



## Decision and Reasons for Decision

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<b>Citation:</b>	<i>Lester and Department of Justice and Attorney-General</i> [2017] QICmr 17 (16 May 2017)
<b>Application Numbers:</b>	312958 and 312969
<b>Applicant:</b>	Lester
<b>Respondent:</b>	Department of Justice and Attorney-General
<b>Decision Date:</b>	16 May 2017
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - PERSONAL INFORMATION - REFUSAL OF ACCESS - NONEXISTENT OR UNLOCATABLE DOCUMENTS - applications for video recordings of applicant within areas of a correctional facility - whether the agency has taken all reasonable steps to locate the video recordings - whether access may be refused to the video recordings on the basis that they are nonexistent or unlocatable - 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)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant, a prisoner, made two separate access applications to the Department of Justice and Attorney-General (**Department**), under the *Information Privacy Act 2009* (Qld) (**IP Act**), seeking access to his personal information contained within video footage, from 2004, of particular areas within the Maryborough Correctional Centre (**MCC**).<sup>1</sup>
2. The Department decided to refuse access to the requested video footage, under section 67(1) of the IP Act and sections 47(3)(e) and 52 of the *Right to Information Act 2009* (Qld) (**RTI Act**) on the basis that the relevant recordings did not exist, essentially because they had been overwritten.<sup>2</sup>
3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of both decisions. In summary, the applicant submitted that the recordings should have been retained by the Department as they would have been required for related investigations.

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<sup>1</sup> Both applications were dated 4 July 2016, but were received and validated on later dates, by the Department.

<sup>2</sup> Decisions dated 18 August 2016 and 25 August 2016.

4. For the reasons set out below, I affirm the Department's decisions to refuse access to the requested video recordings under section 67(1) of the IP Act and section 47(3)(e) of the RTI Act, on the basis that they are nonexistent or unlocatable.

### Background

5. Significant procedural steps relating to the external reviews are set out in the Appendix.

### Reviewable decisions

6. The decisions under review are the Department's decisions dated 25 August 2016<sup>3</sup> and 18 August 2016<sup>4</sup> refusing access to the recordings, as set out at paragraph 2 above.

### Evidence considered

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

### Issue for determination

8. In both reviews, the issue for determination is whether access to the requested video recordings may be refused under section 67(1) of the IP Act and section 47(3)(e) of the RTI Act on the basis that they are nonexistent or unlocatable, within the meaning of section 52(1) of the RTI Act. Specifically, the applicant sought access to the following video recordings:
  - CCTV footage from the medical observation cell and medical observation unit from 6 to 14 January 2004 at the MCC (**Medical Observation Footage**);<sup>5</sup> and
  - CCTV footage and handheld video footage from the MCC reception area holding cell from 3 August 2004 (**Holding Cell Footage**).<sup>6</sup>

### Relevant law

9. The IP Act confers on an individual a right to access documents of an agency, to the extent they contain the individual's personal information.<sup>7</sup> This right of access is subject to limitations, including grounds for refusal of access.<sup>8</sup> Access may be refused to documents that are found to be nonexistent or unlocatable.<sup>9</sup>
10. A document is nonexistent if there are reasonable grounds to be satisfied it does not exist.<sup>10</sup> 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 it, but it cannot be found.<sup>11</sup>
11. To be satisfied that a document does not exist, the Information Commissioner has previously recognised that an agency must rely on its particular knowledge and experience, having regard to various key factors including:

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<sup>3</sup> External review no. 312958.

<sup>4</sup> External review no. 312969.

<sup>5</sup> This is the subject matter of external review no. 312958.

<sup>6</sup> This is the subject matter of external review no. 312969.

<sup>7</sup> Section 40(1)(a) of the IP Act. Section 12 of the 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*'.

<sup>8</sup> Grounds for refusal of access are set out in section 47 of the RTI Act. Section 67(1) of the IP Act provides that access to information may be refused under the IP Act on the same grounds as in section 47 of the RTI Act.

<sup>9</sup> Section 67(1) of the IP Act and sections 47(3)(e) and 52(1) of the RTI Act.

<sup>10</sup> Section 52(1)(a) of the RTI Act.

<sup>11</sup> Section 52(1)(b) of the RTI Act.

- the administrative arrangements of government
  - the agency's structure
  - the agency's functions and responsibilities (particularly with respect to the legislation for which it has administrative responsibility and other legal obligations that fall to it)
  - the agency's practices and procedures (including, but not limited to, its information management approaches); and
  - 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.<sup>12</sup>
12. By considering the above factors, an agency may ascertain that a particular document was not created because, for example, the agency's processes do not involve creating that specific document. In such instances, it is not necessary for the agency to search for the document. Rather, it is sufficient that the relevant circumstances to account for the nonexistent document are adequately explained by the agency.
13. An agency may also rely on searches to satisfy itself that a document does not exist. In those cases, all reasonable steps must be taken to locate the documents.<sup>13</sup> Such steps may include inquiries and searches of all relevant locations identified after consideration of the key factors listed at paragraph 11 above.
14. In determining whether a document is unlocatable, it is necessary to consider:
- 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.<sup>14</sup>
15. In answering these questions, regard should be had to the circumstances of the case and the key factors set out at paragraph 11 above.<sup>15</sup>

## Submissions

16. In relation to both the Medical Observation Footage and Holding Cell Footage, the Department submitted that, following searches conducted by Queensland Corrective Services (**QCS**) and MCC officers, the video recordings were unable to be located.<sup>16</sup>
17. With respect to the Medical Observation Footage, an MCC officer advised:

*... I have spoken to the Honeywell tech, and he informed me that the hard drive has been replaced at least two times since the timeframe in question.*

*He has also informed me, that the original hard drives are in storage, however it will take time to extract any of the footage, and that's if it's not corrupt ...*

*The original areas that I have looked was at all files on the DVR – all burnt copies housed in the Intelligence Office and the Intelligence Safe. I have also asked ... the original*

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<sup>12</sup> *PDE and University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009) (*PDE*) at [37]-[38]. The decision in *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 here.

<sup>13</sup> As set out in *PDE* at [49]. See also section 137(2) of the IP Act.

<sup>14</sup> Section 52(1)(b) of the RTI Act.

<sup>15</sup> *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].

<sup>16</sup> In relation to the Medical Observation Footage, the Deputy General Manager of MCC also confirmed, by signed search record dated 22 August 2016, that no documents were in MCC's possession.

*Intelligence Officer, and he cannot remember the event, and does not have any footage in his office.*

*I believe the retention period of footage is 7 years ... and if that's the case, we would be well over that timeframe to dispose of it ...*

*... we do update equipment, and due to no fault of ours, the information still may not be available due to corrupt hard ware.<sup>17</sup>*

18. With respect to the Holding Cell Footage, an MCC officer advised:

*The video recording tape was not required for any QPS investigation purposes, it was retained for a month and then returned to rotational storage along with other such recordings.*

*It is now 12 years since the incident occurred, the storage time of the tape has expired and the tape has been disposed of.<sup>18</sup>*

19. The Department also referred to its rotational recording policy, to explain the nonexistence of CCTV footage.<sup>19</sup> Essentially, that policy provides that correctional centre CCTV footage which is not required for investigative purposes is automatically overwritten by the surveillance system one month after it is recorded.<sup>20</sup> On external review, the applicant contested the application of that policy.<sup>21</sup> He said that the recordings would have been retained by the Department for a longer period of time, as they would have been required to investigate his subsequent complaints<sup>22</sup> about incidents captured by the recordings.

20. On external review, the Department conducted further searches and inquiries with the Ethical Standards Unit (**ESU**), Corrective Services Investigation Unit (**CSIU**) and Queensland Corrective Services Intelligence Group (**QCSIG**) for any video footage (CCTV or handheld camera) relating to the relevant incidents. However, those searches did not locate any of the requested video footage.<sup>23</sup> The Department provided OIC with written responses from the relevant operational areas as evidence of the inquiries and searches undertaken. In summary, those responses advised that:

- CSIU investigated the applicant's complaints in 2004, and at that time, held a copy of the Medical Observation Footage and Holding Cell Footage and viewed the recordings for the purpose of the investigations<sup>24</sup>
- ordinarily, CSIU would have returned the video recordings to ESU after finalising the investigations, however, CSIU was unable to confirm if that occurred in relation to the requested video recordings
- ESU wrote to the applicant in 2004 to advise it did not hold a copy of the video evidence that was reviewed as part of the CSIU investigation<sup>25</sup>

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<sup>17</sup> MCC Intelligence Advisor response provided to OIC by the Department by email dated 9 December 2016.

<sup>18</sup> MCC General Manager's office response dated 23 September 2016 provided to OIC by the Department on 27 September 2016.

<sup>19</sup> Citing the *Department of Community Safety (Queensland Corrective Services) Retention and Disposal Schedule: QDAN 638 v.2 (RDS)*, in its decision dated 25 August 2016 with respect to the Medical Observation Footage.

<sup>20</sup> RDS section 8.1.2.

<sup>21</sup> Submission received by OIC on 28 October 2016.

<sup>22</sup> To the MCC Director, the then Crime and Misconduct Commission (**CMC**), the then Department of Corrective Services and the Ethical Standards Unit, and other unspecified complaint handling agencies.

<sup>23</sup> Department's submission to OIC dated 24 February 2017, including a signed search certification form confirming that no video recordings were located, record of ESU electronic searches, and email responses from ESU, CSIU and QCSIG.

<sup>24</sup> CSIU internal memoranda dated 12 March 2004 and 24 November 2004. The reports attached to these memoranda confirm that the relevant footage was viewed by the investigating officers at the time and that no further action was taken on the matters, beyond the CSIU investigations.

<sup>25</sup> The Medical Observation Footage.

- CSIU conducted searches of its records for the purpose of these external reviews but could not locate any relevant video recordings in its files<sup>26</sup>
- ESU conducted searches of relevant electronic databases using the search term 'Lester', but could not locate the requested video recordings; and
- QCSIG could not action the request and referred the Department back to MCC.

## Findings

21. I have carefully considered all of the evidence provided to OIC by the Department in relation to the searches and inquiries conducted on the applications and during the external review process. I am satisfied that there is sufficient evidence to establish that the Medical Observation Footage and Holding Cell Footage are documents that were created by the Department, were provided to CSIU for the purpose of investigating the applicant's complaints and were viewed by the relevant CSIU investigating officers in 2004. However, taking into account all of the available evidence in these reviews, it appears that the recordings have since been lost or destroyed, possibly due to the passage of time, or some deviation from applicable recordkeeping protocols.
22. I acknowledge that the responses initially provided by MCC officers<sup>27</sup> were not entirely conclusive as to the nonexistence of the recordings, or the applicable recordkeeping process. However, I consider those responses do indicate that recordings of this nature would have since been destroyed ultimately due to their age.
23. I accept that the RDS is one of the key recordkeeping policies that applies to records of the Department, including audiovisual recordings. However, given my findings that the requested video recordings have been lost or destroyed, I do not consider it necessary to examine the particular section(s) of the RDS that would apply to retention and disposal of the recordings. The conclusion that can be drawn from the evidence in this case is that, in practice, MCC officers understand recordings of this nature would generally be destroyed well within the 12 years since they were created.
24. I am satisfied that the further searches and inquiries conducted by the Department with ESU and CSIU have been targeted and comprehensive, involving multiple officers with experience in recordkeeping in the relevant areas. I accept their responses as evidence that those operational areas do not hold the requested video recordings in their possession. I also accept that, in the ordinary course of events, the video recordings would have been returned by CSIU to the ESU of the Department. However, there is no evidence to indicate that this occurred in relation to either the Medical Observation Footage or Holding Cell Footage.
25. I have also had regard to the fact that the recordings would now be more than 12 years old and machinery of government changes that have occurred during this time.<sup>28</sup> Given the passage of time, I do not consider it would be reasonable for the Department to conduct any further searches or inquiries for the video recordings.
26. In the circumstances of these reviews, I am satisfied that the Department has taken all reasonable steps to locate the Medical Observation Footage and the Holding Cell

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<sup>26</sup> CSIU is an operational area of Queensland Police Service which is a separate agency to the Department. I make no finding on whether documents of CSIU are documents in the possession or under the control of the Department as it is inconsequential to the outcome of this review given the nonexistence of the video recordings.

<sup>27</sup> See paragraphs 17 and 18 above.

<sup>28</sup> As noted in the ESU search record dated 13 February 2017, QCS became part of the Department in 2013 due to machinery of government changes and therefore, ESU's ability to access historical information is somewhat limited.

Footage. As no video recordings have been located, I find that access may be refused to the documents on the basis that they are nonexistent or unlocatable.<sup>29</sup>

## **DECISION**

27. For the reasons set out above, I affirm the Department's decisions to refuse access to the requested video recordings in external reviews 312958 and 312969 under section 67(1) of the IP Act and section 47(3)(e) of the RTI Act.
28. I have made this decision as a delegate of the Information Commissioner, under section 139 of the IP Act.

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**K Shepherd**  
**Assistant Information Commissioner**

**Date: 16 May 2017**

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<sup>29</sup> Under 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
14 September 2016	<p>OIC received the external review application for both reviews.</p> <p>OIC notified the Department of the external review application for review no. 312958 and requested procedural documents. OIC received the requested procedural documents from the Department.</p>
20 September 2016	<p>OIC notified the Department of the external review application for review no. 312969 and requested procedural documents. OIC received the requested procedural documents from the Department.</p>
22 September 2016	<p>OIC asked the Department to provide further information about its searches for review no. 312969.</p>
27 September 2016	<p>The Department provided OIC with further information about its searches for review no. 312969.</p>
5 October 2016	<p>OIC notified the applicant and the Department that the external review application for both reviews had been accepted. OIC conveyed a preliminary view to the applicant for both reviews and invited him to provide submissions in response.</p>
28 October 2016	<p>OIC received submissions from the applicant in response to the preliminary view for both reviews.</p>
25 November 2016	<p>OIC asked the Department to provide further information about its searches for review no. 312958.</p>
9 December 2016	<p>The Department provided OIC with further information about its searches for review no. 312958.</p>
10 February 2017	<p>OIC asked the Department to provide further information about its searches for both reviews.</p>
24 February 2017	<p>The Department provided OIC with further information about its searches for both reviews.</p>