IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

AP.255/01

BETWEEN BRIAN WILLIAM NICHOLL

Appellant

AND CHIEF EXECUTIVE OF THE DEPARTMENT OF WORK AND INCOME

Respondent

Hearing: 5 February 2003

Counsel: The Appellant in Person
Grant Liddell for the Respondent
Robert Stevens for the Privacy Commissioner

Judgment: 6 June 2003

JUDGMENT OF RODNEY HANSEN J

Solicitors: *Crown Law Office, P O Box 5012, Wellington*
Mr R Stevens, 36 Church Street, Devonport, Auckland

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Introduction

[1] The appellant appeals, under s 123 of the Human Rights Act 1993, against a decision of the Complaints Review Tribunal (now the Human Rights Review Tribunal) ("the Tribunal"), given on 31 August 2001. The Tribunal upheld the respondent's decision to withhold the name of an informant from the appellant.

Factual background

[2] In 1997 the appellant was in receipt of a benefit under the Social Security Act 1964. He appealed to the Social Security Appeal Authority against a decision of the respondent to cancel a special benefit which had been paid to him since 12 August 1991. An officer of the respondent provided a report to the Authority, pursuant to s 12K of the Social Security Act 1964, setting out the background to the decision and the position of the respondent. The report included the following passage:

> "I have received information which suggests that the appellant is conducting a home industry from his place of residence. I understand that he does up old coal ranges and then sells them off in Auckland."

[3] The Authority upheld the appeal. It made no reference to the information received from the informant. The appellant was, however, dissatisfied with the quantum of the special benefit which the Authority directed the respondent to pay and unsuccessfully pursued an appeal to the High Court against the decision.

[4] The appellant also asked the respondent, under Principle 6 of the Privacy Act 1993 ("the Act"), for details of the person who provided the information. The respondent refused. The respondent's decision was upheld by the Privacy Commissioner ("the Commissioner") and, on review, by the Tribunal. The appellant appeals to this Court against the Tribunal's decision.

Relevant statutory provisions

[5] Principle 6 in s 6 of the Act provides individuals with a right to access personal information about themselves held by an agency. It provides as follows:

> "Access to personal information
>
> (1) 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.
>
> (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 4 and 5 of this Act."

[6] "Personal information" and "agency" are defined in s 2 of the Act. It is not in dispute that the name of the informant is personal information about the appellant and that the respondent is an agency for the purpose of the Act.

[7] Principle 6 is subject to Part IV of the Act which sets out the circumstances in which an agency may refuse access to personal information. Part IV includes s 27 which relevantly provides:

> "(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; or
>
> (d) To endanger the safety of any individual."

[8] Complaints against a refusal to disclose under Parts IV and V of the Act are dealt with in Part VIII. The complaints procedure applies to an action that is "an interference with the privacy of an individual", a term which is defined in s 66. By

s 66(2)(a)(i) it includes a refusal under Part IV or Part V to make information available in response to a request.

[9] The complaints procedure permits the applicant to ask the Commissioner to review the decision and, on his rejection of it, to bring proceedings before the Tribunal pursuant to s 83(a) of the Act. In such proceedings the Tribunal is entitled to grant a remedy if it is satisfied on the balance of probabilities that there has been an interference with the privacy of an individual. A right of appeal is conferred by s 89 which applies the appeal provisions of the Human Rights Act 1993 to decisions of the Tribunal.

The decision appealed from

[10] The respondent refused to disclose the identity of the informant, relying on s 27(1)(c) of the Act and also on s 29(1)(j) which permits an agency to refuse to disclose information if the request is frivolous or vexatious. The Commissioner determined that the respondent was entitled to rely on s 27(1)(c) but rejected a submission by the respondent that it could also rely on s 27(1)(d). The s 29(1)(j) ground appears not to have been pursued.

[11] The Tribunal agreed with the Commissioner that the respondent was entitled to withhold the name of the informant under s 27(1)(c). It found it unnecessary to decide whether s 27(1)(d) also provided a ground. It summarised its findings in the following passage:

> "Section 27(1)(c) Privacy Act provides agencies like the defendant (e.g. Child, Youth and Family, the police) which rely on the free flow of information from informants to carry out their statutory functions of investigating and detecting offences with the means to ensure that the identity of informants will be kept confidential. If they could not do so their sources of information would dry up and they would be hindered in the performance of these functions."

The Tribunal went on to adopt the following passage from the Commissioner's decision as "a correct statement of the law and the reasons for it":

> "I agree that in cases such as yours, where you consider that the informant has provided false and malicious information, such an outcome may be seen

as unfair. However, if I were to consider the release of informant information in cases where there are allegations that the informant has acted in a malicious or vexatious manner, this would place a burden on the agency holding the information to then conduct a further investigation into the bona fides of the informant. In many cases it would be difficult to establish with any certainty whether or not the informant had provided the informati9on in bad faith and it may still inhibit the flow of information as members of the public would have no certainty with regard to whether or not informant information would be protected."

[12] The issue which arises in this appeal is therefore whether the Tribunal was right to find that there had not been an interference with the privacy of the appellant because the respondent was entitled to refuse to disclose the informant's name pursuant to s 27(1)(c).

Analysis and discussion

[13] Section 27(1) permits an agency to refuse to disclose information if disclosure is "likely" to have any of the consequences which follow. I accept Mr Liddell's submission that in this context "likely" means a distinct or significant possibility and that in order to avail itself of one of the grounds in s 27, an agency must show there is a real and substantial risk to the interest being protected: *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 391, 404 and 411.

[14] Both Mr Liddell and Mr Stevens referred me to the history of s 27(1)(c) of the Act and to the consistent approach which has been taken to its interpretation by decisionmakers and tribunals. Before the Privacy Act was enacted in 1993, the right of access to personal information held by a public sector organisation was conferred by Part V of the Official Information Act 1982. By s 6(c) of the Official Information Act, access to information could be withheld if the making available of that 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."

Decisions of Ombudsmen consistently upheld the right to withhold the identity of an informant under s 6(c): see Eagles, Taggart and Liddell, *Freedom of Information in New Zealand* (OUP, 1992) pp 187 et seq.

[15] Against that background, the identical wording was used in the Privacy Act. Predictably, the Privacy Commissioner and the Tribunal have interpreted s 27(1)(c) in the same way: see Roth, *Privacy Law and Practice*, (Butterworths) para 1027.8. Typical of the decisions upholding a refusal to disclose the name of an informant, is Case No A5862 (1998) 11 Compendium of Case Notes of the Ombudsmen, pp 64-65 which was referred to me by Mr Liddell. In that case a local authority (acting under the comparable provision, s 6(a), of the Local Government Official Information and Meetings Act 1987) had declined to disclose names of persons who had complained about noise at a licensed restaurant that hosted live music. The Chief Ombudsman, Sir Brian Elwood, upheld the decision, saying:

> "The approach taken to this provision in relation to the identity of informants has been well established. Although each case must be considered on its merits, information identifying an informant can, in most cases, be withheld. This is because many public sector agencies have law enforcement functions and rely significantly on information from the public to assist them to discharge those functions. If they were unable to protect the identity of informants or complainants, members of the public would be less likely to come forward with information regarding possible offences, thereby prejudicing the ability of the agencies to maintain the law, including the prevention, investigation and detection of offences."

[16] There is therefore 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 *R v Hardy* (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 anonymity of police informers by keeping open avenues of information which will assist in the detection and investigation of crime.

[17] 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. Mr Stevens said that a two-step enquiry is required in order to answer that question – is the respondent engaged in the maintenance of the law and, secondly, would that function be prejudiced by the release of the information.

In the circumstances of this case, I think that is broadly the way the enquiry should be approached. But I do not see the involvement of an agency in the maintenance of the law as a necessary condition of a refusal to disclose. There may be circumstances in which the maintenance of the law will be prejudiced by release, though the functions of the agency itself are unaffected.

[18] In this case, however, the respondent's involvement in the maintenance of the law is not in issue. Its statutory responsibility for the administration of the benefit system under the Social Security Act 1964 includes preventing, investigating and detecting offences concerning the receipt of benefits. Its statutory objectives are the efficient administration of social welfare benefits and protecting the public purse: *Nicholson v Department of Social Welfare* [1999] 3 NZLR 50, para 30.

[19] For the purpose of discharging these obligations, the respondent relies on information from the public as well as on the activities of its own staff. I think Mr Stevens was right to say that the detection and investigation of benefit fraud is peculiarly reliant on a flow of information from the public. A government department is singularly ill-equipped to carry out the observations which frequently bring such offending to light. It is not just a matter of insufficient resources, though that too must play a part. It is the nature of the activities which tend to reveal benefit abuses. They would often escape detection if it were not for the intervention of members of the public.

[20] In my view, the respondent's fears that disclosure of the identity of the informant could discourage other potential informants from giving information are fully justified. It undoubtedly would prejudice the maintenance of the law, and by the means identified in s 27(1)(c) – the prevention, investigation and detection of offences. There are no special circumstances which could support a contrary view. It follows that the respondent was entitled to refuse disclosure and the Tribunal and the Commissioner were right to uphold the decision.

Appellant's position

[21] Like the Privacy Commissioner, I have considerable sympathy for the appellant who, to use his words, is concerned to know who his friends are. In both his extensive written submissions and in his restrained and responsible oral argument, he also expressed particular concern that the respondent's decision may reflect adversely on him. This largely derived from the respondent's position before the Commissioner and the Tribunal that it was also entitled to rely on s 27(1)(d). Mr Nicholl was upset by the suggestion that the disclosure of the informant's name would pose a threat to the safety of any individual.

[22] It needs to be emphasised that the argument under s 27(1)(d) was not pursued before me. The Privacy Commissioner held that the respondent did not have a proper basis under s 27(1)(d) to withhold the name of the informant. That position was maintained in submissions on his behalf to the Tribunal. The decision of the Tribunal rested solely on s 27(1)(c). There is therefore no implication in either the Tribunal's decision or this judgment that the appellant poses a threat to the informant or any other person.

[23] The appellant also feels aggrieved that the information provided by the informant, which he disputes, remains on record. That issue does not directly arise in this appeal. However, the appellant may wish to take advantage of his right under Principle 7 to request the correction of personal information held by the respondent and to have attached to the information a statement of any correction sought but not made. Mr Liddell made it clear in submissions that the respondent would be prepared to attach such a statement. The appellant may also take comfort from Principle 8 which obliges an agency holding personal information not to use the information without taking reasonable steps to ensure that the information is accurate, up to date, complete, relevant, and not misleading.

Result

[24] The appeal is dismissed. In the circumstances, there is no order for costs.

Delivered at 11.20 a.m./~~p.m.~~ on 6 June 2003.

[signature] J.