

IN THE MATTER of an application under
the Privacy Act 1993

BETWEEN O and others

Plaintiffs

(File CRT 19/94)

AND N

Defendant

BEFORE THE COMPLAINTS REVIEW TRIBUNAL

D J Orchard, Chairperson
GDS Taylor, Member
D B Emery, Member

HEARING in AUCKLAND on the 23rd day of May 1995

APPEARANCES

Mr R Casinader agent for the plaintiffs
Mr B A Gubb and Ms Norton for the defendant
Mr G J Judd QC and Mr R Stevens for the Privacy Commissioner

INTERIM DECISION

This is a decision of the Complaints Review Tribunal on File CRT 19/94 between O and N. The background to this case relates to a child A whose mother has died and left all her estate in trust for him. Before his mother died his parents had been separated, but because both parents' jobs took them away from home frequently, he had received substantial care from the Fs with whom he lived after his mother's death.

When A's father (O) decided that it would be best for A to go to a boarding school, O asked the trustees for assistance in payment of fees. They decided to commission a report from N (clinical psychologist).

The trustees' letter of instructions to N dated 9 July 1993 gave background and said:



"11: It is presumed by the Trustees that O wants the Estate to meet all the costs of A attending the boarding school, being tuition fees, boarding fees and uniform costs.

12: The Trustees request that you undertake a psychological assessment and provide a recommendation as to whether A would be most advantaged by attending boarding school, or by the status quo continuing with such improvements as are possible." (emphasis added)

N stated the reasons for the referral thus in the report headed "Psychological Report":

"To provide a recommendation as to whether A would be most advantaged by attending boarding school, or by the status quo continuing with such improvements as are possible." (emphasis added)

In the course of the report, N stated that a witness "X" had come forward voluntarily and offered opinions which were summarised in the report. O knew nothing of X having been interviewed. He and his family considered that what X had said was false and damaging to them.

Through their solicitor, the family asked N to name X. N refused to do so and wrote in a letter dated 27 September 1993:

"Whatever 'Witness X' had to tell me only confirmed what others had already told me and indeed very little new information was provided by this person. I guaranteed confidentiality and I do not see how it can serve anyone's best interests to breach that promise."

The Proceedings

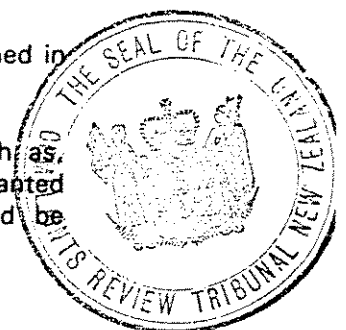
O and his family complained to the Privacy Commissioner. He prepared a provisional opinion and by letter dated 31 May 1994 wrote:

"You have complained that N has refused your request to reveal the identity of witness 'X' in the report that was written on A.

In considering this matter I have taken account of many factors. As you are aware, one of my investigating officers has conducted interviews with the parties concerned. In addition to fact gathering it has been necessary to analyse and interpret how the provisions of the Privacy Act relate to the matters at hand.

The reasons for refusing access to personal information are contained in sections 27, 28 and 29 of the Privacy Act.

These reasons for withholding information cover exemptions such as that the disclosure of the information 'would involve the unwarranted disclosure of the affairs of another individual', or that it would be



contrary to the best interests of an individual under the age of 16. Additional considerations take into account whether granting access could endanger the safety of an individual or prejudice the maintenance of the law. There are also provisions for when a disclosure of information would breach an express promise of confidentiality that has been made through the person who supplies the information.

In this instance, some, but not all, of these considerations were found to apply to the facts of the case. For example it was not considered that disclosure of an informant's identity would be contrary to A's best interests but more serious attention was paid to the promise of complete confidentiality that N had given to the informant.

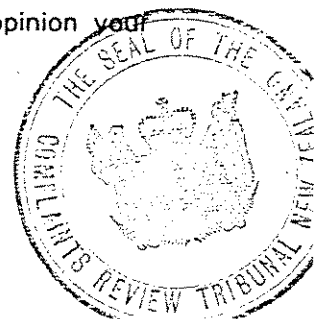
In comparable investigations I have been mindful of the need to protect the identity of informants who disclose information about the welfare issues or inform on breaches of the law. In these situations it is not only the informant's circumstances that are taken into account but also whether revealing their identity would be likely to inhibit the flow of information from other potential informants who may become reluctant to supply information in the future if they observed that promises of confidentiality were not adhered to. Under those circumstances I have upheld the respondent's decision to withhold the identity of their informant.

While I am aware that this may not seem satisfactory for people who feel the information supplied is untrue, there are also provisions in the Privacy Act that allow for correction of information if the material is not accurate, up to date, complete, or it is misleading. In this case, although the report writer stands by what the report writer has written, I understand that N has expressed a willingness to delete the section in the report that refers to witness 'X'. Whether or not [the report writer] does that you are entitled to request a correction under principle 7. If N is unwilling to make that correction you are entitled to have [the report writer] attach to the information the report writer holds, in a manner that will ensure that it is always read with the information, any statement you supply of the correction sought.

Having completed a thorough investigation of this matter I have formed the provisional opinion that there is a proper basis for the decision to withhold the identity of witness 'X'. I cannot disclose the exact grounds for doing so because that would prejudice the interest being protected.

I understand there was some uncertainty at an earlier stage as to whether there was any such person as witness 'X'. I can assure you that the informant does exist and this person has confirmed both that they provided N with the comments in the report and that N gave a promise of confidentiality to the informant."

The Privacy Commissioner confirmed his opinion on 25 July 1994 "that there is a proper basis for N's decision to withhold the identity of witness X and there is no interference with your privacy under section 66(2)(a)(i) and (b). In my opinion your complaint does not have substance".



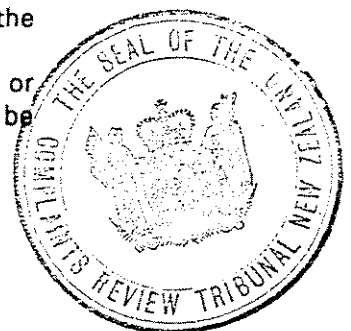
O's family brought proceedings before this Tribunal on 21 November 1994 seeking the following remedies:

- * (1) That the tribunal make a declaration, under section 85(1)(a) of the Privacy Act, that the action of the defendant was an interference with the privacy of the plaintiffs.
- * (2) That the Tribunal, under section 85(1)(d) order the defendant, N to:
 - (a) Make known to the plaintiffs ... the identity of witness X quoted in N's psychological report of 18 August 1993 regarding A.
 - (b) Submit a written apology to the plaintiffs for the damage to their reputation and pain of mind caused by the publication of N's report, which contained defamatory statements about them by witness X, and which has resulted in a gross interference with their privacy.
 - (c) Delete the section in the report containing the statement made by witness X and amend the last paragraph of N's summary and conclusions which draws on the comments made by witness X.
- (3) That the Tribunal award damages against the defendant for the humiliation, loss of dignity and injury to the feelings of the plaintiffs caused by the defendant's action.
- (4) That the Tribunal award costs against the defendant as the Tribunal thinks fit."

In consultations between the parties before the hearing, the Os accepted that breach of principles 1, 2 and 8 claimed by them were not justiciable before the Tribunal since, by section 79 of the Privacy Act, they become justiciable only if committed after 1 July 1996.

By memorandum dated 21 April 1993, Mr Judd for the Privacy Commissioner asked that certain issues relating to section 29(1)(b) and (3) of the Privacy Act be determined before the trial. These provisions read:

- "(1)(b) The disclosure of the information or of information identifying the person who supplied it, being evaluative material, would breach an express or implied promise-
 - (i) Which was made to the person who supplied the information; and
 - (ii) Which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence; ..."



- (3) For the purposes of subsection (1)(b) of this section, the term 'evaluative material' means evaluative or opinion material compiled solely -
- (a) For the purpose of determining the suitability, eligibility, or qualifications of the individual to whom the material relates -
- (i) ...
 - (ii) ...
 - (iii) ...
 - (iv) For the awarding of contracts, awards, scholarships, honours, or other benefits; ..."

The issues sought to be determined separately were:

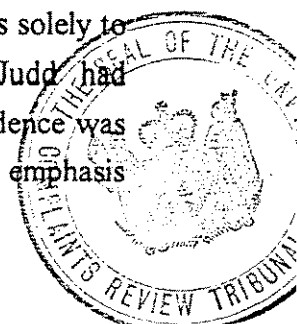
"The issues will be whether the information was evaluative or opinion material, whether a decision by the trustees to pay the boarding school fees can come within the expression 'the awarding of contracts, awards, scholarships, honours, or other benefits', and whether it can be said that the material was compiled solely for the purpose of determining the suitability, eligibility, or qualifications of A to receive the benefit of payment of the school fees."

At the commencement of the hearing an agreed statement of facts and background documents were filed. Materially, the statement of facts did not include that a promise of confidentiality was made by N to X. Mr Casinader for the Os advised that the reason for that not being agreed was that they did not have actual knowledge of the fact and so did not accept or deny it. Mr Gubb for N offered to file an affidavit from N (who was overseas at the time of the hearing) on the subject of the promise. The Os could then decide whether they wished to cross-examine N on the affidavit.

The question of promise or no promise was therefore set to one side and the other issues arising on the preliminary question were addressed.

In his reply, Mr Casinader sought to give evidence from the bar about subsequent actions of the trustees. Mr Gubb objected. The Tribunal then ruled that it had considered the statement of facts and Mr Casinader's statements opened issues which might be relevant and which it would be reluctant to determine on the basis of the statement of facts which left gaps and was ambiguous on the points. These points were:

- (a) whether the trustees' purpose in commissioning N's report was solely to determine whether or not to disburse money, as Mr Judd had submitted, or was also to determine what schooling and residence was in A's best interests. The Tribunal notes the words to which emphasis



was added in the letter from the trustees dated 9 July 1993 and the statement of reasons for the report made by N.

- (b) who had later applied to the High Court to make A a ward of Court (that there had been that application appeared from the statement of facts).
- (c) when the application was made.
- (d) the grounds for the application.

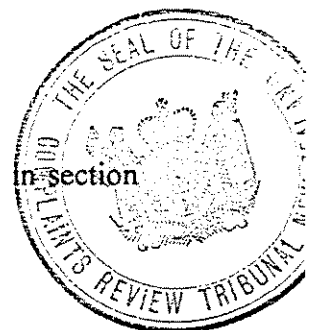
The Tribunal considered that the terms of the instrument creating the trust for A could be relevant as well as suggestions from the bar and purposes inferred from the statement of facts that the trustees' purposes were wider than simply disbursing money.

Mr Judd and Mr Gubb then submitted that these later events were irrelevant to the issue before the Tribunal and were irrelevant to N's understanding of the purpose for which the material was to be compiled. Mr Judd, with support from Mr Gubb, articulated his ultimate submission as that the purpose of compiling the information (refer to the introduction to section 29(3)) was N's, but the determination of the "suitability, eligibility, or qualifications" (refer to section 29(3)(a)) for "the awarding of ... awards, scholarships ... or other benefits" (refer to section 29(3)(a)(iv)) was that of the trustees. Mr Judd modified that submission by saying that, speaking generally, there were two objective situations to be assessed which were not tied to any particular person's opinions but that in the present case that was a distinction without a difference.

The Tribunal accepted Mr Gubb's submission that it should rule on the other issues in the preliminary question before deciding whether further evidence, which the Os wished to adduce from the trustees, should be allowed. This decision is therefore an interim one on the preliminary question of law set out in Mr Judd's memorandum dated 21 April 1993.

The Submissions of Parties

In his submissions to the Tribunal, Mr Casinader divided the issues arising in section 29(1)(b) and (3) into the following points which had to be established:



- (1) Was the information evaluative material,
- (2) was it compiled solely for
- (3) determining the suitability, eligibility or qualifications of A for
- (4) the awarding of a contract, award, scholarship, honour or other benefit, and would
- (5) disclosure of this particular information
- (6) be in breach of a promise of confidentiality made to X?

The Tribunal adopts that analysis.

Counsel for N and the Privacy Commissioner conceded the question of whether or not the identity of the witness is personal information vis a vis O and his family.

This is a suitable stage at which to acknowledge the quality of the submissions made by Mr Casinader which would have done credit to experienced counsel. The Tribunal considers that the Os have been remarkably well represented by this second year law student.

In addressing the question of whether the information was compiled solely for purposes (3) and (4) of his analysis, Mr Casinader submitted that N was commissioned to assess what the best living arrangements for A would be - whether a boarding school or a home. He noted that N's report was punctuated with expressions such as "to provide a home" for A, "[a] placement [that] will provide security and permanence" and "[the problem] of where A is to live". The proposal to send him to a boarding school, Mr Casinader submitted, was only ancillary to the larger question of "Where is A to live?". He observed that this was emphasised in the statement of facts submitted by N to the Tribunal which said:

"Throughout the entire process of preparing [N's] recommendation the Defendant's primary objective was to provide an objective assessment as to what the best living arrangements for A would be."

He concluded:

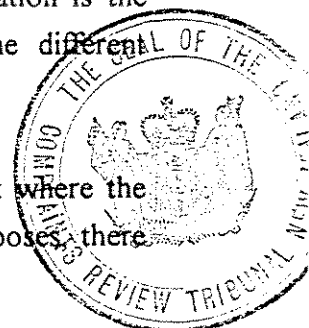


"This purpose (of determining where A should live) does not correspond to any of the purposes specified in section 29(3), which relate only to employment, education and insurance."

Mr Gubb for N submitted that the material provided by X was compiled solely for the purpose of determining A's suitability to attend boarding school in the sense of the defendant assessing, having regard to his personality and background, whether he might fit in or would otherwise benefit by going to boarding school. The information, he submitted, also went to A's eligibility in the sense of whether he would be an acceptable person to send to boarding school having regard to his age, background, personality and experience. He submitted that the material was also relevant to A's qualifications, which he said went beyond academic qualifications and encompassed psychological and social qualifications. Mr Gubb drew the Tribunal's attention to definitions of "award", "scholarship", and "benefit" in the Oxford English Dictionary and to definitions of the latter two in Butterworths *Words And Phrases Judicially Defined*. He submitted that in the circumstances of the case three of the possible five criteria under section 29(3)(a)(iv) were satisfied.

Mr Judd for the Privacy Commissioner made five points in relation to evaluative material. The first was to identify what aspects of the material put forward by Mr Casinader were relevant. The second was that the material in N's report was for the purpose of determining the suitability etcetera of A for the award of a scholarship or other benefit. He submitted that it did not matter who makes the determination of suitability, the point is the purpose for which the information was compiled. If the decision on suitability was that of the trustees then, so long as the situation falls within a purpose in section 29, that is sufficient. Any other interpretation would frustrate the purpose of the legislation. He submitted that there was no separation between "compiled" and "determining". He gave the example of a prospective employer using an outside contractor to interview and prepare a short list of candidates. He submitted that the purpose of the employer was the relevant purpose in determining whether the information compiled by the outside contractor fell within the section. The Tribunal observes that this submission seems to be inconsistent with the way Mr Judd later formulated his submission on this point: that the purpose of compiling was that of the compiler (here N) and the purpose of determination was that of the decision-maker (here the trustees). The Tribunal considers that Mr Judd's first formulation is the correct one. However, for reasons which will become apparent, the different formulations would not lead to different results in this case.

In dealing with the concept of "compiled solely", Mr Judd submitted that where the decision is whether or not to make a grant of money for educational purposes, there



can only be two answers, one "Yes" and the other "No". Where "No" is the answer, then, he submitted the status quo prevails: the fact that "No" is one of the possible answers does not mean that the purpose for which the determination was made ceases to be solely the granting of funds.

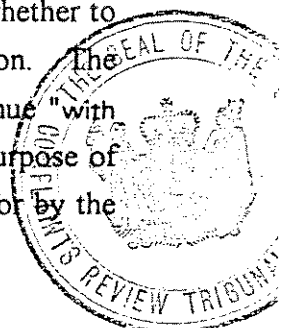
All parties made submissions on the question of whether the payment of school fees for A was "the awarding of contracts, awards, scholarships, honours, or other benefits". Mr Casinader drew the Tribunal's attention to the decision of the Ombudsman in *Case 216* relating to school certificate scripts (1984) 6 Compendium of Case Notes of the Ombudsmen 82. He submitted that the Tribunal should follow the view expressed by the Ombudsman at page 87: "... the nature of the other terms used in [the equivalent to section 29(3)(a)(iv)] suggests that what was contemplated was something more difficult to achieve than School Certificate or something rarer or of a different quality". Both Mr Gubb and Mr Judd sought to distinguish that case on the facts. Their submissions were based on the meanings which could be attributed to the individual words "award", "scholarship", and "benefit". They submitted that each was wide enough to include a decision to make funds available for education.

The Tribunal raised the question whether the word "may" in section 29(1) when combined with the jurisdiction of the Tribunal conferred by section 86(2) of the Human Rights Act 1993, would allow it to reconsider and override the decision of N not to release the information having decided that it did fall within section 29. Although submissions were made to the Tribunal on this point, they were not in the detail that the Tribunal considers would be necessary to decide this difficult point. Since it has proved unnecessary for the Tribunal to determine the issue at this stage, it has decided to leave the question open.

"Compiled Solely"

The Tribunal considers that however one looks at the matter, the evidence establishes that the purpose of compiling the information was broader than simply deciding whether to make funds available for schooling.

First, the letter from the trustees to N relied upon by both counsel for N and for the Privacy Commissioner as establishing that the purpose was solely to decide whether to provide money for schooling does not on its face support that submission. The instruction included a consideration of whether the status quo should continue "with such improvements as are possible". This clearly goes beyond the limited purpose of making funds available for schooling. Had the position been as contended for by the



defendant and the Privacy Commissioner, then the particular instructions would have ended with the words "boarding school" and not gone on to the alternatives of maintaining the status quo and making improvements to the status quo. If one looks at purpose for compiling through the eyes of N, then this demonstrates that the purpose was wider. If one looks at the matter through the eyes of the trustees, then it was also wider.

Secondly, the context of the instructions to N supports this. The question had arisen from O's request for assistance to pay boarding school fees. O had obtained a psychological report which recommended that A be enrolled at boarding school. In a letter to O's barrister dated 16 June 1993 the trustees said they did not consider the report was adequate. They also put forward two other alternatives: full-time fostering by the Fs and care for A by two of the trustees (who envisaged that they might eventually adopt him) on a full-time basis. The letter went on:

"To enable the Trustees to make a decision as to whether the interests of A would be best served either by attending a boarding school or by other arrangements being made, ie either of the above two alternatives or an improvement on the status quo, the Trustees would like to appoint another private psychologist to consider all issues and interview those parties whom the psychologist so desires."

A draft letter to N was enclosed for consideration. As a result of an objection from the Os to the other trustees assuming full-time care of A, with or without the possibility of adoption, reference to that option was deleted from the letter to N.

The Tribunal considers that this evidence reinforces the conclusions to be drawn from the letter of instructions itself. The history of the instructions to N suggests to the Tribunal that the fact that ultimately those instructions made reference to only two possible living arrangements (boarding school or status quo with improvements) did not have the significance contended for by counsel.

"Contracts, Awards, Scholarships, Honours, or Other Benefits"

In the light of the conclusion reached on "compiled solely" it is unnecessary for us to form a conclusion on whether making available money from a trust fund, the sole beneficiary of which was A, would come within section 29(3)(a)(iv). The Tribunal does not find this an easy question to determine and would prefer to leave the ambit of this subparagraph open for determination in a more appropriate case.



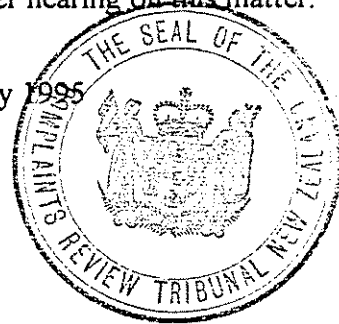
Conclusion

The onus of proof that there is good reason to withhold information under principle 6 of the Privacy Act lies on the person seeking to withhold the information, in this case N (section 87). We are satisfied that N has not discharged that onus of proof. Accordingly, we find it unnecessary to hear further evidence on whether or not a promise was actually made or from the trustees, as we had provisionally thought we might in the course of the hearing.

This being so, it will be necessary to convene a further hearing to determine whether any other grounds in section 29 relied on by N have been made out.

This preliminary hearing was undertaken because of concerns by the Privacy Commissioner about how the proceedings should be conducted if the Privacy Commissioner and N had the information sought by the Os but not the Os. The Tribunal observes that hearings involving similar situations are common before the Australian Administrative Appeals Tribunal and suggests that the parties consider what is done there and its appropriateness for the further hearing on this matter.

DATED at WELLINGTON this 29th day of May 1995



D J Orchard
D J Orchard, Chairperson

GDS Taylor
GDS Taylor, Member

D B Emery
D B Emery, Member