

---

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**I TE KŌTI MĀTUA O AOTEAROA  
TE WHANGANUI-Ā-TARA ROHE**

**CIV-2021-485-553**

---

**BETWEEN**

**TE POU MATAKANA LTD, TRADING AS  
WHĀNAU ORA COMMISSIONING AGENCY**

**FIRST APPLICANT**

**BETWEEN**

**WHĀNAU TAHI LTD**

**SECOND APPLICANT**

**AND**

**ATTORNEY-GENERAL**

**RESPONDENT**

---

**MEMORANDUM / APPLICATION BY THE PRIVACY COMMISSIONER SEEKING  
LEAVE TO INTERVENE**

**19 October 2021**

---

Judicial officer assigned: Mallon J  
Next event date: Hearing, 22 October

**John Edwards / Amy de Joux**  
**Privacy Commissioner**  
**Te Mana Mātāpono Matatapu**  
PO Box 10 094  
Wellington 6143  
(04) 494 7080  
Amy.deJoux@privacy.org.nz

**Ben Keith**  
Thorndon Chambers  
PO Box 1530  
Wellington 6140  
(04) 460 0744  
ben.keith@chambers.co.nz

## MAY IT PLEASE THE COURT

1. The Privacy Commissioner seeks leave to intervene in this proceeding under s 14(2)(m) of the Judicial Review Procedure Act 2016<sup>1</sup> on the grounds that:

1.1 The proceeding raises a number of novel and difficult issues of wider consequence concerning the circumstances and conditions under which personal information may be disclosed which, though not limited to questions under the Privacy Act 2020, do include:

1.1.1 The workable application of the provision for disclosure in r 11(2)(d) of the Health Information Privacy Code, under which individuals' health information may be disclosed without their authorisation if it is both not desirable or practical to obtain authorisation and disclosure is necessary to prevent or lessen a threat to those individuals, others and/or the public;<sup>2</sup> and

1.1.2 The wider question of how requests for disclosure under the Privacy Act 2020 fall to be progressed and decided, especially when requested on an urgent basis,<sup>3</sup> in a way that is transparent, robust and conducive to maintaining confidence of affected individuals and the public as a whole.

1.2 The criteria for intervention were usefully summarised in *Ngāti Whātua Orakei*:<sup>4</sup>

“(a) The power [to grant leave] is broad in nature but should be exercised with restraint to avoid the risk of expanding issues, elongation of hearings and increasing the costs of litigation.

(b) In an appeal involving issues of general and wide importance the court may grant leave when satisfied that it would be assisted by submissions from the intervener.

(c) The fact that the case raises issues of principles transcending the particular facts is not in itself sufficient to extend rights of hearing beyond the parties.

(d) The Court will take into account the relevant expertise or the unique position of an intended intervener as well as the impact of the intervention on appeal.”

---

<sup>1</sup> There is no express rule dealing with intervention: see, for example, *Seales v Attorney-General* [2015] NZHC 828, [41]ff.

<sup>2</sup> Statement of claim, [48]ff.

<sup>3</sup> Statement of claim, [45.2] and [59].

<sup>4</sup> *Ngāti Whātua Orakei Trust v Attorney General* [2017] NZAR 627; [2017] NZCA 183, [11] (citations omitted); applied *Borrowdale v Director-General of Health* [2021] NZCA 33, [2].

- 1.3 Here, the Commissioner, as the independent statutory officer with carriage of the Privacy Act 2020, has a particular and distinct interest in, and responsibility for, these questions both as they bear on the instant case and more widely in the day-to-day administration of the Act:
- 1.3.1 The disclosure provision in issue has not been previously considered by the New Zealand courts, but has been addressed by the Commissioner in the September 2020 *Inquiry into Ministry of Health Disclosure of Covid-19 Patient Information* and a consequent general public guidance statement;<sup>5</sup> and
- 1.3.2 The Commissioner has previously and constructively intervened in proceedings involving decision-making under the Privacy Act, including in respect of the provision for urgency in *Dotcom v Attorney-General* [2020] NZCA 551 and also, and as here, in other proceedings, notably, *R v Alsford* [2017] 1 NZLR 710; [2017] NZSC 42.
2. The Commissioner has advised the parties through counsel of his intention to seek leave to intervene. The Commissioner proposes that, as is conventional:
- 2.1 The Commissioner would file written submissions: noting the urgency of the proceedings, timetable directions already made and the long weekend, written submissions would be filed as soon as possible after receipt of the respondent's submissions, either later on Friday 22<sup>nd</sup> or on Saturday 23<sup>rd</sup>;
- 2.2 Counsel for the Commissioner would make oral submissions only so far as the Court considers to be of assistance; and
- 2.3 The Commissioner would neither seek nor be liable for costs.



B Keith  
Counsel for the Commissioner as applicant for leave

---

<sup>5</sup> Accessible <https://www.privacy.org.nz/assets/DOCUMENTS/Inquiry-into-Ministry-of-Health-Disclosure-of-Covid-19-Patient-Information.pdf> and <https://www.privacy.org.nz/blog/privacy-covid-19-and-the-serious-threat-to-public-health-exception/>.