Decision No. 22/07

Reference No. **HRRT 34/05**

BETWEEN **THE DIRECTOR OF HUMAN RIGHTS PROCEEDINGS**

Plaintiff

AND **THE COMMISSIONER OF POLICE**

Defendant

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

Mr R D C Hindle	Chairperson
Mr S Perese	Member
Dr I Vodanovich	Member

HEARING: 19 July 2006 ([location deleted]) and 27 August 2007 ([location deleted])

APPEARANCES:

Mr R M Hesketh, Director of Human Rights Proceedings, plaintiff
Ms C A Richardson for defendant
Ms K Evans for the Privacy Commissioner on 19 July 2006
Mr M Flahive for Privacy Commissioner on 27 August 2007

DATE OF DECISION: 6 November 2007

EXPLANATORY NOTE: The decision which follows is not the full text of the decision that was issued to the parties. That is because publication of all of the information recorded in the unedited decision would likely disclose the very information which, by this decision, the Tribunal has found to have been properly withheld from the complainant. This version of this decision has therefore been edited (with the consent and approval of the parties) to ensure that the identity of the informant is not disclosed. Deleted and edited passages are indicated in square brackets.

DECISION

Introduction

[1] This case concerns a request that was made in August 2002 under Principle 6 of the Privacy Act 1993 ('the Act') for access to personal information. The person who asked for the information (the complainant in this proceeding) was a police constable [...]. He had become involved in an employment issue with the defendant in this proceeding (we will refer to the defendant as 'the Police'). During the course of that matter, another person (whom we will refer to as 'the informant') had given some relevant information to the senior officer who was responsible for supervision of the [complainant, amongst others].

[2] The employment issue was resolved by mediation at some time before August 2002, but after the issue had been dealt with the complainant asked the Police to

provide him with access to such personal information as was held by the Police about him in respect of the matter. In due course the Police provided the relevant information, save only for the name of the informant.

[3] The Police say that they have good reason to withhold any information that identifies the informant because:

[a] It is information to which s.27(1)(c) of the Act applies, in the sense that the disclosure of the identity of the informant in the circumstances would be likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences and the right to a fair trial; and

[b] Withholding the information is in any event justified under s.29(1)(a) of the Act, since disclosure of the name or identity of the informant would involve an unwarranted disclosure of the affairs of another individual (in this case, the informant).

[4] Before the hearing an agreed statement of facts was filed, and a brief of the complainant's evidence was admitted without the complainant being required for examination. In the circumstances Mr Hesketh opened his argument at the hearing in July 2006 by describing the case as straightforward. It has not proved to be so. The central issues have taken us to a difficult margin between legitimate but competing concerns:

[a] Should the complainant's rights to be able to access personal information held about him by the Police prevail over the concerns articulated by the Police concerning the need they have to be able to keep information that comes to them confidential, so as to better be able to discharge their duties to maintain the law, and to prevent, investigate and detect offences?

[b] What is to be made of the tension between the complainant's rights of access to personal information under the Act, and the informant's concerns about what disclosure of [the informant's] identity as the informant might mean for [the informant]?

[5] In addition, and despite an high level of agreement between the parties about what happened, there are procedural difficulties in a situation in which we are asked to weigh up an individual's rights of access to personal information against the anticipated effect that disclosure of that information will or may have for someone who is not party to, nor a witness in, the proceedings, and who may not even be aware that the proceedings are taking place. How can or should the Tribunal proceed to ensure that the non-party has a fair opportunity to be heard?

[6] Our decision is organised under the following headings:

Introduction

Procedural considerations

Factual background

Matters that are not in dispute

Evidential issues

Application of s.27(1)(c) of the Act

Application of s.29(1)(a) of the Act

Conclusion

Costs

Procedural considerations

[7] The first part of the hearing took place on 19 July 2006. After some deliberation, the Tribunal subsequently met again to review the matter in detail. Amongst other things, there was a concern regarding the way in which this decision should be written if decided in favour of the defendant, and whether that could be done without effectively disclosing to the complainant the very piece of information that is at issue, namely the identity of the informant.

[8] We were also concerned about the informant's position – after all, although [the informant] had not taken part in the hearing, it was clearly [the informant's] situation that was likely to be most directly affected by an outcome adverse to the Police.

[9] We take the issues surrounding the way in which this decision is to be given first.

[10] A consent order was made at the hearing on 19 July 2006 under s.107(3)(b) of the Human Rights Act 1993 prohibiting the publication of the names of either of the complainant or the informant, or of any details that might serve to identify them in connection with this litigation. Those orders were made on a permanent basis and so remain in force, but they did not seem to us to meet the concerns set out above.

[11] As a result a telephone conference was convened between counsel and the Chairperson of the Tribunal on 3 November 2006. In order to alleviate the Tribunal's concern about giving reasons for its decision Mr Hesketh volunteered to give an undertaking to the effect that, when this decision [were] received by him, he would not disclose it to the complainant or to anyone else without further direction of the Tribunal (it may be noted that in a case of this kind Mr Hesketh is the plaintiff in his capacity as the Director of Human Rights Proceedings, and so is not in quite the same position *vis-a-vis* the complainant as he would be if the complainant were plaintiff and he - Mr Hesketh - were instructed as counsel).

[12] Mr Hesketh [again] confirmed his willingness to proceed in that way when the hearing was resumed on 27 August 2007, and we are grateful to him for doing so. The problem would have been very much more difficult to solve if Mr Hesketh had been counsel for the complainant, or if Mr Hesketh had been reluctant to take such a pragmatic approach. Instead we [were] able to direct, by consent, that this decision [was(and is)] to be kept strictly confidential to those persons who are identified on page 1. It [was (and is)] not to be disclosed to any other person or entity without the leave of the Chairperson of the Tribunal first having been obtained in writing.

[13] These orders [were] intended to hold the position until counsel and [Detective] Superintendant Van der Velde [had] had an opportunity to consider [the unedited] document. [They have now done so. With the assistance of counsel, the decision has been edited so as to protect the identity of the informant. But the order that has already been made by the Tribunal (to the effect that the unedited version of the decision, and any drafts circulated for editing, must be kept strictly confidential to the parties identified on page 1 and to Detective Superintendent Van der Velde, and must

not be disclosed to any other person or entity unless the leave of the Chairperson of the Tribunal is first obtained in writing) still stands.]

[14] [...]

[15] We turn to the second of the procedural issues we have had to confront, namely how to deal with the position of the informant.

[16] It is appropriate to record that, following the initial hearing on 19 July 2006, we were not absolutely convinced that revealing the name of the informant to the complainant would involve an unwarranted disclosure of the informant's affairs in such a way as to bring s.29(1)(a) of the Act into play. We recognised, however, that our impressions had been formed without the benefit of hearing from the informant. This was not just an hesitation arising out of the fact that the evidence that we heard on 19 July 2006 on the topic was hearsay. We were also concerned that the person who would be most directly impacted by our decision had not had any opportunity to explain to us what [the informant's] fears about the possible release of personal information about [the informant] (namely, that it was [the person in question] who had been the informant) to the complainant might be.

[17] As a result it was agreed that the informant ought to be given an opportunity to give us direct evidence about [the informant's] position and the concerns that [the informant] had. Although it took some time to arrange, the informant subsequently agreed to attend a hearing in the Tribunal. The resumed hearing ultimately took place on 27 August 2007. It was convened as a private hearing (see s. 107(3)(a) of the Human Rights Act 1993).

[18] The evidence given by the informant has persuaded us that the disclosure of [the informant's] indentity as the informant to the complainant would be an unwarranted disclosure of [the informant's] affairs. We give our reasons below, but we begin by setting out the background in a little more detail.

Factual Background

[19] In 2000 the complainant was a police constable stationed in [...]. [...] ... an employment issue developed between the complainant and the Police as his employer. [...]. Even though the employment dispute was ultimately resolved by mediation, the complainant later decided to transfer away from that [place] and take up a new posting (still with the Police) in [...]. It is also important to note that the matter was dealt with as an employment matter only; there were no disciplinary proceedings brought against the complainant.

[20] After the employment issue was resolved the complainant wrote to the Police asking for access to all personal information held about him by the Police in connection with the matter. There is no argument about the timing and content of the Police response to the complainant's request for access to information, save only in respect of the name or identity of the informant. The Police have always taken the view that they have good grounds to withhold that information from the complainant under either or both of ss.27(1)(c) or 29(1)(a) of the Act.

[21] By the time the matter was prepared for hearing in the Tribunal in 2006 the supervising officer in charge of the [...] Station [we will refer to the supervising officer as "A"] had moved to live out of New Zealand. As a result he was not called to give evidence.

[22] Instead, evidence was given for the Police by Detective Inspector Van der Velde (as he then was; by August 2007 he had attained the rank of [Detective] Superintendant, and so we will refer to him by that title elsewhere in this decision). [Detective] Superintendant Van der Velde was then the officer in charge of the Police National Bureau of Investigations Support at the National Crime Service Centre in Wellington. He has very considerable experience in policing including operational roles in the detection, investigation and prosecution of serious crime. We wish to make it clear that nothing in what follows in this decision should be taken as being critical of the [Detective] Superintendant's involvement in this case in any way. Nonetheless the reality is that the [Detective] Superintendant was not involved at the time that the informant approached [A] in 2000. The Police did not call the informant to give evidence on 19 July 2006 either.

[23] The hearing of this case was initially set down to take place on 22 June 2006. It was called that day but, for reasons that do not now matter, it did not proceed. Nonetheless as a result of discussion on 22 June 2006 [Detective] Superintendant Van der Velde went to see the informant 'covertly' (i.e., their meeting was arranged so that no one else was aware of it). When the hearing took place on 19 July 2006 [Detective] Superintendant Van der Velde then gave evidence about what the informant had told him when they met. He reported:

[a] The informant is [...]. [The informant] had observed the way in which the complainant was performing his duties, and [...];

[b] In or about June 2002 [the informant] spoke to [A] [about the matter ...]. (we note that [the informant's] information came to the Police after the Police had already started to look into the situation at [the Police station in question]. It was not as if [the informant's] information was the starting point for the employment dispute);

[c] The informant had made it clear to [A] that [the informant's] information would only be given to him if [the informant's] identity as the person who had provided it was kept confidential. [The informant] did not want [...] the complainant [...] to know [...] who had conveyed information about the complainant to the Police. [The unedited decision goes on to set out the concerns that were explained by the informant to [Detective] Superintendant Van der Velde when they met, but in essence the informant feared possible retaliatory action by the complainant, amongst other things]. It had been made clear to [Detective] Superintendant Van der Velde from his discussion with the informant that [the informant] would not have given any information to [A] at all if [the informant] had thought there was any chance that [the informant's] identity as the informant would ever be disclosed to anyone else;

[d] [...];

[e] [Detective] Superintendant Van der Velde told us that the informant had expressed essentially two concerns about the possibility that [the informant's] identity might be revealed to the complainant. First, a concern was expressed to the effect that the complainant - who is still a constable operating in a different but not distant community – might somehow target [the informant] for retaliation. Our sense was that there was no concern about physical retaliation, but rather that the complainant might (for example) perform traffic enforcement duties in such a way as to target the informant if he [i.e., the complainant] knew who [the informant] was. [...].

[24] There was nothing in the materials before us to suggest that the complainant would ever do anything of the kind suggested in order to retaliate against the informant. Our sense after the hearing on 19 July was that whatever the informant's subjective concerns or perceptions might have been, this aspect of the concerns that were reported to us did not seem particularly persuasive. The second area of concern, however, was less easy to assess. It seemed to us that if we had been able to hear from the informant [...] we would have had a better basis on which to judge whether, objectively or subjectively viewed, there were any grounds for concern that disclosure of [the informant's] identity to the complainant might have been 'unwarranted'.

[25] Before we leave this general account of the background, we think it appropriate to add some notes about Police practice with respect to informants generally. We should say that the evidence we were given was not offered as a comprehensive survey of the formal and informal procedures that the Police adopt, but rather to give a sense of the concerns that the Police have in respect of the possibility that they might be compelled to disclose an informant's identity.

[26] [Detective] Superintendant Van der Velde explained that the decision to refuse the complainant's request for the name of the informant reflected a concern that such a disclosure would be likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences, because informants might be discouraged from coming forward with information in future if they cannot be assured that their identity will be kept confidential. Informants provide information about a wide range of things. That might include a telephone number currently being used by a drug dealer, a vehicle registration number of a car being driven by a known criminal, or someone who is holding the stolen property from a burglary. It might include observations that a Police officer is associating socially with a criminal element. The possibilities are endless.

[27] Of course not all information received necessarily relates to criminal activity. But all information potentially provides intelligence to the Police which might assist in subsequent investigations. The essential concern is that disclosure of an informant's identity (particularly when the information that was given by the informant was given in the context of an understanding of confidentiality) would be likely to have a chilling effect on the flow of information to the Police.

[28] In the present case there was no serious suggestion that the information given by the informant to the senior officer involved the disclosure of any criminal activity on the part of the complainant. Nor was there any suggestion that what was at stake here might ever have engaged the Police witness protection programme, or anything of that sort. This was an employment matter. But [Detective] Superintendant Van der Velde suggested that there is no significant difference between the informant in the situation at issue, and informants who provide other information to the Police in other circumstances. He suggested that if a police officer is failing to carry out his or her duties in accordance with Police expectations and guidelines, then that does potentially give rise to an issue as to the safety of other police officers and so is in itself a 'maintenance of the law' issue. [Detective] Superintendant Van der Velde concluded his evidence by saying that, from the perspective of a serving police officer who has been involved in covert investigations and information management, the protection of information sources is of paramount importance to the Police. In today's environment of trans-national organised crime the potential for corruption within organisations is not insignificant.

[29] [Detective] Superintendant Van der Velde suggested that if the Police are unable to guarantee that the identity of an informant, or information that they might be able to convey to the Police, can be kept confidential then the ability of the Police to carry out their law enforcement responsibilities would be seriously impacted.

Matters that are not in dispute

[30] A number of potentially significant matters were not in dispute in this case, and we think it convenient to set them out here.

[31] First, as we have already indicated, we are not asked to analyse the circumstances of this case in terms of compliance with the procedural provisions of Part 5 of the Act. It is either accepted that the Police complied with those provisions, or the Director does not wish to make an issue of them in this proceeding.

[32] It is also common ground that, because this is a case brought under Principle 6, it is not necessary for the Director to establish that the complainant suffered harm in terms of any of ss.66 (1)(b)(i)-(iii) of the Act as a result of the Police refusal to disclose the name of the informant: see the reasoning of the High Court in *Winter v Jans* (Unreported, High Court, Hamilton CIV 2003 419 854, 6 April 2004 per Paterson J, P J Davies & L Whiu). That kind of evidence would of course have been relevant to an assessment of damages in any event, but Mr Hesketh made it clear that the only relief he asks for is a declaration. This case was brought to test the principles that are involved, and no more.

[33] It was also accepted that in this case the identity of the informant is 'personal information' about the complainant within the meaning of those words in s.2 of the Act. Although the point was not argued, we note that in her submissions Ms Evans referred to Roth, *Privacy Law and Practice* at para 1002.10, *Hadfield v Police* (1996) 3 HRNZ 115 and *Adams v New Zealand Police* (CRT Decision 16/97; 12 June 1997). We were told that the Privacy Commissioner has consistently taken the view that the identity of an informant is or can be personal information about the person in respect of whom the information is given – see also *Proceedings Commissioner v Commissioner of Police* (CRT Decision 18/2000, 10 July 2000) and *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385.

[34] The practical effect of s.87 of the Act is that in this case it is the Police who carry the burden of establishing, on a balance of probabilities, that they had good grounds to withhold the name of the informant from the complainant.

[35] Finally, all counsel agreed that the case of *O v N (No.2)* (1996) 3 HRNZ 636 was wrongly decided, at least insofar as it was held in that case that a person's name does not fall within the word 'affairs' as used in s.29(1)(a) of the Act. It was also common ground that the Tribunal is not bound by its previous decisions, although it was accepted that the Tribunal ought not to depart from a previously decided position on a question of law without good reason. Nonetheless in this case the consensus was that such grounds exist, and that the Tribunal ought not to follow the decision in *O v N (No.2)*. We will return to the matter below.

Evidential issues

[36] As indicated, the Police accepted the burden of establishing, on a balance of probabilities, that there were good reasons to withhold the name of the informant from the complainant. In another case, one might expect that to be done by calling

the people who were involved at the time to give their evidence about what happened.

[37] The first difficulty confronted by the Police in this respect related to [A]. He was no longer working for the Police by July 2006, and had moved to live in [another country]. Mr Hesketh made a strong submission at the hearing on 19 July 2006 that evidence given by [Detective] Superintendant Van der Velde about what [A] had been told, and as to what he said or did, is hearsay and at points double hearsay. While Mr Hesketh accepted that the Tribunal has powers to receive evidence that might not otherwise be admissible in a court of law (see s.106(1)(d) of the Human Rights Act 1993), he observed that we ought to be slow to give much weight to that kind of evidence. As he noted, part of the difficulty about receiving hearsay evidence is that, in the absence of the person who was directly involved, there is no real opportunity to challenge what has been reported.

[38] A similar concern emerged in the case of *Cobb v W & H Newspapers Limited & Anor* (HRRT Decision 32/03; 30 October 2003). In that case the Tribunal declined to receive hearsay evidence because of concerns (amongst other things) about its reliability. Certainly we agree with Mr Hesketh that, simply because the Tribunal has powers to receive evidence that might not be admissible in a court of law, it does not follow that it is obliged to accept unquestioningly any and all material that is tendered as evidence.

[39] On the other hand, even acknowledging the concerns about the nature of the evidence at issue here, the central point of evidence that might have been given by [A] had he been called would have been to say that the informant had indeed stipulated that [the informant's] anonymity must be protected if [the informant] was to talk to him. As it happens, that was later confirmed by the direct evidence given by the informant when [the informant] attended the hearing on 27 August 2007. But we would have been willing to give the Police the benefit of the doubt on this point in any event. There was nothing unlikely or far-fetched about what [Detective] Superintendant Van der Velde had reported to us and, although hearsay, [there] was no reason to doubt the reliability of the [Detective] Superintendant's evidence on this point. It was information which (to use the language of s.106(1)(d) of the Human Rights Act) we did consider to be of assistance to us in dealing with the matter before us.

[40] The greater difficulty was to know how to deal with the evidence we were given about the informant's concerns as to what the impact that disclosure of [the informant's] identity to the complainant would be for [the informant]. The informant was in New Zealand, and there was no geographic difficulty that would have prevented the Police from calling [the informant] to give evidence in July 2006. Nonetheless, we could understand the Police's hesitation about doing so. [...].

[41] In the end, the difficulties were overcome and we did hear from the informant. As a result it is not necessary for us to state definitively what our overall conclusions would have been if we had not heard from [the informant] at all. It is fair to say, however, that we did find [the informant's] direct evidence on this important point to be far more persuasive and compelling than the account which had been given in July 2006 via [Detective] Superintendant Van der Velde. Again, that is not intended as a criticism of [Detective] Superintendant Van der Velde. In fact in all important respects, the evidence later given by the informant confirmed that he had given us a fair and accurate summary of [the informant's] concerns. Nonetheless, our experience in this case does emphasise the importance that attaches to hearing

evidence from those who were directly involved. In this kind of situation, it has a different quality, and a different impact, from that which is simply reported.

[42] Perhaps that is the lesson to be learned from the way in which this case has unfolded. Our analysis was always going to involve a comparative assessment of the complainant's rights of access to information on the one hand, and the potential for unwarranted disclosure of the affairs of another person on the other hand. In turn that was always going to give rise to a tension between the usual expectations for an open and transparent hearing process, as against the need to ensure that that which has not been disclosed remains undisclosed until a decision has been made. With the considerable benefit of hindsight, it was never really going to be satisfactory for us to try to decide this case without hearing from the informant. It would have avoided a considerable delay if that issue had been confronted squarely in the pre-hearing case management conferences. Of course every case must depend upon its own circumstances. But, although there may be practical difficulties, we certainly envisage that in another case it might be appropriate to set up a procedure by which information about the competing privacy concerns can be given to the Tribunal without being disclosed to the complainant prematurely or at all – in this respect the discussion in *Dijkstra v Police* (HRRT Decision 16/06; 25 May 2006) has some relevance. So too does s.107(3)(a) of the Human Rights Act.

[43] We turn to consider the issues as raised under each of the two sections of the Act upon which the Police case is based.

Application of s.27(1)(c) of the Act

[44] We were particularly appreciative of the thoughtful submissions presented on behalf of the Privacy Commissioner by Ms Evans, and we acknowledge our indebtedness to her submissions in much of what follows. We consider that her approach to the analysis under both s.27(1)(c) and s.29(1)(a) was clearly correct. We have adopted the same broad approach in this decision as well.

[45] Section 27(1)(c) of the Privacy Act 1993 provides:

> *"**27 Security, defence, international relations, etc.***
>
> *(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;"*

[46] The Police argued that disclosure of the identity of the informant in this case would be likely to prejudice the maintenance of the law, including at least the prevention, investigation and detection of offences. Both the Director and Ms Evans disagreed. They submitted that the circumstances here do not justify the conclusion that disclosure of this informant's identity would have any sufficient impact on the maintenance of the law, etc., to justify withholding the information.

[47] We agree with Ms Evans and Mr Hesketh that Principle 6 is the proper starting point for our analysis. It is a cornerstone of the scheme of privacy protection established by the Act. Its significance is reflected in a number of different ways (the list that follows is not intended to be exhaustive):

[a] Effectively two parts of the Act (Parts 4 and 5) are given to setting up an effective procedural framework whereby the Principle 6 rights of access to personal information are given effect;

[b] The Act provides a closed list of grounds for refusing information access requests: see s.30. If there is not a statutory basis for withholding personal information then the 'default' position is that access must be provided;

[c] Principle 3 obliges agencies which collect personal information to take such steps as are reasonable in the circumstances to ensure that individuals concerned are aware of their rights of access to, and correction of, information held by the agency about them – see Principle 3(1)(g);

[d] With respect to public sector agencies (which of course includes the Police), and unlike other Principles in the Act, the right of access to personal information under Principle 6(1) is a legal right and is directly enforceable in Court: see s.11(1) of the Act and Roth, *Privacy Law and Practice* at para 1011.4;

[e] To the extent that reasons for withholding information constitute exceptions to Principle 6, s.87 of the Act makes it clear that the onus of establishing that the exception applies is on the agency seeking to rely upon it.

[48] As significant as the rights of access to personal information are, however, the Act nonetheless identifies a number of exceptions and grounds for withholding information. The exceptions are obviously intended to be meaningful. Where they apply they must be respected for what they are, namely a legislative recognition that there are good grounds to justify the conclusion that, in the cases to which they apply, reasons for refusing access outweigh the interests of the person seeking to have access to personal information.

[49] The rationale behind s.27(1)(c) of the Act was not in dispute. Mr Hesketh and Ms Evans acknowledged that some types of agencies – including public sector agencies, and particularly including the Police – have to rely from time to time on the supply of information from external sources if they (the agencies) are to avoid prejudice to the maintenance of the law, and are to be able to prevent, investigate and/or detect offences. Counsel also accepted that there are situations in which those who supply such information might well be very much less inclined to do so if they feared that their identity as an informant might not be kept confidential.

[50] Ms Evans gave some examples. The Department of Child, Youth & Family Services, for example, has a statutory duty to protect the welfare of children in New Zealand. From time to time members of the public report possible situations of danger to children. Indeed the relevant legislation specifically provides for the collection of that kind of information: see s.15, Children, Young Persons and Their Families Act 1989. Another example is the Ministry of Social Development, and its responsibilities with respect to the administration of social security: see *Nicholl v Department of Work and Income* [2003] 3 NZLR 426. And, perhaps most obviously, the Police often rely on members of the public to provide information that helps them to discharge their statutory duties of preventing crime, upholding the law and so on.

[51] In cases of these kinds where information is received by the Police it is not uncommon to talk about those who supply information as being 'Police informants', or to that effect. The phrase carries with it a sense that the information conveyed

has something to do with criminal offending. But of course that is only a subset of information that is conveyed to the Police by 'third parties' (i.e., where personal information is involved, by a person or persons other than the subject of the information). Strictly speaking, a 'Police informant' is one who provides information to the Police, no more and no less. The description says nothing about the content of the information supplied.

[52] Given the significance of Principle 6 we agree with Ms Evans that it goes too far to suggest that s.27(1)(c) was intended to be available in the case of any or all information that comes to the Police - as a sort of 'blanket' exception to Principle 6 - simply because what is at issue is information that has been given to the Police. To accept such a proposition would amount to saying that Principle 6 does not apply to any personal information the Police hold, unless perhaps it has been provided by the subject of the information itself. That cannot be correct.

[53] Ms Richardson accepted that no such 'blanket' rule could be justified. It was a proper concession. The way in which the Police concerns had been expressed by [Detective] Superintendant Van der Velde in his evidence was that a decision against the Police in this case would set a precedent that would undermine the Police's ability to re-assure informants and potential informants that their anonymity can be protected. Even so, [Detective] Superintendant Van der Velde agreed that if one were to put that issue of principle aside, and look at the facts of this case on their own, then it is difficult to see the matter as raising the same sort of 'maintenace of the law' concerns that are raised where (for example) information is received by the Police in the context of an ongoing investigation of an unresolved criminal matter.

[54] The importance of protecting certain sources of information is discussed in *Nicholl v Chief Executive, Department of Work and Income* (supra):

> *"There is a substantial body of decisions dating from 1982 which have recognised that in a proper case, s.27 (1)(c) may be relied on to deny access to the name of an informant. The decisions are firmly grounded in the words of the statute and in the pragmatic concerns which, since Hardy v R (1794) 24 St Tr 199, have conferred public interest immunity on police informants. For more than two centuries it has been accepted that the public interest favours preserving the annonymity of police informers by keeping open avenues of informnation which will assist in the detection and investigation of crime.*
>
> *"The decisions under the New Zealand legislation have properly emphasised, however, that suppression is not automatic. Each case must be determined on its merits. The question is whether in this case the respondent was entitled to decide that disclosure of the name of the informant would pose a serious risk to the maintenance of the law."*

[55] In our assessment, the only hard and fast rule when the policy of Principle 6 and the concerns reflected in s.27(1)(c) come into tension, is that due consideration must be given to the competing concerns, and in the end the outcome depends on the facts at work in the particular case. Nor do we see a decision against the Police on this issue in this case as setting a precedent of any significant kind. Once it is accepted that there is no 'blanket' rule protecting all information that is supplied to the Police, and no automatic right to withhold information of that kind, then this decision is no more than an application of those propositions to the specific facts of this particular case.

[56] The question we have to determine is whether the release by the Police of the identity of the informant to the complainant in this matter would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences? We have not been persuaded that it would. Considerations we regard as significant are:

[a] If one looks at the list of other exceptions set out in s.27 it will be seen that they deal with significant issues such as the need to avoid prejudice to the security or defence of New Zealand, and concerns that disclosure might compromise the circumstances in which information is entrusted to the Government of New Zealand by the Government of any other country or some other international organisation. We have no doubt that the policy behind s.27(1)(c) is significant, but even so applying the section to the facts of the present case seems a little out of perspective;

[b] We say that because the information in question in this case was information obtained by the Police in the context of an issue about the complainant's conduct as a Police employee. Although there was some reference to the Code of Conduct under the Police Regulations 1992, and a very imprecise suggestion that some kind of offence against those regulations might be disclosed where a Police officer fails to attend to Police duties diligently, there is no satisfactory evidence to establish that at the relevant time the circumstances in this case were treated by the Police as having given rise to an offence of any kind. And, although it was suggested that the informant could have had more to say about the complainant, when the informant did later give evidence [the informant] made it very clear that [the informant] had never disclosed any information about criminal offending by the [complainant] to the Police;

[c] When all is said and done, this was treated as an employment dispute at the time, and it was resolved in that way at the time. There is no sufficient reason for us to treat it in any other way now;

[d] The issue of timing is of some relevance. Even putting aside any significance attaching to the criminal/civil distinction, the fact is that the information was not requested until after the employment matter had been resolved. In this respect the case is very different from the circumstances considered by the Court of Appeal under the Official Information Act 1982 (a precursor to the Privacy Act 1993) in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 or, more recently and under the Privacy Act 1993, by this Tribunal in *Dijkstra v Police* (HRRT Decision 16/06; 25 May 2006).

[57] We have not been persuaded that s.27(1)(c) of the Act is available to the Police to justify withholding the identity of the informant from the complainant in this case.

Application of section 29(1)(a) of the Act

[58] Aside from s.27(1)(c) the Police also relied on s.29(1)(a) of the Act as a reason for withholding the identity of the informant from the complainant. Section 29(1)(a) of the Act provides:

> "***29 Other reasons for refusal of requests*** —
>
> *"(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 or of a deceased individual; or . . ."*

[59] The situation under consideration in *O v N (No.2)* (supra) has many similarities with the present case. In *O v N (No.2)* information had been supplied to a psychologist who was preparing a report. When one of the subjects of her report asked for the identity of the informant, the psychologist declined to provide it. She did so on the basis that she had purported to guarantee anonymity to the informant, and that in any event that information did not add anything to what others had already told her (the psychologist) about the subjects. Section 29(1)(a) was one of the grounds that the psychologist relied on in the Tribunal for withholding the identity of the informant from the requester.

[60] The Tribunal heard argument as to the correct interpretation of the words "*affairs*" and "*unwarranted*" as they appear in s.29(1)(a). With respect to the words "affairs", it accepted that it includes notions of ordinary pursuits of life, business dealings, and public matters. There had been some discussion about the fact that the word in the legislation ends with the letter 's'. It was argued that it followed that the word was not intended to encompass a single action. The Tribunal did not accept that, but said:

> *"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'. .... 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."*

[61] The Tribunal effectively held that the identity of the informant was not part of ... (the informant's) '*affairs*' as that word should be understood in s.29(1)(a). On that reasoning, it might have been argued in this case that s.29(1)(a) is not available to the Police as a basis for withholding the information at issue - since to require that the identity of the informant be disclosed to the complainant does not involve a disclosure of [the informant's] 'affair**s**' (we emphasise the 's' at the end of the word) whether warranted or not.

[62] But the point was not taken. To the contrary, as we have said it was common ground that in this respect *O v N (No.2)* was wrongly decided. Counsel agreed that the decision takes an over-literal view of the words of s.29(1)(a) and that a person's name, or their identity as informant in a particular case, is something that falls within the meaning of the words *"affairs"* as it is used in s.29(1)(a). We agree. We regard it as unrealistic to suggest that someone's name, or the fact that they have been an informant in a particular case (that being encapsulated within the disclosure of their name), is not part of their "affairs". In our view, it follows that s.29(1)(a) can be relied upon to justify withholding the identity of an informant even if the name of the informant is the only piece of information at issue. In our view (and again in this respect we agree with Ms Evans' submissions) the real question is whether disclosure of the information is 'unwarranted' in the circumstances.

[63] Again, everything depends on the circumstances. In each case an assessment has to be made taking into account the significance of the right of access to

information protected by Principle 6, and at the same time recognising that s.29(1)(a) is included in the Act to protect competing privacy interests in appropriate situations.

[64] In her submissions Ms Evans suggested an helpful list of relevant considerations to inform the assessment, including:

[a] Whether the informant was willing to have his or her identity become known to anyone else at the outset. In a case where the only issue is whether or not access to the information by the subject of the information would amount to an unwarranted disclosure of the affairs of the informant, but the informant has never objected to the disclosure, then there would probably have to be some unusual feature to the evidence to justify a finding that s.29(1)(a) is engaged;

[b] On the other hand, the fact that an informant may have expected or even stipulated for anonymity at the time of giving information will be a factor in the assessment, but it is not necessarily conclusive;

[c] The nature of the information;

[d] The characteristics of the informant, and his/her or its situation, and in particular the relationship (if any) that he/she or it has with the requester;

[e] Whether disclosure of the identity of the informant is necessary in order to ensure that the requester has a full and fair opportunity to respond to allegations that have been made against him or her;

[f] The size of the community in which the parties concerned live (in the sense that the revelation may have a disproportionate effect in a smaller community);

[g] What kind of harm might be suffered by the informant should the requester become aware of his or her identity.

[65] The foregoing list is not exhaustive, of course. Nonetheless we think it does provide a useful framework in which to consider whether or not the withholding of the identity of the informant from the complainant was justified in this case.

[66] As we have noted, after the hearing on 19 July 2006 we were not left with a clear sense that the potential impact of disclosure of the informant's identity to the complainant would be such that it should be judged to be 'unwarranted', particularly when taking into account the significance that the Legislature has obviously attached to the right of access to personal information (see, for example, para [47] above). But we have now heard from the informant, and we accept that disclosure of [the informant's] identity would be unwarranted. We will note the relevant features of the evidence below, but before doing so there are three preliminary points.

[67] The first is one that relates to timing. The request for access to personal information in this case was made in August 2002. That was the point at which the assessment under s.27 had to be made by the Police. However some of the evidence given by the informant at the hearing in August 2007 related to events or incidents that had occurred after August 2002. This gives rise to another potential conundrum: if we had not been persuaded that the Police were entitled to rely on s.29(1)(a) in August 2002, but we had been convinced by evidence of later events that disclosure now is not justified, then what ought be done? Perhaps a solution

might be to find the facts and state them, but then decline to award any declaration and instead make it clear that, despite the circumstances in 2002, we would not require the Police to disclose the information after all. We note the issue, but we make it clear that we do not need to decide it and have not done so. Events since August 2002 [...] have rather emphasised the conclusion, but we make it clear that we have now been persuaded that *in August 2002* the Police had sufficient reason under s.29 to withhold the identity of the informant from the complainant.

[68] The second preliminary point is to note an area of on-going concern that arises out of the procedures that have to be engaged when all information in a hearing cannot be shared transparently with everyone who is involved in or affected by the hearing. We are particularly conscious of the fact that we have now heard evidence from the informant about the complainant to which the complainant has not responded. It is open to debate as to whether the complainant could ever have been given such an opportunity without running a real risk of disclosing to him the very piece of information that is in issue. In any event, the history of this case to date is such that we think the preferable course is to proceed to give our decision in any event, but that in approaching the informant's evidence we need to take account of the reality that we do not have [the complainant's] answers to all that was said. Mr Hesketh did not suggest that we should do otherwise.

[69] Finally, there was some debate at the hearing on 19 July 2006 as to whether the assessment of what amounts to an 'unwarranted disclosure' for the purposes of s.29(1)(a) ought to be approached objectively or subjectively. Certainly insofar as it could have been suggested after the hearing on 19 July 2006 that the complainant might have targeted the informant [...] in any criminal way, or even just by picking on [the informant ...] in his ongoing policing duties, we would not have accepted that was a sufficiently likely result to justify a finding that disclosure of [the informant's] name to the complainant would be unwarranted. The informant did not go that far in [the informant's] evidence. But as we listened to the informant give [...] evidence, it occurred to us that the fears that were identified by [the informant] (and which we note below) are [the informant's] perception of events and circumstances. At least to some extent, they are inevitably part of the background against which any assessment as to whether disclosure of [the informant's] identity is warranted or not falls to be made.

[70] The situation we have to consider in this case has come about because in July 2002 the informant decided that [the informant] would talk to [A] about the complainant, but that [...]. We have no doubt on the evidence that we heard that [the informant] was motivated by a very real sense of concern [...]. But it is not for us to say whether that [the informant's decision to talk in confidence with [A]] was the 'right' decision, or a 'wrong' decision, or [...]. What is significant to us is that [the informant has not revealed the fact they were the informant to anyone else]. That has not been an accident or oversight, but a decision [...] from which [the informant] has never wavered. That is the background against which an assessment about [what] the impact of disclosure might be for [the informant] has to be approached.

[71] We agree with Mr Hesketh's submission that in this respect the case boils down to a comparative assessment of (1) on the one hand, the informant's concerns about the consequences [...] if [the informant's] identity were to be made known to the complainant, and (2) the complainant's statutory rights of access to personal information held by the Police about him.

[72] As is obvious, the fact that [A] assured the informant in 2002 that [the informant] would not be identified is an important consideration in favour of withholding the information. It is not (as Ms Richardson accepted) a conclusive consideration, but having heard from the informant we were not left in any doubt of the significance to the informant of the promise [...] given by [A]. [The informant] would not have spoken to him at all without his assurances that [the informant] would never be identified, that no-one [...] would know that the information had come from [the informant], and that it (i.e., the information [the informant] would give) would be dealt with 'properly'.

[73] The information was information that was generally adverse to the complainant. But, although we do not have all the details of what what said by the informant to the Police when [the informant] spoke to [A], we cannot find any reason to suppose that the gist of the complaints that were made was such that they could not have been put to the complainant fairly for him to answer, even though he did not know who had given the information to the Police. In this respect we regard it as material that the employment issues are resolved, and have been closed without any disciplinary action having been taken against the complainant.

[74] With respect to the relationship between the informant and the complainant [...].

[75] Looking at the other side of the privacy 'ledger', we do not wish to diminish the potential significance for a requester of information (such as the complainant) who is unable to obtain information that he or she would otherwise have a statutory right to access. But [the Tribunal was not convinced that any harm that the complainant might suffer if his state of uncertainty as to the identity of the informant were to continue was such as to outweigh the concerns expressed by the the informant].

[76] The Privacy Commissioner joined the Police in submitting that the facts in this case justified the Police decision to withhold the informant's identity from the complainant under s.29(1)(a) of the Act, on the basis that to reveal [the informant's] identity would amount to an unwarranted disclosure of [the informant's] affairs. In an assessment of this sort, there is inevitably a judgement to be made in respect of which objective and informed observers can disagree. We accept that the rights of access to information conferred by Principle 6 are significant but in the end, however, we have come to agree with the Privacy Commissioner and the Police. We have been persuaded that there were sufficient reasons in terms of s.29(1)(a) of the Act in this case to justify the Police decision to refuse to release the identity of the informant to the complainant.

Conclusion

[77] In our assessment the Police had sufficient reason under s.29(1)(a) of the Privacy Act 1993 to refuse to disclose the identity of the informant to the complainant in this case.

[78] It follows that the claim must be dismissed.

Costs

[79] Our impression of the way in which the argument was conducted is that it is unlikely that any of the parties will seek costs. No doubt the parties will also take account of the fact that the plaintiff has succeeded on the first of the grounds relied upon by the Police to refuse to disclose the information at issue, while the Police have succeeded on the second ground.

[80] If there are to be any claims for costs, however, then the following timetable will apply:

[a] Any party seeking an award of costs (including the Privacy Commissioner) to file and serve a memorandum together with any supporting materials within 21 days of the date of this decision;

[b] Any party wishing to respond to such an application, to file their response in writing (again, accompanied by any supporting materials) within a further 14 days;

[c] The Tribunal will then deal with the issue of costs on the basis of the memoranda and materials filed, without any further *viva voce* hearing;

[d] If the foregoing timetable is unachievable, or if for any other reason a variation is sought, then we leave it to the Chairperson of the Tribunal to make such other timetable directions as may be required to ensure that the question of costs is prepared for determination expeditiously and fairly.

"R D C Hindle"	*"I Vodanovich"*	*"S Perese"*
Mr R D C Hindle Chairperson	Dr I Vodanovich Member	Mr S Perese Member

I certify that this is the version of the Tribunal's decision in this matter that has been edited with the assistance and agreement of counsel so as to prevent any disclosure of the identity of the informant.

This is the version of the Tribunal's decision that is to be published.

Mr R D C Hindle
Chairperson
28 March 2008