
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : S -v- DEPARTMENT OF COMMUNITIES [2019]
WASC 260

CORAM : TOTTLE J

HEARD : 12 APRIL 2019 & FURTHER WRITTEN
SUBMISSIONS FILED ON 16 & 24 MAY 2019

DELIVERED : 22 JULY 2019

FILE NO/S : GDA 8 of 2018

BETWEEN : S
Appellant

AND

DEPARTMENT OF COMMUNITIES
Respondent

Catchwords:

Freedom of information - Refusal of access to documents containing personal information - Where appeal against earlier decision of Information Commissioner successful and matter remitted to Information Commission in accordance with court's judgment - Where applicant was the source of the personal information - Where Commissioner required to identify information where applicant the 'sole and only source' - Where decision of Commissioner had no rational basis - Decision legally unreasonable

Legislation:

Freedom of Information Act 1992 (WA), sch 1 cl 3, s 85

Result:

Appeal allowed
Decision of Information Commissioner set aside

Category: B

Representation:

Counsel:

Appellant : Mr D W Thompson
Respondent : Mr J Carroll

Solicitors:

Appellant : In person
Respondent : State Solicitor's Office

Case(s) referred to in decision(s):

Apache Northwest Pty Ltd v Department of Mines and Petroleum [2011] WASC 283
H v Department of Education [2015] WASC 276
I v Department of Agriculture and Food [2016] WASC 272
Minister for Immigration and Border Protection v Singh [2014] FCAFC 1; (2014) 231 FCR 437
Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11; (2016) 237 FCR 1
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332
Osland v Secretary to the Department of Justice [No 2] [2010] HCA 24; (2010) 241 CLR 320
O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210
Re Shire of Carnavon; ex parte Humphrey [2005] WASCA 182

Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)
[2001] HCA 49; (2001) 207 CLR 72
S v Department for Child Protection and Family Support [2017] WASC 305
S v Department for Child Protection and Family Support [2018] WAICmr 2
Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227

TOTTLE J:**Introduction**

- 1 The appellant wishes to obtain access to 15 documents created by the respondent (the Department) in the course of an investigation undertaken by Departmental officers. The appellant says she requires access to the documents in order to check whether information provided by her to the officers was recorded accurately. The information is contained in redacted sections of edited versions of the documents to which the appellant has been granted access. The appellant has appealed to this court under s 85 of the *Freedom of Information Act 1992* (WA) (the Act) against a decision of the Acting Information Commissioner made on 19 June 2018 refusing access.¹
- 2 The 19 June 2018 decision was preceded by an earlier decision of the Information Commissioner made on 23 May 2017 refusing access to the documents. The 23 May 2017 decision was itself the subject of a successful appeal to this court. The 23 May 2017 decision was concerned with an application for access to a wider range of documents than those the subject of the 19 June 2018 decision.
- 3 In the appeal to this court Smith AJ (as her Honour then was) held that in making the 23 May 2017 decision the Information Commissioner had erred by failing to have regard to a material consideration which was that the appellant was the sole and only source of some of the information redacted from the documents.² The gravamen of Smith AJ's decision was that refusing the appellant access to those sections of the documents that contained statements of information about third parties of which the appellant was the sole and only source could not be said to further the public interest in the maintenance of personal privacy of the third parties. Smith AJ ordered that the matter be remitted to the Information Commissioner for determination in accordance with the court's reasons for decision.
- 4 In contrast to the conclusion reached by Smith AJ the Acting Information Commissioner concluded that the public interest in protecting the privacy of the third parties in the information provided by the appellant outweighed the public interest in disclosing personal information about the third parties.

¹ *S v Department for Child Protection and Family Support* [2018] WAICmr 2.

² *S v Department for Child Protection and Family Support* [2017] WASC 305 [70] and [71].

5 For the reasons developed in this judgment I have concluded that the Acting Information Commissioner's decision of 19 June 2018 is one that is legally unreasonable and displays jurisdictional error. Accordingly the decision should be set aside.

6 The appellant has represented herself in the preparation of the appeal. At the hearing of the appeal Mr Thompson of counsel appeared on the appellant's behalf on a pro-bono basis. I record my gratitude for the assistance provided by him.

7 Before explaining the factual background in more detail it is helpful to refer to the objects of the Act and the provisions that apply to the steps taken by the appellant in her pursuit of access to the documents.

The relevant provisions of the Act

8 The legislative scheme established by the Act was described by Edelman J in *Apache Northwest Pty Ltd v Department of Mines and Petroleum*:³

The introduction of freedom of information statutes, such as the FOI Act in 1992, marked a fundamental shift in norms of public administration. The legislation transformed a history of government secrecy into an era of accountability in order 'to reinforce "the three basic principles of democratic government, namely, openness, accountability and responsibility"'. In making this break from the past, the legislation assigned 'very high importance to a public interest in greater openness and transparency in public administration'.

The FOI Act is based upon these same principles and falls to be interpreted against this history.

9 The long title of the Act states that it is 'An Act to provide for public access to documents, and to enable the public to ensure that personal information in documents is accurate, complete, up to date and not misleading, and for related purposes.'

10 The objects of the Act are set out in section 3:

- (1) The objects of this Act are to -
 - (a) enable the public to participate more effectively in governing the State; and

³ *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2011] WASC 283 [18] - [19].

- (b) make the persons and bodies that are responsible for State and local government more accountable to the public.
- (2) The objects of this Act are to be achieved by -
 - (a) creating a general right of access to State and local government documents; and
 - (b) providing means to ensure that personal information held by State and local governments is accurate, complete, up to date and not misleading; and
 - (c) requiring that certain documents concerning State and local government operations be made available to the public.
- (3) Nothing in this Act is intended to prevent or discourage the publication of information, or the giving of access to documents (including documents containing exempt matter), or the amendment of personal information, otherwise than under this Act if that can properly be done or is permitted or required by law to be done.

11 It was common ground that the Act seeks to strike a balance between competing interests by, on the one hand, providing a right of access to documents, and on the other hand, where necessitated by the right to privacy and other similar considerations, modifying that right of access through exemptions contained in sch 1 to the Act. Various provisions combine to enable that balance to be achieved.

12 Part 2 of the Act contains provisions that govern access to documents of an agency. In particular:

- (a) Section 10(1) provides that a person has a right to be given access to the documents of an agency (other than an exempt agency) 'subject to and in accordance with this Act'. The Department is not an exempt agency.
- (b) Section 21 provides that if an applicant has requested access to a document containing personal information about the applicant, the fact that matter is personal information about the applicant must be considered a factor in favour of disclosure for the purpose of making a decision as to whether it is in the public interest for the matter to be disclosed or the effect that disclosure of the matter might have.

- (c) Subject to s 24, an agency may refuse access to a document if the document is an 'exempt document'.⁴ Section 9 provides that terms used in the Act are defined in the glossary. 'Exempt document' is defined in the glossary as a document that contains exempt matter and 'exempt matter' means matter that is exempt under sch 1. Where a document contains exempt matter and it is practicable for the agency to give access to a document from which the exempt matter has been deleted, the agency must do so if it considers the applicant would want access to an edited copy.⁵
- (d) Relevantly, cl 3 of sch 1 states:
- (1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).
 - (2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.
 - ...
 - (6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.

13 It is convenient to interpolate two observations about cl 3(6).

- (a) First, the concept of the public interest imports into cl 3(6) a discretionary value judgment. In the absence of a positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of 'the public interest' will ordinarily only be confined by the subject matter, scope and purpose of the relevant statute.⁶
- (b) Second, as stated by Corboy J in *I v Department of Agriculture and Food* the public interest with which cl 3(6) is concerned is particular to the information that is recorded in the documents sought by the access applicant rather than the public interest in the abstract.⁷

⁴ *Freedom of Information Act 1992* (WA), s 23(1)(a).

⁵ *Freedom of Information Act 1992* (WA), s 24.

⁶ *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ); *Woolworths Ltd v Director of Liquor Licensing* [2013] WASC 227 [48] (Buss JA, Martin CJ & Murphy JA agreeing).

⁷ *I v Department of Agriculture and Food* [2016] WASC 272 [68] (Corboy J).

14 'Personal Information' is defined in the glossary as:⁸
information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -

- (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or
- (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample

15 Division 5 of pt 2 of the Act provides for the internal review of decisions made by agencies about access to documents. A person aggrieved by a decision of an agency in relation to an access application has a right to have the matter internally reviewed by the agency.⁹

16 Part 4 of the Act provides for external review of decisions about access to documents. The Act creates the office of 'Information Commissioner' and provides for the appointment of an Acting Information Commissioner in certain circumstances.¹⁰ The Acting Information Commissioner may exercise the functions of the Commissioner and anything done by the Acting Information Commissioner has the like effect as if it were done by the Commissioner.¹¹ I will use the term 'Commissioner' to refer to the offices of both the Information Commissioner and the Acting Information Commissioner.

17 A complaint to the Commissioner may be made against an agency's decision on an access application.¹² In dealing with a complaint the Commissioner has power to review any decision that has been made by the agency in respect of the access application and decide any matter in relation to the access application that could, under the Act, have been decided by the agency.¹³ The Commissioner has to make a decision in writing on a complaint,¹⁴ and the Commissioner has to arrange for a decision to be published in full or in an abbreviated, summary or note form (whichever is appropriate) in order to ensure that

⁸ *Freedom of Information Act 1992 (WA)*, sch 2 cl 1.

⁹ *Freedom of Information Act 1992 (WA)*, s 39 - 44.

¹⁰ *Freedom of Information Act 1992 (WA)*, s 55, s 59.

¹¹ *Freedom of Information Act 1992 (WA)*, s 59(3).

¹² *Freedom of Information Act 1992 (WA)*, s 65 - 7.6.

¹³ *Freedom of Information Act 1992 (WA)*, s 76(1).

¹⁴ *Freedom of Information Act 1992 (WA)*, s 76(2).

the public is adequately informed of the grounds on which such a decision is made.¹⁵

Factual background

18 The following account of the background is derived from materials filed by the parties and is not contentious.

19 In 2016 the appellant made a complaint to the Department (then known as the Department for Child Protection and Family Support, now the Department of Communities) that her son, who was three years old at that time, had been subjected to sexual abuse. The Department investigated the complaint and found it to be unsubstantiated.

20 On 19 August 2016, the appellant sought access under the Act to the information she had provided to the Department 'with a view to checking that information before making a formal complaint to the respondent on the handling of her complaint'. The appellant was granted access to heavily redacted copies of 15 documents on the basis that the information withheld was either personal information of a third party or so intertwined with such personal information as to make it impossible to give access without revealing the personal information of the third parties.

21 On 24 November 2016 the appellant sought an internal review of the decision to refuse access. As a result of this review the appellant was allowed access to a small amount of information that had previously been redacted but the original decision was confirmed.

22 On 23 January 2017 the appellant made a complaint to the Commissioner and sought an external review of the Department's decision. The Commissioner provided a preliminary view by letter dated 2 May 2017 and a formal decision on 23 May 2017. The result was to uphold the Department's decision on the grounds relied upon by the Department. The Commissioner formed the view that the disputed matter was exempt under cl 3(1) of sch 1 of the Act (as it was matter that, if disclosed, would reveal personal information about an individual) and did not consider that the disclosure of such information would, on balance, be in the public interest in accordance with cl 3(6).

23 Judgment in the appeal against the Commissioner's 23 May 2017 decision was delivered on 26 October 2017 and on 18 December 2017

¹⁵ *Freedom of Information Act 1992* (WA), s 76(8).

an order was made remitting the matter to the Commissioner for determination 'in accordance with the court's reasons for decision'.¹⁶

24 Between February and June 2018 further submissions were made to the Acting Information Commissioner as to how she should approach the task of determining the matter in accordance with the judgment of Smith AJ. It is unnecessary to outline the points addressed in those submissions.

25 On 19 June 2018, the Acting Information Commissioner confirmed the Department's original decision to not allow the appellant to access the documents. The Acting Information Commissioner's decision was recorded in note form rather than being 'published in full'.

The first appeal decision

26 There were three grounds of appeal relied upon by the appellant in her appeal against the 23 May 2017 decision. The central contention raised by ground 1 was that the disclosure of the information sought by the appellant would not 'reveal' personal information about individuals because the information was known to the appellant as she had provided it to the Departmental officers, thus, it was argued, the matter was not exempt for the purposes of cl 3(1) of sch 1. Smith AJ rejected this contention on the basis that the word 'reveal' is to be interpreted without regard to the state of knowledge of the person seeking access to the documents. Her Honour also rejected the second ground, ground 2(a), for reasons that have no present relevance. Ground 2(b) was to the effect that the Commissioner erred in law in determining for the purposes of cl 3(6) of sch 1 to the Act that the public interest served in granting the appellant's application for access was outweighed by the public interest in protecting the disclosure of personal information.

27 Smith AJ viewed redacted and unredacted copies of the documents. Relevantly, her Honour categorised the information in those documents as follows:¹⁷

- (a) a record of matters stated by the appellant that is personal information about third parties;
- (b) a record of matters stated by third parties that is personal information that is not about the appellant; and

¹⁶ The orders made by Smith AJ were not received by the Information Commissioner until 2 February 2018.

¹⁷ *S v Department for Child Protection and Family Support* [37].

- (c) an analysis of personal information stated by the appellant and third parties that is not personal information about the appellant, or, if it is, it is intertwined with third party personal information.

28 In upholding ground 2(b) Smith AJ drew a distinction between the relevance of an access applicant's knowledge of the information contained in the documents for the purposes of cl 3(1) and its relevance for the purposes of considering the public interest in the context of cl 3(6) of sch 1. Her Honour reasoned as follows:

68 Whilst the fact that the appellant is the sole source of some of the information that has been redacted is not a circumstance that is relevant in determining whether the information is to be regarded as personal information about a third party, for the purposes of cl 3(1) of sch 1, such a matter could in some circumstances constitute a relevant matter in determining and weighing the public interest, pursuant to cl 3(6) of sch 1.

69 In this matter, some of the information that has been redacted from parts of the 15 documents are statement of matters about third parties that appear as a record of verbatim statements made orally by the appellant. Further, some of the information of this character is not intertwined with other information that is exempt. There is, however, some information of this character that is intertwined with other exempt information not of this character. In respect of this latter class of information, I am not satisfied that the appellant has demonstrated that the Commissioner was in error in finding that the public interest in granting access to this material was outweighed by the public interest in protecting the privacy of third parties.

70 I am, however, of the opinion that where this information (that is a record of oral verbatim statements made by the appellant) is not intertwined the Commissioner erred in failing to have regard to the fact that the person seeking the information is the sole and only source of the information. The character of information of this kind is such that the protection of the privacy of third parties is necessarily rendered substantially irrelevant as the release of this information will not of itself constitute an invasion of their privacy, as it is information known to the person who is the sole and only source of the information. I have used the term 'only source' as the information of this class is information that is a record of what the appellant has said and in that sense are statements of perceptions, opinions and other matters stated by her.

71 Consequently I am of the opinion that the Commissioner erred in failing to have regard to a material consideration. In particular, refusing access to this class of information cannot be

said to further the public interest in the maintenance of personal privacy.

29 In the paragraphs set out above Smith AJ was directing her attention to those parts of the documents that comprise 'matter' in the form of statements of information about third parties - statements 'the disclosure of which would reveal personal information about an individual'. As noted earlier unless that matter falls within the exception contained in cl 3(6) of sch 1 - that is if its disclosure would, on balance, be in the public interest - it is exempt matter within the meaning of cl 3(1) of the Schedule. Her Honour identified two sub-categories of statements of information about third parties - 'verbatim statements made orally by the appellant' that are not intertwined with other information that is exempt and statements of information about third parties that are intertwined with other exempt information. In this context her Honour's reference to 'other exempt information' must necessarily have been a reference to information exempt for reasons *other* than that is constituted by statements which, if disclosed, would reveal personal information about third parties' within the meaning of cl 3(1).

30 In the final sentence at [70] of her reasons Smith AJ was careful to emphasise that the appellant was the 'only source' of the information to which her Honour referred in that paragraph and that the information is, at least in part, subjective in nature because it comprised 'statements of perceptions, opinions and other matters stated by [the appellant]'.

31 Finally I observe that whilst in [70] of the reasons Smith AJ expressed the view that where the information is constituted by statements made by the appellant that are not intertwined with other exempt information the protection of the privacy of third parties is 'necessarily rendered *substantially* irrelevant' (my emphasis), in the further description of the error made by the Commissioner that appears in [71], her Honour expressed her opinion in unequivocal terms - 'refusing access to this class of information cannot be said to further the public interest in the maintenance of personal privacy.'

32 In the written submissions relied upon by the Department in the present appeal it was contended that Smith AJ's judgment presented some difficulty. There was, however, no appeal. Smith AJ's judgment stated the law as it was to be applied on the remittal.

The Acting Information Commissioner's decision of 19 June 2018

33 The note of the Acting Information Commissioner's decision begins with an outline of the background containing references to: the appellant's application to the Department for internal review; the Commissioner's first decision; and the judgment of Smith AJ on the appeal to this court, quoting from [70] of the judgment. The note then records that the Acting Information Commissioner was required 'to determine whether disclosure of the disputed matter would, on balance, be in the public interest, as described in cl 3(6) [of sch 1 of the Act]'.

34 The note records the Acting Information Commissioner 'took into account the public interest considerations for and against disclosure noted in the Commissioner's letter of 2 May 2017'. The public interest considerations were described by the information Commissioner in the letter of 2 May 2017 as follows:

I accept that there is a public interest in ensuring that the agency is open and accountable in dealing with complaints appropriately. I further consider that there is a public interest in the person who has made a complaint being informed of what action an agency has taken in relation to a complaint and the findings of an investigation into that complaint.

...

In favour of non-disclosure of the disputed information, I recognise that there is a public interest in the maintenance of personal privacy and that the protection of an individual's privacy is a public interest that is recognised in the FOI Act by clause 3. I have consistently expressed the view that the public interest in maintaining personal privacy is a strong one.

35 The note records that the Acting Information Commissioner considered it was not possible to determine whether the appellant was the 'sole and only source of information'. The note records that even if the Acting Information Commissioner assumed that the appellant was the sole and only source of information except for a small amount of information, 'the disputed matter was inextricably intertwined with the personal information of other individuals' and thus it was exempt matter for the purposes of cl 3(1) of sch 1 of the Act. The note goes on to record that the Acting Information Commissioner considered that further editing of the documents to isolate the small amount of information that was not intertwined with the personal information of others would render the documents unintelligible.

36 The note records that the Acting Information Commissioner addressed the discretionary value judgment required by cl 3(6) of sch 1 to the Act and, in summary, recorded that she did not consider that the public interest in favour of disclosure outweighed the 'strong public interest in the protection of personal information'. The Acting Information Commissioner is recorded to have noted that 'it is well-established that disclosure of information under the FOI Act is disclosure to the world at large'.

The nature of an appeal under the Act

37 The jurisdiction of this court to determine appeals from decisions of the Commissioner is conferred by s 85(1) of the Act that provides:

An appeal lies to the Supreme Court on any question of law arising out of any decision of the Commissioner on a complaint relating to an access application.

38 Section 85 confers original jurisdiction in the nature of judicial review, as opposed to appellate jurisdiction.¹⁸ In applications for judicial review courts are concerned to ensure that administrative decisions are made lawfully, that is within and in accordance with the applicable statutory framework.

39 It was submitted on behalf of the Department that the grounds of appeal relied on by the appellant did not constitute an appeal on a question of law within the meaning of s 85 of the Act and that many grounds involved questions of fact. I consider that there is some merit in this criticism but for the reasons I explain below it is unnecessary to address this issue.

40 It was not disputed, however, that the question of whether an administrative decision is within the bounds of legal reasonableness is a question of law.¹⁹

Grounds of appeal

41 As noted earlier, other than at the hearing of the appeal, the appellant has represented herself. In the course of the hearing it became apparent that one of the grounds upon which the appellant

¹⁸ *Osland v Secretary to the Department of Justice [No 2]* [2010] HCA 24; (2010) 241 CLR 320 [18] (French CJ, Gummow & Bell JJ); *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* [2001] HCA 49; (2001) 207 CLR 72 [15] (Gaudron, Gummow, Hayne & Callinan JJ); *H v Department of Education* [2015] WASC 276 [8] - [10] (Chaney J).

¹⁹ *H v Department of Education* [2015] WASC 276 [8] - [10] (Chaney J) citing *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332, 363 [65] and [66] (Hayne, Kiefel & Bell JJ).

wished to rely might also invoke the concept of legal unreasonableness, a concept not otherwise referred to in the grounds prepared by the appellant. The prospect that the concept of legal unreasonableness might have some relevance to the appellant's argument that the Acting Information Commissioner had not taken into account a relevant consideration was anticipated in the Department's written submissions.²⁰

42 The question of whether the decision made by the Acting Information Commissioner was one that was legally unreasonable was a major focus of the parties' oral submissions. This aspect of the argument was developed in part at least from a question from me about the nature of the appellant's case.²¹

43 In oral submissions Mr Thompson submitted that the Acting Information Commissioner's decision was legally unreasonable for two reasons:

- (a) first, because the Acting Information Commissioner had failed to take into account a relevant consideration, that being Smith AJ's conclusion that where the information is constituted by statements made by the appellant that are not intertwined with other exempt information the protection of the privacy of third parties is 'necessarily rendered substantially irrelevant' and that 'refusing access to this class of information cannot be said to further the public interest in the maintenance of personal privacy'; and,
- (b) secondly, because refusing access to parts of documents that contain information about third parties of which the appellant was the sole and only provider on the grounds that to do so would infringe the privacy of third parties involved a fundamental absurdity.²²

44 The central proposition on which the appellant relied was that if the sole and only source of personal information concerning third parties was the appellant then disclosure of the parts of the documents containing those statements to the appellant cannot rationally affect the privacy interests of the third parties.

²⁰ Respondent's Outline of Submissions par 22.

²¹ ts 10.

²² ts 14, 22, 23, 24 and 31.

TOTTLE J

45 The Department's counsel made responsive oral submissions on
both aspects of the appellant's argument about legal reasonableness and,
as explained below, was given leave to file further written submissions
addressing this aspect of the appellant's case and did so.

46 As the appellant's original grounds of appeal had been prepared by
a lay person I granted the appellant leave to file and serve a minute of
proposed amended notice of appeal along with further submissions in
support of both the application for leave to amend and the proposed
additional amended grounds, along with reciprocal leave to the
Department to rely on submissions in opposition to the application for a
grant of leave to amend and in opposition to the proposed additional
grounds.

47 The appellant filed and served a minute of proposed amended
notice of appeal with supporting submissions. The Department did not
oppose the application to amend but filed submissions addressing the
merits of the additional grounds.

48 The proposed amended grounds of appeal do not define with
precision the question or questions of law the appellant seeks to bring
before the court but when read in the context of the oral submissions
made at the hearing, the grounds of appeal raise a question as to
whether the decision of the Acting Information Commissioner was a
legally reasonable decision. That question is a question of law.

49 I will grant leave to the appellant to amend the grounds of appeal.
In their amended form the grounds of appeal are as follows:

50 The appellant relies on the following grounds of appeal:

1. In determining the matter ... the Commissioner erred in law by:
 - (a) disregarding the Court's material findings and reclassifying matter that was implied by the Court to be non-exempt under clause 3(6) of [the Act], as being exempt from production under clause 3(1) of Schedule 1 to the Act, and in doing so, failed to act in accordance with the Court's orders; and
 - (b) further or alternatively, doing so unreasonably.
2. As a result of (1), the Commissioner erred in law by incorrectly, further or alternatively unreasonably, claiming that it was not possible to identify a certain class of information that was identified by the Court, when that class of information would be

easily identifiable had the Commissioner not disregarded the findings of the Court and incorrectly classified non-exempt matter as being exempt.

3. Further to this, the Commissioner erred in law by, or further or alternatively unreasonably, classifying the opinions, recollections or perceptions of the authors of the disputed information as being third party personal information exempt under clause 3(1) of Schedule 1 of the Act.
4. Similarly, or alternatively to (3) the Commissioner erred in law by incorrectly classifying information about the appellant as personal information that was exempt from production under clause 3(1) of the Act, when in accordance with clause 3(2) of the Act, matter is not exempt matter under subclause (1) because its disclosure would reveal personal information about the applicant.
5. In further consideration of clause 3(6) of the Act, the Commissioner significantly erred in law by failing to identify the public interest of accountability of the Department as being a competing public interest.
6. As a result of (4), the Commissioner, when balancing the competing public interests, erred in law by failing to take into account material facts concerning the accountability of the Department.

[Particulars omitted]
7. In addition to (5), the Commissioner, when considering the public interest of the proper conduct and accountability of the Department, also erred in law by failing to take into account the material facts that:

[Particulars omitted]
8. The Commissioner erred in law by:
 - (a) characterising disclosure of the information as a disclosure to the world at large, when in fact disclosure would only be to the person who provided the information to the Department, to be checked for accuracy in accordance with the purposes of the Act; and,
 - (b) further or alternatively, doing so unreasonably.
9. The Commissioner erred in law by disregarding the appellant's submission and failing to give consideration to s. 27 of the Act, which allows that access to a document may be given to an

applicant by giving a reasonable opportunity to inspect the document.

10. The Commissioner erred in law by failing to consider a primary object of the [Act], which is to enable the public to ensure that personal information in documents is accurate, complete, up to date and not misleading.

Analysis and disposition

Legal unreasonableness - the principles

51 For the purposes of this appeal a short summary of the relevant principles is sufficient. The following summary is derived from the judgments of the High Court in *Minister for Immigration and Citizenship v Li* and the discussion and analysis of those judgments by the Full Court of the Federal Court in *Minister for Immigration and Border Protection v Singh*²³ and *Minister for Immigration and Border Protection v Stretton*.²⁴

- (a) Legal reasonableness or an absence of legal unreasonableness is an essential element in the lawfulness of decision-making. This is because Parliament is taken to have intended that a statutory power will be exercised reasonably.²⁵
- (b) It must be remembered that Parliament has conferred the power on the decision maker and the court's function is a supervisory one as to legality. Thus judicial restraint is required. The concept of legal unreasonableness does not provide a vehicle for the court to remake the decision according to its view as to reasonableness and by implication finding a contrary view unreasonable.²⁶
- (c) The concept of legal unreasonableness is not amenable to minute and rigidly-defined categorisation or precise textual formulary.²⁷ A more sophisticated approach is required - one that focusses on the question of whether an administrative decision is one which is within the authority of the decision-

²³ *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437; [43] - [52] (Allsop CJ, Robertson & Mortimer JJ).

²⁴ *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1; (Allsop CJ, Griffiths & Wigney JJ).

²⁵ *Minister for Immigration and Citizenship v Li* [26] and [29] (French CJ) and [63] (Hayne, Kiefel & Bell JJ) and [88], (Gageler J).

²⁶ *Minister for Immigration and Border Protection v Stretton* [8] (Allsop CJ) citing *Minister for Immigration and Citizenship v Li* at [30], [66] and [105].

²⁷ *Minister for Immigration and Border Protection v Stretton* [10] (Allsop CJ).

maker. This requires close attention to be given to the relevant features of the particular statutory framework within which the authority arises.²⁸ Vitiating unreasonableness may be characterised in more than one way to be susceptible to judicial review.²⁹

- (d) There are two species of legal unreasonableness. First, there are those cases in which the reviewing court identifies an underlying jurisdictional error in the decision-making process, and second, there are those cases in which legal unreasonableness may be 'outcome focussed'.³⁰ An outcome focussed conclusion of legal unreasonableness may be an inference drawn because the court cannot identify how the decision was arrived at, in which case the exercise of power may be seen by the supervising court as lacking 'an evident and intelligible justification'.³¹ It has the character of being 'arbitrary, capricious or without common sense'. Outcome focussed unreasonableness occurs in an 'area of decisional freedom'.³²
- (e) Legal unreasonableness is 'invariably fact dependent' and requires a careful evaluation of the evidence.³³
- (f) Where reasons for an administrative decision are provided it is those reasons to which a supervising court should look in order to understand why the power was exercised the way it was. The intelligible justification for the decision must lie within the reasons the decision-maker gave for the exercise of the discretion or the making of the judgment. If the reasons demonstrate a justification it would be a rare case that the exercise of the power would be seen to be legally unreasonable.³⁴
- (g) However, even where some reasons have been provided it may nevertheless not be possible for a court to comprehend how the decision was arrived at. 'Unreasonableness is a conclusion that

²⁸ *Minister for Immigration and Border Protection v Stretton* [62] (Griffiths J).

²⁹ *Minister for Immigration and Citizenship v Li* [26] (French CJ); 72 (Hayne, Kiefel & Bell JJ).

³⁰ *Minister for Immigration and Border Protection v Stretton* [61(c)] (Griffiths J) citing *Minister for Immigration and Citizenship v Li* [66] Hayne, Kiefel and Bell JJ, and at [105] per Gageler J.

³¹ *Minister for Immigration and Citizenship v Li* [76] (Hayne, Kiefel & Bell JJ).

³² *Minister for Immigration and Citizenship v Li* [28] (French CJ).

³³ *Minister for Immigration and Border Protection v Singh* [44].

³⁴ *Minister for Immigration and Border Protection v Singh* [47].

may be applied to a decision that lacks an evident and intelligible justification'.³⁵

Application of the principles

52 Before applying the principles I remind myself that a court should not approach the reasons for administrative decisions with 'an eye attuned to the perception of error'; rather, a benign approach should be adopted. I am also mindful of the need for judicial restraint and the need to ensure that a review of the legality of a decision does not develop into a merits review.

53 As the focus must be on the reasons provided by the decision-maker I will reproduce the critical paragraphs of the note of the Acting Information Commissioner's decision. The first relevant paragraph deals with the identification of the sources of information as follows:

The complainant was not the author of the documents containing the disputed matter. The Commissioner considered that it was not possible on the face of the documents containing the disputed matter to determine where the complainant was the 'sole and only source of information' as opposed to the opinion, recollection or perception of the authors of the documents.

54 The contrast between the assessment made by the Acting Information Commissioner and that made by Smith AJ as to whether it was possible to isolate on the face of the documents where the appellant was the sole and only source of information is striking. I have viewed the redacted and unredacted versions of the documents and my assessment is the same as Smith AJ's. Statements of information provided by the appellant to officers of the Department are readily identifiable on the face of the documents. I do not understand why it was not possible for the Acting Information Commissioner to have identified those statements. In the course of oral submissions counsel for the Department suggested that a possible explanation was that the Acting Information Commissioner may have drawn a distinction between 'verbatim statements' on the one hand (that is statements that might usually be expected to be contained within quotation marks), and the recollections of an officer of the statements of information provided by the appellant on the other. I am not persuaded that this provides an explanation or, indeed, that the Acting Information Commissioner adopted such a precise approach to the identification of 'verbatim statements' as there is no reference to the Acting Information

³⁵ *Minister for Immigration and Citizenship v Li* [76] (Hayne, Kiefel & Bell JJ).

Commissioner being unable to identify 'verbatim' statements in the paragraph quoted above. Quite properly counsel for the Department accepted that if the distinction canvassed by him was not one drawn by the Acting Information Commissioner, it was possible to say that there was information that on the face of the documents of which the appellant was the sole and only source.³⁶

55 Although the difficulty encountered by the Acting Information Commissioner in isolating statements of information of which the appellant was the sole and only source is difficult to understand that issue can be put to one side because the Acting Information Commissioner was prepared to assume that the appellant was the sole and only source of the disputed matter. As the following paragraphs of the decision disclose, however, the assumption and the reasoning that flowed from it highlight a different problem. Relevantly, the note reads as follows:

However, even assuming that the complainant was the 'sole and only source' of the disputed matter, the Commissioner was satisfied that, except for a small amount of information, the disputed matter was inextricably intertwined with personal information of other individuals.

Clause 3(1) of Schedule 1 to the FOI Act (**clause 3(1)**) provides that matter is exempt if it would reveal personal information about an individual (whether living or dead). The FOI Act defines personal information as 'information or an opinion...about an individual...whose identity is apparent or can reasonably [sic] be ascertained from the information or opinion'. The Commissioner considered that, except for a small amount of information, the disputed matter was, on its face, exempt under clause 3(1).

56 As counsel for the Department acknowledged,³⁷ it is clear from the second paragraph quoted above that the Acting Information Commissioner misunderstood Smith AJ's reasons and misunderstood what was required to be done on the remittal. The Acting Information Commissioner failed to appreciate that her Honour's reasoning accepted that all of the redacted material contained the personal information of third parties. The information fell within the ambit of cl 3(1) *unless* the disclosure of the information would on balance be in the public interest, cl 3(6). In other words for the purposes of the decision to be made following remittal it was not sufficient to say that the information was the personal information of third parties. The task was to identify those parts of the information of which the appellant was the sole and only

³⁶ ts 43.

³⁷ ts 40.

source which were not intertwined with other exempt matter and once that subset of information had been identified to undertake the discretionary value judgment required by cl 3(6) of sch 1.

57 After discounting the possibility of further editing the documents the Acting Information Commissioner addressed the discretionary judgment required by cl 3(6). The decision note referred to and quoted the appellant's submission to the effect that there was no risk of a breach of personal privacy in allowing access to the disputed matter to enable the appellant to check it for accuracy. Following that reference the following statement appeared:

In balancing the competing public interests, the Commissioner was of the view that the public interest in protecting the privacy of third parties outweighed the public interest in disclosing personal information about third parties. On balance the Commissioner was of the opinion that it was not in the public interest for sensitive personal information about other individuals to be placed in the public domain by way of the FOI process. The Commissioner noted that, 'it is well-established that disclosure of information under the FOI Act is disclosure to the world at large'.

Based on the information before her, the Commissioner did not consider that the public interests in favour of disclosure outweighed the strong public interest in the protection of personal information.

58 There are a number of difficulties with the Acting Information Commissioner's reasoning which overlap with each other.

59 First, the Acting Information Commissioner did not engage with the conclusion reached by Smith AJ recorded in her judgment at [70] and [71] to the effect that refusing access to statements of information about third parties of which the applicant was the sole and only source could not be said to further the public interest in the maintenance of the personal privacy of those third parties. This is surprising given that the Acting Information Commissioner was making a decision on a remittal from this court and in her judgment Smith AJ had expressed a strong and clear opinion that the personal privacy of the relevant third parties would not be adversely affected by disclosure of the narrow class of information with which the application was concerned.

60 The fundamental difficulty is that the Acting Information Commissioner's decision is recorded as a conclusion without any elucidation of the reasons that led to that conclusion. It is not possible to discern an intelligible justification for the decision from what is

recorded in the note. It may be accepted that some discretionary or evaluative judgments involve an intuitive synthesis that make separating out the elements of the reasoning process difficult. In this case, being conscious as she must have been of the view of Smith AJ, it would be expected that the Acting Information Commissioner would have revealed her reasoning process for coming to a conclusion that differed significantly from the view expressed by the remitting court.

61 Second, the conclusion that the public interest in protecting the privacy of third parties outweighed the public interest in allowing access to the narrow class of information identified by Smith AJ rests on the false premise that disclosure would adversely affect the privacy of that information and the privacy interests of the third parties. Allowing access to the appellant would not involve disclosing to the appellant anything that she does not already know and which she is not presently in a position to publish should she chose to do so. Whilst the appellant's knowledge of the information was not relevant to the question of whether the matter was exempt for the purposes of cl 3(1), Smith AJ held it was relevant to the evaluative judgment required by cl 3(6) in the particular circumstances of this case.

62 Third, (and this may be no more than another way of expressing the second difficulty), in my view it was not rationally open to the Acting Information Commissioner to conclude that disclosing to the appellant the particular personal information about third parties that was not only known to the appellant but of which she was the sole and only source would adversely affect the privacy of the third parties. Although I have expressed the point in different terms it echoes Smith AJ's opinion that allowing the appellant access to the class of information in issue could not be said to further the public interest in the maintenance of personal privacy.

63 Fourth, the absence of reasoning that supports the Acting Information Commissioner's decision, and in particular, the absence of reasoning that either engaged with Smith AJ's opinion that refusing access to the limited class of information could not be said to further the public interest in the maintenance of personal privacy or reflected any evaluation of its significance leads me to conclude that the Acting Information Commissioner did not give 'proper, genuine and realistic'

consideration to a matter that had been held by Smith AJ to be a material consideration.³⁸

64 In the Department's further written submissions filed in response to the grounds in the appellant's minute of proposed amended appeal notice it was submitted that the decision was not legally irrational or lacking in an intelligible justification. In summary the submission was as follows.

- (a) The Acting Information Commissioner was required to identify the relevant aspects of the public interest and did so, in effect, by referring to the public interest considerations enumerated in the 2 May 2017 letter.
- (b) The Information Commissioner (present and past) has consistently recognised that there is a strong public interest in maintaining personal privacy and that the displacement of personal privacy requires some other strong or compelling public interest that requires disclosure of personal information.
- (c) In this case the Acting Information Commissioner's concern was not that disclosure of the disputed matter would have the result of sensitive personal information being provided to the appellant, rather the concern was the release of sensitive personal information into the public domain.
- (d) Even if there was a remote risk of sensitive personal information entering the public domain a decision favouring the public interest in not allowing access was intelligible and entirely rational.

65 I am unable to accept this submission. It deals with the public interest issues at too high a level of generality and without sufficient regard to the particular facts presented by the appellant's application for access. Perhaps more fundamentally it does not provide a satisfactory answer to the question of why allowing access to information about third parties of which the appellant - the access applicant - was the sole and only source would adversely affect the privacy interests of the third parties.

66 The decision made by the Acting Information Commissioner was not one she was authorised to make - it fell outside of the bounds of

³⁸ *Re Shire of Carnavon; ex parte Humphrey* [2005] WASCA 182 [60] (McLure JA, Le Miere AJA agreeing).

legal reasonableness. In the preceding paragraphs I have identified the difficulties with the decision that have led me to this conclusion. In summary my primary reason for so concluding is that I am unable to discern from the note of the decision a rational basis for it. This is compounded by my judgment that there is no rational basis for the decision. Additionally, and perhaps subsumed in my concern about the absence of a rational basis for the decision, I am not satisfied that the Acting Information Commissioner gave proper, genuine and realistic consideration to a material factor. For those reasons the decision should be set aside.

67 I have determined this appeal by reference to the central issue - the legal reasonableness of the decision - an issue raised by grounds 1, 2, 3 and 8. Having reached the conclusion that the decision is legally unreasonable the other grounds of appeal fall away and it is unnecessary for me to deal with them.

68 I will hear from the parties as to the orders that should be made consequent upon this judgment.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

JB
Associate to the Honourable Justice Tottle

22 JULY 2019