



Decision and Reasons for Decision

Citation: *Kalman and Queensland Police Service* [2016] QICmr 17 (13 May 2016)

Application Number: 312536

Applicant: Kalman

Respondent: Queensland Police Service

Decision Date: 13 May 2016

Catchwords: ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - audio recording relating to alleged assault of applicant - audio recording includes personal information of other individuals - whether disclosure would, on balance, be contrary to the public interest - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

ADMINISTRATIVE LAW - INFORMATION PRIVACY ACT - REFUSAL OF ACCESS - UNLOCATABLE AND NONEXISTENT DOCUMENTS - CCTV footage recorded after alleged assault of applicant - whether the agency has taken all reasonable steps to locate the documents but the documents cannot be located or do not exist - section 67(1) of the *Information Privacy Act 2009* (Qld) and sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld)

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 an audio recording and closed circuit television (**CCTV**) footage relating to an incident that occurred in the foyer of the Cairns Police Station (**Station**) on 19 June 2014 (**Incident**). The applicant alleged that, during the Incident, he was assaulted when a package of nappies was thrown in his direction by an individual known to him.
2. The applicant had made a previous IP Act application to QPS for access to certain CCTV footage of the Incident and been granted access to that footage.¹ The

¹ With the identifying features (faces) of individuals other than the applicant and QPS officers pixelated.

application the subject of this review sought access to additional CCTV footage of the Incident from CCTV cameras inside the Station and outside the Station. He also sought an audiotape of a specified conversation.

3. In response to the application, QPS² located an audio recording and some additional CCTV footage taken by CCTV cameras inside the Station (**Inside CCTV Footage**), and decided³ to:
 - release parts of the audio recording, and refuse access to the remainder of it on the ground that disclosure of this information would, on balance, be contrary to the public interest
 - partially release the Inside CCTV Footage, subject to the pixelation of some information on the ground that disclosure of this information would, on balance, be contrary to the public interest; and
 - refuse access to CCTV footage taken by CCTV cameras outside the Station (**Outside CCTV Footage**) on the grounds that it is nonexistent or unlocatable.
4. On internal review, QPS affirmed its decision.
5. 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 deletion of the identifying information of individuals other than himself in the audio recording
 - did not take issue with the deletions made in the Inside CCTV Footage provided to him⁴; and
 - submitted that the Outside CCTV Footage should exist and QPS had failed to locate it.
6. On external review, I find that:
 - access to the identifying information of individuals in the audio recording remaining in issue⁵ can be refused on the ground that disclosure would, on balance, be contrary to the public interest; and
 - access to the Outside CCTV Footage can be refused on the basis that it is nonexistent.

Background

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

Reviewable decision

8. The decision under review is QPS's internal review decision dated 28 July 2015.

² Through the Public Safety Business Agency (**PSBA**), which provided corporate and business services on behalf of QPS through the processing of the access application and external review.

³ In its initial decision dated 29 June 2015.

⁴ Accordingly, access to the information deleted from the Inside CCTV Footage is not considered further in this decision.

⁵ As set out at paragraphs 11 and 12.

Evidence considered

9. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).
10. The applicant provided submissions⁶ 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

11. On external review, QPS released to the applicant the names of QPS officers contained in the audio recording.⁷ 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.⁸
12. Accordingly, the issues remaining for my determination in this review are whether:
 - disclosure of identifying information regarding individuals other than the applicant and QPS Officers (**Identifying Information**) in the audio recording would, on balance, be contrary to the public interest; and
 - the Outside CCTV Footage is nonexistent or unlocatable.
13. I will deal with each of these matters in turn.

Identifying Information

Relevant law

14. 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. However, this right is subject to limitations, including grounds for refusal of access.⁹ An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.
15. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest¹⁰ and explains the steps that a decision-maker must take¹¹ in deciding the public interest. To determine the balance of the public interest a decision-maker must:

⁶ By telephone discussion with an officer of OIC on 6 October 2015 and by email to OIC on 26 November 2015, 13 January 2016, 18 January 2016 and 4 May 2016.

⁷ Under PSBA's cover letter dated 6 October 2015.

⁸ Sections 47(3)(b) and 49 of the *Right to Information Act 2009 (Qld) (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.

⁹ Section 67(1) of the IP Act provides that an agency may refuse access to a document in the same way and to the same extent it could refuse access to the document under section 47 of the RTI Act were the document to be the subject of an access application under the RTI Act.

¹⁰ 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.

¹¹ See section 49(3) of the RTI Act.

- 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

16. No irrelevant factors arise in the circumstances of this case. I will now consider the factors favouring disclosure and nondisclosure of the Identifying Information.

Personal information of individuals other than the applicant

17. Personal information is defined¹² 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*”.
18. The Identifying Information in the audio recording is comprised of the names of individuals, other than the applicant and QPS officers, and other descriptive information about those individuals from which their identity can reasonably be ascertained. Thus the Identifying Information is the personal information of those individuals. In accordance with the RTI Act, disclosure could therefore reasonably be expected to cause a public interest harm.¹³
19. 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.¹⁴ In this case, disclosure of the Identifying Information would intrude upon the ‘personal sphere’ of the named individuals and thus prejudice their right to privacy. As such, I consider that disclosure of the Identifying Information could reasonably be expected to prejudice the right to privacy of those individuals.
20. Given the nature of the information in the audio recording, disclosure of the Identifying Information would reveal the marital acrimony, family discord and legal matters of the individuals in question. In these circumstances, I consider the Identifying Information is at the higher end of the spectrum of personal information and the harm caused by disclosure and the impact on privacy is high. I consider that the weight to be given to these public interest factors in favour of nondisclosure is significant.
21. I have taken into account the fact that the Identifying Information will be generally known to the applicant and accept that this reduces the weight of the factors favouring nondisclosure to some degree. However, I consider that the public interest in the protection of the personal information and privacy of others remains of significant weight in relation to this information.

Personal information of the applicant

22. I acknowledge the importance of providing individuals with access to their personal information held by public authorities.¹⁵ However, I note that QPS has granted access to the part of the recording which contains the applicant’s personal information and the

¹² In section 12 of the IP Act.

¹³ Schedule 4, part 4, item 6 of the RTI Act.

¹⁴ *Marshall and Department of Police* (Unreported, Queensland Information Commissioner, 25 February 2011) at [27], 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.

¹⁵ Schedule 4, part 2, item 7 of the RTI Act.

names of QPS officers. The Identifying Information contains only the personal information of other individuals. Therefore, I consider that the public interest in the applicant having access to his personal information has been discharged and this public interest factor in favour of disclosure does not apply in this case.

Accountability and transparency

23. 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;¹⁶ and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.¹⁷
24. Except for the Identifying Information, QPS has released the entirety of the audio recording to the applicant. In these circumstances, I consider the partly disclosed audio recording provides a contemporaneous record of some of the enquiries made by QPS regarding the Incident, and the public interest in accountability has been significantly discharged by the information released. Disclosure of the Identifying Information would have very little additional effect. Accordingly, I afford these factors low weight in favour of disclosure.

Administration of justice

25. In his submissions to OIC, in addition to alleging that he was assaulted, 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. Given these submissions, it is necessary that I consider whether disclosure of the Identifying Information could reasonably be expected to contribute to the administration of justice for a person¹⁸ – namely, the applicant.
26. In *Willsford and Brisbane City Council*,¹⁹ 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.
27. As noted above, in the present circumstances, QPS has released the audio recording relating to the Incident in which the applicant alleges he was assaulted to the applicant, except for the Identifying Information of individuals identified in the recording, 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.
28. Taking these considerations into account, I am satisfied that disclosure of the Identifying Information would not assist the applicant to pursue any remedy, or assess

¹⁶ Schedule 4, part 2, item 1 of the RTI Act.

¹⁷ Schedule 4, part 2, item 11 of the RTI Act.

¹⁸ Schedule 4, part 2, item 17 of the RTI Act.

¹⁹ Unreported, Queensland Information Commissioner, 27 August 1996 (*Willsford*) at [17].

whether doing so is possible or worthwhile. 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 this public interest factor in favour of disclosure of the Identifying Information does not apply in this case.

Balancing the relevant factors

29. I consider that releasing an unedited version of the audio recording would involve disclosure of the personal information of individuals other than the applicant and QPS officers, giving rise to a 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 Information are deserving of significant weight.
30. In contrast, I consider that the factors favouring disclosure of the Identifying Information related to accountability and transparency have been significantly discharged by the information that QPS has released to the applicant, and therefore carry low weight.
31. In conclusion, I consider that the release of the Identifying Information of individuals other than the applicant and QPS officers in an unedited version of the audio recording 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 Information, as disclosure of the audio recording in an unedited form would, on balance, be contrary to the public interest.

Outside CCTV Footage

32. The applicant submits:²⁰

...“searches undertaken failed to locate any CCTV footage for the incident date” is a gross misrepresentation of the truth. And to say “After 180 days the system automatically deletes the recordings” in this instance I submit that CCTV footage for the incident date was not automatically deleted...

Relevant law

33. 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
34. 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

²⁰ In his external review application dated 29 July 2015.

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 1992* (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.

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 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

35. The scope of the applicant's access application is set out at paragraph one 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
36. During the processing of the applicant's access application, QPS performed searches for documents responsive to the access application in the following locations:
- Police Notebooks
 - Electronic Logs
 - QPRIME;²⁵ and
 - Tapes.
37. As a result of these searches, QPS located the audio recording and the Inside CCTV Footage.
38. In the course of the external review QPS provided the following:
- information from the QPS officer with conduct of the investigation that there were no further documents and no notes in her notebook or in the electronic log
 - signed search certifications which identify the searches performed and state that all documents responsive to the applicant's application in QPS's possession have been located; and
 - policies²⁶ regarding retention periods for CCTV footage recorded by QPS.
39. I note:
- the QPS Retention and Disposal Schedule requires that CCTV tapes be retained for 6 months and are then destroyed
 - the QPS Building Design Manual requires that the relevant CCTV footage be retained for 28 days, after which time the footage is recorded over by new footage
 - the information of a QPS officer, provided in his search certification, that the CCTV footage **outside** the Station was "*only retained for 3 months before (being) deleted*"; and
 - the *Public Records Act 2002* (Qld) imposes obligations on agencies such as QPS in relation to the retention and disposal of documents. QPS records are subject to various retention periods, dependent on the type of record, with the exception of the records being required for use in court proceedings which have been commenced but not yet finalised.

²⁴ As defined in section 12 of the IP Act.

²⁵ QPRIME stands for Queensland Police Records and Information Management Exchange and is the database used to capture and maintain records for all police incidents in Queensland.

²⁶ Namely, QPS Retention and Disposal Schedule and QPS Building Design Manual.

40. It would appear there is some inconsistency in QPS's policy documents concerning the timeframe for which CCTV footage is to be retained. However, I am satisfied on the evidence before me that QPS's practice at the Cairns Station is not to retain CCTV footage, except for footage which is required for use in court proceedings which have been commenced but not yet finalised.
41. In the course of the review the applicant expressed concern²⁷ that the Outside CCTV Footage was deleted by QPS, as he considers it may serve as evidence to be relied upon in court proceedings he may commence in relation to the Incident.
42. In this regard, I note that on 2 July 2014, approximately two weeks after the Incident, QPS's investigation was finalised and report number QP1400878311²⁸ states:

On the 23rd June 2014 the victim (sic) has completed an Affidavit in relation to the incident...CCTV footage from the front counter has been requested...Prosecutions have reviewed the facts in relation to this matter and concur with the outcome that no offence has occurred and there is insufficient evidence to proceed with any complaint. This matter is therefore finalised.

43. Based on this information, I am satisfied that within the two weeks following the Incident, QPS determined that:
- the Outside CCTV Footage was not required to be retained for investigation purposes; and
 - there was insufficient evidence to proceed with any criminal prosecution and therefore any footage recorded at the time of the Incident (including the Outside CCTV Footage) was not required to be retained for use in court proceedings.
44. Accordingly, I am satisfied that the Outside CCTV Footage was deleted by QPS in accordance with its usual practices.
45. Having reviewed all of the material before me, and in view of the nature of the searches undertaken in processing the access application, I find that:
- QPS has taken all reasonable steps to locate the Outside CCTV Footage
 - there is a reasonable basis to be satisfied that the Outside CCTV Footage does not exist as it has been deleted in accordance with QPS's usual practice;²⁹ and
 - access to the Outside CCTV Footage may therefore be refused under sections 47(3)(e) and 52(1)(a) of the RTI Act.

DECISION

46. For the reasons set out above, I vary QPS's decision and find that:
- access to the Identifying Information in the audio recording can be refused on the ground that disclosure of it would, on balance, be contrary to the public interest;³⁰ and
 - access to the Outside CCTV Footage can be refused on the ground that it is nonexistent.³¹

²⁷ From his telephone discussion with an OIC officer on 6 October 2015.

²⁸ Comprising 2 full pages and 5 part pages released to the applicant by PSBA in accordance with their decision dated 10 November 2014 in response to the applicant's access application dated 8 October 2014.

²⁹ Sections 47(3)(e) and 52 of the RTI Act.

³⁰ Section 67(1) of the IP Act and sections 47(3)(b) and 49 of the RTI Act.

³¹ Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

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: 13 May 2016

APPENDIX

Significant procedural steps

Date	Event
25 May 2015	QPS received the applicant's valid access application.
30 June 2015	QPS issued its decision to the applicant.
30 June 2015	QPS received the applicant's application for internal review.
28 July 2015	QPS issued its internal review decision to the applicant.
29 July 2015	OIC received the application for external review of QPS's decision.
29 July 2015	OIC notified QPS that the external review application had been received and requested it provide relevant procedural documents by 6 August 2015.
5 August 2015	OIC received the requested procedural documents from QPS.
14 August 2015	OIC notified the applicant and QPS that it had accepted the external review application. OIC requested QPS provide a copy of the relevant documents by 28 August 2015.
1 September 2015	OIC received the requested information from QPS.
4 September 2015	OIC requested that QPS provide a copy of documents not in issue on external review by 18 September 2015 to complete its preliminary assessment. OIC also conveyed its preliminary view to QPS regarding disclosure of QPS officers' names contained in the audio recording in issue and requested QPS advise by 18 September 2015 whether it was agreeable to releasing the audio of the QPS officers names to the applicant.
18 September 2015	QPS advised it accepted OIC's preliminary view regarding disclosure of QPS officers names contained in the audio recording in issue and was agreeable to releasing the audio of the QPS officers' names to the applicant.
1 October 2015	OIC received the requested documents not in issue from QPS.
1 October 2015	OIC requested that QPS provide further documents not in issue on external review by 20 October 2015.
6 October 2015	QPS provided a further copy of the audio recording, including the additional audio of the QPS officers' names, to the applicant.
6 October 2015	The applicant provided submissions supporting his case.
19 October 2015	OIC received the further requested information from QPS.
6 October 2015	The applicant confirmed that he had received the further copy of the audio recording, including the additional audio of the QPS officers' names.
26 November 2015	The applicant provided submissions supporting his case.
13 January 2016	The applicant provided submissions supporting his case.
18 January 2016	The applicant provided submissions supporting his case.
4 May 2016	OIC conveyed its preliminary view to the applicant and invited him to provide submissions supporting his case by 18 May 2016 if he did not accept the preliminary view.
4 May 2016	The applicant provided submissions supporting his case.