QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*SJN v Office of the Information Commissioner & Anor* [2019] QCATA 115
PARTIES:	**SJN** (applicant/appellant) **v** **OFFICE OF THE INFORMATION COMMISSIONER** (first respondent) **QUEENSLAND POLICE SERVICE** (second respondent)
APPLICATION NO/S:	APL197-17
ORIGINATING APPLICATION NO/S:	Office of the Information Commissioner Application No 312965
MATTER TYPE:	Appeals
DELIVERED ON:	15 August 2019
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Justice Daubney, President
ORDERS:	**The decision of the first respondent dated 29 May 2017 is set aside, and in lieu thereof it is ordered that the second respondent's decision of 8 September 2016 be entirely set aside.**
CATCHWORDS:	ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – RIGHT OF ACCESS – GROUNDS FOR REFUSAL – where the applicant made an access application to the second respondent under the *Information Privacy Act* 2009 ('*IPA*') for access to certain information in the Queensland Police Records and Information Management Exchange – where the second respondent in purported reliance on s 69 of the *IPA* decided to neither confirm nor deny the existence of the requested information – where the first respondent varied the decision on external review and found that the information requested was exempt information under s 59 of the *IPA* and schedule 3, s 10(1)(f) of the *Right to Information Act* 2009 ('*RTIA*') – where the applicant appeals that decision on external review – whether the first respondent erred in its construction of s 59(1)(b) of the *IPA* and s 48 and Schedule 3 s 10(1)(f) of the *RTIA*

Information Privacy Act 2009, s 3, s 40, s 58, s 59, s 64, s 67, s 100, s 121, s 132
Right to Information Act 2009, s 47, s 48, s 49, Schedule 3, s 10(1)(f),

Powell v Queensland University of Technology [2018] 2 Qd R 234; [2017] QCA 200

REPRESENTATION:

Applicant:	Self-represented
First Respondent:	T Lake, employee of the Office of the Information Commissioner
Second Respondent:	C Capper, Senior Legal Officer of the Queensland Police Service Legal Unit

APPEARANCES:

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

REASONS FOR DECISION

[1] The Queensland Police Records and Information Management Exchange ("QPRIME") is a database kept by the Queensland Police Service ("QPS") of information obtained by the QPS in its law enforcement functions. It is a dynamic and constantly updated central record for the QPS. The QPS would describe it as an intelligence tool, which allows police to record information about criminal activity, the circumstances in which criminal activity is likely to occur or has occurred, the identity of those involved or suspected to be involved in criminal activities and the identities of their associates. But it also records information obtained by police officers in the course of their investigations and records criminal intelligence which has been obtained. The QPRIME system also maintains activity reports, whereby a record is kept of the access to particular QPRIME records by, amongst others, serving police officers.

[2] On 1 August 2016, the applicant, who is a former police officer, applied to the QPS under the *Information Privacy Act* 2009 ("*IPA*") for access to certain information in the QPRIME database spanning the period 31 May 2012 to 1 August 2016, namely information about:

(a) searches done on the applicant's name and her former police registration number;

(b) any amendments made to the applicant's file from 31 May 2012 to 1 August 2016; and

(c) the dates the applicant's details were searched and accessed and the registration numbers and names of those who searched and accessed the applicant's details.

[3] On 8 September 2016, in purported reliance on s 69 of the *IPA*, the QPS decided to neither confirm nor deny the existence of the requested information.

[4] On 15 September 2016, the applicant applied to the Information Commissioner ("IC") for external review of the QPS decision.

[5] On 29 May 2017, the IC decided to vary the decision made by the QPS. In summary, the IC decision was that all of the information sought by the applicant was "exempt information" under Schedule 3 s 10(1)(f) of the *Right to Information Act* 2009 ("*RTIA*") because disclosure of the information could reasonably be expected to prejudice QPS' lawful methods or procedures for preventing, detecting, investigating or dealing with contraventions of the law and consequently s 59 of the *IPA* applied to the information, leading to a refusal to deal with the application.

[6] The applicant has now appealed against that decision by the IC on the external review. Such an appeal may only be on a question of law.[1]

The legislation

[7] The objects of the *IPA* are set out in s 3:

> **3 Object of Act**
>
> (1) The primary object of the Act is to provide for –
>
> (a) the fair collection and handling in the public sector environment of personal information; and
>
> (b) a right of access to, and amendment of, personal information in the government's possession or under the government's control unless, on balance, it is contrary to the public interest to give the access or allow the information to be amended.
>
> (2) The Act must be applied and interpreted to further the primary object.

[8] By s 12, the term "personal information" is defined to mean "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".

[9] Section 40(1)(a) of the *IPA* provides that, subject to the *IPA*, an individual has a right to be given access under the *IPA* to documents of an agency to the extent they contain the individual's personal information.

[10] Chapter 3 Part 2 of the *IPA* then, relevantly, contains the legislative provisions by which an individual can make an access application to an agency, i.e. an application to access a document to the extent it contains the individual's personal information.[2]

[11] Chapter 3 Part 3 of the *IPA* sets out the provisions which prescribe procedural matters for dealing with an access application.

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1 *IPA*, s 132(2).

2 See definition of "access application" in *IPA* sch 5.

[12] Chapter 3 Part 4 details circumstances in which an agency may refuse to deal with an access application.

[13] It is important to note that Chapter 3 Part 4 commences with the following express statements of legislative intent in s 58:

> **58 Pro-disclosure bias and pro-amendment bias in deciding to deal with applications**
>
> (1) It is the Parliament's intention that if an access or amendment application is made to an agency or Minister, the agency or Minister should deal with the application unless this would not be in the public interest.
>
> (2) Sections 59, 60 and 62 state the only circumstances in which the Parliament considers it would not be in the public interest to deal with an access application.
>
> (3) Section 60 states the only circumstances in which the Parliament considers it would not be in the public interest to deal with an amendment application.
>
> (4) However, it is the Parliament's intention that this Act should be administered with a pro-disclosure bias and pro-amendment bias and an agency or Minister may deal with an access or amendment application even if this Act provides that the agency or Minister may refuse to deal with the application.

[14] The decision in this case was made by the IC in reliance on s 59, which prescribes the circumstances in which an agency may refuse to deal with an access application:

> **59 Exempt information**
>
> (1) This section applies if –
>
> (a) an access application is expressed to relate to all documents, or to all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and
>
> (b) it appears to the agency or Minister that all of the documents to which the application relates are comprised of exempt information.
>
> (2) The agency or Minister may refuse to deal with the application without having identified any or all of the documents.

[15] In the absence of a circumstance under Chapter 3 Part 4 which enlivens the exercise of a discretion on the part of the agency to refuse to deal with an access application, it then falls to the agency to make a decision in accordance with the provisions set out in Chapter 3 Part 5. These provisions, however, were not relied on as the basis for the IC's decision in this case.

[16] Section 64(1) expresses the intent of Parliament that if an access application is made, the relevant agency or Minister "should decide to give access to the document unless giving access would, on balance, be contrary to the public interest". Section 64(2) then provides:

> (2) The purpose of this part is to help the agency or Minister decide whether giving access would, on balance, be contrary to the public interest by –
>
> (a) setting out in the Right to Information Act, schedule 3, as applied under this Act, types of information the disclosure of which the Parliament has considered would, on balance, be contrary to the public interest; and
>
> (b) setting out in the Right to Information Act, section 49, as applied under this Act, the steps, and in schedule 4 of that Act, as applied under this Act, factors, for deciding, for other types of information, whether disclosure would, on balance, be contrary to the public interest.

[17] Sections 65 and 66 effectively require the agency or the Minister to make a considered decision about the access application within the processing period (as defined in s 22), failing which there is a deemed decision to refuse the access application.

[18] Section 67 provides:

> **67 Grounds on which access may be refused**
>
> (1) An agency may refuse access to a document of the agency and a Minister may refuse access to a document of the Minister in the same way and to the same extent the agency or minister could refuse access to the document under the Right to Information Act, section 47 were the document to be the subject of an access application under that Act.
>
> *Note –*
>
> See the Right to Information Act, section 47 (Grounds on which access may be refused). Generally, the grounds for refusal relate to issues concerning exempt information, the public interest, a child or applicant's best interests, documents being non-existent or unable to be located and other availability of access to documents. However, see also section 4 (Act not intended to prevent other accessing or amendment of personal information) of this Act.
>
> (2) It is the Parliament's intention that –
>
> (a) the grounds on which access may be refused under the Right to Information Act, as applied under this Act, are to be interpreted narrowly; and
>
> (b) an agency or Minister may give access to a document even if a ground on which access may be refused applies.

[19] Section 68 sets out the requirements for notifying the applicant of the decision and reasons for the decision.

[20] Section 69 then provides:

> **69 Information as to existence of particular documents**

> (1) Nothing in this Act requires an agency or Minister to give information as to the existence or non-existence of a document containing prescribed information.
>
> (2) For an access application for a document containing prescribed information, the agency or Minster may give prescribed written notice that does not include the details mentioned in section 199(a) or (b) but, by way of a decision, states that –
>
> (a) the agency or Minister neither confirms nor denies the existence of that type of document as a document of the agency or a document of the Minister; but
>
> (b) assuming the existence of the document, it would be a document to which access would be refused under section 67 to the extent it comprised prescribed information.
>
> (3) To avoid any doubt, it is declared that a decision that states the matters mentioned in subsection (2) is a decision refusing access to a document under section 67.
>
> *Note –*
>
> A decision refusing access to a document under section 67 is a reviewable decision – see schedule 5, definition *reviewable decision*, paragraph (f).

[21] The *IPA* refers to a number of provisions of the *RTIA*. The interrelationship between the two statutes is, in brief, that the *IPA* provides for an individual to seek access to that individual's personal information, while the *RTIA* confers on applicants a more general right of access to information held by government unless it is contrary to the public interest to give access to that information.[3]

[22] If an access application is made under the *RTIA*, then s 47 sets out the grounds on which access may be refused. Relevantly, it provides:

> **47 Grounds on which access may be refused**
>
> (1) This section sets out grounds on which access may be refused.
>
> (2) It is the Parliament's intention that –
>
> (a) the grounds are to be interpreted narrowly; and
>
> (b) an agency or Minister may give access to a document even if a ground on which access may be refused applies.
>
> (3) On an application, an agency may refuse access to a document of the agency and a Minister may refuse access to a document of the Minister –
>
> (a) to the extent the document comprises exempt information under section 48; or

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3 *RTIA*, s 3(1).

(b) to the extent the document comprises information the disclosure of which would, on balance, be contrary to the public interest under section 49;

…

[23] Section 48 of the *RTIA* provides:

48 Exempt information

(1) If an access application is made to an agency or Minister for a document, the agency or Minister must decide to give access to the document unless disclosure would, on balance, be contrary to the public interest.

(2) Schedule 3 sets out the types of information the disclosure of which the Parliament has considered would, on balance, be contrary to the public interest.

(3) However, despite an agency or Minister being able, under section 47(3)(a), to refuse access to all or part of a document, the agency or Minister may decide to give access.

(4) In this Act –

exempt information means the information that is exempt information under schedule 3.

[24] Schedule 3 to the *RTIA* sets out a catalogue of "exempt information" for the purposes of s 48. The IC's decision in this case was based on Schedule 3 s 10(1)(f) which provides:

10 Law enforcement or public safety information

(1) Information is exempt information if its disclosure could reasonably be expected to –

…

(f) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law); …

The IC decision

[25] The IC's decision and reasons on the external review were given on 29 May 2017.

[26] The applicant lodged the application for external review on 15 September 2016. On 29 September 2016, the IC wrote to the QPS advising of the IC's preliminary view in relation to a number of similar applications for external review, including the application which had been made by the applicant. This correspondence set out a preliminary view that the IC rejected the QPS position that it was appropriate to neither confirm nor deny the existence of the relevant material, but that it was open for the QPS to refuse to deal with the application on the basis of Schedule 3 s

10(1)(f) of the *RTIA*. On 7 October 2016, the QPS accepted the IC's preliminary view.

[27] After setting out a brief synopsis of the relevant background, the IC decision referred to this correspondence, and observed that the QPS was no longer advancing the argument that s 69 of the *IPA* applied. On that basis, the IC stated the issues for determination as:

(a) whether the application was expressed to relate to all documents of the stated kind or relate to a stated subject matter; and

(b) whether all of the documents to which the application relates comprise exempt information.

[28] The IC said that if this is the case "the application may be the subject of a refusal to deal decision under section 59 of the IP Act".[4]

[29] The reasons set out s 59 of the *IPA* and the relevant parts of Schedule 3 s 10 of the *RTIA*.

[30] The IC then firstly considered the requirement of s 59(1)(a), and concluded that the application was framed as a request for all documents of the stated class, and also was a request for documents that contained information of a stated kind. The finding that s 59(1)(a) was satisfied was not challenged by the applicant in this appeal.

[31] The IC then turned to consider whether s 59(1)(b) was satisfied. It is necessary to set out those findings in full:

> 19. Secondly, I must be satisfied that all of the documents to which the application relates are comprised of exempt information. Information will be exempt information if the following are established:
>
> - there exists a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law; and
>
> - disclosure *could reasonably be expected* to prejudice that method or procedure.[5]
>
> 20. Having considered the evidence provided by QPS on external review,[6] I am satisfied that the process of QPS officers accessing the QPRIME database forms an integral part of QPS' lawful methods and procedures for preventing, detecting or investigating contraventions, or possible contraventions of the law, specifically in terms of intelligence and surveillance operations.
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> 21. QPS has submitted that disclosure of QPRIME Activity Reports would generally reveal the number of occasions on which QPS officers have accessed the QPRIME database in relation to a particular individual, and would disclose the badge number of the inquiring officer and the

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4 OIC reasons, para 12.
5 *RTIA*, sch 3, s 10(1)(f).
6 Particularly the oral submissions made by QPS to OIC on 16 September 2016.

reasons for access.[7] QPS has submitted that it has serious concerns that the disclosure of such information wold enable an individual to deduce the level of QPS surveillance/investigation they are under, and/or identify any particular QPS units which may/may not be monitoring an individual's behaviour/involvement in activities.[8]

22. While the applicant in this case does not seek access to the units of the officers who allegedly searched for information about her or the reasons for these searches, I am of the view that release of the names and registration numbers of officers may enable their identity and relevant unit to be ascertained. I also consider that releasing the number of occasions on which QPS officers have accessed QPRIME and made amendments to the database in relation to a particular individual may in itself, reveal the level of QPS surveillance/investigation they are under (if any).

23. I have considered the applicant's submissions in relation to her familiarity with the methodologies and investigative procedures of QPS, however I do not consider that this knowledge reduces or negates the prejudice to QPS' methods and procedures that could reasonably be expected to arise from disclosure. The prejudice to QPS' methods and procedures does not stem from revealing how the database or surveillance process works, but rather, from an individual's ability to deduce the level of surveillance they may or may not be under. The applicant is firmly of the view that she is not under any form of surveillance and I accept that there is nothing to suggest that the applicant is under surveillance. However, I consider this irrelevant. I am satisfied that revealing the extent of information in a QPRIME Activity Report, for *any individual*, whether that individual is subject to intelligence and surveillance operations or not, could reasonably be expected to prejudice these lawful methods and procedures as a whole.

24. QPRIME Activity Reports show when and how often QPS officers have accessed the QPRIME database in relation to an individual. I find that disclosure of such information could reasonably be expected to prejudice QPS' methods and procedures for preventing detecting, investigating or dealing with a contravention or possible contravention of the law.

25. As to whether this expectation of prejudice is reasonable,[9] I am satisfied that QPS has demonstrated to OIC that there are particular circumstances in which disclosing information could reasonably be expected to prejudice QPS' lawful methods and procedures, even though the information may appear innocuous, on its face, or when read in isolation.[10]

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7 The QPRIME Activity Report also reveals any amendments to the database.

8 Oral submissions made by QPS to OIC in a meeting on 16 September 2016. These submissions were confirmed in OIC's letter to the QPS on 29 September 2016.

9 The requirements of the phrase "*could reasonably be expected to*" in the particular context of this exemption were discussed by the Right to Information Commissioner in *Gold Coast Bulletin and Queensland Police Service* (Unreported, Queensland Information Commissioner, 23 December 2010) at [20]-[21].

10 Under section 121(3) of the *IPA*, I must not disclose information claimed to be exempt or contrary to the public interest in reasons for decision. I am therefore constrained in the extent to which I can

> 26. For the reasons set out above, I am satisfied that the QPRIME Activity Report comprises exempt information under schedule 3, section 19(1)(f) of the RTI Act.

[32] The reasons then considered and rejected other arguments which had been raised by the applicant, including a contention that the present case fell within an exception to Schedule 3 s 10 because of alleged unauthorised access to the information by police officers. The IC found that it would not invoke such an exception without material to establish the applicant's suspicions and assertions in that regard. The IC also rejected an argument by the applicant based on the fact that the QPS had allowed other applicants access to similar information in the past, saying:

> 32. QPS has, in the past, decided to disclose this type of information to an applicant under the IP Act.[11] However, QPS has since reconsidered its view on releasing QPRIME Activity Reports. In recent months, a series of access applications have been made to QPS under the IP Act, by various individuals seeking access to their personal information in QPRIME Activity Reports. In processing these applications, QPS has identified a number of issues associated with disclosure of QPRIME Activity Reports, which has led QPS to make submissions to OIC regarding the expectation of prejudice to its methods and procedures.[12]
>
> 33. As a decision-maker conducting merits review, I am required to determine each matter on its own facts and on the basis of available evidence at the time of making my decision – there is no requirement for me to follow the approach taken by an agency in a previous external review. Similarly, there is nothing in the IP Act which prevents an agency from, over time, reconsidering its approach to the disclosure of particular information. In any event, an agency retains the discretion to disclose exempt information, whereas the Information Commissioner does not.[13]

[33] Finally, in relation to arguments advanced by the applicant to the effect that the public interest favoured disclosure, the IC found:

> 35. The applicant has also put forward public interest arguments favouring disclosure, submitting that the RTI legislation is aimed at transparency and accountability and "*failing to disclose evidence of corrupt conduct is in itself, corrupt conduct*."[14] I acknowledge that the IP Act is to be administered with a pro-disclosure bias.[15] However, the exemptions in schedule 3 of the RTI Act set out the types of information which Parliament has decided, would, on balance, be contrary to the public interest to disclose. Once the requirements of an exemption have been established, as I have found in this case, I am precluded from considering any public interest factors, no matter how compelling.[16]

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explain the particular circumstances put forward by QPS in support of the application of this exemption.

11 *Wolfe and Queensland Police Service* [2016] QICmr 27 (30 June 2016).

12 Discussed previously in paragraph 21 in this decision.

13 Sections 64(4) and 118(2) of the IP Act.

14 Submissions made to OIC on 23 January 2017.

15 Section 58 of the IP Act.

16 Under section 118 of the *IPA*, the Information Commissioner does not have the power to direct that access to an exempt document be granted. I also note that concerns about alleged unlawful access

The applicant's appeal

[34] Recalling that an appeal such as the present may only be on a question of law, the applicant's fundamental contention is that the IC erred in the interpretation and application of s 59(1)(b) of the *IPA* and s 48 and Schedule 3 s 10(1)(f) of the *RTIA* in finding that the documents appeared to comprise exempt information. In that regard, the applicant challenged the basis for the finding made in relation to the application of Schedule 3 s 10(1)(f) that disclosure of the documents could reasonably be expected to prejudice the method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law.

[35] Many of the arguments advanced by the applicant turned on two propositions:

(a) That as a former police officer who was well versed in the QPRIME system, disclosure of the documents to her could not reasonably be expected to prejudice the respective methods and procedures; and

(b) The fact that the QPS had previously given such access to other applicants demonstrated that the giving of such access could not be reasonably expected to prejudice those methods and procedures.

[36] The applicant also argued:

(a) She was not, in fact, being surveilled or monitored by the QPS, and the contention by the QPS that disclosure of the information would "enable an individual to deduce the level of QPS surveillance/investigation they are under and/or identify any particular QPS units which may/may not be monitoring an individual's behaviour/involvement in activities"[17] was baseless and, in effect, not relevant to the applicant's application;

(b) The "spirit" of the *IPA* and *RTIA* is to protect the privacy of individuals and allow individuals to gain access to their information. It was submitted that the focus should be on the legislation "not the fault or flaws in the QPS policies or procedures";

(c) The IC wrongly applied the legislation because of insufficient knowledge of the workings of the QPRIME system. The applicant sought to exemplify that by demonstrating why knowledge of an officer's registration number and name alone would not necessarily enable identification of that officer's unit. Further, and separately, the applicant descended in submissions into some detail of the workings of the QPRIME system in relation to the interpretation of the number of individual search entries. The applicant did so to bolster her arguments as to her own expertise in relation to the system and to assert a lack of understanding on the part of the IC;

(d) In the course of making submissions about the QPS' change of position or policy in relation to dealing with access applications such as this, the applicant

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to QPRIME records are able to be considered by other bodies, such as the Crime and Corruption Commission, which would have access to such records.

17 OIC reasons, para 21.

argued that her application "should have been approved on the basis of its own merits, not on apparently endemic procedural issues within the QPS".

[37] The applicant also sought to reprise the public interest arguments which had been rejected by the IC. The applicant's point, in short, was to argue that unauthorised access and use of the QPRIME database is of significant public interest.

The IC response

[38] In respect of the appeal proper, the IC adopted the conventional approach of abiding by the Tribunal's decision.

[39] In response to an issue raised at a directions hearing in this matter, the IC put on material and submissions concerning a meeting held with the IC at which it received submissions relating to the external review. I will refer to that matter separately.

The QPS response

[40] After noting the formalities of the external review decision, the QPS submissions provided the following information:

> 5. Due to a number of applications which had been received and determined in a similar manner by the Second Respondent, and were subject to applications for external review, the First Respondent requested a meeting with the Second Respondent to obtain oral submissions to assist in the determination of the external reviews.
>
> 6. On 16 September 2016, the First Respondent met with officers of the Queensland Police Service in relation to numerous applications received and determined by the Second Respondent requesting access to the same or similar information, namely details of access to the QPRIME database concerning the respective persons. Numerous applications, were discussed including the Appellant's application, with the key concerns and submissions of the Second Respondent about the release of the class of documents known as the 'QPRIME activity reports' requested by the respective applications summarily reflected in the file note of the First Respondent.[18]

[41] The QPS submissions made broad brush assertions about what it described as the nature of the information sought, such as:

> 12. For self-evident reasons, the anticipated prejudice to the methods and procedures of the Second Respondent cannot be entirely disclosed in these submissions, particularly in circumstances where the submissions are to be disclosed to another party. Full disclosure of the information would have the prejudicial effect intended to be protected by exemption set out in schedule 3, section 10(1)(f) of the *Right to Information Act 2009*.
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> 13. As the recipient of a significant number of applications for QPRIME activity reports, the Second Respondent's [sic] undertook an analysis of the respective applications and identified a number of key issues and concerns relating to the class of documents known as QPRIME activity

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[18] Page 16 – Appeal Book.

> reports. The concerns raised by the Second Respondent apply generally to the class of documents known as QPRIME activity reports, as opposed to discrete applications, to which any one or more of the concerns may apply. These concerns were conveyed to the First Respondent in the meeting identified in paragraph 6 above.

[42] A general submission was made that the documents sought by the applicant are a "class of document or information, release of which would significantly prejudice the effectiveness of lawful methods or procedures for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law". The QPS submissions then said:

> 16. In support of this contention, the Second Respondent maintains numerous databases including its primary database known as QPRIME. The existence and identity of QPRIME as a database for maintaining and collating information obtained by the QPS in its law enforcement functions is not confidential, nor a secret. QPRIME is designed as a record keeping system for the QPS and there is no doubt that its records can include any interactions with members of the public, with discrete records capable of being properly disclosed upon application, subject to relevant exemptions.
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> 17. The Second Respondent also accepts that disclosure of the fact that police keep information in a computerised database or that police officers access the information held in that database reveals nothing which is novel, covert or clandestine. In fact, the system is regularly identified within requests for information under the *Right to Information Act 2009*, the *Information Privacy Act 2009* and various processes for disclosure or production of documents such as notices to produce and subpoena.
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> 18. In applications such as the present, the Applicants' [sic] are not simply seeking access to the discrete records contained in QPRIME and held by the Second Respondent in relation to themselves, but rather are seeking to satisfy their curiosity as to whom [sic] may have accessed, viewed or otherwise utilised those records. It is this type of information that constitutes the prejudice to the effectiveness of lawful methods or procedures for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law.

[43] It was further submitted that "requests for QPRIME activity reports could reveal hundreds, if not thousands of inquiries on a person's record" and that the "simple process of analysing, investigating and determining" whether disclosure would be exempted by Schedule 3 s 10(1) "could also constitute a substantial and unreasonable diversion of the resources of the agency".[19]

[44] The QPS further submitted that even citing the Schedule 3 s 10 exemption could result in prejudice. It was contended:[20]

> In this regard, disclosure of any information which identifies who accessed a person's record, when the person's records were accessed and by whom could reasonably be expected, amongst other things to:

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19 QPS submissions, para 20.

20 QPS submissions, para 21.

(a) prejudice the investigation of a contravention or possible contravention of the law (including revenue law) in a particular case; or

(b) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law); or

(c) prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety; or

(d) prejudice a system or procedure for the protection of persons, property or the environment.

[45] It is to be noted that, without making specific reference to the legislation, these submissions in fact sought to invoke the exemptions set out in Schedule 3 s 10(1)(g) and (i). Those bases for exemption were no part of the case considered by the IC.

[46] The QPS submissions then record:[21]

> In this regard, the Second Respondent made oral submissions in the meeting referred to in paragraph 6, and subsequently in written submissions in response to other applications dealing with the same class of documents were requested, citing a number of examples for this contention. Overall it was determined that the most appropriate and general ground of exemption which reflected the concerns of the Second Respondent was that the disclosure of the class of documents or information sought in the present application was that disclosure would prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law (including revenue law).

[47] Again, the QPS submitted that, in this regard "the records sought do not relate to individual or discrete records of the applicants which may be held by the Second Respondent, rather the documents or information sought is simply to satisfy their curiosity as to whom [sic] may have accessed, viewed or otherwise utilised those records".[22]

[48] The QPS submissions then raised the prospect of such access applications being used by criminals as a means of counter-surveillance, i.e. to ascertain whether they had been identified as a "person of interest". The submissions raised a lengthy list of hypothetical uses to which a miscreant could put the information obtained on such an access application. Similarly, the submissions adverted to the possibility that the disclosure of the information about the inquiring officer could lead to identification of the specialist unit to which the relevant officer was attached, thereby giving the miscreant insight into the fact that he or she was being looked at in connection with particular types of offences. It was argued that disclosure of information which identifies particular officers as accessing a person's records may not only disclose the fact that the person was a suspect or person of interest but may identify the nature of the investigation being undertaken.

[49] Under the heading "Submissions regarding appeal", the QPS set out a lengthy exposition of the key principles of the *RTIA*. The submissions did not make clear why the QPS chose to advance this commentary in an appeal against a decision

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21 QPS submissions, para 22.

22 QPS submissions, para 23.

made under s 59 of the *IPA*. The submissions included reference to s 49 of the *RTIA* and the catalogue of factors set out in Schedule 4 to the *RTIA* which are relevant and irrelevant to deciding the balance of public interest, and submissions as to why disclosure of the information in this case would be contrary to the public interest.

[50] The confusion in the QPS submissions is apparent from para 37 in which it was said:

> The Second Respondent submits that the correct approach is that the degree of importance or weight given to a relevant public interest factor will depend on the effect that disclosing the information would have on the public interest consideration addressed by the factor. This is reflected in the decision of the First Respondent.

[51] In fact, the IC undertook no such public interest factor balancing exercise, nor was it required to. The decision being made by the IC was pursuant to s 59 of the *IPA*. Section 58(2) of the *IPA* expressly identifies "the only circumstances in which the Parliament considers it would not be in the public interest to deal with an access application", namely the circumstances set out in ss 59, 60 and 62 of the *IPA*. Section 59 is concerned with exempt information, which in turn is "exempt information" under s 48 and Schedule 3 of the *RTIA*. Sections 49 and Schedule 4 of the *RTIA* have no application to ss 59, 60 and 62 of the *IPA*.

[52] The QPS also responded to particular submissions made by the applicant, arguing that her personal background and characteristics were irrelevant to the determination of whether she ought be given access to the documents, and that if the applicant has suspicions that her privacy has been breached, then there are avenues of complaint open to her.

[53] Consequent upon a directions hearing in this matter, the QPS was given leave to file a confidential affidavit, i.e. an affidavit providing evidence to the Tribunal to support the generalised concerns raised in the QPS submissions and communicated to the IC, but which would not be disclosed to the applicant or made available publicly.

[54] Such an affidavit was filed and has been placed in a sealed envelope on the Tribunal file. I will not descend into the detail of the affidavit, but will record that the affidavit:

(a) repeats, albeit with more detail of the hypothetical examples, the general concerns which the QPS holds about allowing access to QPRIME data generally, and the QPRIME access records in particular;

(b) identifies in general terms particular policing areas which have raised concerns about the release of QPRIME data on the basis that release of the data could prejudice intelligence gathering and investigation methodologies;

(c) again advances arguments purportedly based on s 49 and Schedule 4 of the *RTIA* as to why allowing access applications of this type are contrary to the public interest;

(d) gives some further detail of the meeting between the IC and the QPS on 16 September 2016.

[55] In short, despite providing more narrative, this affidavit was long on hypothesis and speculation, and short on any actual evidence to substantiate the matters on which the IC had based its findings.

[56] Notably, neither the QPS submissions nor the confidential affidavit referred to the particular information to which this applicant was seeking access, i.e. her personal information. It was not contended that the information in the relevant QPRIME Activity Reports did not form part of the applicant's personal information. There was no evidence adduced or argument advanced to demonstrate that this applicant's information was exempt information. Rather, the QPS position was to contend, in effect, that every such access application in relation to QPRIME Activity Reports should, as a matter of public policy, be refused, and that the applicant, and others like her who seek such access, should be regarded as being motivated by curiosity.

Consideration of the appeal

[57] In considering whether or not the IC erred in law in making the decision, the starting point must be the legislation under which that decision was made, i.e. the *IPA*.

[58] Notably, s 3(2) prescribes that the *IPA* "must be applied and interpreted to further the primary object [of the *IPA*]". By s 3(1)(b), that primary object includes the conferral on individuals of a right of access to their personal information which is held by the government "unless, on balance, it is contrary to the public interest to give the access".

[59] The legislative primacy of the individual's right of access to their personal information is repeatedly emphasised throughout the *IPA*. For example:

(a) section 40 expressly confers on an individual a right of access to documents of an agency "to the extent they contain the individual's personal information";

(b) both in deciding whether to deal with an application and in deciding whether access to a document containing an individual's personal information should be given, the *IPA* expresses in unambiguous terms the legislative intention that access should be given unless it would not be in the public interest (s 58 and s 64).

[60] Indeed, the pro-disclosure bias is reinforced in the case of decisions whether or not to deal with an access application by s 58(2), which defines and prescribes the only circumstances in which the public interest can outweigh accepting an access application, namely the circumstances stated in ss 59, 60 and 62 of the *IPA*.

[61] It is clear that the *IPA* does not merely create some generic right of access to information. Subject to the legislatively circumscribed public interest exemptions, the statute operates to confer on each individual a right of access to the personal information of that individual which is held, relevantly, by a government agency.

[62] When one has regard to this singular right to have access to the individual's personal information in the context of an express legislative pro-disclosure bias and a closed definition of the circumstances in which public interest considerations might overcome that right of access, it is clear that each application for access must be considered in the context of it being an application for the exercise by that individual of that person's right of access to that individual's personal information. In other

words, just as the *IPA* does not merely create a generic right of access, an application for access under the *IPA* cannot be determined on the basis of generic considerations but must be directed to addressing that individual's access application for their personal information.

[63] To this extent, the IC was correct in saying[23] that, as a decision maker conducting a merits review, the IC was "required to determine each matter on its own facts".

[64] It is, however, apparent on the face of the IC's reasons that the decision was not, in truth, made by reference to the facts of the particular access application made by this individual applicant in relation to her personal information.

[65] The relevant initial question for the IC, under s 59(1)(b) was whether it appeared that "all of the documents to which the [applicant's] application relates are comprised of exempt information".

[66] That, in turn, called for an inquiry under *RTIA* Schedule 3 s 10(1)(f) as to whether this particular information sought by this particular applicant was information, the disclosure of which could reasonably be expected to prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention or possible contravention of the law.

[67] The IC did not, however, undertake any such inquiry in relation to this individual's application. Indeed, the IC eschewed such a consideration of the individual merits of this applicant's access application. After identifying what the IC seems to have considered to be the vice of applications of this nature, namely that release of the names and registration numbers of officers who searched for information about the applicant may enable identification of those officers' relevant units and this, in turn, may lead an individual to deduce whether and to what extent they are under police surveillance, the IC made a blanket finding:[24]

> I am satisfied that revealing the extent of information in a QPRIME Activity Report, for *any individual*, whether that individual is subject to intelligence and surveillance operations or not, could reasonably be expected to prejudice these lawful methods and procedures as a whole.

[68] That blanket finding, which was tantamount to the imposition of a general policy relating to applications to access personal information in the QPRIME database, was then the foundation for the finding[25] that disclosure of the information could reasonably be expected to prejudice the QPS' methods and procedures for preventing, detecting, investigating or dealing with contraventions or possible contraventions of the law.

[69] By adopting this approach, the IC failed to have regard to the particular application made by this particular applicant. The IC did not consider whether the particular information sought by this applicant was exempt information. The IC did not in any way consider how disclosure of this particular information to this particular applicant could reasonably be expected to have the adverse consequences identified in *RTIA* Schedule 3, s 10(1)(f).

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23 At [33] of the decision.
24 At [23] of the decision.
25 In para [24] of the decision.

[70] The IC therefore erred in its consideration and application of s 59 of the *IPA*, and its decision must be set aside.

[71] Turning, then, to consider whether the QPS may refuse to deal with this applicant's access application, it is worth restating the statutory prescription that the QPS must deal with the application unless this would not be in the public interest, and the only circumstances in which it would not be in the public interest to deal with the application are those stated in ss 59, 60 and 62 of the *IPA*. The only public interest consideration invoked by the QPS was under s 59. It is therefore not necessary to consider s 60 or s 62.

[72] Given that this appeal is proceeding by way of a rehearing,[26] it is also appropriate to recall that, on the external review before the IC, the QPS bore the onus of establishing that the IC should give a decision adverse to the applicant.[27]

[73] As already noted, the information put before the IC by the QPS was long on generality and very short, if not non-existent, in detail about this applicant's particular application.

[74] As I have already observed, the QPS arguments amounted to broad brush and general submissions about a range of potential deleterious outcomes if all applicants had an unfettered right of access to the QPRIME Activity Reports. This included the inferences which applicants might be able to draw from the provision of the records, e.g. whether they were under surveillance or being regarded as "persons of interest". There was, however, not even an attempt to link any of those concerns to the particular information sought by this particular applicant. In other words, beyond raising general spectres of the potential misuse of information derived from QPRIME Activity Reports, there was simply no argument put or information provided which could lead to a conclusion that the provision of this particular information to this particular applicant could reasonably be expected to prejudice the effectiveness of the QPS methods or procedures for preventing, detecting, investigating or dealing with contraventions or possible contraventions of the law.

[75] The QPS has therefore failed to discharge the onus of establishing that the information sought is exempt information for the purposes of s 59 of the *IPA*.

[76] Several further points should be made in this context.

[77] One of the general arguments raised by the QPS was the prospect of an application being for documents which are so significant in number as to constitute a "substantial and unreasonable diversion of the resources of the agency". It is not suggested that this is a consideration in respect of this particular applicant. But if such an application is received, then it is open to the QPS to consider refusing to deal with the application under s 60(1) of the *IPA*. This is one of the specific public interest exemptions allowed for under s 58(2), but it has not been invoked or relied on in this case.

[78] The QPS submission that the applicant is nothing more than one of a class of persons who "are seeking to satisfy their curiosity as to whom [sic] may have accessed, viewed or otherwise utilised those records" is misguided in principle. As

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26 *IPA*, s 132(5).

27 *IPA*, s 100.

noted above, the QPS itself argued that the applicant's personal background and characteristics are irrelevant to determination of the question whether she ought be given access to the documents. Equally, the applicant's motive for seeking such access is irrelevant. The applicant has a statutory right to seek access to her personal information, which is circumscribed only by the terms of the legislation. The reason or motive for the applicant seeking to exercise that right is patently irrelevant to the consideration of the question as to whether or not her application should be dealt with. It is certainly not encompassed by the public interest exemptions in ss 59, 60 and 62 of the *IPA*.

[79] The decision in this appeal should not be construed as meaning that the QPS may never have resort to s 59 of the *IPA* when considering whether or not to deal with an access application. One can well envisage that, in particular cases, one or more of the general concerns expressed by the QPS in its present arguments may be crystallised and properly found a conclusion that disclosure of particular information to a particular individual could reasonably be expected to prejudice the policing methods referred to in *RTIA* Schedule 3 s 1(f). But that has not been demonstrated to be the case here.

[80] Similarly, nothing in this appeal decision should be interpreted as preventing the QPS, in an appropriate case, from relying on s 69 of the *IPA* to neither confirm nor deny the existence of a document containing "prescribed information".[28] Again, that has not been demonstrated to be applicable to the present case.

Dealing with the access application

[81] The only decision which is subject to review on this appeal is the IC decision that the documents sought by the applicant comprise exempt information, and therefore s 59 of the *IPA* authorises a refusal to deal with the application.

[82] The present jurisdiction of this Tribunal is, however, confined to hearing and determining the appeal on questions of law, and the fact that the Tribunal has broadly-stated powers on appeal (conferred by s 146 of the *Queensland Civil and Administrative Tribunal Act* 2009) does not have the effect of enlarging that jurisdiction.[29]

[83] For the reasons given above, the IC's decision will be set aside. That then means that the QPS will have to deal with this applicant's particular access application in accordance with the provisions of Chapter 3 Part 5 of the *IPA*.

[84] Obviously, a decision on the access application has not yet been made and it is beyond my power on the present appeal to make that decision. But, given the submissions made and the material filed in the present appeal, it may be of assistance to the QPS in approaching the task of deciding this particular access application if I offer the following observations.

[85] In approaching a consideration of the matter, the QPS should consider this particular access application by this particular applicant. And the QPS must engage in that consideration on the footing that the *IPA* requires that access be given unless giving

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28 As that term is defined in sch 5 of the *IPA*.

29 *Powell v Queensland University of Technology* [2018] 2 Qd R 234; [2017] QCA 200.

access would, on balance, be contrary to the public interest.[30] That is not a generic inquiry – it is whether giving this applicant access to this particular personal information is, on balance, contrary to the public interest.

[86] If the QPS considers it necessary to undertake an analysis as to whether, on balance, giving this applicant access to this information would be contrary to the public interest, then by operation of s 67 of the *IPA* and s 47(3)(b) of the *RTIA*, the QPS will have to follow the steps set out in s 49 by reference to the factors identified in Schedule 4 of the *RTIA*. The necessary balancing exercise is set out in s 49(3):

> If it is relevant for an agency or Minister to consider whether, on balance, disclosure of information would be contrary to the public interest, the agency or Minister must undertake the following steps –
>
> (a) identify any factor that is irrelevant to deciding whether, on balance, disclosure of the information would be contrary to the public interest, including any factor mentioned in schedule 4, part 1 that applies in relation to the information (***an irrelevant factor***);
>
> (b) identify any factor favouring disclosure that applies in relation to the information (***a relevant factor favouring disclosure***), including any factor mentioned in schedule 4, part 2;
>
> (c) identify any factor favouring nondisclosure that applies in relation to the information (***a relevant factor favouring nondisclosure***), including any factor mentioned in schedule 4, part 3 or 4;
>
> (d) disregard any irrelevant factor;
>
> (e) having regard to subsection (4), balance any relevant factor or factors favouring disclosure against any relevant factor or factors favouring nondisclosure;
>
> (f) decide whether, on balance, disclosure of the information would be contrary to the public interest;
>
> (g) unless, on balance, disclosure of the information would be contrary to the public interest, allow access to the information subject to this Act.

[87] I emphasise again that these observations are based on the submissions and material put before me on the present appeal. It may be that, when the QPS comes to consider this particular applicant's application for access to her particular personal information, the QPS might identify factors related to her application which need to be considered in any balancing exercise undertaken under s 49. By way of observation on the material and submissions before me, however, and having regard to the categories of factors identified in Schedule 4 of the *RTIA*, I would note:

(a) There is clearly a factor favouring disclosure in the public interest under Schedule 4 Part 2 s 7, namely the information in question is the applicant's personal information;

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30 *IPA*, s 64.

(b) If, having regard to factors favouring non-disclosure in the public interest enumerated in Schedule 4 Part 3, the QPS seeks to rely on s 7 ("disclosure of the information could reasonably be expected to prejudice security, law enforcement or public safety"), the QPS will need to articulate that factor by reference to the disclosure of this particular information. As already noted, the only public interest objections raised to date by the QPS have been said to be generic to all such applications, and have raised all manner of hypothetical adverse scenarios without attempting to link those to the disclosure to the applicant of the personal information she seeks;

(c) None of the factors favouring non-disclosure in the public interest because of public interest harm in disclosure listed in Schedule 4 Part 4 appear, on their face, to be applicable to the present case.

[88] It will be clear from what I have said in these observations, and indeed in my reasons for setting aside the IC's decision under s 59 of the *IPA*, that this legislation, which repeatedly emphasises a pro-disclosure approach, demands that each application be considered on its own merits, and not by reference to some broad brush policy which is sought to be generally applied to applications of this type. This approach, in my view, is not only apposite to observing and applying the primary object of the *IPA*, it is required by the conferral on the individual of the statutory right of access to personal information and the *IPA*'s repeated statements of legislative intent that the *IPA* is to be administered with a pro-disclosure bias. So, for example, when s 59(1)(b) speaks of "all of the documents to which the application relates", it is not speaking of a class of applications but of the particular access application made by the individual exercising their right of access. Similarly, the reference to "*the* documents to which the application relates" speaks for itself, and cannot be determined simply by invocation of some policy of purported general application.

[89] It is, of course, a matter for the QPS as to whether the broad brush concerns on which it has sought to proceed in this matter to date are so significant as to seek legislative intervention. That is a matter of policy about which it would be inappropriate for me to make any comment. But unless and until that happens, the QPS is bound to observe the terms of the *IPA* and the *RTIA* according to their tenor, and to deal with each access application under the *IPA* according to the circumstances and on the merits of that application. To act otherwise would tend to subvert the statutory right of access conferred by the *IPA* on individuals and evince an attitude contrary to the pro-disclosure bias required under the legislation.

The IC obtaining information

[90] During a directions hearing in this matter, I was alerted to the fact that the IC's decision was based, in part at least, on submissions which had been made orally to the IC by QPS representatives at a meeting with IC representatives on 16 September 2016. At the time of the directions hearing, the only substantive information before me about the circumstances of that meeting, of which the applicant was clearly not aware and in which she did not participate, were the submissions on the appeal by the QPS which are quoted above at and [40] and [46].

[91] Upon the matter being raised in the directions hearing, the parties were given the opportunity to put on further material and submissions concerning the mode of information collection undertaken by the IC.

[92] The information and submissions supplied by the IC to the Tribunal on this point were very informative, and assisted greatly in dispelling concerns which had been raised as a consequence of the way in which the QPS chose to describe its interaction with the IC.

[93] The IC has confirmed that, in exercise of the power conferred by s 108(1)(c) of the *IPA* for the IC to "inform himself or herself on any matter in any way the Commissioner considers appropriate", the IC requested that QPS provide oral submissions about:

(a) the basis upon which the QPS considered it was entitled to rely on the "neither confirm, nor deny" ground to refuse access to information in a number of decisions (including the decision concerning the applicant's access application) which were at that time before the IC for external review and which all sought access to similar information; and

(b) more specific information about why the QPS considered the type of information sought should not be disclosed.

[94] In particular, the IC confirmed to the Tribunal that the meeting on 16 September 2016 was not a broad based policy discussion.

[95] It should be acknowledged that, in performing its function of conducting an external review, the IC must balance the statutory prescription of proceeding with little formality and technicality and of gathering information in any way the IC considers appropriate with the undoubted requirement to afford procedural fairness to all the parties. The challenges of that balancing exercise can obviously be compounded in cases such as the present, where the IC must effectively quarantine from the applicant the information which is claimed to be exempt or not disclosable on public interest grounds. To facilitate that, s 121(2) of the *IPA* provides:

> The commissioner may receive evidence, or hear argument, in the absence of an access participant or an access participant's representative if it is necessary to do so to prevent disclosure to that person of information that is claimed to be exempt information or contrary to the public interest information.

[96] True it is that these provisions permit the information-gathering procedure undertaken by the IC in this case, i.e. a meeting attended by representatives of the IC and the QPS. But in a case such as the present, such a meeting must necessarily be "closed door" and conducted to the exclusion of the applicant. That process may be less formal and more convenient for the IC (and the QPS, for that matter), but it carries with it the risk of there being an adverse perception of the process. That was highlighted in the present case by the way in which the QPS submissions were cast, which seemed to suggest that the meeting between the IC and the QPS had resulted in those parties determining a general policy for dealing with applications of this nature. To safeguard the integrity of the independence of the office of the IC as an external reviewer, the IC may well consider it appropriate to adopt more obviously arms-length processes in such situations, e.g. by calling for confidential written submissions rather than conducting "closed door" meetings.

[97] Having received the further clarification from the IC about the circumstances and content of the meeting in this case, it is not necessary to say anything further on this topic.

Conclusion

[98] For the reasons given above, the IC's decision must be set aside and the applicant's access application now be decided by the QPS.

[99] Accordingly, the Tribunal orders and directs as follows:

1. The decision of the first respondent dated 29 May 2017 is set aside, and in lieu thereof it is ordered that the second respondent's decision of 8 September 2016 be entirely set aside.