



Decision and Reasons for Decision

Citation:	<i>O26 and Queensland Police Service [2019] QICmr 61 (18 December 2019)</i>
Application Number:	314648
Applicant:	O26
Respondent:	Queensland Police Service
Decision Date:	18 December 2019
Catchwords:	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - UNLOCATABLE OR NONEXISTENT DOCUMENTS - applicant contends that CCTV footage and audio recordings should exist - whether agency has taken all reasonable steps to locate the relevant recordings - whether access may be refused on the basis the documents do not exist - section 67(1) of the <i>Information Privacy Act 2009 (Qld)</i> and 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 *Information Privacy Act 2009 (Qld)* (**IP Act**), to access CCTV footage, audio recordings and other information about his attendance at a police station (**Station**) on 15 October 2018.
2. QPS refused access² to the requested information on the basis it had been disposed of in accordance with the Queensland Police Service Retention and Disposal Policy (**Policy**).
3. The applicant applied³ to the Office of the Information Commissioner (**OIC**) for external review. During the review, QPS conducted further searches and enquiries, which located some of the requested information.⁴ However, these further searches and enquiries did not locate the requested CCTV footage and audio recordings (**Missing Documents**). The applicant continues to seek access to the Missing Documents.
4. For the reasons set out below, I affirm QPS's decision and refuse access to any further information on the basis it does not exist or cannot be located.

¹ Access application dated 17 April 2019.

² QPS decision dated 22 May 2019.

³ External review application dated 4 June 2019.

⁴ Being the names of QPS officers who would have interacted with the applicant on 15 October 2018.

Background

5. Significant procedural steps relating to the external review are set out in the Appendix. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and the Appendix).
6. The decision under review is QPS's decision dated 22 May 2019.

Issue for determination

7. The issue for determination is whether access to the Missing Documents may be refused on the basis they are nonexistent or unlocatable.
8. The applicant provided a number of submissions to OIC.⁵ I have carefully reviewed those submissions and taken into account the parts of those submissions which are relevant to the issues for determination. The applicant also asked the Information Commissioner to investigate *why* the Missing Documents no longer exist or cannot be located by QPS⁶ and raised concerns which fall outside the scope of this review (for example, relating to other external reviews involving the applicant).⁷ Although the functions of the Information Commissioner on external review include investigating and reviewing whether an agency has taken reasonable steps to identify and locate documents,⁸ the Information Commissioner has no jurisdiction to undertake the type of investigations requested by the applicant.⁹ I have therefore addressed the applicant's submissions to the extent they are relevant to the issue under consideration, which is whether access may be refused to the Missing Documents on the basis that they do not exist or cannot be located.

Relevant law

9. The IP Act provides individuals with a right to be given access to documents of a Queensland government agency, to the extent they contain the individual's personal information.¹⁰ This right is, however, subject to some limitations, including the grounds on which access to information may be refused.¹¹ One such ground of refusal is where the document is nonexistent or unlocatable.¹²
10. A document is *nonexistent* if there are reasonable grounds to be satisfied the document does not exist.¹³ To be satisfied of this, an agency must rely on their particular knowledge and experience and have regard to key factors, including:
 - the administrative arrangements of government
 - the agency's structure
 - the agency's functions and responsibilities
 - the agency's practices and procedures; and

⁵ As set out in the Appendix.

⁶ Submissions dated 24 October 2019.

⁷ Applicant's submissions of 15 October 2019 suggest that QPS did not comply with its legal obligations in relation to information retention and migration between servers. This is not an issue that can be investigated within the Information Commissioner's external review jurisdiction as explained to the applicant in OIC's letter to him dated 14 October 2019.

⁸ Section 137(2) of the IP Act.

⁹ The applicant was advised of this on 14 and 24 October 2019.

¹⁰ Section 40 of the IP Act.

¹¹ The grounds are set out in section 47 of the *Right to Information Act 2009* (Qld) (**RTI Act**). Section 67(1) of the IP Act provides that access may be refused to information in the same way and to the same extent as information may be refused under the RTI Act.

¹² Sections 47(3)(e) and 52(1) of the RTI Act.

¹³ Section 52(1)(a) of the RTI Act.

- other factors reasonably inferred from information supplied by the applicant, including the nature and age of the requested documents, and the nature of the government activity to which the request relates.¹⁴
11. If searches are relied on to justify a finding that documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case, depending on which of the key factors are most relevant in the particular circumstances.
 12. 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.¹⁵ Determining whether a document exists, but is unlocatable, 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 be had to the circumstances of the case and the relevant key factors.¹⁶

Findings

13. The applicant contends that the Missing Documents exist because they were required to be preserved under the *Public Records Act 2002* (Qld) and the Policy. More specifically, the applicant submits that:
 - *'the charge relating to that CCTV footage has yet to go before the court and as there is a statement that relates DIRECTLY TO THAT FOOTAGE, again it is required to exist'*¹⁷
 - a request for the Missing Documents was made by the applicant's representative within the retention period set out in the Policy¹⁸
 - a statement provided by a particular police officer references a notation of the applicant's actions in a custody report;¹⁹ and
 - although CCTV footage may only be stored at the Station for a short period of time *'it is then required BY LAW to be migrated top [sic] another server where it is to be retained for the remainder of the 6 months'*.²⁰
14. On external review, QPS relied on searches conducted by its officers to justify its position that reasonable steps have been taken to locate documents responsive to the application and provided information about its recordkeeping system and searches. QPS submitted²¹ that the record keeping systems at the Station were searched by its officers and enquiries were made of the Officer in Charge at the Station about the Missing Documents. In respect of the requested CCTV footage, QPS has explained that the

¹⁴ See *Lester and Department of Justice and Attorney-General* [2017] QICmr 17 (16 May 2017) at [11] and *Van Veendendaal and Queensland Police Service* [2017] QICmr 36 (28 August 2017) at [23], which adopt the Information Commissioner's comments in *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld). Section 52 of the RTI Act is drafted in substantially the same terms as the provision considered in *PDE* and, therefore, the Information Commissioner's findings in *PDE* are relevant.

¹⁵ Section 52(1)(b) of the RTI Act.

¹⁶ *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [21]. See also, *F60XCX and Office of the Queensland Parliamentary Counsel* [2016] QICmr 42 (13 October 2016) at [84] and [87], and *Underwood and Minister for Housing and Public Works* [2015] QICmr 27 (29 September 2015) at [33]-[34] and [49].

¹⁷ Submissions dated 14 October 2019.

¹⁸ On 9 July 2019, the applicant provided a copy of an email dated 13 February 2019, from the applicant's legal representative to *'Prosecutions.Brisbane@police.qld.gov.au'*, requesting information which included the Missing Documents.

¹⁹ Submissions dated 9 and 10 July 2019. In submissions dated 9 July 2019, the applicant described the statement as being *'dated in December'* and relating to the applicant's actions on the relevant date. The applicant did not provide a copy of any officer statement or custody report notation to OIC during the review.

²⁰ Submissions dated 15 October 2019.

²¹ Submissions dated 25 July 2019 and 25 September 2019.

Station has the capacity to retain CCTV footage for a period of 50 days and when the request from the applicant's lawyer was made for that footage, the requested CCTV footage had already been deleted or taped over.

15. Given the nature of the Missing Documents and the steps taken by QPS to identify them, I consider that QPS officers have conducted comprehensive searches of locations where it would be reasonable to expect the Missing Documents to be stored. Having reviewed the search records provided by QPS, I am also satisfied that enquiries have been made of staff with working knowledge of the Station's record keeping systems.
16. I understand the applicant is disappointed that the CCTV footage was not retained, despite a request having been made to Police Prosecutions within what he understood to be the applicable document retention periods. However, there is no evidence before me to suggest that any further searches or steps can be taken by QPS to locate the Missing Documents.
17. Although the statement and custody report notation referred to by the applicant (which are not before me) may relate to the applicant's actions on the relevant date, I do not consider that this reasonably leads to a conclusion that the requested CCTV footage still exists. I also acknowledge the applicant's contention that the CCTV footage should have been retained, given ongoing legal proceedings. However, this submission does not impact upon my finding that the Missing Documents are, on the evidence before me, nonexistent or unlocatable.
18. In view of the above, I am satisfied that:
 - QPS has taken reasonable steps to locate documents relevant to the access application; and
 - access to the Missing Documents may be refused on the basis they do not exist, or cannot be located.²²

DECISION

19. I affirm QPS's decision to refuse access to the Missing Documents on the basis that they no longer exist or cannot be located.
20. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

S Martin
Assistant Information Commissioner

Date: 18 December 2019

²² Under 67(1) of the IP Act and section 47(3)(e) of the RTI Act.

APPENDIX

Significant procedural steps

Date	Event
4 June 2019	OIC received the application for external review.
26 June 2019	OIC received submissions from the applicant.
8 July 2019	OIC notified the applicant and QPS that the application for external review had been accepted and requested further information from the applicant and QPS.
9 July 2019	OIC received further submissions from the applicant.
25 July 2019	OIC received the requested information from QPS.
16 August 2019	OIC requested further information from QPS.
29 August 2019	OIC requested further information from QPS.
25 September 2019	OIC received the requested information from QPS.
14 October 2019	OIC conveyed a preliminary view to the applicant.
14 and 15 October 2019	OIC received the applicant's further submissions.
24 October 2019	OIC confirmed the preliminary view to the applicant and received further submissions from the applicant.