



Decision and Reasons for Decision

Citation:	<i>N18 and Queensland Police Service [2023] QICmr 67 (15 December 2023)</i>
Application Number:	317511
Applicant:	N18
Respondent:	Queensland Police Service
Decision Date:	15 December 2023
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - request for body worn camera footage - whether agency has taken all reasonable steps to locate documents - whether access to further documents may be refused on the basis that the documents do not exist - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and sections 47(3)(e) and 52(1)(a) of the <i>Right to Information Act 2009 (Qld)</i>

REASONS FOR DECISION

Summary

1. The applicant applied¹ to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009 (Qld)* (**IP Act**) to access body worn camera (**BWC**) footage.²
2. QPS located BWC footage³ of the attendance and decided⁴ to fully release this BWC footage (**Released BWC footage**) to the applicant.
3. The applicant subsequently sought⁵ external review by the Office of the Information Commissioner (**OIC**) on the basis that additional BWC footage relevant to the request existed and was not located by QPS.⁶
4. For the reasons set out below, I affirm QPS's decision and find that QPS has taken all reasonable steps to locate the BWC footage sought and access to any additional BWC footage may be refused on the basis it does not exist.⁷

¹ Access application dated 25 May 2023.

² BWC footage of a QPS attendance at the applicant's residence on 19 March 2022.

³ BWC footage with a recording length of 12 minutes and 58 seconds.

⁴ Decision dated 8 June 2023.

⁵ External review application dated 16 August 2023.

⁶ The applicant sought an internal review by QPS however QPS was unable to conduct an internal review on the basis that sufficiency of search is not a reviewable decision for an agency. This view was provided to the applicant by the QPS on 26 July 2023.

⁷ Pursuant to section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the *Right to Information Act (Qld)* (**RTI Act**).

Reviewable decision

5. The decision under review is QPS's decision dated 8 June 2023.

Evidence considered

6. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and the Appendix).
7. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information⁸. I consider 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.⁹ 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:¹⁰ '*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.*'¹¹
8. The significant procedural steps taken in this external review are set out in the Appendix.

Issue for determination

9. The applicant seeks access to BWC footage in relation to police attendance at their residence. While QPS located and released BWC footage of that attendance to the applicant, the applicant contends that additional BWC footage in relation to that attendance exists, submitting the Released BWC footage was '*modified to about 12 minutes or so*' from what they believe should be approximately 50 minutes of BWC footage.¹²
10. Given the applicant's contention, the issue for determination is whether QPS has taken all reasonable steps to locate BWC footage sought and whether access to additional BWC footage may be refused on the basis that it does not exist.
11. On external review, the applicant raised concerns about the QPS officer who attended turning off their BWC, which was in the applicant's view, contrary to QPS policy and procedures. The applicant advised they raised this issue to '*demonstrate that [the officer] did not follow the required procedures*' however the applicant acknowledged that it is beyond the Information Commissioner's jurisdiction to investigate a QPS Officer's compliance with QPS policy and procedures.¹³

Relevant law

⁸ Section 21 of the HR Act.

⁹ *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].

¹⁰ *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹¹ **XYZ** at [573]. OIC's approach to the HR Act set out in this paragraph has recently been considered and endorsed by the Queensland Civil and Administrative Tribunal in *Lawrence v Queensland Police Service* [2022] QCATA 134 at [23] (noting that Judicial Member McGill saw '*no reason to differ*' from our position).

¹² Letter dated 23 June 2023 at Para 2.

¹³ Applicant's submission dated 2 November 2023.

12. Under the IP Act, a person has a right to access documents of an agency¹⁴ subject to other provisions of the IP Act and RTI Act including grounds on which an agency may refuse access to documents. Section 67(1) of the IP Act provides that access to a document may be refused on the same basis upon which access to a document could be refused under section 47 of the RTI Act. Under sections 47(3)(e) and 52(1)(a) of the RTI Act, access to a document may be refused if the document is nonexistent.
13. The functions of the Information Commissioner on external review include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.¹⁵
14. A document is nonexistent if there are reasonable grounds for the agency or Minister dealing with the access application to be satisfied that the document does not exist.¹⁶ 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, including:¹⁷
 - the administrative arrangements of government
 - the agency structure
 - the agency's functions and responsibilities
 - the agency's practices and procedures (including but not exclusive to its information management approach); and
 - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.
15. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case as the search and inquiry process an agency will be required to undertake will depend on the particular circumstances.
16. Generally, 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.¹⁸ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable grounds to believe that the agency has not discharged its obligation to locate all relevant documents.¹⁹

Findings

¹⁴ Section 40 of the IP Act.

¹⁵ Section 130(2) of the RTI Act. The Queensland Civil and Administrative Tribunal confirmed in *Webb v Information Commissioner* [2021] QCATA 116 at [6] that the RTI Act 'does not contemplate that [the Information Commissioner] will in some way check an agency's records for relevant documents' and that, ultimately, the Information Commissioner is dependent on the agency's officers to do the actual searching for relevant documents.

¹⁶ Section 52(1)(a) of the RTI Act.

¹⁷ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) (**Pryor**) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) at [28]. These factors were more recently considered in *Van Veendelaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) and *P17 and Queensland Corrective Services* [2020] QICmr 68 (17 November 2020).

¹⁸ Section 87(1) of the RTI Act.

¹⁹ See *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

17. The applicant submits²⁰ that *'the BWC footage I received has been modified to about 12 minutes or so'* and that the QPS attended the property *'for approximately 50 minutes and the complete footage from that incident has not been provided'*.
18. On external review, QPS was requested to provide:²¹

Additional information or explanation that addresses the applicant's concerns about the length of the released footage – ie why the length of the footage is considerably shorter than the QPs officer's attendance at her address.

19. In response, QPS provided the following submission regarding the length of the Released BWC footage:²²

The time BWC recording was terminated by Officer [X]

Officer [X] attended the address and terminated his body worn camera 12minutes and 58 seconds after he commenced recording at 7:53pm on the 19th of March 2022. The recording was therefore terminated at approximately 8:05pm.

...

In accordance with the DERIE Manual section 4.4 – Body worn Cameras "officers allocated a BWC are to:

- (i) turn the BWC on (buffering mode) at the commencement of their shift; and*
- (ii) commence a recording as soon as practicable after an officer reasonably believes they may*
 - (a) exercise a police power under legislation; or*
 - (b) apply a use of force."*

Officers are also to:

- (iii) make BWC recordings when the:*
 - (a) recording might assist in providing a record of evidence which assists in the investigation of an offence or suspected offence; or*
 - (b) officer believes the interaction should be recorded"*

DERIE Manual s4.4 further state,

When an officer commences a BWC recording, the officer should continue recording until:

- (i) the incident is finalised; or*
- (iii) the need to record the incident is no longer required, (e.g. guarding a crime scene overnight)".*

At the time that Officer [X] terminated the BWC recording he had exited the dwelling at [specified address] where he had located the vehicle [registration] marked as stolen in the driveway.

He stood at the end of the driveway on the footpath and organised a tow truck to collect the vehicle. It was at this time that he deactivated his body worn camera.

He reasonably believed that the need to record no longer existed and the incident had been finalised as he was no longer interacting with the occupants and awaiting the arrival of a tow truck.

He was not exercising any power under legislation or applying any use of force.

²⁰ Applicant submission to QPS dated 23 June 2023.

²¹ By way of letter dated 4 September 2023.

²² By email dated 11 September 2023.

Whilst waiting for the tow truck one of the residents approached him and his partner to speak with them. At this time the BWC was not activated as the recording was not going to assist with the investigation into an offence and the officer did not believe that he would exercise any police power or apply any use of force.

He conversed with the resident regarding why they were there before the resident returned into the dwelling.

Officer [X] continued to wait on the footpath for the arrival of a tow truck.

20. The Manager of the Right to Information at QPS further advised the applicant,²³ that she conducted searches herself and confirmed the Released BWC footage provided to the applicant was the entire recording and that it had not been modified or shortened.
21. I also note that a long beep can be heard at the end of the Released BWC footage. This is consistent with the Axon operation manual, which indicates that this occurs when the officer has deactivated the recording function (that is, ended a recording).²⁴
22. I acknowledge the applicant has raised concerns as to whether Officer [X] followed the relevant QPS procedure on when to activate and/or deactivate their BWC. It is not my role to make any findings in this decision in relation to those concerns. The issue for determination in this matter is whether QPS has taken all reasonable steps to locate the BWC footage sought in the access application and may therefore conclude that no further footage exists.
23. On the material before me, I consider that QPS has conducted suitably targeted searches of the relevant location where it was reasonable to expect the BWC footage requested in the access application would be found. Further, in my view, QPS has provided a reasonable explanation as to why additional BWC footage does not exist, that is because Officer [X] turned off their BWC. This explanation is supported by the audible sounds at the end of the Released BWC footage and the Axon operation manual.

DECISION

24. For the reasons set out above, I affirm the decision under review and find that:
 - QPS has taken all reasonable steps in searching for BWC footage in response to the access application; and
 - access to any additional BWC footage may be refused pursuant to section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) on the basis that it does not exist.
25. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

Shiv Martin
Acting Right to Information Commissioner

Date: 15 December 2023

²³ QPS's email to the applicant dated 26 July 2023.

²⁴ Available at https://my.axon.com/s/article/Audio-prompt-and-vibration-guide-body?language=en_US.

APPENDIX

Significant procedural steps

Date	Event
16 August 2023	OIC received the external review application. OIC requested procedural information from QPS.
18 August 2023	OIC received the requested procedural information from QPS.
4 September 2023	OIC advised the applicant and QPS the external review had been accepted and requested QPS provide a copy of the located BWC footage and a submission addressing the applicant's concerns about missing BWC footage.
11 September 2023	OIC received a copy of the located BWC footage and a submission from QPS.
15 September	OIC conveyed a preliminary view to the applicant.
26 September 2023	OIC received a submission from the applicant.
19 October 2023	OIC conveyed a further preliminary view to the applicant.
2 November 2023	OIC received a further submission from the applicant.