QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Marigliano v Queensland Police Service* [2016] QCAT 110
PARTIES:	Joseph Marigliano (Applicant) v Queensland Police Service (Respondent)
APPLICATION NUMBER:	OCL050-15
MATTER TYPE:	Other civil dispute matters
HEARING DATE:	12 February 2016
HEARD AT:	Cairns
DECISION OF:	**Member Krebs**
DELIVERED ON:	10 May 2016
DELIVERED AT:	Cairns
ORDERS MADE:	**1. The complaint that the Queensland Police Service breached Information Privacy Principals 1, 2 and 3 is not substantiated and is dismissed.**
CATCHWORDS:	Information Privacy Act – where police officers entered private property to serve documents – use of body worn camera to record conversation of the applicant without his knowledge – whether police entry onto property constituted trespass *Information Privacy Act* 2009 (Qld) s 3, s 27, s 29, Schedule 3 *Police Powers and Responsibilities Act* 2000 (Qld), s 19, s 20, s 382, s 388, s 325(6), s 389, s 390, s 470, s 486 *Invasion of Privacy Act* 1971 (Qld), s 43(1), s 43(2)(a) *Summary Offences Act* 2005 (Qld), s 6 *Halliday v Nevill* (1984) 155 CLR 1 *Victoria Park Racing and Recreation Grounds Ltd v Taylor* (1936) 58 CLR 479

APPEARANCES:

APPLICANT:	In person – self represented
RESPONDENT:	Mr Michael Nicolson of counsel instructed by Mr Ian Fraser of the Queensland Police Service

REASONS FOR DECISION

[1] This is a matter referred to the Tribunal under the *Information Privacy Act* 2009 (Qld).

[2] The Applicant, Mr Joseph Marigliano has brought this action against the Queensland Police Service ('QPS') for what he calls an invasion of his privacy by Senior Constable Anthony Cooney on 3 December 2014. This officer along with Senior Constable Fahey attended Mr Marigliano's home to serve official documents, to wit a Notice to Appear under section 382 of the *Police Powers and Responsibilities Act* 2000 (Qld) and an identifying particulars notice under section 470 under the *Police Powers and Responsibilities Act* 2000 (Qld).

[3] Senior Constable Cooney at the time was wearing a police issue body worn video device, which he activated before getting out of the police vehicle to record the exchange with the Applicant. Senior Constable Cooney knocked on the front door of the house, which was answered by the Applicant. Senior Constable Cooney stated the reason for the visit and in due course served the two notices on the Applicant and explained the process involved and then left the property.

[4] The Applicant said that he did not know he was being video recorded at the time and nor was he informed by Senior Constable Cooney of this fact. The Applicant said he only became aware of the video recording when he received the brief of evidence at court on 24 February 2015.

[5] The Applicant asserts that in the circumstances the actions of Senior Constable Cooney on 3 December 2014 amount to trespass and breaches of the *Information Privacy Act* 2009 (Qld) ('IPA') and is seeking the Tribunal to make the following orders:

1. An apology from the QPS acknowledging the breach of privacy.
2. A published notification in at least two Brisbane newspapers for a week that video/Audio surveillance without permission of owner/occupier on private property is a direct violation of the Information Privacy Principles.
3. Compensation of $5,805.00 for out of pocket expenses and a further amount of $25,000.00 for psychological damage, which makes a total of $30,805.00.

[6] The QPS assert that Senior Constable Cooney was acting lawfully in the execution of his duty when he attended the Applicants home address to serve the documents and that the QPS as a law enforcement agency is exempt from compliance with specific Information Privacy Principals ('IPPs') which is the basis of the Applicants claim.

[7] The QPS submit that Senior Constable Cooney did not breach the IPA and that the application should be dismissed.

The evidence

[8] The Tribunal heard evidence from the Applicant and from Senior Constable Cooney. The video recording was played at the hearing and tendered into evidence along with the affidavit of Senior Constable Cooney and photographs of the body worn video device.

The Tribunal finds the following facts:

[9] On 3 December 2014 at 6:53pm, Senior Constable Cooney and Senior Constable Fahey drove in a police vehicle onto the property of the Applicant at 51 Gadgerra Road, Lake Barrine. To access the residence on the property they had to drive through an open gate and some 150 metres to the front of the residence. Senior Constable Cooney activated his body worn video device, alighted from the vehicle, and proceeded to the front door while Senior Constable Fahey remained in the vehicle.

[10] Senior Constable Cooney knocked on the door of the residence, which was answered by the Applicant. There was a conversation between the two at the front of the residence and Senior Constable Cooney served on the Applicant the Notice to Appear at the Atherton Magistrates court and the identifying particulars notice and explained what they were about. The video of this conversation and exchange, which is about 10 minutes in length, was played at the hearing and tendered as evidence without objection. Both parties accept that it is an accurate and correct depiction of what occurred that day.

[11] The tribunal finds that the Applicant did not know he was being recorded at the time and that Senior Constable Cooney did not inform him that he was being recorded.

Background:

[12] The attendance by the Police at the Applicants property came about due to an incident involving the Applicant at the Telstra shop in the Tableland Shopping Centre on 17 June 2014.

[13] The facts of the incident are not relevant to these proceedings, but suffice to say the Applicant was involved in an argument with staff in the Telstra shop, which involved the attendance of the police. The Applicant was issued an infringement notice on the spot for $113.00 for the offence of Public Nuisance under the *Summary Offences Act* 2005 (Qld) for allegedly using offensive language.

[14] The infringement notice issued to the Applicant was of the type used to deal with traffic offences, and had the Applicant paid the $113.00 penalty then that would have been the end of the matter. However, the Applicant

exercised his right to take the matter to court and filled in the court election notice on the back of the infringement notice and sent it in. This in turn led to the police attending his property on 3 December 2014 to serve the Notice to appear at court and the notice to provide identifying particulars.

The onus of proof:

[15] The onus of proof is on the applicant to prove the breach of the IPA and that the applicable test is the balance of probabilities.

The law and legislation:

[16] This is a matter referred to this Tribunal under the IPA. The IPA provides for the fair collection and handling in the public sector of personal information. This is achieved by requiring public service agencies to comply with the information privacy principles (IPPs), which are set out in Schedule 1 of the IPA when dealing with an individual's personal information. However, certain exemptions apply in the case of law enforcement agencies such as the QPS of which will be referred to later.

[17] The IPA makes provisions for an individual to make a privacy complaint to the Information Commissioner regarding the use of their personal information.

[18] The privacy complaint maybe referred to QCAT to hear and determine if it is not resolved through mediation and the complainant requests the referral.

[19] Once referred, QCAT exercises its original jurisdiction to hear and decide the complaint.

[20] IPA section 178 sets out the orders that QCAT can make which includes the following:

1. An order that the complaint (or part thereof) has been substantiated together with certain consequential orders including payment of compensation up to $100,000.00
2. An order that the complaint has been substantiated but that no further action will be taken.
3. An order that the complaint (Or part thereof) has not been substantiated together with an order that the complaint or part is dismissed.

The entry onto the Applicant's property:

[21] The Applicant asserts that the entry of the police on 3 December 2014 onto his property is trespass and unlawful. Coupled with the recording of his conversation without his consent he states that this is in breach of IPP 1, which states amongst other things that an agency must not collect personal information in a way that is unfair or unlawful.

[22] Regarding the entry onto what is termed private property, there is at common law what is termed an '*implied licence*' at law that members of the public including the police, can enter a property for the purpose of speaking with the occupier of a house. A common example of this would

be door to door salespeople, kids selling raffle tickets, or even a stranger asking for directions.

[23] In *Halliday v Nevill* (1984) 155 CLR 1, the majority held:

> While the question whether an occupier of land has granted a licence to another to enter upon it is essentially a question of fact, there are circumstances in which such a licence will as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or was revoked. The most common instance if such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban dwelling house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with the entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorised, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the entrance of the dwelling for the purpose of lawful communication with, or delivery to any person in the house.

[24] In addition to the common law, section 19 of the *Police Powers and Responsibilities Act* 2000 (Qld) provides a general power for police officers performing their duties to enter premises to make enquiries, investigations or serve documents and section 20 provides for a reasonable time for a police officer to remain on the premises.

[25] The Tribunal accepts that the police were on the Applicants property in lawful execution of their duty to serve on the Applicant the Notice to appear and the notice to provide identifying particulars. Senior Constable Cooney in his affidavit and in evidence before the Tribunal stated that he decided to record the service on the Applicant in case he decided to challenge the service later. A successful challenge would see the notice dismissed.

[26] The Notice to Appear pursuant to section 382(3) of the *Police Powers and Responsibilities Act* 2000 (Qld) had to be served on the Applicant personally. Section 390 of the Act provides the power to the Court to strike out the notice if service has not been effected or if there are any doubts.

[27] The Applicant in his evidence and submissions, raised the point that he had been originally issued with a Traffic Infringement Notice for the offence of Public Nuisance, and as such, service could have been effected by post as per section 382(4) of the *Police Powers and Responsibilities Act* 2000 (Qld) without the need for the police to come onto his property to serve him.

[28] Despite the use of a Traffic Infringement notice for the alleged offence in the first instance, the offence of Public Nuisance under section 6 of the *Summary Offences Act* 2005 (Qld) is not a traffic matter in which section 382(4) would apply, hence the Applicant had to be served personally with the notice.

[29] The Tribunal finds that the Police Officers were in lawful execution of their duty when they entered the property of the Applicant, were not trespassers, and hence were not acting unlawfully.

The use of the body worn video device by Senior Constable Cooney:

[30] The Tribunal has found that Senior Constable Cooney video recorded the discussion with the Applicant on 3 December 2014. The Tribunal also found that this was done without the knowledge and consent of the Applicant. The Tribunal accepts that the first time the Applicant became aware of the recording is when he was served with the brief of evidence at court.

[31] The body worn video device used by Senior Constable Cooney is a listening device as defined in the *Invasion of Privacy Act* 1971 (Qld). Even though this Act prohibits the recording of private conversations, this does not apply where the person using the device is a party to the conversation as per Section 43(2)(a). Since Senior Constable Cooney was a party to the conversation which was recorded, his actions did not contravene the Act.

[32] The use of the optical component of the Body Worn Video Device is covered in section 325(6) of the *Police Powers and Responsibilities Act* 2000 (Qld) which provides for its use in a place where the presence of the police officer is not an offence. Since the presence of Senior Constable Cooney at the Applicant's residence was not unlawful the use of the camera to record images was lawful.

[33] The Respondent submitted that the amendment of the Police Powers and Responsibilities Act by the insertion of Section 609A (Use of Body worn camera) which came into effect in January 2016 now puts beyond doubt the lawfulness of Police Officers to use body worn cameras in execution of their duty. However for the purposes of this matter, the Tribunal will apply the law as in force on 3 December 2014.

The IPA and law enforcement agencies:

[34] The IPA under section 27 requires agencies to comply with the Information Privacy Principles, which are set out in Schedule 3 of the IPA.

[35] Both the Applicant and Respondent agree that the QPS is an agency for this purpose and that the video recording taken on the 3 December 2014 at the Applicant's residence is a collection of personal information for the purposes of IPP 1 and the Tribunal is satisfied that this is the case.

[36] The Applicant submits to the Tribunal that the actions of the Police, most notably Senior Constable Cooney constitute a breach of IPP 1,2 and 3.

Information Privacy Principal 1

[37] Information Privacy Principal 1 is set out as follows:

> **IPP 1—Collection of personal information (lawful and fair)**
>
> (1) An agency must not collect personal information for inclusion in a document or generally available publication unless—
>
> (a) the information is collected for a lawful purpose directly related to a function or activity of the agency; and
>
> (b) the collection of the information is necessary to fulfil the purpose or is directly related to fulfilling the purpose.

> (2) An agency must not collect personal information in a way that is unfair or unlawful.

[38] The question to be answered is, was the collection of personal information via the use of the body worn video device by Senior Constable Cooney when he attended the Applicants address unfair or unlawful?

Was the collection of the information unfair?

[39] The IPA does not give any definition of the term '*unfair*' for the purposes of the Act. However guidelines issued by the Queensland Privacy Commissioner on fair collection of information state:

> Information may be collected unfairly where it is obtained by trickery, misrepresentation, deception or under duress. It may also be seen as being unfairly obtained where it was collected in circumstances in which the individual would not have ordinarily given up their information had they known they had a choice not to provide it.

[40] The Applicant in his evidence and submissions raises the issue that he was not told about the recording of his conversation and only became aware of it some three months later. On this basis, he considers it deceptive. He also raises the motives of Senior Constable Cooney, suggesting that there was a possible attempt at entrapment.

[41] The video recording itself shows that Senior Constable Cooney after introducing himself, focuses the discussion purely on the notice to appear and the notice to provide identifying particulars in the way of explaining to the Applicant what they mean and what he had to do. This discussion took place outside the residence. There was no discussion on any other topic and no other personal information was sought or obtained from the applicant.

[42] In the circumstances, the Tribunal is satisfied that the collection of the information was not unfair.

Was the collection of the information unlawful?

[43] The Tribunal is satisfied that Senior Constable Cooney was acting in execution of his duty when he entered the Applicants property on 3 December 2014 to personally serve on the Applicant the Notice to Appear and the Notice to provide identifying particulars. The Tribunal is satisfied that the *Police Powers and Responsibility Act* 2000 (Qld) provide for personal service of the notice to appear and that Senior Constable Cooney operated his body worn video device to put beyond doubt that the Applicant was the person served with this document so it could not be struck out for want of service at court.

[44] The fact that the recording was only for the purpose to establish beyond doubt that the Applicant was served with the Notice to Appear in accordance with the *Police Powers and Responsibility Act* 2000 (Qld) section 382(3) and for no other purpose, the Tribunal finds that there has been no breach of the IPA.

[45] The Tribunal is satisfied that the collection of the information was lawful and fair in the circumstances and that the Applicant has not proved that the Respondent had breached IPP1.

Breach of IPP 2 and 3:

[46] The Applicant submits that the actions of Senior Constable Cooney constitute a breach of IPP 2 and 3.

[47] The Respondent submits that it is excused from compliance with IPP 2 and 3 by operation of Section 29 of the IPA.

Section 29. Special provision for law enforcement agencies

[48] Section 29 is set out as follows:

> **Special provision for law enforcement agencies**
>
> (1) A law enforcement agency is not subject to IPP 2, 3, 9, 10 or 11, but only if the law enforcement agency is satisfied on reasonable grounds that noncompliance with the IPP is necessary for—
>
> (a) if the enforcement agency is the Queensland Police Service—the performance of its activities related to the enforcement of laws;…

[49] The Applicant is not clear in his evidence and submissions on how IPP 2 and 3 had been breached apart from stating the fact that he did not know that his information was being collected at the time.

[50] However, the Tribunal finds that pursuant to Section 29, the Respondent is excused from compliance with IPP 2 and 3 and therefore the Applicant's case fails on this ground.

Summary

[51] In the course of the hearing, the Applicant Mr Marigliano raised a number of incidents related to the matter under consideration.

[52] One matter he raised in which he somewhat felt aggrieved was the actions of the police in serving him with the notice to provide identifying particulars. This notice under section 470 of the *Police Powers and Responsibility Act* 2000 (Qld) compelled him to go to the Police Station so that he could be fingerprinted, photographed and have his DNA taken. The Applicant makes the point that had he just paid the $113.00 infringement notice, none of this would have happened. He asserts that this was done to punish him for pleading not guilty in the first instance. The Applicant raised the issue with Sergeant Mark Gorton of Atherton Police who according to the Applicant, seemed to agree with him that the notice to appear should have been sent by mail and that he should not have been compelled to provide his identifying particulars. The Applicant served on Sergeant Gorton a notice to appear at the hearing via telephone to give this evidence before the Tribunal. However, the Applicant forgot to mention he had a witness to call at the end of his case and no evidence from Sergeant Gorton was heard. Regardless, having heard an outline of what was proposed to be lead from Sergeant Gorton in evidence, it would not have changed the decision of this Tribunal.

[53] The Applicant also raised his concerns about this and other aspects of his case with the QPS Ethical Standards Command, the State Attorney General and his local member of Parliament. On 20 October 2015, a

Justice Examination Order under the Mental Health Act was made and the Applicant was taken from his home residence against his will and detained as an involuntary patient at Cairns hospital. He was subsequently released with no psychiatric diagnosis being made on 26 October 2015. The Applicant asserts that this is all linked to complaints he had made about the breach of his privacy.

[54] The Tribunal accepts that the Applicant has been subjected to a lengthy and distressing ordeal due to these circumstances, however in terms of the action brought by the Applicant, the Tribunal can only deal with the matter before it under the IPA. As stated correctly by the Respondent, there is no common law right to privacy as held *in Victoria Park Racing and Recreation Grounds Ltd v Taylor (1936) 58 CLR 479* and any action must be based on the appropriate legislation.

[55] The Tribunal finds that the Applicant has not proved to the requisite standard that the QPS has breached the IPP 1,2 and 3 and this matter is dismissed.