QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Lawrence v Queensland Police Service* [2022] QCATA 134
PARTIES:	**DANIEL LAWRENCE** (applicant/appellant) **v** **QUEENSLAND POLICE SERVICE** (respondent)
APPLICATION NO/S:	APL203-21
MATTER TYPE:	Appeals
DELIVERED ON:	26 September 2022
HEARING DATE:	19 September 2022
HEARD AT:	Brisbane
DECISION OF:	Judicial Member D J McGill SC
ORDERS:	**1. The appeal is dismissed.** **2. If either party seeks an order for costs, the party is to serve submissions in writing on the other party and send them by email to the associate to the Deputy President within fourteen days.** **3. If such submissions are received, the other party may serve a response including any submissions on the first party and send them by email to the associate within fourteen days thereafter.** **4. Any submissions in reply are to be served and emailed to the associate within seven days of the submissions in response.** **5. The Appeal Tribunal will decide any question of costs on the papers after all submissions have been received.**
CATCHWORDS:	ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – REVIEW OF DECISIONS – OTHER STATES – Queensland – appeal on a question of law – whether documents sought included some irrelevant information – whether error of law in determining balance of public interest against disclosure *Human Rights Act* 2019 (Qld) s 21 *Information Privacy Act* 2009 (Qld) s 12, s 40, s 67, s 88 *Right to Information Act* 2009 (Qld) s 49, Schedule 4 Part

2 Item 5

Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139
Osland v Secretary, Department of Justice (2010) 241 CLR 320
Page v Metropolitan Transit Authority (1988) 2 VAR 243
Pivovarova v Michelsen [2014] QCA 257, (2019) 2 QR 508
Powell v Queensland University of Technology [2018] 2 Qd R 276
Robinson Helicopter Co Inc v McDermott [2016] HCA 22, (2016) 90 ALJR 679
Spalding v Kent [2022] QCATA 52
Victoria Police v Marke [2008] VSCA 218
XYZ v Victoria Police [2010] VCAT 255

APPEARANCES & REPRESENTATION:	This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)
Applicant:	M J Jackson instructed by Nyst Legal
Respondent:	S D Anderson instructed by the QPS Legal Unit

REASONS FOR DECISION

[1] The appellant applied to the respondent in 2020 for the release under the *Information Privacy Act* 2009 (Qld) ("the Act") of certain information relating to an incident in 2011.[1] The respondent released 5 full pages and parts of 28 pages, with some irrelevant information deleted, but refused access to a further 7 pages. The appellant sought an internal review of that decision, which resulted in a deemed affirmation under the Act s 97(2). On 15 October 2020 the appellant applied for external review by the Office of the Information Commissioner ("the OIC"). On 22 June 2021 the OIC affirmed the decision of the respondent. On 19 July 2021 the appellant filed in the Tribunal an application to appeal from that decision.

[2] There is a right to appeal to the Appeal Tribunal under the Act s 132, but only on a question of law. The appeal provided by s 132, because it is confined to a question of law, is in the nature of judicial review, as is shown by strong authority.[2] It does not provide a mechanism for reconsidering any issue of fact decided by the OIC, except on the narrow ground that, as a matter of law, the decision on the issue was not open on the material before the OIC. The only issue is whether an error of law was made by the OIC. If on appeal an error of law is shown, the appropriate course

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1 I shall refer to Mr Lawrence as the appellant.

2 *Osland v Secretary, Department of Justice* (2010) 241 CLR 320; *Powell v Queensland University of Technology* [2018] 2 Qd R 276 at [42] – [46]; *Pivovarova v Michelsen* [2014] QCA 257, (2019) 2 QR 508. As to what is an error of law, see also *Commissioner for Liquor and Gaming v Farquhar Corporation Pty Ltd* [2018] QCA 202; *Pivovarova* (*supra*) at [4]; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139; *Spalding v Kent* [2022] QCATA 52 at [20].

is to refer the matter back to the OIC to decide according to law, unless as a matter of law only one decision was open on the material before the OIC.[3]

[3] The OIC considered three issues on the external review: whether information omitted as irrelevant was properly omitted as irrelevant, whether the information of which disclosure was refused was information disclosure of which was contrary to the public interest, and whether additional information within the request, in the form of CCTV footage, had not been identified and released. The OIC proceeded on the basis that the Act s 40 gave a right to access to an individual's personal information, that the information requested was that held in relation to the particular incident, and that the irrelevant information did not relate to the incident or to the applicant, and hence was properly omitted under the Act s 88. The OIC identified factors favouring disclosure and factors favouring non-disclosure, and concluded that the latter outweighed the former. The OIC also concluded that access to further information may be refused on the basis that it is non-existent or unlocatable.

Appellant's submissions

[4] The appellant submitted that, although the right of appeal was confined to a question of law, the appeal was otherwise by way of rehearing and the approach outlined in *Robinson Helicopter Co Inc v McDermott*[4] applied. I do not agree. That decision involved a conventional appeal by way of rehearing from a judgment after a trial. The Court of Appeal decisions cited are clearly inconsistent with such an approach in relation to this appeal, which is by way of judicial review. The only significance of the appeal being by way of rehearing is that I apply the law as it is now.

[5] The appellant identified what were submitted to be four errors of law:

(a) An error in the application of the Act s 88;

(b) A failure to take into account a relevant consideration;

(c) Taking into account an irrelevant consideration; and

(d) As a result of errors (b) and (c), finding that it was not in the public interest to disclose the material of which disclosure was refused.

The Act s 88

[6] The Act provides in s 88 as follows:

> (1) This section applies if giving access to a document will disclose to the applicant information the agency or Minister reasonably considers is not relevant to the access application for the document.
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> (2) The agency or Minister may delete the irrelevant information from a copy of the document and give access to the document by giving access to a copy of the document with the irrelevant information deleted.
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> (3) However, the agency or Minister may give access to the document under subsection (2) only if the agency or Minister considers it is reasonably practicable to give access to the copy.

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3 *Pivovarova* (*supra*) at [9].

4 [2016] HCA 22, (2016) 90 ALJR 679.

[7] The appellant submitted that information had been disclosed in 2012 in response to an earlier request which included information deleted in response to the 2020 request. It was submitted that this was relevant to the request for access, and showed that there had been a misapplication of s 88 in response to the 2020 request. The information extracted in the submissions for the appellant Table 1 was disclosed in 2012 but was not disclosed in 2020, although an earlier entry in the police log by one of the officers and another officer was disclosed (with deletions) in 2012 and in 2020. It was submitted that this information related to the incident. The respondent submitted that it related only to the police investigation, and contained no information about the incident.

[8] There are two relevant limitations on the information subject to disclosure under the Act in response to the 2020 request. First, the Act confers a right to access to documents to the extent that they contain the individual's personal information: the Act s 40. Personal information is defined in s 12 as: "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] The OIC concluded that the information not disclosed under s 88 did not relate to the appellant.[5] There is nothing in the material in Table 1 which shows that that conclusion involved any error of law. Indeed, in relation to the material in Table 1, it was obviously correct. That material contains no information at all which related to the appellant, and hence none of his personal information as defined by s 12. It was not subject to access under the Act.

[10] The other finding made was that the information not disclosed under s 88 was not information relating to the incident. That conclusion was also not shown to have been incorrect in relation to the material in Table 1. The information set out related to the steps taken by police in the process of investigating the incident, but does not contain information about the incident itself. Contrary to the assertion in the submissions for the appellant, the material in Table 1 does not show that the OIC made any error of law in the interpretation of the request of the appellant, or any error of law in connection with the finding of fact that the documents contained information which was not relevant to the access application of the appellant. No error of law has been shown in relation to the application of the Act s 88.

The relevant consideration

[11] The appellant identified the relevant consideration not relied on as that identified in the *Right to Information Act* 2009 (Qld) ("the RTIA") Schedule 4 Part 2 item 5. By the Act s 67, an agency may refuse access to a document if access could be refused under the RTIA s 47. Section 47(3)(b) provides that disclosure of a document may be refused to the extent that it comprises information the disclosure of which would on balance be contrary to the public interest under s 49. Section 49 among other things requires the identification of any factor favouring disclosure including any factor mentioned in Schedule 4 Part 2. Item 5 in Part 2 provides: "Disclosure of the information could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official."

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5 Reasons [14].

[12] The OIC considered the effect of Item 5, but concluded that the disclosure of the personal information of other individuals would not allow or assist enquiry into, reveal or substantiate, any deficiencies in the conduct of the respondent or any of its officers. The conclusion that was reached was that this factor did not apply. Prima facie, this involved a conclusion of fact: the information which was the personal information of other individuals could not reasonably be expected to allow or assist enquiry into possible deficiencies in the conduct or administration of an agency or official. This was said to be so, whether considered in isolation, or in conjunction with the information which was disclosed.

[13] The interpretation of Item 5 is an issue of law. The appellant has not in submissions advanced any specific argument about the correct interpretation of Item 5. The submission was rather that the conclusion was wrong, for various reasons. For this to be characterised as an error of law, the issue must be whether the conclusion was one which no reasonable decision maker could arrive at under the circumstances.

[14] The appellant's submission was that further disclosure may assist in exposing possible deficiencies in the police investigation of his complaint that he had been assaulted, which was ultimately discontinued. This involved a consideration of the extent to which witness statements were obtained, the extent to which their contents supported the decision to discontinue, and efforts made to obtain copies of CCTV footage said to be relevant. The submissions referred to material that CCTV footage which could not be downloaded was seen a couple of days after the incident and supported the version of persons other than the appellant. There is nothing in the material to indicate that the police ever obtained a copy of the footage.

[15] There are difficulties with this argument. It is focused on the content of the police investigation, whereas under the Act what the appellant is entitled to is personal information. The personal information of other persons with whom the police had contact in the course of the investigation is not going to be personal information of the appellant, except to the extent that that information is specifically about the appellant. It is only where the disclosure of personal information of the appellant would require the disclosure of personal information of other persons that the issue arises as to whether the disclosure is on balance contrary to the public interest.

[16] The appellant's argument was that the material, if more fully disclosed, may suggest some inadequacy in the investigation of the appellant's complaint that he was assaulted by four persons, as a result of which he suffered grievous bodily harm (or perhaps just bodily harm). The only evidence supporting his complaint was a statement from a friend of the appellant which is inconsistent with the statement of a plausible independent witness, whose evidence strongly suggests that that friend was the principal aggressor. The four persons provided versions which were consistent, and supported self defence. According to the appellant's submissions, there was an entry in a police document that the only CCTV footage seen supported the version of the four persons. In the circumstances, a conclusion that there was no realistic prospect of securing a conviction in relation to that complaint, and that the investigation should be discontinued, was unsurprising.

[17] To the extent that it could be said that more could have been done by way of investigating the complaint, that can be said without disclosing the personal information of other persons. The content of that personal information would not strengthen that proposition. I expect that that is something which could be said about almost any investigation. I have looked at the material in the appeal book

which includes the unredacted material made available by the respondent to the OIC. Having done so, it is clear to me that the finding made by the OIC, that Item 5 did not apply on the facts of this matter, was a finding of fact which was reasonably open on that material. In those circumstances, this ground does not show any error of law on the part of the OIC.

The irrelevant consideration

[18] The appellant submitted that the OIC, in assessing the weight to be given to "the administration of justice factor" took into account an irrelevant consideration, namely that there may be other avenues of enquiry or processes available to the appellant to identify the individuals involved.[6] It was submitted that the availability of other avenues was an irrelevant consideration, on the basis that the RTIA by s 53 specified certain circumstances in which access under that Act could be refused, on the ground that there was other access available to the relevant document, which was not shown to apply. Further, reliance was placed on the pro-disclosure bias in the Act, as shown by the Act s 3(1)(b), s 64(4) and s 67(2), and by the RTIA s 47(2).

[19] This was not a situation where the OIC refused disclosure on the basis that the relevant information was available in another way, or that this was a factor favouring non-disclosure. At most, it was a factor taken into account when deciding how much weight to attribute to a particular factor favouring disclosure which was accepted as applicable.[7] Ordinarily, the assessment of how much weight to attribute to a particular relevant consideration is a matter of discretion or judgment, and does not give rise to an issue of law, although in principle it would be an error of law to take into account an irrelevant consideration in making that assessment. No authority was cited to support the proposition that this was an irrelevant consideration in relation to the weight to be attributed to this factor.

[20] The parties referred to the decision of *XYZ v Victoria Police* [2010] VCAT 255. That decision involved legislation in somewhat different terms,[8] but at one point considered whether certain information should not be disclosed because it unreasonably disclosed someone's personal affairs, which was defined in terms which would include "personal information" for the purposes of the Act. Reference was made to decisions in *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 and *Victoria Police v Marke* [2008] VSCA 218. Neither of these considered the question of the relevance of the possible existence of alternative means of obtaining the relevant information. The majority in the latter case held that the likely use of the information by the party seeking disclosure was a relevant consideration; Maxwell P dissented on this, but said that whether and to what extent the personal information was already known to that party was a relevant consideration, as was the nature of any interest which the party can demonstrate in the personal information.

[21] It could be said that, if the personal information cannot be obtained in any other way and the applicant has a legitimate interest in obtaining it, that would present a stronger case that it was reasonable to disclose the personal information. If so, this can be seen as providing some support for the proposition that the availability of the information in another way is relevant to the weight to be attributed to the

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6 Reasons [30].

7 It occurs to me that the comment may have been made as a aside, by way of consolation for the appellant, to soften the conclusion that the information sought was not available under the Act.

8 In addition, the factual setting of it was quite different from that in the present case.

"administration of justice" factor. This is really the converse of the proposition that, if the only way the applicant can obtain justice is by the disclosure of the personal information, this adds weight to the "administration of justice" factor.

[22] In the circumstances I am not persuaded that, assuming that the possible existence of other avenues to obtain the information was taken into account in determining the weight to be attributed to this factor, that involved taking into account an irrelevant consideration. It follows that the appellant has not shown that there was any error of law on the part of the OIC in determining the weight to be attributed to the administration of justice factor.

Conclusion

[23] The fourth ground depended in terms on the success of the appellant on grounds (b) and (c), or one of them, and that has not occurred. Nevertheless some submissions were directed to a failure to give proper weight to the inherent pro-disclosure bias in the operation of the Act, as shown by the provisions to which I have referred earlier, and as reinforced by the terms of the *Human Rights Act* 2019 (Qld) s 21, which gives a right to seek and receive information. The OIC was conscious of this,[9] and considered that the application of the Act gave effect to the requirements of the *Human Rights Act*. I see no reason to differ from that conclusion. It must be remembered that the *Human Rights Act* also provides, in s 25, a right not to have a person's privacy unlawfully or arbitrarily interfered with. That is consistent with the recognition of the protection of a person's right to privacy as a factor favouring non-disclosure in the RTIA Schedule 4 Part 3 Item 3.

[24] There was no error of law in giving considerable weight to the protection of the personal information of persons other than the appellant. Indeed, I regard such an approach as appropriate. Unless an error of law can be shown by the appellant in the application of the public interest test, and none has been shown, the decision of the OIC on that matter is not subject to review by the Appeal Tribunal. That is in substance what the appellant seeks in his submissions on ground (d).

[25] No error of law has been shown. The appeal is dismissed. If either party seeks an order for costs, the party is to serve submissions in writing on the other party and send them by email to the associate to the Deputy President within fourteen days. If such submissions are received, the other party may serve a response including any submissions on the first party and send them by email to the associate within fourteen days thereafter. Any submissions in reply are to be served and emailed to the associate within seven days of the submissions in response. The Appeal Tribunal will decide any question of costs on the papers after all submissions have been received.

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[9] Reasons [9].