

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *CH v Queensland Police Service* [2019] QCAT 297

PARTIES: **CH**
(applicant)

v

QUEENSLAND POLICE SERVICE
(respondent)

APPLICATION NO/S: OCL049-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 2 October 2019

HEARING DATE: 6 June 2019

HEARD AT: Brisbane

DECISION OF: Member Richard Oliver

ORDERS:

- 1. The Applicant's complaint is substantiated.**
- 2. The Respondent must provide a written apology to the applicant for the interference with his privacy.**
- 3. The Respondent must pay to the applicant the sum of \$17,806.75 within 28 days of the receipt of this decision.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – *Information Privacy Act 2009* (Qld) – where the applicant was a member of the Australian Defence Force Reserves – where the applicant was arrested in the Brisbane CBD and transported to the City Watch house – where the officer in charge of the City Watch house notified the duty officer of the Australian Defence Force at Amberley Air Force base of the applicant's arrest – where certain information given to the duty officer – where further information given to a member of the Australian Defence Force the day following the applicant's arrest – whether the provision of information by the officer in charge of the City Watch house to the duty officer of the Australian Defence Force breached the applicant's privacy – whether the provision of further information to a member of the Australian Defence Force the day after the arrest of the applicant breached the applicant's privacy – whether the Respondent's Operation Procedure Manual applied to the

release of the applicant's personal information – whether the release of the applicant's personal information was authorised by the Operational Procedure Manual – whether the release of the applicant's personal information was s 29 of the *Information Privacy Act 2009* (Qld)

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 102

Information Privacy Act 2009 (Qld), s 27, s 176

Statutory Instruments Act 1992 (Qld), s 17

Police Service Administration Act 1990 (Qld)

Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld)

**APPEARANCES &
REPRESENTATION:**

Applicant: T Schmitt of counsel by direct brief

Respondent: S McLeod QC of counsel instructed by Queensland Police Service Legal Unit

REASONS FOR DECISION

- [1] The applicant was a member of the Australian Defence Force Reserves when he was arrested by police on the evening of 25 April 2017 at a hotel in the Brisbane CBD. He was transported to the Brisbane Watch House where he was asked for identification. An identification card was produced which revealed that he held an Australian Defence Force ('ADF') Reserves.
- [2] As a consequence of that information coming to the attention of the officer in charge of the Brisbane Watch House, the duty officer of the ADF was contacted and informed of the applicant's arrest. The following day the arresting officer, Constable Smith was contacted by Wing Commander Deveney and provided him with some further information concerning the applicant.
- [3] As a consequence of the information about the applicant's circumstances being passed from the Queensland Police Service ('QPS') to the ADF on the evening of the arrest, and the following day via Constable Smith, the applicant alleges that the QPS breached its obligations under the *Information Privacy Act 2009* (Qld) ('IPA') by disclosing his personal information to the ADF.
- [4] The respondent contends that any disclosure of the applicant's personal information was authorised under the Operational Procedural Manual ('OPM') applying to police officers in service and therefore did not breach its obligations under the IPA.
- [5] The Information Commissioner has referred the complaint to the Tribunal under s 176 of the IPA. Subsection 2 of s 176 provides that:

QCAT must exercise its original jurisdiction under the QCAT Act to hear and decide a privacy complaint referred to it under this section.

The Privacy Legislation

- [6] Section 27 of the IPA imposes obligations on public sector agencies to comply with eleven (11) Information Privacy Principles ('IPP') which regulate the collection, security, access/amendment, use and disclosure of personal information. Personal information is defined as:

Personal information is information or an opinion, including information or an opinion forming part of a database, whether true or not and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

- [7] There are special provisions about law enforcement agencies, like the QPS, who can share information in certain circumstances as set out in s 29. Section 29 provides:
- (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; or ...
- [8] IPP 10 and IPP 11 impose limits on the use of personal information and disclosure of that information.
- [9] However, the respondent relies on part 11.11 of the OPM in so far as it relates to the *Defence Act* 1903 (Cth) ('*Defence Act*') because it is relevant to the determination of this application, it provides:

11.11 Defence Act

The *Defence Act* (CW) is an Act which relates to the Royal Australian Navy, Australian Army, Royal Australian Air Force and the protection of the Commonwealth and the States.

PROCEDURE

Officers investigating matters under the provisions of the *Defence Act* (CW) should not overlook that the Australian Defence Force consists of four Services, the Royal Australian Navy, Australian Army, Royal Australian Air Force and Headquarters, Australian Defence Force. Contact may be made directly with the appropriate establishment regarding investigations.

11.11.1 Contact persons and numbers of military establishments

ORDER

Officers in charge of divisions containing military establishments are to maintain a list of contact persons and telephone numbers for each military establishment and ensure that the list is accessible by staff under their control.

POLICY

Officers who arrest members of the Australian Defence Force should contact the duty officer at the relevant military establishment and where available,

provide particulars of the service number, name and unit of the person charged.

11.11.2 Location of members of the Australian Defence Force

ORDER

When an officer requires access to a member of the Australian Defence Force who resides upon a military establishment, contact is to be made with:

- (i) the officer in charge of the relevant Australian Defence Force (ADF) Service police if such a unit exists at that establishment; or
- (ii) the senior officer at that establishment if no ADF Service police unit exists.

- [10] The respondent also relies on the fact that the ADF were in a position to find out the information about the applicant in any event because of his reporting obligations under Defence Instruction (General) Admin 45(2).
- [11] If it is found that the respondent breached the Information Privacy Principles, then remedies are sought under s 178 of the IPA which permits the Tribunal to make certain orders about the respondent's conduct.

Further Background

- [12] When the applicant initially made a complaint about the conduct of the respondent in releasing his information to the ADF, the respondent initially denied its officers had any contact with the ADF. It was contended that contact came from the Wing Commander in the RAAF who sought information about the incident. After further investigation, the QPS did accept that an 'unidentified police officer did contact the Australian Defence Force and informed it of the details of your arrest and charge'. It also contended that the disclosure of that information was authorised or required under a law in compliance with the Operational Procedural Manual referred to above. The applicant did not accept this to be the case and contended that the QPS had failed to justify the breach of his privacy. After further submissions from the applicant to the Office of the Information Commissioner, the full story emerged and save for some minor detail with respect to Constable Smith's evidence, there does not now appear to be any factual dispute as to what occurred. The relevant facts are as follows:
- (a) The applicant was arrested at the hotel in the Brisbane CBD and taken to the Brisbane Watch House;
 - (b) He was searched and his ADF identification card was produced;
 - (c) Contact was made with the ADF by the then Senior Sergeant in charge of the watch house, Sergeant Jason Trotter who has sworn an affidavit in the proceeding.¹ He has no specific recollection of the events that evening, which is understandable, but accepts that he contacted the ADF duty officer and informed that officer that the applicant was in police custody. He says in his affidavit that he does 'not recall disclosing any information concerning the

¹ Exhibit 6.

circumstances of his arrest or the charges and it would not be (my) practice to do so'. He also says that he has adopted this course of contacting the ADF on many occasions prior to that in accordance with the OPM.

- (d) The contact was made with Dr Perkins who was the duty officer at the RAAF Base at Amberley. He took the call from Sergeant Trotter at about 10:15pm and was advised that a male person was in police custody. He was told that 'he continued to obstruct police by refusing to answer questions'. There was some discussion about the applicant's mental state but after considering what Sergeant Trotter had to say, Dr Perkins did not consider he was at risk of harm. Dr Perkins made contact with the applicant's supervisor and after some further discussion with him he called Sergeant Trotter back and advised him that they would not be collecting the applicant from the watch house.
- (e) At some time that evening the applicant was bailed and released on his own undertaking to appear in the Magistrates Court.
- (f) To further clarify what occurred subsequently, the charges were withdrawn and an infringement notice was issued with a fine which the applicant paid.
- (g) The following day, Wing Commander Deveney contacted Constable Smith and they had a conversation about the applicant's arrest.

[13] Documents have been produced for the purposes of the hearing some of which are from the ADF. One of those documents is the Defence Incident Report. That report notes the date of the incident involving the applicant, the location of that incident in the CBD and a description of the incident which, is as follows (with appropriate amendments):

On 25 Apr 17 the member was asked to leave the (hotel) establishment by security staff at 1940hrs. He refused and the Queensland Police (QPol) were called. Upon responding to the premises, QPol removed the member. The member then allegedly ran from police. Upon being caught by officers, the member was arrested and taken into police custody. The member was charged with two offences and required to attend court on 24 May 2017. The member was not in uniform at time of the incident.

[14] It is noted in the signature box which has the name of 'craig.deveney', the Wing Commander referred to above, and the date in the signature box is '2017.04.26 17:42:13'. Presumably the date and time is the time when the Report was prepared by Wing Commander Deveney. It is also worth noting that in the box making reference to 'actions taken to date' there is a reference to the initial reporting by QPS and then it is noted that 'contact made with Queensland Police for contextual detail'.

[15] As I said earlier, there was a further conversation between Wing Commander Deveney and Constable Smith in which Constable Smith swears that:

11. On or around 26 April 2017, I was contacted by an officer from the Brisbane Watch House advising me that an officer from the ADF wished to obtain information from me about the applicant's arrest.

12. Shortly thereafter, I was contacted by the applicant's Wing Commander from the ADF on my personal mobile phone. He told me that he wanted to confirm the details of the applicant's arrest and charges. He told me that

information was to form an internal investigation to be undertaken by the ADF. I confirmed information of which the Wing Commander seemed to be already aware and did not disclose any further information.

- [16] The limited information exchanged between Sergeant Trotter and Dr Perkins on the evening of 25 April did not include the more fulsome version as recorded by Wing Commander Deveney in the Defence Incident Report. It seems the only conclusion to draw from his conversation with Constable Smith is that further information was provided to Wing Commander Deveney by Constable Smith despite his assertion that he only confirmed information that Wing Commander Deveney already had. There is no direct evidence from Wing Commander Deveney only that which is contained in the report prepared the day after the incident.
- [17] Having regard to that evidence, I have come to the conclusion that Sergeant Trotter did notify the duty officer on the night of 25 April 2017 and provided very basic information which included the applicant's name and rank and the information concerning his behaviour with police and his mental state. That was sufficient information for Dr Perkins to make an assessment as to whether or not the ADF should intervene in the incident.
- [18] I also find that there was a further conversation with Constable Smith the following day, as he admits, but it went further than what Constable Smith contends. I find that he did provide further information to Wing Commander Deveney which is that recorded in the incident report. The fact that the further information was provided becomes relevant in considering whether or not the respondent breached the relevant IPP.

Was the respondent required to contact the ADF?

- [19] I have touched on this to some extent but the QPS asserts that the disclosure by Senior Sergeant Trotter was not a disclosure within the meaning of the IPA and secondly, if it is found that it was such a disclosure, it is excused by IPP 11(1)(d).
- [20] The basis upon which it is contended that it was not a disclosure is that at all times the applicant was a person described as Defence personal within the meaning of that term in Defence Instructions DI-45(2), which has now been repealed, and therefore the applicant was under an obligation to report the matter to the ADF because the incident of his arrest, might fall within paragraph (f) of DI(g)-45(2) as a notifiable incident. Despite the assertion that the applicant may have had such an obligation, the respondent accepts, that he was not under an obligation to so report because of the evidence that the ADF considered the matter sufficiently serious to prepare an incident report. Even so it still gave rise to an obligation on the applicant to disclose what occurred.
- [21] This is a rather strange submission given that there is a positive obligation on the QPS not to make any such disclosures and to then try and cast some unspecified onus on the applicant that he had an obligation to inform the ADF which would absolve the QPS of any conduct which might be said to breach the information privacy principle.
- [22] The argument is not convincing and should be rejected.

[23] The other submission of the QPS is that the disclosure to the ADF was excused by the information privacy principle 11(1)(d) and that is as provided for:

- (1) An agency having control of a document containing an individual's personal information must not disclose the personal information to an entity (the relevant entity), other than the individual the subject of the personal information, unless:

...

- (d) the disclosure is authorised or required under a law.

[24] This then brings in to play the operation of OPM 11.11.1 referred to above. Because the OPM is a statutory instrument as defined in s.17 of the *Statutory Instruments Act* 1992 (Qld) and under the *Police Service Administration Act* 1990 (Qld), it is a lawful instrument to which all police officers must comply. It is conceded that it does have the effect of a statutory instrument by the applicant. That being the case, then it was incumbent upon Senior Sergeant Trotter to comply with it and once he realised he had a member of ADF in his custody, he notified the duty officer to comply with his obligations under the OPM.

The applicant's submission

[25] The first question is whether or not the investigations related to the *Defence Act* as is required by the OPM. It can be seen that the OPM is divided up into three particular parts. The first part simply identifies the various parts of the Australian Defence Force, the Navy, Army and Airforce.

[26] It then goes on to set out the procedure if police officers are investigating matters under the *Defence Act*. They should be aware of the matters set out therein, and should make direct contact with the appropriate establishment regarding the investigations.

[27] OPM 11.11.1 creates a different obligation on officers, that is to ensure that officers in charge of police divisions containing military establishments maintain a list of contact persons and telephone numbers of the establishment, so that such a list is available to staff if need be. It then goes on to describe how that part of the OPM should be implemented by way of policy. Officers who arrest members of the ADF should contact the duty officer at the relevant establishment and provide particulars of the service number, name and unit of the person charged.

[28] OPM 11.11.2 relates to investigations of ADF members who might actually reside on a military establishment and sets out the procedures involved for contact with the relevant officer of the ADF on the particular establishment.

[29] The practical application of the OPM is therefore firstly

- (a) an identification of the part of the OPM that is relevant to the particular matter that is, if the police officer is investigating a matter under the *Defence Act*;
- (b) whether an arrest has been made outside a military establishment; and
- (c) if a police officer requires access to a military establishment to conduct enquiries.

- [30] The applicant submits that the OPM should only relate to offences or matters which are being investigated under the *Defence Act* and as that is not the case here, the OPM does not apply. That is a very restricted application of the OPM which should not be adopted. That is because, 11.11.1 specifically relates to the arrest of members of the ADF independent of any investigation under the *Defence Act*. Therefore, under OPM 11.11.1 Senior Sergeant Trotter was authorised, and required, to notify the duty officer of the applicant's arrest and provide the applicant's service number, name and unit of the person charged.
- [31] However, the applicant says that even if that is correct, the QPS went far beyond that which they are required to do under the OPM. The information was not restricted to those three matters that are required by the policy, but further information was provided about the applicant's conduct and his mental state. It is submitted that going into that much detail, was in breach of the privacy principle. The information relayed was that he obstructed police and refused to answer questions and issues were discussed relating to his medical status including whether he was a suicide risk.
- [32] The duty officer happened to be a medical practitioner, and after Dr Perkins obtained information about the applicant's mental status he did not consider he was at risk. Even though this information went beyond the basic information referred to in the OPM, in my view if there were genuine health and well-being concerns about an individual, the police officer would be duty bound, under the general law, to relate those concerns to the duty officer to determine what further steps should be taken. Although Senior Sergeant Trotter has no specific recollection of the event, Dr Perkins, in his affidavit,² refers to the discussion about the applicant's mental state, I am prepared therefore to accept that Senior Sergeant Trotter did hold a genuine concern about the applicant's welfare. It follows that I am therefore prepared to accept it was appropriate and necessary to relay this further information to the duty officer.
- [33] In respect of the primary communication the applicant has mounted the following arguments. He relies on advice from the Privacy Commissioner to government agencies in the following terms:
- The IPPs set out minimum standards for Agencies. Compliance with the IPPs is a legal obligation, but minimal compliance will not always be an appropriate approach on Agency to take... especially where sensitive information is concerned, or where mishandling personal information may have serious consequences, more care to protect individuals' privacy may be appropriate and is required by the letter of the IPPs.³
- [34] The contention is that the OPM issued by the Commissioner referred to above cannot be incompatible with the agency's compliance with the IPPs. The question then is, is the OPM incompatible to the point where it should be ignored? Reliance is also placed upon the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) ('CLROA') which restricts the disclosure of personal information about a conviction or of a criminal charge made against a person. Once again, the submission is that

² Exhibit 4

³ Office of Privacy Commissioner, Advice to agencies about storage and security of personal information, and access to a correction of personal information. Plain English guidelines to information privacy principles 4-7 (OPC, 1998) page 1.

any exercise of power by the Police Commissioner under the *Police Service Administration Act 1990 (Qld)* to permit disclosure through the OPM is, according to the applicant's submission "inconsistent with the modern approach to statutory interpretation, which necessitates consideration of context, purpose, policy, consistency and fairness as held by the High Court in *Project Blue Sky v ABC*.⁴

- [35] In addition to relying on the general principles of statutory interpretation, the applicant seeks to call comfort from s 14A(1) of the *Acts Interpretation Act 1954 (Qld)* which requires a 'purposive approach to statutory interpretation'. The effect of the applicant's submission is that parliament's intention in enacting the CLROA and the IPA was to preserve privacy, subject to the legitimate law enforcement purposes in reliance on these legislative mandates, there is nothing which supports the respondent's position that the various Acts permit the disclosure of charges of members of the ADF as is seemingly required by the OPM. The applicant's submission is certainly well articulated and creates some doubt as to whether the disclosure is authorised by law.
- [36] Because the OPM is a statutory instrument and the extent of the disclosure is limited. is limited to the details about an individual as set out in the OPM, subject to perhaps the individual's particular circumstances at the time, it seems to me that there is no inconsistency with either the objects of the IPA or the Agency's (the respondent) obligations to comply with minimum standards as required by the IPA.
- [37] However, what occurred here was that the following day Constable Smith disclosed further information about the applicant to Wing Commander Deveney which was clearly not authorised by the OPM. This in my view was a breach of s 27 of the IPA as it was not excused as being an activity related to the enforcement of laws. Clearly Constable Smith probably thought he was being of assistance in responding to the inquiry but his training and knowledge of the OPM's should have alerted him to the inappropriateness of this conduct.

Remedy

- [38] Having found that there was a breach of the applicant's privacy, s 178 of the IPA sets out how the Tribunal can 'dispose of a complaint' which includes requiring:
- (a) That an act or practice of the respondent is an interference with the privacy of the complainant for the complaint and that the respondents must not repeat or continue the act or practice;
 - (b) That the respondent must engage in a stated reasonable act or practice to compensate for loss or damage suffered by the complainant;
 - (c) That the respondent must apologise to the complainant for the interference with the privacy of the complainant;
 - (d) That the respondent must make stated amendments of documents it holds; or
 - (e) That the complainant is entitled to a stated amount, of not more than \$100,000, to compensate the complainant for loss or damage suffered by the complainant

⁴ Applicant's written submission, paragraph 73.

because of the act or practice complained of, including for any injury to the complainant's feelings or humiliation suffered by the complaint.

- [39] The relief sought by the applicant is that the respondent implement a policy to ensure that information in respect of members of the ADF is disclosed lawfully, an apology, \$25,000 compensation for humiliation and \$6,663.75 to compensate the applicant for expenses incurred.
- [40] I am not satisfied that it is appropriate in this case to make any order directing the respondent to implement any further policies or procedures in addition to what is contained in the OPM. It is quite specific in its terms and if it is complied with, an individual's privacy as a member of the ADF is assured. However, in light of the circumstances of this case, it may be appropriate for the respondent to remind its members of the need to only provide that information which is authorised by the OPM. I am sure that Constable Smith's comments to Wing Commander Deveney were well intentioned and he was only trying to assist, not realising the limits to which such assistance could be provided.
- [41] I am, however, satisfied that an apology is appropriate in the circumstances and I will make an order to that effect.
- [42] As for the claim for compensation for loss and damage the applicant, in his affidavit of 7 March 2019, refers to how the disclosure has impacted his psychological well-being and the humiliation and embarrassment he has experienced. He has undergone treatment from a consultant psychiatrist, Dr Shaw and had counselling. He refers to being diagnosed with post-traumatic stress disorder, but there is no evidence to support this from Dr Shaw. Despite there being no specific diagnosis, I am satisfied he did suffer some mental anguish. He concedes the breach of his privacy was not the sole reason for this treatment but certainly a 'major contributing factor'. The cost of that treatment and the general practitioner attendance totals \$2,806.75 after rebate. He has particularised those costs in an annexure to his affidavit.
- [43] As I have found that the disclosure to the duty officer was not a breach of the applicant's privacy, it is only the disclosure to Constable Smith which is compensable. After that disclosure was made, there is no evidence of a further action taken by the ADF as a result of that disclosure. There is no evidence of any further publication of that information to any other person, although the applicant does say that the:
- The proliferation of the personal information was extensive, not limited to my chain of command but also the junior ranks who administered the ADF response, peers and paralegals who documented the information which was exchanged between the ADF and the QPS over a period of months to the ADF.
- [44] There is no specific evidence to support this proliferation and it is a little uncertain whether this relates to the investigation of his complaint or action taken by the ADF because of the complaint. In any event, I accept this whole process has compounded the impact of the disclosure on the applicant's mental health.
- [45] It is also evident, from the material filed, that the applicant was obstructed in trying to get to the truth of what occurred at the time of his initial complaint. After much obfuscation the respondent accepted all of the material facts as asserted by the

applicant in his complaint, save for parts of Constable Smith's evidence. This attitude added to his distress in that there was no initial acceptance of this complaint which, was plainly wrong. This in itself is not compensable but it something to be taken into account.

- [46] The level of compensation must be commensurate with the extent and the particulars of the disclosure and the consequences of it upon the applicant. I note that not only is he a reservist he is also a legal officer in the ADF and for the respondent to dismiss his complaint out of hand is also demeaning. Taking all of these matters into account, including the psychological consequences of the disclosure, I am of the opinion that a reasonable amount of compensation is \$10,000.
- [47] As for the out-of-pocket expenses, the applicant is entitled to be compensated for the medical treatment received. Even though he concedes it was not all for the distress from the disclosure, it was a contributing factor therefore compensable.
- [48] He also claims compensation for the time he has spent in making the complaint, responding to the respondent's inaccurate assertions about the disclosure, having to continuously pursue the OIC in view of the respondent's various responses to the allegations made and then prepare for this proceeding. He also claims his time (22hrs) for attendance on Dr Shaw, which is somewhat unusual. He claims a total of 282.5 hours at a rate of \$55/hr. The total claim is \$15,519.
- [49] A large part of the claim is in the nature of legal costs which, unless s 102 of the QCAT Act can be satisfied, is not recoverable. Nor, is the time he spend on getting medical treatment compensable. However, for the additional time and work necessary taken because of the respondent's approach to the claim I do propose to allow an amount under s 178(e) in the sum of \$5,000. This could have been avoided if the matter was properly investigated at the very beginning.

Conclusion

- [50] I find that the applicant's complaint that the respondent has breached its obligations under the IPA has been substantiated to the extent set out in these reasons.
- [51] I direct that the Commissioner of Police or the appropriate delegate issue a written apology to the applicant.
- [52] I direct that the respondent pay to the applicant within 28 days of the receipt of this decision the sum of \$17,806.75 compensation under s 178(e) of the IPA.