

Mitchell v Police Commissioner - [1995] NZAR 274

Complaints Review Tribunal
CRT 2/94

30 May; 4 November 1994

Chairperson: Mrs D J Orchard Members: Mrs E W Orr, Mr E A MacDonald

Privacy Act -- Request for access to personal information -- Plaintiff requested copies of four sworn affidavits for use in a Court case -- Affidavits unable to be found -- Request for access refused on that basis -- Affidavits later produced unexpectedly at Court case -- Plaintiff claimed production of affidavits caused humiliation and embarrassment -- Damages sought -- Affidavits had been in the possession of one of the deponents -- Whether the information had been "held" by the agency -- Whether the information had been readily retrievable -- Duty to make a reasonable search for the information -- Privacy Act 1993: principle 6, ss 29(2), 30, 66, 85, 87, 88(1)(c)

The Plaintiff had made a request to the New Zealand Police (the defendant) for access to four sworn affidavits concerning her which she wished to produce in a Court case. A search of all the files concerning the plaintiff was made by the Police but the affidavits could not be located. The Police therefore refused the plaintiff's request for access on the grounds that the information could not be found (s 29(2)(b) of the Privacy Act 1993). The affidavits were later unexpectedly produced at the Court case and it was discovered that they had been in the possession of a police constable who had been one of the deponents. The plaintiff claimed that the unexpected production of the documents embarrassed and humiliated her. She sought damages pursuant to s 88(1)(c) in the sum of \$6,000 for humiliation, loss of dignity and injury to her feelings.

The Police submitted that while the production of the affidavits at the hearing might have caused the plaintiff feelings of frustration and anger, their production should not be regarded as humiliating since a prosecutor had to be prepared to be occasionally surprised in an adversarial legal system, there being no requirement that the defence disclose any of the information it might wish to adduce at a hearing. The Police also submitted that they were justified in refusing the request because they did not "hold" the information (as required by principle 6) at any relevant time - the information had been held either by the deponent or his solicitor. The Police first argued that it was for the plaintiff to establish

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under principle 6 that the Police held the personal information in such a way that it was readily retrievable. Even if that was not held to be the case, the Police then contended that the word "holds" should be interpreted to mean that the information had to be in the actual physical custody of the agency to whom the request was made. Should the Tribunal hold that the Police "held" the information, the Police argued that their refusal to disclose the information was justified on the grounds that the information was not readily retrievable (s 29(2)(a)) and/or that the information requested could not be found (s 29(2)(b)).

Held

In order to succeed the plaintiff needed to establish on the balance of probabilities that she had made a request for access to personal information to an agency, that that request had been refused and that the refusal had resulted in significant humiliation, loss of dignity or injury to her feelings. Once those matters were established, the onus of proving that the refusal was justified under the provisions of s 29(2) moved to the defendant. Here, the plaintiff did suffer significant humiliation, loss of dignity and injury to her feelings as a result of the refusal by the Police to comply with her request. Feelings of frustration and anger could be regarded as injuries to feelings. While the defence in criminal proceedings does not have an obligation to disclose information, the defendant here did have an obligation to disclose the information sought, and the feelings of frustration and anger which the plaintiff suffered were a direct result of the defendant's failure to do so.

It was not for the plaintiff to have to prove that an agency held the information sought under principle 6. Such an approach would not take into account the intent of ss 29 and 30 to provide an exhaustive list of the grounds which justified refusal to disclose personal information. Principle 6 also expressly provided that it was

subject to the provisions of Part IV of the Act of which ss 29 and 30 were a part. Further, from a practical point of view, the agency would be in the best position to answer whether it held the information sought or not.

The phrase "holds personal information" in principle 6 was immediately qualified by the phrase "in such a way that it can be readily retrieved". This contemplated that the personal information might not be in the agency's actual physical custody at the time the request was made. It was also clearly the intention of Parliament to impose an obligation on agencies in a position to give individuals access to personal information to provide such access. Therefore the concept of "holding" information in the Act should be given a wide meaning to include cases where an agency did not have actual physical custody but retained control over the information. Here at all relevant times the Police had the authority to require the deponent to return the affidavits. The Police therefore, on the balance of probabilities, "held" the affidavits.

Whether information was readily retrievable was a question of objective fact. Here, had the defendant asked for the return of the affidavits, they would have been returned. The fact that the relevant officer of the defendant did not know where the affidavits were did not change the fact that they were retrievable. It was implicit in the phrase "cannot be

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found" that reasonable attempts had been made to find the information. The search made by the defendant's officer was mechanical rather than intelligent. Papers did not just disappear from Police files. An obvious line of inquiry would have led to the discovery of the whereabouts of the affidavits. The defendant had failed to make a reasonable search, and on the balance of probabilities the tribunal was not satisfied that the documents could not be found. The defendant was therefore not justified in refusing the plaintiff access to the documents. A relatively modest award of \$500.00 was appropriate.

Case referred to in judgment

Sullivan v Earl of Caithness [1976] QB 966

Ms Kerryn Mitchell in person for the Plaintiff

Ms T K Donald for the Defendant

Mr Morpeth for the Privacy Commissioner

DECISION

These are the first proceedings to be brought before the Tribunal under the Privacy Act 1993 (hereinafter referred to as "the Act") which came into force on 1 July 1993.

The proceedings were brought by Ms Mitchell herself, the Privacy Commissioner having formed the opinion that her complaint did not have substance. Mr Morpeth entered an appearance on behalf of the Privacy Commissioner. However, he did not come prepared to take an active part in the proceedings

This case is concerned with the refusal of the Defendant to provide the Plaintiff with copies of four affidavits sworn by Police Officers in connection with her appeal against conviction and sentence on one charge of being found in a building without lawful excuse and two charges of assault on a Police Officer.

Ms Mitchell gave evidence on her own behalf, reading from a written brief of evidence. She also produced a number of documents which were generated in the course of her attempts to obtain the information sought.

The Defendant called one witness, Mr Jack, who is a Privacy Officer at Police National Headquarters.

A combination of Ms Mitchell's oral evidence and the documents which she produced revealed that in November 1992 she was arrested on the charges already referred to. She entered pleas of not guilty to these charges and a defended hearing took place in the Lower Hutt District Court on 22 February 1993. Ms Mitchell was convicted on some or all of the charges and appealed against that conviction or those convictions, and against her sentence. It seems that one of the grounds of the appeal was that her defence had been prejudiced by the failure of a Police Constable, Andrew Eales, to answer a summons served on him by her and that, at the hearing of the appeal, counsel for the Police attempted to produce affidavits sworn by Police Officers outlining the approaches that Ms Mitchell had made to various Police Officers in an attempt to secure the attendance of Constable Eales at the hearing in the District Court and the circumstances in which she had purported to effect service of the summons on Constable Eales. Ms Mitchell's counsel at the hearing of the appeal was provided with unsworn drafts of the four affidavits, but she

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was never given copies of the sworn affidavits which were not in fact admitted into evidence at the hearing of the appeal, which was dismissed.

In June 1993, Ms Mitchell commenced a private prosecution against Constable Eales for failing to answer the summons which she alleged had been properly served upon him.

On 12 July 1993, Ms Mitchell wrote to Superintendent Cunneen of the New Zealand Police, Hutt District, marking the letter for the attention of Sergeant Lavender in the Prosecutions section. She produced a copy of that letter which read as follows:

Dear Sir

Re: *Kerryn Mitchell v NZ Police*

One charge of Unlawfully on a Building/Two charges of Police assaults

Arrest Date 15th November 1992

Appeal Date 2nd June 1993

Appeal Number 67/93

Request for Official Information pursuant to the Official Information Act 1982

I am writing this letter pursuant to the Official Information Act 1982 and with particular reference to the case of *Pearce* to request the following information:

- (a) All records or files relating to the Appeal against the abovementioned charges.

At this stage I should request that I be allowed to view the file as I think I will possibly be doubling up on information already in my possession. Please treat this request as urgent!

Yours faithfully

Kerryn Mitchell

Sergeant Lavender responded by letter dated 16 July 1993, a copy of which was produced by Ms Mitchell. The text of that letter was as follows:

1. In response to your application, please find attached copies of the documents which you requested and I am able to supply.
2. I must stress at this point, that the Police file consists mainly of two copies of your submissions.
3. The reason for this is that the information which you have requested, is not the property and is not in the possession of, the Police. It is the property of the Crown Solicitor and the Act does not apply to those notes.
4. I have been advised that your Counsel will have a copy of the Crown submissions.
5. I have also not released to you two letters from the Police file. These letters, dated 18 May 1993 and 22 May 1993, are not provided on the basis that they are communications between the Police and the Crown Solicitor. These letters are not provided to maintain legal, professional privilege.
6. If you are dissatisfied with my response, please contact Superintendent Cunneen at the Upper Hutt Police Station.
7. Please also note that Sergeant Beardsley now receives requests for official information at our Prosecutions Office at Lower Hutt.

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After receiving Sergeant Lavender's response, Ms Mitchell lodged a complaint against the Lower Hutt Police with the Ombudsman. Her letter was dated 12 July 1993, but it is obvious from the text that it was written in response to Sergeant Lavender's letter dated 16 July 1993. Also, in a letter dated 19 August 1993, the Ombudsman notes that his office received her letter dated 12 July 1993 on 13 August 1993. We infer from this that Ms Mitchell's letter to the Ombudsman was in fact written on about 12 August 1993. The text of Ms Mitchell's letter to the Ombudsman was as follows:

Dear Sir/Madam

COMPLAINT AGAINST THE LOWER HUTT POLICE WITHHOLDING OFFICIAL INFORMATION

I would like to make an official complaint against the Lower Hutt Police withholding information.

On 12 July 1993 the writer requested all files and documentation pursuant to the Official Information Act 1982 and with particular reference to the case of *Pearce*, in relation to her High Court Appeal held on 2 June 1993 at Wellington High Court, Appeal Number 67/93.

In a reply dated 16 July 1993 from Sergeant G. Lavender, Sergeant Prosecutions, Lower Hutt, the writer is informed of the following.

Point 2 of his letter:

2. I must stress at this point, that the Police file consists mainly of two copies of your submissions.

He supplied these to the writer.

Point 3 goes on to say the following:

3. The reason for this is that the information which you have requested is not the property and is not in the possession of the Police. It is the property of the Crown Solicitor and the Act does not apply to those notes.

He is speaking about the rest of the file. The Crown Solicitor that was acting on behalf of the New Zealand Police was Luke, Cunningham and Clere.

Point 6 provides:

6. If you are dissatisfied with my response, please contact Superintendent Cunneen at the Upper Hutt Police Station.

My complaint is that the Crown Solicitor is acting on the behalf of the New Zealand Police. I feel that the Act does cover the Crown Solicitors' records. Please could you clarify for the writer whether she is able to get this information or not.

Point 6 says to contact the Superintendent. I do not feel able to do this, maybe you could contact him on my behalf: The Superintendent at Upper Hutt is no longer Superintendent Cunneen, it is now Superintendent Shaw.

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There are four affidavits that the Police tried to submit to the High Court in the Appeal which I am trying to get or to view. One in particular, is an affidavit by Andrew Thomas Eales. I am trying to get the original (or a copy of the original) in order to use it in a Court Hearing coming up in October/November.

These affidavits were generated by the Lower Hutt Police and submitted to the Crown Solicitor to use in the Appeal. The Police could if they wanted to uplift them off the Crown Solicitors' file. This is the same situation if I submit an affidavit to my Solicitor I can request it back off her file.

Please could you help me get the information requested. Your help in this matter would be appreciated greatly.

Yours faithfully

Kerryn Mitchell

The Ombudsman forwarded the complaint (and Ms Mitchell's letter) to the Privacy Commissioner pursuant to s 67 of the Act and s 70A of the Ombudsman Act.

By letter dated 14 September 1993 Mr Edwards of the office of the Privacy Commissioner notified Ms Mitchell that his office had received her letter of complaint from the Ombudsman's Office, and that the Commissioner of Police had been notified of that complaint and asked for a report on the matter.

On 10 November 1993, Mr Edwards wrote again to Ms Mitchell. In that letter he noted that she had advised Brigid Feehan of his office that she needed the information before a defended hearing on 15 and 16 December. He went on to say:

... I note that there has been a delay in receiving your file from the Police because it had been forwarded to the Police Complaints Authority in connection with a complaint you had laid with that office. The Police have now received the file back from the Authority. However, in working through the file the officer dealing with your complaint has noted that it is not clear to him exactly what information you are interested in assessing. In this respect he has been unable to find on the file any affidavit by Andrew Thomas Eales to assist the Police in responding to this office's investigation and to assist this office in reviewing the response you received from the Police it would be helpful if you could further clarify certain details about the information you are concerned to access. In this respect could you please clarify what affidavits you are referring to (ie in connection with what incident were they made). It would also be of assistance if you were able to

forward copies of your original request of 12 July and the response you received from Sergeant Lavender. You will appreciate that there is apparently many papers on your file including a number of requests for information and responses to those requests. The questions I have posed are just to facilitate a speedy resolution of this matter.

Ms Mitchell's evidence was that after she received that letter, she delivered copies of Sergeant Lavender's letter dated 16 July and the four unsworn affidavits to Ms Feehan.

Ms Mitchell said that subsequently she received a letter dated 14 December 1993, a copy of which she produced, from Mr Rodney

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Haines, written on behalf of the Privacy Commissioner. In this letter Mr Haines said:

1. That, having been notified of the complaint, the Defendant had advised the Privacy Commissioner that he did not wish to maintain that the refusal to supply Ms Mitchell with the information sought was justified by the claim that it was the property of the Crown Solicitor.
2. That after receiving copies of the four affidavits, the originals of which Ms Mitchell was particularly concerned to locate, Ms Feehan had attended at Police Headquarters and worked through the "large number of files" the Police held relating to Ms Mitchell in an effort to locate the originals of those affidavits.
3. That the Police Privacy Officer had made a similar search, checking the Police Computer document locator file to ensure that all relevant files had been made available to him.
4. That the four affidavits could not be found.

Mr Haines concluded by saying:

In these circumstances, the opinion I have formed is that s 29(2)(b) of the Privacy Act provides the Police with a proper basis for refusing your request. This section provides that an agency may refuse a request for personal information if

- (b) The information requested does not exist or cannot be found.

In accepting that this section provides the Police with a proper basis for refusing your request I have had regard to the steps that the Police have taken to locate the relevant information and have formed the opinion that there are no other steps that it would be reasonable to require them to take.

I have now discontinued my investigation of your complaint on the basis that it does not have substance. It is open to you to take this matter to the Complaints Review Tribunal if you do not accept my decision. An information sheet on the procedure is attached.

Ms Mitchell's evidence was that on 15 December the private prosecution she had brought against Constable Eales was heard in the Lower Hutt District Court, and in the course of that hearing two of the sworn affidavits which she had been trying to obtain, including the affidavit sworn by Constable Eales, were produced. Ms Mitchell produced copies of both the sworn and unsworn affidavits. Constable Eales sworn affidavit was identical to the unsworn version. Some changes had been made to the content of the other three affidavits, (all of the sworn affidavits were made available to her some time after the hearing), but Ms Mitchell did not suggest that those changes were significant. She explained that she had sought the affidavits because she had been advised that the unsworn versions could not be produced in evidence. She said that she felt the sudden production of these affidavits made her look incompetent, and embarrassed and humiliated her in front of the presiding Judge and the general public. She said that it was not easy to bring a private prosecution at the best of times without her efforts and confidence being undermined in this way. She also said that she had felt humiliated in front of the staff

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of the Privacy Commissioner because the Police had made it appear that she was mistaken in her assertion that the information sought existed.

For the Defendant, Mr Jack said that, on an unspecified date, he was notified of Ms Mitchell's complaint to the Privacy Commissioner and began inquiries in an effort to locate the information sought. He said that initially he was looking for any information relating to the appeal, and that it was not until much later that he began to look for the four affidavits. He said that he had made inquiries with the Lower Hutt Police Station records office and prosecutions section, and that he had also checked the national index system at Police National Headquarters. Eventually, the High Court file was located at the Police Complaints Authority and it was forwarded to him in early November. He said that by this time, because of his liaison with the Privacy Commissioner's office, it was clear that the four affidavits were the documents that Ms Mitchell required and he searched the High Court file but found that they were not on it. On reflection, it seems strange that Mr Jack

was not aware that the four affidavits should be the focus of the search until this late date as Ms Mitchell made this clear in her letter to the Ombudsman of (about) 12 August, a copy of which, we would have thought, would have been sent to the Police Commissioner and in turn to Mr Jack.

In any event, having failed to locate the documents on the appeal file, Mr Jack said that he again contacted the Lower Hutt Police records office and went out and picked up all files which the Police had relating to Ms Mitchell, acting on the theory that if the documents were not on the appeal file they must be on some other file. He said that he went through all of the files page by page but was unable to find the affidavits. He said that a representative of the Privacy Commissioner's office also looked through the files with the same result.

After the affidavits materialised at the hearing on 15 December (which resulted in a further complaint to the Lower Hutt Police by Ms Mitchell), Mr Jack made further inquiries into the matter. He produced a statement dated 5 April 1994 made by Constable Eales. Constable Eales was not called to give evidence.

In that statement, Constable Eales said that on 24 June he received a summons to appear in the Lower Hutt District Court on a charge of failing to appear as a witness. This related to the prosecution brought by Ms Mitchell. Between that date and 30 June 1993 he submitted a report notifying his superiors of the prosecution, and was given the files relating to the original prosecution and the appeal, which he passed on to his solicitor. Around about the time of his first appearance on 9 July 1993, he took back most of the files, including the originals of the four affidavits, in order to prepare briefs of evidence for his defence. Constable Eales went on to say that "sometime later" Faye Cooley of the records office, Lower Hutt, approached him and asked for "any files regarding Kerryn Mitchell". He said that "the inference that I got was that it was to do with a request that Mitchell had made for files regarding the incident where Dick Whitmore had produced his notebook without disclosure prior to the original Court case". Constable Eales did not explain how he came to interpret such an unambiguous request in that way. Nor does Constable

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Eales' statement tell us whether he was aware of the request made by Ms Mitchell to the Prosecutions section on 12 July 1993 requesting all records or files relating to her appeal. In any event, Constable Eales said that he gave Ms Cooley the files but held back "other loose papers", including the affidavits, which were being used to prepare his defence.

Ms Cooley did not give evidence and so it is not clear for what purpose she requested the return of the files. It might have been as the result of Ms Mitchell's letter of 12 July just referred to, or it might have been in response to a request from the officer investigating Ms Mitchell's complaint to the Police. It cannot have been as the result of a request from Mr Jack since it is clear from his evidence that he received the files from the Police Complaints Authority.

In cross-examination Mr Jack said that when he was trying to find the affidavits

he made no approach to any of the deponents to see if they could shed any light on their whereabouts. He said that he did contact the Crown Solicitor who confirmed the affidavits were on the file when it was returned to the Police after Ms Mitchell's appeal had been heard.

We are satisfied on the evidence, and it was not disputed by the Defendant, that we have jurisdiction to hear these proceedings, Ms Mitchell being an aggrieved individual within the meaning of section 83 of the Act and the Privacy Commissioner having formed the opinion that her complaint did not have substance.

Ms Mitchell has sought damages pursuant to section 88(1)(c) of the Act in the sum of \$6,000.00 for humiliation, loss of dignity and injury to her feelings.

Pursuant to section 85(1) of the Act, the Tribunal may make such an order if it is:

... satisfied on the balance of probabilities that any action of the Defendant is an interference with the privacy of an individual ...

Section 66 of the Act defines what amounts to "an interference with the privacy of an individual".

The relevant parts of that section for the purpose of these proceedings are as follows:

66. **Interference with Privacy** -- (1) For the purposes of this part of this Act, an action is an interference with the privacy of an individual if and only if, --
- (a) In relation to that individual, --

- (i) The action breaches an information privacy principle; and
- (b) In the opinion of ... the Tribunal, the action --
 - (iii) Has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to feelings of that individual.
- (2) Without limiting subsection (1) of this section, an action is an interference with the privacy of an individual if, in relation to an information privacy request made by the individual, --
 - (a) The action consists of a decision made under Part IV or Part V of this Act in relation to the request, including
 -
 - (i) A refusal to make information available in response to the request; ... and
 - (b) ... The Tribunal is of the opinion that there is no proper basis for that decision
- (4) Undue delay in making information available in response to an information privacy request for that information shall be deemed, for the purposes of subsection (2)(a)(i) of this section, to be a refusal to make that information available.

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The applicable information privacy principle is principle 6, the relevant parts of which read as follows:

PRINCIPLE 6

Access to Personal Information

- (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled --
 - (a) To obtain from the agency confirmation of whether or not the agency holds such personal information; and
 - (b) To have access to that information.

Section 2 of the Act defines "Agency" as including:

... any person or body of persons, whether corporate or unincorporate, and whether in the public sector in the private sector; and, for the avoidance of doubt, includes a Department; ...

Section 30 of the Act provides that:

"Subject to sections 7, 31, and 32 of this Act, no reasons other than one or more of the reasons set out in sections 27 to 29 of this Act justifies a refusal to disclose any information requested pursuant to Principle 6."

Sections 7, 27, 28, 31 and 32 have no application to the facts of this case.

The relevant provisions of s 29 are as follows:

- (2) An agency may refuse a request made pursuant to Principle 6 if -
 - (a) The information requested is not readily retrievable; or
 - (b) The information requested does not exist or cannot be found; or
 - (c) The information requested is not held by the agency and the person dealing with the request has no grounds for believing that the information is either -
 - (i) Held by another agency; or
 - (ii) Connected more closely with the functions or activities of another agency.

It is clear that, in order to succeed in this case, the Plaintiff must establish on the balance of probabilities:

1. That she made a request for access to personal information to an agency.
2. That that request was refused, and
3. That the refusal resulted in significant humiliation, loss of dignity, or injury to the feelings of the Plaintiff.

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Once those matters are established, then by virtue of the operation of s 87 of the Act, the onus of proving that the refusal was justified under the provisions of s 29(2) of the Act moves to the defendant.

The relevant provisions of s 87 are as follows:

Where, by any provision of the Information Privacy Principles or of this Act ... conduct is excepted from conduct that is an interference with the privacy of an individual, the onus of proving the exception in any proceedings under this part of this Act lies upon the defendant.

Counsel for the Defendant did not dispute Ms Mitchell's evidence that she had made a request for access to personal information to the Defendant (who is clearly an "agency" within the meaning of the Act), or that that request was refused

However, Ms Donald, while conceding that the production of the affidavits at the hearing after the Police had failed to make them available to her, may have taken Ms Mitchell by surprise and caused feelings of frustration and anger, submitted that their production should not be regarded as humiliating since "a prosecutor must be prepared to be occasionally surprised in an adversarial legal system as there is no requirement on the defence to disclose any of the information it may wish to adduce at the hearing".

The implication of the first part of that submission is that feelings of frustration and anger cannot be regarded as injuries to feelings. We do not accept that. Secondly, while it is true (in most instances) that the defence in criminal proceedings does not have an obligation to disclose information, the defendant in the proceedings with which we are concerned did have an obligation to disclose the information sought to Ms Mitchell and the feelings of anger and frustration, which Ms Donald conceded she may have suffered, were a direct consequence of his failure to do so.

Ms Donald went on to submit that Ms Mitchell was not embarrassed in the conduct of her case by the failure of the Police to disclose the affidavits because she already knew their contents. Ms Mitchell having chosen to make nothing of the discrepancies between the unsworn and sworn versions in three of the affidavits, we are not satisfied, on the balance of probabilities, that the failure to provide copies of the sworn affidavits had an effect on the outcome of the case. However, we accept Ms Mitchell's evidence that she was disconcerted by their sudden and unexpected production.

Ms Donald's next submission was that Ms Mitchell could have liaised with counsel for Constable Eales and possibly located the documents. There is no force in that submission. Ms Mitchell had no way of knowing that Constable Eales' counsel had these affidavits.

Finally, Ms Donald submitted that "after the Police discovered the documents had turned up during the hearing, the embarrassment was theirs. However, when it was discovered that the information was never held by the Police, the feeling of embarrassment quickly became one of annoyance after having spent so much time and energy looking for information that was not held by the Police". In the circumstances of this

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particular case, we regard that submission as untenable and the implied criticism of Ms Mitchell as unjustified.

We are satisfied that Ms Mitchell suffered significant humiliation, loss of dignity and injury to her feelings as a result of the refusal of the Defendant to comply with her request. It is therefore for the Defendant to satisfy us that there was a proper basis for that decision

Ms Donald submitted that the Defendant was justified in refusing the request because it did not hold the information at any relevant time: the information was held either by Constable Eales or his solicitor.

We should say that Ms Donald seemed to base her argument on the proposition that it was for the plaintiff to prove that the defendant held the personal information in such a way that it could readily be retrieved. We have already said that we do not think that this is the case, and that all the plaintiff needs to prove is that she

requested access to the information and that that request was refused. The onus then moves to the defendant to prove, not just that the information was not held by the agency, but also that the person dealing with the request had no grounds for believing that the information was either held by another agency or connected more closely with the functions or activities of another agency pursuant to the provisions of s 29(2)(c)

However, we should also say that, at first sight, there seemed to us to be some merit in Ms Donald's approach since Principle 6 is expressed as applying only to information:

an agency holds ... in such a way that it can be readily retrieved ...

However, such an approach would fail to take into account the intent behind sections 29 and 30 which is to provide an exhaustive list of the grounds which justify a refusal to disclose personal information, and to put the onus for establishing such grounds on the Defendant. We think that if Parliament had intended that the Plaintiff be required to establish that the agency held the personal information in such a way that it could readily be retrieved it would not have included the grounds specified in s 29(2)(a) and (c) as reasons for refusing a request for personal information. There would have been no need to do so.

Also, subsection (3) of Principle 6 expressly provides that:

The application of this Principle is subject to the provisions of Parts IV and V of this Act.

Sections 29 and 30 are contained in Part IV of the Act.

Moreover, section 29(2)(c) provides that it is not enough that an agency does not hold the information sought. It must also establish that the person dealing with the request for the information has no grounds for believing that the information is either held by another agency or connected more closely with the functions or activities of another agency. In other words, obligations are imposed on an agency in respect of personal information beyond that which is held by it. If we were to take the view that the onus was on the Plaintiff to establish that the agency held the information sought, it would be difficult to reconcile that view with the wider obligations imposed by s 29(2)(c).

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Finally, from a practical point of view, if the onus of proving these matters fell on the Plaintiff, there might be circumstances where that would impose an unreasonable burden in that the plaintiff might have grounds for believing that an agency might have certain personal information but, in the face of a refusal, find it quite impossible to establish that it was more likely than not that the agency held such information. The agency will be in the best position to provide the answer.

We think that the over-riding intention of the Act is to impose an obligation on agencies to provide information which they are in a position to provide, and that Parliament has placed the onus of proving that they are not on such agencies to give effect to that object.

In any event, Ms Donald argued that the word "holds" (which is not defined in the Act), as it appears in Privacy Principle 6, should be given the narrow interpretation of meaning that the information had to be in the actual physical custody of the agency to whom the request was made.

While we find as a fact that at all material times the four affidavits were in the actual physical custody of either Constable Eales or his solicitor, we do not accept that "holds" should be given the narrow interpretation for which Ms Donald contended.

First, in Principle 6, the phrase "holds personal information" is immediately qualified by the phrase "in such a way that it can readily be retrieved". It seems to us that this contemplates that the personal information might not be in the agency's actual physical custody at the time the request is made.

Second, as we have already said, it seems to us that it was clearly the intention of Parliament to impose an obligation upon those agencies in a position to give individuals access to personal information to provide such access. We think that view is reinforced by the enactment of ss 30 and 87 to which we have already referred. If the word "holds" were given such a narrow meaning, then this intention could be easily evaded.

We consider that the concept of "holding" within the meaning of the Act is analogous to the concept of "possession". In the criminal law "possession" has been interpreted as including situations where actual custody is temporarily handed to another, provided that the person handing over such custody retains control

over the thing in question - *Sullivan v Earl of Caithness* [1976] QB 966 . We consider that the word "hold" can, in its ordinary sense, include cases where the agency does not have actual physical custody but retains control over the information.

The Defendant accepted, and we find as a fact, that at all relevant times he had the authority to require Constable Eales to return the affidavits to him, and that at all times Constable Eales had the power to require his solicitor to return the documents to him. Likewise, it was accepted that if such a request or requests had been made, it or they would have been complied with.

In those circumstances, not only has the Defendant failed to satisfy us on the balance of probabilities that it did not hold the relevant documents, we are satisfied on the balance of probabilities that it did

While the argument was not articulated in precisely these terms, counsel for the Defendant went on to submit that, should the Tribunal be

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satisfied that the Defendant held the information requested, the refusal to disclose it was justified on the grounds that:

1. It was not readily retrievable (s 29(2)(a)) and/or
2. The information requested could not be found (s 29(2)(b)).

In relation to the first argument, we consider that whether information is retrievable within the meaning of the Act is a question of objective fact. In other words, if the Defendant or an officer authorised by him had asked for the affidavits to be returned, would they have been returned? The answer to that question is yes. Mr Jack's evidence was that the affidavits were not retrieved because he did not know where they were. However, that only explains why the affidavits were not retrieved. It does not alter the fact that they were retrievable.

Ms Donald seemed to concede that for the agency to establish that the information requested could not be found, it had to establish that reasonable efforts had been made to locate the information. We note that the office of the Privacy Commissioner also proceeded on that basis, and we think that it is implicit in the phrase "cannot be found" that reasonable attempts have been made to find the information. If that were not the case, then an agency making no attempt to find information, or only a desultory attempt, would be justified in refusing a request, and the object of the legislation thwarted.

Ms Donald attempted to persuade us that the Defendant, through Mr Jack to whom he delegated the task, had made not just a reasonable search for the affidavits but a thorough one. We are not so satisfied. It seems to us that the search conducted by Mr Jack was mechanical rather than intelligent.

It was clear from the outset that these affidavits were generated for the purpose of Ms Mitchell's appeal against conviction and sentence. They should have been on that file. The only other file they might possibly have been on was the file relating to the original prosecution which would certainly have gone to the Crown Solicitor before the appeal. No evidence was tendered by the Defendant that the affidavits were or could have been relevant to any of the other files relating to Ms Mitchell which he searched.

By November at the latest, Mr Jack was aware that the affidavits had been on the file when the file was returned to the Police by the Crown Solicitor. He knew that the affidavits were no longer on the file when it was forwarded to him from the Police Complaints Authority. Documents do not just vanish from Police files. It seems to us that an obvious line of inquiry was to attempt to trace the progress of the file after it was returned to the Police by the Crown Solicitors' office, beginning with an approach to the Police Complaints Authority.

In his evidence Mr Jack said that he had been aware that Ms Mitchell wanted the affidavits to produce at a hearing involving the Police, but he assumed the hearing would be of a Police prosecution. He complained that Ms Mitchell had not informed him that the case was a private prosecution brought by her against Constable Eales. However, he did not suggest that he ever made any inquiry of Ms Mitchell through the Privacy

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Commissioner's office for more specific information. Even though he believed the information was required for a Police prosecution against Ms Mitchell, that was an obvious step to take. If Ms Mitchell thought the evidence was relevant to that matter, then it is likely the Police would have a similar view, and therefore possible that the documents were on that particular file. Given Ms Mitchell's co-operation with the Privacy Commissioner's office throughout their investigation, we are quite satisfied that this line of inquiry would have revealed to Mr Jack that she was bringing a private prosecution against Constable Eales.

Mr Jack said that he made no approach to any of the four deponents to see if they could cast any light on the

whereabouts of their affidavits. He did not suggest that he had approached Sergeant Lavender of the Prosecutions section at Lower Hutt who had had dealings with the file from the time of the Police prosecution against Ms Mitchell. Nor did he suggest that he had ever approached the officer or officers in charge of the original prosecution or the appeal. We consider that all of these avenues could and should have been explored.

While Mr Jack gave evidence that he had sought the assistance of the records office in Lower Hutt in obtaining any files relating to Ms Mitchell, he did not say that he specifically told the personnel at the records office that he was looking for the four affidavits in particular, or ask for their assistance in locating the affidavits. As we have already mentioned, in his statement Constable Eales said that he was approached by Faye Cooley of the records office and gave her files relating to Ms Mitchell. If a specific approach had been made to the records office, then we think it quite probable that Ms Cooley would have remembered that Constable Eales had had the files and directed Mr Jack's attention to him.

In these circumstances, we are not satisfied that Mr Jack made a reasonable search. We are not satisfied on the balance of probabilities that the documents could not be found.

We are satisfied on the balance of probabilities that there was no proper basis for the decision of the Defendant to refuse to disclose the information requested by the Plaintiff, and that consequently there has been an interference with the privacy of an individual, that is to say the Plaintiff.

In considering what amount it is appropriate to award by way of damages, we have had regard to the fact that the content of Constable Eales' affidavit came as no surprise to Ms Mitchell, and that the failure of the Defendant to provide these affidavits had no impact on the ultimate outcome of the private prosecution brought against Constable Eales. We think that a relatively modest award is appropriate. We therefore make the following order:

1. An order that the Defendant pay to the Plaintiff damages in the sum of \$500.

Costs

The Plaintiff made no application for costs, and an order for costs would not be appropriate since she represented herself. However, we note that at the time of the hearing Ms Mitchell described herself as a full-time

student at Auckland University. It may be that she incurred travelling costs in attending the hearing

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. We reserve leave to her to make an application for travelling expenses if she so wishes. Such an application must be made within one month from the date of this decision, and must be accompanied by appropriate documentation.

Reported by *Catriona Pennington*, Barrister