Decision No. 10/09

Reference No. 13/08

BETWEEN **KENT MILO KAISER**

Plaintiff

AND **MINISTRY OF AGRICULTURE AND FORESTRY, CUSTOMS DEPARTMENT AND THE DEPARTMENT OF CONSERVATION**

Defendants

Reference No. HRRT 12/08

BETWEEN **KENT MILO KAISER**

Plaintiff

AND **CHIEF EXECUTIVE, DEPARTMENT OF LABOUR**

Defendant

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

Mr R D C Hindle Chairperson
Dr A D Trlin Member
Mr S Solomon Member

HEARING: 11 March 2009

APPEARANCES:

Ms C Inglis for all defendants in HRRT 13/08
Mr A Gane for defendant in HRRT 12/08
Ms K Evans and Ms E Pond for the Privacy Commissioner

DATE OF DECISION: 26 May 2009

DECISION

Preliminary

[1] By agreement, these two cases were heard at the same time. Both relate to requests for access to personal information that have been made by the plaintiff, Mr Kaiser. One of the requests was directed to the defendant named in the claim under HRRT 12/08, whom we will refer to as 'the Labour Department'. The other was directed to the defendants named in the claim under HRRT 13/08 collectively, via a multi-agency group that they operate under the name 'Wildlife Enforcement Group' (and which we will refer to by the acronym 'WEG').

[2] There are a number of matters that we are not required to deal with in this decision:

[a] It has been accepted by all defendants that the thresholds for the claims that Mr Kaiser is putting forward have been met, and that we have jurisdiction to deal with the matters covered in this decision. We understand that there is also another matter that is somewhat related to the events which lie behind these proceedings, and which is still either being investigated by the Office of the Privacy Commissioner or which may be (or may already have been) referred to the Office of the Director of Human Rights Proceedings. It has been agreed, however, that any proceedings arising out of that complaint will be dealt with later if necessary;

[b] It is not altogether clear exactly when or in what terms the information access request to the Labour Department was made, save that it was some time before 23 October 2007. In the case of WEG, the request was expressed to have been made under the Official Information Act, rather than the Privacy Act. However nothing turns on these details in these cases. For the purposes of this litigation all defendants have treated the requests as having been made under Principle 6 of the Privacy Act 1993 ('the Act');

[c] The documents we have seen show that the agencies responded to Mr Kaiser's initial requests in a timely way (although it seems that, as the correspondence has unfolded since then, some information that had initially been withheld was later provided). The details do not matter, however, because we have not been asked to evaluate the responses by the Labour Department and/or WEG for compliance with the time limits contemplated by Part 5 of the Act. Our task is limited to the substantive questions as to whether (and to what extent) each of the Labour Department and/ or WEG have good reasons to continue to withhold from Mr Kaiser such information as falls within his original requests for access, but which they have not yet provided to him;

[d] The only relief claimed by Mr Kaiser at this stage was for orders under s.85 of the Act effectively requiring the Labour Department and WEG to release to him such information as has not yet been released to him. It follows that we are not required to evaluate what the consequences of any infringement of the Act may have been for Mr Kaiser, or to assess damages, or to consider any other form of relief that might be available;

[e] We can see that some of the information that has already been provided to Mr Kaiser has had names and other passages blacked out. Although there was some inconclusive reference to this in papers that were filed in advance of the hearing, we have not been asked to review any of the information that has been made available to this point. In particular, we were not asked to assess the appropriateness or otherwise of these kinds of redaction.

[3] Before turning to the background, we add two notes about the procedure for the hearing.

[4] At all times throughout the proceedings Mr Kaiser has been out of New Zealand. It was not likely that he would return to New Zealand within any time soon enough to justify delaying the hearing until he could be present. As a result, and by agreement of all concerned, the hearing took place at the Tribunal's Unit hearing rooms in Wellington. All parties and their witnesses were present, save for Mr

Kaiser. Mr Kaiser attended by telephone, dialling in from Michigan USA. We do not suggest that this procedure would be practical in any other case, and there would be obvious difficulties if the evidence were to include issues of credibility, or other matters of significant factual disagreement. In the present case, however, we were able to deal with the matter to our satisfaction. We do not think the fact that Mr Kaiser was not present in person gave rise to any prejudice to any of the parties who appeared (including Mr Kaiser).

[5] Our second note relates to our inspection of the subject documents. Broadly speaking, we have followed the procedures contemplated in *Dijkstra v Police* [2006] NZHRRT 16. At the time the hearing took place we had not seen the documents at issue. After the hearing was completed, however, we asked counsel for WEG and for the Labour Department to provide us with copies. Both agreed to do so, but made the submission that our request to see the documents was, in the circumstances of this case, unnecessary. The defendants took the position that the content of the documents is of little relevance to the question of whether s. 27(1)(b) might be available to justify withholding them from Mr Kaiser. We will return to the matter later in this decision. At this point we only note that the process of receiving and reviewing the relevant papers has been the primary reason that it has taken some time for us to deliver this decision after the hearing.

Background

[6] Mr Kaiser is from the United States of America. He arrived in New Zealand in March 2006, and in August 2008 he was granted permanent residence in New Zealand. In the course of applying for permanent residence he had, of course, supplied information to the New Zealand Immigration Service. The information he gave included an assertion that, at the date of his application, he was not aware of being under investigation, or that he was wanted by any law enforcement agency, in any other country.

[7] In fact, he was wanted by a law enforcement agency of another country. On or about 18 July 2006 he had been indicted in the United States with several counts relating to the alleged unlawful taking and possession of wildlife, false records relating to wildlife, the purchase of unlawfully taken wildlife, and criminal forfeiture. The charges had been brought forward by the United States Fish and Wildlife Service. Mr Kaiser says he was not aware of the indictment at the time: by then he was in New Zealand.

[8] In late 2006 the Labour Department received information regarding Mr Kaiser from the US Fish and Wildlife Service. As a result of that information, Mr Kaiser was prosecuted in New Zealand by the New Zealand Immigration Service under s.142(1)(c) of the Immigration Act 1987. The charge against him was that he had without reasonable excuse supplied information to an Immigration Officer, namely the application for residence, knowing that it was false or misleading in a material respect; the allegation being that he knew when the application for permanent residence was completed that he was under investigation in the USA.

[9] Sometime before or about early 2007 Mr Kaiser applied to the Department of Conservation (which is one of the agencies within WEG) for a guided hunting permit.

[10] It was against that background that Mr Kaiser's lawyer made the first of the information access requests with which we are concerned, namely that which was made to the Labour Department sometime before 23 October 2007.

[11] The initial response from the Labour Department to Mr Kaisers' information access request was dated 23 October 2007. It provided some, but not all, of the information that had been requested. As noted, further information has since been provided as well, but as things stood at the date of this hearing the following documents – which the Labour Department has in its possession, and which it accepts to fall within the scope of the request – have been withheld (the table also sets out the grounds upon which the Labour Department relies to withhold the information):

Description	***Reference*****	***Grounds for withholding***
Email from Legal Adviser to Investigator dated 15 May 2007	00004	s.29(1)(f)
Counsel's notes dated 11 May 2007	00009 – 00010	s.29(1)(f)
Email correspondence between Investigator and US Wildlife and Fisheries Agent	00076 – 00080	s.27(1)(b)
Email correspondence between Investigator and New Zealand Customs	00084 – 00086	s.27(1)(b)
Email from New Zealand Customs to Investigator	00087 – 00088	s.27(1)(b)
Email correspondence between Immigration New Zealand and New Zealand Customs	00089 – 00092	s.27(1)(b)
Email correspondence between Investigator and US Wildlife and Fisheries Agent	00093 – 00099	s.27(1)(b)
Email correspondence between Investigator, New Zealand Police and US Wildlife and Fisheries Agents	00100 – 00105	s.27(1)(b)

**These are references used by the Labour Department to identify the documents in its records.

[12] The documents suggest that it was likely that Mr Kaiser made his second information access request to WEG on 3 December 2007 as a result of receiving the information that was supplied by the Labour Department. The initial response from WEG to that information access request was dated 12 December 2007. Like the Labour Department, WEG provided some but not all of the information that had been requested. Again, some further information has been provided as well since then, but as things stood at the date of this hearing the following documents – which WEG has in its possession, and which it accepts to fall within the scope of the request – have been withheld:

No	**Date**	**No. of Pages**	**Item Description**
1	12/12/2006	1	Email correspondence between US Fish & Wildlife Service (USFWS) Agent and WEG Investigator.
2	12/12/2006	1	Email correspondence between WEG

			Investigator and USFWS Agent.
3	12/12/2006	1	Email correspondence between WEG Investigator and USFWS Agent.
4	13/12/2006	2	Email correspondence between USFWS Agent and WEG Investigator.
5	13!22006	2	Email correspondence between USFWS Agent and WEG Investigator.
6	14/12/2006	1	Email correspondence between WEG Investigator and New Zealand Immigration Service (NZIS) Investigator.
7	14/12/2006	1	Email correspondence between Department of Internal Affairs Inspector and WEG Investigator.
8	14/12/2006	2	Email correspondence between NZIS Investigator and WEG Investigator.
10	12/12/2006	9	New Zealand Customs information.
11	14/12/2006	1	Email correspondence between New Zealand Police Liaison Officer and WEG Investigator.
12	15/12/2006	3	Email correspondence between WEG Investigator and USFWS Agent.
13	15/02/2007	2	Email correspondence between WEG Investigator and NZIS Investigator.
14	15/12/2006	4	Email correspondence between USFWS Agent and WEG Investigator.
15	15/12/2006	5	Email correspondence between USFWS Agent and WEG Investigator.
16	15/12/2006	5	Email correspondence between USFWS Agent and WEG Investigator.
17	15/12/2006	6	Email correspondence between WEG Investigator and USFWS Agent.
18	15/12/2006	2	Email correspondence between WEG Investigator and US Embassy Official.
19	15/12/2006	6	Email correspondence between USFWS Agent and WEG Investigator.
20	16/12/2006	6	Email correspondence between USFWS Agent and WEG Investigator.
21	18/12/2006	6	Email correspondence between WEG Investigator and USFWS Agent.
22	19/12/2006	8	Email correspondence between USFWS Agent and WEG Investigator.
23	18/12/2006	1	Facsimile cover sheet between WEG Investigator and New Zealand Police. Document faxed was the USFWS warrant for arrest and attached indictment information.
24	19/12/2006	7	Email correspondence between USFWS Agent and WEG Investigator.
25	25/01/2007	1	Email correspondence between USFWS Agent and WEG Investigator.
26	06/02/2007	1	Email correspondence between USFWS Agent and WEG Investigator.
27	15/02/2007	1	Email correspondence between WEG

			Investigator and USFWS Agent.
29	15/02/2007	2	Email correspondence between USFWS Agent and WEG Investigator.
33	30/04/2007	1	Email correspondence between NZIS Investigator and WEG Investigator

[13] An aspect of the information that has been provided, and which needs to be noted, concerns an email that was sent by Special Agent/Pilot Dave Rippeto of the US Fish and Wildlife Service to WEG on 15 March 2007. The email was sent by Agent Rippeto in answer to a query from WEG. The subject is stated *"Re: KAISER, Kent Milo"* and the text of the email reads:

> "[A word or two are blacked out] *We know Kaiser is aware of the indictment. He has initiated a dialogue with the US Attorney's Office, attempting to negotiate a misdemeanor deal. I think if he were denied a permit to guide, that would be beneficial to our case.* ***His knowing about it the reason for denial*** **[sic]** ***would place additional pressure on him to return to the USA and resolve the case.*** *Please keep me in the loop. If you need any additional information let me know.*
>
> *"Please advise your officers to use caution with Kaiser. He has the potential to be dangerous. His typical behaviour is to attempt to con law enforcement officers, but when that fail* [sic] *he will likely be very vocal and aggressive. He has attempted to intimidate me by sending mail to my home address indicating he knows my wife and children's names."* (the emphasis is ours, for reasons which follow at paragraphs [45] to [47] below. We add that this email had been disclosed to Mr Kaiser before the proceedings in the Tribunal were commenced).

[14] On 8 August 2008 the charge against Mr Kaiser in New Zealand under s.142(1)(c) of the Immigration Act 1987 was dismissed. The Judge found that the evidence he had heard left him with a reasonable doubt as to whether Mr Kaiser knew at the relevant time that he was under an investigation of a type that should have been acknowledged in the application for residency in New Zealand: see *NZ Immigration Service v Kent Milo Kaiser* (District Court, Nelson, CRI-2007-042-001726, 8 August 2008 per Zohrab, DCJ).

[15] At the hearing in the Tribunal, Mr Kaiser told us that the proceedings against him in the USA have since given rise to three convictions for misdemeanours. He said that he has been required to pay a fine of US$25,000 and was put on 'parole' for 5 years - from the context, we took that to mean 'parole' in relation to wildlife-related activities. We gather that Mr Kaiser has since commenced (or is contemplating commencing) various proceedings of his own against the US Fish and Wildlife Service and Agent Rippeto for what he (Mr Kaiser) regards as infringements of his rights.

[16] However the investigation which initially gave rise to the proceedings in New Zealand under s.142(1)(c) of the Immigration Act 1987 has been completed, and the criminal proceedings which arose out of that are also at an end.

The legislative grounds for withholding information

[17] The defendants all accept that they carry the burden of establishing the exception upon which they rely to withhold information from Mr Kaiser, and to

which he would otherwise be entitled to have access under Principle 6: see s.87 of the Act.

[18] In the case of the Labour Department, two separate grounds are referred to, namely:

[a] Section 29(1)(f), which relates to information that is the subject of legal professional privilege; and

[b] Section 27(1)(b), which we set out below.

[19] In the case of WEG, the grounds that are relied upon are:

[a] Section 27(1)(c), which relates to information the disclosure of which might prejudice the maintenance of the law, including the prevention, investigation and detection of offences; and

[b] Section 27(1)(b), which 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—

(a)...

(b)To prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by—

(i)The government of any other country or any agency of such a government; or ...

[20] We deal with the different documents under each of these headings in turn.

Section 29(1)(f) - legal professional privilege

[21] As will be seen from the table at paragraph [11] above, the Labour Department is withholding an email from a legal adviser to an investigator dated 15 May 2007, and counsel's notes dated 11 May 2007, on the basis of s.29(1)(f).

[22] The claim filed by the plaintiff at the outset made it clear that he was looking to obtain access to *all* information that had not been made available to him by the Labour Department, although the claim referred in terms only to s27(1)(b) of the Act. Section 29(1)(f) was, however, dealt with in a letter from the Privacy Commissioner that was attached to the claim. As it happened, neither of these two documents was the subject of any particular discussion at the hearing. The Labour Department therefore took the view that access to the documents was no longer being sought. Subsequent correspondence from Mr Kaiser has, however, confirmed that he is pursuing his claim in respect of both of them. Despite its objection the Labour Department then responsibly agreed to provide the documents for us to inspect. Having done so, we regret to say that there now seems to be at least the possibility of a further question as to how the recent decision of the High Court in *Reid v Crown Law Office & Privacy Commissioner* (Wellington High Court, CIV 2008-485-1203, 21 April 2009 per Dobson, J) ought to be applied to these two documents (if at all). However we do not think that it is appropriate for that issue in respect of these two documents to hold up the delivery of this decision any longer. As a result we will reserve our final decision on these two documents. The matter is dealt with at paragraph [58] below.

Section 27(1)(c) - potential prejudice to the maintenance of the law, etc

[23] This ground was relied upon by WEG concurrently with the grounds under s.27(1)(b) – that is, WEG relied on either or both of those grounds as establishing that it had good reasons to refuse to give Mr Kaiser access to all of the documents that it had not disclosed to him at the time of the hearing in the Tribunal.

[24] The Tribunal has discussed the application of s.27(1)(c) in cases like *Director of Human Rights Proceedings v Police* [2007] NZHRRT 22 and *Stoves v Police* [2008] NZHRRT 30. Counsel also referred us to *Nicholl v Chief Executive of the Department of Work and Income* [2003] 3 NZLR 426 and *Commissioner of Police v Ombudsmen* [1988] 1 NZLR 385. Of particular relevance, in the *Commissioner of Police v Ombudsmen* case Cooke P stated:

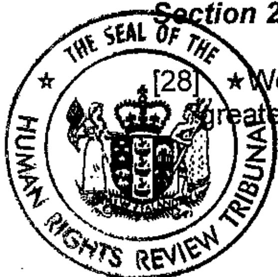
> *"To cast on the Department or organisation an onus of showing that on the balance of probabilities a protected interest would be prejudiced would not accord with protecting official information to the extent consistent with the public interest, which is one of the purposes stated in the long title of the Act. At first sight it might seem otherwise, but what has just been said becomes obvious in my view when one considers the range of protected interests in s 6, including as they do, for instance, the security or defence of New Zealand, the New Zealand economy and the safety of persons. To require a threat to be established as more likely to eventuate than not would be unreal. It must be enough if there is a serious or real and substantial risk to a protected interest, a risk that might well eventuate. ...*
>
> *Whether such a risk exists must be largely a matter of judgment."* (at p. 391).

[25] Although *Commissioner of Police v Ombudsmen* was decided under the Official Information Act 1982, there is no doubt that the same approach applies to the provisions of the Privacy Act with which we are concerned in this case: see *M v Ministry of Health* (29 April 1997) CRT 16/96; Decision No. 12/97 and *M v New Zealand Police* (29 April 1997) CRT 17/96; Decision No 13/97.

[26] The question under this heading, therefore, is whether the disclosure to Mr Kaiser of all or any of the documents that have been withheld by WEG would give rise to a serious or real and substantial risk (that is, a risk that may well eventuate) of prejudice to the maintenance of the law, including the prevention, investigation and detection of offences.

[27] There is, of course, considerable overlap in this case between the availability of this ground and that under s.27(1)(b): a decision to disclose information in circumstances which risks stifling a free flow of information from overseas agencies having law enforcement interests in common with those of WEG, will almost inevitably include a risk of prejudice to the maintenance of the law in New Zealand (in particular the prevention, investigation and detection of wildlife-related offences). The discussion which follows in respect of s.27(1)(b) of the Act is relevant to the assessment under s.27(1)(c) as well.

Section 27(1)(b): prejudice to the entrusting of information, etc



[28] We turn to deal with what was treated at the hearing as being the matter of greatest significance in this case, namely whether the decisions made by the

Labour Department and/or WEG to withhold information from Mr Kaiser fell within s.27(1)(b) of the Act.

[29] We were informed by counsel for the Privacy Commissioner that this is the first case in the Tribunal in which s.27(1)(b) has been applied. Even so, we do not regard the application of the sub-section as being particularly complicated in the present circumstances.

[30] There is no doubt that both the Labour Department and WEG are agencies of the New Zealand Government, so that the question of what information might or might not in future be entrusted to them falls within the opening words of the sub-section. Nor is there any doubt that the information from the US Fish and Wildlife Service is information from an agency of the government of another country, namely the United States of America.

[31] The question of whether and to what extent the information at issue in this case was entrusted to the Labour Department and/or WEG on a basis of confidence is a little less clear. It appears that there were no express protocols to protect the confidentiality of inter-agency exchanges of information of the kind at issue here. Of particular relevance to the position of the Labour Department, there was no evidence of anything corresponding to the kind of agreement contemplated by s.141AA of the Immigration Act 1987, or its reciprocal. Nor is there anything in the description of the information itself (see the tables at para's [11] and [12] above) to make it explicitly clear that what the US Fish and Wildlife Service provided was only being provided to the Labour Department and/or to WEG on a basis of confidence. Furthermore, it was accepted in evidence that not all information that passes between governmental agencies – even including those having responsibilities for preventing immigration and/or wildlife crimes – must automatically give rise to the kinds of concerns that are protected by s.27(1)(b).

[32] There is, however, an important aspect of the legislation to be noted. As Ms Inglis emphasised, s.27(1)(b) refers to information that is provided *" ...on a basis of confidence ..",* rather than information that is 'confidential'. The defendants need not show that the subject information is of an inherently confidential kind, only that what was supplied to them was on a basis of confidence. This subtlety of the legislation reflects the fact that s.27(1)(b) is less concerned with the content of information than it is with the likely effect of disclosing information received from a foreign government or governmental agency.

[33] Of course the content of the information can be relevant to the assessment. No doubt the more obviously 'secret' or confidential the information is, the easier it will be to infer (in the absence of any express agreement as to confidentiality) that the information would not have been supplied if the foreign agency had thought it might be disclosed by the New Zealand agency. But even if the information at issue is not obviously 'confidential' it may be that disclosure of it by a New Zealand agency would leave the foreign provider somewhat less inclined to provide further information of the same kind in future. As a result, we consider that the question in these two cases is whether, *in the context of the situation that applied at the time that the defendants decided to withhold the subject information,* disclosure of it to Mr Kaiser would have been likely to prejudice future information flows from the US Fish and Wildlife Service.

[34] We also agree with Ms Inglis that the question is not whether disclosure would lead to, or would be likely to lead to, complete cessation of any future

information flow from the foreign agency. Section 27(1)(b) only requires that some prejudice to the future flow of information is likely.

[35] We accept the arguments for the defendants that the context of the particular exchanges of information at issue in these two cases is relevant. We particularly accept the evidence that was given by the witnesses for each of WEG and the Labour Department in this respect.

[36] WEG is tasked with the monitoring and investigation of organised illegal trade in wildlife both into and out of New Zealand. As part of that, it liases with the New Zealand Police and it maintains a close working relationship with Interpol. International liaison of that kind is seen as one of WEG's strongest tools in its efforts to prevent, investigate and detect wildlife crime. The sharing of intelligence and operational co-operation is of vital importance for the work that WEG does. Indeed, WEG is recognised in New Zealand and amongst a number of other international wildlife enforcement groups to be the first point of contact in New Zealand for the sharing of information which can lead to the apprehension of illegal and cross-border trading in wildlife. As Mr Williamson, senior investigator with the NZ Customs Service, put it:

> *' ...the sharing of intelligence between international government organisations is of critical importance, particularly in the context of what is often complex criminal offending. In my experience the sharing of information between such organisations is firmly based on a mutual understanding that information that is supplied will be kept confidential. This protects the free flow of information."*

[37] Similar concerns apply to the functions carried out by the Labour Department in respect of the prevention, investigation and detection of immigration offences. The Labour Department (acting through the Immigration Service) regularly exchanges information with external governmental agencies. If the Labour Department were to release information – such as that relating to an ongoing investigation – received from an external governmental agency, then it is not difficult to imagine that action might well leave the external agency disinclined to provide the same kind of information in future.

[38] For these reasons, after the hearing we were persuaded that information of the kind identified in the tables we have set out at paragraphs [11] and [12] above was capable of falling within the scope of s.27(1)(b) (and, for that matter, s.27(1)(c)). At the time that each of the Labour Department and WEG made their decisions to withhold information from Mr Kaiser there were open investigations and 'live' criminal proceedings involving him in both the USA and New Zealand.

[39] However, even accepting that s.27(1)(b) and/or s27(1)(c) might be available to the defendants in principle, we nonetheless thought it appropriate to see the relevant information so as to satisfy ourselves that it does all come within the scope of the protection provided under these sub-sections of the Act. To give an example to illustrate our concern, one of the documents withheld from Mr Kaiser by the Department of Labour is described as "*Email correspondence between Immigration New Zealand and New Zealand Customs*" (see item 00089 – 00092 in the table at para [11] above). It is not obvious from that description alone that the correspondence must have included information that falls under the umbrella of either s.27(1)(b) or s.27(1)(c).

[40] It is fair to say that the defendants agreed to let us see the information at issue somewhat reluctantly. They took the view that, once we were satisfied that disclosure to Mr Kaiser in the circumstances at the time his request was received would have been likely to prejudice future information flows from the US Fish and Wildlife Service (and/or that it might prejudice the maintenance of the law in New Zealand), then the exception under the Act was established, and there was nothing to be achieved by our inspecting the documents.

[41] We respectfully disagree. It is one thing to establish that there is a class of information that is capable of falling under the protection of one or other of the exceptions in ss.27 and/or 29 of the Act. It is a different thing altogether to decide whether or not particular documents or information fall into the excepted class. As noted, the given description of individual documents was not always helpful, far less determinative. And, at a pragmatic level, the evidence made it clear that the information had all been made available to the Privacy Commissioner for her assessment during her investigation of the matter. We did not see the circumstances of these cases as justifying the conclusion that we could discharge our responsibilities without also seeing the information at issue.

[42] Having seen the documents, however, we are satisfied that they all fall within the ambit of either or both of ss.27(1)(b) and/or 27(1)(c) of the Act.

[43] In our view the Labour Department and WEG both had good reasons to withhold the relevant documents from Mr Kaiser when they dealt with his information access requests in late 2007.

Peripheral matters

[44] We deal with three rather peripheral matters briefly.

[45] The first matter relates to the wording of the email from Agent Rippeto dated 15 May 2008. One of the arguments put forward by Mr Kaiser amongst the papers that were filed in advance of the hearing was that the effect of the email was to give the consent of the US Fish and Wildlife Service to disclosure of all the information at issue to Mr Kaiser. It was not a point that Mr Kaiser repeated at the hearing until he was reminded of it, but upon being reminded, he submitted that the sentence we have emphasised ("*His knowing about it the reason for denial* [sic] *would place additional pressure on him to return to the USA and resolve the case.*") effectively amounted to a complete consent to the disclosure to him of all of the relevant information.

[46] The sentence that Mr Kaiser relies on is certainly awkward, but in context we do not regard it as doing anything more than agreeing to the disclosure to Mr Kaiser of the reason why he might be denied a guiding permit in New Zealand (in fact, as we understand things, ultimately Mr Kaiser was not denied the permit he wanted). That reason, as appears from the email, was the fact that he (Mr Kaiser) was wanted in respect of indictments in the USA relating to wildlife offences.

[47] We do not think that the email from Agent Rippeto condones the disclosure of anything more than that, and we certainly do not see it as justifying a decision that, as a result of the email, s.27(1)(b) effectively no longer had any application in this case. In our view the email does not alter the potential application of s.27(1)(b) or, for that matter, the potential application of s.27(1)(c) either.

[48] As a result we do not need to deal with the alternative argument raised by the defendants in this respect; namely that, if he was found by that email to have agreed to the disclosure of information to Mr Kaiser, then in effect Agent Rippeto was not authorised to act for the US Fish and Wildlife Service. It suffices to say we think it would have been far more difficult to find in favour of the defendants on that point.

[49] The second matter under this heading concerns another issue that was noted amongst the papers filed by Mr Kaiser, but which he did not press in any significant way at the hearing itself. The essence of the argument was that the defendants' refusal to provide all information to him upon request was a breach of discovery obligations that arose in the context of the District Court proceedings under the Immigration Act.

[50] We can envisage circumstances in some other case in which the product of an information access request establishes that there has been a failure to make full discovery in a proceeding in some other Court or Tribunal: see, for example, *Proceedings Commissioner v Health Waikato* (2000) 6 HRNZ 274. But at this stage in this case, our only task is to evaluate the way in which the defendants responded to Mr Kaiser's information access requests for compliance with the Privacy Act. We are not yet asked to award any other remedy. On that basis, we agree with counsel for the defendants that shortcomings in the discovery processes relating to the District Court Proceedings (if indeed there were any, which is certainly not accepted) are not material to us when it comes to deciding whether and to what extent any of ss.29(1)(f), 27(1)(b) and/or 27(1)(c) applied to the information access requests with which we are concerned in this decision.

[51] The third and final point under this heading concerns timing. It will be noted that we have been careful to express our conclusions in terms of whether the defendants had good reasons to withhold information from Mr Kaiser at the time that they (the defendants) made their decisions to do so.

[52] If the information access requests were to be repeated now, it may be that different considerations would apply. Certainly circumstances have changed in that the New Zealand immigration-related proceedings are at an end. We do not know for certain what the position in respect of the proceedings in the US is, but if we understood Mr Kaiser correctly then those proceedings are now also at an end. Although it is not for us to judge at this point, we suspect that it is possible (we put it no higher than that) that disclosure of information thus far withheld under ss.27(1)(b) and/or 27(1)(c) might no longer give rise to the same concerns as it did in late 2007 about prejudice to the maintenance of the law, or (particularly if the attitude of the US Fish and Wildlife Service were to be canvassed first) the protection of information flows between the relevant US and New Zealand authorities. No doubt those are matters that the Labour Department and/or WEG would evaluate if further Principle 6 requests were to be received.

[53] However those possibilities lie in the future. Our only conclusion in this case is that (putting aside the two Labour Department documents discussed at paragraph [22] above) the defendants had good reasons to withhold the information that they withheld from the plaintiff after receiving the information access requests that he made in late 2007.

Conclusion

[54] With respect to the claim under HRRT 13/08 against WEG, we find that there has been no infringement of Principle 6, and thus no interference with the plaintiff's privacy. The claim is dismissed.

[55] If WEG or any of those defendants wish to ask for an award of costs, then submissions are to be filed and served within 21 days of the date of this decision. Any reply by Mr Kaiser is to be filed and served within a further 21 days.

[56] The issue of costs in the proceedings under HRRT 13/08 will then be dealt with on the basis of those submissions, and without any further hearing.

[57] In case it is necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable in respect of submissions relating to costs as he considers appropriate.

[58] With respect to the claim under HRRT 12/08 against the Department of Labour:

[a] We reserve our final decision in respect of the two documents referred to at paragraphs [21] and [22] above;

[b] With respect to all of the other documents that are in issue, we find that there has been no infringement of Principle 6, and thus no interference with the plaintiff's privacy. Those aspects of the plaintiff's claims are dismissed;

[c] We will leave it to the Chairperson of the Tribunal to make such procedural orders as he considers appropriate to see that the remaining issue in [a] above, and the question of costs in the matter, are prepared for final determination without unnecessary delay.

Mr R D C Hindle
Chairperson

Dr A D Trlin
Member

Mr S R Solomon
Member