

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Cutbush v Scenic Rim Regional Council* [2018] QCAT 139

PARTIES: **PAUL CUTBUSH**
(applicant)
v
SCENIC RIM REGIONAL COUNCIL
(respondent)

APPLICATION NO/S: GAR325-17

MATTER TYPE: General administrative review matters

DELIVERED ON: 11 May 2018

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Deane

ORDERS:

1. **Until further or other order, Scenic Rim Regional Council is permitted to redact personal information, in the material the Scenic Rim Regional Council must provide to the Tribunal and Mr Cutbush, comprising the residential address, date of birth, fixed and mobile telephone numbers, email addresses and employment information of:**
 - (a) **Persons who are witnesses, but are not Scenic Rim Regional Council employees or expert witnesses;**
 - (b) **Persons who are Scenic Rim Regional Council support staff; and**
 - (c) **Persons who are support staff to the Scenic Rim Regional Council's legal representatives, King & Company Solicitors.**
2. **Until further or other order, the Tribunal prohibits the publication of the contents of a document or other thing produced to the Tribunal and evidence given before the Tribunal that could identify the personal information identified in order 1:**
 - (a) **other than to Paul Cutbush's legal representatives of employment information of persons who are witnesses, but are not Scenic**

Rim Regional Council employees or expert witnesses; and

- (b) save as is necessary for the parties to engage in and progress these proceedings.**
- 3. In respect of any documents filed in the Tribunal after the date of this order the parties must, until further or other order, file redacted versions which removes any material subject to orders 1 and 2 above.**
 - 4. Until further order or other order, pending final determination of these proceedings the Tribunal prohibits the publication, save as is necessary for the parties to engage in and progress these proceedings, of:**
 - (a) all documents in the Scenic Rim Regional Council's possession or control that may be relevant to the Tribunal's review and statements of evidence of its witnesses that are produced to the Tribunal and served on Mr Cutbush;**
 - (b) all things in the Scenic Rim Regional Council's possession or control that may be relevant to the Tribunal's review that are produced to the Tribunal and served on Mr Cutbush, including photographs and video footage;**
 - (c) all evidence given before the Tribunal; and**
 - (d) all information which enables a person who has appeared before the Tribunal or is affected by the proceedings, including Council officers and others persons who provided or prepared documents referred to above, to be identified.**
 - 5. The time for compliance with Direction 5 of the Directions given on 12 December 2017 as to the filing and giving of documents by the Scenic Rim Regional Council pursuant to section 21(2) of the *Queensland Civil and Administrative Tribunal Act 2009* is extended to 4:00pm on 21 May 2018.**
 - 6. The time for compliance with Direction 6 of the Directions given on 12 December 2017 as to the filing and giving of statements of evidence by Paul Cutbush is extended to 4 June 2018.**

CATCHWORDS:

ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where application

for permission to redact personal information and for orders prohibiting publication of personal information and material or evidence – whether non-publication orders necessary to avoid interference with the proper administration of justice or whether non-publication orders necessary in the interests of justice – where communications are likely to continue to be made to target and pressure potential witnesses

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3, s 20, s 24, s 28, s 66, s 230

Cutbush v Team Maree Property Services (No. 3) [2010] QCATA 89

Gemellaro v Burdekin Shire Council [2011] QCAT 496
Queensland College of Teachers v Klemm [2011] QCAT 207

REPRESENTATION:

Applicant: B McMillan, instructed by Anderson Fredericks Turner

Respondent: J Dillon, instructed by King & Company

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

REASONS FOR DECISION

- [1] Mr Cutbush seeks review of decisions of Scenic Rim Regional Council ('the Council'). The decisions, under the *Animal Management (Cats and Dogs) Act 2008* (Qld) ('the Act'), were making a regulated dog declaration declaring Mr Cutbush's dog a dangerous dog and making a destruction order for the dog.
- [2] The Council have applied for orders permitting redaction of certain personal information relating to support staff or persons who are not Council employees or expert witnesses and for orders prohibiting publication of that personal information and prohibiting publication of material or evidence until the proceeding has been determined.¹
- [3] Prior to the Council refining the orders sought, Mr Cutbush indicated that he consented to the Tribunal making a direction permitting redaction of personal information, comprising the residential address, telephone number and email address of any council employee or officer or other person upon whom the Council proposes

¹ Amended Application for Miscellaneous Matters filed 11 April, 2018.

to rely in support of its decision, contained in the Council's material to be filed and served in these proceedings.² He otherwise opposes the application.

- [4] The Council have filed a redacted version of material together with an original version in a sealed envelope.³
- [5] The objects of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') include to deal with matters in a way that is accessible, fair, just, economical and quick and to enhance the openness and accountability of public administration.⁴
- [6] On a review, the Tribunal has power to confirm or amend the Council's decision, set aside the decision and substitute its own or set aside the decision and return it to the Council for reconsideration.⁵ The Tribunal's function is to reach the correct and preferable decision after a fresh hearing on the merits.⁶
- [7] The Tribunal must act fairly and according to the substantial merits of the case.⁷ The Tribunal has previously observed that:⁸

It is part of the requirement of a fair hearing that parties have access to the evidence that is being relied on in a proceeding. It is usual that the identity of witnesses is known by the parties. The identity of a witness can be an essential factor to a party determining the cogency of the evidence that the witness will give. The identity of a witness can also be essential to what evidence is called in response. There are of course circumstances when access to the evidence can be restricted without infringing the fair hearing rule. However, those circumstances must be clearly made out in any given case.

- [8] The Tribunal may make an order restricting access to evidence by prohibiting the publication of the contents of a document or other thing produced to the Tribunal, evidence given before the tribunal or information that may enable a person who has appeared before the tribunal or is affected by a proceeding to be identified.⁹
- [9] The orders sought are broad. The Council submits that the preconditions for the making of such orders are met and that such orders are necessary:
- (a) to avoid interfering with the proper administration of justice;¹⁰
 - (b) to avoid endangering the physical or mental health or safety of a person;¹¹ and

² Submissions filed 9 February, 2018. An email from Anderson Fredericks Turner dated 18 April, 2018 advised that Mr Cutbush relied upon the February submissions in response to the Amended Application.

³ Direction dated 29 March, 2018 by A/Senior Member Browne.

⁴ QCAT Act, s 3(b), s 3(e).

⁵ QCAT Act, s 24.

⁶ Ibid s 20.

⁷ Ibid s 28(2).

⁸ *Gemellaro v Burdekin Shire Council* [2011] QCAT 496, [6]–[7].

⁹ QCAT Act, s 66(1).

¹⁰ Ibid s 66(2)(a).

¹¹ Ibid s 66(2)(b).

(c) in the interests of justice.¹²

[10] The Tribunal has previously observed that:¹³

Deciding an application of this nature requires a balancing of public and private interests.

[11] The phrase ‘in the interests of justice’ confers a broad discretionary power.¹⁴ The then President, His Honour Wilson J stated:¹⁵

Open justice requires that nothing should be done to discourage the fair and accurate reporting of what takes place in the courtroom, unless there is some material before the court to show that it is reasonably necessary to prohibit publication. The onus is on the applicant to show special circumstances justifying the making of the order.

[12] The Council filed an affidavit, which provides evidence of various communications including on various public social media platforms by Mr Cutbush, his wife and various supporters. The Council contend that the evidence demonstrates that such activities and publications have been used to ‘embarrass (sic.), harass and intimidate witnesses and potential witnesses in the proceeding.’ Mr Cutbush has not filed any evidence which disputes the contents of the affidavit.

[13] The Council contends that the orders are necessary to prevent Mr Cutbush from engaging in similar conduct upon receiving information and evidence during the proceeding. A closed hearing is not sought. The Council contends that the broad non-publication orders are necessary to avoid interference with the proper administration of justice and are required in the interests of justice including:

(a) preventing unfair and inaccurate reporting relating to the proceeding and witnesses involved in the proceeding, in circumstance where the material has the capacity to adversely affect or influence potential witnesses and their willingness to give evidence, and the proceeding generally; and

(b) otherwise ensuring a fair hearing of this matter can be conducted.

[14] Mr Cutbush opposes the redaction of information relating to the person’s employer and place of employment of any witness or person upon whom the Council proposes to rely on the basis that this information is likely to be relevant to the matters in issue, provides essential context to the evidence given by or related to the proposed witness, the weight the evidence should be given and in allowing Mr Cutbush to determine whether to challenge the evidence.

[15] The evidence is that Mr Cutbush has written to a potential witness’ club, place of employment and regulatory body making serious allegations and has encouraged supporters to write to a potential witness.

[16] Objectively viewed, the correspondence, circulating flyers and the social media publications make public personal information about individuals associated with the

¹² Ibid s 66(2)(e).

¹³ *Queensland College of Teachers v Klemm* [2011] QCAT 2017, [14].

¹⁴ *Cutbush v Team Maree Property Services (No. 3)* [2010] QCATA 89, [7].

¹⁵ Ibid [9].

decisions under review, make derogatory comments about them and severely criticise them, including by making unparticularised allegations of corruption.

- [17] The social media publications in evidence before me, including by Mr Cutbush's wife and supporters demonstrate a propensity to vilify anyone who disagrees with Mr Cutbush in relation to the decisions under review.
- [18] The Council officer, who gave evidence in support of this application, contends that the actions constitute bullying, intimidation and harassment. His evidence is that:
- (a) he believes that the acts have negatively impacted on the mental health of the Council employees involved;
 - (b) Council has sought the services of a psychologist to assist employees dealing with the impacts of the conduct;
 - (c) he is very concerned about the negative impacts on the mental health of Council employees if Mr Cutbush and others continue to publish material regarding the proceeding;
 - (d) he is concerned about the safety of Council employees, particularly those at the small animal facility;
 - (e) the police have been requested to increase their presence around the small animal facility;
 - (f) he is concerned that potential witnesses will decline to give evidence or assist in the proceeding; and
 - (g) a veterinarian, who has been the subject of Mr Cutbush's communications has indicated he does not wish to provide further reports in this matter as a result of the communications.
- [19] I note that any increase in police presence is likely to be periodic as distinct from continuous.
- [20] Mr Cutbush contends that the Council officer is not qualified to give an opinion as to the affect of the conduct on the mental health of any other person and that such evidence should be disregarded. I accept that evidence from the psychologist retained by Council would carry more weight.
- [21] The Tribunal is, however, not bound by the strict rules of evidence.¹⁶ The Council officer is a senior manager. According to the 2016-2017 Annual Report he holds an Executive management role with the Council and has responsibility for governance, which is described as providing 'the framework to ensure that Council complies with its legislative requirements'.¹⁷ Public authorities and their officers have responsibilities for both the physical and mental health and well being of staff.¹⁸
- [22] I accept that, more likely than not, the nature and extent of the communications will have had an adverse affect on the mental health of those named and that continuing

¹⁶ QCAT Act, s 28(3).

¹⁷ Scenic Rim Regional Council, *2016-17 Annual Report*, 12 – 14, 81 <www.scenicrim.qld.gov.au>

¹⁸ *Work Health and Safety Act 2011* (Qld), Division 6.

publications would, more likely than not, have adverse affects on the mental health of those targeted.

- [23] It is not difficult to draw the inference that more likely than not:
- (a) the communications have been designed to target and pressure the potential witnesses, the subject of the communications; and
 - (b) unless prohibited, communications of a similar nature and extent are likely to continue to be made to target and pressure potential witnesses and that information obtained through these proceedings may be used to do so.
- [24] Any document or thing filed by the parties in compliance with the Tribunal's directions form part of the record for the proceeding.¹⁹ A non-party may inspect and obtain a copy of any document or thing in the record unless inspection, copying and publication has been prohibited under a non-publication order or under an enabling Act.²⁰ QCAT Practice Direction No 6 of 2011 encourages parties to review proceedings to consider whether any material to be filed should be subject to a non-publication order.
- [25] His Honour Justice Applegarth recently published a document which stated in relation to unacceptable behaviour towards witnesses by the media:²¹
- The justice system depends upon witnesses and parties being able to attend court and give evidence without undue influence or pressure. This includes protection from vilification, in any form of communication, which may prejudice a pending proceeding, as well as protection from physical obstruction. Witnesses play a central role in the justice system. Their testimony enables the guilty to be convicted and the innocent acquitted, and for courts to reach correct decisions.
- [26] I am satisfied that special circumstances have been made out and that it is an appropriate case to avoid interference with the proper administration of justice, and to exercise my discretion, in the interests of justice, to protect witnesses and others affected by the proceedings from potential vilification, and to allow a fair hearing of the matters in dispute.
- [27] I accept that employment information of witnesses may be relevant as submitted by Mr Cutbush and permit limited publication of that information only to Mr Cutbush's legal representatives.
- [28] It is appropriate to make directions for the further conduct of this matter.

¹⁹ QCAT Act, s 230(1).

²⁰ Ibid s 230(3).

²¹ Applegarth J, *The treatment of witnesses, parties and lawyers* (6 November 2017) Queensland Courts <www.courts.qld.gov.au/-data/assets/pdf/>