SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of the Police Service v Shelton & Anor* [2020] QCA 96
PARTIES:	**COMMISSIONER OF THE POLICE SERVICE** (applicant) **v** **NATIKA JEMMA HOLLY SHELTON** (first respondent) **THE INFORMATION COMMISSIONER** (second respondent)
FILE NO/S:	Appeal No 9815 of 2019 QCATA No 197 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Appeal Tribunal of the Queensland Civil and Administrative Tribunal at Brisbane – [2019] QCATA 115 (Daubney J)
DELIVERED ON:	8 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2020
JUDGES:	Holmes CJ and Fraser JA and Boddice J
ORDERS:	**1. The time for filing the application for leave to appeal is extended to 8 October 2019.** **2. The applicant is granted leave to appeal.** **3. The appeal is allowed.** **4. The orders of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal are set aside.** **5. The first respondent's appeal to the Appeal Tribunal of the Queensland Civil and Administrative Tribunal from the decision of the Information Commissioner is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – RIGHT OF ACCESS – GROUNDS FOR REFUSAL – where the first respondent applied to the applicant under s 43 of the *Information Privacy Act* 2009 seeking a report of instances of access to her file in a police database – where the second respondent found on external

review that the information was exempt information under sch 3 s 10(1)(f) of the *Right to Information Act* 2009 and hence for the purposes of s 59 of the *Information Privacy Act* – where the second respondent found that the information was exempt under sch 3 s 10(1)(f) on the basis that its disclosure could reasonably be expected to prejudice lawful methods and procedures for investigating crime and that it was not excluded from exemption because it did not reveal that the scope of a law enforcement investigation had exceeded the limits imposed by law – where the Appeal Tribunal of the Queensland Civil and Administrative Tribunal (QCAT), on appeal by the first respondent, set aside the applicant's decision – where the QCAT Appeal Tribunal found that the second respondent had erred in failing to have regard to the first respondent's particular application or how disclosure of the particular information to her could reasonably be expected to prejudice lawful methods and procedures for investigating crime – whether the second respondent was obliged to consider the actual content of the report sought or the circumstances of the first respondent in seeking it in determining whether there was a reasonable expectation of prejudice to investigative methods and procedures – whether the second respondent was obliged to consider the actual content of the report sought in determining whether it revealed that the scope of a law enforcement investigation had exceeded the limits imposed by law – whether the second respondent erred in her construction and application of s 59 of the *Information Privacy Act*

Information Privacy Act 2009 (Qld), s 40, s 43, s 58, s 59, s 69, s 118, sch 5
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 150(3), s 151(2)
Right to Information Act 2009 (Qld), s 48(4), sch 3 s 10(1), sch 3 s 10(2)

Hall v South Australian Police [2019] SADC 5, cited
Police Force of Western Australia v Kelly & Smith (1996) 17 WAR 9, cited

COUNSEL: S A McLeod QC, with R H Berry, for the applicant
The first respondent appeared on her own behalf
T E Lake (*sol*) for the second respondent

SOLICITORS: Queensland Police Service Solicitor for the applicant
The first respondent appeared on her own behalf
Office of the Information Commissioner for the second respondent

[1] **HOLMES CJ:** The applicant, the Commissioner of the Police Service,[1] seeks an extension of time within which to file an application for leave to appeal a decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal (QCAT), setting aside, firstly, a decision of the second respondent, the Information Commissioner, which found that information to which the first respondent sought access under the *Information Privacy Act* 2009 was exempt information for the purposes of s 59 of that Act, so that it was not necessary to deal with her application; and, secondly, a decision of the Queensland Police Service (made under s 69 of the Act) to refuse to confirm or deny the existence of that information. The QCAT Appeal Tribunal was constituted by the President of QCAT, a judge of the Supreme Court. The principal issue in the proposed appeal is whether his Honour erred in his construction of s 59 of the *Information Privacy Act*, which permits refusal to deal with applications for access to documents containing exempt information.

[2] Section 155 of the *Information Privacy Act* entitles the Information Commissioner to take part in proceedings arising out of the performance of her functions, but she chose to take no active role in the Tribunal proceeding and similarly does not seek to be heard in this Court.

Extension of time and grant of leave

[3] It is necessary for the applicant to seek a month's extension of time to file her leave application because her legal representatives overlooked the requirement (contained in s 150(3) of the *Queensland Civil and Administrative Tribunal Act* 2009) for leave to appeal against a decision of the QCAT Appeal Tribunal, and hence failed to make the application within the 28 day period prescribed by s 151(2) of that Act. It is difficult to understand how that oversight came about, but the extension sought is not large, and the question involved in this case is an important one of significant public interest. I would grant the extension of time and I would grant leave to appeal.

The first respondent's application for information

[4] The first respondent, a former police officer, made her application for information to the Queensland Police Service under s 43 of the *Information Privacy Act*, which permits an individual to apply for access to an agency's document to the extent it contains his or her personal information. Section 43(2)(b) requires that the applicant give sufficient information about the document to enable the agency (or Minister, as the case may be) to identify the document. The first respondent identified the type of document sought as "QPRIME database", a reference to the Queensland Police Records and Information Management Exchange ("QPRIME") database, with which she was familiar through her work as a police officer.

[5] The QPRIME database is described in the QCAT Appeal Tribunal decision as

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[1] In the review by the Information Commissioner and in the QCAT proceeding, the respective application and appeal were, wrongly, titled as brought against the Queensland Police Service, when the entity carrying out the functions in question was the Commissioner of the Police Service, that office having been established by s 4.1 of the *Police Service Administration Act* 1990. However, given that the original decision-maker was referred to throughout both sets of proceedings as the "Queensland Police Service" I have from time to time used that nomenclature in this judgment. In the QCAT proceedings, the second respondent was incorrectly named as "Office of the Information Commissioner" when the decision-making function in question was, pursuant to s 137 and s 139 of the *Information Privacy Act* 2009, performed by the Information Commissioner through a delegate.

> "…a database kept by the Queensland Police Service ("QPS") of the information obtained by the QPS in its law enforcement functions. It is a dynamic and constantly updated central record for the QPS. The QPS would describe it is as an intelligence tool, which allows police to record information about criminal activity, the circumstances in which criminal activity is likely to occur or has occurred, the identity of those involved or suspected to be involved in criminal activities and the identities of their associates. But it also records information obtained by police officers in the course of their investigations and records criminal intelligence which has been obtained. The QPRIME system also maintains activity reports, whereby a record is kept of the access to particular QPRIME records by, amongst others, serving police officers."[2]

[6] The first respondent requested, over a time period of about four years, the following information: searches done on her name and former registration number; "any amendments made to [her] file"; the dates on which her details had been searched and accessed; and the registration numbers and names of those police officers who had searched in relation to her. (It should in fairness be said that she made clear in her review application that she did not believe there to have been any legitimate grounds for searches to have been conducted in respect of her, other than for the purposes of forwarding correspondence or medals she had been awarded, and her concern was that there had been unauthorised access to her file.)

[7] Relying on s 69 of the *Information Privacy Act*, the Queensland Police Service refused to confirm or deny the existence of documents containing the information which the first respondent sought. She then sought external review by the Information Commissioner of that refusal, pursuant to s 99 of the Act. The Information Commissioner rejected the proposition that s 69 had any application, but instead proceeded to consider whether the Queensland Police Service was entitled to refuse to deal with the application under s 59 of the Act, on the ground that the documents sought were comprised of exempt information.

Relevant provisions of the Information Privacy Act and the Right to Information Act

[8] Section 40 of the *Information Privacy Act* gives an individual a right to access to the documents of an agency or Minister to the extent they contain that person's personal information, subject to other provisions of the Act. Section 43 of the Act, as already mentioned, permits the making of an access application, and it specifies the information which it must contain, or which must accompany it. Section 58 prescribes the approach to be taken to refusal to deal with applications for information, or amendment of information, and enables, but does not require, an agency or Minister to refuse on public interest grounds to deal with an application:

> "**Pro-disclosure bias and pro-amendment bias in deciding to deal with applications**
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> (1) It is the Parliament's intention that if an access or amendment application is made to an agency or Minister, the agency or

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2 *SJN v Office of the Information Commissioner & Anor* [2019] QCATA 115 at [1].

> Minister should deal with the application unless this would not be in the public interest.
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> (2) Sections 59, 60 and 62 state the only circumstances in which the Parliament considers it would not be in the public interest to deal with an access application.
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> (3) Section 60 states the only circumstances in which the Parliament considers it would not be in the public interest to deal with an amendment application.
>
> (4) However, it is the Parliament's intention that this Act should be administered with a pro-disclosure bias and pro-amendment bias and an agency or Minister may deal with an access or amendment application even if this Act provides that the agency or Minister may refuse to deal with the application."

[9] Of the provisions mentioned in s 58(2), s 60 permits refusal to deal with an application because, in effect, of the unreasonable extent of the resources which would be required or an anticipated adverse impact on the performance of Ministerial functions, while s 62 deals with circumstances where a repeat application for access to material is made without any reasonable basis. Neither provision has any application here. For completeness, I note that s 67 of the Act permits refusal of access to documents on broader grounds, including public interest grounds, but since the first respondent's application was not dealt with, the point at which s 67 might have been considered was not reached in the present case.

[10] Section 59 of the Act, which the Information Commissioner considered applicable, relates to exempt information:

> "(1) This section applies if—
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> (a) an access application is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and
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> (b) it appears to the agency or Minister that all of the documents to which the application relates are comprised of exempt information.
>
> (2) The agency or Minister may refuse to deal with the application without having identified any or all of the documents."

[11] The dictionary in sch 5 to the *Information Privacy Act* defines "exempt information" as

> "[I]nformation that is exempt information under the Right to Information Act".

In turn, s 48(4) of the *Right to Information Act* 2009 defines the term as meaning exempt information under sch 3 to the Act. That schedule sets out, in its 12 sections, 12 categories of exempt information. In particular, sch 3 s 10(1) lists certain information in the category relied on here, while s 10(2) contains some exceptions to that category. Those parts relevant here are as follows:

> "**10 Law enforcement or public safety information**
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> (1) Information is exempt information if its disclosure could reasonably be expected to—

> …
> (f) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law)…
>
> …
> (2) However, information is not exempt information under subsection (1) if it consists of—
> (a) matter revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law...".

The balance of s 10(2) identifies other forms of information ("matter" or reports) whose content, because it meets one of the descriptions set out therein, does not qualify as exempt information, and s 10(6) also excludes information about an applicant from an investigation which has been finalised.

[12] Part 9 of the *Information Privacy Act* provides for external review by the Information Commissioner of agency or Ministerial decisions on access applications. Section 118 provides for the relevant form of review to be merits review: the Commissioner has the power to make any decision that the relevant agency could have made, with the exception of giving access to an exempt or contrary to public interest document, or one containing exempt or contrary to public interest information. Section 113 of the Act entitles the Information Commissioner to full access to the documents in question.

The Information Commissioner's decision

[13] Although one might have expected that "amendments made" to the first respondent's file (one of the types of information to which she sought access) would be a reference to substantive changes to information rather than merely a record of access for that purpose, the Information Commissioner proceeded on the basis put to her by the Queensland Police Service, that all of the information to which the first respondent requested access would be contained in a QPRIME activity report.[3] That approach was not challenged on appeal, either to QCAT or to this Court. The Commissioner was provided with the activity report maintained in the QPRIME system in respect of the first respondent.[4]

[14] The Information Commissioner concluded that the first respondent's application was

> "…framed as a request to access *all documents or documents of a stated class*, that demonstrate instances of the [first respondent's] name and/or registration number being searched and/or information being amended in the QPRIME database, including which officers accessed/amended the information" [5]

and that it was

> "…expressed to relate to all documents…that contain information of a *stated kind*, i.e. search/amendment history relating to the [first respondent's]

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3 *Shelton and Queensland Police Service* [2017] QICmr 18 at [5].
4 *ibid* at [5].
5 *ibid* at [18].

> personal information in the QPRIME database, within the specified timeframe".[6]

I doubt that the application was accurately characterised as "…expressed to relate to all documents of a stated class", but the Commissioner's finding was not contentious, and the request could, in any case, reasonably be regarded as one "…expressed to relate to all documents… that contain information of a stated kind".

[15] The critical question for the Information Commissioner, then, was whether the information was "exempt information". If it was, s 118(2) of the *Information Privacy Act* precluded her from directing access to be given to the documents containing it.

[16] The Information Commissioner began that consideration by finding, for the purposes of s 59(1)(a), that

> "…the process of QPS officers accessing the QPRIME database forms an integral part of QPS' lawful methods and procedures for preventing, detecting or investigating contraventions, or possible contraventions of the law, specifically in terms of intelligence and surveillance operations".[7]

There was no challenge to that finding.

[17] The first respondent's application to the Information Commissioner for external review was one of a number in which the Commissioner received oral submissions from Queensland Police Service officers as to their concerns, expressed generally, about disclosure of information contained in QPRIME activity reports. Those views were conveyed in a meeting and were subsequently relied on by the Commissioner in her decisions on four external reviews, one of which was the first respondent's. The Commissioner summarised the submissions:[8] disclosure of the QPRIME activity reports could reveal how many times officers had accessed the database in relation to a particular individual, and would disclose the badge number of the officer concerned and the reasons for seeking access. The concern was that the information would enable such an individual to deduce the level of surveillance or investigation in relation to them and to identify the police units monitoring them.

[18] Although the applicant had not sought information about the units to which any searching officers belonged, or the reasons for searches, the Information Commissioner found that the release of names and registration numbers of officers could enable ascertainment of their identity and the unit to which they belonged. Revealing the number of occasions on which the database was accessed and amendments made to it in respect of a particular individual could disclose the level of surveillance or investigation, if any, of that person. From this stemmed the potential prejudice to police methods and procedures. The Commissioner continued by saying that it was irrelevant that the first respondent was familiar with the workings of the database and that nothing suggested that she was in fact under surveillance. She expressed herself satisfied

> "…that revealing the extent of information in a QPRIME Activity Report for *any individual*, whether that individual is subject to

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6 *ibid* at [18].
7 *ibid* at [20].
8 *ibid* at [21].

> intelligence and surveillance operations or not, could reasonably be expected to prejudice [Queensland Police Service] lawful methods and procedures as a whole".[9]

Disclosure of information about when and how often police officers had had access to the QPRIME database in relation to an individual could also reasonably be expected to prejudice such methods and procedures.[10]

[19] Oddly, given that she had already made those findings, the Information Commissioner went on to consider whether the expectation of prejudice was reasonable, and found it was; the Queensland Police Service had demonstrated

> "…that there are particular circumstances in which disclosing information could reasonably be expected to prejudice QPS' lawful methods and procedures, even though the information may appear innocuous, on its face, or when read in isolation".[11]

She could not, she observed, explain the "particular circumstances" put forward by the police because to do so would disclose information claimed to be exempt or contrary to the public interest, in contravention of s 121(3) of the *Information Privacy Act*. (From an examination of the material before the Commissioner which was put before the Appeal Tribunal and this court on the basis that it would not be disclosed to the first respondent, it can be said, in general terms, that what the Queensland Police Service put forward was an identification of the kinds of criminal act or investigation which might be affected.)

[20] The Information Commissioner expressed herself satisfied that the QPRIME activity report constituted exempt information under sch 3, s 10(1)(f). Next, she considered what she described as the exception in s 10(2) of sch 3, because the first respondent had asserted that Queensland Police Service officers had had unauthorised access to the information concerning her in the QPRIME database. The Commissioner observed,

> "As noted in *Isles* and *Flori*, for this exception to apply, the information must consist of material that objectively and authoritatively reveals the scope of a law enforcement investigation has exceeded the limits imposed by law. QPRIME Activity Reports generally reveal the amount of activity and the number of occasions on which QPS officers have accessed QPRIME in relation to an individual, the badge number of the [enquiring] officer, and it includes a technical log of interactions within the database. This information alone (or together with any information currently before me) does not reveal in any authoritative manner that any particular access was unauthorised, or that the scope of the law enforcement investigation has exceeded the limits imposed by law in any other way. At best, this type of information may amount to untested evidence concerning authority to access the QPRIME database in a particular instance."[12]

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9 *ibid* at [23].
10 *ibid* at [24].
11 *ibid* at [25].
12 *ibid* at [28]; citations omitted.

[21] The reference to *Isles*[13] and *Flori*[14] is to earlier decisions by the Information Commissioner considering s 10(2) of sch 3. In the former, the Information Commissioner had made this statement:

> "In my view, for this exception to apply, a decision-maker would generally need to have available to them some form of objective and authoritative finding that the scope of the law enforcement investigation has exceeded the limits imposed by law. I do not consider the RTI Act intends for a decision-maker to draw a conclusion of this nature by assessing untested evidence or unsubstantiated allegations."[15]

A similar observation was made in *Flori*.[16]

[22] It is not entirely clear what the Information Commissioner had in mind when she referred to an "objective and authoritative finding", but she does not seem to have been suggesting that the decision as to what the material revealed had to be made in a vacuum, without regard, for example, to other knowledge an agency might have available to it. In each of the *Isles* and *Flori* applications, she made a finding in the negative on an assessment of the evidence available to her. Consistently with her approach in those reviews, the Commissioner noted in the present case that, notwithstanding the first respondent's suspicions, it was the material itself which must reveal that the scope of a law enforcement investigation had exceeded the limits imposed by law. On the evidence available to her, the exception did not apply.

[23] The Commissioner varied the decision of the Queensland Police Service by finding that s 59 applied.

The QCAT Appeal Tribunal decision

[24] Section 132 of the *Information Privacy Act* permits appeal to the Appeal Tribunal of QCAT, restricted to a question of law, against a decision of the Information Commissioner made on an external review. The first respondent brought such an appeal, with the question of law identified in the broadest of terms:

> '…the RTI Commissioner has wrongly interpreted and applied the *Information Privacy Act* 2009 and the *Right to Information Act* 2009 that it does not come within the parameters of exemption".

The first respondent's grounds alleged error in a failure by the Information Commissioner to apply a "reasonable person" test and factual error in her conclusions about the QPRIME database, which was said to have led to a wrong application of s 59(1)(b) in the finding that the information was exempt.

[25] The appeal to QCAT was heard on the papers. In written submissions, the applicant contended that the Commissioner had made no error of law. It was

> "…necessary to balance the various factors that favour disclosure and those, which favour non-disclosure as it relates to the class of documents, as opposed to release to any one individual applicant. The

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13 *Isles and Queensland Police Service* [2017] QICmr 1.
14 *Flori and Queensland Police Service* [2017] QICmr 5.
15 *Isles and Queensland Police Service* [2017] QICmr 1at [21]; citations omitted.
16 *Flori and Queensland Police Service* [2017] QICmr 5 at [25].

> reasons for an individual's application, the possible mischief that an individual applicant may engage in and the use they may make of the information are irrelevant considerations."

[26] In addition to submissions which were served on the first respondent, the judge constituting the Appeal Tribunal made directions for the filing of further evidence and written submissions: from the Queensland Police Service in relation to the Information Commissioner's finding that the activity report constituted exempt information and from the Information Commissioner in relation to the meeting at which police officers provided information on a confidential basis; none of which were to be provided to the first respondent.

[27] In its decision, the Appeal Tribunal considered the relevant provisions of the *Information Privacy Act*. The legislation required that each application be considered on its own merits. That was to be discerned from the its primary object, the conferral of the statutory right of access to personal information; and the statements of legislative intent that the Act was to be administered with a pro-disclosure bias. Hence, s 59(1)(b) was not concerned with a class of applications but with the particular application made by the individual in question for access.

[28] The Appeal Tribunal noted that neither the submissions filed on behalf of the Queensland Police Service, nor a confidential affidavit which set out its concerns about allowing access to QPRIME data and, in particular, QPRIME access records, addressed the particular information to which the first respondent sought access. Instead, the Queensland Police Service had contended in general terms that all access applications in relation to QPRIME activity reports should as a matter of public policy be refused. The Appeal Tribunal was particularly critical of a submission made by the applicant in these terms:

> "…the [first respondent and other applicants for access] are not simply seeking access to the discrete records contained in QPRIME and held by [the applicant], in relation to themselves, but rather are seeking to satisfy their curiosity as to whom [sic] may have accessed, viewed or otherwise utilised those records".[17]

The first respondent's motive for seeking the information, the Appeal Tribunal said, was irrelevant to whether or not her application should be dealt with.[18]

[29] The Appeal Tribunal concluded that the Information Commissioner had failed to consider whether the particular information which the first respondent sought was exempt information. The finding that revealing the extent of information in a QPRIME activity report for any individual, whether subject to police attention or not, could reasonably be expected to prejudice police methods and procedures amounted to the imposition of a general policy relating to applications for access to personal information in the QPRIME database. There had been a failure to have regard to the first respondent's particular application, or to consider how disclosure of the information to her could reasonably be expected to have the consequences identified in sch 3 s 10(1)(f). That was an error in the consideration and application of s 59. The Information Commissioner's decision was set aside.

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17 *SJN v Office of the Information Commissioner & Anor* [2019] QCATA 115 at [42].

18 *ibid* at [78].

[30] In re-making the decision, the Appeal Tribunal observed that the Queensland Police Service had not gone beyond general propositions about the potential misuse of information from QPRIME activity reports to provide any argument or information as to the effect of providing to the first respondent the particular information she sought. It had thus failed to discharge its onus of establishing that the information she sought was exempt information under s 59. The decision refusing to confirm or deny the existence of the information sought was set aside. The result was that the applicant was now in the position of having to decide whether to grant access to the activity report relating to the first respondent.

The grounds of appeal and the applicant's submissions

[31] The applicant's proposed notice of appeal set out the following grounds:

(a) The Appeal Tribunal erred in failing to find all the information sought by the First Respondent below to be 'exempt information' for the purposes of s 59 of the *Information Privacy Act* 2009 (Qld) including because of the effect of s 48 and Schedule 3 s 10(1)(f) of the *Right to Information Act* 2009 (Qld).

(b) The Appeal Tribunal erred in its construction of s 59 of the *Information Privacy Act* by:

(i) depriving it of application to all documents within a class, and here the class which comprises the Queensland Police Records and Information Management Exchange (QPRIME) database or the results of the interrogation of that database;

(ii) rejecting the finding by the Information Commission at (Reasons [67] and [68] below) that the revelation of a QPRIME Activity Report for any individual could reasonably be expected to prejudice lawful methods and procedures as a whole.

(c) The Appeal Tribunal erred in finding (at Reasons [69] below) that the Information Commissioner had failed to have regard to the particular application made by this particular applicant (being the First Respondent to this appeal).

[32] Appeal ground 1 does not identify the error of law which is said to have led to the result of which it complains. Apparently in support of this ground, the applicant made a number of submissions as to why activity reports ought to be regarded as exempt. That did not assist in identifying any error of law; and if the Appeal Tribunal's construction of s 59 were correct and the approach of the Information Commissioner wrong, there could be no such error in the drawing of a different conclusion. Ground 2(b) seems, similarly, to identify a consequence of an alleged error in construction, rather than itself identifying an error of law. Both of those grounds can be put to one side.

[33] As to ground 2(a), the applicant contended that the issue raised was whether information of the kind identified in sch 3 s 10(1)(f) of the *Right to Information Act* was to be protected from disclosure under s 59 of the *Information Privacy Act* as a class of documents or whether it was necessary to consider each application for disclosure on a "situation – specific basis". The former, it was contended, was the correct approach, and the Appeal Tribunal had erred by taking the latter. That could be discerned (it was argued) from the regime for granting access to information, which turned on the question of whether its disclosure would be contrary to the public interest. Section 64

of the *Information Privacy Act* (which applies to the process of dealing with access applications) drew a distinction between classes of information: exempt information, identified in sch 3 of the *Right to Information Act*, disclosure of which Parliament had deemed not in the public interest, and other types of information, where Parliament had prescribed a public interest balancing test, as to which s 49 of the *Right to Information Act*, combined with sch 4 to that Act, set out the steps to be taken, and factors to be considered.

[34] In respect of the former, Parliament had identified categories of information which it would be contrary to the public interest to disclose because of the class to which they belonged and the potential harm if they were disclosed. Schedule 3 included, for example, Cabinet documents, whose exemption as a class was justified by their very nature and the need to protect candour and unrestricted debate, without any occasion for individual analysis. Similarly, documents concerning policing and law enforcement information fell within another such class. To propose as the relevant question whether the disclosure of the particular information to the particular applicant could reasonably be expected to have the adverse consequences identified in sch 3 s 10(1)(f) was to apply the wrong test. For the purposes of 59, the Queensland Police Service had merely to establish that the class of documents, not any particular document the subject of the application, was exempt. The class which the applicant identified in submissions as relevant in the present case was QPRIME activity reports; a narrower class than that suggested by appeal ground 2(a).

[35] As to ground 3, the applicant submitted, the Information Commissioner did have regard to the first respondent's application, and applied the correct statutory test in respect of it. She acknowledged the latter's familiarity, as a former police officer, with police methodologies and investigative procedures and her view that she was not under surveillance, but found those matters, correctly, to be irrelevant. In addition, she had made the general statement that she was

> "…required to determine each matter on its own facts and on the basis of available evidence"[19]

in the context of considering whether there was any requirement to follow the relevant agency's previous approach, or, indeed, an Information Commissioner's previous approach.

[36] At the Court's request, the applicant provided supplementary submissions reviewing Commonwealth, State and Territory provisions contained in Freedom of Information legislation dealing with exemptions from access in relation to information concerning police methods and procedures in similar terms to sch 3 s 10(2) and, in particular, identifying any case law which might assist in their interpretation. Two cases were identified: *Police Force of Western Australia v Kelly & Smith*[20] and *Hall v South Australian Police.*[21] In *Hall*, a District Court judge was dealing with an appeal from a decision on external review refusing access to police-held documents on the ground that they appeared to be subject to secrecy provisions under unrelated legislation. The judge hearing the appeal rejected that ground and proceeded to consider a number of other argued bases for exemption claimed by the police, including that disclosure would create a reasonable expectation of prejudice to a police investigation. In order to

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19 *Shelton and Queensland Police Service* [2017] QICmr 18 at [33].
20 (1996) 17 WAR 9.
21 [2019] SADC 5.

resolve those claims, and to determine the appeal, which seems to have been on the merits, he examined the relevant documents.

[37] In *Kelly & Smith*, a single judge of the Supreme Court of Western Australia was considering a number of specified documents concerning an internal investigation of police officers, to which access had been refused. In that case the material was exempt if its disclosure could reasonably expected to reveal the investigation of a contravention of the law. His Honour identified the question before the first instance decision-maker as whether the documents in question did contain such a matter; on appeal the issue was whether, in forming her opinion in the negative, the decision-maker had applied the correct test. She was held not to have done so, and the judge indicated his intention to remit the application to her for determination, in light of his reasons, of the question of fact as to whether the documents were exempt.

The first respondent's submissions

[38] The first respondent submitted, correctly, that two authorities on which the applicant had indicated an intention to rely, *Sankey v Whitlam*[22] and *Conway v Rimmer*,[23] were irrelevant; but those cases did not, in the event, feature in the applicant's oral argument. The first respondent also made some submissions in relation to public interest generally and pointed out that the Explanatory Notes to the *Right to Information Bill* 2009 stated

> "…The principles of the Right to Information reforms emphasise increased proactive and administrative disclosure, with formal application under the Bill intended to be an avenue of last resort".[24]

She went on to make a number of points about the QPRIME database, which she said was accessible to a large number of Queensland Police Service employees and was not properly audited. The applicant had not, she contended, provided convincing evidence as to why the information she sought should be regarded as exempt and had previously released similar documents to other applicants.

Consideration

[39] The operation of s 59 falls, as the Appeal Tribunal correctly observed, to be considered against the legislative intent conveyed by the primary object of the *Information Privacy Act*, set out in s 3; part of which is to provide for

> "…(b) a right of access to, and amendment of, personal information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access or allow the information to be amended."

Subsection (2) requires the application and interpretation of the Act to further the primary object. The intent evident from that object is reaffirmed in the pro-disclosure bias expressed in s 58 of the Act. However, it is significant that those provisions also manifest the legislative intent to carve out public interest exceptions, one of which is that relevant here: for exempt information. And the intention of a pro-disclosure bias expressed in s 58(4) relates to the exercise of a choice, notwithstanding an entitlement

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22 (1978) 142 CLR 1.
23 [1968] 1 All ER 874.
24 Explanatory Notes to the *Right to Information Bill* 2009 at 8.

to refuse to deal with an application, to do so anyway. It does not bear directly on whether the entitlement exists in the first instance, and the mechanics of how that is determined.

[40] The necessary view under s 59(1)(b) must be formed in relation to "the documents to which the application relates". The application does not have to identify those documents. What it "relates" to for the purposes of s 59(1)(b) will depend on what it is expressed to relate to: either, documents containing a stated kind of information or concerning a stated subject matter, or a stated class of documents meeting one of those descriptions. The question which this appeal poses is whether the decision-maker is entitled to reach a view about the status (as containing exempt information, or otherwise) of the documents to which the application relates by reference to the kind of information which documents of that kind usually contain (as the Information Commissioner did) or whether (as the Appeal Tribunal found) attention must be focussed on the information which the particular documents falling within the application contain. Having considered the relevant provisions, my conclusion is a hybrid one, at least for the category of documents in this case.

[41] Section 59, when taken in conjunction with the exclusions in sch 3 s 10(2), presents some difficulties of construction. Section 59(2) permits an agency or Minister to refuse to deal with an application if it appears that all of the documents to which it relates are comprised of exempt information, "without having identified any or all of the documents". The latter phrase might mean that the Minister or agency is not obliged to identify the documents covered by the application before refusing to deal with it, or it might mean that, having reached the view that the information in the documents is exempt, the agency or Minister is not obliged to particularise the documents in question for the applicant.

[42] Some assistance can be got in determining what identifying documents entails in the context of s 59(2) by considering other provisions of the Act using the words "identify" or "identifying". Section 43(2)(b) requires that the access application:

> "…(b) give sufficient information concerning the document to enable a responsible officer of the agency or the Minister to identify the document…" .

In relation to the public interest question under s 60 of whether an agency or Minister may refuse to deal with an application because of its effect in diverting resources, regard is to be had

> "…to the resources that would have to be used –
>
> (a) in identifying, locating or collating any document in the filing system of the agency or the Minister's office…".

Both provisions contemplate that identification of the relevant documents is for the purposes of dealing, or refusing to deal, with the application; and under s 60 it is, by inference, a step which need not be taken if it would have the adverse effects referred to in that provision.

[43] Giving s 59(2) a reading consistent with those provisions, it does not refer to an identification to the applicant of any document but the process by which the agency may (or may choose not to) identify, for the purposes of carrying out its functions in

relation to the application, the documents in which the information sought can be found. The use of the past tense, "having identified", rather than "identifying", supports that view, suggesting a step which the agency or Minister has already elected not to take in the course of making the decision. And the use in s 59(1)(b) of the words "…it appears…that all of the documents…are comprised of exempt information", rather than a requirement that they actually be comprised of exempt information, is also suggestive of a less stringent approach than its being necessary to examine the documents in order to determine their status. If the documents which respond to the access application need not be identified at all where they appear to be comprised of exempt information, it would seem to follow that the decision about whether they do so appear can be made in the abstract; for example, by reference to the general characteristics of documents of that kind.

[44] But in order for it to appear to the Minister or agency that all of the documents to which the application relates are comprised of exempt information, their contents must fall within one of the categories set out under sch 3 to the *Right to Information Act*. Those categories are not quite so broadly stated by reference to class as the applicant's submissions suggested. In general terms, information is made exempt within the 12 groupings contained in the 12 sections of sch 3 by reason of: the circumstances of its creation; the way it has been dealt with (as, for example, information submitted to Executive Council); or the consequences of its disclosure. Within the category of Cabinet information, some documents are made exempt by their very character; as Cabinet submissions, or briefing notes, for example. Cabinet documents are thus not a good example for the purposes of the applicant's argument, because documents falling within the category said to be relevant here, "Law enforcement or public safety information", have no such automatic status. In addition, the category in which Cabinet documents fall, like most of the categories in sch 3, contains no exclusions which may require attention to the particular documents in question. That is not the case for the "Law enforcement or public safety information" category.

[45] In the case of documents in the latter category, it must be determined not only whether their disclosure can reasonably be expected to produce one of a number of results listed in s 10(1), but also whether they consist of any of the kinds of matter or report listed in s 10(2); relevantly here, matter revealing that the scope of a law enforcement investigation has exceeded legal limits. The important distinction between the sub-sections is that while s 10(1) is concerned with the characterisation of information by the (reasonably expected) effects of its disclosure, s 10(2) focusses on what the information in question actually consists of; whether it is matter or a report with a specified content. The difficulty with taking the 59(2) approach of not identifying the documents in question is that while the enquiry as to what may reasonably be expected from disclosure lends itself to that approach, and to a conclusion drawn by reference to the nature of the documents, the second enquiry, as to whether their actual content meets a particular description, inevitably requires consideration of the documents themselves.

[46] Taking the kind of documents relevant here, activity reports, it is one thing to accept they generally have certain characteristics which enable them to be categorised as containing information the disclosure of which could reasonably be expected to prejudice the effectiveness of police investigative methods. It is quite another to say that they will also uniformly lack any indication that investigative authority has been exceeded. For example, it may well be apparent to the Queensland Police Service on

the face of an activity report, from the identities of those who have been obtaining access or the frequency of access, that legitimate investigatory bounds have been exceeded. (I would note, however, that it does not follow that every instance of unauthorised access will be evidence that a law enforcement investigation has gone beyond legal limits, as opposed to being the improper conduct of an individual.)

[47] On my view, then, an agency cannot reach the view necessary under s 59(1)(b) in relation to information which may be exempt under sch 3 s 10 without a consideration of the documents the subject of the application to ascertain whether they fall within s 10(2). (It may also be necessary to determine, under s 10(6), whether the information concerns an applicant in respect of whom an investigation has been completed, but that was not relevant here.) If the information meets any of the descriptions in s 10 (2), it is not exempt and it cannot appear to be.

[48] In sum, the inference I draw from s 59(2) is that it is permissible (but not obligatory), in considering sch 3 s 10(1) factors, to draw conclusions as to the effects of disclosure by reference to the nature of information that documents of the kind to which access is sought usually contain, without reference to the particular content of the documents in question. But although s 59(2) extends the discretion to refuse to deal with the application by enabling its exercise without any requirement to identify the relevant documents, the latter dispensation will have no practical content where a provision such as sch 3 s 10(2) makes the actual consideration of those documents a necessary earlier step, in deciding the exemption issue. However, that will not necessarily be the case for other categories of exempt information under sch 3, which may permit the forming of an opinion in relation to the documents subject to a particular application by reference to the kind of information sought, without more.

[49] The applicant's submission, made in relation to appeal ground 2(a), that activity reports are to be protected as a class of documents under sch 3 s 10, without any necessity to consider any particular document the subject of the application, must be rejected, because it disregards the obligation to consider the issues raised by sch 3 s 10(2).

[50] There is more substance to ground 3, however, because it does not follow that the Information Commissioner made that mistake. She appears to have had regard to what was sought in the application but to have reached her conclusions about the effects of disclosure by having regard to considerations generally applying to activity reports. As one of my colleagues observed in the course of argument, the finding

> "I am satisfied that revealing the extent of information in a QPRIME Activity Report, for *any individual*, whether that individual is subject to intelligence and surveillance operations or not, could reasonably be expected to prejudice [Queensland Police Service] lawful methods and procedures as a whole"[25]

is a large finding. Nonetheless, for the reasons I have given, it was not incumbent on the Information Commissioner, in considering whether the information sought fell within sch 3 s 10(1), to address the actual content of the document in which it was to be found, or for that matter, the circumstances of the first respondent in seeking it.[26] If the

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25 *Shelton and Queensland Police Service* [2017] QICmr 18 at [23].

26 That is not to say that the motives of an applicant will invariably be irrelevant. Although the Appeal Tribunal rightly dismissed the suggestion that the motivation of curiosity which the Queensland Police

Commissioner was satisfied that disclosure of the kind of information ordinarily to be found in activity reports could reasonably be expected to prejudice lawful police methods, she was entitled to take that view in relation to the information to which the first respondent's application related, to be found in the activity report concerning her. Her finding, which was made in respect of that activity report, indicates that she did.[27]

[51] The Information Commissioner began the second part of the exercise - the determination as to whether the information sought consisted of matter revealing that the scope of a law enforcement investigation had exceeded legal limits - by noting that the information generally to be found in activity reports did not reveal that any given access was unauthorised or that the scope of the law enforcement investigation had exceeded proper limits. Had she stopped there, she would not have completed the task of determining whether the information sought was exempt; but she went on to reach the same conclusion in relation to the information currently before her, which included the relevant activity report. In doing so, the Commissioner correctly emphasised the need to consider the material itself. She was entitled to make the finding of fact that it did not disclose that any law enforcement investigation had exceeded proper bounds. There was no contention on any other basis that the information was not exempt.

[52] I think, with respect, that the Commissioner's decision does exhibit this error in the sequence of the decision-making process: that she expressed satisfaction that the activity report comprised exempt information under sch 3 s 10(1)(f) of the *Right to Information Act* before going on to consider whether s 10(2) applied. The two sub-sections need to be read in conjunction. Rather, the proper approach, in my view, is to consider whether any of the factors set out in s 10(1) is applicable and then to consider whether any of the features in s 10(2) exists; because if they do, that subsection does not merely create an exception to the application of s 10(1), but renders the information non-exempt under s 10(1); so that a finding of exemption under that sub-section cannot be made. But that error in approach had no practical effect.

[53] For those reasons, while I agree with many of the principles expressed in the QCAT Appeal Tribunal decision, I do not consider that the Information Commissioner's finding amounted to the imposition of a general policy for applications for access to personal information in the QPRIME database. The Commissioner, was in my view, entitled to apply general considerations in considering whether the information sought by the first respondent's application fell within sch 3 s 10(1)(f), and there was no error of law in that approach. The appeal should be allowed, the decision of the QCAT Appeal Tribunal set aside and in its place an order made dismissing the first respondent's appeal to the Appeal Tribunal.

[54] The applicant submitted, without elaboration, that an order should be made for her costs of the application and appeal. However, she had required the Court's indulgence, in the form of the extension of time, in order to proceed, and for that purpose relied on the public advantage to be gained from a ruling. That benefit may be accepted; the case

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Service attributed to the first respondent could disentitle her to access, I would be inclined to think that police might reasonably form an expectation under sch 3 s 10(1) about the likely results of disclosure in a particular case if the applicant had a long history of being involved in organised crime, for example. But no such issue arising in this case, it is unnecessary to consider it further.

27 *ibid* at [26].

involved a novel and difficult question of construction of the *Information Privacy Act*. In the circumstances, I consider it the proper course to make no order as to costs.

Orders

[55] I would order that:

(a) The time for filing the application for leave to appeal be extended to 8 October 2019.

(b) The applicant be granted leave to appeal.

(c) The appeal be allowed.

(d) The orders of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal be set aside.

(e) The first respondent's appeal to the Appeal Tribunal of the Queensland Civil and Administrative Tribunal from the decision of the Information Commissioner be dismissed.

[56] **FRASER JA:** I agree with the reasons for judgment of Holmes CJ and the orders proposed by her Honour.

[57] **BODDICE J:** I agree with Holmes CJ.