Office of the Information Commissioner
Queensland

Decision and Reasons for Decision

Citation:	***Seven Network (Operations) Limited and Department of Justice and Attorney-General; Carmody (Third Party)*** **[2016] QICmr 22 (27 June 2016)**
Application Number:	**312477**
Applicant:	**Seven Network (Operations) Limited**
Respondent:	**Department of Justice and Attorney-General**
Third Party:	**The Honourable Justice T F Carmody**
Decision Date:	**27 June 2016**
Catchwords:	**ADMINISTRATIVE LAW - RIGHT TO INFORMATION - JURISDICTION - DOCUMENT OF AN AGENCY - documents concerning the Supreme Court of Queensland - whether requested documents are documents of the respondent under section 12 of the *Right to Information Act 2009* (Qld) - whether documents are subject to the *Right to Information Act 2009* (Qld)** **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - JUDICIAL FUNCTIONS OF A COURT OR JUDICIAL OFFICE-HOLDER - whether information is excluded under section 17 and schedule 2, part 2, item 1 of the *Right to Information Act 2009* (Qld)** **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - CONFIDENTIAL INFORMATION - whether disclosure would found an action for breach of confidence under schedule 3, section 8 of the *Right to Information Act 2009* (Qld) - whether access may be refused under section 47(3)(a) and section 48 of the *Right to Information Act 2009* (Qld)** **ADMINISTRATIVE LAW - RIGHT TO INFORMATION - EXEMPT INFORMATION - PREJUDICE AN INVESTIGATION - whether disclosure could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case under schedule 3, section 10(1)(a) of the *Right to Information Act 2009* (Qld) - whether access may be refused under section 47(3)(a) and section 48 of the *Right to Information Act 2009* (Qld)**

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - access refused to information about the third party - personal information and privacy - disclosure is prohibited by an Act - whether disclosure could reasonably be expected to cause a loss of public confidence in the judiciary - whether disclosure could reasonably be expected to prejudice the future supply of confidential information or the ability of an agency to obtain confidential information - whether disclosure could reasonably be expected to impede the administration of justice generally or for a person - whether disclosure could reasonably be expected to prejudice intergovernmental relations - whether disclosure of information would, on balance, be contrary to the public interest - whether access may be refused under sections 47(3)(b) and 49 of the *Right to Information Act 2009* (Qld)

REASONS FOR DECISION

Summary

1. The applicant applied[1] to the Department of Justice and Attorney-General (**DJAG**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to '*any documents, including briefing notes and correspondence involving Chief Justice Tim Carmody, such as emails, since January 31, 2015, relating to:*

    1. The seat of Ferny Grove;
    2. The possibility of a challenge in the seat of Ferny Grove.'

2. DJAG located 123 pages of responsive information as well as an audio-recording of a meeting that took place on 12 February 2015 between the third party and two other judges. By decision dated 5 June 2015,[2] it decided to give full access to 39 pages, partial access to 8 pages, and to refuse access to 76 pages. It also decided to refuse access to the audio-recording.

3. DJAG refused access on the grounds that:

    - the information related to the exercise of the Supreme Court of Queensland's judicial functions and was therefore excluded from the RTI Act under section 17 and schedule 2, part 2, item 1 of the RTI Act; or
    - disclosure of the information would, on balance, be contrary to the public interest under section 47(3)(b) and section 49 of the RTI Act.

4. The public interest factors favouring nondisclosure relied upon by DJAG in its decision were that disclosure of the information in issue could reasonably be expected to:

    - prejudice the third party's right to privacy; and/or
    - undermine public confidence in the judiciary.

[1] Application dated 30 March 2015.
[2] DJAG gave a number of decisions on 5 June 2015 in response to other applications that sought access to documents concerning the third party and the Supreme Court. Part of DJAG's decision in this review mistakenly discusses the terms of one of those other applications that had requested access to documents about the position of the Senior Judge Administrator.

5. On 5 June 2015, the applicant applied to the Office of the Information Commissioner (**OIC**) for external review of DJAG's decision.

6. By letter dated 30 June 2015, the third party (who had been consulted by DJAG about disclosure of the information in issue during the processing of the application by DJAG) contacted OIC to advise that he objected to the disclosure of all information that concerned him. He applied to become a participant in the review (and in a number of other related reviews). The third party's application was granted. Throughout the course of the review, the third party (or his lawyers) provided a number of written submissions to OIC in support of his objection to the release of the information in issue. His grounds for objection can be summarised as follows:

    - some documents in issue were not documents of DJAG under section 12 of the RTI Act because they were in the possession of the Supreme Court (a separate entity) and not DJAG at the time the access application was received by DJAG;
    - even if the documents were documents of DJAG for the purposes of section 12, the documents concerned the exercise of the Supreme Court's judicial functions and were therefore excluded from the operation of the RTI Act by section 17 and schedule 2, part 2, item 1;
    - some information was exempt under schedule 3, section 8 of the RTI Act because its disclosure would found an action for breach of confidence;
    - some information was exempt under schedule 3, section 10(1)(a) of the RTI Act because its disclosure could reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case; and
    - the disclosure of all documents would, on balance, be contrary to the public interest.[3]

7. Throughout the course of the review, Crown Law on behalf of DJAG provided a number of written submissions in support of DJAG's decision to refuse access to the information in issue. Crown Law sought to rely on decisions given by DJAG in response to four other applications that sought access to the same or similar documents which were currently before OIC on external review. Although no internal review decision was given by DJAG in this review or in three of the other four related reviews (the only review where an internal review decision was given is review 312516), Crown Law stated in its submissions dated 5 November 2015 that it *'adopt[ed] and repeat[ed] the content of the internal review decisions* [sic] *in these external reviews'* and that, if it became necessary for a formal decision to be given, Crown Law expected that *'the Information Commissioner will consider each point contained in the internal review decisions* [sic]*, and this submission'*. In making my decision in this review, I have taken account of the internal review decision dated 7 July 2015 given by Ms Glenda Newick of DJAG in review 312516. In respect of the audio-recording, Ms Newick decided that the conversation in question took place '*in confidence'* and that the audio-recording was either exempt information under schedule 3, section 8 (breach of confidence), or that its disclosure could reasonably be expected to cause a public interest harm under schedule 4, part 4, item 8 (prejudice to the future supply of confidential information). She also decided that a public interest factor favouring nondisclosure of the audio-recording was that disclosure of the recording was prohibited by an Act (schedule 4, part 3, item 22), namely, by section 45(1) of the *Invasion of Privacy Act 1971* (Qld) (**Invasion of Privacy Act**).

[3] The third party relied upon a number of factors that he contended favoured nondisclosure of the information in issue, which I will discuss below.

8. Having carefully considered DJAG's decision and submissions in this review, and the submissions of the third party objecting to the release of the information in issue, I set aside the decision of DJAG. For reasons that I will explain below, I am satisfied that:

    - the documents in issue are documents of DJAG under section 12 of the RTI Act and are subject to the RTI Act;
    - section 17 and schedule 2, part 2, item 1 of the RTI Act have no application because the access application was made to DJAG which is not an entity identified in schedule 2, part 2, item 1;
    - none of the information in issue relates to the exercise of the Supreme Court's judicial functions;
    - the information in issue does not comprise exempt information because its disclosure would not found an equitable action for breach of confidence, nor could its disclosure reasonably be expected to prejudice the investigation of a contravention or possible contravention of the law in a particular case; and
    - the balance of the public interest favours disclosure of the information in issue.

Background

9. As noted above, the access application was one of a considerable number made to DJAG at around the same time by applicants (mostly media organisations) seeking access to documents about events involving judges of the Supreme Court of Queensland during the time the third party held the position of Chief Justice.[4]

10. It is important to note at the outset that I regard the circumstances of this review (and other related reviews involving the third party and the Supreme Court) to be unique. The extraordinary and unprecedented public ventilation of the apparent discord that existed within the Court at the relevant time has necessarily impacted upon my consideration of the issues for determination in this review, particularly the application of the public interest balancing test. I acknowledge the importance of the Supreme Court as a public institution and that it is crucial that the public has confidence in the Court's effective and efficient functioning. As a corollary of that, I also acknowledge the importance of protecting the ability of members of the Court to discuss openly, with their fellow judges, their views about the proper administration of the Court without these conversations and discussions being made public as a matter of course. However, in this instance, the sources of disquiet that existed within the Court, that raised important issues affecting the administration of the Court, were referred to publicly on numerous occasions, through media reports, public speeches, interviews given by the third party, and in correspondence sent by the third party to professional bodies.[5]

11. In a valedictory speech delivered on 26 March 2015 upon his retirement from the Supreme Court bench, a Supreme Court justice referred publicly to a rift in the Court and the particular issues that he considered were at the centre of it, namely:

    - the third party's removal of himself from all trial division sittings in Brisbane;

[4] The third party was appointed as Chief Justice on 8 July 2014 and resigned on 1 July 2015. He currently sits as a member of the Queensland Civil and Administrative Tribunal (**QCAT**).

[5] The following are examples, and not an exhaustive list: articles appearing in *The Australian* on 18 May, 30 May 2015 and 2 April 2016; in *The Australian Business Review* on 25 May 2015; an interview with the third party published in *The Australian* on 25 May 2015; articles in *The Courier-Mail* on 5 and 12 June 2015; in the *Brisbane Times* on 10 February 2015 and 27 March 2015; in *The Guardian* on 19 May, 6 and 11 June 2015; on the ABC news website on 18 May, 25 May and 5 June 2015; on the 9News website on 25 May 2015; in letters sent by the third party to the Bar Association of Qld and the Law Society of Qld on 29 March 2015, for distribution to all members.

- the third party's actions regarding the constitution of the Court of Disputed Returns (**CDR**); and
- the third party's actions regarding the duties performed by the Senior Judge Administrator (**SJA**).[6]

12. A number of applications were subsequently made to DJAG under the RTI Act seeking access to documents concerning these issues. The issue the subject of the access application in this review is one of significant public importance, namely, apparent disagreement surrounding the process for constituting the CDR. The applicant, in essence, seeks access to information concerning the third party and the CDR in the event that the seat of Ferny Grove was referred to the CDR by the Electoral Commission of Queensland (**ECQ**).

13. Immediately after the 31 January 2015 Queensland election, it was discovered that a candidate in the seat of Ferny Grove was an undischarged bankrupt and therefore potentially ineligible to run for Parliament. While counting in the seat continued and the outcome remained unclear, the ECQ stated publicly that it was considering its options and that one option open to it (in the event that it decided that the votes given to the ineligible candidate had materially affected the result in the seat) included a challenge in the CDR of the Ferny Grove result which could result in a by-election for the district. It was reported that the result in the seat was potentially crucial in deciding the election.[7]

14. The Supreme Court of Queensland is the CDR for the purposes of the *Electoral Act 1992* (Qld) (**Electoral Act**). Section 137 of the Electoral Act sets out how the CDR is constituted. It provides that a single judge may constitute the CDR, and that the Chief Justice may be that single judge, or may appoint another Supreme Court judge to be the single judge.

15. Since 1995, an internal Supreme Court protocol has existed that provides for the way in which a judge will be appointed, in advance, to constitute the CDR for the next 12 months.

16. The ECQ eventually decided not to refer the seat of Ferny Grove to the CDR. However, during the time when it was a possibility, there were meetings and discussions involving the third party and other judges of the Supreme Court regarding the constitution of the CDR in the event of a referral. The applicant seeks access to information about this issue under the RTI Act.

Discussion of procedural steps and submissions of the parties

17. The procedural steps involved in the review process were long and complex. A considerable amount of time was taken in dealing with numerous procedural issues raised by the third party and his lawyers during the course of the review. It is necessary to set out the procedural steps in some detail in order to understand the complexities of the review and the issues involved in reaching a decision.

18. OIC received five external review applications[8] in June and July 2015 that sought review of decisions made by DJAG refusing access to various documents concerning the third party and issues arising within the Supreme Court. Given that DJAG's reasons for

[6] Justice Alan Wilson, *"Notes"* for a speech delivered at the valedictory ceremony to mark his retirement, Banco Court, 26 March 2015, Supreme Court Library of Queensland.
[7] *"Queensland Election 2015: Chief Justice Tim Carmody to play role in deciding Ferny Grove"*, Brisbane Times, 10 February 2015.
[8] Including this review. The other related reviews are 312478, 312480, 312481 and 312516.

refusing access were the same or similar in each of the reviews, together with the fact that many of the documents in issue were duplicated across the reviews and involved the same issues and considerations, OIC dealt with the reviews together to the extent that it was procedurally convenient to do so.[9]

19. OIC wrote to a large number of judicial members (current and former) of the Supreme Court to consult with them about disclosure of information that concerned them. OIC invited the judges to participate in the review[10] and to provide submissions in support of their case in the event that they objected to disclosure of information. With the exception of two judges who objected to the disclosure of two documents,[11] the consulted judges did not object to disclosure of relevant information. A number reiterated the earlier advice that they had provided to DJAG during its processing of the access application, namely, that they considered that it was in the public interest to release all information in issue. None applied to participate in the review.

20. Following completion of the consultation process, I wrote to both the third party and DJAG[12] to communicate the preliminary view I had formed regarding release of the information in issue. In the event that they did not accept my preliminary view, I invited each to provide written submissions in support of their respective cases for nondisclosure. Crown Law, acting for DJAG, provided submissions dated 5 November 2015 which included a statutory declaration by DJAG's decision-maker, Ms Edwards, in which Ms Edwards described the steps that DJAG took in processing the application.

21. By four letters, all dated 23 October 2015, the third party raised numerous preliminary procedural issues, including requesting further and better particulars of the reasons for my preliminary view; requesting an oral hearing; requesting information concerning documents in issue about which he had not been consulted;[13] as well as contending that my preliminary view letter contained errors of law.[14] The third party also requested an extension of time to 31 January 2016 to provide submissions in support of his case for nondisclosure of the information in issue.

22. I responded to the various issues raised by the third party[15] and granted an extension of time for receipt of his submissions to 27 November 2015.

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[9] In terms of undertaking procedural steps such as third party consultations; communicating preliminary views to DJAG and the third party; and requesting submissions from DJAG and the third party. The procedure to be followed in an external review is at the discretion of the Information Commissioner: see section 95 of the RTI Act.
[10] Section 89 of the RTI Act.
[11] These documents comprised notes of meetings between judges and representatives of professional bodies. I formed the preliminary view that some information contained in these documents fell outside the scope of the applicant's application and that disclosure of the remainder would, on balance, be contrary to the public interest because the information in question was confidential and its disclosure could reasonably be expected to prejudice its future supply. The applicant accepted my preliminary view and these documents are therefore not in issue in this review.
[12] On 9 and 12 October 2015, respectively.
[13] I did not consult with the third party about the two documents referred to in paragraph 19. Given that DJAG had refused access to these documents, and I had formed the preliminary view that their disclosure would, on balance, be contrary to the public interest, there was no requirement to consult the third party about his views on their disclosure: see sections 37 and 97(4) of the RTI Act. As noted, the applicant accepted my preliminary view. I rejected the third party's contention that he required access to these documents in order to formulate his submissions about the nondisclosure of other documents.
[14] In the context of related review 312516, the third party objected to my using the wording used by Justice Wilson in his valedictory speech wherein he referred to the *'sacking'* of the SJA by the third party. The third party contended that he had no power to sack the SJA and that, by referring to his actions as such in my letter, I had committed an *'error of law of such gravity as to give rise to a jurisdictional error'*. I rejected this submission. The terminology had been used in correspondence that simply raised preliminary issues for consideration. It was not a finding contained in any decision or document with binding force. I accept that the Chief Justice took over responsibility for the SJA's powers and functions for a period of time.
[15] By letter dated 29 October 2015.

23. By letter dated 16 November 2015, the third party again requested an extension of time to 31 January 2016 to enable him to resolve issues concerning the appointment of legal advisers. I granted a further extension to 11 December 2015.

24. On 7 December 2015, I received a letter from King & Wood Mallesons (**King & Wood**) advising that they acted for the third party. King & Wood submitted that there were a number of threshold legal questions that should be referred to QCAT for determination before the review could be progressed. These questions related substantially to King & Wood's contention that some documents in issue were not 'documents of an agency' under section 12 of the RTI Act because they were in the Supreme Court's, and not DJAG's, possession at the time the access application was received by DJAG, or were otherwise excluded from the application of the RTI Act. King & Wood requested that the Information Commissioner exercise her discretion[16] to refer those questions to QCAT.

25. In response[17], I advised King & Wood that the issues they had raised about the correct interpretation to be given to section 12 of the RTI Act had already been considered by OIC in previous decisions and that the Information Commissioner was not satisfied that King & Wood had raised any relevant threshold questions that required determination by QCAT before the review could be finalised. I advised that I was prepared to grant the third party a final extension of time to 18 December 2015 in which to provide his submissions.

26. The third party's submissions were provided on 18 December 2015. King & Wood requested[18] that I convene an oral hearing[19] to afford the third party the opportunity to *'further articulate concerns held as to findings of fact including the relationship between the judiciary and DJAG…'* and whether the documents in issue were documents of DJAG under section 12. In effect, King & Wood argued that DJAG and the Supreme Court were separate entities for the purposes of section 12 of the RTI Act. I again declined the request on the basis that I saw no need for an oral hearing, nor was I satisfied that fairness to any party required one. In response,[20] King & Wood continued to argue that if the opportunity to make oral submissions was denied, their client would not have been afforded procedural fairness.

27. By letter dated 14 January 2016, I referred to the responses I had previously given to the third party's requests for an oral hearing and set out detailed reasons for again declining the third party's request. I noted that:

    - sections 95 and 97 of the RTI Act provide that the decision whether or not to hold an oral hearing is entirely at the Information Commissioner's discretion (as are all aspects of the manner in which an external review is conducted);
    - a participant has no legislative entitlement to an oral hearing, however the Information Commissioner may decide to hold an oral hearing (which must be held in public unless the Commissioner decides otherwise) if the Commissioner is satisfied that fairness to a participant requires one; and
    - the overriding obligation on the Information Commissioner is to ensure that the procedures adopted in an external review are fair to all participants and that each participant has an opportunity to present their views to the Commissioner.

[16] Under section 118 of the RTI Act.
[17] Letter dated 10 December 2015.
[18] The third party had already made a request for an oral hearing in one of his four letters dated 23 October 2015.
[19] Under section 97(2) of the RTI Act.
[20] Letter dated 8 January 2016.

28. I discussed the relevant case law[21] and noted that the RTI Act reflects the relevant principles, namely, that the primary consideration in deciding whether or not to hold an oral hearing is whether fairness requires one in all the circumstances, i.e., whether to deny an oral hearing would deny a party a fair opportunity to be heard or otherwise unfairly disadvantage a party. I advised the third party that I was not satisfied that the reasons he had given for requesting an oral hearing established that fairness to him required such a hearing. I was satisfied that the third party had been given a fair opportunity to present his case about the relationship between DJAG and the judiciary.[22] I rejected his contention that his ability to *'further articulate his concerns'* required an oral hearing, nor that an oral hearing would provide him with *'greater flexibility'* in making his case.

29. Accordingly, I was satisfied that proceeding with the review on the basis of written submissions would not cause any unfairness to the third party.

30. However, in recognition of the third party's contention that there was a threshold issue to be determined about the relationship between DJAG and the Supreme Court for the purposes of section 12 of the RTI Act, I advised the third party that I would invite DJAG's response to this issue, with the third party being given an opportunity to respond to any material provided by DJAG.

31. Crown Law provided a brief response[23] in which it advised that it was of the view that, for the purposes of section 12 of the RTI Act, the Supreme Court forms part of DJAG and therefore that documents generated by the Courts are documents of DJAG. However, Crown Law also advised that DJAG did not resile from its central contention that the RTI Act did not apply to the documents in issue because of the operation of section 17 and schedule 2, part 2, item 1. King & Wood was provided with Crown Law's submission.

32. I then wrote to the third party[24], and to DJAG[25], where I discussed in detail the submissions that each had made in favour of nondisclosure of the information in issue to date, and explained why I remained of the preliminary view that the information in issue was subject to the RTI Act, and that the bulk of it should be released. I invited each to provide final submissions in support of their respective positions in the event that they did not accept my preliminary view.

33. King & Wood responded on 4 March 2016 with revised submissions, but still maintaining an objection to disclosure of all information in issue. Crown Law responded on 14 March 2016 with additional submissions, also advising that DJAG maintained its objection to disclosure. At the request of both parties, I then provided each with the relevant submissions of the other[26] and gave each a final opportunity to lodge any material in response to issues raised by the other.

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[21] *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 516; *Chandra v Queensland Building and Construction Commission* [2014] QCA 335 at [61]; *O'Rourke v Miller* (1985) 156 CLR 342 at [15]; *Chen v Minister for Immigration and Ethnic Affairs* [1994] FCA 985 at [32]; *Kioa v West* (1985) 159 CLR 550 at 584; and *Ross Anthony Dunn and Australian Federal Police* – A84/561 [1985] AATA 87.

[22] I noted that, as a sitting member of the Supreme Court, and Chief Justice at the time the access application was received and processed by DJAG, and with personal involvement in the application, the third party was well-placed to provide relevant information to support his contentions about the relationship between DJAG and the Court with respect to the processing of applications that requested access to documents concerning the Court.

[23] Letter dated 29 January 2016.

[24] On 18 February 2016.

[25] On 25 February 2016.

[26] Except where Crown Law's submissions had briefly discussed documents in issue about which the third party had not been consulted.

34. In the meantime, I wrote to the applicant[27] to provide an update on the progress of the review. I explained my preliminary view that some information in issue fell outside the terms of the access application; and that some information should not be released under the RTI Act because its disclosure would, on balance, be contrary to the public interest. I advised the applicant that, despite the submissions of DJAG and the third party in favour of nondisclosure (which I summarised), I was of the preliminary view that the remaining information should be released under the RTI Act. In the event that the applicant did not accept my preliminary view about the information which I considered should not be released, I invited it to provide submissions in support of its case for disclosure.

35. The applicant did not respond within the requested timeframe and so, as advised in my letter, I proceeded on the basis that it accepted my preliminary view and did not continue to seek access to the information that I considered should not be released under the RTI Act. Accordingly, that information is no longer in issue in this review.

36. DJAG did not lodge any further material following its receipt of the third party's submissions. However, the third party, through King & Wood, lodged additional submissions dated 13 April 2016. In those submissions, King & Wood:

    - advised that the third party agreed with DJAG's submissions to the extent that they did not conflict with the third party's position; and
    - raised new grounds in support of the nondisclosure of the audio-recording and related notes of the 12 February 2015 meeting, submitting that schedule 3, section 10(1)(a) of the RTI Act (prejudice to an investigation of a contravention or possible contravention of the law); and items 8 and 9 of schedule 4, part 3 of the RTI Act (impede the administration of justice both generally, and for a person) applied to this information.

37. By letter dated 26 May 2016, having made further inquiries based upon King & Wood's submissions, I informed King & Wood that, although I had given careful consideration to its fresh submissions, I remained of the preliminary view that the bulk of the audio-recording and related notes should be released under the RTI Act. King & Wood responded by letter dated 6 June 2016, advising that the third party did not accept my preliminary view and continued to rely on the relevant provisions in support of his case for nondisclosure of the audio-recording and related notes of the meeting.

38. In accordance with the previous exchange of submissions between DJAG and the third party, copies of King & Wood's submissions were provided to DJAG for its information. DJAG did not provide any further submissions in support of its case for nondisclosure of the information in issue.

39. A summary of the significant procedural steps relating to the application and external review process is set out in Appendix 1 to this decision.

Reviewable decision

40. The decision under review is DJAG's decision dated 5 June 2015.

Evidence considered

41. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and appendices). As noted,

[27] On 30 March 2016.

the third party and DJAG made extensive submissions throughout the course of the review in support of the nondisclosure of the information in issue. In addition, I have taken account of the arguments relied upon by DJAG in its decisions in the four related reviews. In the interests of brevity, I have distilled the central issues raised by DJAG and the third party and summarised the relevant arguments. However, in making my decision, I have given careful consideration to all relevant issues raised by the parties in their submissions.

Information in issue

42. As mentioned, the applicant accepted my preliminary view that some information fell outside the scope of its access application and the disclosure of other information would, on balance, be contrary to the public interest. This information included the two documents discussed at paragraph 19, as well as ancillary references to personal information of persons not directly involved in the issues under consideration. In addition, the applicant accepted my preliminary view that the balance of the public interest did not favour disclosure of signatures, signed initials, email addresses and telephone contact details of the judges and court staff.[28] This information is therefore no longer in issue in this review.

43. The information that remains in issue is identified in Appendix 2 to these reasons for decision (**information in issue**). It includes all or parts of notes and resolutions of meetings of the trial judges;[29] email, memoranda and correspondence exchanges between the judges; statements and file notes of discussions between the judges; and the audio-recording of the 12 February 2015 meeting which took place between the third party and Justices Byrne and Boddice. As noted, with the exception of two judges who objected to the disclosure of two documents (which are no longer in issue), none of the judges with whom OIC consulted (except the third party) objected to disclosure of the information that concerned them. When consulted about the audio-recording, Justice Byrne confirmed that he taped the meeting on his (DJAG-issued) mobile phone, without the knowledge of the other parties to the meeting.[30] Following the meeting, Justice Boddice made a note of the discussion that took place. Justice Byrne prepared a statement on 18 February 2015 that discussed the meeting, as well as a number of other events. Parts of both of those documents are in issue.

44. During the course of the review, OIC identified nine additional documents (comprising 21 pages of memoranda, emails, letters and notes of meetings) that contained information that responded to the terms of the access application but which had not been considered by DJAG in its decision.[31] The relevant documents are identified in Appendix 2 as 'supplementary documents'.

Issues for determination

45. The arguments in favour of nondisclosure of the information in issue made by both DJAG and the third party are set out in the Summary above. Based upon those submissions, the issues requiring determination in this review are:

[28] Given the nature of the work performed by judges and their staff, I regard their contact details as having a heightened sensitivity, rather than simply being regarded as routine work information.
[29] I note that one document in issue comprises minutes of a meeting of judges marked 'Confidential to the Judges'. However, when consulted, none of the judges in attendance raised any objection to disclosure of the notes.
[30] Neither Justice Byrne nor Justice Boddice objects to disclosure of the audio-recording.
[31] In the course of reviewing documents in issue in the other related external reviews, OIC identified documents that responded to the terms of the access application in this review but which had not been dealt with by DJAG in its decision.

- whether the documents containing the information in issue are documents in the possession or under the control of DJAG under section 12 of the RTI Act;
- whether section 17 and schedule 2, part 2, item 1 operate to exclude the information in issue from the RTI Act;
- whether the information in issue comprises exempt information under either schedule 3, section 8 (confidential information) or schedule 3, section 10(a) (prejudice the investigation of a contravention or possible contravention of the law) of the RTI Act; and
- whether disclosure of the information in issue would, on balance, be contrary to the public interest.

Findings

Are the documents containing the information in issue documents of DJAG under section 12 of the RTI Act?

46. Yes, for the reasons that follow.

Submissions of the third party

47. The third party submits that:

- the Supreme Court cannot be regarded as forming part of DJAG for administrative purposes under the RTI Act;
- the Supreme Court is a separate and *'excluded entity'* under schedule 2, part 2, item 1 RTI Act;
- some hard-copy documents the subject of the review were in the possession of judges of the Supreme Court, and not DJAG, at the time the access application was received by DJAG;
- the documents were only transferred to DJAG after receipt of the access application and are therefore not covered by the access application;
- while electronic documents relating to the Supreme Court were stored on a server owned by DJAG, electronic documents have no corporeal existence and it does not follow that, because the server on which they are stored is in an agency's possession, the documents stored on the server must also be in the agency's possession; and
- such hard-copy and electronic documents cannot properly be regarded as documents of DJAG under section 12 of the RTI Act.

Relevant law

48. Section 17(b) in conjunction with schedule 2, part 2, item 1 of the RTI Act provides that a court, or the holder of a judicial office or other office connected with a court, is not subject to the RTI Act in relation to the court's judicial functions. When exercising the court's judicial functions, these entities are excluded from the definition of 'agency' in section 14 of the RTI Act.

49. The right that is conferred under the RTI Act is described in section 23(1) (relevantly) as a right to be given access under the RTI Act to 'documents of an agency'. Under section 24, a person who wishes to be given access to a document of an agency may apply to the agency for access to the document. DJAG is an agency subject to the RTI Act.

50. The term 'document of an agency' is defined in section 12 to mean (relevantly):

> *A document … in the possession, or under the control of the agency whether brought into existence or received in the agency, and includes:*
>
> *(a) a document to which the agency is entitled to access; and*
> *(b) a document in the possession, or under the control, of an officer of the agency in the officer's official capacity.*

51. Electronic documents and audio-recordings are 'documents' under section 36 of the *Acts Interpretation Act 1954* (Qld) and are documents of an agency for the purposes of section 12 of the RTI Act.

52. The Information Commissioner has considered the meaning of 'possession' as used in section 12 in previous decisions. The term requires nothing more than the relevant documents be in the physical possession of an agency.[32] Formal legal possession is not required; nor is it necessary to consider the means by which the document came into the agency's possession.[33]

53. Included in the concept of documents which are under the control of an agency are documents to which an agency is entitled to access. This concept is apt to cover a document in respect of which an agency has legal ownership, and hence a right to obtain possession, even though the document is not in the physical possession of the agency. The words 'under the control' convey the concept of a present legal entitlement to control the use or physical possession of a document (as exists, for example, in the case of documents held on behalf of a principal by the principal's agent, or documents held by a bailee on behalf of the owner of the documents.) For a document to be one which is under the control of the agency, an agency must have a present legal entitlement to take physical possession of the document (at least for so long as necessary to discharge all of the agency's obligations under the RTI Act in respect of the document).[34]

54. Section 27 of the RTI Act provides that an access application is taken only to apply to documents that are, or may be, in existence on the day that an application is received. A document will only be regarded as being in the possession or under the control of an agency if the agency had possession or control of the document at the time the application was received by the agency. A 'post-application document' is a document that did not exist, or was not in the possession or under the control of the agency under section 12, on the day the agency received a valid access application and has been created or received by the agency after that date.[35]

55. Section 45 of the RTI Act provides that the agency to which the access application is made must make a decision (before the end of the prescribed period for processing)[36] about whether access is to be given to the requested documents of the agency.

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[32] *Holt and Reeves and Education Queensland and Anor* (1998) 4 QAR 310 at [22]**.** While this decision concerned section 7 of the *Freedom of Information Act 1992* (Qld) (repealed) (**repealed FOI Act**), that provision was framed in substantially similar terms to section 12 of the RTI Act. I am satisfied relevant principles apply equally to section 12 of the RTI Act.
[33] *Kalinga Wooloowin Residents Association Inc and Department of Employment, Economic Development and Innovation; City North Infrastructure Pty Ltd (Third Party)* (Unreported, Queensland Information Commissioner, 21 December 2011).
[34] *Re Price and the Nominal Defendant* (1999) 5 QAR 80.
[35] See OIC's Guideline on post-application documents and *Stiller and Department of Transport* (unreported, Queensland Information Commissioner, 11 February 2009).
[36] Section 18 of the RTI Act.

Processing of the application by DJAG

56. The access application was made to DJAG. Upon its receipt, DJAG's RTI Unit issued its standard internal 'Document Search Request' forms to those of its 'business units' that could reasonably be expected to hold responsive documents. Search requests were sent to 'Supreme and District Courts' (that is, via email to staff of the Executive Director of the Courts); and to the third party as Chief Justice, who was asked to forward the request to relevant judges.[37]

57. Documents responding to the terms of the application were located by various judges (or their associates or administrative assistants), including the third party, and provided to the RTI Unit for processing. DJAG reviewed the documents; undertook third party consultations; and then made its decision regarding whether or not the documents should be released under the RTI Act. It decided to give access to some documents, and to refuse access to others either in whole or in part. The decision was made by DJAG's decision-maker, Ms Edwards, on behalf of DJAG. There is nothing in any of DJAG's processing of the application or in its decision to suggest that Ms Edwards was exercising delegated authority to process and decide the application on behalf of the Supreme Court as a separate or external entity. No evidence of such a delegation has been provided to OIC.[38]

Analysis

58. As noted, when exercising the court's judicial functions, the courts and judicial office holders or other office connected with a court are not subject to the RTI Act. Pursuant to schedule 2, part 2, item 1 of the RTI Act, a person will not be successful in applying to the courts or a judicial office holder etc. under the RTI Act for access to documents relating to the exercise of the court's judicial functions. It is only in that context that the third party is correct in referring to the Supreme Court as *'an excluded entity'*. In this case, the application was made to DJAG and not the Supreme Court.[39]

59. As administrative bodies, and under administrative arrangements and structures established by government, the courts sit within the portfolio of the Attorney-General and Minister for Justice and form part of DJAG's Justice Services division.[40] DJAG administers the courts by providing administrative services and support to the courts and their judicial officers, including for example, courthouse facilities, registry operations, administrative and judicial support staff and information technology (**IT**) equipment and services. In the delivery of justice services, Queensland courts and tribunals are a service area of DJAG.[41] They are referred to as 'business units' of DJAG.

60. As such, under arrangements established by government, a person wishing to access administrative documents of the courts is directed to make the application to DJAG. 'Making an RTI or IP application' on DJAG's website advises that applications for access to 'Queensland Courts administrative files (not court files)' are to be made to DJAG. It

[37] As attested to in the statutory declaration of Anne Edwards of DJAG dated 5 November 2015.
[38] Section 30(3) of the RTI Act provides that an agency's principal officer may, with the agreement of another agency's principal officer, delegate the power to deal with the application to the other agency's principal officer. For example, the Legal Services Commissioner has delegated his RTI decision-making powers to the Director-General of DJAG who has sub-delegated those powers to DJAG's RTI unit.
[39] I will discuss the application of section 17 and schedule 2, part 2, item 1 of the RTI Act in detail further below, including explaining my reasons for finding that none of the documents in issue relate to the exercise of the Court's judicial functions in any event.
[40] Administrative Arrangements Order (No.3) 2015; Department of Justice & Attorney-General Annual Report 2014-2015, at page 12.
[41] Department of Justice and Attorney-General Annual Report 2014-2015, at page 10.

provides information for applicants about how to identify the administrative documents of the courts that an applicant may wish to access. The RTI tab on the Queensland Courts website (which is administered by DJAG) takes the user to the RTI page located on DJAG's website.

61. The manner in which DJAG processed the application (explained at paragraphs 56 and 57 above) indicates that DJAG's RTI unit, administrative officers of the Supreme Court, and the individual judges who conducted searches for, and provided, responsive documents to DJAG's RTI unit, regarded the documents as in the possession or under the control of DJAG. As far as I am aware, none of the judges, including the third party, raised any issue, objection or qualification regarding the provision of documents in their possession to the RTI unit for the purpose of responding to the access application. None contended that DJAG was not entitled to be provided with copies of responsive documents because they were documents of the Court and not DJAG.

62. When invited to respond to the third party's submissions on this point, DJAG briefly confirmed that it considered the Supreme Court to be part of DJAG for the purposes of section 12 of the RTI Act and that documents generated by the Court and its judicial officers were to be regarded as documents in the possession and/or under the control of DJAG.[42]

63. Moreover, I note that the Supreme Court does not maintain its own IT system. It uses DJAG's IT system and equipment. Electronic documents generated by the judiciary are stored on DJAG's servers. DJAG is entitled to access and retrieve electronic documents stored on its server. DJAG has provided no evidence to suggest that documents of the Courts are somehow quarantined on its server or access restricted in some way. As such, those documents are in DJAG's physical possession and under its control within the meaning of section 12 of the RTI Act because DJAG has a present legal entitlement to possession of documents located on its server.[43] (Of course, while DJAG is obliged to identify and deal with such documents when processing an access application, it does not follow that it is required to give access to them. There may be grounds for exemption that apply to the documents or public interest factors favouring their nondisclosure.) I find the third party's submissions concerning the distinction to be drawn between the physical possession of a server and the physical possession of documents located on the server to be misconceived. In the absence of any restriction, DJAG is entitled to access and retrieve documents stored on its server.

64. For the reasons explained, I reject the third party's submission that the documents in issue were not in the possession or under the control of DJAG at the time the access application was received by DJAG because they were in the possession of a separate entity (the Supreme Court), and were not transferred to DJAG's RTI unit until after receipt of the application. Under administrative arrangements established by government, the Supreme Court is a division of DJAG and documents generated by the Court are therefore documents of DJAG under section 12 because they are in the possession or under the control of DJAG. In recognition of this relationship, applicants wishing to access documents generated by the Court are directed by DJAG to make their application to DJAG.[44]

[42] Crown Law's letter dated 29 January 2016.
[43] Similarly, mobile phones are issued to judges by DJAG. The mobile phones remain the property of DJAG. DJAG is entitled to access work-related information stored on mobile phones.
[44] If I am wrong in this respect, the applicant would need to make a fresh access application directed to the Supreme Court with administrative arrangements put in place to enable the Supreme Court to process access applications made to it.

Conclusion

65. I am satisfied that the documents in issue are documents of DJAG under section 12 of the RTI Act because they were in the physical possession and/or under the control of DJAG at the time the access application was received by DJAG.

Is the information in issue excluded from the RTI Act because of the operation of section 17 and schedule 2, part 2, item 1?

66. No, for the reasons that follow.

Submissions of DJAG and the third party

67. DJAG submits that:

- the relevant right conferred under the RTI Act is a right of access to documents;
- reading together sections 12, 14, 17 and 23, and schedule 2, part 2, item 1, of the RTI Act, the result is that the RTI Act does not confer a right to obtain access to a document that is not a 'document of an agency' because 'agency' does not include an entity mentioned in schedule 2, part 2 in relation to a function mentioned in that part;
- if an entity is mentioned in schedule 2, part 2 in relation to a function mentioned in that part, then under section 17, the right of access does not extend to those documents;
- the *'principle driving question'*[45] is whether a judicial function is involved in the document in issue: if it is, schedule 2, part 2 applies with the consequence that the relevant document is not a 'document of an agency' under section 12; and
- the documents in issue concern the exercise of the Supreme Court's judicial functions and are therefore excluded from the RTI Act.

68. The third party made no specific submissions about this issue, except to say that he supported DJAG's submissions to the extent they did not conflict with his own position.

Relevant law

69. As noted above:

- section 23(1)(a) of the RTI Act creates a legally enforceable right for a person to access 'documents of an agency';
- section 24 of the RTI Act provides that a person who wishes to be given access to a document of an agency may apply to the agency for access to the document;
- 'document of an agency' is defined in section 12 of the RTI Act (see the discussion at paragraphs 50-54 above); and
- section 12 of the RTI Act excludes documents to which the RTI Act does not apply (as set out in schedule 1 of the RTI Act).

70. Section 14 of the RTI Act defines the meaning of 'agency' and provides (in section 14(2)) that 'agency' does not include an entity to which this Act does not apply.

[45] Crown Law's letter dated 14 March 2016.

71. Section 17 of the RTI Act provides that 'an entity to which this Act does not apply' means:

- an entity mentioned in schedule 2, part 1; or
- an entity mentioned in schedule 2, part 2 in relation to the function mentioned in that part.

72. Schedule 2, part 2, item 1 of the RTI Act provides that a court, or the holder of a judicial office or other officer connected with a court, are entities to which the RTI Act does not apply in relation to the court's judicial functions.

Analysis

73. The effect of section 14(2) and section 17 of the RTI Act is to exempt from the definition of 'agency', entities listed in schedule 2, part 1 absolutely, and entities listed in schedule 2, part 2 when they are exercising a particular function. A person may not make an access application under section 24 of the RTI Act to these entities either at all (in the case of part 1 entities), or when the requested documents relate to the exercise by the entity of the particular function (in the case of part 2 entities).

74. In the case of schedule 2, part 2, item 1, a court, or the holder of a judicial office or other office connected with a court, do not fall within the definition of 'agency' in relation to the court's judicial functions.

75. It is important to note that **entities** are excluded under schedule 2, part 2, and not **documents**.[46] Schedule 2, part 2 has no application to entities that are not listed. In this case, the access application was made to DJAG. DJAG is not listed in schedule 2, part 2 as an entity to which the RTI Act does not apply in respect of a particular function. It is therefore an agency under section 14(1), and a person is entitled to make an application to DJAG under section 24 to access documents of DJAG under section 12: that is, documents that are in DJAG's physical possession or to which DJAG is entitled to access at the time of receipt of the access application. I have explained above why I consider the documents in issue to be such documents.

76. I reject the submission made by DJAG to the effect that it does not matter in whose hands the relevant documents are held: if they relate to a court's judicial functions, then they are excluded from the RTI Act under schedule 2, part 2, item 1. I do not consider that a plain reading of the relevant provisions I have set out above leads to that result. Schedule 2, part 2 is an entity-based exclusion that operates to affect the definition of 'agency' in section 14 and to exclude entities from complying with obligations under the RTI Act in certain circumstances. It is not a document-based exclusion. If Parliament had intended to exclude judicial documents from the operation of the RTI Act absolutely, no matter in whose hands they are held, it is reasonable to expect that Parliament would have included them in schedule 1 of the RTI Act. It did not do so. The comments of the Information Commissioner in *Cannon and Magistrates Court*[47] (***Cannon***) in that regard are relevant:

> *In my view, it cannot have been Parliament's intention to exclude from the application of the FOI Act, as a class, any documents relating to the judicial functions of a court. That would produce absurd consequences. It would exclude citizens from seeking access, under the FOI Act, to any documents held by government agencies that related to current*

[46] My emphasis.
[47] (2004) 6 QAR 340. The Information Commissioner was discussing a drafting error that appeared in section 11(1)(e) of the repealed FOI Act. However, the comments of the Information Commissioner cited and relied upon are relevant in the current circumstances.

> *or concluded legal proceedings: not only legal proceedings to which a government entity was a party, but also, for example, documents relating to evidence given by employees of government agencies (in that capacity) as witnesses or expert witnesses in cases not involving a government entity as a party.*

77. In summary, based upon a reading of the relevant provisions contained in the RTI Act, I am satisfied that schedule 2, part 2, item 1 applies only when the relevant access application is made to an entity listed in item 1 and only when the application seeks access to documents that relate to the exercise of the court's judicial functions. If documents relating to the judicial functions of a court (or holder of a judicial office etc.) are in the possession or under the control of an agency that is subject to the RTI Act under section 14, there is nothing in the RTI Act to prevent a person applying to that agency for access to the documents. That agency is subject to the RTI Act and the documents are documents of the agency under section 12. A person is therefore entitled to apply to access them under section 24.

78. Of course, the mere fact that such documents in the hands of another agency are the subject of an access application does not mean that access to them may not be refused. In deciding whether or not to grant access, an agency's decision-maker would be obliged to consult with concerned third parties regarding disclosure, including with the relevant court or judicial officer.[48] The decision-maker would also be required to consider whether the documents comprise exempt information under section 48, or whether disclosure would, on balance, be contrary to the public interest under section 49.

79. In its submissions, DJAG relied upon a number of cases[49] that had been decided by the Information Commissioner under section 11(1)(e) and section 11(2) of the repealed FOI Act where the Information Commissioner examined the type of function being performed in deciding whether or not the documents in question were subject to the RTI Act. However, as I noted in my response to DJAG, the scheme and structure of the RTI Act and the repealed FOI Act are quite different. As the Information Commissioner noted in *Cannon*,[50] the exclusion under section 11 of the repealed FOI Act was drafted in such a way as to cover any documents received or brought into existence by a court, or the holder of a judicial office in performing the judicial functions of a court, or holder of a judicial office, etc.

Conclusion

80. I am satisfied that section 17 and schedule 2, part 2, item 1 of the RTI Act do not operate to exclude the information in issue from the operation of the RTI Act because the access application was not made to an entity listed in item 1.

81. Given this finding, it is not strictly necessary for me to go on to consider whether any of the information in issue relates to the exercise of a court's judicial functions. However, DJAG provided detailed submissions on this issue during the course of the review and discussed relevant case law. I will therefore explain my reasons for finding that, even if I am wrong about the application of schedule 2, part 2, item 1 of the RTI Act, and it applies to exclude documents relating to the Court's judicial functions no matter in whose hands they are held, none of the documents in issue relates to the exercise of the Court's judicial functions.

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[48] Section 37 of the RTI Act.
[49] *Devine and Department of Justice* (Information Commissioner Queensland, unreported), 31 March 2000 (***Devine***); and *Kinder and Barristers' Board* (Information Commissioner Queensland, unreported), 31 March 2000 (***Kinder***).
[50] At [22].

Does the information in issue relate to the exercise of a court's judicial functions?

82. No, for the reasons that follow.

Submissions of DJAG and the third party

83. DJAG submits[51] that:

- the expression 'in relation to' used in schedule 2, part 2, item 1 must be read widely in accordance with the interpretation given to this phrase by the courts, and as supported by the legislative history of the RTI Act;
- the pro-disclosure bias provided for in section 44 of the RTI Act does not require a narrow interpretation to be given to 'in relation to' in this case because the requested documents do not fall within the scope of the RTI Act;
- the decision in *Cannon* can be distinguished because the documents in that case had been brought into existence and received by the court from outside the court (i,e., a complaint to the Chief Magistrate from Ms Cannon) while the documents in the present case were generated within the Court;
- a distinction must be drawn between 'judicial function' and 'judicial power', with 'judicial function' broader in scope and meaning;
- where documents concern a specific matter, rather than more general administrative work, this is a factor in favour of finding that the documents concern the exercise of a 'judicial function'. Here, the documents concern the possibility of a specific matter being referred to the CDR;
- the fact that matters occur outside a court setting does not remove documents from the realm of 'judicial function' especially if aimed at preparation for the hearing of a particular case;
- there is no basis in the RTI Act to make a distinction between a judicial function and an administrative function: the only relevant question is whether the documents are concerned with the exercise of the court's judicial functions;
- the RTI Act does not contemplate a mutually exclusive divide between judicial functions and administrative functions: some functions can be both;
- the information in issue that concerns the powers and duties of the Chief Justice under the *Supreme Court of Queensland Act 1991* (Qld) (**SCQ Act**) and the Electoral Act falls within the category of 'judicial administration' which forms part of the term 'judicial function';
- 'judicial administration' is specifically recognised in the SCQ Act through the role and functions of the Chief Justice (see section 15) and the SJA (see section 51);
- similarly, section 137(3) of the Electoral Act confers on the Chief Justice powers in relation to the constitution of the CDR; and
- because the powers of the SJA and the Chief Justice can only be exercised by a judge, those powers fall within the scope of 'judicial functions'.

84. DJAG relied upon a number of cases in support of its position, which I will discuss below.

85. Again, the third party made no specific submissions on this point except to say that he considered there was merit in DJAG's arguments, and that he expected my decision to take into account the relevant case law that considered the interpretation to be given to the meaning of 'judicial functions'.

[51] In its decisions in the five related reviews and in submissions provided during the course of the external reviews.

Relevant case law

86. The RTI Act does not define 'in relation to'. As DJAG noted, the courts have found that 'in relation to' is an expression of wide import.[52] It ordinarily means '*in the context of; in connection with'*.[53] However, I also acknowledge Parliament's clear intention that the RTI Act be administered with a pro-disclosure bias.[54] The stated object of the RTI Act[55] is to give access to government information unless, on balance, it would be contrary to the public interest to do so. Exemptions and other restrictions on access provided for in the RTI Act must be applied and interpreted in such a way as to further this primary object.[56] Section 14A(1) of the *Acts Interpretation Act 1954* (Qld) provides that, in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

87. These provisions give rise to an obligation to interpret the words used in schedule 2, part 2, item 1 to further the pro-disclosure bias of the RTI Act. This would suggest against a wide interpretation of exemptions and restrictions on access. In any event, even if I were to accept DJAG's argument that 'in relation to' should be given the wide meaning commonly applied by the courts, I do not consider it would operate to widen the meaning of 'judicial functions' sufficiently so as to capture any of the information in issue.

88. As to the meaning of 'judicial function', there is no definitive definition. While DJAG is correct in arguing that the only distinction that can properly be drawn from the words used in schedule 2, part 2, item 1 is between judicial functions and non-judicial functions, the courts have nevertheless often taken the approach of defining 'judicial' by distinguishing it from legislative or administrative functions (and vice-versa).[57] I do not accept that such discussion and analysis in the case law should be disregarded simply because the courts often seek to characterise functions that they regard as non-judicial as being legislative or administrative.

89. In *Cannon*, the Information Commissioner examined the powers and functions being performed by the Chief Magistrate under Part 3 (section 10) of the *Magistrates Act 1991* (Qld) (**Magistrates Act**) in receiving and responding to a complaint made by Ms Cannon about the performance of a Magistrate who had presided over a preliminary hearing of a matter concerning Ms Cannon and her former husband. The Information Commissioner said as follows about the interpretation to be given to 'judicial functions':

> *I consider the Chief Magistrate's functions under Part 3 of the* Magistrates Act *… were essentially administrative in character. They were not judicial in character, nor were they necessarily connected with any specific judicial process. They were to do whatever was necessary and practicable to ensure the orderly and expeditious exercise of the jurisdiction and powers of the Magistrates Court. The powers were conferred on the head of the Magistrates Court as the officer best placed to deal with organisational and operational matters concerning the courts.*[58]
>
> *…*
>
> *In this case, the Chief Magistrate was not, for example, attempting to adjudicate, or to give a final or conclusive decision about, a dispute between parties as to existing rights or*

[52] *Victoria v The Commonwealth* (1971) 122 CLR 353.
[53] Oxford Dictionary.
[54] Section 44 of the RTI Act.
[55] Section 3(1) of the RTI Act.
[56] Section 3(2) of the RTI Act. The RTI Act is beneficial legislation. In interpreting beneficial legislation, any ambiguity in the provisions should be construed beneficially, and resolved in favour of the intended beneficiary: *Bull v AG (NSW)* (1913) 17 CLR 370; *IW v City of Perth* (1997) 1 CLR 1 at 12.
[57] Australian Law Reform Commission, *"For Your Information: Australian Privacy Law and Practice"* (ALRC Report 108) 35.
[58] At [43].

> *obligations by reference to established rules or principles, that being the hallmark of a judicial function or decision. …*[59]

90. I acknowledge that the distinction between judicial and administrative functions is sometimes difficult. In *Evans v Friemann,*[60] Fox ACJ of the Federal Court stated that *'it has … proved very difficult, virtually impossible to arrive at criteria which will distinguish in all cases*' the administrative, the legislative and the judicial. In addition, the courts have held that the concepts can overlap or merge into one another,[61] and *'functions may be classified as either judicial or administrative according to the way in which they are to be exercised*'.[62]

91. In *Kotsis v Kotsis*,[63] (***Kotsis***) the Court distinguished between judicial and administrative functions by differentiating between what is *'truly ancillary to an adjudication by the court'* (which it regarded as a judicial function incidental to the exercise of judicial power) and that which is not truly ancillary to an adjudication (which it regarded as an administrative function):

> *A function that is truly ancillary to an adjudication by the court must be truly subservient to adjudication. They must be undertaken pursuant to a direction by the court for the purpose of either quantifying and giving effect to an adjudication already made by the court, or of providing material upon the basis of which an adjudication by the court is to be made.*

92. Under the *Freedom of Information Act 1982* (Cth) (**Cth FOI Act**), a distinction is made between matters of an administrative and non-administrative nature.[64] The relevant case law suggests that documents that relate to matters of a non-administrative nature include: documents of the court which relate to the determination of particular matters such as draft judgments, pleadings, documents returned under summons;[65] unrevised and unpublished transcripts of proceedings;[66] proceedings and decisions of a court held by an appellate court for the purposes of an appeal;[67] and notes relating to the provision of conciliation counselling by an officer of the court.[68] I note that all of these examples of 'non-administrative' documents concerned or were ancillary to the adjudicative function of a court.

93. In its submissions, DJAG relied upon previous decisions in *Devine* and *Kinder* made by the Information Commissioner under the repealed FOI Act to argue that it was not necessary for the documents in question to relate to a matter that was the subject of court proceedings in order for them to concern the judicial functions of a court. However, I do not consider that either case assists DJAG in its submissions. Firstly, in *Devine*, although the documents in question were tendered at a pre-inquest conference rather than at the inquest itself, there was clearly a specific inquest process already on foot. The pre-inquest conference formed part of, and was in preparation for, the inquest proceedings, and was conducted by the coroner. In contrast, in the present case, no application had been made to the CDR. There were no proceedings on foot.

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[59] At [56]. I reject DJAG's submissions that the decision in *Cannon* can be distinguished because the documents in issue were external to the Court. One of the documents in issue was the Chief Magistrate's reply to Ms Cannon's letter of complaint. The Information Commissioner considered the Chief Magistrate's functions in receiving and responding to the complaint.
[60] (1981) 35 ALR 428 at 433.
[61] *Hamblin v Duffy* (1981) 34 ALR 333 at 338.
[62] *Precision Data Holdings Ltd v Wills* (1991) 104 ALR 317 at 325.
[63] (1970) 122 CLR 69 at 92.
[64] Section 6 of the Cth FOI Act provides that courts and tribunals are excluded from the statutory obligation to grant access to a document unless the document relates to matters of an administrative nature. Judges in their official capacity are wholly excluded from the operation of the FOI Act.
[65] *Re Altman and the Family Court of Australia* (1992) 27 ALD 369.
[66] *Re Loughnan (Principal Registrar, Family Court of Australia) v Altman* (1992) 111 ALR 445.
[67] *Davison v Commonwealth* [1998] FCA 529.
[68] *Re O'Sullivan and the Family Court of Australia* (1997) 47 ALD 765.

Discussions about the CDR that are contained in the documents in issue took place merely in the context of by what process the CDR would be constituted in the event that an application was made.

94. In *Kinder*, which involved documents concerning a complaint about the conduct of a barrister, there was no need to identify a specific judicial process as the Information Commissioner was satisfied that all of the functions performed by the Barristers' Board related to the Supreme Court's judicial function of disciplining barristers-at-law.

95. DJAG also relied upon the following passage from the judgement of Gleeson CJ in *Fingleton v The Queen*[69] (***Fingleton***) concerning functions exercised by the Chief Magistrate under section 10 (Part 3) of the Magistrates Act:[70]

> *… include the organising of court lists, the allocation of magistrates to particular localities, and the assigning of magistrates to particular work. Arrangements of that kind are not merely matters of internal administration. They affect litigants and the public. Within any court, the assignment of a judicial officer to a particular case, or a particular kind of business, or a particular locality, is a matter intimately related to the independent and impartial administration of justice.*
> *…*
> *[W]here it is the function of a head of jurisdiction to assign members of a court to hear particular cases, the capacity to exercise that function, free from interference by, and scrutiny of, the other branches of government is an essential aspect of judicial independence.*
> *…*
> *[S]ome of those responsibilities, and especially those involving decisions which directly or indirectly determine how the business of Magistrates Courts will be arranged and allocated, concern matters which go to the essence of judicial independence.*

96. DJAG argued that these comments guide the interpretation of the meaning of 'judicial function' as including allocation of judicial officers to hear a particular case or type of case (in this case, the CDR) given that the purpose of schedule 2, part 2, item 1 is to recognise the independence of the judiciary in relation to the court's judicial functions.

97. The case of *Fingleton* was concerned with whether the former Chief Magistrate, in writing to a fellow Magistrate calling on him to show cause why she should not exercise her disciplinary power under section 10 of the Magistrates Act to withdraw his nomination as a coordinating magistrate, was entitled to the immunity conferred by section 21A of the Magistrates Act.[71]

98. Section 21A of the Magistrates Act provides that a magistrate has, in the performance or exercise of an **administrative function or power** … the same protection and immunity as a magistrate has in a judicial proceeding in a Magistrates Court. (my emphasis)

99. The protection and immunity given to a magistrate in a judicial proceeding is contained in section 30 of the *Criminal Code* (Qld). It provides that a judicial officer is not criminally responsible for anything done or omitted to be done by the judicial officer in the exercise of the officer's judicial functions, although the act done is in excess of the officer's judicial authority, or although the officer is bound to do the act omitted to be done.

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[69] (2005) 227 CLR 166 at 190-191.
[70] Now, section 12. See the discussion above regarding the Information Commissioner's decision in *Cannon* which also examined the operation of section 10 of the Magistrates Act.
[71] The Chief Magistrate had been charged with and found guilty of intimidating a witness, and sentenced to a one year jail term. Her conviction was later overturned by the High Court.

100. As the actions of the Chief Magistrate under section 10 of the Magistrates Act did not take place in the context of judicial proceedings, it was necessary for the High Court to decide whether they could be characterised as the exercise of administrative functions or powers under section 21A so that the Chief Magistrate obtained the benefit of the immunity granted by that section.

101. The High Court found that, while some of the functions conferred on the Chief Magistrate under section 10 of the Magistrates Act may not be purely administrative in nature, they nevertheless were covered by section 21A:

> *Nor are we concerned with … the dividing line between the exercise of judicial and administrative or ministerial functions. Some of the powers conferred by s 10 of the Magistrates Act may be so closely allied to the adjudicative function that they ought not to be regarded as purely administrative. It is unnecessary to consider whether s 30 alone would extend to the exercise of such powers because, for the reasons given below, they are covered by s 21A of the Magistrates Act.*

102. The comments made by Gleeson CJ extracted above and upon which DJAG relies, were made in the context of rejecting submissions by the respondent that the immunity conferred by section 21A of the Magistrates Act was not intended to extend to matters of internal court administration and discipline dealt with in section 10. Gleeson CJ rejected these submissions and observed that the purpose of the immunity was to protect the independence of the magistracy. He was of the view that some of the functions and powers of the Chief Magistrate listed in section 10 were intimately related to the independent and impartial administration of justice, and were therefore sufficiently related to the rationale for the immunity:

> *It is therefore incorrect to say that the functions and powers conferred on the Chief Magistrate by section 10 are unrelated to the rationale for the immunity in question. As to some of those functions the rationale is directly relevant. As to some it may be of no relevance, or of limited relevance. As to others, its relevance may depend upon the circumstances. …*
>
> *…*
>
> *The distinction between adjudicative and administrative functions drawn in the context of discussions of judicial independence is not clear cut. Nevertheless, the powers conferred by s10 of the Magistrates Act include powers that fall squarely within the rationale of the immunity in question.*[72]

103. I do not consider that the decision in *Fingleton* has any direct application to the issues under consideration in the present case in terms of the interpretation to be given to 'judicial functions' in schedule 2, part 2, item 1 of the RTI Act. The High Court was concerned with the operation of an immunity from criminal prosecution for administrative functions and powers and with whether the functions of the Chief Magistrate in section 10 of the Magistrates Act related sufficiently to the independence of the magistracy such as to fit within the rationale for the immunity. While the Court gave examples of duties and functions (such as the organising of court lists) that it considered *'went to the essence of judicial independence'* and therefore should obtain the benefit of the immunity, it nevertheless was satisfied that such duties and functions were administrative in nature. This accords with the Information Commissioner's decision in *Cannon*. The High Court did not consider in detail the distinction between judicial and administrative functions, although the comments set out at paragraph 101 above suggest that the Court considered

[72] At [52] and [53].

that there was a distinction between purely administrative functions and those *'closely allied to the adjudicative function*'.

104. The present case is concerned with an application to access government information under legislation with a clear pro-disclosure bias. As noted at paragraphs 86 and 87 above, exemptions and other restrictions on access provided for in the RTI Act must be applied and interpreted in such a way as to further this primary object.

105. I also note that the general statement of the powers and functions of the Chief Magistrate under Part 3 of the Magistrates Act that the High Court found to be administrative in nature (that the Chief Magistrate is responsible for *'ensuring the orderly and expeditious exercise of the jurisdiction and powers of … the Court*') uses the same wording that is used in respect of the general statement of the Chief Justice's functions and powers under section 15 of the SCQ Act, as well as those of the SJA under section 51 of the SCQ Act.

106. The third party also made reference to *Kline v Official Secretary to the Governor-General.*[73] In this case, the High Court considered the application of section 6A of the Cth FOI Act to documents relating to the making by the Governor-General of Order of Australia awards. While the Governor-General was excluded from the operation of the Cth FOI Act, the Official Secretary to the Governor-General was subject to the Cth FOI Act under section 6A in respect of documents it held that related to matters of an administrative nature. The High Court found that the Office of the Official Secretary assisted and supported the Governor-General in two ways:

- in assisting and supporting the Governor-General in respect of all aspects of the Governor-General's role, which included assisting and supporting the Governor-General's discharge of substantive powers and functions in respect of the Order; and
- in assisting and supporting the Governor-General by the management and administration of office resources.

107. The High Court found that the documents in question related squarely to the exercise by the Governor-General of the Governor-General's substantive powers and functions, and therefore did not relate to matters of an administrative nature. The documents were therefore not subject to the Cth FOI Act.

108. Of central importance to the Court's findings was the fact that the Governor-General was not subject to the FOI Act. The Court decided that, as Parliament's clear intention in excluding the Governor-General was that the Governor-General not be subject to public scrutiny in the discharge of his or her substantive powers and functions, the documents intended for public scrutiny under the Cth FOI Act in the hands of the Official Secretary related only to the second of the roles carried out by the Official Secretary, namely, the management and administration of office resources:

> *The "non-application" of the FOI Act to requests for access to documents of the Official Secretary … inevitably refers to a class of documents which are not "of an administrative nature". In conformity with the exclusion of the Governor-General from the operation of the FOI Act, those documents relate to the discharge of the Governor-General's substantive powers and functions. By contrast, the exception of a class of document which relates to "matters of an administrative nature" connotes documents which concern the management*

[73] [2013] HCA 52. The third party stated in his letter dated 4 March 2016 that he expected that I would take this decision into account in making my decision, as well as the decisions in *Fingleton* and *Bienstein v Family Court of Australia* (2008) 251 ALR 453 (***Bienstein***).

> *and administration of office resources…. This is a common enough connotation of the epithet "administrative".*[74]

109. The Court made a number of observations regarding the similar position of federal courts and tribunals under the Cth FOI Act. Again, of central importance was the fact that justices of the High Court, and holders of federal judicial office, are wholly excluded from the operation of the Cth FOI Act in their capacity as holders of that office:

> *Thus the processes and activities of government which are opened to increased public scrutiny by the operation of the FOI Act, do not include those associated with the exercise of the Governor-General's substantive powers and functions, many (even most) of which are exercised in public. Similarly, the FOI Act does not expose to public scrutiny the discharge of the substantive powers and functions of judicial officers or holders of quasi-judicial office to the extent that they have not been discharged in an open court or a public forum.*[75]
>
> …
>
> *The analogous exclusion of federal courts and specified tribunals, authorities and bodies from the general operation of the FOI Act, except for documents which relate to matters of an administrative nature, also involves a balance of conflicting public interests. There is a long-recognised public interest in the protection of judicial independence to enable holders of judicial office to exercise authority without fear of favour – judges work in public, are obliged to give reasons, and are subject to appellate review. However, not every action undertaken by a judge in the substantive powers and functions of adjudication is undertaken in public….*[76]

110. Again, implicit in the wording used by the High Court is the distinction to be drawn between documents of an administrative nature, and documents that relate to the exercise by a judge of their substantive powers and functions of adjudication.

111. Following the same line of analysis it had expressed with respect to the position of the Governor-General and the documents held by the Office of the Official Secretary, the Court observed that the only documents which courts are obliged to open to increased public scrutiny under the Cth FOI Act are those documents relating to the management and administration of registry and office resources. It reached this view because of the complete exclusion of judges in their official capacity from the Cth FOI Act, no matter what power or function they may be exercising.

112. While the High Court distinguished the decisions in *Bienstein* and *Fingleton* (to the extent that *Bienstein* sought to rely on reasoning apparently derived from *Fingleton* in finding that those administrative powers and functions exercised by a judicial officer that were not closely related to judicial independence would not need protection from the operation of the FOI Act), it did so because it found the reasoning afforded no weight to the circumstance that a judicial officer is not subject to the Cth FOI Act in their official capacity. It was therefore not apt for application to section 6A of the Cth FOI Act.[77]

113. The position under the RTI Act is materially different. Unlike the Cth FOI Act, judicial officers are subject to the RTI Act, except in relation to the exercise of the court's judicial functions. The RTI Act therefore recognises that not all functions performed by the holder of a judicial office are judicial in nature. It seeks to open to public scrutiny, documents concerning the non-judicial functions of courts. This reflects the pro-disclosure bias of the RTI Act.

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[74] At [41].
[75] At [34].
[76] At [45].
[77] At [51].

Analysis

114. As can be seen from the case law discussed above, the courts often refer to the **adjudicative** powers and functions of courts and judicial officers in seeking to distinguish between matters of a judicial and non-judicial (or administrative) nature.[78] I am in agreement with that approach. At the heart of the exercise of judicial powers and functions there must be an adjudication or determination of some type – *'an attempt to adjudicate, or to give a final or conclusive decision about, a dispute between parties as to existing rights or obligations by reference to established rules or principles'*, as described by the Information Commissioner in *Cannon.*

115. DJAG submits that a distinction is to be drawn between 'judicial function' and 'judicial power'. I accept that 'judicial function' is a wider term. However, an adjudication is still at the heart of both terms. I agree with the approach taken by the Court in *Kotsis*. That is, the exercise of a judicial power involves an adjudication of some type: the power to hear and decide controversies between subjects that does not begin until some tribunal which has power to give a binding decision is called upon to take action;[79] or a decision settling for the future the existence of rights and obligations;[80] while the exercise of a judicial function involves anything truly ancillary or incidental to that exercise of adjudicative power.

116. In summary, I find that in order for a function of a court to be considered judicial in nature under schedule 2, part 2, item 1, it must be referable or incidental to, or have some ancillary relationship with, the exercise of an adjudicative power by a court or judicial officer or other office connected with a court.[81]

117. Applying that interpretation to the information in issue, I do not consider that any of the information relates to the exercise of the Supreme Court's judicial functions. None is sufficiently referable or incidental to, or connected with, the exercise of the Court's adjudicative powers - that is, with a hearing or determination of proceedings before the Court. The information in issue, as contained in the audio-recording as well as in emails, memoranda, correspondence and meeting minutes, relates either to discussions about the apprehended application to the CDR by the ECQ and the manner in which the CDR would be constituted should an application be received; or to the aftermath of the issue, when it became clear that no application would in fact be made. No proceedings were commenced at any time, nor was the court required to exercise any kind of adjudicative or determinative power or function at any time. I do not consider that the information in issue has a sufficient connection with the Court's judicial functions in those circumstances.

118. I reject DJAG's submissions that the information in issue falls within the category of 'judicial administration' which therefore gives it the necessary judicial flavour. The comments made by the Information Commissioner in *Cannon* with respect to the Chief Magistrate's functions under section 10 of the Magistrates Act are applicable in the present case. The administrative responsibilities of the Chief Justice under sections 15-19 of the SCQ Act are simply designed to ensure the orderly and expeditious administration of the Court's jurisdiction and powers. These administrative responsibilities are conferred on the head of the Supreme Court simply because that

[78] My emphasis. See, for example, paragraphs 101 and 109 above.
[79] *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330.
[80] *R v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.
[81] I note that section 6 of the *Privacy and Personal Information Protection Act 1998* (NSW) is in accord with this approach and provides that 'judicial functions of a court' means: *'such of the functions of the court or tribunal as relate to the hearing or determination of proceedings before it… .'*

person is the officer best placed to deal with organisational and operational matters concerning the Court. The conferral of such responsibilities on judges, rather than on administrative officers, is in recognition of the independence of the Court, not because they require a judicial mind to be brought to bear. Such responsibilities ordinarily will have no connection with an adjudicative power or function and will not require a judicial determination to be made. The same can be said of the Chief Justice's responsibilities under section 137 of the Electoral Act. Section 137 is merely a statutory power of appointment. If, for example, the power had vested in the Governor-in-Council, then it could hardly be said that the appointment was an exercise of a judicial function. Section 137 provides for the Chief Justice to sit on the CDR or to appoint another judge to sit on the CDR simply because it is an expedient and independent process for appointment. It recognises the Chief Justice's position as the most senior judge of the Supreme Court, and the officer responsible for the administration of the Court. The power of appointment is not judicial in nature. I reject DJAG's submission that a clearly statutory or administrative power takes on a judicial flavour simply because a judge is required to exercise it.

119. One last point to note in respect of this issue is that, when requested by DJAG's RTI unit to provide copies of any documents in their possession that responded to the terms of the access application, none of the judges, including the third party, argued that the information related to the exercise of the court's judicial functions. (The third party sought to adopt DJAG's submissions on this point during the course of the review.) A number of judges argued strongly against DJAG characterising the information as having any connection with the exercise by them of judicial functions.

Conclusion

120. Even if section 17 and schedule 2, part 2, item 1 of the RTI Act were to operate in the circumstances of this review to exclude documents in the possession or under the control of DJAG that relate to the exercise of the Supreme Court's judicial functions, I am satisfied that none of the information in issue can properly be characterised as relating to the exercise of the Supreme Court's judicial functions.

Does the information in issue comprise exempt information?

121. No, for the reasons that follow.

Breach of confidence

122. While the third party has identified specific information that it argues is exempt information under schedule 3, section 8(1) of the RTI Act because its disclosure would found an action for breach of confidence,[82] I have considered the application of the relevant principles to all of the information in issue.

123. In its internal review decision in review 312516, DJAG raised the possible application of schedule 3, section 8(1) of the RTI Act to the audio-recording.

[82] See Appendix 2: pages 11-12, 26-27, 30, 33-37, 49 and 62 (and duplicates) from File 01; pages 2-6, 26, 36, 40-41 and 45-47 (and duplicates) from File 02; the audio-recording (File 03); and supplementary pages 11-17 and 18. (These documents were identified in a schedule that King & Wood prepared and attached to its letter dated 18 December 2015).

Relevant law

124. The right of access contained in the RTI Act is subject to some limitations, including the grounds on which access to information may be refused. Access may be refused to information to the extent that the information comprises 'exempt information'.[83] Parliament considers disclosure of exempt information would, on balance, be contrary to the public interest.[84]

125. One category of exempt information is where disclosure would found an action for breach of confidence. This exemption requires consideration of whether an equitable obligation of confidence exists. The following cumulative requirements must be established to give rise to an equitable obligation of confidence:

(a) the information must be capable of being specifically identifiable as information that is secret, rather than generally available;
(b) the information must have the necessary quality of confidence;
(c) the circumstances of the communication must create an equitable obligation of confidence;
(d) disclosure of the information to the access applicant must constitute an unauthorised use of the confidential information; and
(e) disclosure must cause detriment to the confider.

126. Accordingly, the test for exemption is to be evaluated by reference to a hypothetical legal action in which there is a clearly identifiable plaintiff, possessed of appropriate standing to bring a suit to enforce an obligation of confidence said to be owed to that plaintiff, in respect of information in the possession or control of the agency faced with an application under the RTI Act for access to the information in issue.[85]

Submissions of DJAG

127. During the review, Crown Law made no specific submissions about the application of schedule 3, section 8(1) to the audio-recording. However, in her decision in review 312516, Ms Newick observed that comments made by the third party in the media[86] about the 12 February 2015 meeting reflected the third party's view that the conversation was *'in confidence'* and that he did not know it was being taped. Ms Newick simply stated that it appeared to her that *'many, if not all'* of the requirements necessary to establish an equitable obligation of confidence applied to the audio-recording (and, by inference, to any notes made of the conversation).

128. As noted, the requirements set out above are cumulative. It is not sufficient that some are met. All must be established in order to give rise to an equitable obligation of confidence.

[83] Section 47(3)(a) of the RTI Act. The categories of exempt information are set out in schedule 3 of the RTI Act.
[84] Section 48 of the RTI Act.
[85] See the Information Commissioner's analysis in *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 applying section 46(1)(a), the equivalent exemption under the repealed FOI Act. For a restatement of the criteria in the context of the RTI Act, see *TSO08G and Department of Health* (unreported, Queensland Information Commissioner, 13 December 2011).
[86] See the third party's interview in *The Australian* on 25 May 2015.

Submissions of the third party

129. The third party submits that:

- there has been only limited prior publication of some information in issue which does not destroy the confidentiality of the relevant documents;
- the vast majority of the information remains secret, unpublished and inaccessible to the public;
- the relevant circumstances of the communications included that:
    - the relationship between the parties involved was between judicial officers who work together in the Supreme Court;
    - much of the information is of a personal, inflammatory and highly sensitive nature about discordant relationships and personality clashes between judicial officers;
    - much of the information was communicated for the purpose of personally attacking the third party and to exert pressure on him to vacate his judicial office; and
    - the documents were communicated on the understanding that they would be kept confidential and not communicated to other people, including media outlets, for any other purpose;
- where a document was created by the third party, his attitude and conduct were consistent with his maintenance of a claim for confidentiality;
- where documents were created by other judicial officers, the information is of such a character that the confiders would not reasonably expect it to be used for any purpose other than that for which it was privately conveyed;
- equity will restrain the publication of information that was improperly or surreptitiously obtained – the audio recording (and related notes) that are in issue contain a record of a conversation that was taped without the third party's knowledge or consent, and publication of the audio recording is prohibited by section 45(1) of the Invasion of Privacy Act; and
- as regards detriment:
    - if the information in issue is to be regarded as personal information of the third party, detriment would be caused through injury to the third party's professional reputation;
    - if the information in issue is to be regarded as government information, detriment to the public interest would be caused through harm to the ordinary business of government, particularly the doctrine of judicial independence which would be compromised by the disclosure of documents that reveal animosity between judicial members and attempts to delegitimise the legislative commission of the third party.

Analysis

130. Many of the communications that the third party claims are subject to an equitable obligation of confidence were not conveyed by the third party. Rather, they were communicated to the third party by other judges. When consulted about disclosure, none of the judges involved made any claim for confidentiality in respect of their communications, and none objected to disclosure of the relevant information under the RTI Act.[87] A number pressed for full disclosure. I do not consider that the third party has standing to bring an action in equity to enforce an obligation of confidence in respect of information that he did not supply and where the confider does not object to

[87] As noted earlier, one document in issue comprises minutes of a meeting of the judges marked 'Confidential to the Judges'. However, when consulted, none of the judges in attendance at the meeting objected to disclosure.

disclosure. I do not consider that requirements (d) and (e) above can be met in such circumstances.

131. As regards the documents in issue that contain information conveyed by the third party, I have examined both the nature of the information and the circumstances surrounding its communication. I am not satisfied that:

- the information possesses 'the necessary quality of confidence'; and/or
- the information was communicated in such circumstances that any reasonable person standing in the shoes of the recipient would reasonably have realised that the information was being given to them in confidence.[88]

132. Generally, for information to be treated as confidential information by the courts, it must have been communicated by the confider and received by the recipient on the basis of a mutual understanding that the information is not to be disclosed except where authorised. Where there is no express statement of confidentiality, one test for deciding whether an obligation of confidence exists is whether information has been supplied for a specific purpose and in circumstances where there is a reasonable expectation that confidentiality will be preserved.

133. Most of the documents in question comprise email or memoranda exchanges between the third party and other judges regarding aspects of the administration of the Court and the protocol for appointing judges to sit on the CDR. They were prepared by the third party and received by other judges in the performance by them of their administrative functions as members of the Supreme Court. While some may incidentally reveal a level of tension between the third party and other judges, they discuss work-related issues and I am not satisfied that a reasonable person ought to have realised that the third party was communicating the information in confidence. Moreover, the conflict between the third party and other judges over the constitution of the CDR has been publicly disclosed. I do not regard related information about this issue as being sufficiently secret for it to be the subject of an obligation of confidence.

134. As regards the audio-recording, I acknowledge that the third party was not aware that the meeting was being taped. I will discuss in detail below, in the context of the public interest balancing test, the relevant provisions of the Invasion of Privacy Act raised by the third party. I simply note here that I do not accept the third party's submission that the information was *'improperly obtained'*. It is not an offence for a person who is a party to a conversation to tape that conversation. Furthermore, I am not satisfied that the bulk of the contents of the audio-recording possess the necessary quality of confidence. As DJAG itself has acknowledged, the contents of the recorded conversation have been *'widely reported upon*'.[89]

Public interest issues

135. Public interest issues are also relevant when considering a claim that government information or information supplied to government is subject to an equitable obligation of confidence. Further difficulties with the third party's claim for exemption arise in this context.

[88] *Mense v Milenkovic* [1973] VR 784; *Rapid Metal Developments (Australia) Pty Ltd v Anderson Formrite Pty Ltd* [2005] WASC 255; *Trevorrow v State of South Australia (No 4)* (2006) 94 SASR 64 at [41].
[89] See page 10 of DJAG's internal review decision in review 312516. See also footnote 97 and the discussion below regarding public interest factors favouring nondisclosure of the audio-recording.

136. Given my finding that, under administrative arrangements established by the government, the Supreme Court is part of DJAG when exercising its non-judicial functions, I am satisfied that the information in issue is properly to be regarded as government information (rather than information supplied to government by a third party or separate entity). The courts will not grant protection from disclosure of such information unless disclosure would injure the public interest.[90] But even if the information were to be characterised as information supplied to government by a third party, it has been established that Australian law will recognise a public interest exception on the basis that an obligation of confidence claimed to apply in respect of information supplied to government will necessarily be subject to the public's legitimate interest in obtaining information about the affairs of government.[91]

137. I will explain in detail below, in discussing the application of the public interest balancing test, why I am satisfied that disclosure of the information in issue would, on balance, be in the public interest. This includes the audio-recording and related notes of the taped conversation. For the purposes of considering the third party's claim for exemption under schedule 3, section 8(1) of the RTI Act, it is sufficient for me to find that I am not satisfied that disclosure of the information in issue would injure the public interest. I reject the third party's submission that disclosure could reasonably be expected to harm the doctrine of judicial independence. The third party argues that judges must be perceived to be independent of influences that might reasonably be expected to compromise their ability to decide cases fairly and impartially. He submits that this perception may be compromised were it to be disclosed that serious animosity exists between judges.

138. I accept the importance of the doctrine of judicial independence. However, in the present circumstances, I do not accept that disclosure of the information in issue could reasonably be expected to prejudice that doctrine. As noted, while some documents in issue may disclose a level of discord between the third party and other judges while the third party held the position of Chief Justice (this has been reported and commented upon publicly in any event, including by the third party himself),[92] there is nothing before me (including in the documents themselves) to suggest that such tension extended to an interference with the independence of each judge when exercising their judicial functions. (Again, I reiterate my view that the documents in issue do not relate to the exercise of the Court's judicial functions.)

139. In those circumstances, I do not accept that disclosure of the information in issue could reasonably be expected to prejudice the doctrine of judicial independence of the Court.

140. While I reject the third party's argument that prejudice to the proper functioning of the Court could occur through harm to the doctrine of judicial independence, I have given consideration to whether disclosure of the information in issue could reasonably be expected to prejudice the proper functioning of the Court by inhibiting the future free and open communication between judicial officers concerning the administration of the Court (thereby injuring the public interest).[93] I accept the importance of the ability of judges to communicate openly with each other in the interests of the efficient and effective functioning of the Court.

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[90] *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 52.

[91] See *Seeney and Department of State Development; Berri Limited (Third Party)* (2004) 6 QAR 354 at [191ff] and *Orth and Medical Board of Queensland; Cooke (Third Party)* (2003) 6 QAR 209 at [34].

[92] See, for example, the third party's interview with *The Australian* on 25 May 2015.

[93] This is similar to the public interest factor favouring nondisclosure where documents in issue concern a workplace dispute and disclosure could reasonably be expected to prejudice the management function of an agency, or to have a substantial adverse effect on the management by an agency of its staff and the workplace – schedule 4, part 3, item 19 and schedule 4, part 4, item 3(c) of the RTI Act.

141. I acknowledge there may be occasions where the release of sensitive information could reasonably be expected to impede the proper functioning of the Court by inhibiting the willingness of judges to express open and candid views about the functioning of the Court. However, in this case, the major topics of dispute between the judges, including the dispute about the constitution of the CDR (which I consider to be of considerable public importance), have already been disclosed and discussed publicly. In those circumstances, I have difficulty accepting that disclosure of the information in issue could reasonably be expected to inhibit future free and open communication between the judges.

142. Furthermore, I note that none of the judges consulted about the information in issue raised a concern that disclosure of their communications would make them reluctant to express openly their views to fellow judges in future. As mentioned, none advised that they considered their communications to be confidential. When consulted by DJAG, a number argued for full public disclosure of their communications (rather than the partial disclosure proposed by DJAG) in order to give a complete picture of the events that had transpired. A number reiterated their desire for full disclosure of their communications when consulted by OIC.

143. There is therefore no material before me sufficient to support a finding that disclosure of the information in issue could reasonably be expected to prejudice the proper functioning of the Supreme Court through the inhibiting of open communication between judges.

Conclusion

144. For the reasons set out above, I am not satisfied that the requirements for establishing that disclosure of the information in issue would found an action for breach of confidence are met. The information in issue is therefore not exempt information under schedule 3, section 8 of the RTI Act.

Prejudice an investigation

145. The third party argues that the audio-recording and related notes of the 12 February 2015 meeting between the third party and Justices Byrne and Boddice are exempt information under schedule 3, section 10(1)(a) of the RTI Act because their disclosure could reasonably be expected to prejudice an investigation by the Queensland Police Service (**QPS**) of a contravention or possible contravention of the law.

Relevant law

146. In order for information to be exempt under schedule 3, section 10(1)(a) of the RTI Act, I must be satisfied that an agency is conducting an investigation of a contravention or possible contravention of the law and that disclosure of the information in issue could reasonably be expected to prejudice the investigation.

147. The words 'could reasonably be expected to' call for a decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible or merely speculative, and expectations that are reasonably based: that is, expectations for the occurrence of which real and substantial grounds exist.[94]

[94] See *Cannon and Australian Quality Egg Farms Limited* (1994) 1 QAR 491.

148. The phrase 'contravention or possible contravention of the law' extends to any law that imposes an enforceable legal duty to do or refrain from doing something.[95]

Submissions of the third party

149. The third party relies on an article that was published in *The Australian* on 2 April 2016 regarding QPS investigation[96] into the alleged unauthorised disclosure of the audio-recording to the media[97] and whether the disclosure constituted an offence under the Invasion of Privacy Act. The third party submits that:

- the QPS investigation is ongoing;
- disclosure of the audio-recording and related file notes would prejudice the investigation and its ability to be thorough and rigorous *'should the cooperation of any individuals involved in the investigation be compromised by any future undue media attention raised by the release of these* [documents]';
- the *'reluctance of any individuals to cooperate in a full and frank manner should undue media attention result is reasonably likely and any lack of candour on the part of witnesses can only act as a detriment to the investigation process'*;
- inferences arising from the contents of the audio-recording and the intention to create it could reasonably be expected to interfere with the cooperation, or influence the evidence, of any individuals involved in the investigation;
- it is not merely speculative to suggest that prejudice to the investigation is a possibility due to undue media attention, given the media attention that the matter has attracted in the past;
- the investigation may involve scrutinising the content of the audio-recording if its content (and the content of the related notes of the meeting) may assist in determining who released the audio to the media; and
- the content of the recording may suggest the identity of persons who may assist the QPS in its inquiries.[98]

Analysis

150. Following receipt of these submissions, I wrote to the QPS[99] to consult with it about disclosure of the audio-recording and whether it objected to release under the RTI Act.

151. In response,[100] the QPS advised that disclosure of the audio-recording would not prejudice any investigation currently being undertaken and that it therefore did not

[95] *Byers and Department of Justice and Attorney-General* [2014] QICmr 34.
[96] The article also refers to a complaint having been made to the Crime and Corruption Commission (**CCC**). The third party did not make any submissions directed towards CCC involvement. However, for the sake of completeness, OIC consulted with the CCC which advised on 19 May 2016 that it did not possess a copy of the audio-recording and that it did not consider that release of the audio-recording would compromise any CCC investigation. Therefore, I did not deal with this aspect any further.
[97] Following the 12 February 2015 meeting, a number of media articles were published which purported to describe what had transpired at the meeting. See, for example, the articles in *The Australian* on 18, 25 and 30 May 2015; and in *The Courier-Mail* on 12 June 2015.
[98] Submissions dated 13 April 2016 and 6 June 2016.
[99] Letter dated 14 April 2016.
[100] Letter dated 12 May 2016. The QPS raised the possible relevance of part 4 of the Invasion of Privacy Act to any consideration of factors favouring non-disclosure of the audio-recording. I will discuss this further below.

object to disclosure. It is reasonable to assume that the position would be the same for notes made of the meeting should they be in the possession of the QPS.[101]

152. I am not satisfied that there are reasonable grounds (as opposed to a mere possibility or mere speculation) for expecting that disclosure of the audio-recording and related notes of the meeting under the RTI Act would prejudice any investigation that the QPS may be undertaking. I accept that the discussions that took place at the meeting on 12 February 2015 have already been the subject of considerable media attention and that it is not unreasonable to expect that disclosure of the audio-recording may again result in media coverage. However, I am not satisfied that media attention could reasonably be expected to prejudice the investigation. I do not accept that it is reasonable to expect that witnesses and other persons involved in the investigation would be reluctant to cooperate with the investigation in a full and frank manner because of media coverage; nor that disclosure of the audio-recording would influence the evidence of individuals involved in the investigation.

153. I am not aware of the nature of any investigation that the QPS may be conducting, nor is it for me to speculate about the inquiries that the QPS may be making. Of relevance, however, is that the QPS itself does not consider that disclosure of the audio-recording would prejudice its investigation.

Conclusion

154. For the reasons set out above, I am not satisfied that disclosure of the information in issue could reasonably be expected to prejudice an investigation of a contravention or possible contravention of the law in a particular case. The information in issue is therefore not exempt information under schedule 3, section 10(1)(a) of the RTI Act.

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

155. No, for the reasons that follow.

Relevant law

156. As noted at paragraph 124, the right of access contained in the RTI Act is subject to some limitations, including the grounds on which access to information may be refused. One ground for refusal of access is where disclosure would, on balance, be contrary to the public interest.[102]

157. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest[103] and explains the steps that a decision-maker must take[104] in deciding the public interest as follows:

- identify any irrelevant factors and disregard them;

[101] In any event, I have difficulty in seeing how written notes of the meeting would be relevant to an investigation by the QPS into whether disclosure of the audio-recording breached the Invasion of Privacy Act. There is nothing to suggest that Justice Boddice recorded the conversation or that his file note was prepared directly or indirectly from the use of a listening device. Accordingly, his file note would not be covered by section 45(1) of the Invasion of Privacy Act.
[102] Sections 47(3)(b) and 49 of the RTI Act. The term *'public interest'* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that, in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.
[103] Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.
[104] Section 49(3) of the RTI Act.

- identify relevant public interest factors favouring disclosure and nondisclosure;
- balance the relevant factors favouring disclosure and nondisclosure; and
- decide whether disclosure of the information in issue would, on balance, be contrary to the public interest.

General comments

158. I reiterate the comments I made at the outset[105] concerning the unique circumstances of this review. The wide public ventilation[106] of issues concerning the administration of the Court necessarily affects my consideration of the public interest balancing test, particularly, the weight to be given to the public interest in protecting the third party's privacy interests.

159. In addition, the source of the conflict between the third party and other judges that is the subject of this review was the process for constituting the CDR, which I consider to be an issue of considerable public importance.

Irrelevant factors

160. A factor favouring nondisclosure relied upon by DJAG was that disclosure could reasonably be expected to cause a loss of public confidence in the judiciary. During the course of the review, I raised with DJAG whether this factor should properly be regarded as irrelevant under schedule 4, part 1 of the RTI Act. DJAG refuted this position. I have taken account of its arguments concerning the application of this factor and I will discuss them below in the context of factors favouring nondisclosure.

161. I have not taken into account any irrelevant factors in deciding the public interest.

Factors favouring nondisclosure relied upon by DJAG and the third party

162. Both DJAG and the third party contend that disclosure of all information in issue would, on balance, be contrary to the public interest.

163. The public interest factors favouring nondisclosure relied upon by DJAG are:

- disclosure could reasonably be expected to disclose personal information of the third party, and prejudice the third party's right to privacy;
- disclosure of the audio-recording is prohibited by an Act;
- disclosure could reasonably be expected to cause a loss of public confidence in the judiciary; and
- disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information, or prejudice the future supply of confidential information of the same type.

164. DJAG argues that given that public debate and ventilation about the tenure of the third party as Chief Justice has subsided, disclosure of the information in issue would not serve the public interest, and would appeal only to a prurient interest.

[105] See paragraph 10 above.
[106] See footnotes 5 and 6.

165. The public interest factors favouring nondisclosure relied upon by the third party are:

- disclosure could reasonably be expected to disclose personal information of the third party, and prejudice the third party's right to privacy;
- disclosure of the audio-recording is prohibited by an Act;
- disclosure could reasonably be expected to prejudice an agency's ability to obtain confidential information, or prejudice the future supply of confidential information of the same type;
- disclosure could reasonably be expected to impede the administration of justice for a person; and
- disclosure could reasonably be expected to prejudice intergovernmental relations.

Personal information and privacy

166. The RTI Act recognises that:

- a factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice the protection of an individual's right to privacy;[107] and
- disclosing information could reasonably be expected to cause a public interest harm if it would disclose personal information of a person, whether living or dead.[108]

167. As noted, the applicant accepted my preliminary view that the balance of the public interest did not favour disclosure of some personal information contained in the documents. This includes references in the audio-recording to the personal information of persons not directly involved in the matters under discussion. This information is no longer in issue.

168. I acknowledge that some of the information in issue is the third party's personal information and is sensitive in nature, comprising opinions, thoughts and feelings. A public interest harm therefore arises by disclosure.

169. The concept of 'privacy' is not defined in either the RTI Act or the IP Act. It can, however, essentially be viewed as the right of an individual to preserve their personal sphere free from interference from others.[109]

170. In its decision, DJAG stated:

> *A competing public interest in deciding whether or not to release documents is the right of an individual to privacy. … Some of the documents contain the personal information of the Chief Justice, and on this basis, I believe the right of the Chief Justice to privacy outweighs the public interest in releasing those documents or part documents. This applies to documents including a letter, several memos, several emails and, in particular, to the sound recording of a meeting held between the Chief Justice and two other judges of the Supreme Court. There is perhaps nothing more personal than a sound recording of one's voice where personal views and opinions are expressed in what most would regard as a private exchange.*

[107] Schedule 4, part 3, item 3 of the RTI Act.
[108] Schedule 4, part 4, item 6(1) of the RTI Act. *Personal information* is information, whether true or not, and whether recorded in a material from or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion: section 12 of the *Information Privacy Act 2009* (Qld) (**IP Act**).
[109] Paraphrasing the Australian Law Reform Commission's definition of the concept in *"For your information: Australian Privacy Law and Practice",* Australian Law Reform Commission Report No. 108 released 11 August 2008, at paragraph 1.56.

171. A distinction is to be drawn between a person's personal and public spheres. In *Hardy and Department of Health*[110] a distinction was drawn between information in the personal sphere and *'routine work information – that is, information that is solely and wholly related to the routine day to day work duties of a public service officer*'.

172. I note that all of the information in issue was generated in the context of a workplace environment and all of it stems from work-related issues.

173. However, I also acknowledge the sensitive nature of some of the information in issue that comprises feelings and opinions about work colleagues and the fact that some of it arose from circumstances that could not be considered to be routine.[111] Ordinarily, this would give rise to a significant public interest in protecting the privacy of the individuals concerned. But, as noted above, I must also take account of relevant information that is in the public domain.

174. In his submissions, the third party argued that very little of the information in issue is in the public domain. He contended that while some public documents touched on some of the same issues, they did so only in a *'general, and often, vague manner without offering specific details'*.[112] The third party described the information as highly personal and sensitive, and that its disclosure under the RTI Act would be a significant intrusion into the privacy of the relevant individuals:

> *… the information comprises information about serious animosity between members of the Queensland judiciary and (what may be perceived as) attempts to delegitimise the legislative commission of our client. The information identifies individuals, details their emotional reactions to events in the workplace and outlines concerns of a sensitive nature which were privately conveyed between members of the Supreme Court Bench.*[113]

175. I do not accept the third party's description of the information in issue. While, as noted, some documents may incidentally reveal tension between the third party and other judges, all were generated in the context of a workplace environment and all stem from work-related issues. Not all of the information contained in the documents in issue is already in the public domain, however, as I have noted, the central topics about which there was conflict between the third party and other judges were publicly referred to and discussed and debated in media articles on numerous occasions. In respect of the dispute about the constitution of the CDR, which is the subject of this review, the substance of the dispute was described in the valedictory speech given by a retiring judge, and was responded to by the third party in his letters to the Bar Association and the Law Society. The documents in issue, such as minutes and resolutions of meetings of judges, memoranda, correspondence and emails between judges; and the audio-recording, discuss CDR issues and provide a more complete picture of what is already publicly known about the events that transpired and the background to the dispute.

176. In its submissions about the weight to be given to the public interest in protecting the third party's privacy regarding the audio-recording, DJAG argued that:

- the meeting was recorded without the third party's knowledge and consent;
- the conversation was in-confidence;
- it took place in the third party's chambers and not in any public place;

[110] [2011] QICmr 28 at [26].
[111] See *Tol and The University of Queensland* [2015] QICmr 4 at [23] and [24].
[112] Submission dated 18 December 2015.
[113] Submission dated 18 December 2015.

- the evidence indicates that the third party did not disclose details of the conversation to the media but merely responded to an unauthorised disclosure;[114] and
- any record of the meeting that is already in the public domain was unauthorised and an unauthorised disclosure should not be relied upon to reduce the weight to be given to protecting the third party's privacy interests.

177. In her internal review decision in review 312516, Ms Newick stated as follows in response to arguments raised in favour of disclosure:

> *I find the fact that the contents of the recorded conversation has* [sic] *already been widely reported in the media should not properly reduce the weight to be given to the argument it was a private conversation and should not be disclosed on that basis.*
>
> *I do not know the circumstances in which the information about the conversation was provided to the media outlet/s who published the relevant details. As far as I am aware, there has been no official authorisation for release of the details that have been made public. Further, the fact of the apparent release of some details of the conversation does not negate the circumstances and personal evidence of the privacy of the conversation as attributed to the Chief Justice* [in media interviews] *and which are uncontested by any other evidence.*

178. The meeting in question occurred in the workplace, and work-related matters were discussed. The third party has indicated that he considered that what was discussed was *'only between the three of us in the room'*.[115] However, given that issues affecting the operation of the Court were discussed, particularly, an important issue of public interest concerning the composition of the CDR to ensure no perception of bias, I do not accept that it was reasonable to expect that the discussions would remain confidential as between the three participants to the meeting.[116]

179. I acknowledge that the meeting was taped without the third party's knowledge or consent. I also acknowledge that a recording of a person's voice conveys a range of 'nonlexical' information, such as tone, cadence, emphasis, inflection and pauses. Such information is sensitive and highly personal in nature.[117] The public interest harm that could ordinarily be expected to flow from disclosure of personal information of this kind is significant having regard to the prejudicial effect on the protection of an individual's right to privacy. However, in some instances, it is also true that information of this type can add important meaning and context to what is being conveyed during a conversation.

180. Summaries of what was discussed at the meeting have been published in various media articles.[118] The circumstances under which, and by whom, details of the meeting were revealed to the media are not known to me, and are irrelevant in any event. I reject DJAG's submission that the fact that details of the meeting have been widely reported upon in the media as the result of what DJAG contends was an unauthorised disclosure should not affect the weight to be given to the third party's privacy interests. If the public is already aware of information, by whatever means, the public interest in protecting a person's privacy regarding that information is necessarily lessened.

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[114] The third party stated in his submission dated 13 April 2016 that he did not initiate contact with the media regarding what occurred at the 12 February 2015 meeting.
[115] As quoted in the third party's interview in *The Australian* on 25 May 2015.
[116] See the earlier discussion concerning breach of confidence.
[117] See *New York Times Co. and National Aeronautics and Space Administration* 920 F.2d 1002 (D.C.Cir. 1990, 1006).
[118] See, for example, articles appearing in *The Australian* on 18 May and 30 May 2015. The third party himself discussed the taping of the meeting in his interview with *The Australian* on 25 May 2015 and acknowledged that he was angry and felt provoked.

Conclusion

181. For the reasons discussed, I give significant weight to the public interest in protecting the privacy interests of the third party in respect of the nonlexical information contained in the audio-recording. As regards the remainder of the information in issue (including the content of the audio-recording), I find that the information that is already in the public domain about the CDR and the dispute between the third party and other judges about its constitution necessarily lessens the weight to be afforded to the public interest in protecting the third party's privacy interests. As a result, I afford this public interest factor moderate weight in respect of such information.

Disclosure of information prohibited by an Act

182. The RTI Act recognises that a public interest factor favouring nondisclosure in the public interest arises when disclosure of the information in issue is prohibited by an Act.[119]

183. Both DJAG and the third party argue that disclosure of the audio-recording is prohibited by section 45(1) of the Invasion of Privacy Act. The third party submitted that *'the publication offence created by s 45(1) … evinces Parliament's clear and unequivocal intention that this type of personal information be protected from publication'*.[120]

184. Part 4 of the Invasion of Privacy Act deals with listening devices and creates a number of offences connected with their use. Sections 43, 44 and 46 have no application in the current circumstances because the meeting was recorded by a person who was a party to the conversation. It was therefore not recorded in contravention of section 43.

185. Section 45(1) of the Invasion of Privacy Act operates to prohibit a person who has been a party to a private conversation, and who has recorded that conversation, from communicating or publishing the record (directly or indirectly) by use of the listening device or any statement prepared from the record. However, it is not an absolute prohibition. Section 45(2) provides that section 45(1) does not apply in certain circumstances, which are listed. These include, for example, where publication is in the public interest; or in the performance of a duty of the person; or is for the protection of the lawful interests of that person.

186. In its submissions, DJAG focuses on the past disclosure of details of the meeting to the media and speculates as to how that may have occurred, in terms of arguing that none of the section 45(2) 'exceptions' could have applied to that disclosure. However, the fact that details of the meeting may have been published to the media previously and how that may have occurred[121] is irrelevant to a consideration of the application of schedule 4, part 3, item 22 of the RTI Act. All that is required in deciding whether item 22 applies and, if so, what weight it should be given in balancing the public interest, is whether disclosure of the audio-recording is prohibited by an Act.

187. DJAG argues that it is sufficient that disclosure of the audio-recording is *prima facie* prohibited by section 45(1) of the Invasion of Privacy Act. I do not agree. As noted, section 45(1) is not an absolute prohibition. It must be read in conjunction with section 45(2) which sets out circumstances where publication is not prohibited. Whether or not

[119] Schedule 4, part 3, item 22 of the RTI Act.
[120] Submission dated 18 December 2015.
[121] I have already stated that I am not aware of how and under what circumstances the media became aware of details of the meeting.

a relevant circumstance could be established in the present case is not something I can determine, nor is it my role to do so. I cannot therefore be satisfied that the prohibition contained in section 45(1) would apply in the present circumstances such as to bring into consideration in balancing the public interest, the factor favouring nondisclosure contained in schedule 4, part 3, item 22 of the RTI Act.

Conclusion

188. For the reasons discussed, I am not satisfied that schedule 4, part 3, item 22 of the RTI Act applies to a consideration of the public interest factors favouring nondisclosure of the audio-recording. Section 45(1) of the Invasion of Privacy Act does not contain an absolute prohibition on disclosure of the audio-recording and whether section 45(2) would operate to permit disclosure is not something I can establish.

189. If I am wrong in interpreting section 45 in that manner and it is sufficient that section 45(1) contains a prohibition on disclosure, I would afford schedule 4, part 3, item 22 moderate weight as a factor favouring nondisclosure of the audio-recording, taking account of the information that is already in the public domain about the contents of the audio-recording.

Disclosure could reasonably be expected to cause a loss of public confidence in the judiciary

190. In its decision, DJAG decided that disclosure of the information in issue would undermine public confidence in the already damaged reputation of the judiciary. DJAG found that public confidence in the judiciary is critical to the operation of the courts and the rule of law in Queensland, and that, if it is damaged, Queensland's system of government could be compromised.

191. In my initial response to this issue, I raised with DJAG that schedule 4, part 1 of the RTI Act provides that it is irrelevant in deciding the public interest that disclosure could reasonably be expected to cause embarrassment to the Government or to cause a loss of confidence in the Government.

192. DJAG responded by arguing that a distinction must be drawn between the use of 'Government' and 'government' in the RTI Act, and that 'Government' means an elected government of the day (whether of the past or present) which does not include the judiciary.

193. I acknowledge that punctuation in an Act is part of the Act.[122] However, the use of 'Government' and 'government' in different contexts throughout the RTI Act is not consistent and I am not satisfied that any clear legislative intent can be drawn from circumstances where one or the other is used. As DJAG noted in its internal review decision in review 312516, 'Government' is not defined in the RTI Act's dictionary, (however 'government' is defined and includes a court) nor do the Explanatory Notes to the RTI Bill explain the distinction. The judiciary forms part of a government as one of the three recognised arms of any Westminster model of government. If DJAG's interpretation of 'Government' were correct (as excluding the judiciary), public interest factors favouring disclosure such as those contained in schedule 4, part 2, item 1 (enhancing the Government's accountability) and schedule 4, part 2, item 3 (informing the community of the Government's operations) would not apply to the administrative functions of the courts. I am not satisfied there is justification for this interpretation.

[122] See section 14(5) of the *Acts Interpretation Act 1954* (Qld).

Judicial officers are appointed by governments and are paid from the public purse. Parliament intended that the non-judicial functions of courts and judicial officers be open to public scrutiny under the RTI Act. Unlike the Commonwealth FOI Act, judicial officers do not enjoy a complete exclusion from the RTI Act in their capacity as holders of judicial office.

194. Moreover, I consider that, rather than undermining public confidence in the judiciary, disclosure of the information in issue may serve to reinforce public confidence by showing that members of the Court were concerned for its proper administration and were able to raise and discuss issues that they considered were in the best interests of the proper administration of the Court.

195. Even if I were to accept DJAG's claim of an anticipated loss of confidence in the judiciary as a relevant factor in determining the balance of the public interest, I consider that, given the information that is already publicly known about the rift in the Supreme Court that occurred during the third party's tenure as Chief Justice, it is not reasonable to expect that disclosure of the information in issue at this point in time would contribute significantly to any undermining of public confidence in the judiciary. Of relevance is the fact that the third party resigned as Chief Justice in July 2015 and moved to QCAT, with a new Chief Justice appointed. The source of any ongoing public conflict between the third party and other judges arising from his role as Chief Justice has therefore ended. In those circumstances, I am not satisfied that disclosure would have an ongoing negative effect on public confidence in the judiciary.

Conclusion

196. For the reasons explained, I am not satisfied that a loss of public confidence in the judiciary is a relevant factor in deciding the public interest. If it were relevant, I would afford it low weight for the reasons explained.

Prejudice ability to obtain confidential information; affecting confidential communications

197. The RTI Act provides that:

- a factor favouring nondisclosure in the public interest arises where disclosure of the information in issue could reasonably be expected to prejudice an agency's ability to obtain confidential information;[123]
- a factor favouring nondisclosure in the public interest because of a public interest harm in disclosure arises where the information in issue is of a confidential nature and was communicated in confidence; and disclosure could reasonably be expected to prejudice the future supply of information of this type.[124]

198. In its internal review decision in review 312516, DJAG focused on the audio-recording and found as follows:

> *… There is a good argument for contending that whatever remains of the conversation that has not been the subject of the media statements remains information of a confidential nature. …*

[123] Schedule 4, part 3, item 16 of the RTI Act.
[124] Schedule 4, part 4, item 8 of the RTI Act.

> *As to the second factor, I think it is reasonable to expect that if the full text of the conversation were to be revealed, then that would prejudice the future supply of information of that type, in the sense of judges apparently in conflict over a particular point not communicating frankly over the conflict.*

199. I have already explained above[125] my finding that the information in issue is not confidential because of its nature, and/or the circumstances under which it was communicated. In addition, DJAG itself acknowledges that the contents of the recorded conversation have been reported upon widely in the media.[126]

200. I reiterate my acceptance of the general proposition, as explained above, that there may be occasions where the public disclosure of communications by judicial officers concerning the functioning and administration of the Court may make judicial officers reluctant in the future to supply such information. However, I do not regard that as a reasonable expectation in the particular circumstances of this case, given not only that (with the exception of the third party) no judge has made such a submission, but also because much of the substance of the information concerning the administration of the Court (and, in this case, communications concerning the constitution of the CDR), is already in the public domain.

201. In his submissions, the third party characterises the information in issue as information that was communicated in confidence by the Supreme Court to DJAG for the purpose of assisting DJAG to process the RTI access application:

> *We understand that there is no contractual or customary obligation on the Supreme Court to provide such assistance. The documents were provided in aid of agency cooperation. It is very likely that publication of the* [information in issue], *which will no doubt attract significant media attention, would damage relations between DJAG and the Supreme Court. The future cooperation of the Supreme Court to provide such assistance to DJAG or other government agencies could reasonably be expected to be prejudiced.*[127]

202. I do not accept this characterisation as correct. As explained, under the administrative arrangements established by government, the Court, when exercising its administrative functions, is properly to be regarded as part of DJAG for RTI purposes. Its administrative documents are DJAG's administrative documents. Neither the Court nor its judicial officers are in a position to refuse to 'supply' such documents in the future, nor is it a question of them choosing or refusing to assist, or cooperate with, DJAG or any other agency in the future. As a business unit of DJAG, the Court and its officers are obliged under the RTI Act to search for and provide to the RTI unit for processing, all responsive documents.

Conclusion

203. For the reasons explained, I find that neither of these public interest factors favouring nondisclosure arises for consideration in balancing the public interest.

Impede the administration of justice generally; or for a person

204. Schedule 4, part 3, items 8 and 9 provide that if disclosure of the information in issue could reasonably be expected to impede the administration of justice generally

[125] Refer to the discussion above about breach of confidence.
[126] See page 10 of its internal review decision in review 312516.
[127] Submissions dated 18 December 2015.

(including procedural fairness); or the administration of justice for a person, then these are to be regarded as factors favouring nondisclosure in the public interest.

205. The third party relies on the same arguments he put forward in arguing that disclosure of the audio-recording and related notes of the meeting of 12 February 2015 could reasonably be expected to prejudice the QPS investigation.[128] He submits that disclosure of this information in issue could reasonably be expected to *'impede the assessment process being undertaken by the QPS and any future legal proceedings resulting from a breach of the Invasion of Privacy Act*.'[129]

206. I make the same comments I made in the discussion above about prejudice to the QPS investigation. I do not consider there are reasonable grounds for expecting that disclosure of the audio-recording and related notes of the meeting under the RTI Act would impede the administration of justice either generally, or for a particular person. As far as I am aware, there are no judicial or legal processes on foot and it is merely speculative to suggest that these will occur. As regards the QPS investigation, the QPS itself has advised that it does not consider that disclosure of the audio-recording would prejudice or impede its assessment or investigative process.

Conclusion

207. For the reasons explained, I find that neither of these public interest factors favouring nondisclosure arises for consideration in balancing the public interest.

Prejudice to intergovernmental relations

208. A factor favouring nondisclosure in the public interest arises when disclosure of the information in issue could reasonably be expected to prejudice intergovernmental relations.[130]

209. The purpose of this factor is to give weight to the public interest in protecting confidential communications between the State and another government where disclosure could reasonably be expected to prejudice the relations between those two governments.[131]

210. The third party contends that the relationship 'at risk' is between DJAG and the Supreme Court. His submission on this point is misconceived. Even taking the position that the Supreme Court is a separate entity from DJAG, it is clearly not a government. There is no intergovernmental relationship involved in the circumstances of this review.

Conclusion

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

Factors favouring disclosure

212. In its decision, the only factor which DJAG identified as favouring disclosure of the information in issue was as follows:

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[128] See paragraph 149 above.
[129] Submissions dated 13 April 2016 and 6 June 2016.
[130] Schedule 4, part 3, item 14 of the RTI Act.
[131] *Qld Newspapers Pty Ltd and Queensland Police Service* [2014] QICmr 5.

- Disclosure of the information could reasonably be expected to contribute to positive and informed debate on important issues or matters of serious interest.[132]

213. In addition to this factor, I consider that the following public interest factors favouring disclosure are relevant:

- Disclosure could reasonably be expected to promote open discussion of public affairs and enhance the Government's accountability;[133]
- Disclosure could reasonably be expected to allow or assist inquiry into possible deficiencies in the conduct or administration of an agency or official;[134] and
- Disclosure could reasonably be expected to reveal the reason for a government decision and any background or contextual information that informed the decision.[135]

214. In respect of the first factor, while DJAG accepted that disclosure of the information in issue could reasonably be expected to contribute to informed debate on the important issue of the operation of the Supreme Court, it decided that disclosure may not contribute to this debate in a positive way:

> *I have considered that there is already a great deal of material in the public domain relating to the broader issues about the contentious nature of the appointment of the Chief Justice in July 2014, negative public comment by senior leaders in the legal profession about his appointment, and discontent among Supreme Court judges about decisions he has since made. The disclosure of any further material is not likely to lead to positive and informed debate.*[136]

215. I do not agree. I have acknowledged that a significant amount of information about the issues affecting the Court while the third party was Chief Justice is already in the public domain. The contention that making more information available would somehow result in only negative debate about the issues is rejected. The process for constituting the CDR is a matter of considerable public interest. Serious issues were raised publicly in connection with the process and the actions of the third party and other judges. The third party also raised issues of public importance in his letters to the Bar Association and the Law Society when he alleged that there had been an organised and coordinated campaign by senior members of the legal community to undermine him.[137] I consider that disclosure of the information in issue in this review would inform the community about the Court's administrative operations. It would provide the public with a more complete picture of the events that transpired in connection with the constitution of the CDR and the background to the conflict and disharmony within the Court around this issue, as well as giving context to the information that has already been disclosed. Disclosure could reasonably be expected to promote open discussion of these important public affairs and contribute further to the debate (both positive and negative) that has already occurred regarding the administration of the Supreme Court; the process for constituting the CDR; the administrative responsibilities of the Chief Justice; and the manner in which those responsibilities were discharged. As the third party stated in a statement he released on 25 May 2015 foreshadowing his resignation:

[132] Schedule 4, part 2, item 2 of the RTI Act.
[133] Schedule 4, part 2, item 1 of the RTI Act.
[134] Schedule 4, part 2, item 5 of the RTI Act.
[135] Schedule 4, part 2, item 11 of the RTI Act.
[136] Decision dated 5 June 2015.
[137] See the article in *The Australian* on 18 May 2015.

> *… the disharmony between me and some judges has been played out in the media.*
>
> *The public deserve resolution to this situation immediately. But they deserve much more than that. These recent revelations shine a light on serious cultural and structural problems within the judiciary.*

216. The Supreme Court is an important public institution, funded from the public purse. In discharging their duties to properly administer the Court, judicial officers are accountable to the public they serve. Where issues arise and decisions are made which impact on the effective functioning of the Court, there is a strong public interest in disclosing information that would assist the public to understand the issues. The efficient and effective administration of the Court is crucial to the maintenance of an effective justice system. The public interest in scrutinising the administration and protocols of the Supreme Court, and the administrative actions of its judicial officers, is necessarily high.

217. I also consider that disclosure of the information in issue would give the public the opportunity to inquire into possible deficiencies in the administration of the Supreme Court.

218. During the course of the review, DJAG argued that:

- the passing of time has significantly diminished public interest arguments favouring disclosure in respect of the period of time when the third party was Chief Justice and would appeal now only to a prurient interest; and
- disclosure of the information in issue would not give a complete picture of the various events that led to the dispute about the CDR and the decision to tape the 12 February 2015 meeting because any picture that would emerge would only be the product of the view of the judges who made available documents in response to the access application.

219. I do not accept that the passing of time has diminished to any significant degree the public interest in inquiring into possible deficiencies both in the administration of the Supreme Court and in the conduct of its officers. Nor has it diminished the public interest in scrutinising and understanding the process for constituting the CDR. The applicant has been regularly updated by OIC about the progress of the external review and the steps taken to finalise it, and continues to seek access to the information in issue. Moreover, the passing of time that DJAG refers to is through no fault of the applicant. The access application was made to DJAG in March 2015, at a time when the issues under consideration were current and the third party still held the position of Chief Justice. It would be wrong to use the time it has taken to process the applicant's access and external review applications as the basis for a factor favouring nondisclosure.

220. I do not understand DJAG's second point. Disclosure of the information in issue would give as complete a picture as is available (and certainly a more complete picture than is already in the public domain through the limited amount of information disclosed by DJAG), based on all of the responsive information in the possession or under the control of DJAG. Given that all judges of the Court were asked to conduct searches for any responsive documents they held, the '*picture that would emerge'* would of course be that contained in the responsive documents that the judges located. I am unsure of what other source of information DJAG contends would allow for a different picture to emerge. If other relevant information exists in the possession of either DJAG

or others, it is open to those parties to disclose such information to ensure that the relevant picture is as complete as possible.

Conclusion

221. For the reasons explained, I afford significant weight to each of the public interest factors identified above that favour disclosure of the information in issue.

Balancing the public interest

222. For the reasons previously expounded, as regards public interest factors favouring nondisclosure, I afford significant weight to the public interest in protecting the third party's right to privacy regarding the nonlexical information contained in the audio-recording, and moderate weight to the public interest in protecting the third party's right to privacy in respect of the remainder of the information in issue.

223. I am not satisfied that any of the other public interest factors favouring nondisclosure relied upon by DJAG and the third party arise for consideration. However, if I am wrong in respect of two of those factors, then, as explained, I would afford low weight to the fact that disclosure could reasonably be expected to cause a loss of public confidence in the judiciary; and I would afford afford moderate weight to the fact that disclosure of the audio-recording is prohibited by an Act.

224. As regards the four public interest factors I have identified as favouring disclosure, I afford each of them significant weight.

225. Having weighed these factors, I find that the public interest weighs in favour of disclosure of the information in issue. I am satisfied that disclosure of the information in issue would not, on balance, be contrary to the public interest. Access to the information in issue therefore cannot be refused under sections 47(3)(b) and 49 of the RTI Act.

DECISION

226. I set aside the decision under review. I find that the information in issue does not comprise exempt information, and nor would its disclosure, on balance, be contrary to the public interest. I therefore find that there is no ground under the RTI Act on which DJAG may refuse access to the information in issue.

227. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Clare Smith
Right to Information Commissioner

Date: 27 June 2016

Appendix 1
External Review 312477 – *Seven Network (Operations) Limited and Department of Justice and Attorney-General; Carmody (Third Party)*
Significant Procedural Steps

Date	Event
30 March 2015	Department of Justice and Attorney-General (**DJAG**) received the access application.
5 June 2015	DJAG issued its decision in response to the access application.
5 June 2015	Office of the Information Commissioner (**OIC**) received the application for external review of DJAG's decision.
5 June 2015	OIC wrote to DJAG and requested that relevant procedural documents be provided.
9 June 2015	OIC received the requested procedural documents from DJAG.
18 June 2015	OIC informed the applicant and DJAG that the application had been accepted for external review. OIC requested that DJAG provide, by 2 July 2015, a copy of documents located in response to the access application, its search records and certification, and other relevant documents.
25 June 2015	OIC received the requested documents from DJAG.
30 June 2015	The third party wrote to OIC to apply to become a participant in the external review.
2 July 2015	OIC granted the third party's application to become a participant in the external review.
17 July 2015	OIC wrote to DJAG and requested further documents.
29 July 2015	OIC received the further requested documents from DJAG.
19 August 2015	OIC updated the applicant.
August-September 2015	OIC undertook extensive third party consultations and received responses.
23 September 2015	OIC updated the applicant.
9 October 2015	OIC conveyed a written preliminary review to the third party. OIC invited the third party to provide submissions in response to the preliminary view by 30 October 2015.
12 October 2015	OIC conveyed a written preliminary view to DJAG. OIC invited DJAG to provide submissions in response to the preliminary view by 30 October 2015.
23 October 2015	The third party wrote four letters to OIC in which he raised numerous preliminary procedural issues. The third party also requested an extension of time, to 31 January 2016, to provide submissions in support of his case for the non-disclosure of the information in issue.
29 October 2015	OIC responded to the third party, addressing the preliminary issues he had raised. OIC granted the third party an extension of time until 27 November 2016 to provide submissions. OIC updated the applicant.

Appendix 1
Review 312477 – *Seven Network (Operations) Limited and Department of Justice and Attorney-General; Carmody (Third Party)*
Significant Procedural Steps

Date	**Event**
5 November 2015	Crown Law advised that it acted for DJAG and provided submissions in response to OIC's preliminary view letter.
16 November 2015	The third party requested a further extension of time until 31 January 2016 to provide submissions.
19 November 2015	OIC granted the third party a further extension of time until 11 December 2015 to provide submissions.
7 December 2015	OIC received submissions from King & Wood Mallesons (**King & Wood**), who advised that they acted for the third party. King & Wood submitted that there were threshold legal questions that should be referred to the Queensland Administrative and Civil Tribunal for determination.
10 December 2015	OIC responded to King & Wood's submissions. OIC granted the third party a further extension of time to 18 December 2015 to provide submissions in response to OIC's letter dated 9 October 2015.
18 December 2015	King & Wood provided submissions and requested that an oral hearing be convened to address the relationship between the respondent and the Supreme Court for the purposes of the RTI Act.
22 December 2015	OIC provided reasons for declining King & Wood's request for an oral hearing. OIC updated the applicant.
8 January 2016	King & Wood made a further request for an oral hearing.
14 January 2016	OIC provided detailed reasons for again declining King & Wood's request for an oral hearing but advised that the preliminary issue about the relationship between the respondent and the Supreme Court would be provided to Crown Law for response.
18 January 2016	OIC invited Crown Law to provide a response to the third party's submissions. OIC provided the applicant with an update, advising that the third party had raised a preliminary issue about the information in issue that had been referred to Crown Law for response.
29 January 2016	Crown Law's response received.
18 February 2016	OIC conveyed a written preliminary view to King & Wood and invited King & Wood to provide final submissions by 4 March 2016.
25 February 2016	OIC conveyed a written preliminary to Crown Law, and invited Crown Law to provide final submissions by 11 March 2016.
2 March 2016	Crown Law requested an extension of time until 14 March 2016 to provide submissions.
4 March 2016	OIC granted an extension of time to Crown Law to 14 March 2016. OIC received submissions from King & Wood.
14 March 2016	Crown Law provided submissions. OIC updated the applicant.

Appendix 1
Review 312477 – *Seven Network (Operations) Limited and Department of Justice and Attorney-General; Carmody (Third Party)*
Significant Procedural Steps

Date	**Event**
30 March 2016	OIC conveyed a written preliminary view to the applicant and invited the applicant to provide submissions by 15 April 2016. OIC provided King & Wood with copies of Crown Law's submissions and gave a final opportunity to lodge any material in response to issues raised by Crown Law. OIC provided Crown Law with copies of King & Wood's submissions and gave a final opportunity to lodge any material in response to issues raised by King & Wood.
13 April 2016	King & Wood provided further submissions.
14 April 2016	OIC made inquiries of the Queensland Police Service.
12 May 2016	Queensland Police Service's response received.
26 May 2016	OIC conveyed a written preliminary view to King & Wood and invited a response by 3 June 2016.
3 June 2016	King & Wood requested an extension of time to 7 June 2016. OIC granted the request for an extension of time.
6 June 2016	OIC received submissions from King & Wood.
8 June 2016	OIC acknowledged receipt of King & Wood's submissions and advised it would proceed to prepare formal reasons for decision after receipt of any further submissions from DJAG. OIC provided DJAG with a copy of King & Wood's submissions and invited DJAG to provide any further submissions by 15 June 2016.
13 June 2016	DJAG advised that it would not be providing any further submissions.

APPENDIX 2

External review 312477 – *Seven Network (Operations) Limited and Department of Justice and Attorney-General; Carmody (Third Party)*

Information in Issue

***DJAG document reference: RTI 151329**

Date	File	Page Nos	Description of Document	Whole or part in issue?
10.02.15	1	5-6	Meeting minutes of the Judges of both divisions of the Court.	Part only
11.02.15	1	8	Email from Byrne SJA to Carmody CJ.	Part only
11.02.15	1	11-12	Email from Byrne SJA to Trial Division Judges	Part only
11.02.15	1	13	Memorandum from Carmody CJ to Byrne SJA.	Part only
Undated	1	15	Notice of resolutions to be considered at meeting of Judges.	Part only
19.02.15	1	22-24	Meeting minutes of Trial Division Judges' meeting.	Part only
20.02.15	1	26-27	Memorandum from Carmody CJ to Atkinson J and Jackson J.	Part only
12.02.15	1	28-29	Memorandum from Carmody CJ to Byrne SJA.	Part only
13.02.15	1	30	Memorandum from Byrne SJA to Carmody CJ.	Part only
18.02.15	1	33-37	Statement of Justice John Byrne.	Part only
12.02.15	1	44-45	Memorandum from Carmody CJ to Byrne SJA.	Part only
16.02.15	1	49	Memorandum from Carmody CJ to Byrne SJA.	Part only
18.02.15	1	54-58	Statement of Justice John Byrne.	Part only
10.02.15	1	59-61	Memorandum from Byrne SJA to Carmody CJ.	Part only
11.02.15	1	62	Email from Byrne SJA to Carmody CJ.	Part only
12.02.15	1	63	Memorandum from Carmody CJ to Byrne SJA.	Part only
13.02.15	1	64	Memorandum from Byrne SJA to Carmody CJ.	Part only
Undated	2	2-6	Notes of Meeting with Chief Justice on 12 February 2015, written by Boddice J.	Part only
13.02.15	2	7	Memorandum from Carmody CJ to Boddice J.	Part only
10.02.15	2	8-10	Memorandum from Byrne SJA to Carmody CJ.	Part only
12.02.15	2	13-14	Memorandum from Carmody CJ to Byrne SJA.	Part only
13.02.15	2	15	Memorandum from Byrne SJA to Carmody CJ.	Part only
16.02.15	2	21	Memorandum from Carmody CJ to Byrne SJA.	Part only
17.02.15	2	26	Memorandum from A. Lyons J to Carmody CJ.	Part only
18.02.15	2	27	Email from Jackson J to McMeekin J, North J and Henry J.	Part only
18.02.15	2	28	Email exchange between Jackson J and Atkinson J.	Part only

APPENDIX 2

External review 312477 – *Seven Network (Operations) Limited and Department of Justice and Attorney-General; Carmody (Third Party)*

Information in Issue

Date	File	Page Nos	Description of Document	Whole or part in issue?
19.02.15	2	36	Email from Jackson J to North J.	Part only
Undated	2	37	Resolutions of a meeting of the Judges of the Trial Division on 19.02.15	Part only
23.03.15	2	40-41	Memorandum from A. Lyons J to Carmody CJ.	Part only
25.03.15	2	45-47	Letter from Applegarth J to Carmody CJ.	Part only
12.02.15	3		Audio-recording of meeting between Carmody CJ, Byrne SJA and Boddice J.	Part only
25.03.15	4	1-3	Letter from Applegarth J to Carmody CJ.	Part only
10.02.15	Supp	1	Memorandum from Boddice J to Atkinson J.	Part only
10.02.15	Supp	2	Email exchange between court officers and with Carmody CJ.	Part only
12.02.15	Supp	3	Memorandum from Carmody CJ to Byrne SJA.	Part only
13.02.15	Supp	4	Memorandum from Carmody CJ to court officer.	Part only
13.02.15	Supp	5-9	Handwritten notes by Dalton J of telephone conversation with Chief Justice.	Part only
18.02.15	Supp	10	Email exchange between Jackson J and Atkinson J.	Part only
19.02.15	Supp	11-17	Handwritten notes: meeting of judges.	Part only
23.02.15	Supp	18	Memorandum from Atkinson J and Jackson J to Carmody CJ.	Part only
29.03.15	Supp	19-21	Letter from Carmody CJ to Bar Association of Qld.	Part only