

Decision No. 14/97

Reference No. CRT 18/96

IN THE MATTER of the Privacy Act 1993

BETWEEN

JUNE MARION
WESTWOOD

Plaintiff

AND

THE UNIVERSITY OF
AUCKLAND

Defendant

BEFORE THE COMPLAINTS REVIEW TRIBUNAL

S C Bathgate - Chairperson

M A Smith - Member

D B Emery - Member

HEARING at AUCKLAND on the 20th day of March 1997

APPEARANCES

G P Barton QC and P McCoskrie for Plaintiff

D J Neutze for Defendant

S Pilgrim for Privacy Commissioner

DECISION

The plaintiff in these proceedings has alleged that the defendant committed a breach of information privacy principle 6(1)(b) of s. 6 Privacy Act 1993 in that the defendant has refused her access to four reports by the supervisors of her PhD thesis. She seeks a declaration of breach and an order directing the defendant to give her access to those reports.

The defendant has claimed the protection of s. 29(1)(b) of the Act as the reason for the refusal of the plaintiff's request, in that the reports are evaluative material which were supplied pursuant to a promise of confidentiality.

This matter has been the subject of an investigation and decision by the Privacy Commissioner so that, pursuant to s. 83(a) Privacy Act 1993, we are satisfied that we have the jurisdiction to hear and determine these proceedings.

BACKGROUND

In 1987 the plaintiff completed a Master of Arts (Honours) Degree at the defendant University in languages and literature and in 1988 she began the preparation for a PhD thesis. Her supervisor, at that time, was a member of staff of the Maori Studies Department. She carried out the research for the thesis in 1989, 1990 and 1991. The supervisor had a one year leave of absence in 1991 and when he returned the plaintiff submitted her thesis in February 1992.

The practice with theses of this kind is that they are forwarded to an Oral Examiner and an External Examiner, neither of whom can be the supervisor, for reports preliminary to an oral examination. The oral examination is conducted by these two examiners and the supervisor who, for these purposes, is known as the Supervising Examiner. By April 1992 only one report was available. In June 1992 the supervisor became suddenly seriously ill and was unable to continue to act as supervisor. In July 1992 the plaintiff sought the advice of the Head of the Department who advised that he would take on this role as there was no one else in the Department able to do so.

On 1 December 1992 the oral examination was held. On 9 February 1993 the plaintiff was advised that the thesis had not been accepted. She was invited to re-submit it by 1 August 1994. She also received a copy of comments by the examiners to assist with the revision of the thesis.

On 7 April 1993 the plaintiff was advised that her supervisor was retiring. It confirmed the appointment of his successor as Head of Department as her new supervisor.

On 24 August 1993 she presented the revised thesis in draft form to the new supervisor. She was directed by him by letter dated 27 August 1993 to submit it to the Academic Registry for forwarding to the examiners.

On 24 March 1994 she was advised that the Deans Committee of the Senate had *resolved that the degree of Doctor of Philosophy be not awarded.* The plaintiff then sought approval for the thesis to be re-submitted, the appointment of a new supervisor and examiners and copies of the examiners reports and all correspondence in respect of this thesis. These requests were rejected and the following response provided with respect to the request for the examiners reports:

"...the reports were given by the examiners on a confidential basis and, consistent with S29(i)(b) and S29(3) of the Privacy Act, are not able to be released. These particular provisions and their application to examiners' reports on a thesis parallel previous legislation in the 'personal information' provisions of the Official Information Act and have been reviewed by the Ombudsman who has determined that the University is not required to release individual examiner's reports subject to a confidentiality requirement."

Following the receipt of the other material sought the plaintiff accepted that the reports of the external examiners would not be made available and requested instead four specific documents:

- an internal memorandum dated 28 September 1992 from her supervisor to the Academic Registrar
- a report on the oral examination from the supervisor requested in a memorandum to him from the Academic Registrar dated 1 October 1992
- the supervisor's report referred to as received in a memorandum to him from the Academic Registrar dated 15 December 1993
- the supervisor's final recommendation referred to a memorandum to him dated 9 February 1994

This request was refused pursuant to s. 29(1)(b) Privacy Act 1993. These are the documents to which the plaintiff seeks access.

THE LAW

Information Privacy Principle 6 provides:

1. Where an agency holds personal information in such a way that it can be readily retrieved, the individual concerned shall be entitled -
 - (a) To obtain from the agency confirmation of whether or not the agency holds such personal information
 - (b) To have access to that information
2. Where, in accordance with subclause (1)(b) of this principle, an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
3. The application of this principle is subject to the provisions of Parts IV and V of this Act.

The relevant parts of section 29 Privacy Act 1993 are:

1. An agency may refuse to disclose any information requested pursuant to principle 6 if -
 - (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; or
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 qualification of the individual to whom the material relates-
 - (i) For employment or for appointment to office; or
 - (ii) For promotion in employment or office or for continuance in employment or office; or
 - (iii) For removal from employment or office; or
 - (iv) For the awarding of contracts, awards, scholarships, honours, or other benefits; or
 - (b) For the purpose of determining whether any contract, award, scholarship, honour, or benefit should be continued, modified, or cancelled; or
 - (c) For the purpose of deciding whether to insure any individual or property or to continue or renew the insurance of any individual or property.

THE HEARING

The plaintiff gave evidence. The substance of it has been outlined above as the background to this proceeding.

It was submitted, for the plaintiff, that the material which she seeks was supplied to the defendant by its own employees and for that reason comes within the meaning of section 3 of the Act (information held by an employee in their capacity as an employee is deemed to be held by the agency from whom the information is sought) because it originated in the University and was nothing more than documents of communication between employees of the defendant who were "*appointed to fulfil their respective roles by reason of their status as teachers of the University*".

It was also submitted that in respect of the first two documents of the list above there was no promise of confidentiality made to the supervisor. For that reason the provisions of s. 29(1)(b) of the Act cannot apply.

In respect of the other two documents it was conceded that an express promise of confidentiality was made but that it was made at the behest of the University and not the supervisor: "*...this is, indeed, a case where the University has, by unilateral action, attempted to create a blanket exemption for evaluative material by simply promising in advance to withhold all evaluative material in all situations involving all examinations including PhD examinations.*"

Four witnesses gave evidence for the defendant: the two supervisors whose reports are the subject of these proceedings, the Deputy Vice Chancellor who was a member of the Deans Committee at the relevant times and the Assistant Registrar.

The supervisors gave evidence of their expectations of confidentiality at the time they prepared the documents now sought.

The Deputy Vice Chancellor gave evidence about the examination process (for PhD students) and the need for "*the reports made by the oral examiners, both internal and external [to] be kept confidential to facilitate the free and frank discussion of potential issues between examiners*". He confirmed the decisions of the Deans Committee outlined above and the reports which have been kept confidential (nine altogether). He also indicated that it was his view of those reports that the views of the examiners have been adequately communicated to the plaintiff by the statements of reasons (representing the collective views of the examiners) which have been provided to her.

The Assistant to the Registrar confirmed the approach of the Ombudsman to the issues raised by this proceeding, that internal examiners reports were evaluative material supplied to the University and did not need to be disclosed. He confirmed the arrangement for a statement of reasons (being the collective views of the examiners) which was prepared and provided to the plaintiff in July 1995.

For the defendant it was submitted that there was a supply of the reports at issue by the supervisors to the University because:

- their reports were written in their role as supervising examiners and this is a voluntary role and not part of their normal employment duties
- s. 29 is not concerned with the relationship between supplier and recipient but only with the nature of the information supplied.
- s. 29 does not differentiate between classes of supplier so there is no reason to treat differently the same type of information depending upon whether it was supplied by an employee or a third person.
- s. 3 is designed to prevent agencies from avoiding disclosure by saying information is held by its employees but here the reports are held by the agency and not the examiners.
- All reports by examiners should be treated in the same way, regardless of whether the examiners are employees of the University or not.

It was also submitted that the practice of treating examiners reports as confidential was the subject of scrutiny by the Ombudsman in 1992. He found that there was an express or implied promise of confidentiality to examiners in the 1991 instructions to examiners and assessors. He also determined that the internal examiner's report was supplied to the University because of the particular capacity in which the employee was acting, as a specialist.

FINDINGS

Our task is to determine whether the defendant had a proper basis for the decision to withhold personal information from the plaintiff. If we find that it did not have a proper basis for so withholding then, pursuant to s. 66(2) of the Act, we are required to find that an interference with the privacy of the plaintiff has been established, which in turn, pursuant to s. 85, gives us the power to determine whether any of the remedies which the plaintiff has sought should be granted.

We asked for and read the reports which are the subject of this proceeding. We are satisfied that they are reports written by the supervisors in their roles as supervising examiners and that the reports were compiled for the purpose of determining the suitability of the plaintiff for the award of the PhD degree. In terms of s. 29(3) we are satisfied, therefore, that the information sought is evaluative material.

The issues which remain, therefore, are whether these reports were supplied to the defendant and whether they were supplied pursuant to a promise of confidentiality.

Supply

This issue arises as the result of the submission that information which is generated by the employees of an agency for the agency cannot be said to be supplied to the agency. This argument is based on a somewhat wider interpretation of s. 3 of the Act than, in our view, the provision deserves. It is simply a deeming provision. It deems information held by an employee, in their capacity as an employee, to be held by the agency. In this case the information is held (and acknowledged as such) by the agency. It seems to us that reference to this provision would be required if the defendant said

that it was unable to provide access to the information because it was held by the supervisors. But that is not the argument. We do not accept that the provision operates in the way contended for by the plaintiff - that it means that any material generated internally by an agency can never be supplied to that agency.

We accept, furthermore, the submissions of the defendant in respect of s. 29 of the Act - that it is concerned with the nature of the information sought and not with either the relationship between the supplier and the recipient or the distinction between different classes of supplier.

For these reasons we are unable to accept the proposition that it is a condition of the word supply in s. 29 that material supplied must be by a person outside the agency to whom it is supplied. It follows that we accept the possibility that the supervisors, in their roles as supervising examiners, may have been able to supply the defendant with reports of the kind covered by s. 29.

On this issue of supply we think also there is some merit in the argument that it is the capacity in which the employee is acting (to borrow that phrase from the Ombudsman) that may determine the issue of supply. If the supervisors are regarded as specialists providing specialist advice to the University rather like the solicitor providing advice to the client (which it is then the client's privilege to have protected) then it is clear how the relationship of supply is established. The plaintiff argued that this analogy meant that the privilege was the candidate's to invoke. We disagree. We think it is the University's 'privilege'.

Of no small importance, furthermore, is the desirability of ensuring a certain equality of treatment of material supplied by persons who are in a similar role to each other. We think it undesirable to treat the reports of external examiners differently from those of internal examiners, particularly with respect to the same candidate. To do so may well be to reveal that which it was promised would be kept confidential. For instance, if there were two internal examiners and one external examiner and the reports of the external examiner were confidential but the reports of the others were not then any summary of joint reasons would reveal who held which views on the basis of the availability of the internal reports.

Confidentiality

Two issues have been raised under this head. The first concerns the absence of any evidence of an express promise of confidentiality in respect of the first two reports sought and the second concerns the blanket nature of the promise of confidentiality and the fact that it was offered by the University as distinct from sought by the examiners.

The promise of confidentiality in s. 29(1)(b) may be either express or implied. We think there is sufficient in the evidence of the practice of the defendant in respect to examiners reports and the prior acceptance by the Ombudsman that this practice was sufficient to establish the existence of promises of confidentiality in circumstances such as this to imply that promise in respect of the first two reports sought. Furthermore the supervisor claiming the existence of the promise was the Head of Department and

had been employed for a sufficient length of time by the defendant to be clearly familiar with this practice, so that notwithstanding the absence of an express promise of confidentiality we find that he provided his reports on the basis of an implied promise.

The other requirements of the promise are that it is made to the person supplying the information and it is to the effect that the material supplied will be held in confidence. The Ombudsman, in his opinion to the defendant in 1992, had the following to say about the same requirements in s. 27 Official Information Act 1982:

"In cases where it is established that an express or implied promise of confidentiality was in fact operative at the time the information was supplied, it does not always automatically follow that disclosure of the information would 'breach' such a promise. It is therefore not sufficient to simply establish that there was a promise of confidentiality. The Act requires that disclosure would 'breach' such a promise before section 27(1)(c) applies. This distinction is important and reflects the evidence purpose of section 27(1)(c) (consistent with the overall scheme of the Act and the creation in Part IV of the legal right of access by individuals to personal information about themselves) to only protect evaluative material which would not be supplied to the organisation but for a promise of confidentiality. Otherwise Departments and organisations could unilaterally create an effective blanket exemption for evaluative material by simply expressly promising in advance to withhold all evaluative material in all situations. This would clearly be inconsistent with the spirit and overall purposes of the Act.

There have been a number of cases under the Act where, following consultation with the supplier of the evaluative material, it has been discovered that the supplier in fact has no objection to disclosure of the information or his or her identity or both. In such cases my colleague and I have found it difficult to accept that such disclosure would 'breach' the promise of confidentiality given to the supplier at the time the evaluative material was sought. In short, if the supplier has no objection to disclosure there is no basis to argue that disclosure would prejudice future supply of evaluative material as might be expected if information was disclosed against the clear wishes of the supplier."

We think it appropriate to adopt that reasoning here. The supervisors have given evidence that they did rely on the promise of confidentiality when they supplied their reports. For that reason we find the requirements of the provision of the promise are satisfied. It follows that we do not accept that an individual relying upon promises such as these must, themselves, seek the promise. That is not what s. 29(1)(b) requires. But if promises of confidentiality are provided in the manner adopted by this defendant then those to whom they were given must still be asked, when a request for relevant information is made, whether they relied upon them when material was being supplied.

Accordingly we are satisfied that the defendant did have a proper basis for withholding the reports of the supervisors in their roles as supervising examiners and that this proceeding should be dismissed.

It was clear, however, during the course of the hearing that what the plaintiff really wanted was some information that we think the defendant should provide, if it is to regard itself as properly accountable to her in respect of the fees she paid during the course of the preparation of her thesis. It is personal information and it appears not to be in written form. (We have recently held that information acquired by an employee of an agency in the course of their employment which is held in their memory is in certain circumstances personal information which is readily retrievable. We think the information which the plaintiff wants is sufficiently specific and particular so as to be


readily retrievable) It is information which the two supervisors (whose reports as examiners were the subject of these proceedings) acquired and hold in their capacity as supervisors (and not necessarily as supervising examiners) of the plaintiff. It was the advice that we understand supervisors are expected to provide and to which the plaintiff was entitled before the thesis was examined and assessed. It is clear, from the evidence, that she did not receive this advice and it is equally clear that she still wants it.

The Deputy Vice Chancellor, in reply to a question from the Tribunal, accepted that it may well be possible to provide this information. We note also that in one of his letters to her one of the supervisors expressed a desire to be as helpful, in terms of the information she required, as he could.

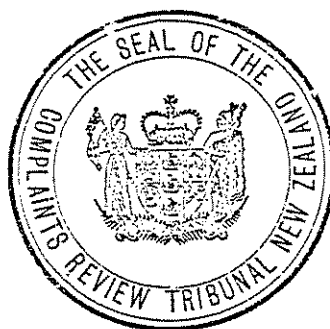
For these reasons we believe that with some goodwill it may well be possible for the defendant to solve the problem raised by these proceedings, notwithstanding our findings above. We would have thought that the facilitation of a meeting by the defendant of all concerned may well yield the information which the plaintiff actually requires.

Proceeding Dismissed

DATED at Wellington this *30th* day of *April* 1997


 S C Bathgate
 Chairperson

"D. B. EMERY"
 D B Emery
 Member



"M. A. SMITH"
 M A Smith
 Member