SUPREME COURT OF QUEENSLAND

CITATION:	*Peros v Dwyer & Anor* [2014] QSC 201
PARTIES:	**JOHN PEROS** (applicant) v **MAGISTRATE DAMIEN JOHN DWYER** (first respondent) and **COMMISSIONER OF THE QUEENSLAND POLICE SERVICE** (second respondent)
FILE NO/S:	BS5710/14
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	26 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2014
JUDGE:	Justice Alan Wilson
ORDERS:	**1. Application dismissed;** **2. That Exhibit A to the affidavit of Graham Walker sworn 7 August 2014 be sealed and not opened without the leave of the court or a judge.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – EXCLUSION OF PROCEDURAL FAIRNESS – PROCEDURES PROVIDED BY STATUTE – where the applicant seeks judicial review of the decision of the first respondent to make a non-intimate forensic procedure order – where the applicant's grounds of review contend that the rules of procedural fairness have been breached by the second respondent for failing to give the applicant notice of the application under s 459 of the *Police Powers and Responsibilities Act* 2000 (Qld) – where the applicant contends that procedural fairness was further denied because the lack of notice meant that the applicant was not heard on the application – whether s 460 of the Act applies to override these requirements of natural justice

Judicial Review Act 1991 (Qld), s 20
Police Powers and Responsibilities Act 2000 (Qld), s 459, s 460, s 461

Annetts v McCann (1990) 170 CLR 596, cited
Australia Meat Holdings Pty Ltd v Douglas [2005] 2 Qd R 457, cited
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, cited
Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532, cited
Harms v Queensland Parole Board [2008] QSC 163, cited
Jarratt v Commissioner of Police (NSW) (2005) 224 CLR 44, cited
Twist v Randwick Municipal Council (1976) 136 CLR 106, cited

COUNSEL: J Fenton for the applicant
SA McLeod for the second respondent

SOLICITORS: AW Bale & Son for the applicant
Queensland Police Service Solicitor for the second respondent

[1] **Alan Wilson J:** Mr Peros has brought an application for statutory order of review under Part 3 of the *Judicial Review Act* 1991 (Qld). He seeks to challenge the decision of the first respondent, Magistrate Dwyer, to grant a non-intimate forensic procedure order on 28 May 2014 on the ground that he was denied procedural fairness.[1]

[2] The application for the order was brought by the second respondent, the Queensland Police Service, in the course of investigations into the murder of Shandee Renee Blackburn, which occurred on 9 February 2013 in Mackay.

[3] A Magistrate may only make such an order if satisfied that there are '*reasonable grounds for believing performing the forensic procedure concerned on the person may provide evidence of the commission of an indictable offence*', and must balance the public interest against the rights and liberties of the person in considering whether the order is justified.[2]

[4] The applicant does not seek review of the question whether the decision itself fell within the limits of this statutory power. Rather, the ground of procedural fairness, upon which the applicant's case hinges, requires an examination into whether the process taken to reach that decision was appropriate with regard to the rules of natural justice.

[5] The circumstances that the applicant says violate the rules of procedural fairness are, first, that the second respondent did not notify the applicant of the application itself; and, secondly, that it did not disclose to the applicant the specific nature of

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1 *Judicial Review Act* 1991 (Qld), s 20(2)(a).
2 *Police Powers and Responsibilities Act* 2000 (Qld) s 461(1)-(2).

the non-intimate forensic procedure it sought.[3] (This information is contained in Exhibit A to the affidavit of Graham Walker, sworn 7 August 2014, which has not been shown to the applicant, and which the second respondent asks to be sealed if I dismiss the application.)

[6] The applicant contends that the second respondent's failure to give notice violates the rules of procedural fairness, giving rise to that ground for judicial review.

[7] Section 459 of the *Police Powers and Responsibilities Act* 2000 (Qld) (the *PPRA*) sets out the procedural requirements for applications for forensic orders brought under Chapter 17, Part 3 of that Act.

[8] The applicant first alleges that he was entitled to be notified of the application at least seven days before it was heard by the first respondent under s 459(1) of the *PPRA*, and that the second respondent failed to give such notice. Second, the applicant contends that had he received notice in accordance with that subsection, he would have appeared, and have been entitled to be heard on the application under s 459(3) of the *PPRA*.

[9] If these claims are made out, the applicant seeks disclosure of the contents of the sealed envelope detailing the specific nature of the order.

[10] Although s 459 usually applies to the type of proceeding that is the subject of this application for review, that section is subject to certain limitations upon the obligation to give a notice, set out in s 460.[4] That section relevantly provides:

> '**459 Notice of application must ordinarily be given**
>
> (1) This section applies if the magistrate is satisfied—
>
> (a) a police officer has made a reasonable attempt to locate the person to whom the application relates and was unable to locate the person; or
>
> (b) the person is likely to abscond if given notice of the application; or
>
> (c) evidence that may be obtained by performing the forensic procedure to which the application relates on the person is likely to be lost or destroyed if the person is given notice of the application; or
>
> (d) giving notice of the application to the person may jeopardise the investigation of any indictable offence the person is suspected of having committed because—
>
> (i) evidence relating to the offence may be concealed, fabricated or destroyed; or
>
> (ii) a witness may be intimidated; or
>
> (iii) an accomplice or accessory of the person may take steps to avoid apprehension.
>
> (2) The person is not entitled to be given notice of the application under section 459 or to be heard on the application'.

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[3] The potential procedures are outlined in the definition of 'non-intimate forensic procedure' in Schedule 6 of the *Police Powers and Responsibilities Act* 2000 (Qld).

[4] Ibid, s 459(8).

[11] The applicant's principal argument was that s 460(1) does not operate on the facts to exclude the requirements of procedural fairness. It was submitted that subsections (a), (b) and (d)(ii)-(iii) do not apply because the applicant is incarcerated, and was at the relevant time of making the application, meaning that the risk of evasion or interference with relevant witnesses or accomplices were significantly mitigated.

[12] The applicant argued that the more contentious issue is whether there is a possibility that he may have sought to destroy or otherwise tamper with the physical evidence that was the subject of the order, enlivening subsections (c) or (d)(i).

[13] The applicant laboured under a marked disadvantage: he cannot speak to these matters in any depth because the specific nature of the order was not and has not been disclosed to him. Unsurprisingly in those circumstances the submissions made on his behalf are speculative. His counsel submitted that it is 'highly unlikely' that the applicant would destroy by cutting off any permanent body part which, for example, the police may have sought to photograph; and, that if the second respondent sought a sample of, for instance, the applicant's hair or nails, destruction is not an issue as these types of samples cannot be permanently lost nor destroyed.

[14] There is no evidence before me from which I can form a comprehensive view as to the likelihood of either of these risks eventuating. I must rely on the opinion that had been formed by the second respondent, in bringing the application, that were the applicant given notice then '*an event described within s 460(1) would be likely to occur*'.[5]

[15] That opinion is outside the ambit of judicial review: although it most likely contributed to the reasoning process of the Magistrate in deciding that there were '*reasonable grounds*' for the order, and that it was justified in the circumstances for him to make a s 461 order, it is the order itself which is the final, determinative and therefore reviewable decision.[6]

[16] It is not, then, my role to decide the correctness or otherwise of the respondents' view that s 460(1) was enlivened on the facts, and I cannot carry out the applicant's request for me to '*closely examine any attempt by the second respondent to justify why natural justice was denied*'. The sole question is whether s 460(2) operates in effect to exclude the requirements of procedural fairness.

[17] The High Court has been cautious in approaching legislation that seeks to curtail requirements of procedural fairness in administrative decision-making. The Court has stressed that a legislative intention to exclude or modify the rules of procedural fairness must be '*unambiguously clear*',[7] and be expressed by '*plain words of necessary intendment*'.[8]

[18] The wording in s 460(2) is unambiguous, leaving no doubt that Parliament intended to exclude the requirement of notice and the entitlement to be heard in factual

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5 Affidavit of Graham Walker, sworn 7 August 2014, at [5]-[6].

6 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 335-36 per Mason CJ.

7 *Twist v Randwick Municipal Council* (1976) 136 CLR 106, 110 per Barwick CJ, applied more recently by the Queensland Court of Appeal in *Australia Meat Holdings Pty Ltd v Douglas* [2005] 2 Qd R 457, 461 per McPherson JA.

8 *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532, 595-96 per Crennan J, quoting *Annetts v McCann* (1990) 170 CLR 596, 598 per Mason CJ, Deane and McHugh JJ and *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 56 per Gleeson CJ.

situations that the decision-maker is satisfied are covered by subsection (1). I am of the view that the *PPRA* clearly and adequately expresses a legislative intention for procedural fairness requirements to be overridden in these circumstances, which the respondents have categorised as giving rise to the concerns in s 460(1).

[19] The applicant was therefore not, at the relevant time, entitled to be notified of the grounds for applying for the forensic procedure order, which the second respondent would otherwise been required to disclose.[9] 'Grounds' may have extended to disclosing the specific content of the order, in which case it may have been justified in circumstances not falling under s 460(1) to allow the applicant access to Exhibit A. However, my conclusion that s 460 does apply means that it is not necessary for me to decide the scope of that aspect of notice under s 459, or whether a public interest privilege claim would successfully prevent disclosure to the applicant in any event.[10]

[20] For these reasons, the applicant was not entitled to notice or to be heard, and I dismiss the application. I also order that Exhibit A to the affidavit of Graham Walker, sworn 7 August 2014, be sealed and not opened without the leave of the court or a judge. I will hear from the parties on costs.

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9 *Police Powers and Responsibilities Act* 2000 (Qld), s 459(2)(a).

10 The applicant noted in oral submissions that this privilege was successfully made out in *Harms v Queensland Parole Board* [2008] QSC 163.