

Reference No. HRRT 018/2016

UNDER THE PRIVACY ACT 1993

BETWEEN DAVID ANDREW O'HAGAN

PLAINTIFF

AND NEW ZEALAND POLICE

DEFENDANT

AT AUCKLAND

BEFORE:

Ms MA Roche, Co-Chairperson

Ms DL Hart, Member

Hon KL Shirley, Member

REPRESENTATION:

Mr DA O'Hagan in person

Ms V McCall for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 28 November 2017

DECISION OF TRIBUNAL ON APPLICATION BY PLAINTIFF FOR FURTHER AND BETTER DISCOVERY AND AMENDMENT TO TIMETABLE¹

The Application

[1] This case has been set down for hearing at Wellington on 19 February 2018.

[2] By memorandum dated 18 October 2017 Mr O'Hagan has applied for further and better discovery. He has also applied for non-party discovery in respect of information held by the Health and Disability Commissioner and for an order that a late filed brief of evidence from the Police not be accepted.

¹ [This decision is to be cited as *O'Hagan v New Zealand Police (Discovery)* [2017] NZHRRT 51.]

[3] Mr O'Hagan's application is opposed by the Police.

Brief background

[4] A brief background will aid an understanding of the issues raised by the application. Mr O'Hagan has an acrimonious relationship with his ex-wife. A Family Court hearing in respect of a dispute between them concerning the care of their children had been set down for 29 June 2015.

[5] On 2 May 2015 Mr O'Hagan requested access to his personal information from the Police. The information sought related to allegations made by Mr O'Hagan's ex-wife against him. Mr O'Hagan intended to use the information in the Family Court hearing.

[6] The information was provided by the Police on 26 June 2015. This response was outside the 20 working day time limit provided by s 40 of the Privacy Act 1993.

[7] Mr O'Hagan made a complaint to the Privacy Commissioner. The resulting Certificate of Investigation noted the Commissioner's opinion that there had been a deemed refusal to provide information, that the Police had failed to provide a response to Mr O'Hagan's information request within 20 working days, and that there had been an interference with privacy.

[8] The present proceedings were filed on 14 March 2016. In his claim, Mr O'Hagan stated the information he received on 26 June 2015 consisted of 200 pages sent via email and that he had no time to consider it in his preparation for the Family Court hearing. Neither did he have time to seek professional advice on how to process or use the information. It was alleged that the police had breached information privacy principle 6, that this breach had caused stress to Mr O'Hagan, and had adversely affected the outcome of the Family Court hearing.

[9] In a statement of reply dated 29 April 2016 the Police admit the release of the information was outside the statutorily prescribed timeframe but deny any consequential interference with Mr O'Hagan's privacy.

[10] The Police having admitted the breach of the statutory timeframe, the issues to be determined at the substantive hearing are accordingly narrow and concern:

[10.1] Whether, in terms of the Privacy Act, s 66(2)(b), there was a proper basis for the deemed refusal to make the requested information available.

[10.2] Whether, in terms of s 66, there has been an interference with the privacy of Mr O'Hagan.

[10.3] Whether any remedy is to be granted and if so, the nature of that remedy.

Discovery - background

[11] Under Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002, the Tribunal or Chairperson has power to give directions which are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with as fairly, efficiently, simply and speedily as is consistent with justice. Pursuant to this power it is the practice of the Tribunal and of the Chairperson to direct discovery to be carried out on an informal basis in the first instance. This reduces both cost and inconvenience. More formal directions are required from time to time depending on the facts of the particular case. However, whether conducted on an informal or formal basis, the basic

structure of discovery before the Tribunal is (subject to all necessary modifications) that found in the discovery rules introduced by the High Court Amendment Rules (No. 2) 2011 which came into effect on 1 February 2012 and which are now set out in High Court Rules, Part 8, rr 8.1 to 8.33. Only the provisions relating to standard discovery need be set out here:

8.7 Standard discovery

Standard discovery requires each party to disclose the documents that are or have been in that party's control and that are—

- (a) documents on which the party relies; or
- (b) documents that adversely affect that party's own case; or
- (c) documents that adversely affect another party's case; or
- (d) documents that support another party's case.

The discovery order

[12] At a teleconference convened by the Chairperson on 19 May 2017 a consent order was made that the parties give informal discovery. The order was in the following terms:

[12.1] Discovery and inspection of documents are to be attended to on an informal basis and to be completed by 5pm on Friday 23 June 2017.

[13] In a *Minute* issued following the teleconference the Chairperson recorded with respect to discovery:

I have cautioned Mr O'Hagan the discovery process is restricted to documents relevant to the proceedings and is not an occasion for a general examination of all documents held by the Police affecting him. In the present case relevance is confined to the central allegation in the statement of claim namely, the deemed refusal of the request for access to personal information consequent upon the alleged breach of the statutory time period.

The request for further and better discovery

[14] Mr O'Hagan has applied for further and better discovery. At paragraph 1 of his memorandum he states that the police hold information concerning previous incidents where they have acted against him in a way that has been detrimental to his rights and has discriminated against him in favour of his ex-wife.

[15] At paragraph 2 of his memorandum he requests disclosure of and inclusion in the common bundle of the following:

- Details of how the ASA got the address they used to send details of my [assault] to a physical address other than the one given to the police privacy officer to use as a postal address. As well as the details that the officer had that caused them to initiate such a letter.
- Documents in relation to the police's investigation into their refusal to investigate a suspected stolen cheque due to me not providing an address. Including the outcome that was concluded by Butler Ngatamatoa.
- Documents in relation to the police refusing to give information requested under the OIA and the investigation from the ombudsman, including the ombudsman's finding on 26 June 2015.
- Documents in relation to the police officers who invaded my home on 13 November 2013 and any admission of physical contact and assault by any officer. Including any details of the assault by [my ex-wife] reported on the day (and via the IPCA the following day) Including details of the 111 call made when the officers refused to leave my property and made physical threats against me.
- Documents used by the police in order to remove my son from my care under the CYFS act on 16 November 2013, including the statements given to police prior to them entering

my house that was referred to by the officers while at my house and used to remove my son under the CYFS Act.

- Documents police have regarding the complaint of [assault] made to the police by phone in August 2016 as well as any documents relating to the complete made the following day via Hamish Blackburn in regards to the way I was questioned by the officer who took my complaint and what actions the police took in relation to such complaint, including any investigation that is underway into how this has been handled.
- Transcript of any phone conversation when I was questioned by the police regarding the sexual assault complaints to the police.
- Documents either collected or referred to by the Police at Wellington police station when I went in on make complaint in October 2016 to discuss the [assault].
- Documents held by police in relation to the handling of the complaint that I had made against [my ex-wife] for [assaults] she subjected me to, including their correspondence to the IPCA about their handling of this. In particular the disputed account of Hamish Blackburn, the officer that took responsibility for my complaint against the police, and his involvement in this matter. Including any requests for correction of information in regards to the information handed to the IPCA.
- Statement made to police in June or July 2006 Re assault by [my ex-wife], as well as a call out to police a few days later when I was attacked again by [my ex-wife]. Including the actions the police took regarding these two complaints, including why she was not charged with an offence on both occasions and what documents they have regarding the withdrawing of any charges if they did in fact charge her.
- Any correspondence between police and [my ex-wife] re why no charge was laid against her in relation to the two assault complaints laid in 2006.

[16] In his memorandum at paragraph 3, Mr O'Hagan states his view that the information sought will help demonstrate the discriminatory manner in which the Police have acted in the past and to establish a pattern of behaviour that has led him to feel discriminated against.

[17] In their memorandum of 19 October 2017, the Police submit that to the extent that any of the documents contained in the list at paragraph 2 of Mr O'Hagan's memorandum are relevant to this proceeding, they will have been disclosed to the plaintiff by the Police on 25 June 2015 and will therefore be included in the common bundle. To the extent they relate to other of the various requests Mr O'Hagan has made to the Police for information, they are not relevant to the proceeding and the Police has accordingly declined to include them in the common bundle.

Further and better discovery

[18] A discovery order having already been made, the analogous provision of the High Court Rules which applies to the present application is r 8.19. Mr O'Hagan must establish there are grounds for believing that the Police have not discovered documents that should have been discovered:

8.19 Order for particular discovery against party after proceeding commenced

If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—

- (a) to file an affidavit stating—
 - (i) whether the documents are or have been in the party's control; and
 - (ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control and who now has control of them; and
- (b) to serve the affidavit on the other party or parties; and
- (c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the other party or parties.

[19] Brief reference to the relevant rules of discovery is required. These rules were addressed by the Tribunal in *Hood v American Express International (NZ) Incorporated* [2015] NZHRRT 1. For the purpose of this decision we largely duplicate what was said in *Hood*.

Discovery – relevant principles

[20] As is well known, standard discovery is narrower in scope than under the former *Peruvian Guano* test (documents that are or may be relevant to issues in the proceeding or may lead to a train of inquiry). The former test has been replaced by the “adverse documents” test. However, relevance remains at the heart of discovery and the definition of standard discovery in r 8.7 is to be seen as an elaboration of what is included in “relevance” and provides a formula by which relevance can be assessed. See *Intercity Group (NZ) Ltd v Naked Bus NZ Ltd* [2013] NZHC 1054 at [15] per Asher J.

[21] Two principles accordingly inform the determination of the present application:

[21.1] Pleadings set the outer limits of what needs to be disclosed on discovery: *West Harbour Holdings Ltd (in liq) v Tamihere* [2014] NZHC 716 at [15] and [16] per Associate Judge Bell. The issues mapped in those pleadings are the touchstone against which relevance is measured. That is, discovery of documents is assessed against their relevance to the issues identified in the pleadings. *Intercity Group (NZ) Ltd v Naked Bus NZ Ltd* at [17].

[21.2] Discovery of documents will not be ordered if the only purpose is to impeach the credit of those who might give evidence for the other side: *West Harbour Holdings Ltd (in liq) v Tamihere* at [18] and [29].

Discussion

[22] Requests for further information, in addition to the personal information provided to Mr O’Hagan on 26 June 2015 in response to the request made on 2 May 2015, are to be distinguished from the provision of documents in compliance with the discovery order made by the Chairperson.

[23] The adequacy of the disclosure by the Police of Mr O’Hagan’s personal information to him on 25 June 2015 is not at issue in this proceeding. The issues raised in the statement of claim concern the failure of the Police to comply with the 20 working day statutory timeframe for the disclosure of the information, whether there has been an interference with the privacy of Mr O’Hagan, and whether any remedy should be granted. Given the issues to be determined by the Tribunal, the further information sought by Mr O’Hagan, relating to interactions over the years between himself, the police, and his ex-wife, is not relevant.

[24] Even if, contrary to this view, some marginal relevance could be established, discovery is limited to what is reasonable and proportionate. The very breadth of the information and documents sought self-evidently establishes that an order for discovery in the terms sought by Mr O’Hagan will be both unreasonable and grossly disproportionate.

[25] We note further that Mr O’Hagan has stated that the purpose of the information sought is to demonstrate the discriminatory manner in which the Police have allegedly acted in in the past and to establish a pattern of behaviour that has led Mr O’Hagan to feel discriminated against.

[26] As to this, the Tribunal is limited to granting a remedy for the alleged breach of the Privacy Act (as alleged in the statement of claim), not for any other alleged conduct by the Police on other occasions.

Conclusion

[27] In terms of the High Court Rules, r 8.19, Mr O'Hagan has failed to satisfy us from evidence or from the nature of the circumstances of the case or from any documents filed in the proceeding that there are grounds for believing the Police have not discovered one or more documents or a group of documents that should have been discovered. The application for further and better discovery against the Police is dismissed.

Non-party discovery

[28] As noted above Mr O'Hagan has requested that the Health and Disability Commissioner be ordered to disclose information he holds regarding a complaint laid by his ex-wife against a counsellor used by Mr O'Hagan and his ex-wife. The stated reason for seeking this information is that it will help demonstrate that the police have assisted Mr O'Hagan's ex-wife in evading prosecution on other occasions. As noted above, the Tribunal is limited to granting a remedy for the alleged breach of the Privacy Act (as alleged in the statement of claim), not for any other alleged conduct by the Police on other occasions. The information sought is not relevant to the issues raised in the statement of claim.

Late filing brief of evidence

[29] The timetable provided in the Chairperson's *Minute* of 19 May 2017 directed that written statements of the evidence to be called at the hearing by the Police be filed and served by 5pm on Friday 13 October 2017. The brief of evidence of Inspector Clint Walker was filed by the Police on 18 October 2017 some three working days following the expiry of this deadline. Mr O'Hagan has sought an order that this evidence not be considered at the hearing. In response, the Police have submitted that Inspector Walker's evidence will be of assistance to the Tribunal in determining the proceeding and that Mr O'Hagan has not been prejudiced by the late filing of the brief.

[30] We do not consider that it is appropriate to exclude the brief of Inspector Walker. Having viewed it, we consider that the evidence is relevant and will be of assistance to the Tribunal. In any event, the point taken by Mr O'Hagan is trivial. The filing of a brief of evidence three working days after the expiry of the deadline is of no consequence and Mr O'Hagan has advanced no prejudice. There is ample time for the remaining parts of the case management timetable to be adjusted by three days without in any way prejudicing the hearing which will commence on 19 February 2017. The technical point raised by Mr O'Hagan is one which the Human Rights Act 1993, s 105 properly requires to be dismissed.

[31] In the circumstances, we direct an amendment to the timetable. Should Mr O'Hagan wish to file any statements of evidence in reply to the evidence of Inspector Walker he may do so by 5pm on 4 December 2017. The common bundle to be filed and served by 5pm on 15 December 2017.

Decision

[32] For the foregoing reasons the decision of the Tribunal is that:

[32.1] The application for further discovery is dismissed.

[32.2] The application for non-party discovery is dismissed.

[32.3] The application that the Tribunal not consider the brief of Inspector Clint Walker is dismissed.

Directions

[33] The following directions are made:

[33.1] Should Mr O'Hagan wish to file a statement in reply to the evidence of Inspector Walker he may do so by 5pm on Monday 4 December 2017.

[33.2] The date for filing and serving the common bundle is extended to 5pm on Friday 15 December 2017.

[33.3] The proceedings are to be heard at Wellington on 19 to 21 February 2017. The venue is the Tribunals Unit, Level 1, 86 Customhouse Quay, Wellington.

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Ms MA Roche
Co-Chairperson

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Ms DL Hart
Member

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Hon KL Shirley
Member