QCAT

Queensland **Civil and Administrative Tribunal**

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| **CITATION:** | *Carmody v Information Commissioner & Ors (5)* [2018] QCATA 18 |
| **APPLICATION NUMBER:** | APL 342-16 |
| **PARTIES:** | The Honourable Justice TF Carmody<br>(Applicant)<br>v<br>Information Commissioner<br>(Frist Respondent)<br><br>Department of Justice & Attorney General<br>(Second Respondent)<br><br>Seven Network (Operations) Ltd<br>(Third Respondent) |
| **MATTER TYPE:** | General administrative review matters |
| **HEARING DATE:** | 8 November 2017 |
| **HEARD AT:** | Brisbane |
| **DECISION OF:** | Justice CRR Hoeben |
| **DELIVERED ON:** | 2 March 2018 |
| **DELIVERED AT:** | Brisbane |
| **ORDERS MADE:** | **1. The appeal by the applicant against the decision of the IC in her external review is upheld.**<br>**2. The decision of the IC in her external review of 19 September 2016 is set aside**<br>**3. Access to the unreleased documents is refused.**<br>**4. The costs of the appeal are reserved with liberty to the parties to apply to the tribunal on 28 days' notice on the issue of costs.** |
| **CATCHWORDS:** | APPEAL – right to information – finding by Information Commissioner (IC) that parts of certain documents should be made available to media outlets – whether IC properly took into account item 9 of schedule 4 of part 3 of *Right to Information Act 2009* (Qld) (RTI) – whether IC erred by inconsistently taking into account that much of the information in issue |

was already in the public domain – whether IC erred in not finding that Ms Edwards was "the holder of an office connected with … a quasi-judicial entity" – whether the unreleased documents were prepared "in relation to that entity's quasi-judicial functions" – whether the IC erred by taking into account irrelevant considerations – whether IC erred in failing to take into account relevant considerations – whether unreleased documents fell outside scope of access application – whether IC properly considered whether disclosure of unreleased documents would found an action for breach of confidence – whether decision should be returned to IC for reconsideration.

*Acts Interpretation Act 1954* (Qld), sch 1
*Invasion of Privacy Act 1971* (Qld), s 45
*Right to Information Act 2009* (Qld), s 14, s 17, s 23, s 47, s 49, s 119, sch 2, sch 3, sch 4
*Supreme Court of Queensland Act 1991* (Qld), s 15, s 51
*Queensland Civil and Administrative Tribunals Act 2009* (Qld) s 146

*Attorney General v Times Newspapers Ltd (No 1)* (1973) QB 710
*Cairns Port Authority v Albietz* [1995] 2 Qd R 470
*Davis v City North Infrastructure Pty Ltd* [2012] 2 Qd R 103
*Fingleton v The Queen* [2005] HCA 34; 227 CLR 166
*Henderson v Legal Practice Committee* (Application no 310322 of 30 November 2011)
*R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; 144 CLR 13
*R v Khazaal* [2012] HCA 26; 246 CLR 601
*Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ltd & Ors* [1986] HCA 40; 162 CLR 24
*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611

**APPEARANCES:**

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| **APPLICANT:** | Mr S Doyle QC with Mr J Green for the Applicant |
| **RESPONDENTS:** | Mr JM Horton QC for the First Respondent |
| | Mr GP Sammon for the Second Respondent |
| | Ms Sandy for the Third Respondent |
| **REPRESENTATIVES:** | |
| **APPLICANT:** | King & Woods Mallesons for the Applicant |
| **RESPONDENTS:** | Clayton Utz for the First Respondent |
| | Crown Law for the Second Respondent |
| | Ms Sandy for the Third Respondent |

**REASONS FOR DECISION**

[1] This is an appeal pursuant to s 119 of the *Right to Information Act 2009* (Qld) (RTI Act). Such appeals "may only be on a question of law". The appeal is against a decision of the Information Commissioner (IC) by way of an external review, dated 19 September 2016, in application No: 312598.

[2] For ease of identification, Justice Carmody will be referred to as "the applicant" and the Department of Justice and Attorney General as "DJAG". Unless otherwise indicated, references to the Supreme Court are to the Supreme Court of Queensland. Seven Network (Operations) Ltd is referred to as "Seven Network".

[3] The applicant has appealed against the decision of the IC on the following grounds:

a) The Right to Information Commissioner failed to take into account a relevant consideration favouring nondisclosure in the public interest, namely item 9 of schedule 4, part 3: that disclosure of the information could reasonably be expected to impede the administration of justice for a person.

b) The Right to Information Commissioner made an error of law by inconsistently considering the effect of the fact that much of the information in issue is already in the public domain.

c) The Right to Information Commissioner erred in not deciding that the Unreleased Documents were documents of an entity to which the

*Right to Information Act 2009* (Qld) (the RTI Act) does not apply pursuant to s 17 and schedule 2, part 2, item 7, and in particular that:

i) Ms Anne Edwards was "the holder of an office connected with … a quasi-judicial entity"; and

ii) That the Unreleased Documents were prepared "in relation to the entity's quasi-judicial functions".

d) The Right to Information Commissioner erred by taking irrelevant considerations into account including that disclosure of the Unreleased Documents:

i) Could reasonably be expected to enhance the Government's accountability; and

ii) Would reasonably be expected to inform the community of the Government's operations including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community.

e) The Right to Information Commissioner erred by failing to take relevant considerations into account including that:

i) The Unreleased Documents comprise "exempt information" under schedule 3, s 8(1) of the RTI Act; and

ii) Disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information (item 16 of part 3, schedule 4) and that the disclosure could reasonably be expected to prejudice the future supply of confidential information (item 8(1) of part 4, schedule 4).

**Factual background**

[4] A number of applications under the RTI Act were made to DJAG in early 2015 (mostly by media organisations), seeking access to documents about various events involving judges of the Supreme Court during the time that the applicant held the position of Chief Justice.

[5] In RTI access application 151329, Seven Network had applied to DJAG on 30 March 2015 for access to documents concerning the applicant and the seat of Ferny Grove, in connection with the constitution of the Court of Disputed Returns (CDR). DJAG gave its decision on 5 June 2015 refusing access to the bulk of the requested documents. On 8 June 2015, Seven Network made another application to DJAG, seeking access to "Documents since 30 March 2015 relating to Seven Network's RTI application 151329". In effect, Seven Network sought access to documents concerning the internal processing by DJAG of Seven Network's earlier access application. It is this later access application which is the subject of these proceedings and this judgment.

[6] DJAG consulted a number of parties, including the applicant, regarding disclosure of documents that concerned them. The applicant objected to disclosure of some documents. The other parties raised no objection.

[7] DJAG decided to give full access to 127 pages, partial access to 3 pages and refused access to 14 pages. It advised both the applicant and Seven Network of its decision in letters dated 25 August 2015. Seven Network did not seek a review of DJAG's decision to refuse access to certain documents. Some documents which DJAG decided to disclose were contrary to the objections of the applicant, (the unreleased documents). Access was therefore deferred to allow the applicant to exercise his review rights.

[8] By letter dated 21 September 2015, the applicant applied to the Office of the Information Commissioner (OIC) for external review of DJAG's decision to release documents contrary to his objection. The applicant contended that disclosure of the relevant documents would, on balance, be contrary to the public interest under s 47(3)(b) and s 49 of the RTI Act.

[9] Having considered the applicant's submissions in support of nondisclosure of the unreleased documents, the IC affirmed DJAG's decision to disclose the information under the RTI Act. The IC was satisfied that disclosure of the unreleased documents would not, on balance, be contrary to the public interest.

[10] The unreleased documents were:

- a one page file note, dated 12 May 2015, prepared by Ms Anne Edwards of DJAG in relation to her meeting with Justice Byrne (document (i)); and

- parts of a four page letter, dated 26 May 2015, from Justice Applegarth to Ms Edwards (document (ii)).

[11] The IC advised the applicant that her preliminary view was that the bulk of the unreleased documents should be disclosed under the RTI Act. By letter dated 15 January 2016, the applicant withdrew reliance upon one of the public interest factors favouring nondisclosure that he had raised earlier but otherwise maintained his objection to disclosure.

[12] During the course of the external review, the IC advised Seven Network that the disclosure of a small amount of information in the file note would, on balance, be contrary to the public interest. Seven Network accepted that preliminary view so that that part of the file note was no longer in issue in the external review.

[13] The IC identified the decision under review as DJAG's decision of 25 August 2015 to grant access to Seven Network to the two unreleased documents.

[14] The unreleased documents were prepared or received by DJAG in connection with its processing of Seven Network's RTI access application 151329. Ms Edwards, who was DJAG's decision maker at the time, consulted with Justices Byrne and Applegarth about disclosure of documents in issue in RTI 151329. The unreleased documents came into existence as part of that consultation process.

[15] The file note is a record prepared by Ms Edwards of her meeting with Justice Byrne, during which they discussed documents that concerned him, their provenance, and Justice Byrne's view on their disclosure. Document (ii) is a letter which Justice Applegarth wrote to Ms Edwards setting out his views about disclosure of an earlier letter that he had written to the applicant, dated 25 March 2015, which was in issue in RTI 151329. The second letter took the form of a commentary on the earlier letter. Substantial parts of the earlier letter were replicated. DJAG consulted Justices Byrne and Applegarth about disclosure of those two documents. Neither objected to their disclosure. The IC did not consult with them again as part of the external review process.

[16] As a result of the external review, the IC upheld the determination of DJAG that most of the content of the unreleased documents should be produced to Seven Network.

*Would disclosure of the information in issue be, on balance, contrary to the public interest'?*

[17] The IC answered that question in the negative.

[18] The IC set out her reasons as follows:

> "28 The grounds upon which access to information may be refused under the RTI Act are contained in section 47. One ground for refusal of access is where disclosure would, on balance, be contrary to the public interest. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest and explains the steps that a decision-maker must take in deciding the public interest as follows:
>
> - identify any irrelevant factors and disregard them;
> - identify relevant public interest factors favouring disclosure and nondisclosure;
> - balance the relevant factors favouring disclosure and nondisclosure; and
> - decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.
>
> 29 I have not taken into account any irrelevant factors in making my decision in this review.
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> **The applicant's submissions – public interest factors favouring nondisclosure**

*Personal information and privacy*

30 The RTI Act recognises that:

- a factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy;

- disclosing information could reasonably be expected to cause a public interest harm if it would disclose personal information of a person, whether living or dead.

31 I accept that two sentences contained in the second paragraph of document (i), and some parts of document (ii), are properly to be characterised as the applicant's personal information. A public interest harm therefore arises by disclosure of that information. However, the bulk of document (i) and the remainder of document (ii) contain no information that is the applicant's personal information.

32 The concept of 'privacy" is not defined in either the RTI Act or the IP Act. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere free from interference from others.

33 A distinction is to be drawn between a person's personal and public spheres. In Hardy and Department of Health a distinction was drawn between information in the personal sphere and “routine work information - that is, information that is solely and wholly related to the routine day to day work duties of a public service officer".

34 I note that the personal information in issue was generated in the context of a workplace environment and all of it stems from work-related issues. However, I also acknowledge the sensitive nature of some of the Information in Issue that comprises feelings and opinions about the applicant by work colleagues and the fact that some of it arose from circumstances that could not be considered to be routine. This gives rise to a significant public interest in protecting the privacy of the applicant.

*Conclusion*

35 For the reasons discussed, I give significant weight to the public interest in protecting the privacy interests of the applicant in respect of the personal information contained in the Information in Issue.

*Prejudice the fair treatment of individuals*

36 The RTI Act recognises that a public interest factor favouring nondisclosure in the public interest will arise where:

- disclosure of information could reasonably be expected to prejudice the fair treatment of individuals; and

- the information is about unsubstantiated allegations of misconduct or unlawful, negligent or improper conduct.

37 I am satisfied that this public interest factor does not arise for consideration in relation to document (i). While the applicant has complained about the contents of document (i), alleging that some statements contained within it are 'absurd and disingenuous' or 'unfounded and unverifiable' none of the information in issue in document (i) is about unsubstantiated allegations against the applicant of misconduct or unlawful, negligent or improper conduct.

38 In respect of document (ii), the information contained in the last three paragraphs in issue on page 2, and the third and fourth paragraph in issue on page 3, contains criticisms or negative opinions about aspects of the applicant's conduct. However, I consider that only two brief references contained in the last paragraph in issue on page 2 are capable of being characterised as an allegation of misconduct or improper conduct, rather than simply a criticism.

39 As regards the requirement that the allegation be unsubstantiated, I accept that the conduct in question was not investigated or sanctioned, and to that extent can be regarded as unsubstantiated. I also note the limited bases and circumstances upon which a judge's conduct may be investigated and sanctioned.

40 As regards the requirement that disclosure of this information could reasonably be expected to prejudice the fair treatment of the applicant, the applicant submitted:

- disclosure could reasonably be expected to prejudice his fair treatment by the media in the form of unbalanced or unfair reporting;

- disclosure could reasonably be expected to affect adversely his reputation and public standing; and

- while there had been previous public ventilation of criticisms of the applicant's conduct and actions as Chief Justice, re-publication of unsubstantiated allegations would expose the applicant to further unfair treatment by the media.

…

43 I do not regard the elapse of time since the dispute within the Supreme Court took effect as a factor that can be used to bolster the prejudicial effect the applicant contends for. The Information in Issue was prepared in May 2015 and the third party applied for access in June 2015. The time that has elapsed since then has been due to the processing of the application by DJAG; dealing with the subsequent application for external review; as well as the necessary delays as OIC finalised and issued decisions in the five earlier, related reviews involving the applicant as a third party. While circumstances may well have changed within the Supreme Court in the intervening period, that elapse of time is through no fault of the third party and it would be wrong to use it to strengthen an argument favouring nondisclosure. In any event, I do not accept that the passing of time has diminished to any significant degree the public interest factors favouring disclosure, which I will discuss below.

…

45 While the applicant did not provide specific examples of where he considered the media had treated him unfairly in the past, I acknowledge that the apparent rift that occurred in the Supreme Court while the applicant held the office of Chief Justice, and the public criticisms made of the applicant's conduct by other judges during that period, have been reported upon widely, with media articles sometimes reflecting unfavourably on the applicant. However, I cannot disregard the fact that the conduct in question and the criticisms of it by other judges are already publicly known. This necessarily affects my consideration of whether disclosure of the information in this review could reasonably be expected to prejudice the fair treatment of the applicant.

46 Having regard to the brief nature of the information in question, together with the fact that it has been disclosed publicly previously, I am not satisfied that there are reasonable grounds (as opposed to mere speculation) for expecting that its disclosure could prejudice the applicant's fair treatment.

47 Even if I accepted that there were reasonable grounds for expecting that disclosure of the comments in question could result in prejudice to the applicant's fair treatment, I would afford this factor low weight in balancing the public interest, in recognition of the fact that the conduct in question, and the disapproval of that conduct by other judges, is already publicly known. Despite the applicant's argument to the contrary, the fact that the public is already aware of the incident In question and that others disapproved of it necessarily lessens the potential detrimental impact, in terms of damage to the applicant's standing or reputation, of any further reporting and any adverse reflection on the applicant's conduct.

*Conclusion*

48 For the reasons discussed, I find that the public interest factor favouring nondisclosure contained in schedule 4, part 3, item 6 of the RTI Act - disclosure could reasonably be expected to prejudice the fair treatment of an individual - does not arise for consideration in respect of the Information in Issue. Even if I accepted that it applies to two references contained in the last paragraph in issue on page 2 of document (ii), I would afford it low weight in balancing the public interest, for the reasons explained.

*Prejudice an agency's ability to obtain confidential information; affecting confidential communications*

49 The RTI Act provides that:

- a factor favouring nondisclosure in the public interest arises where disclosure of the information in issue could reasonably be expected to prejudice an agency's ability to obtain confidential information;

- a factor favouring nondisclosure in the public interest because of a public interest harm in disclosure arises where the information in issue is of a confidential nature and was communicated in

confidence; and disclosure could reasonably be expected to prejudice the future supply of information of this type.

50 The applicant argued that the third party consultation process provided for under the RTI Act is a confidential process and that disclosure of a third party's response to consultation could reasonably be expected to prejudice an agency's ability to obtain responses from third parties in the future. …

51 I do not accept that the third party consultation process provided for under the RTI Act is necessarily confidential, nor that it is reasonable for third parties to have a blanket expectation of confidentiality in respect of information they provide in response to a consultation request. While the identities of consulted third parties may sometimes not be disclosed where they have elected not to participate in a review, it is usual for decisions to disclose that third parties have been consulted about the disclosure of any documents in issue that concern them, and to state whether or not they object to disclosure. Where the information or submissions provided by a third party in the consultation process are taken into account by the decision-maker in making their decision, the requirements of procedural fairness will ordinarily require the decision to disclose the relevant information.

…

53 In any event, the issue of confidentiality does not arise in this case as neither Justice Byrne nor Justice Applegarth has submitted that the information they provided to DJAG during the consultation process was given in confidence. Neither objects to its disclosure to the applicant for access.

…

55 I acknowledge that some information provided by Justices Byrne and Applegarth is the applicant's personal information and is sensitive in nature. As noted above, I give significant weight to the public interest in protecting the privacy interests of the applicant in respect of that information.

*Conclusion*

56 For the reasons explained, I find that this public interest factor favouring nondisclosure does not arise for consideration in balancing the public interest.

…

**Public interest factors favouring disclosure**

63 I consider that the following public interest factors favouring disclosure arise for consideration in balancing the public interest:

- disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability;

- disclosure could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest;

- disclosure could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;

- disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;

- disclosure could reasonably be expected to reveal the reason for a government m decision and any background or contextual information that informed the decision.

64 I find that disclosure of the Information in Issue could reasonably be expected to:

- promote discussion about the effective functioning of the Supreme Court which is an important public institution, funded from the public purse, and that is accountable to the public;

- provide relevant background information and promote discussion about the conflict that occurred within the Supreme Court while the applicant was Chief Justice and its impact upon the Court;

- promote discussion about the appropriateness or otherwise of the actions of the applicant and other judges, and allow or assist inquiry into possible deficiencies in that conduct;

- promote the government's accountability in terms of the manner in which it processes RTI applications; the decisions it makes; and the manner in which it undertakes third party consultation processes;

- contribute to informed (both positive and negative) debate about important public affairs concerning the operations of the Supreme Court; the conduct of its officers; the responsibilities and powers of the Chief Justice; and the manner in which those responsibilities and powers were discharged; and

- reveal the reason for government decisions and any background or contextual information that informed the decision, including the decisions made by DJAG in response to RTI access applications.

65 I acknowledge the importance of the Supreme Court as a public institution and that it is crucial that the public has confidence in the Court's effective and efficient functioning. The public interest in scrutinising the administration of the Supreme Court, and the conduct of its judicial officers, is necessarily high. I also acknowledge the importance of protecting the ability of members of the Court to discuss openly, with their fellow judges, their views (and disagreements) about the proper administration and functioning of the Court without these conversations and discussions being made public as a matter of course. This is particularly relevant with respect

to document (ii). However, in this case, there is already a significant amount of information in the public domain about the conflict that existed in the Court and important issues that affected the administration of the Court. I consider that disclosure of the Information in Issue would provide a more complete picture of the relevant events that transpired and the conduct of the relevant judges, as well as giving context to the information that has already been disclosed. It would also reveal background and contextual information that informed DJAG's decisions in response to various RTI applications, and enhance DJAG's accountability in that regard.

…

69 I reiterate my view that the passing of time (which has occurred through no fault of the third party) has not diminished to any significant degree the public interest factors favouring disclosure identified above. I acknowledge that the applicant resigned as Chief Justice in July 2015, but I do not accept that the fact the applicant has endeavoured to move on and put the past behind him lessens the public interest in disclosing contextual information that would provide a more complete picture of the events that transpired while he was Chief Justice; that impacted upon the administrative functioning of the Court; and that attracted significant public attention, debate and comment. The public interest in scrutinising the administration of the Court and the conduct of its judicial officers remains high, as does the public interest in enhancing the accountability of DJAG for the decisions it makes in response to RTI applications and for the way in which it processes such applications, including undertaking third party consultations.

70 I reject the applicant's contention that disclosure of the Information in Issue could reasonably be expected to have a substantial adverse effect on Court staff or impact upon their current working environment. I am unable to identify how disclosure could reasonably be expected to result in an unfair level of scrutiny of the Supreme Court as a workplace.

*Conclusion*

71 For the reasons explained, I afford significant weight to each of the public interest factors identified above that favour disclosure of the Information in Issue.

**Balancing the public interest**

72 For the reasons previously expounded, as regards public interest factors favouring nondisclosure, I give significant weight to the public interest in protecting the privacy interests of the applicant in respect of the personal information contained in the Information in Issue.

73 I am not satisfied that any of the other public interest factors favouring nondisclosure relied upon by the applicant arise for consideration. In respect of the information contained in the last paragraph in issue on page 2 of document (ii), if I were to accept that its disclosure could reasonably be expected to prejudice the fair treatment of an individual pursuant to schedule 4, part 3, item 6 of the RTI Act, I would

> afford this factor favouring nondisclosure low weight in the public interest balancing test, taking account of information that is already in the public domain.
>
> 74 As regards the five public interest factors I have identified as favouring disclosure, I afford each of them significant weight.
>
> 75 Having weighed these factors, I find that the public interest weighs in favour of disclosure of the information in issue. I am satisfied that disclosure of the Information in Issue would not, on balance, be contrary to the public interest. Access to the Information in Issue therefore cannot be refused under sections 47(3)(b) and 49 of the RTI Act.
>
> **DECISION**
>
> 76 I affirm DJAG's decision to grant access to the Information in Issue. I find that disclosure of the Information in Issue would not, on balance, be contrary to the public interest."

## Consideration

[19] It is common ground between the parties that no new evidence was adduced before the Tribunal in the hearing of this appeal. In those circumstances, it was open to the applicant to make submissions on appeal, which were not made to the IC. Leave was granted to the applicant to amend his grounds of appeal on 6 February 2017, so that it could not be said that the respondents to the appeal have been taken by surprise by the matters now relied upon by the applicant.

[20] Nevertheless, the IC has sought to make submissions in relation to those additional grounds of appeal. She has done so in written submissions dated 3 February 2017. Those submissions, it seems to me, go somewhat beyond the limitations identified by the High Court (Gibbs, Stephen, Mason, Aickin and Wilson JJ) in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*[1] where their Honours said:

> "There is one final matter. Mr Hughes was instructed by the Tribunal to take the unusual course of contesting the prosecutors' case for relief and this he did by presenting a substantive argument. In cases of this kind the usual course is for a tribunal to submit to such order as the court may make. The course which was adopted by the Tribunal in this Court is not one which we would wish to encourage. If a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this Court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the Tribunal."

[21] Accordingly, I have had regard to the submissions of the IC, on the basis that it is useful when dealing with new material, which has not been the

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1 [1980] HCA 13; 144 CLR 13 at [35]-[36].

subject of argument, to have a contradictor so that both sides of the question can be properly considered. I do not propose however, to specifically deal with the IC's further submissions separately from the matters raised by the applicant, but rather as part of the overall consideration of them.

**Ground of Appeal 1: The Commissioner failed to take into account a relevant consideration favouring nondisclosure in the public interest, namely item 9 of schedule 4 part 3: that disclosure of the information could reasonably be expected to impede the administration of justice for a person.**

[22] This ground of appeal was originally raised by the applicant in the course of the IC's external review but subsequently withdrawn so that the IC did not have to rule upon it. That does not prevent the applicant raising the issue when appealing from the external review decision to this Tribunal. There was no opposition to the applicant's application for leave to amend his grounds of appeal. The parties have been aware that he would be relying upon this ground since February 2017. The ground of appeal raises an issue of law and is not dependent on the adducing of any further evidence. In those circumstances, I propose to consider this ground of appeal.

[23] The applicant submits that disclosure of the unreleased documents can reasonably be expected to impede the administration of justice for him. This is because each of the documents is effectively a commentary by sitting members of the Supreme Court on the lawfulness of the disclosure of documents, which are the subject of what has been described as "the First Carmody Appeals", i.e. the appeals against the IC's external review decisions of 27 June 2016.

[24] The applicant submitted that in the ordinary course, publication of material which tends to prejudice or influence pending civil proceedings, or pre-judge the merits or issues to be adjudicated, is undesirable and contrary to the fair and impartial determination of disputes. In that regard, the applicant relied upon *Attorney General v Times Newspapers Ltd (No 1)*[2] where Lord Denning MR (with whom Scarman LJ agreed) said:

> "It is undoubted law that, when litigation is pending and actively in suit before the court, no-one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause … even if the person making the comment honestly believes it to be true, still it is a contempt of court if he pre-judges the truth before it is ascertained in the proceedings …"

[25] The applicant submitted that while there was no allegation of improper conduct or that the unreleased documents were intended to interfere with

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2 (1973) QB 710 at [739].

any proceedings, it is nevertheless unhelpful for private comments made by sitting judges touching upon cases which are pending determination by their colleagues to be made public. The applicant submitted that allowing disclosure of the unreleased documents to Seven Network would be likely to produce such a result. The applicant submitted that this is an unsatisfactory position, both for him and for the fair and impartial determination of the First Carmody Appeals by the Tribunal. The applicant submitted that this circumstance should have been considered by the IC before deciding to disclose the documents.

[26] I have concluded that this is a matter which the IC should have taken into account as a matter favouring nondisclosure, but I would give to it low weight in the public interest balancing test. This is because one would expect the Tribunal, regardless of which judge was presiding, to bring an open mind to the consideration of public interest and certainly not be influenced by the informal comments of other judges. Accordingly, I would allow this ground of appeal, although its contribution to the public interest weighing test would not be particularly great.

**Ground of Appeal 2: The Commissioner made an error of law by inconsistently considering the effect of the fact that much of the information in issue is already in the public domain.**

[27] The applicant submitted to the IC that disclosure of the unreleased documents could reasonably be expected to prejudice his fair treatment. This was on the basis that disclosure would likely lead to unbalanced or unfair media reporting and would impact adversely upon his reputation and public standing. The potential for disclosure of the documents to prejudice the fair treatment of an individual is a factor favouring nondisclosure (item 6 of part 3 of schedule 4 of the RTI Act) which the IC was obliged to consider in relation to each of the documents in issue.

[28] In discounting that consideration, the IC found:

> "46 Having regard to the brief nature of the information in question together with the fact that it has been disclosed publicly previously, I am not satisfied that there are reasonable grounds (as opposed to mere speculation) for expecting that its disclosure could prejudice the applicant's fair treatment.
>
> 47 Even if I accepted that there were reasonable grounds for expecting that disclosure of the comments in question could result in prejudice the applicant's fair treatment I would afford this factor low weight in balancing the public interest in recognition of the fact that the conduct in question and the disapproval of that conduct by other judges is already publicly known. Despite the applicant's argument to the contrary the fact that the public is already aware of the incident in question and that others disapproved of it, necessarily lessens the potential detrimental impact in terms of damage to the applicant's standing or reputation, of any further reporting and any adverse reflection on the applicant's conduct."

[29] The applicant submitted that the IC's finding that "low weight" should be given to any prejudice he might suffer as a result of disclosure of the documents because some information concerning those documents was already in the public domain, directly contradicted her later findings that disclosure of the documents could reasonably be expected to:

a) "promote discussion about the effective functioning of the Supreme Court";

b) "promote discussion about the appropriateness or otherwise of the actions of the applicant and other judges";

c) "contribute to informed (both positive and negative) debate about important public affairs concerning … the responsibilities and powers of the Chief Justice; and the manner in which those responsibilities and powers were discharged" (at [64]).

[30] The applicant noted that those factors were accorded "significant weight" ([70]). He submitted that the IC's failure to recognise the inconsistency between holding on one hand that disclosure of the documents in dispute was likely to generate discussion (including "positive and negative" debate) regarding the applicant's conduct while on the other hand affording "low weight" to any unfair treatment suffered by him, evidenced serious irrationality in each of the IC's decisions. The applicant submitted that the decision to afford "low weight" to any unfair treatment suffered by him (which unfair treatment was stated to be "mere speculation") was at odds with the IC's express acknowledgment that there had been "public criticisms made of the applicant's conduct by the judges … with media articles sometimes reflecting unfavourably on the applicant" ([45]). The applicant submitted that in line with that reasoning by the IC, further disclosure of documents relating to his tenure as Chief Justice (such as the unreleased documents) was likely to result in similar public comment upon him.

[31] The applicant relied upon the observations by Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS*[3]:

> "… the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion."

[32] The applicant submitted that the IC's reasoning failed to satisfy that test. He submitted that the IC ought to have recognised the inconsistency in

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3 [2010] HCA 16; 240 CLR 611 at [131].

the approach revealed in her reasons and either given greater weight to the prejudice likely to be suffered by him, or less weight to the perceived public interest benefit in allowing disclosure of the documents in issue.

[33] The applicant submitted that where a decision maker fails to give correct weight to factors required to be taken into account, the decision may be reviewed on the grounds of irrationality. The applicant relied upon the observation in *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ltd & Ors*[4] where Mason J (with whom Gibbs CJ and Dawson J agreed) said:

> "… both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable".

[34] I have concluded that there is an inconsistency in the approach of the IC. This is not one of those circumstances where reasonable minds might differ in respect of the conclusions to be drawn from the evidence. That error on the part of the IC does constitute an error of law and requires that the IC's decision in relation to the weighing of public interest factors be reconsidered. This ground of appeal has been made out.

**Ground of Appeal 3: The Commissioner erred in not deciding that the Unreleased Documents were documents of an entity to which the RTI Act does not apply pursuant to s 17 and schedule 2, part 2, item 7 of the Act, and in particular that:**

**a. Ms Anne Edwards was "the holder of an office connected with … a quasi-judicial entity"; and**

**b. that the Unreleased Documents were prepared "in relation to the entity's quasi-judicial functions".**

[35] The applicant explained the basis of this ground of appeal as follows. The right of access conferred by s 23(1)(a) of the RTI Act is expressed in terms of "documents of an agency". Section 14(1) defines "agency" to mean a series of entities which includes in s 14(1)(a), "a department" (and therefore DJAG). The applicant relied upon the observation of Applegarth J in *Davis v City North Infrastructure Pty Ltd*[5] where his Honour said:

> "The Parliament did not intend that the right of access to information should extend to a document held by an entity that falls outside the Act's definition of "agency". If the Parliament had intended the Act to give a right of access to information to the fullest possible extent, then it would not have conferred that right by reference to certain defined agencies."

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4 [1986] HCA 40; 162 CLR 24 at 41.
5 [2012] 2 Qd R 103 at 25.

[36] Section 14(2) makes clear that the concept of "agency" "does not include an entity to which this Act does not apply". That phrase is defined in s 17(a) to mean entities identified in schedule 2, part 1. So, for example, the concept of an "agency" does not include the Governor or a member of the Assembly. However, s 17(b) also defines the expression "an entity to which this Act does not apply" as referring to entities mentioned in schedule 2, part 2 in relation to a particular function. Schedule 2, part 2, item 7 then provides:

> "A member of, or the holder of an office connected with, a quasi-judicial entity, in relation to the entity's quasi-judicial functions."

[37] The applicant submitted that the RTI Act treats DJAG as an "agency" other than in the case of any members of, or holders of, "offices" connected with quasi-judicial entities in relation to those quasi-judicial functions. The phrase "quasi-judicial entity" is defined in the RTI Act to mean "an entity that exercises quasi-judicial functions". The term "office" is not defined in the Act, however, schedule 1 of the *Acts Interpretation Act 1954* (Qld) provides that the term "includes position".

[38] The applicant submitted that there was authority for the proposition that the IC when acting as an arbiter between two contending parties, operates in a quasi-judicial role (*Cairns Port Authority v Albietz).*[6] The applicant submitted that each of the documents was prepared by or received by Ms Edwards, who occupied the position of Director of DJAG's Right to Information Unit. That position is "connected with" the office of the IC (a quasi-judicial entity) because Ms Edwards was required under the RTI Act to make a decision regarding the earlier access applications, the subject of the First Carmody Appeals, which decision was reviewable by the IC.

[39] The phrase "connected with" has been recognised to be a relational term capable of wide meaning. On that issue, the applicant relied upon *R v Khazaal*,[7] where French CJ said:

> "31 Relational terms such as "connected with" appear in a variety of statutory settings. Other examples are: "in relation to"; "in respect of"; "in connection with"; and "in". They may refer to a relationship between two subjects which may be the same or different and may encompass activities, events, persons or things. They may denote relationships which are causal or temporal or relationships of similarity or difference. The task of construing such terms does not involve the resolution of ambiguity. They are ambulatory words and may be designed to cover a variety of subjects and a variety of relationships between those subjects. The nature and breadth of the relationships they cover will depend upon their statutory context and purpose. …"

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6 [1995] 2 Qd R 470 at 479 per Thomas J.
7 [2012] HCA 26; 246 CLR 601 at [30].

[40] The applicant submitted that the breadth of the exclusion contemplated by item 7 of part 2, schedule 2 is enhanced by the connecting words selected by the drafter namely "in relation to". The applicant submitted that something which is not itself a quasi-judicial function can nonetheless "relate to" the quasi-judicial function. The wide connecting words show that Parliament intended things which were not themselves documents produced in the performance of quasi-judicial functions to be within the scope of the exemption as documents "relating to" that quasi-judicial function.

[41] The applicant submitted that in this case Ms Edwards was DJAG's "decision maker" for the purposes of the RTI Act in relation to the earlier access applications made to DJAG. The applicant noted that because DJAG had undertaken consultation with Byrne SJA and Applegarth J as to disclosure of the documents, the subject of the First Carmody Appeals, it was not necessary to undertake those consultations again during the external review.

[42] The applicant submitted that in those circumstances Ms Edwards was acting in a position (or office) "connected with" the IC's quasi-judicial functions (namely determining the rights of the access applicants in the First Carmody Appeals) and that the documents in issue were prepared "in relation" to that function.

[43] The applicant relied upon *Henderson v Legal Practice Committee*,[8] where Right to Information Commissioner Mead, found that the Legal Practice Committee was a "quasi-judicial entity" for the purposes of item 6 of part 2, schedule 2 of the Act and that documents which were received or brought into existence by the Legal Practice Committee for the purpose of performing its disciplinary function were documents to which the Act did not apply.

[44] The applicant submitted that similar principles should apply in this case where the unreleased documents in issue relate to the actions of DJAG's initial decision maker (Ms Edwards) in resolving the rights of the access applicants in the First Carmody Appeals. The applicant submitted that so long as the documents relate to the functions of a quasi-judicial entity they are not documents "of an agency" for the purposes of s 23 of the RTI Act and there is accordingly no right to Seven Network to their release. The applicant submitted that on this construction of the RTI Act, the IC ought to have concluded that s 17 excludes the documents from the RTI Act's operation and should not have decided to release them.

[45] In the course of oral submissions, the applicant submitted that Ms Edwards was the relevant Right to Information principal officer of DJAG tasked with doing things which were the first step in the process leading to the task to be performed by a quasi-judicial body and in the performance of quasi-judicial functions. The applicant submitted that the RTI Act was

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8 Application No 310322 of 30 November 2011.

to be construed so that Ms Edwards in the performance of this particular activity fell within item 7, part 2 of schedule 2. The applicant accepted that the connection between Ms Edwards and the OIC was not the most direct, but submitted that it met the description of the holder of an office connected with and in relation to the quasi-judicial functions being performed by the entity.

[46] The applicant submitted that there were compelling reasons why that construction should be accepted.

a) Items 6 and 8 of schedule 2, part 2 already exclude a quasi-judicial entity and its staff. Accordingly, item 7 must be intended to capture something broader and outside those two categories and relevantly the next office holder connected with a quasi-judicial entity's functions here would be the principal officer of the agency.

b) To construe item 7 of schedule 2, part 2, so as to include Ms Edwards, avoids endless access applications. To otherwise construe it, every time there was an access application it would spawn access applications as to the process involved in the first. The applicant submitted that the process laid down by the RTI Act would in that eventuality become self-defeating because no decision would ever bring about finality. Even if the process went to a review, someone could always go back and ask for information about that process. In making that submission, the applicant was aware and accepted that the position of the IC herself was outside the operation of the RTI Act. The applicant submitted that this argument was not directed to the IC but was concerned with the position of Ms Edwards and people like her in other departments and entities.

c) The objects of the RTI Act would not be furthered by construing item 7 in a narrow way so as to exclude Ms Edwards or to construe it in the way in which the IC construed it. The applicant submitted that if someone to whom the principal officer made inquiry knows that what is said can itself be the subject of an access application that must inevitably impair the operation of the RTI Act and the Act ought not be construed in such a way as to give it that effect. The applicant noted that the documents in issue highlight a particular circumstance in that coincidentally, what is being sought from the unrelated documents are the views of judges on legal issues where they were not involved in an adjudicative process, but which views are eventually to be potentially revealed to the world. That is unlikely to have been the expectation of the judges concerned. Even if it were an expectation of the two identified judges, it cannot have been thought to be the likely expectation on the part of somebody being interviewed as part of that quasi-judicial process.

[47] The applicant submitted that the principal officer in DJAG for RTI purposes, Ms Edwards, is to be regarded as the holder of an office, which office is connected with the IC in relation to the IC's quasi-judicial functions because she performs the function of assembling information

and adjudicating upon the decision which enlivens the quasi-judicial office and the quasi-judicial entity's functions. The applicant submitted that if that analysis is correct then this application ought to have failed as it was in respect of documents of someone who was not an agency to which the RTI Act applied.

[48] I accept that at no time did Ms Edwards hold an office or position within the OIC. Nevertheless, she does come within the description in item 7 of schedule 2, part 2, given the breadth of the connecting words "in relation to". Such an interpretation also avoids the vice which has been identified by the applicant, of a potentially continuous succession of access applications.

[49] The IC challenged the applicant's interpretation on three bases:

a) That the applicant had "misconstrued" Ms Edwards' role in handling the access applications, the subject of the First Carmody Appeals.

b) That Ms Edwards did not hold an office "connected with" the IC; and

c) That the IC is not a "quasi-judicial entity" and is otherwise excluded from the operation of the RTI Act.

[50] The IC submitted that Ms Edwards was not acting "on behalf of" the IC. However, that phraseology and those connecting words are not used in the RTI Act, nor in the applicant's submission. The exclusion upon which the applicant relies does not require Ms Edwards to have acted "on behalf of" the IC, only that she hold an "office" (or position) that is "connected with the IC".

[51] It is clear that relational expressions such as "connected with" and "in relation to" are capable of extremely broad application. The IC provided no reasoning or authority for the assertion that "at no time did Ms Edwards hold an office or position connected with [the IC]". To the contrary:

a) Ms Edwards was the "decision maker" (under the RTI Act) in relation to each of the original access applications lodged in the First Carmody Appeals.

b) Those decisions were reviewable by the IC pursuant to ss 84 and 88 of the RTI Act (and indeed were reviewed by the IC).

c) The documents in this appeal were created or received by Ms Edwards as part of the determination of the original access applications lodged in the First Carmody Appeals.

[52] That factual matrix demonstrates the necessary "connection" between Ms Edwards' position as Director of DJAG's Right to Information Unit and the OIC. Those facts are not challenged, and no basis has been identified upon which the applicant can be said to have "misconstrued" Ms Edwards' role in creating the "documents in issue".

[53] In relation to the IC's third point, no authority is provided for the proposition that the IC is not a "quasi-judicial entity". Indeed that proposition conflicts with the authority of *Cairns Port Authority v Albietz,* an authority which has been relied upon both by the applicant and the IC.

[54] As can be seen, I favour the applicant's interpretation and were it necessary to resolve this appeal, I would interpret item 7 of schedule 2, part 2 in the way submitted by the applicant. In view of the conclusions which I have reached in relation to other grounds of appeal, it is not necessary for me to decide this ground and base my decision upon it. Moreover, in the absence of full argument on the issue, I would prefer to reserve my position.

**Ground of Appeal 4: The Commissioner erred by taking irrelevant considerations into account, including that disclosure of the Unreleased Documents:**

**a. Could reasonably be expected to enhance the Government's accountability; and**

**b. could reasonably be expected to inform the community of the Government's operations, including, in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community;**

[55] The IC based her findings that public interest factors favoured the disclosure of the unreleased documents at [63] – [64] on the proposition that the words "the Government", where appearing in the RTI Act, include the judiciary. On that premise, the IC took into account that disclosure of the documents could reasonably be expected to promote open discussion of public affairs, enhance the Government's accountability, inform the community of Government operations, including in particular, the policies, guidelines and codes of conduct followed by the Government in its dealings with members of the community.

[56] This interpretation of the RTI Act cannot be correct.

a) The object of the RTI Act is expressed as giving a right of access to information in "the government's control".

b) But the RTI Act distinguishes between "government" and "Government". This distinction must be recognised (but the IC does not do so). Where Parliament has used the phrase "the Government" in schedule 4, part 2, items 1 and 3, it must be taken to be referring to the elected Government of the day and not the broader concept of "government" (which would include the judiciary).

c) Such an interpretation is consistent with the fact that other factors favouring nondisclosure of information tend to exclude the operation of the RTI Act insofar as it would otherwise apply to the judiciary and that disclosure will:

i) “Prejudice the … professional … affairs of entities”, (which entities may include courts as evidenced by items 1 and 2 of part 2, schedule 2);

ii) “Impede the administration of justice generally, including procedural fairness”; and

iii) “Impede the administration of justice for a person”.

[57] The important distinction is between the term used in item 1, part 1 of schedule 4, which uses the expression “Government” and use of the term “government” (with a lower case “g”) in the RTI Act; for example in the preamble to the RTI Act, the submission is supported with a number of references to "Government" including paragraph (2) which states "Government is proposing a new approach to access information" (which can only refer to the then Government of the day). Accordingly, the context of "Government" in the RTI Act, including in item 1, part 1 of schedule 4, refers to the elected Government of the day which does not include the judiciary.

[58] There is no definition in the RTI Act that defines "government" (with a lower case "g") to be or include a court or a judicial officer. Item 1 of schedule 2, part 2 specifically provides that the RTI Act does not apply to "a court" or the holder of a judicial office or other office connected with a court, in relation to the court's judicial functions. It follows that the judiciary, the courts or a judicial officer cannot be considered to be part of the "Government of the day" or a particular Government, as an elected Government. To do so in a statute that is concerned with accountability of elected Governments, such as the RTI Act, is to ignore the important distinction between the judiciary and other arms of "government" recognised by the concept of separation of powers and judicial independence reflected in the reasoning, by Gleeson CJ in *Fingleton v The Queen*.[9]

[59] It follows that the decision by the IC to allow disclosure of the unreleased documents was made after erroneously taking into account irrelevant factors, i.e. that the disclosure of the documents in issue, which contained comments by judges, would give rise to community discussion concerning the operation of Government. This constitutes an error of law. This ground of appeal has been made out.

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9 [2005] HCA 34; 227 CLR 166.

**Ground of Appeal 5: The Commissioner erred by failing to take relevant considerations into account, including that:**

**a. the Unreleased Documents comprise 'exempt information' under schedule 3, s 8(1) of the RTI Act; and**

**b. disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information (item 16 of part 3, schedule 4), and that the disclosure could reasonably be expected to prejudice the future supply of confidential information (item 8(1) of part 4, schedule 4).**

[60] The applicant submitted that the IC failed to consider whether the unreleased documents comprised "exempt information". Section 8(1) of schedule 3 of the RTI Act states that information is "exempt" if its disclosure "would found an action for breach of confidence". Section 48 provides that "exempt information" is information, the disclosure of which the Parliament has considered would, on balance, be contrary to the public interest.

[61] The applicant submitted that while neither of the documents was authored by him, the information in them was not excluded from being confidential to him. The *Supreme Court of Queensland Act 1991* (SCQ Act) provides for the existence and structure of the Supreme Court and conferred broad powers and responsibilities upon the applicant during his tenure as Chief Justice (ss 15 and 51). The applicant submitted that, assessed objectively, one would expect that private communications between judges (including him) regarding the management and administration of the Supreme Court are communications of a confidential nature.

[62] The applicant submitted that he had a right to the maintenance of confidentiality in information sent privately by him to members of the judiciary in the exercise of his functions as Chief Justice. He submitted that it was not to the point that other judges might have repeated (amongst themselves or to Ms Edwards or others) that information in other forms. He submitted that a voluntary release of that information would be actionable.

[63] I agree that at least in respect of the audio-recording (the subject of the commentary by Byrne SJA in the file note), it is clear that the recording was obtained secretly and concerns confidential information communicated by the applicant to others (namely Justices Byrne and Boddice). In the ordinary course of events, its publication would be an offence under s 45(1) of the *Invasion of Privacy Act 1971* (Qld) and it is wrong to suggest that the conversation in the audio-recording would have occurred in an identical fashion had it been revealed in advance that it was to be recorded. I am persuaded that the discussion of the audio-recording documented in the file note is "exempt information" on the basis that its disclosure would found an action for breach of confidence. My reasons for reaching that conclusion are more fully set out in the First Carmody Appeals.

[64] The applicant submitted that the content of the letter authored by Applegarth J similarly restates confidential information which must have initially been communicated by the applicant (and other judges) regarding the management and administration of the Supreme Court. He submitted that a public interest harm from disclosure of such information arises in at least two respects. First, the disclosure might harm public confidence in the judiciary and second, disclosure on this occasion might inhibit free and frank discussions between judges in the future, so as to impair the functioning of the judiciary and the discharge of the Chief Justice's responsibilities under s 15 of the SCQ Act.

[65] The applicant submitted that if disclosure of the documents is supported because some criticism of him had been discussed publicly, then that is bound to inhibit the future freedom of communications between judges. The applicant submitted that that it is precisely the reason why judges are entitled to confidentiality in their communications. He submitted that the notion that a right to privacy and confidentiality fundamental to free and open communication between members of the judiciary might be obviated by the discussion and criticism in the public realm of his tenure as Chief Justice, is not defensible.

[66] The applicant submitted that the confidentiality, in any and all documents which affect or record communications by him (even if passed on between other judges), cannot be defeated by the lack of objection from other judges to its being disclosed. The applicant submitted that it is likely that confidentiality as to communications between judges concerning the administration of the Supreme Court is a confidentiality which is shared amongst the judges (and therefore would require a "waiver" of confidentiality from all of them, including himself). The applicant submitted that the IC's finding that neither Byrne SJA or Applegarth J objected to the disclosure of the documents cannot constitute a waiver by the applicant or any of the other judges of the Supreme Court of the confidentiality of the content of those documents.

[67] In written submissions on this issue, the IC submitted that the applicant had failed to make out this ground of appeal because he had failed to establish the existence of an equitable obligation of confidence. The IC submitted that the application of s 8(1) of schedule 3 of the RTI Act should be approached by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff in respect of information in the possession or under the control of the agency faced with an application under the RTI Act.

[68] The IC submitted that the following cumulative requirements had not been established by the applicant and therefore such a hypothetical legal action could not succeed:

- The information must be capable of being specifically identifiable as information that is secret, rather than generally available;

- The information must have the necessary quality of confidence;
- The circumstances of the communication must create an equitable obligation of confidence;
- The disclosure of the information to the access applicant must constitute an authorised use of the confidential information; and
- The disclosure must cause detriment to the confider.

[69] I am not persuaded by this submission. It is not clear on what basis the IC asserts that these requirements were not met in this case.

[70] In relation to the first requirement, the Applegarth letter contained information regarding the management of the Supreme Court. That information, including information regarding discussions between and meetings of judges, is not generally available. In relation to the second and third requirements, assessed objectively, communications and meetings between judges as to the management of a court comprise information of a confidential nature.

[71] In relation to the fourth requirement, the applicant's primary submission in this appeal is that the confidentiality inherent in the information within the letter is likely to be one which is shared among the judges of the court. Accordingly, that confidentiality cannot be waived by the consent of only some of them. It is trite law to observe that even a person who "innocently" obtains confidential information may nevertheless be restrained from publishing that information if later informed of its confidential nature.

[72] I have concluded that the fifth requirement of detriment to the confider is satisfied in the circumstances of this case. The reasons of the IC for her decision in this matter recognise that previous disclosure of related information had led to public criticism of the applicant.

[73] It follows that I am satisfied that the information recorded in the unreleased documents is capable of being made the subject of an action for breach of confidence. In any event, the fact that the documents in issue contain information of a confidential nature is a factor which ought to have been considered by the IC before any decision to disclose the documents was made. This ground of appeal has been made out.

**Conclusion and orders**

[74] For the reasons set out above, the IC's exercise of discretion has miscarried and errors of law have occurred. In particular, the IC has taken into account irrelevant considerations, i.e. that a discussion of court affairs will give rise to a discussion concerning Government generally, and has failed to take into account relevant considerations, in particular, the breach of confidentiality which the disclosure of the documents in issue will give rise to.

[75] Under s 146 of the *Queensland Civil and Administrative Tribunals Act 2009* (Qld) the Tribunal has wide powers in an appeal where errors of law have been established. Those powers include setting aside the decision and substituting its own decision or setting aside the decision and returning the matter to the IC for reconsideration according to law. Having regard to the protracted nature of the proceedings, and the undisputed primary facts, I have concluded that the better course is to set aside the decision of the IC and substitute my own decision in relation to the unreleased documents.

[76] As can be seen from the IC's reasons at [63] – [64] the basis for her decision to disclose the documents in issue were the public interest factors favouring disclosure identified in [63]. The IC gave each of those factors "significant weight" [74]. As explained in relation to Ground of Appeal 4, error has been established in that approach because of an incorrect interpretation of the word "Government" as used in the RTI Act. Once those factors are taken out of the weighing process, and due weight is given to the matters raised in Grounds of Appeal a, d and e, the factors favouring nondisclosure of the documents significantly outweigh those favouring disclosure.

[77] Accordingly, the orders which I make are:

1. The appeal by the applicant against the decision of the IC in her external review is upheld.
2. The decision of the IC in her external review of 19 September 2016 is set aside.
3. Access to the unreleased documents is refused.
4. The costs of the appeal are reserved, with liberty to the parties to apply to the Tribunal on 28 days' notice on the issue of costs.