', as there is no restriction under the FOI Act regarding the use to which information obtained under the FOI Act can be put. Further, where information concerns the shared personal affairs of an access applicant and other individuals, this principle carries even more weight because in such situations, each individual concerned should have a measure of control over the dissemination of information which concerns their personal affairs, that is, an access applicant should not be put in a position to control dissemination of information concerning the personal affairs of the other affected individuals unless such an outcome would, on balance, be in the public interest (see *KBN and Department of Families, Youth and Community Care* (1998) 4 QAR 422, at paragraph 58 and *Williamson* at paragraph 25).
68. Accordingly, I find that the cassette tapes are *prima facie* exempt from disclosure under section 44(1) of the FOI Act, subject to the application of the public interest balancing test which is incorporated within this section.

*Public interest balancing test*

69. Once the initial test for exemption under section 44(1) of the FOI Act is satisfied, a public interest consideration, accepted by Parliament as weighing against disclosure of the relevant information, is established. Specifically, it is the public interest in protecting the privacy of information concerning the personal affairs of identifiable individuals (see *Williamson and Queensland Police Service and Anor* (2005) 7 QAR 51 (*Williamson*)).
70. As I am satisfied that the recordings fall within the exemption provided for in section 44(1) of the FOI Act, I must now determine whether there are sufficient public interest considerations favouring disclosure of the recordings to justify a finding that disclosure would, on balance, be in the public interest.
71. The term 'public interest' refers to considerations affecting the good order and functioning of community and governmental affairs, for the well-being of citizens. In general, a public interest consideration is one that is common to all members of the community (or a substantial segment of them), and for their benefit.
72. The public interest is usually treated as distinct from matters of purely private or personal interest. However, some recognised public interest considerations may apply for the benefit of individuals in particular cases, including for example, the public interest in individuals receiving fair treatment in accordance with the law in their dealings with government.
73. I recognise that there may be a public interest consideration in favour of disclosure of the recordings to facilitate the accountability of the CSOs. This issue was raised by the applicant with respect to alleged misconduct by CSOs contained on the video recordings which I have found qualify for exemption under section 42(1)(g) of the FOI Act. I acknowledge that evidence of misconduct contained on the audio recordings could raise a public interest consideration in favour of disclosure of the recordings. However, I note that the applicant has not submitted that such evidence is contained on the recordings nor was any evident when the tapes were listened to. Accordingly, I do not consider that this public interest consideration is substantiated.
74. As I have not identified, on the material before me, any public interest considerations favouring disclosure that are sufficient to outweigh the considerations against disclosure of the cassette tapes and the applicant has not made any submissions to this Office with respect to public interest considerations. I find that disclosure of the audio intercom recordings would not, on balance, be in the public interest and that they are exempt from disclosure under section 44(1) of the FOI Act.

**Section 42(1)(h) of the FOI Act**

75. Section 42(1)(h) of the FOI Act provides:

**42 Matter relating to law enforcement or public safety**

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

...

(h) prejudice a system or procedure for the protection of persons, property or environment; or

...

76. In light of my finding that the cassette tapes qualify for exemption under section 44(1) of the FOI Act, it is unnecessary for me to express a finding on the application of section 42(1)(h) of the FOI Act to the audio intercom recordings.

### **Handheld video recording**

77. As stated in paragraphs 22 and 26 of this decision, the applicant contends that certain footage is missing from the 2 December 2005 handheld video recording provided to him by QCS in response to both of these reviews. I note that QCS did not raise any FOI Act exemption claim over this recording and therefore, in their view, an entire copy was released to the applicant.
78. In his letter dated 29 April 2007, the applicant contended that footage is missing after the CSOs place him in the detention unit but prior to the nurse arriving to examine him. The applicant contends that in this time, the camera operator filmed him at the window of the detention unit door, speaking to the camera operator, with blood on his face (missing footage).
79. As stated in paragraph 30 of this decision, the QCS recording is not the original recording but is in fact a copy created by AGCC from an eight millimetre tape that was used in the handheld video recorder during the recording process. QCS has not been able to confirm whether it initially received the eight millimetre tape from AGCC and later returned it after a copy was made onto a VHS tape or whether it simply received the VHS tape copy of the recording pursuant to its initial request for documents responsive to the applicant's FOI application.
80. On 22 May 2007, I requested QCS to undertake searches for the eight millimetre tape. In its response to this Office dated 23 May 2007, QCS advised that it could not locate a copy of the eight millimetre tape in its records and set out the following advice it had received from AGCC as to why the eight millimetre tape could not be located:
- all tapes that are 12 months or older that do not pertain to an incident are destroyed and discarded
  - all breach tapes are kept for 12 months and then destroyed or discarded
  - other tapes used for operational reasons are kept for 30 days unless external departments request these tapes prior to the 30 day cut off period
  - the only reason a tape is kept for longer than 12 months is when a specific incident has occurred
  - if a tape is returned from an external department and is older than 12 months and no longer required for an incident, it will be destroyed unless written correspondence is received in regards to keeping the said tape for a further period of time in storage.
81. Essentially, QCS's position in relation to the handheld video recording of the 2 December 2005 incident is that no further documents responsive to this request are in its possession or under its control, namely, the eight millimetre tape. I consider that this situation gives rise to consideration of the sufficiency of the agency's searches. The questions which I must answer in this situation are:
- whether there are reasonable grounds to believe that the requested documents exist and are documents of the agency as that term is defined in section 7 of the FOI Act and if so
  - whether the search efforts made by the agency to locate such documents have been reasonable in all the circumstances of the particular case (see *Shepherd*



*and Department of Housing, Local Government and Planning (1994) 1 QAR 464, at paragraphs 18-19).*

82. In light of the submissions of QCS set out in paragraph 80 of this decision, I consider there are reasonable grounds to believe that the original eight millimetre tape used in the handheld video recorder on 2 December 2005 has been destroyed. In the event that the eight millimetre tape was sent to QCS pursuant to its initial request for documents and later returned to AGCC, it would now be older than 12 months and since destroyed by AGCC. Alternatively, if the tape was never provided to QCS for the purpose of the applicant's FOI application, I consider it reasonable to assume that it was destroyed by AGCC after 12 months had passed from the date of the recording.
83. Although I was unable to view the original recording for the purposes of this review, a staff member of this Office viewed the QCS recording and the copy provided to the applicant in order to confirm that they contained the same footage. The staff member viewed both recordings in full and observed as follows:
- the recording contains footage of [text deleted prior to publication]
  - both recordings were of the same duration - approximately 29 minutes
  - there were 'gaps' in both recordings at the same time intervals, possibly due to the camera operator changing tapes or stopping and re-starting recording.
84. With respect to the alleged missing footage, I note that approximately 18 minutes into each recording, the CSOs exit the detention unit, [text deleted prior to publication]. After the door to the detention unit is closed, the camera operator moves toward the window in the door of the detention unit and briefly films [text deleted prior to publication]. Following this, there is blank tape for a couple of seconds and footage commences again when the nurse arrives and enters the detention unit with the CSOs. I note that there is no footage of the applicant at the window of the detention unit door, speaking with blood on his face between the footage of CSOs exiting the detention unit and the nurse arriving. I note however, that at other times during the recording, there is footage of the applicant at the window of the detention unit door, speaking to the CSOs.
85. Based on my examination of the QCS recording, the copy provided to the applicant and the searches conducted by AGCC and QCS, I am satisfied that:
- the original eight millimetre tape used in the handheld video recorder on 2 December 2005 has been destroyed by AGCC
  - the applicant has been provided with all handheld video camera footage of the 2 December 2005 incident held by QCS in response to these reviews
  - there are no reasonable grounds to believe that footage is missing from the copy provided to the applicant or that additional footage exists
  - there are no further searches which it would be reasonable to ask QCS to undertake in order to locate additional footage of the 2 December 2005 incident.

### ***Paper documents***

86. In external review no. 175/06, the applicant sought access to all reports relating to an incident, involving him, which occurred on 2 December 2005 in the MSU of AGCC. On 28 March 2006, QCS issued a decision in respect of this aspect of the applicant's FOI application. This decision was given outside the timeframe required under the FOI Act and accordingly, had no effect on the processing of the applicant's external review

application. QCS has however, relied upon this decision as its submissions in this external review.

87. Pursuant to its decision dated 28 March 2006, QCS released the following documents to the applicant in response to this request:

- incident reports by CSO McKenzie, CSO Weaver and Correctional Manager (CM) Hafner relating to the 2 December 2005 incident (6 pages)
- medical progress note dated 2 December 2005 (1 page).

88. By letter to this Office dated 22 February 2007, the applicant submitted that further documents responsive to this request should exist, namely:

- a report of CSO McLaughlin
- reports from the officers operating the doors
- reports from officers monitoring the incident by intercom and video.

89. In light of the applicant's submission on the existence of further documents, this Office requested QCS to conduct further searches for the report of CSO McLaughlin and any other reports relating to the 2 December 2005 incident. On 20 April 2007, QCS informed this Office that:

- it had conducted further searches of its files for reports relating to the 2 December 2005 incident and no further reports responsive to this request could be located
- CM Hafner had also conducted additional searches for reports relating to the 2 December 2005 incident and no further reports responsive to this request could be located
- it had received advice from CM Hafner that in practice, not every CSO present at an incident will prepare a report, particularly when several other CSOs have already prepared similar reports and the incident is not of a serious nature.

90. In his submissions dated 29 April 2007, the applicant maintained his contention that a report of CSO McLaughlin should exist. The applicant relied upon a QCS policy document entitled 'Procedure: Safety and Security – Use of Force', version 00, (Use of Force Procedure), specifically, paragraph 3.9, to support his contention. That paragraph provides:

*When a corrective services officer has considered it reasonable to apply physical or chemical force to a prisoner or other person in compliance with the Act, the officer must, as soon as practicable notify the general manager of the facility and before proceeding off duty provide a written report to the general manager detailing the nature of the force used and the reasons for the use of such force.*

*The general manager of a corrective services facility or General Manager, Operational Support Services Unit must report the event in accordance with the procedure - Incident Reporting.*

91. QCS has argued, in relation to the applicant's request for reports relating to the 2 December 2005 incident, that no further documents responsive to this request are in its possession or under its control. I consider that this situation gives rise to consideration of the sufficiency of the agency's searches. The questions which I must answer in this situation are set out in paragraph 81 of this decision.

92. I have examined the incident reports of CSO McKenzie, CSO Weaver and Correctional Manager Hafner released to the applicant. I am satisfied that the preparation of these reports accords with the requirements set out in paragraph 3.9 of the Use of Force Procedure.
93. With respect to the reports of the officers operating the doors and monitoring the incident by intercom and video, the applicant has not provided me with any submissions or supporting document to establish that these CSOs applied force during the incident. [text deleted prior to publication] However, none of the CSO reports refer to the presence of any other officers operating the doors or monitoring the incident by intercom.
94. With respect to CSO McLaughlin, I note that all of the reports record the presence of this officer at the incident. The report of CSO McKenzie states that:
- The cell door was then opened and CM Hafner, CSOs McLaughlin and Weaver entered the cell and [text deleted prior to publication].*
95. I recognise that this statement [text deleted prior to publication] However, I note that two other CSOs and the Correctional Manager prepared almost identical reports on this incident. Further, I note that the wording of paragraph 3.9 of the Use of Force Procedure does not specify that **all** CSOs present at an incident involving the use of force must prepare a report. Rather, the Use of Force Procedure simply states that '*a corrective services officer ... must ... provide a written report*'. Thus, an alternative interpretation of the Use of Force Procedure is that it is sufficient if one of the CSOs present at an incident involving the use of force provides a report.
96. In light of the fact that other policy documents of QCS (and AGCC) in relation to reporting requirements for other matters specify that all officers are to provide reports, I am of the view that the more correct interpretation of paragraph 3.9 is that only one CSO is required to provide a report in the circumstances identified in the Use of Force Procedure.
97. In light of the further searches undertaken by QCS and AGCC for CSO McLaughlin's report, the explanation provided by QCS as to the absence of this report and my observations set out in paragraphs 93-96 of this decision, I am satisfied that:
- there are no reasonable grounds to believe that QCS has in its possession or under its control any further reports relating to the 2 December 2005 incident
  - the searches undertaken by QCS in an effort to locate further reports have been reasonable in the circumstances of this review
  - there are no further searches or inquiries which it would be reasonable to ask QCS to undertake in an effort to locate further reports.

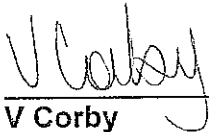
## Decision

98. The decision subject to external review in review no. 171/06 and 175/06 is QCS's 'deemed refusal' to grant access to the documents sought by the applicant in his FOI applications.
99. Based upon my reasons set out in this decision, I set aside the 'deemed refusal' by QCS on these applications and find as follows:

99. Based upon my reasons set out in this decision, I set aside the 'deemed refusal' by QCS on these applications and find as follows:

- disclosure of the video recordings located by QCS could reasonably be expected to endanger the security of the MSU of the AGCC and on this basis, the recordings qualify for exemption under section 42(1)(g) of the FOI Act
- the audio intercom recordings located by QCS are *prima facie* exempt from disclosure because the recordings contain information relating to the personal affairs of other MSU prisoners. It would not, on balance, be in the public interest to disclose these recordings and therefore, they qualify for exemption under section 44(1) of the FOI Act
- there are reasonable grounds to believe that the original eight millimetre tape used in the handheld video recorder on 2 December 2005 has been destroyed. Further, all handheld video camera footage of the 2 December 2005 incident held by QCS has been provided to the applicant. There are no reasonable grounds to believe that additional footage exists and no further searches which it would be reasonable to ask QCS to undertake in the circumstances of this review
- no reasonable grounds exist to believe that QCS has in its possession or under its control any further reports relating to the 2 December 2005 incident. Also, the searches undertaken by QCS in an effort to locate the documents have been reasonable in the circumstances of this review.

100. I have made this decision as a delegate of the Information Commissioner, under section 90 of the *Freedom of Information Act 1992* (Qld).



V Corby  
Assistant Commissioner

Date: 29 May 2007