



Decision and Reasons for Decision

Citation:	<i>Palmer and Queensland Police Service</i> [2018] QICmr 38 (13 September 2018)
Application Number:	313520
Applicant:	Palmer
Respondent:	Queensland Police Service
Decision Date:	13 September 2018
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION – audio recordings of individuals other than the applicant - personal information and privacy - whether disclosure would, on balance, be contrary to public interest - sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld) ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - video recordings - whether agency has taken all reasonable steps to locate documents but the documents cannot be found or do not exist - sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Queensland Police Service (**QPS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to documents concerning a named police operation.
2. QPS located 46 pages in response to the access application and decided¹ to refuse access to some information under the RTI Act.²
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for external review of QPS' decision, on the grounds QPS had failed to locate and deal with all information relevant to his access application. The applicant's submissions centred on references to additional documents contained in documents disclosed to him by QPS, including audio and video recordings.
4. At OIC's request, QPS conducted further searches for potentially relevant documents. These searches located a further six relevant documents, comprising audio recordings. QPS disclosed one of these recordings to the applicant, but contended that access to

¹ Decision dated 17 August 2017.

² Comprising parts of 13 pages on the basis that disclosure of the information would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

³ The applicant's external review application was received outside the timeframe for making such an application as prescribed in section 88(1)(d) of the RTI Act. OIC exercised the discretion conferred by this provision to allow a longer period for the making of the application, and therefore accept that application.

the remaining five may be refused on the basis their disclosure would, on balance, be contrary to the public interest. No video recordings could be located.

5. Having carefully considered all relevant information, I am satisfied that QPS has taken all reasonable steps to locate the video recordings (**Video Recordings**) and that there are reasonable grounds to be satisfied that the Video Recordings cannot be located. Access to these documents may be refused on the grounds that they are unlocatable.⁴
6. Access may also be refused to the five audio recordings remaining in issue (**Audio Recordings**), on the grounds their disclosure would, on balance, be contrary to the public interest. I vary QPS' decision, to the extent necessary to reflect the findings summarised in this and the preceding paragraph.

Procedural steps

7. OIC wrote to the applicant during the course of the review, expressing a preliminary view on the issues to be determined – including, that access to the Audio Recordings may be refused. The letter dated 5 April 2018 required the applicant to reply by 27 April 2018, failing which OIC would finalise the review without formal decision.
8. Having received no reply by 27 April 2018, on 4 May 2018 OIC wrote to the applicant and QPS finalising the review, and closing our file.
9. On 18 and 21 May 2018, OIC received further correspondence from the applicant dated 14 and 15 May 2018 respectively, contending that he had not received our 5 April 2018 letter and requesting a statement of reasons under the *Judicial Review Act 1991* (Qld) as to why he had been denied access to the Audio Recordings.
10. OIC replied by letter dated 4 June 2018, reiterating its earlier preliminary view to the effect that the Audio Recordings may be refused and there appeared to be little utility in re-opening the review.
11. On 21 June 2018, OIC received a reply from the applicant dated 14 June 2018, maintaining his claim for access to information, advising that he had sought professional advice, and requesting additional time to allow for the provision of that advice. In all the circumstances, OIC re-opened the review, advising the applicant to this effect by letter dated 28 June 2018.⁵
12. OIC's 28 June 2018 letter also informed the applicant that OIC would finalise the re-opened review by way of formal decision and that unless he supplied any further information to OIC by 27 July 2018, his 21 June 2018 letter would comprise his final submission in the review.
13. Nothing further has been received from the applicant. I have therefore made this decision based on information before me at today's date, including the applicant's correspondence and submissions up to and including his letter received by OIC on 21 June 2018.
14. A further procedural matter is the applicant's request⁶ that he '*would appreciate the principles of model litigant to be applied this time*'.
15. Insofar as this submission is directed to OIC, OIC is an independent entity established to conduct merit-based reviews of agency decisions on, relevantly, RTI applications for access to information. In this role, OIC is the adjudicating entity before whom State

⁴ Under sections 47(3)(e) and 52(1)(b) of the RTI Act.

⁵ QPS was formally advised of this re-opening by letter dated 4 July 2018.

⁶ Stated in correspondence dated 19 March 2018 and received by OIC on 22 March 2018.

government agencies are expected to observe model litigant principles.⁷ Whilst obliged by both general law and the RTI Act to conduct proceedings fairly and impartially, OIC is not, in an external review, itself required to observe model litigant principles, as it is not a *'litigant'* in this context.⁸

16. Insofar as the above submission may be directed toward QPS, I am satisfied that that agency has conducted itself appropriately in the course of this review.
17. Significant procedural steps are as otherwise set out in the appendix to this decision.

Reviewable decision

18. The decision under review is QPS' decision dated 17 August 2017.

Evidence considered

19. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).

Information in issue

20. The information in issue comprises:
 - the unlocatable Video Recordings; and
 - the five Audio Recordings located by QPS during this external review, to which QPS has refused the applicant access.⁹

Issues for determination

21. The issues for determination, which will be dealt with in turn below, are whether QPS may refuse access to:
 - the Video Recordings, on the grounds they are unlocatable; and
 - the Audio Recordings, on the grounds their disclosure would, on balance, be contrary to the public interest.

Video Recordings

Relevant law – unlocatable documents

22. While the RTI Act provides a general right of access to documents,¹⁰ this right is subject to certain exclusions, including the grounds on which an agency may refuse access to documents.¹¹ One ground for refusal is where documents are nonexistent or unlocatable.¹² A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist (for example, where it was never created). A document is unlocatable if it has been, or should be, in the agency's possession and all reasonable steps have been taken to find the document but the document cannot be found.

⁷ *Gill and Brisbane City Council* (2001) 6 QAR 45, at paragraphs 100-104.

⁸ Of course OIC would, on my understanding, be obliged to observe the principles where OIC is itself a party to proceedings before a court or tribunal, such as appeals of OIC decisions to the Queensland Civil and Administrative Tribunal under section 119 of the RTI Act.

⁹ The applicant has not sought review of QPS' decision insofar as it refused him access to parts of the 13 pages of information originally located by QPS during processing of his application. That information is, therefore, not in issue in this review.

¹⁰ Section 23 of the RTI Act.

¹¹ Under section 47 of the RTI Act.

¹² Sections 47(3)(e) and 52 of the RTI Act.

Findings

23. As already noted, QPS conducted further searches for relevant documents at OIC's request. QPS expended more than six hours searching:
- QPS' Evidence Storage Management Facility
 - the relevant investigation unit; and
 - other storage units.
24. These search efforts located the Audio Recordings, dealt with below. The Video Recordings, however, were not found.
25. QPS advised¹³ OIC that the Video Recordings are the visual counterparts of four of the Audio Recordings. Despite the search efforts noted above, they could not be located within QPS. QPS surmises that it is possible they were used by the Director of Public Prosecutions¹⁴ during the applicant's trial; in any event, their whereabouts are now unknown and they cannot be located as documents in the possession or under the control of QPS.
26. I am satisfied that QPS has searched relevant locations where the Video Recordings may have been kept, and has taken all reasonable steps to locate these documents. I therefore consider that, while it appears safe to conclude the Video Recordings have at some stage been in QPS' possession, there are reasonable grounds to be satisfied that they cannot now be located.
27. The applicant has made no submissions contesting the above reasoning or conclusions,¹⁵ and I find that access to the video recordings may be refused,¹⁶ on the grounds that they are unlocatable.

Audio Recordings

28. QPS submits that access to the Audio Recordings can be refused under the RTI Act, as their disclosure would, on balance, be contrary to the public interest. I accept QPS' submissions, for the following reasons.

Relevant law - contrary to the public interest

29. Under the RTI Act, a person has a general right to be given access to documents held by a Queensland government agency.¹⁷ However, this right is subject to limitations including grounds on which access may be refused. One ground for refusing access is where disclosure would, on balance, be contrary to the public interest.
30. In deciding whether disclosure would, on balance, be contrary to the public interest, the RTI Act requires a decision-maker to:¹⁸
- identify any irrelevant factors and disregard them¹⁹
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

¹³ Attachments to QPS' letter dated 8 December 2017.

¹⁴ A separate agency for the purposes of the RTI Act.

¹⁵ Which were put to him by OIC on a preliminary basis via our 14 March 2018 letter, for his consideration and reply.

¹⁶ Under sections 47(3)(e) and 52(1)(b) of the RTI Act.

¹⁷ Section 23 of the RTI Act.

¹⁸ Section 49 of the RTI Act.

¹⁹ In my view, no irrelevant factors arise in this case, and I have taken none into account in reaching my decision.

31. Schedule 4 of the RTI Act contains non-exhaustive lists of factors that may be relevant in determining where the balance of the public interest lies in a particular case. I have carefully considered these lists, together with participants' submissions, in reaching my decision in this review.

Findings

32. As for factors favouring disclosure, the applicant obtains the benefit of the general public interest in promoting access to government-held information²⁰ – a modest benefit in this case, given that, as discussed further below, the relevant information is relatively sensitive personal information of persons other than the applicant.
33. Additionally, by revealing information obtained by QPS in an investigation, disclosure of the Audio Recordings could reasonably be expected to enhance QPS accountability and transparency,²¹ and, to reveal information apparently used in QPS' investigation.²² Matters the subject of QPS' investigations have, however, been to trial and through appeal proceedings in open court, and evidence analysed and tested via these processes. I do not consider that any accountability and transparency interests would be significantly advanced by the disclosure of evidentiary information of the kind in issue. I therefore afford these factors favouring disclosure limited weight.²³
34. The applicant argues that a further factor operates to favour disclosure in this case, namely, that disclosure of the Audio Recordings could reasonably be expected to contribute to the administration of justice for a person, namely, himself. The applicant argues that he requires the Audio Recordings to aid in the preparation of a request for pardon for '*wrongful convictions*'.²⁴
35. I accept that this pro-disclosure consideration will apply where a reasonable expectation can be established that disclosure of information would aid a person in mounting a defence, overturning a conviction or otherwise clearing their name. There is, however, nothing in the information before me to support such an expectation in this case. The applicant has tested his convictions in the Court of Appeal,²⁵ and beyond a mere assertion as to their '*relevance*', has not advanced any submission as to how disclosure of the Audio Recordings would assist in a request for pardon. I cannot independently identify how a case for pardon might be assisted by disclosure of Audio Recordings, and am not satisfied that administration of justice considerations operate to favour their release.
36. Telling against disclosure is the public interest harm presumed to arise from disclosure of an individual's personal information,²⁶ and the prejudice to the protection of individuals' right to privacy that could reasonably be expected to follow disclosure of the Audio Recordings.²⁷

²⁰ Implicit, for example, in the preamble to the RTI Act.

²¹ Schedule 4, part 2, item 1 of the RTI Act.

²² A factor favouring disclosure arises where disclosure of information could reasonably be expected to reveal background or contextual information informing government decisions: schedule 4, part 2, item 11 of the RTI Act.

²³ It might also be thought that, as the Audio Recordings concern events involving the applicant, they may contain his personal information, thereby giving rise to the factor favouring disclosure in schedule 4, part 2, item 7 of the RTI Act. Having reviewed the recordings, I cannot see that they do, and this factor does not, therefore, arise for consideration in this case.

²⁴ Submissions dated 19 March 2018. The applicant has also cited various authorities in his correspondence with QPS during its handling of his application, and OIC during the course of this review. Apart from *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 (cited in support of his 'model litigant' submissions discussed above), the applicant cited *Ragg v Magistrates' Court and Corcoris* [2008] VSC 1; *Mallard v the Queen* [2005] HCA 68, and 'Stafford', which I understand is a reference to *R v Stafford* [2009] QCA 407. These authorities are not relevant to the matters I must determine in this review.

²⁵ *R v Palmer & Hite* [2002] QCA 346.

²⁶ Schedule 4, part 4, section 6 of the RTI Act.

²⁷ Schedule 4, part 3, item 3 of the RTI Act.

37. Personal information is:²⁸

information or an opinion, ... whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion

38. The Audio Recordings contain identifying information, such as the names of recorded individuals. They therefore comprise the personal information of those individuals in accordance with the above definition, and in accordance with schedule 4, part 4, section 6 of the RTI Act, their disclosure would thus give rise to a public interest harm.
39. Their disclosure could also reasonably be expected to prejudice protection of the recorded individuals' right to privacy.
40. The concept of 'privacy' is not defined in either the RTI Act or the IP Act. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere free from interference from others.²⁹ Audio recordings of the kind in issue convey not only what is said by a given speaker, but a range of 'non-lexical' information, such as tone, cadence, emphasis, inflection and pause – information, which, in turn, can reveal information about a given speaker's emotional state or intellectual capacity at the time of recording. Such information is sensitive and highly personal in nature,³⁰ and squarely within the 'personal sphere' over which individuals reasonably expect to be able to exert control.
41. Obviously, that control will at times be subordinated to other public interests, such as the administration of justice – persons who provide information to the QPS as part of its investigation process would (or should) expect, for example, that the information may subsequently be disclosed to some extent as a consequence of trial proceedings. Such individuals – and the community generally – are, however, also entitled to expect that personal information collected from them by government agencies will be handled appropriately, and not subject to routine disclosure to others. This is particularly so in the context of disclosure under the RTI Act, where there is no restriction on the use or dissemination of released information.
42. Implicit in the RTI Act³¹ is the recognition³² that individuals should have a measure of control over their personal information as held by government. By extension, an access applicant should not be put in a position to control the dissemination of the personal information of others, nor intrude unreasonably into the latter's right to privacy. I afford each of these considerations against disclosure strong weight.
43. In reaching the above conclusion, I acknowledge the age of the Audio Recordings, and the fact that information they contain may have entered the public domain, and/or have been made known to the applicant through open court processes and his criminal defence. There is, however, nothing before me to suggest that the recordings themselves – including the lexical and non-lexical personal information they contain – are presently available to the public generally, or the applicant specifically. Nor do I consider that their age alone erodes the sensitivity of the personal information of which they are comprised. In the circumstances, I consider that this information retains a high privacy value, and that disclosure of relevant personal information could reasonably be expected to occasion a public interest harm of considerable magnitude.

²⁸ Section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**).

²⁹ Paraphrasing the Australian Law Reform Commission's definition of the concept in "For your information: Australian Privacy Law and Practice" *Australian Law Reform Commission Report No. 108, Vol 1*. Released 12 August 2008, at paragraph 1.56.

³⁰ See *New York Times Co. and National Aeronautics and Space Administration* 920 F.2d 1002 (D.C.Cir. 1990, 1006), cited and applied in *Williamson and Queensland Police Service; "A" (Third Party)* (2005) 7 QAR 51.

³¹ And its counterpart, the **IP Act**.

³² Which is embodied not only in the personal information and privacy public interest harm and nondisclosure factors discussed in these reasons, but in, for example, restrictions on Disclosure Log publication embodied in section 78(3) and 78B(2)(c) of the RTI Act.

44. On balancing all relevant considerations against one another, I am of the view that factors favouring disclosure of the Audio Recordings – the general public interest in promoting access to government-held information, accountability and transparency considerations – are insufficient to displace the significant and substantial public interest in protecting personal information and safeguarding individual privacy.
45. Disclosure of the Audio Recordings would, on balance, be contrary to the public interest. Access to this information may therefore be refused, under section 47(3)(b) of the RTI Act.

DECISION

46. As discussed above, additional information has been located during the course of this review, and a further ground for refusing access to some of that information identified (ie, a ground not relied on by QPS in the decision under review). In the circumstances, I vary the decision under review, and find that access to the Video Recordings and Audio Recordings may be refused under sections 47(3)(e) and 47(3)(b) of the RTI Act respectively, in accordance with these reasons for decision.
47. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

L Lynch
Right to Information Commissioner

Date: 13 September 2018

APPENDIX

Significant procedural steps

Date	Event
27 September 2017	OIC received the external review application.
3 October 2017	OIC notified QPS that it had received the external review application and requested initiating documents.
10 October 2017	OIC received the requested documents from QPS.
24 October 2017	OIC wrote to QPS requesting information.
25 October 2017	OIC received the requested information from QPS.
27 October 2017	OIC wrote to the applicant to advising his application for external review had been made out of time, and inviting submissions as to why time should be extended.
10 November 2017	The applicant provided submissions regarding the delay in his application for external review. OIC advised the applicant it had extended the time for making the application, and accepted that application.
14 November 2017	OIC notified QPS that it had accepted the application for external review and requested information relating to QPS' decision.
14 December 2017	OIC received the requested information from QPS, including the Audio Recordings.
19 January 2018	OIC wrote to QPS seeking its view on disclosure of the Audio Recordings.
9 February 2018	OIC received QPS' response conveying their views on disclosure.
14 March 2018	OIC conveyed a preliminary view to the applicant that the Video Recordings were unlocatable, and that disclosure of the Audio Recordings would, on balance, be contrary to the public interest.
22 March 2018	OIC received submissions from the applicant in reply to OIC's preliminary view.
5 April 2018	OIC wrote to the applicant, reiterating OIC's 14 March 2018 preliminary view, requiring any reply by 27 April 2018, and advising that the review would be finalised if no reply was received by that latter date.
4 May 2018	Having received no reply from the applicant, OIC wrote to the applicant and QPS, finalising the review and closing OIC's file.
18 May 2018	OIC received a letter from the applicant confirming receipt of OIC's closure letter.
21 May 2018	OIC received submissions from the applicant contesting finalisation of the external review.
4 June 2018	OIC invited the applicant to make submissions as to why the review should be re-opened.
21 June 2018	OIC received the applicant's submissions.
28 June 2018	OIC notified the applicant that it would re-open the review, and invited the applicant to make submissions in support of his case.
4 July 2018	OIC wrote to QPS confirming the re-opening of the external review.