



Decision and Reasons for Decision

Citation: *U26 and Queensland Police Service [2021] QICmr 13 (19 March 2021)*

Application Number: 315272

Applicant: U26

Respondent: Queensland Police Service

Decision Date: 19 March 2021

Catchwords: ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - information relating to police investigation of applicant's complaint - body worn video footage of police officer's discussions with another individual - promoting transparency and accountability in police investigations - safeguarding personal information and the right to privacy of other individuals - preventing prejudice to the flow of information to police - whether disclosure of video footage would, on balance, be contrary to the public interest - section 67(1) of the *Information Privacy Act 2009* (Qld) and section 47(3)(b) of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT DOCUMENTS - body worn camera footage of police officer's discussions with the applicant - whether there are reasonable grounds to be satisfied that a recording does not exist under section 52(1)(a) of the *Right to Information Act 2009* (Qld) - whether access to the recording may be refused under section 67(1) of the *Information Privacy Act 2009* (Qld) and section 47(3)(e) of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied¹ to Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to 'information to support the decisions made by [an investigating officer]' about a complaint of wilful damage she had made to QPS.

¹ Access application dated 13 September 2019.

2. QPS located a 24 page report² and released it, subject only to the redaction of information relating to other individuals appearing on each page.³ The released information included the investigating officer's summary of the facts, evidence gathered from his inquiries, and his finding which was for the matter to be *'filed pending further evidence that supports the complainant assertion that wilful damage has occurred'*.⁴
3. The applicant applied to OIC for external review of QPS's decision submitting that she had not been provided with any reasons *'why the material facts and the evidence I provided were disregarded'* by the investigating officer and that she was seeking to *'challenge the lawfulness of this police investigation'*.⁵ The applicant also complained that she was already aware of most of the information released to her by QPS in the Report because she had provided it to Policelink with her complaint, or it had already been provided to her.
4. On external review, QPS conducted further searches and located body worn camera (**BWC**) footage of discussions held between the investigating officer and another individual in relation to the applicant's complaint (**Video Footage**). QPS submitted that disclosure of the footage would, on balance, be contrary to the public interest and that access should, therefore, be refused. QPS also submitted to OIC that no further video recordings exist, including BWC footage of the investigating officer's discussions with the applicant (**Further BWC Footage**).
5. For the reasons set out below, I vary QPS's decision and find that:
 - access to the Video Footage may be refused under section 67(1) of the IP Act and section 47(3)(b) of the *Right to Information Act 2009* (Qld) (**RTI Act**) as disclosure would, on balance, be contrary to the public interest; and
 - access to Further BWC Footage may be refused under section 67(1) of the IP Act and section 47(3)(e) of the RTI Act on the basis that it does not exist.

Background and evidence considered

6. Significant procedural steps taken in this review are set out in the Appendix.
7. The decision under review is the considered decision of QPS dated 11 March 2020.
8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including in the footnotes and Appendix).
9. The applicant's complaint to QPS arose out of a boundary fence dispute involving a neighbouring property. In summary, the applicant was not satisfied with the outcome of, or process followed by QPS in investigating her complaint of wilful damage to a boundary fence. The applicant proceeded to lodge a complaint with the QPS Ethical Standards Unit and Crime and Corruption Commission. She also sought relief through the Queensland Ombudsman and Legal Aid Queensland. However, the applicant did not obtain an outcome to her satisfaction through any of those processes. The applicant's submissions on external review raise issues that are beyond the Information Commissioner's jurisdiction under the IP and RTI Acts. To the extent that the applicant is seeking to complain about the investigating officer's conduct or allege flaws in the investigation process, these are not matters which OIC can investigate. However, to the

² QP1900489696 (**Report**).

³ Decision notice dated 11 March 2020. There was a significant delay between the application and decision as a result of a deemed decision notice being issued by QPS and further time subsequently being granted by OIC for QPS to make its decision.

⁴ Pages 21-23 of the Report.

⁵ External review application dated 12 March 2020.

extent the applicant's submissions raise public interest factors which may serve to favour disclosure of the Video Footage, I have examined them below.

10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),⁶ particularly the right to seek and receive information.⁷ A decision maker will be '*respecting*' and '*acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the IP Act and RTI Act.⁸ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:⁹ '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act*'.¹⁰

Information in issue and issues for determination

11. The Video Footage remains in issue¹¹ and the issue for determination is whether disclosure would, on balance, be contrary to the public interest.¹² I am limited in the extent to which I can describe the content of the Video Footage as it is claimed by QPS to be contrary to public interest information.¹³ Generally however, it comprises two separate files¹⁴ recorded by the investigating officer when he attended the subject property in response to the applicant's complaint. The Video Footage contains audio of the investigating officer's discussions with another individual (**Third Party**), and video footage of the Third Party on site, at the subject property.

12. As stated above, the Video Footage was found as a result of additional searches conducted by QPS on external review. Those searches were conducted on the basis of the applicant's concerns about the lack of information originally located by QPS, as follows:

*Only 1 document contains information entered by [investigating officer] to support his decision making. I remain aggrieved because this information is untrue, does not comply with relevant legislation i.e. the Law, is based on his own personal opinions, and not only has [investigating officer] ignored the relevant material facts and the evidence I provided, he has ridiculed this information.*¹⁵

13. While QPS's further searches located the Video Footage, no further *supporting* information, as sought by the applicant, could be located. The applicant conceded in her final submissions to OIC that she accepted my view that '*no documents exist which support the investigation*'.¹⁶ On that basis, I have treated that sufficiency of search issue as resolved. However, the applicant also specifically queried the existence of BWC footage of *her* discussions with the investigating officer.¹⁷ QPS did not locate any further recordings and provided OIC with an explanation to account for the nonexistence of any Further BWC Footage.¹⁸ Therefore, I have considered, in the reasons below, whether there are reasonable grounds to be satisfied that Further BWC Footage does not exist.

⁶ The HR Act came into force on 1 January 2020.

⁷ Section 21 of the HR Act.

⁸ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

⁹ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁰ *XYZ* at [573].

¹¹ The applicant did not seek to pursue access to the information about other individuals redacted from the 24 page Report and therefore, that information is not addressed in these reasons.

¹² Section 49 of the RTI Act.

¹³ Section 121 of the IP Act.

¹⁴ Two mp4 files, one of 18.11 minutes duration and the other of 30.31 minutes duration.

¹⁵ External review application dated 12 March 2020.

¹⁶ Submissions dated 19 October 2020.

¹⁷ Submissions dated 19 October 2020.

¹⁸ Submissions dated 11 March 2021.

Relevant law

14. A person has a right, under the IP Act, to be given access to documents of an agency to the extent they contain the individual's personal information.¹⁹ However, this right is subject to other provisions of the IP Act and RTI Act including the grounds on which access to information may be refused.²⁰
15. Access to information may be refused if its disclosure would, on balance, be contrary to the public interest.²¹ In deciding where the balance of the public interest lies, the legislation requires a decision maker to identify relevant factors for and against disclosure²² and decide, on balance, whether disclosure would be contrary to the public interest.²³
16. Access may also be refused to nonexistent documents.²⁴ A document will be nonexistent if there are reasonable grounds to be satisfied the document does not exist.²⁵ To be satisfied of this, a decision maker must rely on their particular knowledge and experience and have regard to a number of key factors.²⁶ By considering those key factors, an agency may ascertain that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.
17. An agency may also rely on searches to satisfy itself that a document does not exist. In those cases, reasonable steps must be taken to locate the documents.²⁷ Such steps may include inquiries and searches of all relevant locations identified after consideration of the key factors.²⁸
18. Generally, on external review, the agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.²⁹ However, where the issue of missing documents is raised, the applicant bears a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents.³⁰

¹⁹ Section 40 of the IP Act.

²⁰ Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

²¹ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

²² And identify, and disregard, irrelevant factors.

²³ Section 49(3) of the RTI Act.

²⁴ Sections 47(3)(e) and 52(1)(a) of the RTI Act.

²⁵ Section 52(1)(a) of the RTI Act.

²⁶ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]–[38]. The key factors include: the administrative arrangements of government; the agency structure; the agency's functions and responsibilities; the agency's practices and procedures and other factors including the nature and age of the requested document/s and the nature of the government activity to which the request relates.

²⁷ As set out in *PDE* at [49]. See also section 130(2) of the RTI Act.

²⁸ The key factors are set out in footnote 26.

²⁹ Section 87(1) of the RTI Act.

³⁰ See *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

Findings

Video Footage – analysis of public interest factors

19. 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. As set out below, I have considered these lists³¹ in the context of the Video Footage and the applicant's submissions, and identified the relevant factors favouring disclosure and nondisclosure. Additionally, I have had regard to the IP Act's pro-disclosure bias³² and Parliament's requirement that grounds for refusing access to information be interpreted narrowly,³³ and have not taken into account any irrelevant factors.³⁴
20. In addition to the pro-disclosure bias in relation to disclosure of government held information, there is also a specific public interest in individuals having access to information about them held by government agencies.³⁵ The Video Footage does not contain video or audio recordings of the applicant personally. However, issues regarding the applicant and her property are the subject of discussion in the Video Footage given that the investigating officer is conducting an interview with the Third Party in response to the applicant's wilful damage complaint. I afford this factor moderate weight in favour of disclosure. However, the references to the applicant and her property in the discussions are inextricably intertwined with the personal information of the Third Party and cannot be severed so as to allow partial release. To do so would reveal the Third Party's personal information, which raises a public interest factor favouring nondisclosure, as discussed below.
21. The applicant is particularly concerned about the process followed by the investigating officer in investigating her complaint, and alleges that the investigation was unlawful, biased and dishonest, that there were delays in the investigation process.³⁶ She also has submitted that the facts and evidence relied upon in the Report were untrue. I accept that disclosure could reasonably be expected enhance QPS's accountability and transparency in relation to QPS's investigation processes and methods,³⁷ and could allow or assist inquiry into possible deficiencies in the conduct of QPS.³⁸ Although I acknowledge that the applicant does not agree with the Report, it does include the investigating officer's summary of his process and findings, and the Video Footage would only provide limited additional insight.³⁹ Accordingly, I consider that the weight of these factors is low in the circumstances.
22. The applicant has also submitted that she was at a disadvantage in the investigation process, and that the investigating officer failed to properly consider her evidence.⁴⁰ In particular, the applicant has raised concerns that the investigating officer relied solely on a particular land survey to assist in the investigation, and ignored the documents, images

³¹ Whilst I have considered each of the factors in these lists, some clearly have no relevance, such as for example, schedule 4, part 2, item 19 (relating to innovation and facilitation of research).

³² Section 64 of the RTI Act.

³³ Section 67(2) of the IP Act.

³⁴ Including the factors listed in schedule 4, part 1 of the RTI Act.

³⁵ Schedule 4, part 2, item 7 of the RTI Act.

³⁶ Submissions dated 23 August 2020.

³⁷ Schedule 4, part 2, items 1, 3 and 11 of the RTI Act.

³⁸ Schedule 4, part 2, item 5 of the RTI Act. Given the applicant's submissions, I have also considered item 6, which applies where disclosure of the information could reasonably be expected to reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct. However, having considered the Video Footage, I do not consider it is capable of giving rise to this factor.

³⁹ I have also considered schedule 4, part 2, items 15 and 18 of the RTI Act, which apply where disclosure could reasonably be expected to contribute to the maintenance of peace and order, or where disclosure could reasonably be expected to contribute to the enforcement of the criminal law. However, in the circumstances of the matter, I am unable to identify how disclosure of the Video Footage (of discussions held between the investigating officer and another individual) would contribute to the maintenance of peace, order or any enforcement process.

⁴⁰ Submissions dated 23 August 2020 and 19 October 2020.

and expert opinions that she provided to him. The RTI Act recognises that there is a public interest in affording procedural fairness, and in advancing fair treatment for an individual in their dealings with an agency.⁴¹ Taking into account the content of the Video Footage, I am unable to identify any evidence to establish that the applicant was denied procedural fairness or fair treatment, however, I accept that disclosure of the Video Footage would apprise the applicant of the entirety of the investigating officer's discussions with the Third Party.⁴² Obtaining a comprehensive picture of the evidence relied upon could reasonably be expected to advance the applicant's fair treatment, and may contribute to procedural fairness, albeit to a limited extent given the information that has already been released to her. Accordingly, I afford these factors low weight.

23. The applicant submits that certain matters in the Report and other matters communicated by the Third Party to the investigating officer were untrue. A factor favouring disclosure arises where disclosure of the information could reasonably be expected to reveal that the information was incorrect.⁴³ Having considered the applicant's submissions, and the Video Footage, I consider it unlikely that disclosure of the footage itself will reveal that it is untrue or incorrect. The facts are disputed, and the discussions only provide one party's views and version of events. At best, it may allow the applicant to better understand the position of the Third Party involved. Accordingly, I afford this factor low weight.
24. As noted above, the Video Footage contains images and audio of the investigating officer engaged in discussions with the Third Party on site, at the subject property. I am satisfied that the images and voice of the Third Party comprise their personal information⁴⁴ from which their identity could reasonably be ascertained, given the facts of the case. I am satisfied that disclosure of this information could reasonably be expected to:
 - cause a public interest harm as it would reveal the personal views, opinions and emotions expressed by the Third Party to the investigating police officer⁴⁵
 - prejudice the Third Party's right to privacy given that the subject matter concerns a private residence;⁴⁶ and
 - prejudice the flow of information to police as individuals may be reluctant to participate in recorded interviews if they are aware they will be routinely disclosed under the IP or RTI Act.⁴⁷
25. The nature of the Video Footage, being interactions between a police officer and a Third Party, is that it is sensitive. Whilst I acknowledge that the applicant is aware of the background to the matter, I consider that given the sensitive nature of the information, the factors concerning personal information and privacy carry moderate weight.
26. In relation to the final factor listed above, I consider there is a very strong public interest in protecting the free flow of information to the police. This is supported by several previous decisions of the Information Commissioner.⁴⁸ The effective use of policing resources is facilitated by police being able to seek and obtain information from various members of the community, including complainants, bystanders, informers and the

⁴¹ Schedule 4, part 2, items 10 and 16 of the RTI Act.

⁴² As opposed to the summary form which appears in the Report.

⁴³ Schedule 4, part 2, item 12(a) of the RTI Act.

⁴⁴ The term 'personal information' is defined in section 12 of the IP Act as 'information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion'.

⁴⁵ Schedule 4, part 4, item 6 of the RTI Act.

⁴⁶ Schedule 4, part 3, item 3 of the RTI Act.

⁴⁷ Schedule 4, part 3, item 13 of the RTI Act.

⁴⁸ See for example, *P6Y4SX and Queensland Police Service* [2015] QICmr 25 (11 September 2015) at [29]; *Gregory and Queensland Police Service* [2014] QICmr 48 (12 November 2014) at [25]; *P6Y4SX and Department of Police* (Unreported, Queensland Information Commissioner, 31 January 2012) at [40].

subjects of a complaint, with as much cooperation as possible. I am satisfied that disclosing the type of information shown in the Video Footage would tend to discourage individuals from cooperating with police in the future, as they may consider that their personal information could be released to other individuals. I do not consider that the weight of this factor is reduced to any significant extent by the applicant's submission that certain information provided to the police was untrue. Accordingly, I also afford this factor moderate weight.

27. I acknowledge that there a number of factors which favour disclosure of the Video Footage in terms of the applicant having access to her personal information, increased transparency and accountability in QPS' investigation processes, allowing inquiry into possible deficiencies in QPS' conduct, affording procedural fairness and ensuring fair treatment of individuals in their dealings with agencies. However, I am satisfied that, given the particular nature of the Video Footage, these are outweighed by the greater weight I have afforded to the public interest in safeguarding the personal information and right to privacy of other individuals in the sensitive context of a QPS investigation, and to a slightly lesser degree, the public interest in minimising prejudice to the flow of information to police. On balance, I find that the public interest favours nondisclosure of the Video Footage and therefore, access to it may be refused on the basis that disclosure, would, on balance, be contrary to the public interest.⁴⁹

Further BWC Footage – nonexistent

28. The applicant considers she should be provided with access to any BWC recording of her conversation with the investigating officer on the basis it contains her personal information.⁵⁰ The applicant also makes allegations that the investigating officer engaged in *'inappropriate conduct'* in his use of BWC and did not advise the applicant that it was being used.⁵¹

29. Originally, the investigating officer explained that:

*The involvement I had was attending the address and speaking with both parties, which was recorded on Body Worn Camera. I am providing these two recordings. I then utilised the provided documents and images to investigate the matter ...*⁵²

30. Upon examining the *'two recordings'* provided by QPS, I observed that they only comprised BWC recordings of the investigating officer speaking to the Third Party—neither recording contains any discussions between the applicant and investigating officer. Therefore, I asked QPS to clarify its position in relation to the possible existence of Further BWC Footage. In response, the investigating officer advised that while he recalled having a conversation with the applicant on the date in question and was of the belief that it was recorded on his BWC, he has no other recordings in his possession and that was the only time he attended the property.⁵³
31. I accept the investigating officer's submission that he has provided copies of the recordings in his possession, and holds no further recordings. While he was under the belief that he recorded his conversation with the applicant, no such recording has been located. While there is no further evidence to explain the nonexistence, it may have been due to failure of the recording device or human error in not starting the recording or inadvertently deleting the recording. In any event, it is unnecessary for me to make a

⁴⁹ Section 47(3)(b) of the RTI Act.

⁵⁰ Page 2 of submissions dated 19 October 2020.

⁵¹ Submission dated 19 October 2020. OIC does not have jurisdiction to investigate any allegations about police officer conduct.

⁵² Email dated 12 July 2020.

⁵³ Email dated 11 March 2021.

finding on exactly why Further BWC Footage does not exist. The issue is whether there are reasonable grounds to be satisfied of the nonexistence. In the circumstances, I am satisfied that, having regard to the responses provided by the investigating officer, the content of the recordings located, and the searches undertaken by QPS,⁵⁴ Further BWC Footage does not exist, and access to it may therefore be refused under section 47(3)(e) of the RTI Act.

DECISION

32. I vary QPS's decision and find that:

- access to the Video Footage may be refused under section 67 of the IP Act and section 47(3)(b) of the RTI Act as disclosure would, on balance, be contrary to the public interest; and
- access to any Further BWC Footage may be refused under section 67 of the IP Act and section 47(3)(e) of the RTI Act on the basis it does not exist.

33. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

K Shepherd
Assistant Information Commissioner

Date: 19 March 2021

⁵⁴ QPS searched its Records and Information Management Exchange (known as QPRIME), located the Video Footage, and provided to OIC an explanation from the investigating officer about the information relied upon in investigating the complaint. While the issue of sufficiency of search was generally treated as resolved during the review (see paragraph 13 above), I have considered QPS's searches to the extent they are relevant to the issue of nonexistence of Further BWC Footage.

APPENDIX

Significant procedural steps

Date	Event
12 March 2020	OIC received the application for external review.
20 March 2020	OIC acknowledged receipt of the application and requested procedural documents from QPS.
8 April 2020	OIC received procedural documents from QPS.
13 to 27 May 2020	During this period, the applicant and OIC communicated several times regarding continuation of the review. The applicant indicated that she may withdraw the application, but subsequently decided to proceed.
29 May 2020	OIC wrote to the applicant and QPS to advise that the application for external review had been accepted. OIC requested a copy of QPS's search records.
12 June 2020	QPS advised that no search records were created and explained the nature of the searches.
18 June 2020	OIC requested that QPS obtain further information from the relevant QPS officer about the documents created during the investigation.
17 August 2020	OIC conveyed a preliminary view to the applicant by telephone and the applicant provided oral submissions in support of her case.
18 August 2020	OIC confirmed the preliminary view to the applicant by email and invited the applicant to make further submissions.
23 August 2020	OIC received a submission from the applicant.
25 August 2020	OIC received the Video Footage that was located by QPS and a submission from the investigating officer concerning the information relied upon to investigate the matter.
31 August 2020	OIC wrote to QPS to seek its consent to disclose the further information provided by the investigating officer, and to advise the applicant that the Video Footage had been located.
4 September 2020	QPS agreed that further information could be conveyed to the applicant to aid informal resolution of the review.
13 October 2020	OIC conveyed a preliminary view to the applicant that access to the Video Footage may be refused on the basis that it would, on balance, be contrary to the public interest to disclose, and that QPS had taken all reasonable steps to locate information in response to her application.
19 October 2020	OIC received a submission from the applicant contesting the preliminary view on the Video Footage but accepting the view on nonexistent documents.
17 November 2020	OIC provided the applicant with an update on the status of the review.
19 January, 5 and 12 February 2021	OIC sought further submissions from QPS concerning any Further BWC Footage.
11 March 2021	OIC received a further submission from QPS concerning the non-existence of Further BWC Footage.