



Decision and Reasons for Decision

Citation:	<i>F11 and Queensland Police Service [2022] QICmr 27 (18 May 2022)</i>
Application Number:	316320
Applicant:	F11
Respondent:	Queensland Police Service
Decision Date:	18 May 2022
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - request for CCTV footage concerning an alleged assault - whether agency has taken all reasonable steps to locate the requested CCTV footage - whether access to further CCTV footage may be refused on the basis that the documents do not exist or are unlocatable - sections 47(3)(e) and 52 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 *Right to Information Act 2009 (Qld)* (**RTI Act**) to access certain CCTV footage in the period 10 minutes before and 10 minutes after the time of an alleged assault (**alleged assault**).
2. QPS located 21 CCTV recordings as relevant to the application and disclosed two recordings to the applicant. QPS decided² to release the remaining 19 recordings, subject to the removal of portions of footage which depicted other individuals.
3. The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review.³ The applicant is dissatisfied with the level of information released to him and believes that further CCTV footage exists.⁴
4. For the reasons explained below, I vary QPS' decision and find that access to any further CCTV footage may be refused on the basis it does not exist.

¹ Access application dated 2 August 2021.

² QPS decision dated 3 September 2021.

³ External review application dated 13 September 2021. In his external review application, the applicant indicated he had not received the 19 recordings that QPS had decided to partially disclose. By letter dated 6 October 2021, the applicant confirmed to OIC that he had received these recordings from QPS on 5 October 2021.

⁴ As the applicant did not seek external review of QPS' decision to delete images depicting other individuals from the released recordings, the refusal of access to that information is not considered in these reasons for decision.

Background

5. On 20 October 2020, the applicant attended a police station (**Police Station**) to report that he had been assaulted by a particular individual. The assault allegation was investigated by QPS and QPS determined that the allegation was unfounded.⁵ The information obtained by QPS for its investigation included CCTV footage obtained from available cameras, which were located some distance from where the alleged incident occurred.
6. In November 2020, the applicant applied to QPS under the *Information Privacy Act 2009* (Qld) (**IP Act**) to access documents, including CCTV footage, relevant to the QPS investigation into the alleged assault (**IP Act Application**⁶). QPS located relevant documents and disclosed certain information to the applicant, including information from a QPS officer's notebook, QPRIME records relating to the alleged assault, and a small amount of CCTV footage. The released information confirmed that the located CCTV footage was motion-sensitive and did not capture the alleged assault. The applicant was dissatisfied with the disclosed information and, in seeking internal review, requested CCTV footage for the 10 minutes after the time of the alleged assault. On internal review, no further CCTV footage was disclosed to the applicant.
7. The applicant then requested external review of the decision issued in respect of the IP Act Application⁷ (**Prior Review**). In the Prior Review, the applicant agitated for disclosure of all CCTV footage 10 minutes before and 10 minutes after 1:18:09pm on 20 October 2020, being when he considered the alleged assault occurred. QPS provided OIC with 31 individual clips of CCTV footage⁸ and disclosed a further 8 partially edited clips of CCTV footage to the applicant during the Prior Review. OIC also confirmed to the applicant that QPS had:
 - disclosed all the located CCTV footage, to the extent that it contained the applicant's personal information⁹; and
 - not located any CCTV footage that captured the moments when the applicant contends the alleged assault occurred, or its aftermath.
8. Following completion of the Prior Review, the applicant applied to QPS under the RTI Act to access CCTV footage for the period 10 minutes before and 10 minutes after 1:18:09pm on 20 October 2020 (**Application**). As the Application referenced CCTV footage that the applicant had not received in respect of the IP Act Application, QPS interpreted the Application as requesting CCTV footage that was not considered relevant to the IP Act Application.¹⁰
9. The applicant has confirmed to OIC that he has now received a total of 31 clips of CCTV footage from QPS¹¹ and that he is particularly seeking to access CCTV footage for the

⁵ The applicant was dissatisfied with the investigation, and its outcome, and has pursued separate complaint processes in that regard.

⁶ To avoid identifying the applicant, I have not included the QPS reference number for the IP Act Application in these reasons for decision.

⁷ External review 315987, which was finalised without the Information Commissioner issuing a formal decision.

⁸ These clips were for the period between 1:05:00pm and 1:25:24pm on 20 October 2020, however, QPS did not locate any CCTV footage for the periods between 1:17:14pm and 1:17:55pm and 1:18:09pm and 1:18:37pm.

⁹ As notified to the applicant, the clips of CCTV footage which did not contain any of the applicant's personal information fell outside the scope of the IP Act Application (section 43 of the IP Act).

¹⁰ Noting that the scope of the IP Act application was limited to documents containing the applicant's personal information, whereas under the RTI Act, the personal information limitation does not apply.

¹¹ Submissions dated 6 October 2021. This includes the partially disclosed clips of CCTV footage in which the identifying images of other individuals had been removed.

period between 1:18:09pm and 1:18:37pm on 20 October 2020 (that is, a further 28 seconds of CCTV footage), which he believes will show the alleged assault.¹²

10. Significant procedural steps relating to the external review are set out in the Appendix.

Reviewable decision and evidence considered

11. The decision under review is QPS' decision dated 3 September 2021.
12. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
13. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.¹³ 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 RTI Act.¹⁴ I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.¹⁵

Issue for determination

14. Of the 31 clips of CCTV footage which QPS located in respect of the IP Act Application, QPS identified that 21 of those clips were relevant to the Application. Those 21 clips were disclosed to the applicant, subject to the redaction of the images of other individuals. On external review, the applicant submits that there '*must be*' CCTV footage of the period between 1:18:09pm and 1:18:37pm on 20 October 2020.¹⁶
15. The issue for determination is whether access to further CCTV footage, particularly of the period between 1:18:09pm and 1:18:37pm on 20 October 2020, may be refused on the basis that it is nonexistent or unlocatable.¹⁷
16. The applicant provided a number of submissions to OIC.¹⁸ I have carefully reviewed those submissions and taken into account the parts of those submissions which are relevant to the issue for determination. The applicant is frustrated that the alleged assault has not been captured on the CCTV footage located by QPS and asserts that QPS is '*deliberately avoiding*' provision of the requested CCTV footage to him.¹⁹ There is no evidence before me which supports this assertion. The applicant also seeks to raise concerns beyond the jurisdiction of the Information Commissioner, and which fall outside the scope of this review (such as concerns about the manner in which the clips of CCTV footage have been provided to him).²⁰ In reaching this decision, I have only considered the applicant's submissions to the extent they are relevant to the issue for determination.

¹² Submissions dated 25 November 2021, 22 January 2022 and 4 February 2022.

¹³ Section 21 of the HR Act.

¹⁴ *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].

¹⁵ I also note the following observations made by Bell J in *XYZ* at [573], on the interaction between equivalent pieces of Victorian legislation (namely, the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)): '*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.*'

¹⁶ Submissions dated 4 February 2022.

¹⁷ Under sections 47(3)(e) and 52 of the RTI Act.

¹⁸ As set out in the Appendix.

¹⁹ External review application dated 13 September 2021.

²⁰ Submissions dated 6 October 2021.

Relevant law

17. The RTI Act provides a right to be given access to documents of an agency,²¹ however, this right of access is subject to limitations, including the grounds on which access to information may be refused.²²
18. On external review, the functions of the Information Commissioner include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents applied for by applicants.²³ However, access to a document may be refused if the document is nonexistent or unlocatable.²⁴
19. 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, including:²⁵
 - 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.
20. 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.
21. To determine whether a document exists, but is unlocatable, the RTI Act requires consideration of whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and whether the agency has taken all reasonable steps to find the document. In answering these questions, regard should again be had to the circumstances of the case and the key factors.²⁶
22. 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.²⁷ However, where an external review involves the issue of missing documents, the applicant has a practical onus to establish reasonable

²¹ Section 23(1)(a) of the RTI Act.

²² The grounds on which an agency may refuse access are set out in section 47(3) of the RTI Act.

²³ Section 130(2) of the RTI Act. The Queensland Civil and Administrative Tribunal recently 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.

²⁴ Sections 47(3)(e) and 52 of the RTI Act. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist—section 52(1)(a) of the RTI Act. A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document but it cannot be found—section 52(1)(b) of the RTI Act.

²⁵ *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).

²⁶ *Pryor* at [21].

²⁷ Section 87(1) of the RTI Act.

grounds to believe that the agency has not discharged its obligation to locate all relevant documents.²⁸

Findings

23. QPS provided OIC with evidence, including search records and certifications, of the searches it conducted to locate the CCTV footage.²⁹ That information confirmed that:
- searches for documents relevant to the investigation (including for CCTV footage) were undertaken at the Police Station and the relevant Criminal Investigation Branch;³⁰ and
 - the located CCTV footage was held in the audio and video records of the Police Station.
24. I consider that it is reasonable to expect that all of the CCTV footage which QPS obtained in its investigation of the alleged assault would be retained in the records which QPS has searched. However, the footage of specific interest to the applicant (namely, for period between 1:18:09pm and 1:18:37pm on 20 October 2020) was not located by those searches.
25. In terms of the applicant's assertion or belief that QPS must have the further CCTV footage which is of particular interest to him, this of itself is insufficient to support a reasonable expectation that such further CCTV footage was in fact obtained by QPS in its investigation of the alleged assault or that it is in QPS' possession or under its control.
26. On the other hand, the information which QPS disclosed to the applicant in respect of the IP Act Application records that the CCTV footage QPS obtained for the assault investigation was motion-sensitive and, as a result, did not continuously record during the timeframe specified in the Application. More specifically, that disclosed information records that:
- in investigating the applicant's report of the alleged assault, QPS requested CCTV footage for 10 minutes before and 10 minutes after the time of the alleged assault and reviewed the CCTV footage that was available
 - the investigating officer observed that *'each section of CCTV depicts the camera activating and deactivating upon movement of a palm frond [sic] directly in front of the camera at the [location]'* and *'the CCTV footage is motioned-sensored and unfortunately deactivated just as this incident was occurring';*³¹ and
 - in notifying the applicant of the investigation outcome, QPS explained to the applicant that the located CCTV footage was activated by a palm frond directly outside of the camera, which had stopped moving at the time of this incident and, as a result, the CCTV footage stopped as there was no movement to activate the camera.³²
27. I acknowledge the applicant's frustration that the located CCTV footage did not record the alleged assault, or its aftermath. However, based on the searches undertaken by QPS and the content of the information which has been disclosed to the applicant

²⁸ See *Mewburn and Department of Local Government, Community Recovery and Resilience* [2014] QICmr 43 (31 October 2014) at [13].

²⁹ On 29 September 2021 and 21 January 2022.

³⁰ To avoid identifying the applicant, I have not included, in these reasons for decision, the location of the Police Station or the Criminal Investigation Branch where these searches were conducted.

³¹ Page 11 of the documents disclosed to the applicant in respect of the IP Act Application. This document also records the investigating officer's conclusion that the circumstances surrounding the CCTV *'stopping just as this incident was occurring'* was not suspicious.

³² Page 2 of the documents disclosed to the applicant in respect of the IP Act Application.

(including the information summarised above), there is nothing before me, other than the applicant's assertions, to support an expectation that additional CCTV footage (including for the period which is of specific interest to the applicant) exists. Accordingly, I am satisfied that QPS has taken all reasonable steps to locate CCTV footage relevant to the Application and access to further CCTV footage may be refused on the basis it does not exist.³³

DECISION

28. For the reasons set out above, as a delegate of the Information Commissioner under section 145 of the RTI Act, I vary QPS' decision and find that access to any further information may be refused under section 47(3)(e) of the RTI Act, on the basis that it is non-existent.

T Lake
Acting Assistant Information Commissioner

Date: 18 May 2022

³³ Under section 47(3)(e) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
13 September 2021	OIC received the external review application.
27 September 2021	OIC notified the applicant and QPS that the application for external review had been accepted and requested information from QPS. OIC also asked QPS to send the applicant a copy of the 19 recordings it had decided to partially disclose.
29 September 2021	OIC received certain requested information from QPS.
6 October 2021	OIC received the applicant's submission and further requested information from QPS.
15 November 2021	OIC received the applicant's request for an update.
24 November 2021	OIC conveyed a preliminary view to the applicant.
25 November 2021	OIC received the applicant's further submissions and request to access CCTV footage for the period 1:18:09pm to 1:18:37pm on 20 October 2020.
10 January 2022	OIC requested further information from QPS.
21 January 2022	OIC received the requested information from QPS.
22 January 2022	OIC received the applicant's further request for disclosure of CCTV footage for the period 1:18:09pm to 1:18:37pm on 20 October 2020.
2 February 2022	OIC conveyed a further preliminary view to the applicant.
4 February 2022	OIC received the applicant's further submissions.
23 February 2022	OIC conveyed a further preliminary view to the applicant and received the applicant's request for a formal decision to be issued to finalise the review.