



Decision and Reasons for Decision

Citation:	<i>Kalman and Queensland Police Service</i> [2015] QICmr 28 (8 October 2015)
Application Number:	312323
Applicant:	Kalman
Respondent:	Queensland Police Service
Decision Date:	8 October 2015
Catchwords:	<p>ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - CCTV footage of alleged assault of applicant - CCTV footage containing images of other individuals - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(b) and 49 of the <i>Right to Information Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - SCOPE OF ACCESS APPLICATION - CCTV footage after alleged assault of applicant - whether information is outside scope of the access application - section 40 of the <i>Information Privacy Act 2009</i> (Qld)</p> <p>ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - NONEXISTENT DOCUMENTS - documents about alleged assault of applicant - whether the agency has taken all reasonable steps to locate the documents but the documents do not exist - section 67(1) of the <i>Information Privacy Act 2009</i> (Qld) and sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)</p>

REASONS FOR DECISION

Summary

1. The applicant applied to the Queensland Police Service (**QPS**) under the *Information Privacy Act 2009* (Qld) (**IP Act**) for access to a QPrime Report (**Report**) and closed circuit television (**CCTV**) footage relating to an incident that occurred in the foyer of the Cairns Police Station on 19 June 2014 (**Incident**). According to the applicant, the Incident involved him being assaulted when a package of nappies was thrown in his direction by an individual known to him.

2. In response to the application, QPS¹ located an affidavit made by the applicant, the Report and CCTV footage, and decided to:
 - release parts of the applicant's affidavit and the Report, and refuse access to the remainder of them on the ground that disclosure of this information would, on balance, be contrary to the public interest; and
 - refuse access to the entirety of the CCTV footage on the grounds that it comprised exempt information or its disclosure would, on balance, be contrary to the public interest.
3. On internal review, QPS decided to:
 - release the applicant's affidavit in full; and
 - partially release the CCTV footage, subject to the pixelation of the faces of individuals other than the applicant appearing in the footage, on the ground that disclosure of the pixelated information would, on balance, be contrary to the public interest.
4. The applicant applied to the Office of the Information Commissioner (**OIC**) for an external review. In his application for external review, the applicant:
 - objected to the pixelation of the identifying features (that is, the faces) of individuals other than himself in the CCTV footage
 - sought further CCTV footage extending beyond the Incident (**Additional CCTV Footage**)²
 - submitted that QPS had failed to locate all investigation documents responsive to his application (**Additional Documents**); and
 - expressed concern regarding the legibility of the Report.³
5. On external review, I find that:
 - access to the identifying features of individuals other than the applicant and QPS officers in the CCTV footage can be refused on the ground that disclosure of them would, on balance, be contrary to the public interest.
 - the Additional CCTV Footage is outside the scope of the applicant's access application; and
 - the Additional Documents can be refused on the basis that they are nonexistent.

Background

6. Significant procedural steps relating to the external review are set out in the Appendix to this decision.

Reviewable decision

7. The decision under review is QPS's internal review decision dated 19 December 2014.

¹ Through the Public Safety Business Agency, which provides corporate and business services on behalf of QPS.

² The applicant states in his application for external review..."The affidavit I supplied showed the incident at the Police Station continued up to when Constable McDonald returned to the inside of the Police station and had an extensive discussion with [another individual] and myself, before we eventually left..."

³ The applicant did not seek internal or external review of QPS's decision to refuse access to parts of four pages of the Report on the ground that disclosure of this information would, on balance, be contrary to the public interest.

Evidence considered

8. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).
9. The applicant provided submissions⁴ to OIC supporting his case. Whilst I have carefully considered all of the applicant's submissions, not all matters raised are relevant to the issues for determination. I have summarised and addressed the applicant's submissions below to the extent they are relevant to the issues for determination.

Issues for determination

10. On external review, QPS located two seconds of CCTV footage that did not appear in the CCTV footage released in accordance with QPS's internal review decision,⁵ and agreed to release a version of the CCTV footage, including this footage, to the applicant. Then, QPS agreed to release a further version of the CCTV footage to the applicant showing the identifying features of QPS officers. This information was released on the basis it comprised information recorded in the course of the QPS officers' routine work as public officers, and its disclosure would not, on balance, be contrary to the public interest.⁶ In this further version, the faces of individuals other than the applicant and QPS officers remain pixelated and, for the purpose of this decision, comprise the **Identifying Features** in issue.
11. Taking into account the applicant's application for external review and submissions, it is necessary that I consider whether:
 - disclosure of the Identifying Features in the CCTV footage would, on balance, be contrary to the public interest
 - the Additional CCTV Footage is outside the scope of the access application; and
 - Additional Documents are nonexistent or unlocatable.
12. The decision also addresses the applicant's concern about the legibility of the Report.
13. I will deal with each of these matters in turn.

Identifying Features

14. QPS has released CCTV footage of the Incident to the applicant, subject to the deletion, by pixelation, of the Identifying Features (that is, the face of each individual other than the applicant and QPS officers) appearing throughout the footage.

Relevant law

15. Under the IP Act, an individual has a right to be given access to documents of an agency to the extent the documents contain the individual's personal information.

⁴ By telephone discussion with an officer of OIC on 7 April 2015 and by email to OIC on 30 July 2015 and 7 August 2015.

⁵ Which skipped from 2:05:32 to 2:05:33, according to the time recorded on screen time.

⁶ Sections 47(3)(b) and 49 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. However, there are some recognised public interest considerations that may apply for the benefit of an individual.

However, this right is subject to limitations, including grounds for refusal of access.⁷ An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.

16. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest⁸ and explains the steps that a decision-maker must take⁹ in deciding the public interest. To determine the balance of the public interest a decision-maker must:
 - identify any irrelevant factors and disregard them
 - identify relevant public interest factors favouring disclosure and nondisclosure
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information would, on balance, be contrary to the public interest.

Findings

17. No irrelevant factors arise in the circumstances of this case. I will now consider the factors favouring disclosure and nondisclosure of the Identifying Features, excluding QPS officers.

Personal information

18. Personal information is defined¹⁰ as “*information or an opinion... whether true or not... about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion*”. An individual’s identity may be ascertained from images of them contained in a recording such as the CCTV footage. This likelihood increases when identifying features of the individual are visible in the images. I consider that, if the images include the individual’s face (which embodies their most readily identifiable features), the individual’s identity can be reasonably be ascertained from the images.
19. The Identifying Features of individuals pixelated from the CCTV footage do not comprise the personal information of the applicant. Accordingly, I am satisfied that the public interest factor favouring disclosure of an applicant’s personal information¹¹ does not apply to this information.
20. The Identifying Features comprise the personal information of the individuals in question (that is, the individuals, other than the applicant and QPS officers, who appear in the CCTV footage). This raises public interest factors favouring nondisclosure relating to privacy and safeguarding personal information.¹²
21. I have taken into careful consideration the fact that the CCTV footage comprises a recording of a public place – namely the foyer of the Cairns Police Station. While this arguably reduces 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 altogether.¹³ I consider there is a community expectation that, while CCTV systems are likely to operate in public places, the personal information

⁷ 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 *Right to Information Act 2009* (Qld) (**RTI Act**) were the document to be the subject of an access application under the RTI Act.

⁸ Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

⁹ See section 49(3) of the RTI Act.

¹⁰ In section 12 of the IP Act.

¹¹ Schedule 4, part 2, item 7 of the RTI Act.

¹² Schedule 4, part 3, item 3 and part 4, item 6(1) of the RTI Act.

¹³ Particularly as against the ‘world at large’, i.e., anyone other than eyewitnesses to an individual’s conduct in the public space.

they collect will be used for limited purposes only, and will not be subject to unrestricted dissemination.¹⁴ Further, I consider that members of the community are entitled to expect that they will enjoy a reasonable degree of privacy and anonymity whilst traversing public spaces and interacting with public officials, at least as regards surveillance conducted by government agencies of those movements and interactions.

22. In this regard, I consider that appearing in CCTV footage recorded in a police station's foyer is likely to comprise relatively sensitive information about individuals other than police officers and legal representatives – that is, individuals whose reasons for being at the police station and/or interacting with police officers are personal, rather than work-related. I consider this to be the case regarding the two individuals known to the applicant (that is, the individual sitting next to him, and the individual alleged to have thrown a package of nappies in his direction), as well as the individuals unrelated to the Incident.
23. Given these considerations, I am satisfied that the harm and prejudice to privacy that would arise if the Identifying Features were disclosed is high. I therefore afford these factors significant weight in favour of nondisclosure.

Accountability and transparency

24. The RTI Act gives rise to factors favouring disclosure in circumstances where disclosing information could reasonably be expected to:
- promote open discussion of public affairs and enhance the Government's accountability;¹⁵ and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.¹⁶
25. Except for the pixelated Identifying Features, QPS has released the entirety of the CCTV footage to the applicant. QPS has also released the entirety of the applicant's affidavit and most of the Report. In these circumstances, I consider the steps taken and evidence considered by QPS leading to QPS's decision not to prosecute the individual who allegedly threw the package of nappies are apparent from the information released to the applicant. I also note that the actions of a QPS officer immediately after the package of nappies was allegedly thrown and the individual in question left the foyer are visible in the CCTV footage. According, the public interest in enhancing QPS's accountability has been significantly discharged by the released information, and disclosure of the Identifying Features would have very little additional effect. According, I afford these factors negligible weight in favour of disclosure.

Administration of justice

26. In his submissions to OIC, as well as alleging that he was assaulted by the individual who threw a package of nappies in his direction, the applicant expressed the view that QPS may have breached a duty of care owed to him, because the alleged assault occurred in a QPS police station foyer, metres away from QPS officers. The applicant also described himself as a victim of crime. Given these submissions, it is necessary that I consider whether disclosure of the Identifying Features could reasonably be expected to contribute to the administration of justice for a person¹⁷ – namely, the applicant.

¹⁴ See *Young and Queensland Police Service* (Unreported, Queensland Information Commissioner, 25 June 2013) at [20].

¹⁵ Schedule 4, part 2, item 1 of the RTI Act.

¹⁶ Schedule 4, part 2, item 11 of the RTI Act.

¹⁷ Schedule 4, part 2, item 17 of the RTI Act.

27. In *Willsford and Brisbane City Council*,¹⁸ the Information Commissioner found that this factor will arise if an applicant can demonstrate that:
- they have suffered loss or damage or some kind of wrong, in respect of which a remedy is, or may be available under the law
 - they have a reasonable basis for seeking to pursue the remedy; and
 - disclosing the information would assist the applicant to pursue the remedy, or to evaluate whether a remedy is available or worth pursuing.
28. As noted above, in the present circumstances, QPS has released the footage of the entirety of the Incident in which the applicant alleges he was assaulted to the applicant, except for the Identifying Features of individuals in the foyer for personal reasons, including his alleged assailant. I further note from the applicant's submissions that he is aware of the alleged assailant's identity. Accordingly, I am satisfied that the applicant has before him both information about his alleged assault and knowledge of the identity of his alleged assailant.
29. Taking these considerations into account, I am satisfied that the Identifying Features of the alleged assailant would not assist the applicant to pursue any remedy, or assess whether doing so is possible or worthwhile. I am also satisfied that this is the case in relation the Identifying Features of the other individual known to the applicant, and the Identifying Features of individuals, other than QPS officers, unrelated to the Incident. Accordingly, I consider that the third requirement set out in *Willsford* is not satisfied, and that it is therefore unnecessary to consider the first two requirements. In these circumstances, I am satisfied that the Identifying Features do not raise the public interest factor favouring disclosure regarding administration of justice for a person.

Balancing the relevant factors

30. I consider that releasing an unpixelated version of the CCTV footage would involve disclosure of the personal information of individuals other than the applicant and QPS officers, giving rise to public interest harm. I am also of the view that such disclosure would prejudice the protection of those individuals' right to privacy. There is a clear public interest in ensuring that government protects privacy and respects the personal information it collects from members of the community. Given these considerations, I am satisfied that the factors favouring nondisclosure of the Identifying Features are deserving of significant weight for individuals in the foyer for personal reasons.
31. In contrast, I consider that the factors favouring disclosure of the Identifying Features related to accountability and transparency have been significantly discharged by the information that QPS has released to the applicant, and therefore carry negligible weight.
32. In conclusion, I consider that release of the Identifying Features of individuals other than the applicant and QPS officers in an unpixelated version of the CCTV footage would disclose sensitive personal information of persons other than the applicant, and in doing so, cause significant prejudice to their privacy, while having relatively little positive effect in terms of advancing the public interest. Accordingly, I find that QPS is entitled to refuse access to the Identifying Features, as disclosure of the CCTV footage in an unpixelated form would, on balance, be contrary to the public interest.

¹⁸ Unreported, Queensland Information Commissioner, 27 August 1996 (*Willsford*) at [17].

Additional CCTV Footage

33. I have considered the applicant's request for Additional CCTV Footage in light of the scope of his original access application. The Additional CCTV Footage raised by the applicant relates to circumstances occurring **after** the Incident of the package of nappies allegedly being thrown. However, the applicant's access application requested:

... copies of the full investigation file for QP [reference number] and the related CCTV footage.

34. That is, the applicant's access application specified CCTV footage related to an 'investigation file', and gave the Report's reference number as the reference number for this investigation file.

35. Noting the applicant's reference to the Report's reference number, QPS's submission that the Report *'is the official investigation report of the incident'*¹⁹ and the content of the Report, I am satisfied that the investigation file referred to by the applicant in his access application is the Report. I have carefully considered the Report, and am of the view that it relates only to the allegation of an assault having taken place, and not to any events that occurred afterwards. On this basis, I am satisfied that the Additional CCTV Footage raised by the applicant, regarding events occurring after the Incident, is outside the scope of this access application.²⁰

Additional Documents

36. In the applicant's application for external review, he submitted:

In my original request under the FOI Act [sic], I requested a copy of what was described to me as an internal investigation as to how and why the actions of [his alleged assailant] were not sufficient to make a successful prosecution. The documents supplied to me fell very short of that...

Relevant law

37. Access to a document may be refused if the document is nonexistent.²¹ A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.²²
38. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors.²³ When proper consideration is given to relevant factors, it may not be necessary for searches to be conducted. However, 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

¹⁹ By email from QPS to OIC sent on 31 March 2015.

²⁰ The applicant made a further access application to QPS for information including the Additional CCTV Footage and, on 29 July 2015 applied to OIC for external review of QPS's decision regarding some of that information. The issue of access to the Additional CCTV Footage will therefore be considered in that separate external review.

²¹ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1)(a) of the RTI Act.

²² Section 52(1)(a) of the RTI Act.

²³ *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* [2009] QICmr 7 (9 February 2009) regarding section 28A of the repealed *Freedom of Information Act 2009* (Qld), given the requirements of that section are replicated in section 52 of the RTI Act. The key factors include: the administrative arrangements of government; the agency structure; the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and the other legal obligations that fall to it); 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.

search and enquiry process an agency will be required to undertake will depend on which of the key factors are most relevant in the particular circumstances.

Findings

39. The scope of the applicant's access application is set out at paragraph 33 above. It was made under the IP Act, rather than the RTI Act, and therefore only applies to documents which contain the applicant's personal information.²⁴
40. During the processing of the applicant's application, QPS performed searches for documents responsive to the applicant's access application in the following locations:
- notebook of QPS officer with conduct of investigation of the applicant's assault allegation
 - electronic log
 - QPrime Reports; and
 - audio and video tapes.
41. As a result of these searches, QPS located the Report, the applicant's affidavit which was referred to in the Report, and the CCTV footage. The QPS officer with conduct of the investigation advised that there were no further documents and confirmed that there were no notes in her notebook or in the electronic log. QPS has provided OIC with a signed search certification which identifies the searches performed and confirms that all documents in QPS's possession have been located.
42. I acknowledge the applicant's expectation, conveyed in his submission, that *'internal investigation'* documents recording *'how and why the actions of [his alleged assailant] were not sufficient to make a successful prosecution'* would exist. However, on careful consideration of the content of the Report that QPS released to the applicant, I note that it records *'how and why the actions of [his alleged assailant] were not sufficient to make a successful prosecution'*, insofar as it records the evidence considered by QPS, and discusses the insufficiency of this evidence to support prosecution under particular provisions of the *Criminal Code 1899* (Qld). Given that the Report itself appears to record what the applicant refers to as an *'internal investigation'*, the searches that QPS has undertaken (as noted above), and the absence of any further information from the applicant as to why he considers that Additional Documents exist, I am satisfied that the searches performed by QPS were comprehensive and appropriately targeted in the circumstances, and would have located any Additional Documents sought by the applicant, if they existed and fell within the scope of his application under the IP Act.
43. I therefore find that QPS has taken all reasonable steps to locate the Additional Documents, and access to them can be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act as they are nonexistent.

Legibility of the Report

44. In his external review application, the applicant expressed concerns that the Report *'appeared to be in code or HTML format'*.²⁵ During the course of the external review, the applicant has raised similar concerns that the Report is *'in hieroglyphics'* and that he cannot understand its contents.²⁶

²⁴ As defined in section 12 of the IP Act.

²⁵ Contained in the applicant's email to OIC on 3 January 2015.

²⁶ For example, during the applicant's telephone discussion with an OIC officer on 24 June 2015.

45. I have reviewed the six pages comprising the Report. Of the information in the Report released to the applicant, I note that a number of prompts which could possibly be interpreted as code or be difficult to understand are used, particularly on pages 1 and 2, and to a lesser extent on page 6. It appears that these prompts are used by the QPS to provide guidance to QPS officers about the information that is required to be inserted into each section of the Report. The prompts do not, in my view, restrict or diminish the quality of information provided to the applicant. Even if this were the case, OIC's external review jurisdiction regarding access applications relates to access to documents. It does not extend to their legibility. Accordingly, I am unable to consider the applicant's concerns about the legibility of the Report in this decision.

DECISION

46. For the reasons set out above, I vary QPS's decision and find that:
- access to the Identifying Features in CCTV footage of the Incident can be refused on the ground that disclosure of them would, on balance, be contrary to the public interest²⁷
 - the Additional CCTV Footage is outside the scope of the applicant's access application; and
 - the Additional Documents can be refused on the ground that they are nonexistent.²⁸
47. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

A Rickard
Acting Assistant Information Commissioner

Date: 8 October 2015

²⁷ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

²⁸ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
8 October 2014	QPS received the access application.
10 November 2014	QPS issued its decision to the applicant.
28 November 2014	QPS received the applicant's application for internal review.
19 December 2014	QPS issued its internal review decision to the applicant.
3 January 2015	OIC received the application for external review of QPS's decision.
5 January 2015	OIC notified QPS that the external review application had been received and requested it provide relevant procedural documents by 12 January 2015.
12 January 2015	OIC received the requested procedural documents from QPS.
4 February 2015	OIC notified the applicant and QPS that it had accepted the external review application. OIC requested QPS to provide a copy of the CCTV footage documents by 18 February 2015.
16 February 2015	OIC received the requested information from QPS.
31 March 2015	OIC requested that QPS provide a copy of the documents not in issue on external review. QPS provided copies of the applicant's affidavit and Report and made brief submissions regarding the Report.
2 April 2015	OIC requested that QPS provide a further copy of the CCTV footage, including two additional seconds of footage, to OIC and the applicant by 24 April 2015.
7 April 2015	OIC received the requested information from QPS.
9 April 2015	QPS provided a copy of the CCTV footage, including two additional seconds of footage, to the applicant.
20 April 2015	The applicant confirmed that he had received the copy of the CCTV footage, including two additional seconds of footage. The applicant advised that he had made a further access application to QPS for information including the Additional CCTV Footage, and that he wished to await that application's outcome before deciding whether or not to proceed with the present external review.
24 June 2015	The applicant confirmed to OIC that he was still awaiting the outcome of his further access application.
28 July 2015	In absence of advice from the applicant regarding the outcome of his further access application, OIC conveyed its preliminary view to the applicant and invited him to provide submissions supporting his case by 11 August 2015 if he did not accept the preliminary view.
30 July 2015	The applicant provided submissions supporting his case.
7 August 2015	The applicant provided further submissions supporting his case.
14 September 2015	OIC requested that QPS provide a further copy of the CCTV footage, showing the identifying features of QPS officers, to the applicant by 6

	October 2015, and provide a copy of same to OIC, also by 6 October 2015.
6 October 2015	The applicant confirmed that he had received a further copy of the CCTV footage showing QPS officers' identifying features, did not accept OIC's preliminary view regarding the remaining information sought by him, and wanted a formal decision.
7 October 2015	OIC received a further copy of the CCTV footage showing QPS officers' identifying features.