



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>Nine Entertainment Co Holdings Ltd and Queensland Police Service [2018] QICmr 54 (20 December 2018)</i></b>
<b>Application Number:</b>	<b>313985</b>
<b>Applicant:</b>	<b>Nine Entertainment Co Holdings Ltd (ACN 122 203 892)</b>
<b>Respondent:</b>	<b>Queensland Police Service</b>
<b>Decision Date:</b>	<b>20 December 2018</b>
<b>Catchwords:</b>	<b>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)</b>

### REASONS FOR DECISION

#### Summary

1. Nine Entertainment Co Holdings Ltd (**Nine**) applied<sup>1</sup> to Queensland Police Service (**QPS**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to various documents concerning positive drink and drug driving tests, including five examples of body-worn camera (**BWC**) footage of incidents *'where further charges relating to resisting arrest were laid'* (ie, following persons being detained for returning positive drink/drug driving tests).
2. QPS relevantly decided to disclose five BWC recordings, edited so as to obscure the faces of members of the public featured in the recordings, and remove most<sup>2</sup> of the audio from each recording.
3. Nine applied to the Office of the Information Commissioner (**OIC**), for external review of QPS' decision to refuse access to the audio component of each recording. For reasons explained below, I affirm QPS' decision to refuse access to this information, on the grounds its disclosure would, on balance, be contrary to the public interest.

#### Background

4. Significant procedural steps are set out in the appendix to this decision.

#### Reviewable decision

5. The decision under review is QPS' internal review decision dated 6 June 2018.

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<sup>1</sup> Application dated 13 December 2017.

<sup>2</sup> QPS decided to disclose portions of audio from certain recordings; that information is not in issue. Nor are other documents dealt with in QPS' decision, in relation to which Nine has not sought external review.

## Evidence considered

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

## Information in issue

7. The information in issue comprises those parts of the audio component of each of the five BWC recordings,<sup>3</sup> to which QPS refused Nine access. I will refer to this information as the 'Audio'.

## Issue for determination

8. The issue for determination is whether disclosure of the Audio would, on balance, be contrary to the public interest.

## Relevant law

9. The RTI Act gives people a right to access documents of government agencies such as QPS.<sup>4</sup> This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Access may be refused to information the disclosure of which would, on balance, be contrary to the public interest.<sup>5</sup>
10. In deciding whether disclosure would, on balance, be contrary to the public interest, the RTI Act requires a decision-maker to:<sup>6</sup>
  - identify any irrelevant factors and disregard them<sup>7</sup>
  - 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.
11. 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 the decision under review and Nine's submissions, in reaching my decision.

## Findings

### **Factors favouring disclosure**

12. Nine obtains the benefit of the general public interest in promoting access to government-held information<sup>8</sup> – a modest benefit in this case, given that, as discussed further below, the Audio is relatively sensitive personal information of members of the community.

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<sup>3</sup> The BWC recordings are themselves segments of longer recordings, as apparently edited by QPS for relevance. The footage containing the audio in issue is as follows: Recording 1: 7:18-8:38 (approx.) of original video; Recording 2: 11:24-12:53; Recording 3: 27:13-29:22; Recording 4: 3:27-7:05; Recording 5: 17:13-18:39.

<sup>4</sup> Section 23 of the RTI Act.

<sup>5</sup> Section 47(3)(b) of the RTI Act. The term '*public interest*' refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.

<sup>6</sup> Section 49 of the RTI Act.

<sup>7</sup> In my view, no irrelevant factors arise in this case, and I have taken none into account in reaching my decision.

<sup>8</sup> Implicit, for example, in the preamble to the RTI Act.

13. Additionally, I acknowledge that disclosure of material revealing the nature of interactions between police and the public may advance the public interest in promoting positive and informed debate about the administration of justice.<sup>9</sup> I also recognise the public interest in enhancing the transparency of QPS operations, and ensuring QPS is accountable for the manner in which it conducts policing operations.<sup>10</sup> The footage QPS decided to release, however, largely satisfies these considerations, reducing the weight to be accorded to each in balancing the public interest. I afford each consideration favouring disclosure modest weight.
14. Having carefully considered the entirety of Nine's submissions, and the list of public interest factors favouring disclosure in schedule 4, part 2 of the RTI Act, I cannot identify any additional factors favouring disclosure of the Audio.

### **Factors favouring nondisclosure**

15. Telling against disclosure of the Audio is the public interest harm presumed to arise from disclosure of an individual's personal information,<sup>11</sup> and the prejudice to the protection of individuals' right to privacy that could reasonably be expected to follow disclosure of the Audio.<sup>12</sup>

#### **Personal information public interest harm factor**

16. Personal information is:<sup>13</sup>

*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.*

17. While it will depend on the circumstances of a particular case, I consider that a person's voice will often comprise that individual's personal information.<sup>14</sup>
18. The test in every case is whether the identity of the recorded person is reasonably ascertainable. This is an issue I recently considered in *Seven Network (Operations) Limited and Logan City Council*<sup>15</sup> (**Seven**), in assessing whether disclosure of CCTV footage could reasonably be expected to identify persons appearing in that footage. In *Seven*, I was not satisfied that disclosure of the specific pixelated footage in the context in which it appeared in that case could reasonably be expected to identify featured individuals.
19. Voice recordings such as the Audio are, in my view, analogous to unedited video footage, disclosure of which could reasonably be expected to allow identification of recorded persons, via both the words spoken by recorded individuals – 'lexical' information<sup>16</sup> – and

<sup>9</sup> Schedule 4, part 2, item 2 of the RTI Act, and including, arguably, debate encouraging public compliance with lawful police directions, as I understand Nine to have been contending in submitting that disclosure of the Audio would 'have the effect of educating those who watch the report' (Application for external review dated 21 June 2018).

<sup>10</sup> Schedule 4, part 2, item 1 of the RTI Act.

<sup>11</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>12</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>13</sup> Section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**).

<sup>14</sup> As regards voice recordings comprising personal information, see *New York Times Co. and National Aeronautics and Space Administration*, 920 F.2d 1002 (D.C. Cir. 1990) (**New York Times and NASA**). The majority of the United States Court of Appeals for the District of Columbia in that case stated that '... information is not conveyed by words alone. The information recorded through the capture of a person's voice is distinct and in addition to the information contained in the words themselves. ... voice inflections and other "nonlexical" information can constitute personal information...'. *New York Times and NASA* was cited with approval by the Information Commissioner in *Williamson and Queensland Police Service; "A" (Third Party)* (2005) 7 QAR 51 (**Williamson**), in affirming the QPS' decision to refuse access under the former *Freedom of Information Act 1992* (Qld) (**FOI Act**) to an audio and video recording of a police interview. *Williamson* considered the application of the former 'personal affairs' exemption as contained in section 44(1) of the FOI Act; relevant observations may nevertheless be usefully applied in the present case.

<sup>15</sup> [2018] QICmr 21 (11 May 2018).

<sup>16</sup> See note 14.

the tone and character of the voice used to speak those words – ‘*nonlexical*’ information. This is particularly so where voice recordings are, as here, coupled with other elements, such as clear close-range footage of involved persons (thus depicting a range of physical characteristics and personal traits, even allowing for face pixelation), their vehicles, and aspects of the locations where filmed interactions occurred – all of which, taken together, heightens the likelihood of identification.

20. It is not, as Nine notes in its application for external review, possible to conclusively determine whether the recordings in issue would identify given individuals. The test for personal information does not, however, require this, nor a ‘*strong*’ likelihood of identification:<sup>17</sup> the definition of personal information only requires that an identity could be *reasonably ascertained* were information to be disclosed. As the Australian Information Commissioner has noted in considering a similar statutory definition,<sup>18</sup> where any uncertainty exists as to whether information comprises personal information, prudence dictates erring on the side of caution.<sup>19</sup>
21. With this in mind, my view is that the Audio comprises the personal information of those recorded.<sup>20</sup> In view of the nature of those recordings – strained encounters between officers and individual members of the community, in an atmosphere of hostility and in which sensitive ‘*lexical*’ information is spoken – I consider that disclosure of the Audio could reasonably be expected to occasion a public interest harm of considerable magnitude.

### **Prejudice protection of right to privacy**

22. A closely-related factor favouring nondisclosure of information arises for consideration where disclosure of that information could reasonably be expected<sup>21</sup> to prejudice the protection of a person’s right to privacy.<sup>22</sup>
23. The concept of ‘*privacy*’ is not defined in the RTI Act. It can, however, be viewed as the right of an individual to preserve their personal sphere free from interference from others.<sup>23</sup>
24. In this case, I consider that disclosure of the Audio could reasonably be expected to prejudice the protection of the recorded individuals’ right to privacy. The Audio portrays members of the community interacting with law enforcement officials, in a tense and emotional fashion. As I have discussed above, release of this information would not only disclose ‘*lexical*’ information spoken by the recorded individuals – some of which is extremely sensitive information – but reveal a considerable amount of ‘*nonlexical*’ information, such as the involved individuals’ levels of agitation and emotional stress.

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<sup>17</sup> Nine’s submissions dated 27 September 2018.

<sup>18</sup> Section 6(1) of the *Privacy Act 1988* (Cth).

<sup>19</sup> ‘What is ‘personal information’, Office of the Australian Information Commissioner Guide, May 2017: <https://www.oaic.gov.au/agencies-and-organisations/guides/what-is-personal-information>.

<sup>20</sup> My comments in this regard extend to the voices of QPS officers where that information has been withheld. Disclosure of personal information concerning or generated in the discharge of a public servant’s routine work activities will generally occasion little public interest prejudice. In this case, however, the recordings concern incidents played out in an atmosphere of considerable tension and hostility, and reveal the emotional state of involved officers and attendant privacy interests are, therefore, relatively weighty. Further, information spoken and conveyed by QPS officers is inextricably intertwined with that spoken by the members of the community featured in the Audio, such that disclosure of one would entail disclosure of the other.

<sup>21</sup> The words ‘*could reasonably be expected to*’ call for a 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: *B and Brisbane North Regional Health Authority* [1994] 1 QAR 279 at [155] to [160].

<sup>22</sup> Schedule 4, part 3, item 3 of the RTI Act.

<sup>23</sup> 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* released 11 August 2008, at paragraph 1.56. Importantly, this consideration can apply to favour nondisclosure of information other than personal information.

25. An individual's interactions with public officials and their demeanour in doing so are matters falling within their personal sphere.<sup>24</sup> It is reasonable, in my view, to expect that disclosing information revealing inherently personal matters of this kind could prejudice the protection of the involved individual's right to privacy.
26. In forming this view, I have taken into account the fact that the incidents featured in the recordings occurred in public places. While this arguably attenuates the scope of the right to privacy – diminishing, in a sense, the size of the '*personal sphere*' a given individual may expect to maintain free from interference – it does not eliminate it.
27. Members of the community are entitled to expect a reasonable degree of privacy and anonymity whilst traversing public spaces and interacting with public officials, at least as regards surveillance recordings that might be made by government agencies of those movements and interactions. Further, I consider there is a legitimate community expectation that where government does collect personal information in these circumstances – such as by way of CCTV or BWC recordings – it will be used for the purpose for which it was collected,<sup>25</sup> and not subject to unrestricted dissemination.<sup>26</sup>

### **Factors favouring nondisclosure - conclusion**

28. Implicit in the RTI Act<sup>27</sup> is the recognition<sup>28</sup> 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 '*personal sphere*' and thus prejudice protection of their right to privacy. In this case, I afford each of the considerations favouring nondisclosure discussed above significant weight.
29. In deciding on weight, I have taken into account the possibility that the recordings, and thus the Audio, may have formed part of criminal prosecution proceedings. As discussed further below, I do not think this possibility erodes the weight of the privacy interests attaching to this information to any material degree.

### **Balancing the public interest**

30. As noted above, I acknowledge the public interest in furthering access to government-held information, and enabling access to information disclosure of which may promote positive and informed discussion of QPS policing activities, enhance the transparency of QPS operations, and help to ensure the accountability of QPS officers for the manner in which they discharge their duties.<sup>29</sup> As I have also noted, the footage to which QPS has granted Nine access already substantially satisfies these considerations - QPS decided to disclose

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<sup>24</sup> Noting the Information Commissioner's observations in *Williamson* that a person's voice may be recognised as information distinct from the words used alone (at [63]); information which, given it reveals inflections and other '*non-lexical*' information, is '*of...[its]...nature more intrusive and revelatory of what is inherently personal...than just the words*' an individual may have spoken. (At [62]).

<sup>25</sup> Such as law enforcement or maintaining public safety.

<sup>26</sup> In this regard, I agree with the comments of Assistant Information Commissioner Corby in *Young and Queensland Police Service* (Unreported, Queensland Information Commissioner, 25 June 2013) at [20], observing that while there is a general expectation CCTV systems are likely to operate in public places, equally the community expects that footage these record will be used for limited purposes and not be liable to unrestricted dissemination. These comments apply equally if not more so, in my view, to mobile recording systems such as BWCs of the kind used in this case. I also note the comments of Senior Member Davis of the Victorian Civil and Administrative Tribunal in *Willner v Dept Economic Development, Jobs, Training and Resources (Review and Regulation)* [2015] VCAT 669. In affirming a decision to refuse access to CCTV footage of public transport passengers, the Senior Member noted that '[i]n relation to surveillance footage, passengers would have no expectation whatsoever that that footage would be made public. In fact, in my view, their expectation would be quite the contrary, that is, it would not be made public.' (At [25]).

<sup>27</sup> And its counterpart, the IP Act.

<sup>28</sup> 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, and the right to request amendment of personal information in section 41 of the IP Act.

<sup>29</sup> Schedule 4, part 2, item 1 of the RTI Act.

clear, close-up images of relevant interactions, with only faces pixelated and the Audio withheld. This reduces the weight to be accorded each of the above factors in balancing the public interest.

31. There is, on the other hand, a clear public interest in ensuring that government protects privacy and treats with respect the personal information that it collects from members of the community<sup>30</sup> – particularly information collected by relatively intrusive collection methods such as BWCs. Releasing the Audio, as I have explained above, would involve disclosure of personal information, giving rise to a substantial public interest harm. I am also of the view that such disclosure would prejudice the protection of featured individuals' right to privacy, a consideration deserving significant weight.
32. Balancing public interest considerations against one another, I consider that factors weighing against release of the Audio in this case displace those favouring disclosure. Disclosure of the Audio would, on balance, be contrary to the public interest.

### Nine's submissions

33. Nine made various submissions in its application for external review and further during the course of this review. Some of these<sup>31</sup> are adequately dealt with in the reasoning set out above. The balance generally concern Nine's understanding of the intersection of the public interest in protecting individual privacy and ensuring open justice, and apprehensions that refusing it access to the Audio amounts to 'censorship' and/or 'discrimination' against electronic media.<sup>32</sup>
34. On the issue of open justice, in submissions dated 27 September 2018, Nine contended that:

*the decision by the Court that the conduct captured in the film and audio is criminal conduct overrides the right to privacy. This is why the Court system is open and public. It is axiomatic that evidence tendered in open Court is already available to the public and should therefore be released under RTI. Unless there is a non-publication order in place by the Court, by virtue of having been used in a Court case it should be released.*

35. As noted above, it may be that the Audio formed part of material tendered in court; QPS has advised that each of the individuals the subject of the recordings containing the Audio were served with notices to appear and dealt with via the Magistrates Court.<sup>33</sup> As I advised Nine during the course of the review, the fact materials may have been used as evidence in court proceedings does not, of itself, mean that those materials are therefore openly accessible to the community generally.<sup>34</sup>
36. The *Criminal Practice Rules 1999* (Qld) (**Rules**) require a range of matters<sup>35</sup> to be taken into account before an exhibit may be copied<sup>36</sup> for the purposes of publication,<sup>37</sup> including whether the copying is in the public interest,<sup>38</sup> and whether the exhibit contains information that is private or personally sensitive. While it is not clear that relevant rules would apply to documents or records used in Magistrates Court proceedings (such as those in issue in this

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<sup>30</sup> And indeed, its employees.

<sup>31</sup> Going to the weight to be afforded to competing public interest factors, and the issue as to whether the Audio comprises personal information – canvassed, for example, in its 27 September 2018 submissions.

<sup>32</sup> External review application dated 21 June 2018.

<sup>33</sup> QPS email dated 19 November 2018.

<sup>34</sup> Noting that if they were, it may be open for an agency such as QPS to refuse access, on the ground other access to relevant documents was available: section 47(3)(f) of the RTI Act.

<sup>35</sup> See generally rule 56A(4) of the *Rules*.

<sup>36</sup> The form of access requested by Nine.

<sup>37</sup> Which, based on Nine's external review application, appears to be the purpose for which it is seeking to obtain access to the Audio.

<sup>38</sup> Or another legitimate interest: rule 56A(4)(a).

case), section 154 of the *Justices Act 1886* (Qld)<sup>39</sup> also contains limits on copying of exhibits – prohibiting, relevantly, provision of copies of anything containing or displaying an image of a person,<sup>40</sup> the disclosure of which to another person would, without the imaged person’s consent, interfere with the imaged person’s privacy.<sup>41</sup>

37. In these circumstances, even if it is accepted that the recordings had been tendered as exhibits in criminal prosecution proceedings, I can identify nothing supporting a conclusion that such court use ‘*overrides the right to privacy*’, nor that unconditional disclosure as would result were access to be given under the RTI Act ought ‘*axiomatically*’ to follow such use.
38. To the contrary, by requiring either that regard be had to the nature of a given exhibit, and the broader public interest (as does rule 56A(4)), or the consent of a person ‘*imaged*’ in an exhibit, relevant statutory provisions recognise that transitory public disclosure for the limited and specific purpose of particular court proceedings does not abrogate the privacy interests of which a particular exhibit may be possessed, and that such privacy interests may retain weight sufficient to warrant restrictions on future or further disclosure.
39. Ultimately, I am called only to consider whether a ground for refusing access to the Audio is established under the RTI Act, and no other statutory scheme. As explained above, I am in this case satisfied such a ground exists – that disclosure of the Audio would, on balance, be contrary to the public interest, in accordance with the balancing exercise prescribed in section 49 of the RTI Act.
40. I remain of this view, irrespective of whether the recordings containing the Audio have been played in open court. The privacy interests attaching to this information are significant, and while use in open court might somewhat diminish the weight to be attributed those interests, they nevertheless remain substantial – sufficient, in my view, to outweigh considerations favouring disclosure discussed above, and to therefore justify a decision refusing access.
41. Finally, I turn to Nine’s submissions that refusal of the Audio comprises ‘ *censorship* ’, and that doing so somehow prefers one form of media to another.
42. As I advised Nine during the review,<sup>42</sup> these submissions misconceive the nature of the information access regime enshrined in the RTI Act, which is to provide the community with access to government-held information, unless doing so would, on balance, be contrary to the public interest.
43. Withholding access to sensitive information depicting members of that community in varied states of agitation and distress is not ‘ *censorship* ’, but, for reasons explained above, a justifiable exercise by QPS of the power – conferred on it by Parliament – to refuse access to information. Media organisations are, of course, as entitled to exercise the right to apply for information under the RTI Act as any other member of the community. Conversely, however, it must be appreciated that that right is not absolute, and comes with the various exceptions and qualifications as imposed by the legislature.
44. As for Nine’s concern as to ‘ *discrimination* ’ preferring one form of media over the other, it is important to bear in mind that the information contained in the recordings was not actually collected for either broadcast or print media purposes, but rather, for the purpose of aiding QPS officers in the discharge of their official duties. As I have reasoned above, the community is legitimately entitled to expect that personal information collected by

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<sup>39</sup> Which would, as I understand, apply in the alternative to the *Rules*.

<sup>40</sup> As the recordings containing the Audio do.

<sup>41</sup> Section 154(3) of the *Justices Act 1886* (Qld) and section 590AF of the *Criminal Code 1889* (Qld).

<sup>42</sup> OIC letter dated 13 September 2018.

government surveillance devices in such a context will be carefully managed, and not subject to unconditional dissemination.

## **Conclusion**

45. QPS' decision to release an edited version of relevant BWC footage reflects an effort to fairly balance the public interest in safeguarding individual privacy and protecting personal information against the public interest in furthering access to government-held information, promoting informed community discourse, and ensuring QPS operates transparently and accountably. I consider that that decision strikes an appropriate balance between these competing public interests.
46. As I have reasoned above, my view is that the edited versions of the recordings QPS decided to release to Nine generally satisfy any public interest considerations that might be said to favour disclosure in this case. Disclosure of the Audio would not materially advance the public interest in this regard, least of all to a degree sufficient to justify the public interest harm and prejudice to the protection of the right to privacy that would follow such disclosure.

## **DECISION**

47. I affirm the decision under review. Access to the Audio may be refused, under section 47(3)(b) of the RTI Act.
48. I have made this decision under section 110 of the RTI Act, as a delegate of the Information Commissioner, under section 145 of the RTI Act

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**Louisa Lynch**  
**Right to Information Commissioner**

**Date: 20 December 2018**



## APPENDIX

### Significant procedural steps

Date	Event
21 June 2018	OIC received the applicant's external review application.
28 June 2018	OIC wrote to the applicant and Queensland Police Service ( <b>QPS</b> ) advising that the application for external review had been accepted and requested the Information in Issue from QPS.
10 and 28 August 2018	OIC received the Information in Issue from QPS.
13 September 2018	OIC completed a review of the Information in Issue and communicated a preliminary view to the applicant.
27 September 2018	OIC received written submissions from the applicant.
22 October 2018	OIC communicated a further preliminary view to the applicant.
5 November 2018	OIC received further written submissions from the applicant requesting that a formal decision be issued.