Decision No. 4 /96

CRT 19/94

IN THE MATTER of the Privacy Act 1993

BETWEEN O and others

Plaintiffs

AND N

Defendant

BEFORE THE COMPLAINTS REVIEW TRIBUNAL

Mrs D J Orchard (Chairperson)
Mr G D S Taylor - Member
Mr D B Emery - Member

HEARING at AUCKLAND on the 23rd day of May, the 15th and 16th days of June, and 15th and 16th days of November 1995

APPEARANCES

Mr R Casinader as agent for the Plaintiffs
Mr B A Gubb and Ms Norton (23 May 1995), Mr B A Gubb (15 and 16 June and 15 November 1995 (withdrew with leave) for the Defendant
Mr G J Judd QC (23 May, 15 June, and 15 and 16 November 1995) and Mr R Stevens (throughout) for the Privacy Commissioner

DECISION

This is a civil proceeding brought by Mr O, his wife and mother-in-law, against N , a psychologist, claiming:

(1) A declaration that N's actions were an invasion of their privacy.

(2) Orders that N

(a) make known the identity of witness X referred to in her psychological report of 18 August 1993 concerning O's son A;

(b) submit a written apology to the Plaintiffs for the damage to their reputation and peace of mind caused by the report;

(c) delete the section of her report containing the statements made by X and the last paragraph containing conclusions drawn from X's statements.

(3) Damages.

(4) Costs.

Originally, the O's alleged breaches of privacy principles 1, 2 and 8, but after a pre-hearing conference they accepted that they were not justiciable before 1 July 1996 (Privacy Act 1993, s.79) and withdrew them. The claim proceeded for breach of principle 6 which provides relevantly that:

> *"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."*

"Agency" is defined by s.2 to mean (subject to a number of exclusions which do not affect this case) *"any person or body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector ..."* It was not disputed that N was an agency.

It was also undisputed that the identity of X was held by N in a way in which it could readily be retrieved.

"Personal information" is defined in s.2 to mean *"information about an identifiable individual"*. In terms of principle 6 there is a right to personal information only if it is personal information of the *"individual concerned"*, ie the person seeking its disclosure. Initially N disputed that X's name was the Os' personal information. However, at the commencement of the hearing, Mr Gubb conceded that it was, citing reports of the Ombudsmen on ss.2 and 24 of the Official Information Act 1982 on complaint 10 (5th Compendium of Case Notes, 27) that the name of an informer was information about the person informed against. The Tribunal has acted on that concession, but, since the point has not been argued before it, it should not be taken to have accepted that the Ombudsmen's view is necessarily correct.

Background to the proceedings

The background of this case relates to a child, A, the son of the Plaintiff Mr O, whose mother has died and left all her estate in trust for him. Before A's mother died, his parents had been separated. A had lived with his mother, but because of the nature of both her and Mr O's work, A had received substantial care from the Fs. Also before A's mother's death, Mr O had remarried. His second wife, Mrs O, and her mother, G, are the other Plaintiffs. After his mother's death, A continued to live with the Fs and Mr O continued to have access. He also made substantial payments to the Fs on account of A.

When O decided that it would be best for A to go to boarding school, he asked the trustees for assistance in payment of the fees. The trustees commissioned from N "*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.*"

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

Through their solicitor, they asked N to disclose X's name. She refused and wrote in reply 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 Os complained to the Privacy Commissioner who prepared a provisional report dated 31 May 1994. The Commissioner referred to his investigating officers having interviewed the parties concerned. He advised that he considered that disclosure would not be in A's best interests and that the promise of complete confidentiality given to X by N should not be breached. Finally he noted that N had expressed willingness to delete the section referring to X and stated his provisional opinion that N's decision to withhold X's name should be upheld.

The Commissioner confirmed his opinion by letter of 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.*"

The Os brought this proceeding on 21 November 1994.

The Course of this Proceeding

The proceeding was brought by the Os pursuant to s.83 of the Privacy Act, which provides that:

> *"... the aggrieved individual ... may himself or herself bring proceedings before the Complaints Review Tribunal against a person to whom section 82 of this Act applies if the aggrieved individual wishes to do so, and -*
>
> *(a) The [Privacy] Commissioner or the Proceedings Commissioner [of the Human Rights Commission] is of the opinion that the complaint does not have substance ..."*

There was no suggestion that s.83 was not fulfilled here.

By s.85:

> *"(1) If, in any proceedings under ... section 83 of this Act, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant one or more of the following remedies:*
>
> *...*
>
> *(2) In any proceedings under ... section 83 of this Act, the Tribunal may award such costs ... or may decline to award costs against either party.*
>
> *...*
>
> *(4) It shall not be a defence to proceedings under ... section 83 of this Act that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant."*

What is an interference with privacy is defined in s.66:

> *"(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; or*
> >
> > *... and*
>
> *(b) In the opinion of ... the Tribunal, the action -*

(i) Has caused, or may cause, loss, detriment, damage, or injury to that individual; or

(ii) Has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or

(iii) Has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the 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;

..."

The proceeding here fell within s.66(2)(a)(i). The relevant principle relied on was principle 6, which has been set out earlier. It is subject to Parts IV and V. Part IV sets out good reasons for refusing access to personal information.

N at various times sought to rely on a number of grounds to withhold X's name. These were:

Prejudice to the maintenance of the law - s.27(1)(c) - which was not raised originally, but was raised before the hearing commenced.

Endangering the safety of any individual - s.27(1)(d) - also not raised originally, but raised before hearing.

Unwarranted disclosure of the affairs of another - s.29(1)(a) - always relied upon.

Evaluative material with breach of a promise of confidentiality - s.29(1)(b) - originally relied on and determined in an interim decision.

Contrary to the interests of a child under 16 - s.29(1)(d) - raised later in the hearing.

Legal professional privilege - s.29(1)(f) - raised after the first day's hearing and the interim decision.

Frivolous, vexatious and trivial - s.29(1)(j) - always relied upon.

Before the hearing of the proceeding commenced, the Privacy Commissioner filed a memorandum dated 21 April 1995 that the Tribunal should initially consider whether there was good reason under s.29(1)(b). If it held that there were good reason, the Commissioner submitted, the problem of how to receive evidence from or about X, without disclosing material tending to identify X, could be avoided.

The Tribunal accepted that proposal and heard argument on 23 May 1995. In its interim decision dated 29 May 1995 (annexed), the Tribunal rejected s.29(1)(b) as a good reason to withhold X's name.

In its interim decision, the Tribunal referred to the issue of hearing evidence from or about X and referred the parties to the practice of the Australian Administrative Appeals Tribunal which had been dealing with such matters for some time. We invited submissions. To assist with the issue, the Tribunal identified Australian material and later provided the parties with a possible draft practice note.

When the hearing reconvened on 15 June 1995, much of the morning was spent on the issue of evidence from and about X. Mr Judd made very helpful comments on the draft practice note. Mr Casinader, a second year law student, was able to make useful submissions on the Australian situation, but it is noted with regret that it was mainly left to the Tribunal's own researches to advance matters in this respect. The Tribunal has concluded that a practice note should follow consideration by all chairpersons and members and will consider the need for and form of a note in due course.

After submissions, and over objections by Mr Casinader, the Tribunal convened a hearing in the absence of Mr Casinader and the Plaintiffs, to hear a statement from Mr Judd about what the Commissioner knew of X and why he considered that X's name should be withheld. The Tribunal considered that information and ruled in Mr Casinader's and the Os' presence that the hearing would be adjourned for the rest of the day and that it would then receive evidence from X in Mr Casinader's and the Plaintiffs' absence. The evidence was then received in the presence of Mr Gubb and Mr Stevens.

The Tribunal will not (cannot) in this decision disclose any information that might disclose X's identity - that will be for N to do in implementing our decision. It considers, however, that it should deal with Mr Judd's statement and aspects of X's evidence at this stage.

Mr Judd with complete honesty and candour made six propositions. Following evidence from X, the Tribunal concluded that two were incorrect and one other misleading. The Tribunal makes no criticism of Mr Judd whatsoever. Indeed, in some aspects the situation had changed since the Privacy Commissioner had formed his opinion. But the Tribunal concludes that in this jurisdiction, second-hand information derived from counsel's instructions is no substitute for direct evidence. Grounds for withholding information such as safety, the best interests of a child, and maintenance of the law require such careful assessment of what is said and the manner of saying it that the course taken here is one which should ordinarily be taken by the Tribunal.

The Tribunal also heard evidence from N, Mrs D (one of the trustees), Mr and Mrs O and Mrs G. By the end of 16 June 1995, the Tribunal had only heard X, N, Mrs D, and evidence-in-chief and cross-examination of Mr O. The remaining evidence was heard, with submissions, on 15 and 16 November 1995.

When the hearing began on 15 November 1995, Mr Gubb appeared to record his withdrawal from the proceedings. He also produced a letter from the Commissioner for Children which he had received that morning by facsimile. It seems that Mr Gubb had been speaking to him and he had decided to bring his interest and views to the Tribunal's attention. The question then arose of whether the Commissioner for Children should be given leave to intervene. The Tribunal decided to accept his letter as a submission, which he had requested as one way of dealing with the matter, but not to allow formal intervention with consequential delay to a proceeding which had already extended over too long a time by nobody's fault. His submission will be discussed at the relevant points of this decision.

Jurisdiction

There were no challenges to the Tribunal's jurisdiction. It was not part of the Tribunal's jurisdiction to consider what would be best for A's educational, family or social needs. The quality of Mr and Mrs O as people and parents loomed too large in the evidence and cross-examination. Its relevance was very limited, as the Tribunal pointed out, to assessing whether X's safety was likely to be endangered by disclosure, or whether disclosure would be contrary to A's interests. We will consider that evidence strictly in those contexts.

Credibility

The concentration on the personal and parenting qualities of Mr and Mrs O gave useful opportunities for the Tribunal to see the witnesses under pressure of making or repelling accusations. This enabled us to assess credibility more easily.

We regret we have to say that the only witness whose evidence we considered we could rely on completely was Mrs G, although there was only one aspect of Mrs O's evidence (on a discrete topic) which gave us pause. N's evidence gave us pause for a number of matters which cast doubt on N's ability to gauge the reliability of information provided or things observed. Mrs D cast doubt on her own evidence by checking it regularly by eye contact with her husband and her antipathy towards Mr O which surfaced regularly. X's evidence relied largely on assumptions drawn from partial information. Reservations we held during examination in chief of Mr O developed after devastating cross-examination to the stage where we could place little or no reliance on what he said.

Interference with Privacy

All the Os gave evidence of the effect that X's information in N's report had on their lives, particularly in making them suspicious of their acquaintances. Mr Stevens cross-examined each on why they could not ask acquaintances whether they had given the information. The Os rejected that for sound practical commonsense reasons. We find that there has been an interference with their privacy in terms of s.66.

Maintenance of the Law - s.27(1)(c)

Section 27(1)(c) provides that:

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

There was no suggestion that disclosure of X's name would fail to maintain the criminal law. The argument raised here was that s.27(1)(c) is not just concerned with the criminal law but with the law in general, including statute and common law. We do not find it necessary to reach a conclusion on that interesting proposition. If it were accepted, it would require a further question to be answered, namely, what law would withholding X's

name maintain? The answer to that question has the potential to extend s.27(1)(c) into an amorphous "*catch-all*" provision.

Mr Gubb and the Commissioner for Children pointed to provisions in Acts making the welfare of a child paramount, eg, Guardianship Act 1968 s.23 and Children, Young Persons and their Families Act 1989 s.6. This case does not involve any matter which would bring such provisions into play. The Privacy Act 1993 also contains its own analogous provision (s.29(1)(d)) which differs significantly from the paramouncy provisions. That paragraph will be considered in due course.

The Commissioner for Children also referred to the United Nations Convention on the Rights of the Child. Article 3 of that Convention provides:

> "*1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"

We note that this is less than the Guardianship and Children, Young Persons and their Families Acts provisions. It is not a paramouncy provision. We identify s.29(1)(d) as a provision which gives effect to the Convention. In the absence of submissions on the manner of interpreting s.29(1)(d), we have considered it first most favourably to establishing good reason - as if "*interests*" meant "*best interests*" in accordance with general principles of statutory interpretation of ambiguous provisions where New Zealand has relevant international obligations. Having concluded that, even interpreting it that way, there was still no proper basis on the facts to withhold X's name, we have not discussed whether it should in law be interpreted that way. We will leave consideration of the Commissioner's submission to the relevant point in this decision.

Both Mr Gubb and the Commissioner for Children relied on a "*wider public interest*" (the Commissioner's words) that psychologists making reports needed to have access to the best information available and people may be deterred from providing information if their identities could be disclosed.

Assuming that the arguments advanced by Mr Gubb and the Commissioner for Children summarised to this point were established, the Tribunal would have to find that disclosure of X's name would be likely to prejudice the maintenance of those laws and principles.

"*Likely*" as used in the identical provision in the Official Information Act 1982 s.6(c) was held by the Court of Appeal in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 to mean no more than a distinct or significant possibility, a serious or real or substantial risk that the prejudice might

eventuate. Assessment of risk was recognised as largely a matter of judgment, and if the Ombudsman were in two minds then he should come down on the side of disclosure.

For the Tribunal, an evidential onus of proof of good reason to withhold information is placed on the agency seeking to withhold it. This is because access to information is an entitlement under privacy principle 6. Once that is established, or conceded as here, then subject to there being loss, detriment, etc, under s.66(1)(b), there is an interference with privacy in terms of s.66 if the Tribunal is of the opinion that there is no proper basis for withholding the information sought, ie, no good reason to withhold it. But in the absence of evidence that there is a proper basis, a quasi-judicial tribunal with adversarial parties before it, such as this Tribunal, would necessarily be of the opinion that there was not.

The Tribunal rejects the argued wider public interest in this case. It does not follow from release of X's name in this instance that names of informants to psychologists will be disclosed as a matter of course. Whether there is good reason to withhold the name in any case will depend on the facts. In this, the first case of its type before the Tribunal, we will not venture to suggest guidelines or give any indication of what might happen in other cases. Inability to give an ironclad promise of non-disclosure would be likely, we suggest, to be beneficial.

If information is provided completely anonymously, we would have thought that a careful report writer would subject the information to separate testing. If it is established from other sources or material, then it can be relied on and that material cited. If it cannot be established, then there would generally be real doubt as to its reliability and it would not be relied upon. If the source is known, but does not wish his or her identity to be disclosed (as here), we would expect a careful report writer to consider why the informer was not prepared to be identified. That reason, along with existence or non-existence of independent verification, would be relevant to reliability.

Here N testified that what X said was also said by others who were interviewed. N was not, apparently, prepared in the report which summarised what each interviewee said, to attribute any of X's information to any other person. In evidence, N said that was because it was not a psychologist's job to stir-up trouble. We do not know who else said what X said, although N did offer to show the interview notes, but one reasonable conclusion is that no one was prepared to take the responsibility of attaching their names to the information. After hearing evidence from X we were not convinced of the reliability of the conclusions drawn by X and conveyed to N. This was reinforced after all the evidence had been given. The resulting situation rang alarm bells for the Tribunal and supported our view that disclosure tends to give greater credence to information.

We are of the opinion that there is no proper basis for this ground of refusal.

Safety of any Person - s.27(1)(d)

Section 27(1)(d) provides that:

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

This was the good reason most pressed at the hearing. It is one of the reasons where the standard is likelihood of the event happening. The primary person argued to be at risk was X, but as the argument developed, the reason of the interests of a child under 16 came to overlap. The suggestion was that if X's name were disclosed, then a source of protection to A may be cut off from him by the Os.

In evidence-in-chief, N said that X's name was not disclosed because she *"felt"* that that would put X and family at risk. The reasons given were that Mr O *"showed some features of an obsessive and persistent personality"*:

- *"a restricted ability to express warm or tender emotions"* shown by his not referring to A by name during interview and advising N that he had advertised his son for adoption through his Church.
- His insistence that others [A] submit to his way of doing things and his lack of awareness of the feelings elicited by his behaviour.
- *"He has an almost obsessive determination to rid himself of responsibility for his son ..."*
- A series of silent phone calls after release of the report.
- The Os' car being parked near N's home on two occasions, one with Mr O sitting in the car.
- Four incidents of which N was informed which in N's opinion demonstrated that Mr and Mrs O *"could indeed be very emotionally abusive."*

It was this evidence which led to our earlier observations about N's credibility in this case. We accept that N gave evidence truthfully.

The silent phone calls which N attributed to Mr or Mrs O could only be supposition. It was not evidence that they were the culprits. N's willingness to draw from them a conclusion that they were the culprits cast doubt, in our minds, on the soundness of other inferences N made in evidence, which we then examined in greater detail.

The car incidents were explained by Mrs O to our satisfaction in that their doctor had rooms at the end of the street, that often they had to park some way away, and that when Mr O was in town, he did not always come into the surgery but waited in the car. It is a good illustration of the wisdom of the principle of natural justice - to hear both sides before reaching a conclusion.

Again, Mrs O and Mrs G were able to put the four incidents referred to in the final bulletted paragraph into a context which at least made them equivocal and cast doubt on N's inference. In the absence of evidence from A, which no one suggested was appropriate, as well as from the Os with the accusations being put to all of them, we are not in a position (nor we think was N) to draw a conclusion either way.

One of the reasons given to support N's claim that Mr O had an obsessive determination to rid himself of responsibility for A (*"financial"*) was not true on the evidence before us. It may have resulted from N's letter of instructions from the trustees. Mr O's barrister's response to the trustees' enquiry about the level of payments sought from the trust was ambiguous, and the trustees' instructions to N were that they *"presumed"* that all costs were sought. There is nothing in N's evidence that that proposition came from any other source. Having heard from Mr and Mrs O and Mrs G, we consider that N's conclusion of an obsessive determination to rid himself of responsibility was an exaggerated one.

So, on the evidence before us, N's conclusion in examination in chief that X was at risk from disclosure lacked adequate support. We will consider A's risk/interests later.

Again, N appeared to take what A said as gospel truth. Yet on N's behalf there was put before the Tribunal another psychologist's second report (the first report - favourable to Mr O - was not proffered and waited until cross-examination of Mrs D to come before the Tribunal) where A was said to have said what he did on the occasion of that psychologist's first interview because Mr O forced him to say that. Mr O denied this, and we have no need to consider the truth of it or otherwise. The point is that on one or other of those occasions, A seems to have been able to say things that were not his own and be believed. It might be that greater scepticism by N would have been in order.

Finally, in answer to the question of one Tribunal member, N replied that the weight given to X's information was not increased by the fact that N knew X's name. We refer to our earlier discussion of anonymous information.

The Tribunal was not prepared to give substantial weight to N's evidence on safety of X and looked for corroboration in other evidence.

Mrs D, a trustee and apparently a close friend of A's mother, gave evidence. Although the hearing was closed, we permitted Mr D to be present as he was another trustee. We have already noted the way Mrs D checked her answers by eye contact with her husband.

Mrs D's brief of evidence was too full of generalities, of hearsay including that of people who could have been expected to be witnesses such as the Fs, and of suppositions. The Tribunal concluded that her evidence on the safety issue was exaggerated, and found it difficult to rely on her reasons in support of her statement that:

> *"Based on my dealings with Mr O over the past 4 years, I believe that he holds grudges and retains bitterness over bygone events and for this reason I believe if he knew of the witness's identity or of the witness's family, that they would be harassed."*

She testified that:

> *"[Mr O] would constantly harass his wife ... after their separation by deliberately ringing her at work at a time when he knew that she would be busy, and would start arguments with her causing her great distress knowing full well that she had a heart problem. She would ring me crying after these calls."*

and Mr Judd relied on this passage in his submissions. The antipathy of Mrs D towards Mr O and the extreme general nature of what she said (*"constantly"*, *"deliberately ... at a time when he knew"*, *"would start arguments"*) all without specifics, limited the value of this evidence. In relation to this and some other evidence noted in this decision, Mr Judd drew attention to the fact that it was unchallenged. We consider that there is nothing in the suggestion that the failure of a second year law student (who obviously and understandably had no experience of or technique in cross-examination) to cross-examine on the point gave strength to that evidence.

There was one passage in Mrs D's evidence which is separate from the parts subjected to comment in the preceding paragraph. That was when a member of the Tribunal was asking about an occasion when the Ds had A for a weekend which became extended for some (unresolved) time. Mrs D explained what happened when A was about to be returned to his father after the initial weekend:

> *"... I had a terrible performance with him because he just, he cried and he sobbed and he hung on to me and he wouldn't let me go and he just would not let me take him home and I promised him I wouldn't take him home. He*

was frightened because he was being put into [Z] where he didn't want to go into another institution. He was frightened of how his father was going to handle him. He was a really worried frightened little boy and he's been through an awful lot in the last ten years of his life and I did not, I was not going to let him go, and I'm sorry if I did something wrong, but I'm afraid I feel too much for the boy and I was determined to hang onto him until he was in a safe place."

This was the most helpful passage on safety in her evidence, but like so much it was lacking in specifics which would have given it real cogency. We accept the physical events stated and Mrs D's views, but the overlay of being frightened was too insubstantial and unspecific to advance matters on whether X would be likely to be subject to actions to bring s.27(1)(d) into play.

The most important evidence on the question of X's safety was from X personally. X spoke of a number of incidents heard from another about A when at home with the Os and then said how it came about that information had been given to N. The name of the Ds as trustees had come up. X contacted Mrs D who said that X's information was no use without X's name and suggested X contact N. "Mrs D asked me to do her a favour and to get in touch with N". Mrs D told X how to do that. X may have contacted the third trustee before speaking to Mrs D, and certainly contacted the third trustee at some stage. X sought confidentiality because of *"fear of the backlash"* and for certain other reasons. X said that X would not give the information again because of worry over being embroiled in this proceeding. What was said, was said in good faith. A could not *"stick up for himself"*. X told the Tribunal about past and current contacts with the Os. When asked if X was still concerned, the answer was *"Yes, intimidation, backlash, threats. If I saw an old person being bashed in the street, I wouldn't do anything. I wouldn't be a witness."* When asked why X was concerned about a backlash, X replied that *"If they treat a little boy that way, what are they capable of doing to others?"* In answer to Mr Gubb in re-examination, X said that if Mr O knew the identity he would be angry and surprised, and that X would not believe any undertaking given by the Os not to take steps against X. It was verbal intimidation which was feared, with possible health consequences.

While the standard of proof is likelihood as defined by the Court of Appeal in 1987, the allegation that Mr O was likely to threaten X's safety is such a serious one that it would need to be established with greater cogency than a ground which did not impute such anti-social conduct - see Hornal v Neuberger Products Ltd [1957] 1 QB 247 and cf W V Middleditch and Son Ltd v Hinds [1963] NZLR 570. We have come to the conclusion, having heard and seen the relevant witnesses that the evidence of likelihood lacks the cogency to find that s.27(1)(d) applies.

Before leaving this ground the Tribunal notes Mr Judd's and Mr Gubb's submissions that *"safety"* includes *"mental safety"*. Section 27(1)(d) is taken from s.6(d) of the Official Information Act 1982 as amended in 1987. That amendment also removed s.27(1)(f)(ii) which was in the same terms as the new s.6(d) from a provision dealing with requests from convicted criminals to a general provision. At the same time there existed s.9(2)(c) (*"avoid prejudice to measures protecting the health or safety of members of the public"*).

Mr Judd referred to the definition of safety in the Shorter Oxford English Dictionary as the state of being protected or guarded against hurt or injury. He submitted that the expression had something in common with the definition of mental disorder in the Mental Health (Compulsory Assessment and Treatment) Act 1992. He argued that had physical safety only been covered the provision would simply have said *"endanger any individual"*.

We are not persuaded by Mr Judd. It can equally be said that if health were intended to be covered the provision would have read *"endanger the health or safety"* - cp Official Information Act 1982 s.9(2)(c). More importantly, we take the view that in ordinary usage *"safety"* bears the connotation of physical safety. That is the inference which also arises from the legislative history of the provision. Thus, the original s.27(1)(f)(ii) was limited to convicted criminals not those charged, harassment of witnesses to dissuade them from testifying was not apparently an objective.

We are of the opinion that there is no proper basis for this ground to exist.

Unwarranted Disclosure of the Affairs of Another - s.29(1)(a)

Section 29(1)(a) provides that:

> *"(1) An agency may refuse to disclose any information requested pursuant to principle 6 if -*
>
> *(a) The disclosure of the information would involve the unwarranted disclosure of the affairs of another individual ..."*

The Tribunal sees s.29(1)(a) as the primary regulator of mixed information, ie, information about two or more individuals. It means that an agency cannot delete information about a person other than the requester automatically. If the information is *"about"* the requester, and that is a very wide net, then it can be withheld only if it would be an *"unwarrantable"* disclosure of the *"affairs"* of some other person of whom the information is also about. We disagree with Mr Judd's submission that information about somebody else is generally not personal information about the requester. By definition the information is readily retrievable by reference to the requester and to be so it would be about the requester (ie, is personal information as defined) unless it has been miscollated or misfiled.

In terms of general approach to s.29(1)(a) we accept the passages from the Compendia of Ombudsmen's case notes cited by both Mr Judd and Mr Casinader - volume 10(2) general comment on the equivalent Official Information Act section (p 105) cited by Mr Judd

> *"... the holder must balance the requester's right of access to personal information about himself or herself against the other person's interest in protecting his or her privacy. ... because [s 29(1)(a)] applies to personal information about the requester, and the Act provides a legal right [here, entitlement] to such information, the grounds for invoking [s 29(1)(a)] must be strong."*

and volume 9 p 185 case note A018 cited by Mr Casinader

> *"Where the requested information relates to, or is about, more than one person, each person has a personal interest in the question whether it is disclosed or not disclosed. Accordingly the 'test' that I formulated in this case was whether the other person's privacy-based interest in controlling the flow of information about their affairs is, seen objectively, so great that it outweighs the requester's privacy-based interest in obtaining the information."*

Although there are variances between the two passages, they form a generally consistent approach which we have followed.

The two key words in s.29(1)(a) are *"affairs"* and *"unwarranted"*. Both Mr Judd and Mr Casinader agreed on the dictionary definition of *"affairs"*: ordinary pursuits of life, business dealings, public matters.

Mr Judd submitted that to disclose X's name was to link her to N and that, as distinct from the name as such, would disclose X's *"affairs"*. In oral argument, Mr Judd gave a series of examples where the proposition *"that is his or her affair"* would be apt. He submitted that a single action could come within *"affairs"*. He said that *"affairs"* was not a plural but a collective noun.

In contrast, Mr Casinader submitted that a course of conduct was looked to, and he cited the plural character of the dictionary definitions. He said that if a single action was within the paragraph then the Parliament would have used the word *"information"*.

We accept that *"affairs"* can in some cases apply to a single action. The question is whether, on the facts, there is a strong enough link with a course of conduct which is the essence of the dictionary definition and what we find to be common usage. The proposition *"That is my affair"* is an assertion of a privacy interest, but the Act does not say *"disclosure of a private affair"* or *"invasion of privacy"*, but *"disclosure of the affairs"*. We refer back to the

passages quoted from the Ombudsmen's Compendia. The s.29(1)(a) interest is assuredly privacy-based and must outweigh the requester's interest, but the Tribunal can only work from the words of the Act.

Both took the view that embarrassment about disclosure would not be a proper basis to withhold X's name. We agree, and see the concept of *"unwarranted"* as guiding the balancing of the two privacy-based interests. Here there was no evidence whether X's action was atypical or whether X regularly passed on information acquired to other people. The narrative of how X came to give the information is perhaps more suggestive of an uncommon event. In the particular circumstances of this case we find that it falls more into Mr Casinader's *"information"* category than Mr Judd's *"affairs"* as a collective noun. We do not find a sufficient link to the dictionary definition of affairs.

Be that as it may, our observation of X and the evidence X gave is that it is in fact embarrassment and inconvenient consequences of having contacted N which are at the root of X's objection to disclosure.

On balance, it is our opinion that disclosure would not be unwarranted and there is no proper basis for this ground of refusal.

<u>Contrary to the Interests of Child Under 16 - s.29(1)(d)</u>

Section 29(1)(d) provides that:

> *"(1) An agency may refuse to disclose any information requested pursuant to principle 6 if -*
>
> ...
>
> *(d) In the case of an individual under the age of 16, the disclosure of that information would be contrary to that individual's interests;"*

There were two arguments here. The first was that Mr O would take out on A his anger at X. All there was to support this was the last passage from Mrs D's evidence quoted earlier. We found no cogent evidence that this would be likely to occur.

The other argument was that disclosure of X's name may result in A being cut off by the Os from a source of his protection. The standard of proof is *"would"*, which we take to be the balance of probabilities. On all the evidence before us we find, as a matter of fact, that this would not occur.

Accordingly, we do not find that there is a proper basis for this ground of refusal even if para (d) is read as *"best interests"* of A.

Legal Professional Privilege - s.29()(f)

Section 29(1)(f) provides that:

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

Only Mr Gubb relied on this ground. Mr Judd said he could not understand how it could apply.

Mr Gubb raised it after the first day of the hearing and before the second. He tendered a memorandum dated 12 June 1995 saying that he had spoken to the third trustee who told him that N's report was sought in the course of legal proceedings brought by Mr O for an order that the trustees contribute to A's boarding school fees. The evidence before the Tribunal was inconsistent with that proposition and there was no evidence that such proceedings were contemplated at the time.

We are of the opinion that there is no proper basis for this ground of refusal to apply.

Frivolous, Vexatious or Trivial - s.29(1)(j)

Section 29(1)(j) provides that:

> *"(1) An agency may refuse to disclose any information requested pursuant to principle 6 if -*
>
> *...*
>
> *(j) The request is frivolous or vexatious, or the information requested is trivial."*

Mr Judd relied on the *"vexatious"* aspect of this ground. He tendered the dictionary definition of *"vexatious"* as causing or tending to cause vexation, annoyance or distress. In a legal context he identified the further element of there being insufficient grounds for a proceeding to succeed. He submitted that in the Privacy Act it should bear the wider meaning. We disagree. Principle 6 provides an *"entitlement"* to the information. If the information is neither frivolous nor trivial, then the fact that seeking it will or may cause annoyance, vexation or distress would not, we think justify refusal. Rather

an indirect motive is, we consider, needed. One example would be pointed to by an absence of prospects of success.

Mr Judd submitted that it was never likely that N would identify X, and we accept that, but the fact that a person may have to press farther up the hierarchy to succeed cannot make starting at the bottom vexatious if that is where the person has to start.

Again we are of the opinion that there is no proper basis for this ground of refusal.

Review of an Agency's Discretion

This point arose in relation to the expression *"may refuse"* in ss.27 and 29. Under the Official Information Act 1982 the Ombudsmen can review the decision to refuse where a ground of refusal has been made out. Accepting that establishment of a ground of refusal under s.27 or s.29 does not require an agency to refuse, the question arises whether the Tribunal could review a refusal and say, as the Ombudsmen do, that that was unreasonable, and grant a remedy.

In a cogent and sustained argument, Mr Judd took the Tribunal through the Act and submitted that the Tribunal has no such power of review. There was no need to determine the point in this case, since in our opinion there was no proper ground of refusal. The point is a highly important one and we would prefer to leave it to a case where it is fully argued on both sides and has to be resolved. We do comment, however, that we found Mr Judd's argument persuasive.

Remedies

The Os seek a declaration that the action of the defendant [scil. withholding X's name] is an interference with the privacy of the plaintiffs. We make that declaration.

The Os seek an order that N *"make known to the plaintiffs [named] the identity of witness* X [the report used 'A' but we have substituted 'X' because there is already an 'A']". We make that order.

The Os seek an order that N 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. We are not prepared to make that order. The events took place just after the Privacy Act 1993 came into force when it could not be expected that N would be familiar with the requirements of that Act. N acted in good faith and reached the conclusions which seemed best at the time. N was not party to

the instigation of X's seeking to give information. Had N known that X came at Mrs D's instigation, N might possibly have been less trusting of what was said.

The Os seek an order that N delete the section in the report dealing with what X said and amend the final paragraph of conclusions. N has already offered to do the former and we make that order. Without the section on X, the third and fourth sentences of the last paragraph of the report cannot stand and should be deleted. We make that order. Given N's evidence that others said the same thing, it might be possible to rewrite the report attributing those matters and maintaining the final paragraph. We would not encourage that. The events are rapidly aging and no useful purpose would be served by raking over the coals.

The Os seek damages. For the same reasons that we refused the apology and the expense that N has already been put to in defending this proceeding over three days before Mr Gubb withdrew, we take the view that this is not an appropriate case for damages.

Costs

The Os have succeeded and costs normally follow the event. Here they have been represented most capably by a law student relative and so costs are limited to the Os' expenses - see, most recently, Official Assignee v Cavell Leitch Pringle and Boyle (High Court, Christchurch CP 131/88 and B 28/91, 18 August 1995, Blanchard J). A large part of these would be Mr Casinader's air fares from Wellington. We consider that it was appropriate for the Os to ask him to appear (their claim for costs would have been many times higher had they used an Auckland barrister or solicitor).

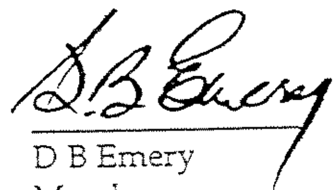
N has acted in good faith at a very early stage in the history of the Act and has incurred substantial legal fees in the case. We are reluctant to add to N's costs, but the Os and Mr Casinader should not be left out of pocket. We suggest that Mr Casinader, Mr Gubb and Mr Stevens consult on how the Os' expenses should be paid. We will receive memoranda if necessary.

The authorship of Dr G D S Taylor in the writing of this decision, which was unanimous, is acknowledged.

DATED at WELLINGTON this 12th day of March 1996

D J Orchard
Chairperson

G D S Taylor
Member


D B Emery
Member