

Decision No. 10/99

Reference No. CRT 30/98

IN THE MATTER of the Privacy Act 1993

BETWEEN JAMES LOUDON
STIRLING CABLE

Plaintiff

AND NZ INSOLVENCY AND
TRUSTEE SERVICE

Defendant

BEFORE THE COMPLAINTS REVIEW TRIBUNAL

S C Bathgate - Chairperson

W A C Abbiss - Member

M K Shields - Member

HEARING at NELSON on the 19th day of April 1999

APPEARANCES

Plaintiff in person

J Hardie for Defendant

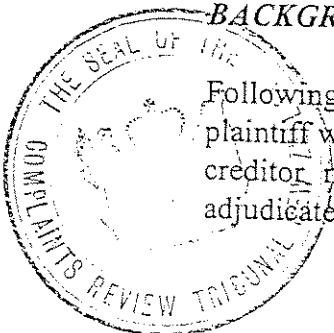
S Pilgrim for Privacy Commission

DECISION

The plaintiff in these proceedings has alleged that the defendant committed a breach of Information Privacy Principle 6 in that it withheld personal information sought by him in the second half of 1997. 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.

BACKGROUND

Following the sharemarket crash of October 1987 and ensuing court proceedings the plaintiff was found to be liable for a debt of approximately \$250,000.00 in mid 1996. The creditor moved shortly after this to have the plaintiff declared bankrupt. He was adjudicated bankrupt on 16 October 1996. Prior to this his interest in a business which he



had built from scratch some 30 years previously had been transferred to his wife. He was engaged as manager of the business at the time of the adjudication. Following the adjudication he was advised that he could not continue to manage the company without the consent of the defendant. This period coincided with the gradual breakdown of his marriage. He and his wife were unable to cooperate in the management and oversight of the business. The wife took certain steps which she believed were those required of her by the defendant but which the plaintiff perceived as simply frustrating his ability to keep the business afloat. In mid 1997 the plaintiff took steps to have his bankruptcy annulled. An order annulling the bankruptcy was made on 6 June 1997. The wife, however, was unaware of these steps, and on 5 June 1997 sent a fax to the defendant with advice which she did not wish the plaintiff to see. The plaintiff became aware of the contents (or some of the contents) of this fax during a telephone call with one of the officers of the defendant. He asked for a copy of the fax. The defendant declined to provide a copy. The plaintiff then made a formal Privacy Act request for the fax and during the process of determining whether to grant access the defendant entered into some correspondence with the wife's solicitor. When access to the fax was declined the plaintiff complained to the Privacy Commissioner. He sought the fax and the correspondence between the defendant and the wife's solicitor. The plaintiff believed the ensuing investigation to encompass both categories of information. The Commissioner and the defendant believed that the investigation covered only the fax of 5 June because the plaintiff had not made a separate formal request of the defendant for the later correspondence.

This raised the issue whether the Tribunal had jurisdiction to determine whether the defendant's decision to withhold the correspondence with the wife's solicitor breached the Privacy Act. It was accepted that the Tribunal had jurisdiction to determine whether the decision to withhold the 5 June fax breached the Privacy Act.

THE LAW

Section 27(1)(d) Privacy Act 1993 provides:

SECURITY, DEFENCE, INTERNATIONAL RELATIONS, ETC.--

- (1) An agency may refuse to disclose any information requested pursuant to principle 6 if the disclosure of the information would be likely--
 - (d) To endanger the safety of any individual.

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

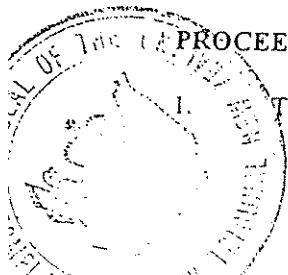
OTHER REASONS FOR REFUSAL OF REQUESTS--

- (1) An agency may refuse to disclose any information requested pursuant to principle 6 if--
 - (f) The disclosure of the information would breach legal professional privilege; or...

Section 82(1)(a) Privacy Act 1993 provides:

PROCEEDINGS BEFORE COMPLAINTS REVIEW TRIBUNAL

This section applies to any person-



- (a) In respect of whom an investigation has been conducted under this Part of this Act in relation to any action alleged to be an interference with the privacy of an individual; or..

Section 83(a) Privacy Act 1993 provides:

AGGRIEVED INDIVIDUAL MAY BRING PROCEEDINGS BEFORE COMPLAINTS REVIEW TRIBUNAL

Notwithstanding section 82(2) of this Act, the aggrieved individual (if any) may himself or herself bring proceedings before the Complaints Review Tribunal against a person to whom section 82 of this Act applies if the aggrieved individual wishes to do so, and-

- (a) The Commissioner or the Proceedings Commissioner is of the opinion that the complaint does not have substance or that the matter ought not to be proceeded with; or...

THE HEARING

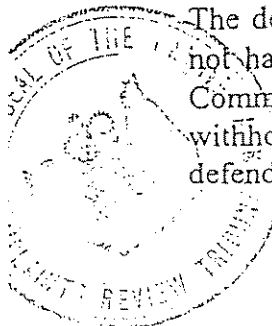
The plaintiff, one of his former employees, and a former Mayor of Nelson (a character witness) gave evidence for the plaintiff. An officer of the defendant and the plaintiff's former wife gave evidence for the defendant.

The plaintiff said that on or about 9 June 1997 he telephoned the office of the defendant and was told that his former wife had sent a letter dated 5 June 1997 about his opening a bank account for the business. He said he asked for a copy of the letter which he says the officer agreed to send. When he had not received the letter a week later and sought it he was referred to the office solicitor of the defendant. She indicated that his wife's solicitor opposed his being given access to the letter. He says she later told him, in a conversation which took place on 18 September 1997, that the solicitors had told her that the release of the letter to him would cause him to become violent. He was unable to persuade her that this was not the case.

For the defendant it was submitted that the decision to withhold the 5 June fax from the defendant was made pursuant to s. 27(1)(d) on the grounds that since there was a recent domestic protection order in place in June 1997 there was sufficient basis for concern that the safety of the plaintiff's former wife would be endangered if the plaintiff was to receive a copy of the fax.

On the issue whether the Tribunal had jurisdiction to determine if there were proper grounds for withholding the correspondence between the defendant and the wife's solicitor it was submitted by the plaintiff that he had included this category of document in his complaint to the Privacy Commission and had been under the impression that these documents were included in the Privacy Commission investigation. He did not understand the reply from the Privacy Commission to require him to formally request, again, from the defendant that which had already been denied him.

The defendant and counsel for the Privacy Commission submitted that the Tribunal did not have jurisdiction to consider the issues raised by the latter documents because the Commission had not completed its investigation in respect of the grounds advanced for withholding them. This was because the plaintiff had not made a formal request of the defendant for them until shortly before the hearing.



When the Tribunal determined that it did have jurisdiction (for reasons set out below) the defendant submitted that the documents had been withheld on the basis that they were subject to legal professional privilege in that they had come into existence for the purposes of impending litigation i.e. these proceedings. They were letters which were concerned with the grounds for withholding the 5 June 1997 fax.

FINDINGS

Jurisdiction

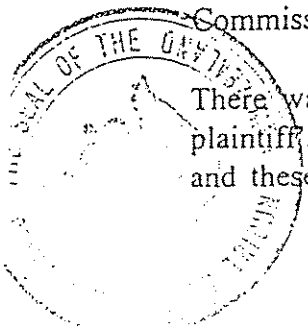
The Tribunal's jurisdiction to hear and determine proceedings brought by those who have laid a complaint with the Privacy Commission and had their complaint investigated but not resolved to their satisfaction is founded in sections 82 and 83 Privacy Act 1993. Section 82 requires the Tribunal to be satisfied that the defendant named by the plaintiff is a person in respect of whom an investigation has been conducted under Part VIII of the Act in relation to any action alleged to be an interference with the privacy of an individual. We are satisfied that the plaintiff laid a complaint, by letter dated 16 October 1997, with the Privacy Commission specifying both categories of document which were being withheld from him. We are also satisfied that the defendant was a person in respect of whom an investigation was conducted following the receipt of that complaint.

Section 83 requires the Tribunal to be satisfied that the plaintiff was the complainant ("*the aggrieved individual*") and that the Commissioner was of the opinion that the complaint did not have substance or that the matter ought not to be proceeded with. We are satisfied that the plaintiff was the aggrieved individual and that the Privacy Commissioner was of the opinion that the complaint did not have substance.

For these reasons we determined at the hearing that we had the jurisdiction to hear and determine the complaint regarding the correspondence between the defendant and the wife's solicitor, notwithstanding the advice that the Privacy Commissioner had not reached an opinion on this part of the original complaint.

The Tribunal has no powers to review the Commissioner's investigation process or any part of it. It must simply be satisfied that an investigation has been completed. The submissions of the defendant and the Commissioner (that the Tribunal has jurisdiction only to consider the particular matters covered by the investigation, regardless of those matters raised by the complaint) raise the issue whether the way in which a complaint is investigated is determinative of the Tribunal's jurisdiction. This would involve an inquiry by the Tribunal of the particulars investigated, or, in other words, a review of the investigation process. That is not what sections 82 or 83 say and it is not within the power of the Tribunal to do so. We do not therefore accept that the way in which the plaintiff's complaint was investigated should affect or limit our jurisdiction to hear and determine proceedings containing the same allegations as the original complaint to the Commissioner.

There was another reason why we proceeded to hear and determine the whole of the plaintiff's allegations at the hearing. The plaintiff, throughout the course of the complaint and these proceedings, was unrepresented. He is not a lawyer. He does not have the



appreciation of the fine detail of the distinctions between various categories of information and the reasons for withholding access to information that lawyers well versed in the Privacy Act have. He thought that all of the material to which he sought access and about which he laid his complaint was withheld because he might become violent. In the circumstances of this particular case that was an understandable assumption: if the first letter to which he sought access was withheld on this basis then it would be likely that all that followed, particularly if they were all related, would be withheld for the same reason. The reason why the second category of complaint was withheld (legal professional privilege) was not a matter on which he could bring evidence, in any event. That reason was always going to be rejected or upheld only by a perusal of the documents by the Tribunal. The Tribunal, by Regulation 3 of the Complaints Review Tribunal Regulations 1996, is exhorted to act in a way which best secures the speedy, fair and just determination of proceedings before it. It can hardly be regarded as conforming to that standard if by accepting that it had only a limited jurisdiction it acted in a way which required two hearings some weeks or months apart (each requiring all three members of the Tribunal, counsel for the Commissioner and the defendant to travel to the hearing) to be held in respect of a total of 4 (one page) documents.

Whether Tribunal should inspect documents withheld

In *M v Ministry of Health and New Zealand Police* (CRT 16/96; Dec 44/96) the issue whether the Tribunal should inspect documents withheld from a requester was raised and dealt with on the basis that inspection of documents withheld has *"the advantage of providing a relatively quick resolution of the issues before [the Tribunal] in that it has the opportunity to measure the reasons advanced by the defendants for withholding information from the plaintiff against the information itself."*

The other reason advanced for inspection by the Tribunal concerned the perceptions of the requester: *"It can hardly provide him with any confidence that the Tribunal will fairly and impartially consider his request for access to information denied him if it is simply content to rely on reasons advanced by the defendants for withholding information from him without, at the same time, inspecting the documents containing that information."*

The Tribunal also held (in the same proceeding) that on the issue whether an agency had proper grounds for withholding information, the Tribunal must *"independently assess whether there was, in fact, good reason for those decisions"*. This makes inspection by the Tribunal a necessity.

It was for these reasons that the Tribunal obtained copies of the documents sought by the plaintiff at this hearing.

Withheld 5 June 1997 fax

This fax has been withheld from the plaintiff pursuant to s. 27(1)(d) Privacy Act 1993. The onus is on the defendant to satisfy the Tribunal that at the time the decision to withhold this fax was made, disclosure would have been likely to endanger the safety of the plaintiff's former wife. The Tribunal must determine whether there was a proper basis for that decision in order to decide whether there was an interference with the privacy of the plaintiff pursuant to s. 66(2) of the Act. On the issue of likelihood we must be

satisfied that there was a distinct or significant possibility, a serious or real or substantial risk that prejudice might eventuate.

We have concluded that this issue of the likelihood that the plaintiff posed a danger to his former wife in mid 1997 from the perspective of the defendant is a finely balanced one. On the one hand the defendant itself had disclosed the gist of the contents of the fax, and there was no evidence that the wife had been put at risk by that disclosure. On the other hand it now appears that the disclosure was unknown to the person who made the decision to withhold. The defendant was also dependent (for its assessment of risk) on information provided by the wife's solicitor. That information included the fact that a protection order had recently been made in the Family Court. It was also clear to the defendant that considerable acrimony existed between the plaintiff and his former wife, and that on any assessment the fax could be interpreted as provocative to a man who was already showing signs of intense frustration over the way his wife was managing his business.

On balance we think that in this case the defendant was correct to attach more significance to the fact of the protection order than to the fact of the disclosure. (We have taken the defendant to know about the disclosure because it was made by one of its officers. It is therefore immaterial that the person who made the decision to withhold made it without that fact. It is a fact that we must take into account in order to determine whether there was a proper basis for the decision to withhold.) We are satisfied that on the basis of the information available to the defendant at that time there was a distinct possibility that there was a serious risk to the wife. Accordingly we are satisfied that there was a proper basis for the decision to withhold.

It is open to the plaintiff to again seek access to this document. Should he do so our view would be completely different. The protection order is no longer in existence. The acrimony between the parties endures. The wife's physical safety has not been put at risk, if the decisions of the Family Court Judge on the alleged breaches of the protection order are anything to go by. The history of this matter shows that the outlet for the plaintiff's frustrations appears to be litigation rather than violence. Notwithstanding her evidence on this point we do not accept that the wife is at risk - the offer to provide access to the fax confirms this in our view. The wife cannot have it both ways: if she was still concerned for her safety then she could not have consented to the offer to grant access to that fax. It was furthermore inappropriate to make the offer conditional on the plaintiff withdrawing the request for the correspondence because the reason for withholding that information was different and unconnected to the reason for withholding the 5 June fax. Either she was still at risk and no offer of access could be made or she was no longer at risk and he could have the fax.

Withheld correspondence with wife's solicitor

The reason advanced by the defendant for withholding this category of personal information about the plaintiff was that the information was contained in documents subject to legal professional privilege (section 29(1)(f) Privacy Act 1993). Having inspected the documents we are satisfied that they came into existence for the purpose of forming the decision whether the 5 June 1997 fax should be withheld from the plaintiff by the defendant. It was, or must have been, reasonably clear at that time that the plaintiff

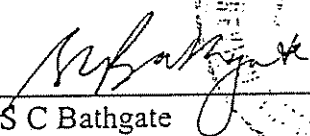
would not accept the decision to withhold the fax and that he would take the matter further. These proceedings attest to that.

This class of documents is in a different category from the 5 June fax in that a different reason for withholding them applies. It is a reason which is not changed by the passing of time. A renewed request would not alter their status as properly capable of being withheld. The plaintiff must accept, therefore, that he is unlikely ever to gain access to these documents. The defendant and the solicitors have the discretion to waive the privilege but that is a discretion incapable of review by the Tribunal, and unlikely to be waived by either party whilst the plaintiff continues to litigate the complaints he has about the various people and institutions he perceives to have acted adversely to his interests.

PROCEEDING DISMISSED

Costs Reserved

DATED at Wellington this 6th day of MAY 1999


S C Bathgate
Chairperson

" M K Shields "
M K Shields
Member

" W A C Abbiss "
W A C Abbiss
Member