

Decision No. 16/97

Reference No. CRT 3/97

IN THE MATTER of the Privacy Act 1993

BETWEEN **DONALD MICHAEL
ADAMS**

Plaintiff

AND **NEW ZEALAND
POLICE**

Defendant

BEFORE THE COMPLAINTS REVIEW TRIBUNAL

S C Bathgate - Chairperson

A K Knowles - Member

P McDonald - Member

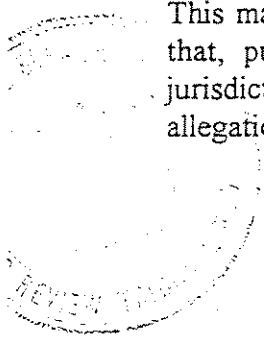
HEARING on the papers at WELLINGTON on the 14th day of May 1997

DECISION

The plaintiff in these proceedings has alleged that the defendant committed a breach of Information Privacy Principles 6 and 7 in s. 6 Privacy Act 1993 in that it refused him access to all personal information about him held by the defendant and it refused to accept his required corrections to personal information.

The plaintiff sought access to personal information held about him by the defendant some time in 1993. The defendant provided access to some of that information but refused access to other information on the grounds of ss 27(1)(c), 29(1)(a) and 29(1)(f) Privacy Act 1993. A complaint was thereupon laid with the Privacy Commissioner on 21 September 1993. A further internal review by the defendant and investigations by Commission staff followed. The matter was not able to be resolved to the plaintiff's satisfaction, mainly because a particular file which he sought could not be located.

This matter has been the subject of an investigation by the Privacy Commissioner so that, pursuant to s. 83(a) Privacy Act 1993, we are satisfied that we have the jurisdiction to hear and determine these proceedings. This decision concerns the allegation that the defendant breached Information Privacy Principle (IPP) 6 only. The



parties agreed that this issue should be determined before the issues raised by IPP 7 were discussed between the parties.

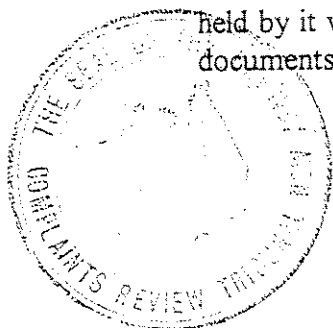
BACKGROUND

The plaintiff was convicted on 30 April 1986 of unlawful possession of some explosive material. It was a condition of the sentence of supervision that he was not to have possession of a firearm without the authority of a Probation Officer. His firearms had already been seized by the defendant. They were returned to him in June 1986 following representations to the defendant by the probation officer.

Between December 1986 and June 1990 the plaintiff came again to the attention of the defendant because he made a number of threats to officials and a Minister of two Government departments with whom he was engaged in a dispute. On 30 October 1990 he applied to the defendant for endorsements to his firearms licence. The application was declined in early 1991. The plaintiff complained to the Police Complaints Authority and the defendant reconsidered the application but again declined it. An appeal was lodged at the District Court and after a hearing on 16 and 17 December 1992 it was granted. No order for costs was made by the District Court Judge. The costs incurred by the plaintiff on this matter were the subject of a long running dispute between the parties which was eventually submitted to an independent arbitrator, an Auckland Queen's Counsel, who awarded the plaintiff \$45,947.79 which was two thirds of the amount he had sought from the defendant.

Prior to the making of the award the arbitrator received information from both parties, in documentary and oral forms. He returned the defendant's file some time after the award. The plaintiff wished to have access to that file because he does not accept that an officer of the defendant who was interviewed by the arbitrator told the truth and for that reason has lodged a number of Official Information and Privacy Acts requests.

In response to those requests the defendant forwarded information but the plaintiff was not satisfied that he had received all the information held on him. He was not satisfied that he had received the documents that were in the file that was sent to the arbitrator. For that reason he complained to the Privacy Commissioner. On 30 August 1996 the defendant disclosed further information with the advice that some information was being withheld (pursuant to sections 27(1)(c), 29(1)(a) and 29(1)(f) Privacy Act). Following a meeting between the defendant's Privacy Officer, an investigating officer of the Privacy Commission and the plaintiff in October 1996 the defendant's Privacy Officer made some further inquiries and as a result some more information (subject to some deletions in terms of s. 29(1)(a) Privacy Act 1993 and s. 9(2)(a) Official Information Act 1982) was disclosed on 5 December 1996 and 15 January 1997. Shortly after receiving this information the plaintiff filed these proceedings. The defendant maintains that the plaintiff has now received all the information about him held by it with the exception of that information (mainly in the form of deletions from documents disclosed) which it has good grounds to withhold.



THE LAW

Information Privacy Principle 6 provides:

1. Where an agency holds personal information in such a way that it can be readily retrieved, the individual concerned shall be entitled -
 - (a) To obtain from the agency confirmation of whether or not the agency holds such personal information
 - (b) To have access to that information
2. Where, in accordance with subclause (1)(b) of this principle, an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
3. The application of this principle is subject to the provisions of Parts IV and V of this Act.

Section 7(2) Privacy Act provides:

Nothing in principle 6 or principle 11 derogates from any provision that is contained in any other Act of Parliament and that -

- (a) imposes a prohibition or restriction in relation to the availability of personal information; or
- (b) Regulates the manner in which personal information may be obtained or made available.

Section 27(1)(c) Privacy Act provides:

1. An agency may refuse to disclose any information requested pursuant to principle 6 if the disclosure of the information would be likely -
 - (c) To prejudice the maintenance of the law, including the prevention, investigation and detection of offences,, and the right to a fair trial

Section 29(1)(a) and (f) Privacy Act 1993 provides:

1. An agency may refuse to disclose any information requested pursuant to principle 6 if -
 - (a) The disclosure of the information would involve the unwarranted disclosure of the affairs of another individual or of a deceased individual; or...
 - (f) The disclosure of the information would breach legal professional privilege; or...
2. An agency may refuse a request made pursuant to principle 6 if-
 - (b) The information requested does not exist or cannot be found...

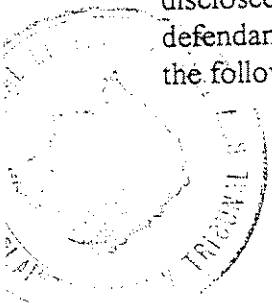
Section 55(d) Privacy Act 1993 provides:

Nothing in principle 6 or principle 7 applies in respect of -

- (d) Information contained in any correspondence or communication that has taken place between the office of the Ombudsmen and any agency and that relates to any investigation conducted by an Ombudsman under the Ombudsman Act 1975 or the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987, other than information that came into existence before the commencement of that investigation; or

THE HEARING

This hearing was conducted on the papers and concerned only the decisions to withhold certain information from the plaintiff. The defendant supplied the information disclosed and withheld together with submissions about the grounds on which the defendant relied to withhold certain information. The information withheld falls into the following categories:



- Information compiled in respect of complaints made by the plaintiff to the Police Complaints Authority
- The file which the defendant cannot locate and does not believe exists but which the plaintiff believes to exist and to contain information forwarded to the arbitrator
- The deletions made to the information supplied on 30 August, 5 December 1996 and 15 January 1997.

The defendant made the following submissions about these categories of withheld information:

Police Complaints Authority information

It was submitted that the application of the Privacy Act 1993 and the Official Information Act 1982 to information held by the Police Complaints Authority is currently the subject of a matter before the High Court and for this reason it would be *"inappropriate to disclose such information until the High Court has ruled on the matter"*.

Information concerning arbitration

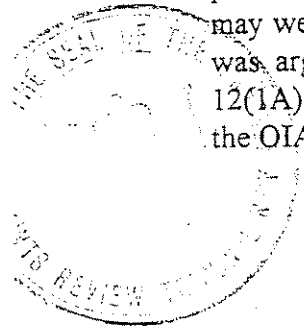
It was submitted that the defendant had a proper basis pursuant to s. 29(2)(b) of the Act to refuse the plaintiff's request because there is sufficient evidence that the defendant has made all reasonable efforts to locate the information sought and that it does not exist in the form in which the plaintiff supposes it to exist.

Deletions

These fell into the following categories:

- the names of people who provided information to the defendant in response to inquiries about the plaintiff
- personal details of those who provided information about the plaintiff
- the names and personal details of people in custody on the same night as the plaintiff in 1986
- the name and medical condition of a member of the defendant's staff
- the names of natural people who called the Prime Minister's office on the same day as the plaintiff in September 1993
- the details of an inquiry into a threat by the plaintiff in 1989
- communications between the defendant and its legal advisers
- a report prepared for the Ombudsman

In respect of the names of informers it was submitted that the names did not constitute personal information about the plaintiff - the information provided by the informers may well have been personal information but the names were not. For that reason, it was argued, the deeming provision in the Official Information Act 1982, (OIA) s. 12(1A), (which deems requests for personal information to those agencies covered by the OIA as requests made pursuant to the Privacy Act) does not apply. The names can



therefore be withheld pursuant to s. 9(2)(a) OIA which provides that information can be withheld to protect the privacy of natural persons.

In the alternative it was submitted that the names were withheld pursuant to s. 27(1)(c) Privacy Act because disclosure of this information would be likely to prejudice the maintenance of the law if those providing information were at risk of having their names disclosed to a defendant or suspect about whom they had given information.

The same arguments were presented in respect of the information containing personal details of the informers - likes addresses, telephone numbers and dates of birth. It was also argued that s. 29(1)(a) Privacy Act applied because the disclosure of this information would constitute an unwarranted intrusion into the personal affairs of those people.

These were the arguments which it was submitted applied to the names and details of the people interviewed in connection with a complaint the plaintiff made about the treatment by the defendant of another person in custody at the same time as he was in April 1986, to the leave details and medical condition of a staff member of the defendant and the names of those recorded as having called the Prime Minister's office on the same day as the plaintiff in September 1993.

The information about an inquiry which the defendant undertook as the result of a threat made by the plaintiff in 1989 was withheld pursuant to s. 27(1)(c). The plaintiff was not charged with an offence as a result of this inquiry and revealing the investigation methods used to connect him to the offence would be likely to prejudice the investigation and detection of any similar offences he may commit in the future.

Two of the documents withheld from the plaintiff are legal opinions and a third is a letter from outside legal advisers to the defendant. It was submitted that these are all subject to legal professional privilege and as such protected from disclosure by s. 29(1)(f).

The final document withheld from the plaintiff is a report for the Ombudsman who is not an 'agency' for the purposes of the Privacy Act. It was submitted that s. 55(d) Privacy Act applied to this document because the report was part of a communication with the Ombudsman and as such is not subject to IPP 6.

FINDINGS

Our task is to determine whether the defendant had a proper basis for the decisions to withhold personal information from the plaintiff. If we find that it did not have a proper basis for so withholding then, pursuant to s. 66(2) of the Act, we are required to find that an interference with the privacy of the plaintiff has been established, which in turn, pursuant to s. 85, gives us the power to determine whether any of the remedies which the plaintiff has sought should be granted. We do not require any evidence of damage to be established because our jurisdiction in this case arises from s. 66(2) of the Act and not s. 66(1).

Our findings about the three categories of information withheld are as follows:

Police Complaints Authority information

We accept that consideration of the issues raised by this category of information should await the High Court decision which we understand to be about the status of that information for the purposes of Privacy Act requests. We therefore intend to adjourn our determination about this category of information until that decision is available.

Information concerning arbitration

This appears to be the information about which the plaintiff is most concerned. There appears, however, to be some acceptance on his part that the file has now been disclosed if the first paragraph of a letter he wrote dated 26 March 1997 to the defendant shortly after these proceedings were filed is anything to go by:

"It appears that mysteriously a certain file has eventually turned up that may well contain the documentation provided by the Police to the arbitrator."

This is the information that was forwarded on 5 December 1996 and came from the officer of the defendant who was involved with the arbitration. Some of the documents refer to the arbitration and some refer to earlier events that were considered by the arbitrator. The information appears to have materialised as a result of the search made by the defendant's Privacy Officer following the October 1996 meeting at the Privacy Commission at which he and the plaintiff were present.

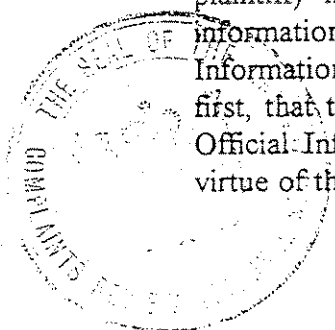
It also appears, from the letter referred to above, that the plaintiff's concern has now moved from receiving those documents to knowing why they were not forwarded to the Ombudsman as a result of OIA requests. That is clearly not within our jurisdiction, although the time that was taken to disclose them to the plaintiff following his Privacy Information request may well be an issue for us at a later date.

For these reasons we take the view that this information has now been disclosed to the plaintiff and is no longer sought. There is clearly no need for us to consider the submissions about whether or not that information exists.

Deletions

Effect of Official Information Act

The first submission with which we must deal is that concerning the deeming provision in the Official Information Act 1982. As we understand the defendant's submission it is that this deeming provision does not apply because the information withheld (the names and other personal details of people named in the defendant's files on the plaintiff) is not personal information about the plaintiff. For that reason the information withheld is official information within the meaning of the Official Information Act and it was properly withheld pursuant to s. 9 of that Act. We note, first, that the information request was made pursuant to the Privacy Act and not the Official Information Act, second, that the Privacy Act applies to the defendant by virtue of the definition of 'agency' in s. 2 and third, that s. 12(1A) Official Information



Act is simply an instruction to the Ombudsman in respect of OIA requests for personal information. For the purposes of the plaintiff's Privacy Act request s. 12(1A) is not relevant. The real issue is whether the information withheld for the reason advanced is 'personal information' within the meaning of the Privacy Act. If it is not then it becomes 'official information' under the Official Information Act by virtue of the fact that the defendant is subject to both statutes.

'Personal information' is defined (inter alia) in both statutes as '*information about an identifiable individual*'. The defendant has sought to sever the information provided about the plaintiff from those who supplied it by submitting that the former is clearly personal information but the latter is not. In the particular circumstances of this case we do not accept that it is possible to sever the connection between the information provided and its source because the two are so intimately connected. The information was provided generally as a result of what the informants saw, heard, or otherwise experienced. Some of the details of the informants sought to be withheld is also sufficiently closely connected to the information provided about the plaintiff to be regarded as personal information. Other details may not fall into that category. We think the point is arguable. In the absence of detailed submissions from both parties on this important issue we intend to consider it all as personal information. For the reasons set out below the point in this case is academic. We prefer, in other words, to consider the submission that the personal information which was about others was properly withheld pursuant to sections 27(1)(c) and 29(1)(a) Privacy Act.

The defendant drew a distinction between that information which simply contained names from that which contained other personal details of those named in the information provided by informers. It was submitted that the former category was protected by s. 27(1)(c) and the latter by s. 29(1)(a).

The names of informants: s. 27(1)(c)

The Court of Appeal has accepted the general proposition that until the identities of those who have given information during the course of an investigation into the commission of a crime are required to be disclosed in the interests of a fair trial they may be protected to ensure that the Police can continue to obtain information required to prevent, detect and investigate crime. (*R v Hughes* [1986] 2 NZLR 129) The informers in this case were providing information in the context of investigations into offences allegedly committed by the plaintiff. For these reasons we accept that the defendant had a proper basis in s. 27(1)(c) for withholding the names of those from whom it obtained information about offences it investigated.

Informants' personal details: s. 29(1)(a)

The personal details of those informants were withheld pursuant to s. 29(1)(a) on the grounds that disclosing them to the plaintiff would constitute an unwarranted intrusion into their personal affairs. We accept that these personal details (addresses, telephone numbers, birth dates etc) constitute information about the affairs of the informants. The issue then is whether disclosure would constitute an unwarranted intrusion into those affairs. We note and accept the Ombudsman's view that **unwarranted** means '*unjustified*' or '*without good and sufficient grounds*' in the same provision of the

Official Information Act. We think the disclosure of these particular details to the plaintiff is neither justified or for good and sufficient reason, particularly in light of the finding above that the names of those whose details are sought to be withheld were themselves properly withheld. Accordingly we find that the defendant had a proper basis for withholding this information.

Other persons' personal affairs: s. 29(1)(a)

In our view the same reasoning applies to the disclosure of leave details and the medical condition of a member of staff of the defendant, the names and personal details of people in custody on the same night as the plaintiff in 1986 and the names of natural people who called the Prime Minister's office on the same day as the plaintiff in September 1993. The fact that people were in custody or calling the Prime Minister's office is, in our view, information about their personal affairs because their names were included in the detail of where they were or what they were doing at the times in issue. This is the kind of detail that we can see no good or sufficient reason to disclose to the plaintiff and for that reason we accept that there was a proper basis for withholding it.

Details of inquiry: s. 27(1)(c)

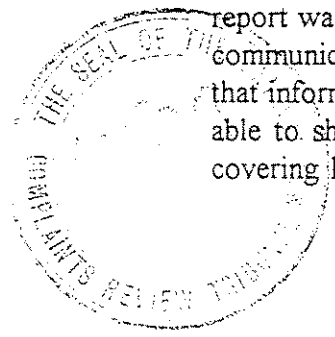
The details of an inquiry into a threat by the plaintiff in 1989 were withheld pursuant to s. 27(1)(c) on the grounds that their disclosure would be likely to prejudice any future investigation or detection of threats made in a similar manner. The defendant is concerned that if this detail is disclosed to the plaintiff he could use that information to avoid detection in the future. There is some risk that the plaintiff may repeat this behaviour- he seems to have a very low frustration threshold and between 1986 and 1994 he made a number of threats which he apparently did not intend to carry out but which nonetheless involved the defendant's investigators. We think for these reasons that there is some likelihood that this information could be of value to the plaintiff in the future in a way which could prejudice any future investigation. Accordingly we find that there were sufficient grounds to withhold this information from him.

Legal Professional Privilege

We accept that the legal opinions and a letter from outside legal advisers to the defendant (being communications between client and legal adviser) are subject to legal professional privilege and as such are protected from disclosure by s. 29(1)(f). The defendant accordingly had a proper basis to withhold that information from the plaintiff.

Report for Ombudsman

The issue raised here is whether a report prepared for the Ombudsman comes within the exemption provided in s. 55(d) of the Act. The difficulty we initially had with this report was that it appeared to have been prepared for internal use. None of the direct communications with the Ombudsman were included in the material withheld because that information is exempt from IPP 6 and 7 pursuant to s. 55(d). The defendant was able to show, however, that the report was sent directly to the Ombudsman with a covering letter dated 25 May 1992. Having seen this material we are now satisfied

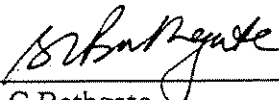


that the report constituted *information contained in any correspondence or communication with the office of the Ombudsman* pursuant to s. 55(d) and that it was accordingly exempt from IPP 6.

We are accordingly satisfied that there was a proper basis in each case for withholding certain specified information from the plaintiff.

This proceeding is now adjourned for a further directions conference on the issues raised by IPP 7.

DATED at Wellington this 12th day of JUNE 1997 .



 S C Bathgate
 Chairperson

" P McDonald "

 P McDonald
 Member

" A K Knowles "

 Member

