
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : PUBLIC TRANSPORT AUTHORITY
[2018] WASC 47

CORAM : SMITH AJ

HEARD : 16 JANUARY 2018

DELIVERED : 16 FEBRUARY 2018

FILE NO/S : GDA 7 of 2017

MATTER : *Freedom of Information Act 1992 (WA)*

BETWEEN : PUBLIC TRANSPORT AUTHORITY
Appellant

ON APPEAL FROM:

Jurisdiction : OFFICE OF THE INFORMATION
COMMISSIONER

Coram : S BLUEMMEL (INFORMATION COMMISSIONER)

Citation : RE SEVEN NETWORK (OPERATIONS) LIMITED
AND PUBLIC TRANSPORT AUTHORITY [2017]
WAICmr 12

Catchwords:

Freedom of information - Exempt matter - *Freedom of Information Act* sch 1 cl 3(1) - Whether CCTV footage contained personal information - Construction of expression - 'Information about an individual whose identity is apparent or can reasonably be ascertained from the information'

Legislation:

Freedom of Information Act 1992 (WA), s 10, s 23(1), s 86(3), sch 1 cl 3(1), cl 3(2), cl 3(3), cl 3(6)

Result:

Appeal allowed

Category: B

Representation:

Counsel:

Appellant : Mr D E Leigh & Mr J M Carroll

Solicitors:

Appellant : State Solicitor for Western Australia

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

AIN v Medical Council (New South Wales) [2016] NSWCATAD 5

Healy and BZ and Department of Immigration and Border Protection [2014] AICmr 55

Murdoch v The Queen [2007] NTCCA 1

Office of Finance and Services v APV [2014] NSWCATAP 88

Police Force of Western Australia v Ayton [1999] WASCA 233

Re Lobo and Department of Immigration and Citizenship [2011] AATA 705; (2011) 124 ALD 238

Re West Australian Newspapers Ltd and Department of the Premier and Cabinet [2006] WAICmr 23

WL v La Trobe University [2005] VCAT 2592

SMITH AJ:

The appeal

1 This is an appeal against a decision made by the Information
Commissioner on 26 May 2017. The appeal turns on whether the
Commissioner erred in law in determining whether three disputed
documents, each being CCTV footage, are exempt from disclosure by the
appellant.

2 Section 10 of the *Freedom of Information Act 1992* (WA) (FOI Act)
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, the FOI Act. Section 23(1) of the FOI Act provides that an agency
may refuse access to a document if the document is an 'exempt document'.
An 'exempt document' is defined in the glossary to mean a document that
contains 'exempt matter'. 'Exempt matter' is, in turn, defined to mean
'matter that is exempt under Schedule 1'.

3 Clause 3(1) of sch 1 provides:

Matter is exempt matter if its disclosure would reveal personal information
about an individual (whether living or dead).

4 'Personal information' is defined to mean in cl 1 of the glossary:

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;

5 The grounds of appeal raise the proper construction of:

(a) the expression 'information about an individual whose identity is
apparent or can reasonably be ascertained from the information' in
the definition of personal information in cl 1 of the glossary; and

(b) the question whether the disputed CCTV footage if disclosed
would reveal personal information as defined in cl 3(1) of sch 1.

Background to the appeal

6 By letter dated 30 May 2014, Seven Network (Operations) Ltd
(Channel 7) applied to the Department of Transport for access to
documents under the FOI Act. Channel 7 specifically sought access to
'summary documents, plus CCTV relating to any near misses at train
stations or level crossings caught on camera since January 1, 2012'.

7 The Department transferred the application to the appellant, under
s 15(1) of the FOI Act, as the documents sought by Channel 7 were held
by the appellant.

8 On 15 July 2014, the appellant issued a notice of decision granting
Channel 7 access to some documents falling within the scope of the
application. It refused access to other documents, essentially on grounds
that release would reveal individual's personal information and are thus
exempt matter.

9 On 27 July 2014, Channel 7 applied for internal review of the
original decision. By letter dated 8 August 2014, the appellant confirmed
its decision.

10 On 17 August 2014, Channel 7 applied to the Commissioner for
external review of the internal review decision.

11 On 21 January 2015, representatives of the appellant and Channel 7
attended a conciliation conference, but were unable to resolve the
application. The matter was referred to a case officer for formal external
review. The case officer invited the appellant to release certain footage to
Channel 7. The appellant agreed to edit and release some footage, but
maintained its claim for exemption under cl 3(1) of sch 1 for the balance
of the disputed footage.

12 By email on 15 October 2015, Channel 7 confirmed that it had
received the footage but was not satisfied with the access provided and
wished to pursue the complaint. It claimed that access could be given to
an edited copy of the remaining footage.

13 On 11 January 2016, the Commissioner provided the parties with a
letter in which he stated that it was his preliminary view that the footage,
then in dispute, was exempt under cl 3(1) of sch 1. He then went on to
find it was not practicable to give access to an edited copy of the footage
in accordance with s 24 of the FOI Act.

14 After further submissions were received from Channel 7, the Office
of the Commissioner made further inquiries with the appellant about its
editing capabilities. The Commissioner's officers subsequently edited the
footage, relating to three incidents, utilising a software package possessed
by the Office of the Commissioner.

15 On 8 March 2016, the appellant was invited to release edited footage
to Channel 7.

16 By letter dated 23 March 2016, the State Solicitor's Office, on behalf
of the appellant, made further submissions to the Commissioner, advising
that, among other things, the appellant did not agree that it was practicable
to edit the footage. The State Solicitor's Office also made a submission
that the footage which remained after editing was not personal
information.

17 At the invitation of the officers of Commissioner, further
submissions were provided on behalf of the appellant on 9 June 2016,
outlining relevant case law which it said supported its claim that the
identity of the individuals concerned was apparent, or could reasonably be
ascertained from the edited footage.

18 By letter dated 24 January 2017, the Commissioner provided the
parties with his supplementary preliminary view that, for the reasons
given, the disputed CCTV footage did not consist of personal information,
and was not exempt under cl 3(1) of sch 1 of the FOI Act.

19 After the supplementary preliminary view of the Commissioner was
provided to the appellant and Channel 7, the State Solicitor's Office
provided further submissions to the Commissioner on behalf of the
appellant.

20 On 26 May 2017, the Commissioner published his final decision, in
which, he set aside the original decision and determined that the three
unedited disputed documents, being CCTV footage, were not exempt
under cl 3(1) of schedule 1.

21 The Commissioner determined that if only the individuals
themselves or a small number of people could potentially, or possibly
could identify the individuals in the images shown in the disputed CCTV
footage (which he found was unlikely) he did not accept that disclosure of
the footage would reveal personal information about the individuals
concerned.

22 On 17 July 2017, Martino J made provisional orders on the appeal. One of the orders made by his Honour was (pursuant to s 86(3) of the FOI Act) that any application by Channel 7 to be joined as a party to the appeal be filed and served by Channel 7. However, Channel 7 did not make an application to be so joined. Consequently, this appeal has proceeded without a respondent.

Reasons why the Commissioner found the documents were not personal information

23 The Commissioner identified the question for determination was whether an image of an individual recorded in CCTV footage consists of information about an individual whose identity is apparent or can reasonably be ascertained from the information. He then went on to say the mere possibility that a person's identity could be ascertained is not sufficient; the question is whether the individual's identity can reasonably be ascertained from the information.

24 In *Re West Australian Newspapers Ltd and Department of the Premier and Cabinet* [2006] WAICmr 23 (KEMH Inquiry) A/Information Commissioner Wookey observed:

The definition of 'personal information' in the Glossary to the FOI Act does not state to whom the identity must be apparent or by whom it must be reasonably ascertainable, although I tend to agree with the agency's submission that the definition itself contemplates identification by people with special knowledge in some circumstances [45].

25 The Commissioner referred to this observation and said that the question to ask is not by whom the identity of an individual must be reasonably ascertainable, but simply, whether an individual's identity can reasonably be ascertained from the information in question.

26 The Commissioner agreed that the definition of personal information in the glossary itself contemplates identification by people with special knowledge in some circumstances.

27 The Commissioner found that:

- (a) determining whether an individual's identity can reasonably be ascertained from the information in question is a question of fact that requires analysis of the circumstances of the particular case;
- (b) such circumstances may include, among other things, the number of steps required to ascertain the individual's identity, and the

number of people who had the necessary knowledge or contextual information to ascertain the individual's identity; and

- (c) if only one other person or only a small group of people could possibly or potentially ascertain an individual's identity in an image recorded in CCTV footage from the contextual information known or available to them, that did not mean that the individual's identity could reasonably be ascertained from the footage. He observed, however, exceptions to this may arise in circumstances where the identity of the individual could be ascertained by the access applicant, who already has knowledge of the individual's identity, or where an access application is framed in such a way that the identity of an individual could be ascertained from the context of the access application.

28 Despite finding that the question to be answered is not by whom the identity of a person must reasonably be ascertainable, when the Commissioner made factual findings about the contents of the disputed CCTV footage, it is apparent that he regarded that it was relevant to consider by whom a person could be identified, together with how many people could identify the person.

The disputed documents - CCTV footage: PTA 1, PTA 11 and PTA 39

29 An examination of the disputed documents reveals that:

- (a) The footage in PTA 1 is from a fixed camera. It shows a man at the side of the foreground of the footage on a train platform. The footage also shows a train approaching in the distance and a crossing where a near miss between a car and a train occurs. The man appears to be unaware of this event and is using a mobile telephone. Whilst the image of the man is not clear, he stands in close proximity to the camera, and his face can on occasions be seen as he turns towards the camera.
- (b) PTA 11 is footage from a pan/tilt camera manually operated from the appellant's central monitoring room. The footage contains images that zoom in to show a woman standing on the tracks in front of an approaching train. She walks slowly with an unsteady gait across the tracks, turns, and then walks quickly off the tracks. As she walks off, she is apprehended by three officers who are joined by a fourth officer. The incident occurs very close to a platform at the train station. The image of the face of the woman is not clear. Her clothing, footwear, backpack and gait are all

visible. Two of the officers are dressed in black and are of a different height and build. Two other officers are in light coloured blue uniforms with high-vis jackets. Each of the four officers are wearing caps.

- (c) PTA 39 is footage from a fixed camera. It shows a platform at a train station in the middle of a freeway. A number of persons walk onto the platform. One of whom is a person (A) who later engages in an incident with a train that comes into the station. (A) initially appears to be with another person although this is not clear. (A's) clothing and accessories appear to be distinctive and are visible. More people come onto the platform, some of whom are closer to the camera. By the time the incident occurs, there are several people on the platform. The clothing and accessories of each of those persons are visible. The faces of two individuals can be seen as they turn and either face or walk towards the camera.

The Commissioner's findings about the contents of PTA 1, PTA 11 and PTA 39

30 The Commissioner found that the identity of the persons whose images are recorded in the disputed footage are not apparent.

31 The Commissioner had regard to the length of time that had passed since the incidents were recorded. He found that based on the quality and contents of the footage he did not accept that disclosure of PTA 1, PTA 11 and PTA 39 would reveal personal information about the individual or individuals whose images are recorded. Consequently, he found that the disputed documents PTA 1, PTA 11 and PTA 39 were not exempt matter for the purposes of cl 3(1) of sch 1 of the FOI Act.

32 Based on the fact that the footage in PTA 1 was recorded more than five years ago, and having regard to the quality and contents of the footage, the Commissioner was not persuaded that the person's identity could reasonably be ascertained from the footage, apart from potentially by the man himself.

33 The Commissioner also found that the fact that as more than three years had passed since the incident recorded in PTA 11 took place was relevant to the question of whether the identities of the people whose images were recorded could reasonably be ascertained from the footage.

34 The Commissioner also found in relation to PTA 11 that:

- (a) he was not persuaded that the identity of the woman could reasonably be ascertained from the footage, apart from potentially by the woman herself;
- (b) the quality of the footage is such that the identities of the officers of the appellant could not reasonably be ascertained from the footage;
- (c) neither the faces of the transit officers or any other identifying characteristics were sufficiently clear so that their identities could reasonably be ascertained; and
- (d) it may be possible (but unlikely) that someone who knows the woman or the officers whose images are recorded in PTA 11, such as a family member or a friend, or at most a small group of people who know those individuals, could potentially ascertain the identity of those individuals from the contextual information known to them.

35 The Commissioner observed in relation to PTA 39, the fact that more than four years had passed since the incident was recorded in the footage was relevant to the question of whether the identities of the people whose images are recorded in PTA 39 could reasonably be ascertained from the footage. The Commissioner found the image of the face of (A) was not clear and that whilst his clothing and accessories may be visible, based on the quality of the footage, the Commissioner was not persuaded that his identity could reasonably be ascertained from the footage, apart from potentially by the man himself.

36 Despite the fact that other persons were on the platform with (A), the Commissioner found that there was nothing before him to suggest that any of the persons on the platform knew the identity of (A), or that there was any information available to those people which would result in the identity of (A) being reasonably ascertainable by them. He also found that:

- (a) those observations applied equally to the bystanders on the train platform;
- (b) none of the faces of the bystanders or other identifying features were clear.

37 In his view, none of the identities of any of the bystanders could reasonably be ascertained from the footage. He, however, accepted that it may be possible (but unlikely) that someone who knows the man or the bystanders whose images are recorded in PTA 39, such as a family member or friend, or at most a small group of people who know those individuals, could potentially ascertain the identity of those individuals from the contextual information known to them.

The grounds of appeal

1. The Information Commissioner erred in law by misconstruing the test to be applied in determining whether information was 'personal information' for the purposes of clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*.

Particulars

- (a) The Information Commissioner wrongly held that in considering whether a person's identity was 'reasonably' ascertainable it was relevant to consider 'the number of people who have the necessary knowledge or contextual information to ascertain the individual's identity': [51];
 - (b) The Information Commissioner wrongly held that if the identity of a person could be ascertained from specified information only by one other person, or only a small group of people, then that information was not necessarily personal information: [53], [72], [80]; and
 - (c) The Information Commissioner wrongly held if the identity of a person could be ascertained from specified information only by that person himself or herself, then that information was not personal information: [58], [63], [68], [76].
2. The Information Commissioner erred in law by finding as a fact that 'at most only a small group of people' could ascertain the identity of persons depicted in CCTV footage from the contextual information known to them, in circumstances where there was no evidence to support that finding: [72], [80].

38 It is not contended that this appeal concerns information that is not about an individual. It is clear that in respect of each of the disputed CCTV footage there are individuals whose images are shown in each of the footage who could identify themselves.

39 The appellant in its written submissions points out that a preliminary step in the proper construction of the term 'personal information' is that

the term is relevantly defined by reference to the word 'identity'. The term 'identity' is not defined in the FOI Act. A submission is made that two meanings could be given to the term 'identity' as it appears in the definition of 'personal information'. These are:

- (a) all of those characteristics of an individual which allow that person to be specifically identified, and distinguished from all other individuals (for example, the combination of a person's name, address, age, etc) (the narrow meaning); or
- (b) characteristics of an individual such that the combination of some or all of those characteristics would allow them to be distinguished from other individuals, but would not necessarily allow them to be specifically identified (for example, 'the lady in the red jacket who attends the coffee shop each morning'). Such characteristics distinguish that individual from other contextually relevant individuals (in this example, those who attend the coffee shop each morning), but do not necessarily enable the individual to be identified by name, address, etc) (the broad meaning).

40 I am of the view, however, it is not necessary for the disposition of this appeal to determine whether the narrow or broad meaning of identity applies. This is because on either view of the meaning of identity, it appears that the information contained in the disputed CCTV footage is such that the individuals whose images are contained in the footage could, by viewing the footage, determine that it is their image that is depicted.

Consideration of the test applied by the Commissioner

41 The test the Commissioner applied in determining whether an individual's identity can reasonably be ascertained from the information to which access is sought, has been accepted in part.

42 It is established in determining whether an individual's identity can reasonably be ascertained from the information in question, a relevant consideration may be the complexity of steps required to ascertain the individual's identity.

43 The number of, and the complexity of, steps that are required to ascertain a person's identity usually arises as a relevant matter in factual circumstances where there are in existence a number of separate sources of information, including extraneous information which if strung together with the information (to which access is sought) would reveal the identity of a particular person, or persons.

44 In *WL v La Trobe University* [2005] VCAT 2592, the process of identifying the complainant's identity involved inquiries and cross-matching from a number of different databases, and then cross-matching with an external database. In these circumstances, Coghlan DP found the complainant's identity was not reasonably ascertainable as this process would involve taking more than moderate steps to ascertain the person's identity [42] - [52].

45 Similarly, in *Police Force of Western Australia v Ayton* [1999] WASCA 233, Wheeler J observed that whilst there would be borderline cases in ascertaining whether an individual's identity is apparent from the reading of a document, her Honour then went on to say:

[N]o doubt documents will not contain personal information merely because a person about whom information is recorded can be identified, not from the document itself, but from some obscure and lengthy process of cross-referencing and deduction from other materials [38].

46 The 'moderate steps' test has been applied by the New South Wales Civil and Administrative Tribunal in *AIN v Medical Council (New South Wales)* [2016] NSWCATAD 5, and by the Federal Administrative Appeals Tribunal in *Re Lobo and Department of Immigration and Citizenship* [2011] AATA 705; (2011) 124 ALD 238 [293] - [302] (SA Forgie DP).

47 In determining whether an individual's identity can reasonably be ascertained from information, will turn on the circumstances raised in a particular matter.

48 However, it appears clear that if a person's identity can only reasonably be ascertained after complicated, or obscure, or tedious, searches of extraneous information in the public arena, together with the information to which access is sought, in the absence of any other relevant circumstances, it could not be found that information to which access is sought contains personal information.

49 In determining the number of people who would have the necessary knowledge or contextual information to ascertain an individual's identity, the Commissioner found that much will turn on the quality of the CCTV footage in each case. He considered that the quality of the footage is determined by factors such as the size and resolution of the image, the position of the individual to the camera and the degree to which the individual's face and other identifying characteristics are visible.

50 Where the quality of the footage is such that an individual's face or other identifying characteristics in the image are clear or visible in the CCTV footage, the Commissioner accepted that the image will usually consist of personal information. He also accepted that those identifying characteristics or features may include gait, height, weight, clothing, accessories, demeanour and location. In these circumstances, the Commissioner did not appear to find it necessary to have regard to the number of people who could identify such a person. He found that when an individual's face is clear in the image, it seemed to him uncontroversial that the disclosure of the individual's face will necessarily disclose personal information because the individual's identity is apparent, or can be reasonably ascertained, from their face (the first class).

51 The Commissioner went on to consider a less straightforward class of cases where an individual's face is not clear in footage but other identifying features or characteristics such as their clothing or accessories are (the second class). He remarked that in such a case, judgment has to be made by an agency's decision-maker, or by him on external review, as to whether the visible features or characteristics of the individual viewed as a whole, including their location at a particular place at a particular point in time, are such that the identity of the individual concerned can reasonably be ascertained from the information. In these circumstances, the Commissioner found that the question of reasonableness required an analysis of the circumstances of each particular case which may include factors such as the number of steps required to ascertain an individual's identity and the number of people who have the necessary knowledge or contextual information to ascertain the individual's identity.

52 The Commissioner appeared to distinguish a third class of case where the quality of footage is such that neither an individual's face, nor their identifying features are clear in an image or when that individual's image is pixilated, obscured or blurred (the third class). In such a case he was of the opinion that disclosure of that footage would not necessarily disclose personal information of that individual. He referred to decisions in other jurisdictions which seem to accept that if an individual's image and footage is pixilated then disclosure of that footage would not disclose personal information about that individual which included, *Healy and BZ and Department of Immigration and Border Protection* [2014] AICmr 55.

53 The Commissioner did not explain why he formed the view that if it is only the individual themselves and/or family members or friends who know them who could potentially ascertain their identity from the

contextual information known to them, that would not result in a finding that the identity of the individuals in question can reasonably be ascertained from the footage. It appears the Commissioner only contemplated that this test should apply where a person's face is not clear in footage but where other identifying features such as clothing and accessories are (the second class).

54 It appears clear from his decision that the Commissioner did not consider it relevant to ascertain the number of persons who could identify a person where an individual's face or other identifying characteristics are clearly visible in CCTV footage (the first class). With respect, the difficulty with this analysis is that it does not address whether the identity of an individual can reasonably be ascertained if an individual whose image is shown in a video is a traveller from overseas, who has just arrived in Western Australia for the first time, and is not known to any other persons in this State.

55 The Commissioner did, however, make it clear in his decision that his view was at least partly motivated by a concern that it might never be possible for access to be given to an edited copy of footage with an individual's image pixilated or obscured. This is because the footage would still disclose personal information as the individual themselves would know, or may know, that it is their image that has been pixilated.

56 As counsel for the appellant points out, the Commissioner's concern is misplaced. A matter is not exempt, under cl 3(1) of sch 1, if its disclosure would, on balance, be in the public interest: cl 3(6) of sch 1. Accordingly, even if edited footage contained personal information (because the identity of an individual captured in the footage could still reasonably be ascertained from the edited footage), that edited footage might not be exempt under cl 3(1) if its disclosure would, on balance, be in the public interest.

57 Whilst I accept in some matters the length of time that has passed since an incident has been recorded in CCTV footage may be relevant in some circumstances, I do not accept that is necessarily a relevant matter in relation to PTA 11 or PTA 39.

58 The incident recorded in PTA 11 could be described as dramatic in one sense. It is an event such that had a person been watching the event from the nearby platform they would remember as it appears that the woman who walked in front of the train did so when the train was very close to her.

59 The incident that is recorded in PTA 39 results in the train that comes into the station not opening its doors to receive any passengers but departing without passengers from that platform. In these circumstances, given that there are several bystanders on the platform when the incident occurred, some of whom may recall the incident at which they were themselves bystanders and recognise themselves and/or other persons on the platform, if they were known to them. It may also be a matter that they discussed with their family and friends shortly after the incident occurred, and if shown the video, their family and friends may recognise a person whose image appears on the footage.

60 I do not agree that the faces of all of the bystanders and other identifying features of at least some of the persons present on the platform in PTA 39 are not clear. In particular, person (A), who engaged in the incident, was wearing distinctive clothing. Given these circumstances, I am not persuaded that time would be a relevant issue.

61 All of these matters, however, go to findings of fact that can be made from viewing the information depicted in the CCTV footage. Those matters are not the subject of a ground of appeal, and cannot be so, as an appeal only lies to the court on any question of law: s 85(1) FOI Act.

62 There is in my respectful opinion difficulty with the Commissioner's analysis that a relevant consideration in determining whether a person's identity is ascertainable, in images in CCTV footage where a person's face is not clear, is the number of people who have the necessary knowledge or contextual information, to identify a person.

63 Firstly, the definition of 'personal information' does not restrict exempt matter to information of a character that would, in fact, actually reveal a person's identity. If otherwise, the words in the definition of personal information 'can reasonably be ascertained from the information or opinion', would have no work to do.

64 In *Office of Finance and Services v APV* [2014] NSWCATAP 88, Hennessy DP and Montgomery SM observed:

Either the identity is 'apparent' from the information or it 'can reasonably be ascertained' from that information. The dictionary definition of the adjective 'apparent' is 'capable of being clearly perceived or understood; plain or clear.' (Macquarie Dictionary online). The verb 'ascertain' means 'to find out by trial, examination, or experiment, so as to know as certain; determine.' (Macquarie Dictionary online). By including the option that a person's identity can 'reasonably be ascertained' from the information, the legislature was intending to allow a person to find out or determine the

identity of the person from the information and, where reasonably identifiable from other information, from that other information [56].

65 Thus, the task of determining whether a person's identity 'can reasonably be ascertained' must be considered within the context of the circumstances of the collection of the information. The question is not whether an individual would be identified, in the sense a person's identity 'is ascertainable', but whether it is reasonable that they could be identified, or put another way is it reasonably possible that they could be identified.

66 Secondly, in this matter, whilst it appears there is no other information available to examine together with the disputed CCTV footage, it is a matter of common experience that individuals can recognise themselves or others they know well, by characteristics such as their stance, posture or body movements even when the face or image of an individual is not clear.

67 An illustration of this point arose in *Murdoch v The Queen* [2007] NTCCA 1. In that matter, the identification of the identity of an individual and a vehicle from poor quality video footage was considered in a criminal matter that had widespread publicity throughout Australia. In *Murdoch*, the Northern Territory Court of Appeal found that there was no substance in a proposed ground of appeal that asserted the trial judge erred in admitting evidence given by three witnesses (each who knew Murdoch well) as to their opinions concerning the likeness of a person, depicted in a truck stop video, to Murdoch. The trial judge warned the jury that the image on the video was not clear enough to enable them to draw a conclusion beyond reasonable doubt, from their own viewing alone, that the man in the video was Murdoch. The jury was, however, given a direction that they could have regard to the evidence of the witnesses in drawing a conclusion whether the image of the person shown in the video was Murdoch. This evidence included evidence given by the three witnesses. One of those witnesses' evidence was to the effect that she 'was fairly convinced it was him at the time' because of the way 'his whole body posture, you know, stance. When you know someone you know someone' [209]. Another witness said of the image of the man at the truck stop, 'the man, that's Brad. The way he walks' [218]. The third witness gave similar evidence.

68 I do not agree that the question whether a 'substantial' number of persons who have the necessary knowledge or contextual information to ascertain the individual's identity is relevant. To apply such a test would

introduce an element that is not an express term of the definition of personal information.

69 Further, a construction that it is only necessary that one person may have the necessary information to ascertain their identity or the identity of another person is consistent with the exemption in cl 3(2) of sch 1 that contemplates that unless it is the applicant who is seeking personal information about themselves, the personal information is exempt from disclosure. In this context, cl 3(2) contemplates that personal information may only be information revealed about one person.

70 For these reasons, I am of the opinion that there is nothing in the text of the definition of personal information in cl 1 of the glossary, or in cl 3(1) of sch 1, which raises a test of ascertaining by regard to the number of people, or a sufficient, or substantial, number of persons who may have the contextual knowledge or information.

71 It is well-established that disclosure of information under the FOI Act is disclosure to the world at large.

72 The issue is whether a person's identity can reasonably be ascertained. The question to be asked is whether, on an objective assessment of all relevant circumstances when examining CCTV footage, it can reasonably be said that at least one or more persons, including the person or persons whose image(s) are shown in CCTV footage, could have the necessary knowledge or contextual information to ascertain the identity of the individual or individuals.

73 When this test is applied to PTA 1, PTA 11 and PTA 39, it is clear each of those documents contain exempt matter within the meaning of cl 3(1) of sch 1 of the FOI Act.

74 For these reasons, I am satisfied ground 1 of the appeal is made out and the appeal should be allowed. I do not find it necessary to consider ground 2 of the appeal.

Orders

75 The appellant's counsel informed the court, during the hearing of the appeal, that if the appeal is successful, the Commissioner's decision should be set aside and the matter remitted to the Commissioner to consider whether, pursuant to cl 3(6) of sch 1, it is in the public interest to disclose the CCTV footage.

76 The court was also informed that it is now the appellant's opinion that it may be practicable to edit PTA 1 and PTA 11 so as to delete the personal information by pixilating the image of the man in PTA 1 and the woman in PTA 11. The appellant does not concede that it is practicable to edit PTA 39. Because of the number of persons on the platform, it is said that the pixilating of images of persons results in the footage being unintelligible.

77 Having considered the actions of the officers in PTA 11, it is conceded, on behalf of the appellant, that the images of the officers are deemed not to be an exempt matter by operation of cl 3(3) of sch 1, as the images of the officers depict actions by each of them carried out in the course of performing their functions as an officer.

78 In light of these concessions, I will make orders that the decision of the Commissioner made on 26 May 2017 be set aside, and the matter remitted to the Commissioner to reconsider:

- (a) whether the disclosure of those portions of PTA 1, PTA 11, or PTA 39 (disputed documents) containing matter that would reveal personal information if disclosed would, on balance, be in the public interest; and
- (b) in the event that disclosure of those portions of the disputed documents would not be in the public interest, whether it is practicable to edit the disputed documents to delete that exempt matter.