



Decision and Reasons for Decision

Citation:	<i>Van Kuijck and Queensland Police Service</i> [2014] QICmr 35 (19 August 2014)
Application Number:	311963
Applicant:	Van Kuijck
Respondent:	Queensland Police Service
Decision Date:	19 August 2014
Catchwords:	ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – witness statements and police reports - personal information - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b), 49 and schedule 4 of the <i>Right to Information Act 2009</i> (Qld) ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – NONEXISTENT OR UNLOCATABLE DOCUMENTS – digital audio recordings - applicant contends further documents exist - whether all reasonable steps have been taken to locate documents but the documents cannot be found or do not exist – sections 47(3)(e) and 52 of the <i>Right to Information Act 2009</i> (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied to the Queensland Police Service (**QPS**), under the *Right to Information Act 2009* (Qld) (**RTI Act**), for access to Activity Logs for specific stations and various police reports, intelligence reports and digital audio recordings in relation to incidents involving her.
2. QPS decided to refuse access to 49 documents in full and 183 documents in part on the basis that disclosure of those documents would, on balance, be contrary to the public interest and that some of the documents included exempt information. This decision was affirmed on internal review.
3. The applicant sought external review of the QPS decision to refuse access to some specific documents and questioned the adequacy of the steps taken by QPS to locate the audio recordings identified in the access application.

4. For the reasons set out below, the QPS decision is affirmed in relation to the documents to which access has been refused and access to any additional documents can be refused on the basis that they do not exist or are unlocatable.

Background

5. Significant procedural steps are set out in the Appendix.

Reviewable decision

6. The decision under review is the QPS internal review decision dated 29 January 2014.

Evidence considered

7. The evidence, submissions, legislation and other material considered in reaching this decision is disclosed in these reasons (including footnotes and Appendix).

Issues for consideration

8. The issues for determination¹ are whether QPS is entitled to:
 - refuse part access to two pages of police reports² and full access to 10 pages of witness statements³ on the basis that disclosure of this information would, on balance, be contrary to the public interest; and
 - refuse access to eight audio recordings identified in the access application on the basis that they are nonexistent or unlocatable.⁴

Is QPS entitled to refuse access to information on the basis that disclosure would, on balance, be contrary to the public interest?

9. Yes, for the reasons that follow.
10. The information considered by QPS to be contrary to the public interest comprises (**Refused Information**):
 - parts of police reports recording information about, or provided by, individuals other than the applicant; and
 - witness statements.

Relevant law

11. Under the RTI Act, a person has a right to be given access to documents of an agency subject to certain limitations, including grounds for refusal of access. An agency may refuse access to information where its disclosure would, on balance, be contrary to the public interest.⁵

¹ As confirmed in the applicant's submissions to OIC dated 7 July 2014 and OIC's email to the applicant dated 23 July 2014 where OIC confirmed that pages 299 to 322 would not be considered on external review.

² Pages 83 and 117.

³ Pages 90-93 and 189-194.

⁴ Recordings dated 21/4/2010, 21/4/2010, 22/4/2010, 16/5/2010, 01/08/2010, 13/08/2010 and 23/08/2010. On external review the applicant sought to change the request for an audio recording dated 16/5/2010 to one dated 15/5/2010. However, as this was not sought in the access application made to QPS, OIC has not considered this on external review.

⁵ Section 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.

12. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest⁶ and explains the steps that a decision-maker must take⁷ in deciding the public interest as follows:
- 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 in issue would, on balance, be contrary to the public interest.

Findings

Irrelevant factors

13. No irrelevant factors arise in the circumstances of this case and I have not taken any into account.

Factors favouring disclosure

Applicant's personal information

14. If disclosing information could reasonably be expected to disclose the personal information of the individual applying for that information, a public interest factor favouring disclosure arises.⁸
15. I am satisfied that the Refused Information comprises the applicant's personal information as it identifies the applicant and discusses incidents involving the applicant.
16. Given the Refused Information is about incidents involving the applicant that were brought to the attention of QPS officers and includes witness statements about the applicant, this factor warrants significant weight. However, the way in which the information is presented means that it is not possible to separate the applicant's personal information from the personal information of others within the documents. In other words, the Refused Information cannot be disclosed to the applicant without disclosing personal information of other individuals. Therefore, the relevant privacy interests of other people (which I explain below in the discussion about factors favouring nondisclosure) must be balanced against the public interest in disclosing to the applicant her own personal information.

Incorrect, misleading or unfairly subjective information

17. The RTI Act gives rise to a factor in favour of disclosure where the information could reasonably be expected to reveal that the information was incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.⁹
18. This factor operates in relation to the specific information to which an applicant seeks access. In this case, that information comprises information provided to QPS by third

⁶ 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.

⁷ Section 49(3) of the RTI Act.

⁸ Schedule 4, part 2, item 7 of the RTI Act. Section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**) defines 'personal information' as *information or an opinion, including information or an opinion forming part of a database, 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.*

⁹ Schedule 4, part 2, item 12 of the RTI Act.

parties and recorded in police reports and formal witness statements.

19. The applicant submits that disclosure of the Refused Information would reveal that QPS received misleading or inaccurate information from third parties in relation to a particular incident.¹⁰ However, other than the applicant's contentions, there is no evidence before me to demonstrate that the Relevant Information is inaccurate or misleading.
20. In the decision of *Marshall and Department of Police*¹¹ the Right to Information Commissioner considered this public interest factor in the context of witness statements and made the following observation:¹²

information of this kind is by its very nature an individual's particular version of events, and will obviously be shaped by factors such as the individual's memory of relevant events and subjective impressions. This inherent subjectivity does not, however, mean that the resulting account or statement is necessarily incorrect or 'false and misleading'. It simply comprises a personal interpretation of relevant events, which an investigator must then balance against other (often competing) statements and other evidence in reaching a conclusion in a particular case.

While there may be circumstances in which disclosure of information of this kind may advance this particular public interest – such as, for example, where there is a clear discrepancy between evidence given orally and subsequently recorded, or some other objective material suggesting that an individual's account has been incorrectly or inaccurately recorded, or is itself a manifest fabrication – there is nothing in the material before me to suggest this is such a case.

In my view, all disclosure of this specific information would potentially reveal is that there exists a view of events differing from that the applicant holds. In the circumstances, I do not consider that disclosure of this information could reasonably be expected to reveal it is incorrect, out of date, misleading, gratuitous, unfairly subjective or irrelevant.

21. Having carefully reviewed the Refused Information and in applying the observations made by the Right to Information Commissioner in *Marshall and Department of Police*, I consider that while the applicant may disagree with the version of events provided to QPS by third parties, I do not consider that the QPS record of this information is incorrect or misleading. Accordingly, I consider that this public interest factor does not apply.

Pursuit of legal remedy

22. The RTI Act gives rise to a public interest factor favouring disclosure where disclosing the information in issue would enable pursuit or evaluation of an appropriate legal remedy.¹³
23. The applicant submits that disclosure of the Refused Information would enable her to pursue a legal remedy and reference is made to the previous decision of the Information Commissioner in *Willsford and Brisbane City Council (Willsford)*.¹⁴ The applicant does not, however, provide details of the specific legal remedy that would be assisted by disclosure of the Refused Information nor does she detail how disclosure would assist in an evaluation or pursuit of a legal remedy.

¹⁰ Applicant submissions dated 7 July 2014.

¹¹ (Unreported, Queensland Information Commissioner, 25 February 2011).

¹² *Marshall and Department of Police* (unreported, Queensland Information Commissioner, 25 February 2011) at [18 – 20].

¹³ Schedule 4 part 2 item 17 of the RTI Act.

¹⁴ (1996) 3 QAR 368.

24. In *Willsford*, the Information Commissioner recognised that in an appropriate case there may be a public interest in a person who has suffered, or may have suffered, an actionable wrong, being permitted to obtain access to information which would assist the person to pursue any remedy which the law affords in those circumstances.
25. However, the mere assertion by an applicant that information is required to enable pursuit of a legal remedy is not sufficient to establish this pro-disclosure consideration.¹⁵ An applicant must, at the least, demonstrate that they have suffered some kind of wrong in respect of which a remedy is, or may be, available under the law, and that they have a reasonable basis for seeking to pursue any such remedy. The applicant must also then be able to demonstrate how disclosure of the information in issue itself would enable the pursuit of that remedy.
26. Apart from providing information about a dispute between the applicant and the third parties and the assertion that disclosure of the Refused Information would enable the pursuit of a legal remedy, the applicant does not provide any information to satisfy me that this public interest factor arises. Therefore I consider that this public interest factor does not apply.

Possible deficiencies, misconduct or negligent, improper or unlawful conduct

27. The RTI Act gives rise to factors favouring disclosure where disclosing information could reasonably be expected to:
 - allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;¹⁶ and
 - reveal or substantiate that an agency or official has engaged in misconduct or negligent, improper or unlawful conduct.¹⁷
28. The applicant submits that QPS failed to properly deal with the specific complaints she raised with them and that disclosure of the Refused Information would assist in revealing that QPS officers had engaged in misconduct, negligent, improper and unlawful conduct in ongoing investigations.¹⁸
29. Having carefully assessed the Refused Information, which I have previously described as witness statements and information provided by third parties that has been recorded in police reports, I am unable to identify how disclosure of this information could further the public interest factors set out above. I also note that it is not my role to determine whether there has been any maladministration or wrongdoing on the part of QPS in investigating the matters involving the applicant.
30. I am not satisfied that disclosure of the Refused Information could reasonably be expected to further the two public interest factors set out above and accordingly, I consider that they do not apply.

QPS accountability and transparency

31. The RTI Act gives rise to factors favouring disclosure in circumstances where disclosing the information in issue could reasonably be expected to:

¹⁵ *Willsford*, at [17].

¹⁶ Schedule 4, part 2, item 5 of the RTI Act.

¹⁷ Schedule 4, part 2, item 6 of the RTI Act.

¹⁸ Applicant submissions dated 7 July 2014.

- promote open discussion of public affairs and enhance the Government's accountability¹⁹
 - contribute to positive and informed debate on important issues or matters of serious interest;²⁰ and
 - reveal the reason for a government decision and any background or contextual information that informed the decision.²¹
32. Having carefully assessed the Refused Information, I accept that this information appears in the context of QPS investigation records and discloses the information that was available to QPS while it investigated and responded to concerns raised by the applicant and third parties. For this reason, I consider that some weight can be attributed to the above factors favouring disclosure that go towards enhancing QPS accountability.
33. However, while I am restricted from describing the precise content²² of the Refused Information, I also note that the Refused Information is limited to information provided by third parties to QPS officers. Where details of the QPS investigations can be disclosed without identifying third parties this has occurred.
34. As the Refused Information is limited to information provided by third parties and because the applicant has been provided with the remaining information about the relevant QPS investigations, I have reduced the weight to be attributed this factor and attribute it moderate weight.

Factors favouring nondisclosure

Personal information and privacy

35. The RTI Act recognised two factors favouring nondisclosure of information where:
- disclosure of the information could reasonably be expected to prejudice the protection of an individual's right to privacy;²³ and
 - disclosure of the information could reasonably be expected to cause a public interest harm if disclosure would disclose personal information of a person.²⁴
36. As noted previously, the Refused Information comprises information provided by third parties to QPS. I am satisfied that the Refused Information comprises the personal information of someone *other* than the applicant. Accordingly, disclosure of this information could reasonably be expected to cause a public interest harm.
37. The concept of 'privacy' is not defined in either the IP Act or the RTI Act. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere free from interference from others.²⁵ I consider the provision of information to law enforcement authorities such as the QPS to be a private action falling within an individual's 'personal sphere'.

¹⁹ Schedule 4, part 2, item 1 of the RTI Act.

²⁰ Schedule 4, part 2, item 2 of the RTI Act.

²¹ Schedule 4, part 2, item 11 of the RTI Act.

²² Section 108(3) of the RTI Act provides that the Information Commissioner must not, in a decision or in reasons for a decision on external review, include information that is claimed to be exempt information or contrary to the public interest information.

²³ Schedule 4 part 3 item 3 of the RTI Act.

²⁴ Schedule 4 part 4 item 6 of the RTI Act.

²⁵ 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.

38. I also consider that the substance of the information provided to police to assist in investigations, such as a witness statement – consisting as it almost invariably will of an individual's impressions, opinions and even emotional responses to relevant events – comprises information of a private nature.
39. I recognise that in appropriate cases information supplied to QPS will need to be further disseminated or published (so as, for example, to enable further investigation, or for prosecutorial purposes, often in open court) which may reduce the privacy interest attaching to relevant information. This is not such a case. I am satisfied that disclosure of Refused Information could reasonably be expected to prejudice an individual's right to privacy. Members of the community assisting police with inquiries have a legitimate expectation that in doing so, their privacy will be maintained and respected as far as is possible. Accordingly, I have afforded these two factors in favour of nondisclosure significant weight.
40. The applicant submits that the application of these public interest factors in favour of nondisclosure can be avoided by disclosure of a deidentified version of the Refused Information.²⁶ In some cases removing the name and other details from a document may mean that the identity of the relevant third party is not apparent. However, here, I consider that the identity of the relevant third parties can *reasonably be ascertained* from disclosure of any of the content of the Refused Information given the circumstances of this case.²⁷ Accordingly, I do not consider the significant weight I have attributed to the personal information and privacy public interest factors can be reduced.

Prejudice flow of information to police

41. The RTI Act recognises a factor in favour of nondisclosure where disclosure of the information could reasonably be expected to prejudice the flow of information to the police or another law enforcement or regulatory agency.²⁸
42. I consider that disclosure of the Refused Information could reasonably be expected to have a detrimental impact²⁹ on the flow of information from the community to police in the future. I acknowledge police possess certain coercive powers when investigating complaints. Nevertheless, efficient and effective use of policing resources is facilitated by police being able to seek and obtain information from various members of the community – complainants, bystanders, informers and even the subjects of complaint – consensually, that is with as much cooperation as possible. Routine disclosure of information provided by individuals assisting QPS investigations would in my view, discourage persons from providing information to police or cooperating with future inquiries.
43. In this case, I consider that disclosure of the Refused Information would have a detrimental impact on the flow of information to the QPS. Accordingly, I have attributed this factor in favour of nondisclosure significant weight.

²⁶ Applicant submissions dated 7 July 2014.

²⁷ In the past, the Information Commissioner has decided that a number of factors can be taken into account to consider whether information can be used to ascertain an individual's identity, such as the circumstances of the case.. See *Mahoney and Ipswich City Council* (Unreported, Queensland Information Commissioner, 17 June 2011).

²⁸ Schedule 4 part 3 item 13 of the RTI Act.

²⁹ Adopting the ordinary meaning of the term 'prejudice': see *Daw and Queensland Rail* (Unreported, Queensland Information Commissioner, 24 November 2010) at [17] for a succinct exposition of the meaning of 'prejudice' as used throughout the RTI Act.

Balancing the public interest

44. Having identified and examined the public interest factors for and against disclosure, I consider that the public interest in:

- safeguarding personal information;
- protecting an individual's right to privacy and thus avoiding public interest harm; and
- preserving the free flow of information between the community and QPS,

should each be afforded significant weight, and outweigh those factors favouring disclosure of the Refused Information.

45. Accordingly, I consider that QPS is entitled to refuse access to the Refused Information on the basis that disclosure would, on balance, be contrary to the public interest under section 47(3)(b) and 49 of the RTI Act.

Has QPS taken all reasonable steps to locate the audio recordings?

Relevant law

46. Access to a document may be refused if the document is nonexistent or unlocatable.³⁰ A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to locate the document but it cannot be found.³¹ A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist.³²

47. The RTI Act is silent on how an agency can be satisfied that a document does not exist. However in *PDE and The University of Queensland*,³³ the Information Commissioner explained that, to be satisfied that a document does not exist, an agency must rely on its particular knowledge and experience, having regard to various key factors including:

- 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.

48. When these factors are properly considered and a conclusion reached that the document does not exist, it may be unnecessary for searches to be conducted. Alternatively, an agency may rely on searches to justify a decision that the document

³⁰ Sections 47(3)(e) and 52 of the RTI Act.

³¹ Section 52(1)(b) of the RTI Act.

³² Section 52(1)(a) of the RTI Act.

³³ (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*). Although *PDE* concerned the application of section 28A of the now repealed *Freedom of Information Act 1992* (Qld), the requirements of that section are replicated in section 52 of the RTI Act.

sought does not exist. If an agency relies on searches, all reasonable steps must be taken to locate the requested document. In determining whether all reasonable steps have been taken, regard should be had to the factors listed in *PDE* as set out above.

Findings

49. The applicant contends that QPS should be required to conduct further searches for the specific audio recordings that were identified in the access application but not located by QPS when processing the application (**Unlocatable Audio**).³⁴ In support of the claim that QPS has not taken all reasonable steps to identify audio recordings, reference is made to examples of what the applicant considers to be QPS' inability to progress the RTI application competently and diligently.³⁵
50. While I acknowledge that there have been disruptions in the processing of the access application by QPS³⁶, these disruptions are not grounds for suggesting that the searches conduct by QPS were inadequate. Accordingly, the applicant's submissions do not support a conclusion that the searches conducted by QPS were inadequate.
51. The applicant also provides specific information about the context of the Unlocatable Audio including the date, approximate time and content of the conversations and the specific QPS officers and stations involved. The applicant's submissions provided useful and sufficient detail to assist QPS in locating the relevant audio recordings.³⁷
52. In its decision QPS explains that searches for the Unlocatable Audio were conducted of the records and databases of its South West District and the audio recordings that were located as a result of these searches were provided to the applicant.
53. On external review QPS has:
 - provided OIC with search records from the Dalby Burnett Patrol Office (**Patrol Office**) confirming that the Unlocatable Audio was not found despite searches of the audio tapes held by the Patrol Office;³⁸ and
 - conducted direct enquiries with the Senior Constable specifically identified by the applicant as being involved in all of the recordings. The Senior Constable has advised that all recordings made by him were placed on the Dalby file server, since searched by the Patrol Office, and that he does not personally hold any additional recordings.³⁹
54. Having carefully considered the applicant's submissions and the searches conducted by QPS, I am satisfied that the Unlocatable Audio are documents that would have been held by the Patrol Office. QPS has provided OIC with a signed certification from an officer in charge of that Patrol Office confirming that a thorough search for all documents relevant to the request has been conducted.⁴⁰ QPS has also confirmed with the individual officer identified by the applicant as having made the recordings, that he does not personally hold any additional recordings.

³⁴ In the external review application dated 12 March 2014 and submissions dated 7 July 2014, the applicant requests the Information Commissioner use her powers under sections 103 and 104 of the RTI Act to require QPS to conduct additional searches.

³⁵ External review application dated 12 March 2014 and applicant submissions dated 7 July 2014.

³⁶ As referred to in the applicant's external review application.

³⁷ Applicant submissions dated 7 July 2014.

³⁸ QPS submissions dated 6 May 2014.

³⁹ QPS submissions dated 15 August 2014.

⁴⁰ Search submission from QPS dated 25 February 2014.

55. In addition to the searches and enquiries already conducted by QPS, the applicant has not provided submissions about what additional specific searches QPS can reasonably conduct to identify the Unlocatable Audio. I also note that there is no evidence before me to indicate that the Unlocatable Audio may be located in places other than those already searched by QPS. Accordingly, I am unable to identify any reasonable basis upon which to base a request for further searches.
56. Therefore, with reference to the factors outlined in *PDE*, I consider that QPS has taken all reasonable steps to identify documents in response to the access application. Accordingly, I am satisfied that QPS is entitled to refuse access to the Unlocatable Audio on the basis that it is either nonexistent or unlocatable under sections 47(3)(e) and 52 of the RTI Act.

DECISION

57. For the reasons set out above, I affirm the decision under review and find that QPS is entitled to:
- refuse access to the Refused Information under section 47(3)(b) of the RTI Act on the basis that disclosure of it would, on balance, be contrary to the public interest under section 49 and schedule 4 of the RTI Act; and
 - refuse access to the Unlocatable Audio under section 47(3)(e) of the RTI Act on the basis that they are either nonexistent or unlocatable under section 52(1) of the RTI Act.
58. I have made this decision as a delegate of the Information Commissioner, under section 145 of the *Right to Information Act 2009* (Qld).

L Lynch
Assistant Information Commissioner

Date: 19 August 2014

APPENDIX

Significant procedural steps

Date	Event
22 October 2013	QPS received the access application under the RTI Act.
16 December 2013	QPS issued its decision on the access application.
16 January 2014	QPS received the applicant's application for internal review
29 January 2014	QPS issued its internal review decision.
12 March 2014	The applicant applied to OIC for external review of the QPS internal review decision.
13 March 2014	OIC notified QPS of the external review application and requested procedural documents in relation to the application.
20 March 2014	QPS provided OIC with the requested procedural documents.
24 March 2014	OIC notified the applicant and QPS that OIC had accepted the application for external review. OIC requested that QPS provide copies of documents to which full and partial access was refused.
15 April 2014	OIC received copies of the documents requested in the letter dated 24 March 2014.
29 April 2014	OIC emailed the applicant's solicitors to confirm the issues to be considered on external review.
30 April 2014	OIC wrote to QPS seeking information in support of its decision.
7 May 2014	The applicant's solicitors contacted OIC to confirm the issues in the review.
8 May 2014	OIC received additional submissions from QPS.
2 June 2014	OIC received additional search records from QPS.
26 June 2014	OIC provided the applicant with a preliminary view on the issues in this review and invited the applicant to provide submissions in response to the view.
7 July 2014	The applicant provided submissions in response to the preliminary view.
15 July 2014	OIC contacted the applicant's lawyers to explain that the external review decision would not be de-identified and to confirm the issues in the external review.
23 July 2014	OIC contacted the applicant's lawyers to clarify the issues to be considered on external review.
1 August 2014	OIC sought additional search submissions from QPS.
15 August 2014	QPS provided additional search submissions to OIC.