IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 10**

	Reference No. HRRT 040/2011 & 041/2011
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**RAZDAN RAFIQ**
	PLAINTIFF
AND	**CIVIL AVIATION AUTHORITY OF NEW ZEALAND**
	FIRST DEFENDANT
AND	**DIRECTOR OF CIVIL AVIATION**
	SECOND DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson
Dr SJ Hickey, Member
Dr AD Trlin, Member

REPRESENTATION:
Mr R Rafiq in person (no appearance)
Mr E Child and Mr T Hallett-Hook for Defendants

DATE OF HEARING: **13 April 2012**

DATE OF DECISION: **8 April 2013**

DECISION OF TRIBUNAL

Background circumstances

[1] On 29 February 2008 the Director of Civil Aviation (the Director) revoked the private pilot licence held by Mr Rafiq and on 21 May 2008 Mr Rafiq pleaded guilty to two charges under s 49 of the Civil Aviation Act 1990 which makes it an offence to communicate false information to the Director or to fail to disclose information relevant to the granting or holding of an aviation document. Following conviction he was fined $500

on each charge with $130 court costs. It is these circumstances which are the background to the present proceedings.

The proceedings – a summary

[2] On 10 November 2011 Mr Rafiq filed with the Tribunal two separate proceedings under the Privacy Act 1993. The proceedings in HRRT040/2011 cited the "Civil Aviation Authority of New Zealand" as defendant while the proceedings in HRRT041/2011 cited the "Civil Aviation Authority of England operating in New Zealand". The statements of claim are, in part, almost identical. Neither are models of clarity and are difficult to follow. They have been understood as making complaints that the defendants breached:

> **[2.1]** Principle 6 of the information privacy principles in that the defendants wrongly refused access to personal information requested by Mr Rafiq (HRRT040/2011).
>
> **[2.2]** Principles 1-4 and Principle 11 in that the investigations into whether Mr Rafiq was a fit and proper person to hold a pilot licence and whether he had committed offences under the Civil Aviation Act did not comply with these information privacy principles (HRRT041/2011).

Consolidation of proceedings

[3] Given that the two proceedings bear strong similarities and further given the close interrelationship of the background circumstances shared by them, by *Minute* dated 23 December 2011 the Chairperson consolidated the two proceedings pursuant to Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002:

> **[4]** The two statements of claim bear strong similarities, many of the paragraphs being identically worded. It is clear that the matters complained of arise out of the same factual matrix. Because the proceedings are closely related a consolidation order is required under Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002. I am satisfied that to ensure that the proceedings are heard, determined or otherwise dealt with fairly, efficiently, simply and speedily as is consistent with justice such order is required. Consequently the proceedings are to have a joint intituling, being the intituling shown in this *Minute* and the evidence filed in one of the proceedings is to be treated as having been filed also in the other. The objective is to achieve a single hearing on consolidated pleadings on a single body of evidence. Each of HRRT 040/2011 and 041/2011 are to continue to have separate and distinct statements of claim and statements of reply and in that sense only each of the separate proceedings is to retain its distinct identity.

[4] In the same *Minute* and for the reasons given at para [2], the Chairperson directed that the first defendant be cited as the Civil Aviation Authority of New Zealand (the CAA) and that the Director be cited as second defendant.

The jurisdiction of the Tribunal

[5] For a plaintiff to succeed before the Tribunal on a claim under the Privacy Act 1993, the plaintiff must first establish jurisdiction for the Tribunal to consider the particular claim.

[6] The effect of ss 82(1) and 83 of the Privacy Act 1993 is that the Tribunal only has jurisdiction over "any action" alleged to be an interference with the privacy of an individual **and in relation to which** the Privacy Commissioner has conducted an investigation.

[7] To ensure clarity as to what "action alleged" has been investigated by the Privacy Commissioner, the Commissioner issues a Certificate of Investigation particularising the subject of the investigation. It is this certificate which sets the boundary of the Tribunal's jurisdiction.

[8] The statement of claim in HRRT040/2011 is in this respect relatively straightforward in that overall, it is a complaint that Principle 6 has been breached. The order sought is that the defendants release the withheld information. Submitted with the statement of claim was a certificate from the Privacy Commissioner dated 18 March 2011 specifying that the "action" in relation to which the Privacy Commissioner conducted an investigation was an alleged breach of Principle 6. Nevertheless the statement of claim also pleads breaches of Principles 1, 3, 4, 5, 7, 8, 10 and 11. For the reasons given, the jurisdictional limits set by the Privacy Commissioner's certificate dated 18 March 2011 mean that the alleged breaches of these information privacy principles are irrelevant and cannot be inquired into.

[9] The statement of claim in HRRT041/2011 is in many respects a duplication of that in HRRT040/2011 and similarly alleges breaches of information privacy Principles 1, 3, 4, 5, 7, 8, 10 and 11. The certificate from the Privacy Commissioner dated 7 April 2010, on the other hand, certifies that the Privacy Commissioner investigated information privacy Principles 1 to 4 and 11 only. It relevantly states:

Certificate of Investigation dated 4 April 2010

Matters Investigated	Mr Rafiq complained that the CAA contacted his mother and brother-in-law in 2008 and stated to them that he had provided false and misleading information to the CAA in respect of a pilot's licence application. Mr Rafiq states that the CAA sought further information from his mother and brother-in-law in relation to his identification and family background. Mr Rafiq states that in doing so the CAA disclosed some personal information about him to his mother and brother-in-law, including his driving history and Police information.
Principle(s) applied	Principles 1-4 and 11 of the Privacy Act

[10] It follows that in HRRT041/2011 the Tribunal only has jurisdiction to investigate breaches of principles 1-4 and 11, not Principles 5, 7, 8 and 10. The position is confirmed by the letter dated 28 November 2011 from the Privacy Commissioner and signed by Ms Katrine Evans, Assistant Commissioner (Legal and Policy):

> We investigated the complaint to which 041/11 relates under principles 1-4 (collection of information about Mr Rafiq from his mother and brother in law) and principle 11 (disclosure of information about Mr Rafiq to his mother and brother in law).
>
> The Tribunal therefore has jurisdiction to consider those aspects of Mr Rafiq's claims.
>
> However, to the extent that Mr Rafiq may possibly wish to claim that other actions of the CAA breached the Privacy Act, the Tribunal does not have jurisdiction to consider that claim. We have not investigated them.

The application to dismiss

[11] On or about 24 January 2012 Mr Rafiq filed two unsworn "statements of evidence" in support of his two proceedings. They provided little support for his claims, being broad and general in terms. Also submitted was an unsworn statement by his sister Ms Munashra Rafiq setting out her account of an interview conducted by two officials from the CAA (Ms CA Penney and Mr SJ Pawson) when they visited her home on 17 January 2008. A later "statement of evidence" (by Mr Rafiq) dated 23 February 2012 followed.

[12] By application dated 30 March 2012 the defendants sought an order dismissing the proceedings on the grounds that:

> 5.1 It seems clear that the plaintiff will not attend the hearing.
>
> 5.2 There is no real case for the defendants to answer.
>
> 5.3 The plaintiff appears to be seeking to use the proceedings for an ulterior and improper purpose.
>
> 5.4 The plaintiff descends once again into obscene, abusive, and inappropriate language, in direct contravention of directions from the Tribunal.

[13] Each of these four grounds were expanded upon in a supporting memorandum filed by Mr Child. The submission was that these factors suggested that both proceedings should be brought to an end immediately and that the defendants should not be troubled further by having to continue to prepare for and appear at a substantive hearing. The Tribunal was invited to dismiss the proceedings under s 115 of the Human Rights Act 1993 (which applies to these proceedings by virtue of s 89 of the Privacy Act) on the grounds that they are frivolous, vexatious, or not brought in good faith.

[14] In a *Minute* issued by the Chairperson on 3 April 2012 the dismissal application was declined because the Chairperson was of the view that it was premature to assume that Mr Rafiq would not appear at the hearing scheduled to take place at Wellington on 13 April 2012:

> **[7]** The submissions developed by Mr Child are cogent. However, much of the argument will fall away if Mr Rafiq chooses to attend the hearings to give evidence and to participate in good faith. Bearing in mind that Mr Rafiq is representing himself the Tribunal does not presently believe that it is safe to predict what will happen on the fixture dates. Helpful as the submissions by Mr Child are, it would not be appropriate to dismiss these proceedings now in advance of the fixture.
>
> **[8]** That does not mean to say that the application cannot be renewed at the hearings should Mr Rafiq indeed elect not to appear.
>
> **[9]** Mr Child has also signalled that in the event of these proceedings being determined in favour of any defendant an application for costs may well follow. Mr Rafiq should make careful note. His non-attendance at the hearings will undoubtedly make him more vulnerable to an order that he pay costs in each of the eight proceedings.
>
> **[10]** The Tribunal has in the past encouraged Mr Rafiq to attend the hearings. It takes this opportunity to renew that encouragement. It is in his own interests to attend and to participate responsibly and in good faith.

[15] As matters turned out, Mr Rafiq did not appear at the hearing of these proceedings in Wellington on 13 April 2012. A detailed account of the circumstances is to be found in *Rafiq v Commissioner of Inland Revenue* [2012] NZHRRT 12 (23 May 2012) at [2] to [6] and in *Rafiq v Commissioner of Police* [2012] NZHRRT 13 (23 May 2012) at [2] to [4], being decisions given by this Tribunal in related proceedings brought by Mr Rafiq and heard in the same week as the present proceedings.

[16] The hearing in the present consolidated proceedings went ahead in the absence of Mr Rafiq, as permitted by Regulation 19(3) of the 2002 Regulations. The defendants' witnesses, Ms CA Penney, Mr SJ Pawson and Mr SJR Jennings, all of Wellington, gave oral evidence and answered supplementary questions from Mr Child and from the Tribunal.

[17] At the commencement of the hearing Mr Child formally renewed the application to dismiss. He did not, however, seek a preliminary ruling on the issue and asked only that the application be determined after the defendants had called their evidence and when the Tribunal delivered its decision. The dismissal application under s 115 of the Human Rights Act was described as an alternative ground for disposing of the two cases.

[18] We intend addressing the Principle 6 issue first before turning to the alleged breaches of information privacy Principles 1-4 and 11 and the dismissal application.

THE ALLEGED BREACH OF PRINCIPLE 6

The request for access to personal information

[19] By letters dated 12 February 2008, 22 March 2008 and 27 December 2008 Mr Rafiq requested access to the personal information held by the defendants. While it is only the last request which is the subject of these proceedings, the background provided by the earlier two requests is necessary for context.

[20] The first request was made on 12 February 2008. The response of the CAA on 18 March 2008 was to advise Mr Rafiq that the information he sought related to an active criminal prosecution and that criminal disclosure would soon be made to him, in accordance with the usual process.

[21] By letter dated 22 March 2008 Mr Rafiq renewed his request, challenging the CAA response of 18 March 2008. In a further letter dated 18 April 2008 he narrowed the scope of his request to information accumulated in the course of the CAA investigation. By letter dated 23 April 2008 the CAA communicated a decision on the request and with that letter enclosed a large bundle of documents. Some information was withheld. On or about 26 June 2008 the CAA was advised by NZ Post that the addressee had failed to respond to multiple "card to call" slips left at the address which advised Mr Rafiq to claim the package from his local Post Shop. The package was eventually returned to the CAA as unclaimed.

[22] Subsequently, by letter dated 27 December 2008 Mr Rafiq made a further request for personal information. By letter dated 27 January 2009 the CAA communicated the decision on the request and enclosed with the letter a bundle of documents of about 338 pages, being the documents released by the CAA. A small number of documents (20 pages) was withheld. The relevant withholding grounds under the Privacy Act were ss 27(1)(c) (maintenance of the law), 29(1)(a) (privacy of others) and 29(1)(f) (legal privilege).

[23] Mr Rafiq did not request further information, nor did he advise the CAA that he considered the information provided to him was incomplete.

[24] Two years later, on 19 January 2011, the CAA was notified by the Privacy Commissioner that a complaint had been made by Mr Rafiq about the decision to withhold information in respect of the request of 27 December 2008.

The withheld information

[25] The procedure adopted by the Tribunal on 13 April 2012 for determining whether the information was properly withheld followed the practice established in *Dijkstra v Police* [2006] NZHRRT 16; (2006) 8 HRNZ 339, *Reid v New Zealand Fire Service Commission* [2008] NZHRRT 8 and *NG v Commissioner of Police* [2010] NZHRRT 16.

The opening submissions of Mr Child were received in open hearing. Thereafter, after they had been sworn, the evidence of Ms Penney, Mr Pawson and Mr Jennings was received in open hearing. Once the hearing reached the point where it was necessary that the Tribunal see the withheld information the hearing was closed to all except for Mr Jennings (the witness) and Mr Child and Mr Hallett-Hook. In the closed part of the hearing the Tribunal received the closed evidence of Mr Jennings together with the closed documentation, being the information which the defendants continue to withhold from Mr Rafiq. Once this process had been concluded the hearing returned to "open" format.

[26] This process has been devised by the Tribunal to accommodate those cases where the defendant agency cannot adequately explain the nature of the withheld information and its reasons for withholding it without compromising the very matters that the agency submits warrant withholding the information from the plaintiff. In addition, the Tribunal needs to see the information at issue to form its own view as to whether or not the information ought to be disclosed. But the plaintiff cannot see the closed information unless and until the Tribunal decides that it ought to be disclosed.

[27] The following explanatory table provided by Mr Jennings (a solicitor employed by the CAA) provides a brief description of the withheld information and the withholding grounds relied on:

Document Description	**Pages**	**Ground(s) for Withholding**	**Comment**
Letter from Duncan Ferrier (Solicitor) to Mark Woolford (Prosecutor)	3	s9(2)(h) OIA & s29(1)(f) Privacy Act	Letter contains instructions to prosecute, and details of CAA theory of case and background and are legally privileged.
Enforcement Action Cover Sheet	1	s6(c) OIA & s27(1)(c) Privacy Act s9(2)(h) OIA & s29(1)(f) Privacy Act	Cover sheet is used for internal decision making regarding commencement of a prosecution, and contains legal advice from the Chief Legal Adviser.
Recommended Charges	1	s6(c) OIA & s27(1)(c) Privacy Act s9(2)(h) OIA & s29(1)(f) Privacy Act	Document is intended to be for legal review and sign off, and is considered with the enforcement action cover sheet above.
Tariff Table	4	s6(c) OIA & s27(1)(c) Privacy Act s9(2)(h) OIA & s29(1)(f) Privacy Act s9(2)(a)	Document contains information which is produced by CAA as an informal record of sentence tariffs for offences against the Civil Aviation Act. The table is produced solely for the benefit of CAA prosecutors, and the drafting of sentencing submissions. Table also contains personal information about third parties.
Summary of Evidence	9	s6(c) OIA & s27(1)(c) Privacy Act s9(2)(h) OIA & s29(1)(f) Privacy Act	This document contains information which is the summary of the CAA's evidence in respect of the investigation. It is created for decision making purposes and the conduct of the prosecution, but principally to communicate the investigator's theory of the case to the instructed CAA prosecutor.
Memo to Legal Services	1	s9(2)(h) OIA & s29(1)(f) Privacy Act	This document contains information which is intended solely for the purposes of legal review and for the benefit of providing instructions to the instructed CAA prosecutor.
Copy of business card of Police Officer	1	s9(2)(a) OIA	Not personal information about Mr Rafiq.

[28] We will address separately the three withholding grounds relied on by the defendants.

Section 27(1)(c) Privacy Act – disclosure likely to prejudice the maintenance of the law

[29] Privacy Principle 6 provides that:

> Principle 6
> *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), 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.

[30] Principle 6 is subject to Part 4 of the Act which sets out the circumstances in which an agency may refuse access to personal information. Part 4 includes s 27 which relevantly 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—
> (a) ...
> (b) ...
> (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) ...

[31] As can be seen, s 27(1) permits an agency to refuse to disclose information if disclosure is "likely" to have any of the consequences which follow. The standard of proof is not the balance of probabilities ie "more likely than not". In this context "likely" means a distinct or significant possibility and 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 (CA) at 391, 404 and 411 and *Nicholl v Chief Executive of the Department of Work and Income* [2003] 3 NZLR 426 (Rodney Hansen J) at 430. In *Commissioner of Police v Ombudsman* Cooke P, in relation to earlier but similar provisions in the Official Information Act 1982, stated that:

> To cast on the Department or organisation an onus of showing that on the balance of probabilities a protected interest would be prejudiced would not accord with protecting official information to the extent consistent with the public interest, which is one of the purposes stated in the long title of the Act. At first sight it might seem otherwise, but what has just been said becomes obvious in my view when one considers the range of protected interests in s 6, including as they do, for instance, the security or defence of New Zealand, the New Zealand economy and the safety of persons. **To require a threat to be established as more likely to eventuate than not would be unreal. It must be enough if there is a serious or real and substantial risk to a protected interest, a risk that might well eventuate** …
>
> **Whether such a risk exists must be largely a matter of judgment** … [Emphasis added]

[32] This passage has been applied by the Tribunal on a number of occasions. See for example *Te Koeti v Otago District Health Board* [2009] NZHRRT 24, *Kaiser v Ministry of Agriculture and Forestry* [2009] NZHRRT 10.

[33] Applying the standard of proof prescribed in *Commissioner of Police v Ombudsman* we have concluded, by a wide and substantial margin, that the withholding of the information in question was fully justified for the reasons given in evidence by Mr Jennings and elaborated on by Mr Child in his submissions. We have no doubt that disclosure of the information would be likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences. There are no special circumstances which could support a contrary view. It follows that the defendants were entitled to refuse disclosure. We would have reached the same conclusion even had the standard of proof been the balance of probabilities.

[34] We turn now to the second withholding ground relied on by the Commissioner, namely s 29(1)(a).

Section 29(1)(a) Privacy Act – unwarranted disclosure of the affairs of another

[35] Section 29(1)(a) of the Privacy 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

[36] This withholding provision has two limbs. First, that the disclosure of the information would disclose the affairs of another person and second, that such disclosure would be unwarranted. The term "unwarranted" requires the Principle 6 right of access held by the requester to be weighed against the competing privacy interest recognised in subs (1)(a). As to how the balance is to be struck and a determination made whether disclosure of the information would involve the "unwarranted disclosure" of the affairs of another individual will depend on the circumstances. See *Director of Human Rights Proceedings v Commissioner of Police* [2007] NZHRRT 22 at [63]. In that decision the Tribunal made reference to some of the considerations which can be relevant when weighing the competing interests. The defendants also rely on the fact that it is possible to find that disclosure can be unwarranted because of what is known about the requester and what he or she is likely to do with the information. See *M v Ministry of Health* (1997) 4 HRNZ 79 (CRT).

[37] There are two grounds for our decision upholding the decision to withhold this information:

> **[37.1]** The business card of a police officer is not, on the evidence before us in this case, "personal information" as defined in s 2 of the Act. That is, it is not information "about" Mr Rafiq. On this ground alone the information is not disclosable.
>
> **[37.2]** In the alternative, even if there is a weak argument that the card is personal information, the withholding provisions of s 29(1)(a) apply. Mr Rafiq has a capacity to engage in vindictive harassment of virtually all officials who have had dealings with him. See *Rafiq v Commissioner of Inland Revenue* at [44] to [49] and *Rafiq v Commissioner of Police* at [39]. Here the information is at the outer fringe of what can sensibly be regarded as information about Mr Rafiq. Weighing the privacy interest of the police officer against that of Mr Rafiq we have

no hesitation in concluding that the balance decisively favours that of the police officer.

[38] We turn now to the third withholding ground relied on by the defendants, namely s 29(1)(f).

Section 29(1)(f) Privacy Act – legal professional privilege

[39] Section 29(1)(f) of the Privacy Act provides:

> **29 Other reasons for refusal of requests**
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
> …
> (f) the disclosure of the information would breach legal professional privilege; or

[40] In applying this provision it is appropriate to have regard to s 54 of the Evidence Act 2006:

> **54 Privilege for communications with legal advisers**
>
> (1) A person who obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—
> (a) intended to be confidential; and
> (b) made in the course of and for the purpose of—
> (i) the person obtaining professional legal services from the legal adviser; or
> (ii) the legal adviser giving such services to the person.
> (2) In this section, *professional legal services* means, in the case of a registered patent attorney or an overseas practitioner whose functions wholly or partly correspond to those of a registered patent attorney, obtaining or giving information or advice concerning intellectual property.
> (3) In subsection (2), *intellectual property* means 1 or more of the following matters:
> (a) literary, artistic, and scientific works, and copyright:
> (b) performances of performing artists, phonograms, and broadcasts:
> (c) inventions in all fields of human endeavour:
> (d) scientific discoveries:
> (e) geographical indications:
> (f) patents, plant varieties, registered designs, registered and unregistered trade marks, service marks, commercial names and designations, and industrial designs:
> (g) protection against unfair competition:
> (h) circuit layouts and semi-conductor chip products:
> (i) confidential information:
> (j) all other rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.

[41] We intend treating s 54(1) of the Evidence Act as an appropriate definition of "legal professional privilege" in s 29(1)(f) of the Privacy Act.

[42] In *Hart v Bankfield Farm Ltd* HC Timaru CIV-2008-476-72, 21 May 2008, (2008) 9 NZCPR 685 at [45] French J emphasised that by protecting communications made for the purpose of obtaining professional legal **services**, s 54 has a wider scope than would have been the case if the protection was granted only for communications made for the purpose of obtaining legal **advice**. The privilege extends to documents prepared for the purpose of obtaining legal services: *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [159] – [160] and *R v Huang* HC Auckland, CRI 2005-004-21953, 19 September 2007, Rodney Hansen J at [53] – [57].

[43] Applying the s 54(1) definition to the closed information received by us we have concluded, by a wide and substantial margin, that disclosure of the information would breach legal professional privilege and that the withholding of the information under s 29(1)(f) of the Privacy Act was fully justified.

Decision on the Principle 6 claim

[44] It follows from our conclusions that all of the information the defendants have refused to disclose in response to Mr Rafiq's Principle 6 request has been properly and justifiably refused under the Privacy Act 1993 ss 27(1)(c), 29(1)(a) and 29(1)(f). Mr Rafiq has accordingly failed to satisfy the Tribunal on the balance of probabilities that any action of the defendants was an interference with his privacy. The Tribunal therefore does not have jurisdiction under s 85 of the Act to grant a remedy.

[45] Mr Rafiq's claim is dismissed.

[46] We turn now to the second issue.

THE ALLEGED BREACH OF PRINCIPLES 1-4 AND 11

[47] The general principle is that personal information is not to be collected by an agency unless the information is collected for a lawful purpose connected with a function or activity of the agency and the collection of the information is necessary for that purpose (Principle 1). The information should be collected directly from the individual (Principle 2) and the individual must know that the information is being collected and the purpose for which it is being collected (Principle 3). Personal information is not to be collected by unlawful means or by means that, in the circumstances of the case, are unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned (Principle 4). Once collected, personal information can only be disclosed in certain circumstances (Principle 11).

Mr Rafiq's claim

[48] In his unsworn "statement of evidence" dated 18 January 2012 Mr Rafiq provides the following particulars of his claim (the statement of claim containing nothing meaningful):

> The Civil Aviation Authority of New Zealand unlawfully disclosed the following false information to the witness [his sister, Munashra Rafiq];
>
> Police Report even this report bears incorrect information.
>
> - disorderly behaviour
> - trespass order at my rented property
> - infringement notices
> - littering
> - obtaining by deception under $500 in Wellington
> - that I have visited the Manukau Police Station to have a fine remove –
> - that I have been driving without a Licence
> - that I make various allegations around character and involved in fraud
> - that I am under a high alert by CAA –
>
> Other information disclosed unlawfully by CAA consisted of the following;
>
> - a copy of my birth certificate – private and confidential information.
> - personal identifications example Drivers Licence, Traffic Offence History Report from Land Transport New Zealand (Land Transport Safety New Zealand) – private and confidential information.

- pilot's Licence application form and its contents (CAA24FPP) – confidential information
- the investigation findings so far as far as my fit and proper status was concerned – confidential information
- information from other departments like Airways Corporation Ltd

I am 100% sure that IF I WERE A MAORI CAA would not have been disclosing personal information to my siblings. The Defendant advanced the above unlawful action just becoz I am not a Maori.

[49] Also submitted was an unsworn statement by Ms Munashra Rafiq stating (inter alia) that:

- When the CAA officers arrived at her home on 17 January 2008 they advised her that they were making enquiries in relation to her brother, Razdan Rafiq.
- Mr Rafiq had provided the CAA with an authority to interview, collect details and to show his personal files "briefly" to her.
- The officers told her that it was a legal requirement that she cooperate otherwise she might get into trouble and be liable for legal action.
- The officers revealed Mr Rafiq's driving history, Police and CAA records.
- The officers said that Mr Rafiq was not a fit and proper person and that his pilot's licence would be revoked.

[50] As mentioned, neither Mr Rafiq nor his sister attended to give evidence before the Tribunal when it convened to hear his case on 13 April 2012.

[51] However, the defendants concede that:

[51.1] Ms Munashra Rafiq and Ms Jubeda Elizabeth Khan (understood to be either the mother or step-mother of Mr Rafiq) were both shown a copy of the birth certificate that had been provided to the CAA by Mr Rafiq.

[51.2] Mr Rafiq's arrest for disorderly behaviour was discussed with Ms Jubeda Khan.

[51.3] The issue of Mr Rafiq being trespassed from 34C Neilson Street (where Ms Jubeda Khan lives) was discussed with Ms Munashra Rafiq and Ms Jubeda Khan.

[51.4] It is likely that the purpose of the CAA enquiry was explained in general terms.

The defence

[52] The defendants say that:

[52.1] At the relevant time the CAA was conducting a dual investigation into:

[52.1.1] Whether Mr Rafiq was a fit and proper person to hold licences under the Civil Aviation Act; and

[52.1.2] Whether he had committed offences against the Civil Aviation Act.

[52.2] In the course of those investigations the investigators spoke with his sister and with Ms Jubeda Khan to establish his identity and living circumstances.

[52.3] The investigations did not breach Principle 1 because they were for lawful and proper purposes under the Civil Aviation Act relating to the holding and

issuing of regulatory licences and the detection and prosecution of offences under the Civil Aviation Act.

[52.4] Principle 2 permits information being collected from a source other than Mr Rafiq:

[52.4.1] The questions at issue concerning Mr Rafiq's identity, personal history and honesty necessarily involved speaking with those who knew him and doing so without his express knowledge or involvement. This was necessary to avoid prejudice to the maintenance of the law and because collecting information directly from Mr Rafiq would prejudice the purposes of the collection.

[52.4.2] In addition, collecting such information was expressly authorised by a prior consent form signed by Mr Rafiq.

[52.5] The dealings with the relatives were appropriate, fair and non-intrusive and so did not breach Principle 4. The interviews were conducted professionally.

[52.6] The disclosures that were made to the relatives were appropriate and lawful. In particular, they were permitted by Principle 11 because they were:

[52.6.1] Necessary for the maintenance of the law; and

[52.6.2] Expressly authorised by a prior consent form signed by Mr Rafiq.

[52.7] In addition, all aspects of the fit and proper person investigation were authorised by s 10(3) of the Civil Aviation Act, which overrides the Privacy Act.

The "fit and proper person" requirement

[53] Under the Civil Aviation Act (and the rules made under it) a pilot must hold a licence (which is an "aviation document" for the purposes of the Civil Aviation Act). The Act requires a person who applies for an aviation document to be a "fit and proper person" to hold that aviation document. See s 9(1)(b)(ii). It is also an express requirement of every aviation document (including a pilot's licence) that the person who holds it continue to satisfy this fit and proper person test on an ongoing basis. See s 9(3). The statutory scheme is discussed in greater detail in *Civil Aviation Authority v Airline Pilots' Association Industrial Union of Workers Inc* [2011] NZCA 520, [2012] NZAR 66 at [13] to [31].

[54] When a person applies for an aviation document (including a pilot licence) they are required to fill out an application form and a fit and proper person form or questionnaire. An applicant may be required to supply additional information or to undertake relevant tests or examinations before their application is approved. The criteria for the fit and proper person test are set out in s 10 and relevantly include:

[54.1] The person's compliance history with transport safety regulatory requirements.

[54.2] Any history of physical or mental health or serious behavioural problems.

[54.3] Any conviction for any transport safety offence.

[54.4] Any evidence that the person has committed a transport safety offence or has contravened or failed to comply with rules made under the Civil Aviation Act.

[54.5] Such other matters and evidence as may be relevant.

[55] The applicant also authorises the Director to obtain, use and disclose information about the applicant for the purpose of the Civil Aviation Act.

[56] Mr Rafiq provided three such authorisations. The two in longer form are dated 25 October 2007 and 13 November 2007 respectively. A shorter but nevertheless substantially same authority was given on 20 March 2007. The longer form of authorisation was in the following terms:

> I declare that to the best of my knowledge and belief the statements made and the information supplied in this questionnaire and the attachments are complete and correct.
>
> **Consent to Disclosure and Collection**
>
> I authorise the collection by the Director of Civil Aviation or his delegate (hereinafter referred to as "the Director") from, and the disclosure to the Director by, any person, organisation or government department of any details of the following information about me: my knowledge and compliance with transport safety regulatory requirements; my physical or mental health or serious behavioural problems; any criminal investigations, charges or convictions, including any matters relating to any transport safety offence. However I do not consent to the release of any information to which the clean slate scheme applies, pursuant to the Criminal Records (Clean Slate) Act 2004.
>
> I authorise the Director to use, and disclose, the information obtained about me for any purpose associated with the lawful functions of the Director and the Civil Aviation Authority under the Civil Aviation Act 1990, or other such purpose permitted by law.

The evidence

[57] We now turn to the evidence of Mr Pawson (an investigating officer with the CAA) and of Ms Penney (an Aviation Examiner with the CAA). We will concentrate on the evidence of Mr Pawson as he led the interviews with both Ms Munashra Rafiq and with Ms Jubeda Khan on 17 January 2008. Ms Penney was present but her role was secondary. Whereas Ms Penney was conducting the fit and proper person enquiry, Mr Pawson was investigating whether Mr Rafiq had committed an offence under s 49 of the Civil Aviation Act. As with Ms Penney, his focus was on Mr Rafiq's identity as well as his criminal and traffic history. In the interviews with Mr Rafiq's sister and Ms Jubeda Khan a key aspect of the enquiry was to determine the identity of Mr Rafiq and to confirm, clarify or check various aspects of his claimed circumstances and to establish the truth in relation to the suspicions held by the CAA about Mr Rafiq's honesty and possible deception.

[58] The concerns held by Mr Pawson and Ms Penney related to (inter alia):

[58.1] A dispute Mr Rafiq had with the Airways Corporation of New Zealand Ltd over an administrative error, which he had escalated in a way that called his mental state into question.

[58.2] Evidence, uncovered while looking into the Airways complaint, that Mr Rafiq appeared to be using a number of aliases in his correspondence with Airways.

[58.3] One of these aliases, Mohammed Razdan Rafiq Khan, had been issued with three traffic infringement notices.

[58.4] The traffic offences under the name "Mohammed Khan" had not been declared when Mr Rafiq filled out his original fit and proper person questionnaires or the declaration and second questionnaire he filled out in relation to his application for a commercial pilot licence. His explanation wsa that "Mohammed Khan" was his estranged twin brother.

[58.5] At the time Mr Rafiq had applied for his commercial pilot licence he was facing a pending criminal charge for disorderly behaviour.

[59] Mr Pawson accepts that during the interview with Ms Munashra Rafiq on 17 January 2008 he showed to her a copy of the birth certificate provided to the CAA by Mr Rafiq. The purpose was to establish any information she had about Mr Rafiq's true identity, including whether that birth certificate pertained to him and not to a twin brother or other brother.

[60] In the later interview with Ms Jubeda Khan Mr Pawson showed to her the front page of Mr Rafiq's application for a commercial pilots licence to confirm the address and phone number that Mr Rafiq had handwritten on the form. He also asked Ms Jubeda Khan if she understood why the CAA was speaking with her and advised her that "we have this person Khan who has traffic offences which haven't been declared by Ray and all the details for Mr Khan including the middle names which match up with Ray and Rafiq and all the other details". He also showed to Ms Jubeda Khan the birth certificate provided by Mr Rafiq. He read out an extract from a letter from Mr Rafiq in which he (Mr Rafiq) referred to his brother being responsible for the traffic convictions. He did this to more effectively question Ms Jubeda Khan about the alleged twin brother and Mr Rafiq's claim that it was this twin brother who was responsible for the various matters then the subject of attention by the CAA. Ms Khan told Mr Pawson and Ms Penney that when Mr Rafiq's birth mother died she had married Mr Rafiq's father and, as step-mother, had brought up the children, including Mr Rafiq. There was no twin brother. Mr Rafiq had been living with her at 34C Neilson Street but due to his behaviour she had arranged for the Police to serve a trespass notice and he was no longer living at the address.

[61] Mr Pawson says that the allegations made by Ms Munashra Rafiq in her unsigned statement are not correct. He and Ms Penney did not show to her Mr Rafiq's personal files. While he and Ms Penney did explain that they were looking for Mr Rafiq in relation to their investigation and explained that they were hoping to verify Mr Rafiq's identity, at no time did they tell Ms Munashra Rafiq that they were acting under some type of "authority" submitted by Mr Rafiq. Nor did he or Ms Penney make any threats, implied or otherwise, that failure to cooperate with the CAA might result in some type of legal sanction. He recalls that Ms Rafiq was helpful and cooperative during the meeting and that she was happy to provide background information regarding her brother, confirming he had never lived at her house. She also provided feedback after reviewing the birth certificate. The allegation by Ms Rafiq that the officers revealed Mr Rafiq's file consisting of driving history, Police and CAA records is not true. The only document Mr Pawson discussed with Ms Rafiq was the birth certificate provided to the CAA by Mr Rafiq. That enquiry was necessary to establish Mr Rafiq's identity and background particularly given the allegation that there was a twin brother. As to the allegation that the CAA officers said that Mr Rafiq was not a fit and proper person, this too is an allegation which is not true. Mr Pawson did not volunteer the information and if he had been asked the question he would not have made comment that Mr Rafiq was not a fit and proper

person to hold a pilot licence. The purpose of his investigation was to ascertain the facts and to establish whether an offence against the Act had been committed.

[62] In summary, the evidence of Mr Pawson (corroborated by Ms Penney) was that any disclosures of information were for the purposes of the parallel investigations. To make meaningful inquiry it was necessary to outline or to put information to witnesses to ascertain whether they could verify the information provided by Mr Rafiq, particularly regarding his identity. The discussions Mr Pawson and Ms Penney had with Ms Rafiq and Ms Jubeda Khan were all useful and necessary for the purposes of their investigations into whether Mr Rafiq had committed offences against the Civil Aviation Act and into whether his private pilots licence should be revoked. His identity and his honesty were at issue and a prosecution was reasonably in contemplation, as was revocation of his private pilots licence. In their view it was both important and appropriate, as part of carrying out the investigations, to visit addresses where Mr Rafiq might be found and to attempt verification with those who knew him well what CAA knew about Mr Rafiq or what he had told CAA about his circumstances. The investigations could hardly have been satisfactorily concluded without doing so. The very nature of the issues involved meant that this was not the sort of inquiry that could have been conducted by speaking only to Mr Rafiq, or by speaking to others only with his express consent or participation. Furthermore, to gain the cooperation of the prospective witnesses, it was necessary to speak in general terms about what the nature of the inquiries were.

[63] Both Ms Penney and Mr Pawson described the interviews with Ms Munashra Rafiq and Ms Jubeda Khan as friendly and cooperative.

Conclusions – Principle 11

[64] The primary issue is whether the disclosure of personal information about Mr Rafiq to his sister and to Ms Jubeda Khan was in breach of Principle 11. We address this issue first.

[65] While, in general terms, Principle 11 prohibits an agency from disclosing personal information, the prohibition is by no means an absolute one, as can be seen from the text of Principle 11:

> Principle 11
> *Limits on disclosure of personal information*
>
> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
> (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
> (b) that the source of the information is a publicly available publication; or
> (c) that the disclosure is to the individual concerned; or
> (d) that the disclosure is authorised by the individual concerned; or
> (e) that non-compliance is necessary—
> (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
> (ii) for the enforcement of a law imposing a pecuniary penalty; or
> (iii) for the protection of the public revenue; or
> (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or

(f) that the disclosure of the information is necessary to prevent or lessen a serious and imminent threat to—
  (i) public health or public safety; or
  (ii) the life or health of the individual concerned or another individual; or
(g) that the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or
(h) that the information—
  (i) is to be used in a form in which the individual concerned is not identified; or
  (ii) is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
(i) that the disclosure of the information is in accordance with an authority granted under section 54.

[66] The relevant exceptions applicable to the present facts are (d) (disclosure authorised by the individual) and (e) (non compliance necessary for the maintenance of the law).

[67] As to Principle 11(d) we are of the view that the wording of the authorisations signed by Mr Rafiq provided the CAA with reasonable grounds to believe that the disclosures made by Mr Pawson and Ms Penney were authorised by Mr Rafiq.

[68] In the alternative, Principle 11(e) applied. Without reciting again the evidence provided by Mr Pawson and Ms Penney, it is sufficient to note only:

[68.1] Enquiries had shown that Mr Rafiq's true identity was in issue in that he had been variously known as Mohammed Razdan Rafiq Khan, Ray Rafiq, Roy Rafiq, Razdan Rafiz, Mohammed Rafiq and Mohammed Khan.

[68.2] Information showed that Land Transport New Zealand held records relating to a Mr Mohammed Razdan Rafiq Khan who had the same date of birth, address and mobile telephone number as Mr Rafiq. "Mr Khan" had been issued with three traffic infringement notices for offences between 1 September 2005 and 18 January 2007.

[68.3] When the CAA wrote to Mr Rafiq asking him to comment on this information Mr Rafiq initially replied that "the person of the above mentioned name (Mohammed Khan) has nothing to do with me or my application for the license". Two days later he altered his position and advised that the Land Transport report "relates to my brother Mr Khan who no longer resides with me or my family".

[68.4] Mr Rafiq's arrest for disorderly behaviour and his being trespassed by Ms Jubeda Khan from 34C Neilson Street were directly relevant to the "fit and proper person" enquiry being conducted by the CAA.

[69] The inevitable conclusion is that the admitted disclosures by Mr Pawson and Ms Penney were necessary for one or more of the purposes enumerated in Principle 11(e). We find that no breach of Principle 11 occurred.

[70] In these circumstances we do not need to consider s 10(3) of the Civil Aviation Act which provides:

10 Criteria for fit and proper person test

(3) The Director may, for the purpose of determining whether or not a person is a fit and proper person for any purpose under this Act,—

(a) seek and receive such information (including medical reports) as the Director thinks fit; and

(b) consider information obtained from any source.

[71] We can now more briefly address the alleged breaches of information privacy Principles 1-4.

Conclusions – Principle 1

[72] The CAA collected information about Mr Rafiq as part of two concurrent investigations. First, a "fit and proper person" investigation under s 15A of the Civil Aviation Act and second, an enforcement investigation into whether an offence had been committed under s 49 of the Act. These are both plainly lawful purposes connected with the CAA's duties, functions and powers under the Civil Aviation Act. For the reasons explained by Ms Penny and Mr Pawson the collection of the information was necessary for those purposes. There is no evidence to suggest that the investigating officers sought to collect personal information about Mr Rafiq unconnected to the lawful purpose of their investigations. In the circumstances it was entirely appropriate for them to interview his family members in the manner that they did. Principle 1 was complied with.

Conclusions – Principles 2 and 3

[73] As Mr Child observed in his submissions, the claims by Mr Rafiq under these heads are not clearly formulated, but in essence the objection appears to be that the investigating officers collected information about him from his relatives (and especially doing so without his knowledge).

[74] While Principle 2 does require an agency to collect personal information about an individual directly from that individual, exceptions are explicitly recognised. In the present case Principle 2(2)(b), (d) and (e) apply in that:

> **[74.1]** Written authority was given by Mr Rafiq when applying for his pilot licences authorising the Director to obtain, use and disclose information for the purpose of the Civil Aviation Act.
>
> **[74.2]** Even without an express authorisation, there were reasonable grounds for the CAA to believe that collection of information from people other than Mr Rafiq was necessary to avoid prejudice to the maintenance of the law, or that collecting the information directly from Mr Rafiq would have undermined the investigation being conducted. The key reason why information was sought from members of his family was to check whether what he had said about having a twin brother was true. There were reasonable grounds for the CAA to believe that collection of information from people other than Mr Rafiq was necessary. Indeed, the facts establish that it was reasonable for the CAA to believe that collection of information directly from Mr Rafiq would have prejudiced the purpose for which the information was being collected. From the information in their perspective it was reasonable to conclude that Mr Rafiq was a serial liar.
>
> **[74.3]** Prosecution proceedings were then reasonably in contemplation and it was reasonable for Mr Pawson to believe that non-compliance was necessary for the conduct of those contemplated proceedings.

[75] For similar reasons Principle 3(4)(a), (c) and (d) applied.

[76] We accordingly find that there was no breach of information privacy Principles 2 and 3.

Conclusions – Principle 4

[77] There is no evidence whatsoever to suggest that Ms Penney and Mr Pawson collected information by unlawful means or by means that, in the circumstances of the case, were unfair or intruded to an unreasonable extent upon the personal affairs of Mr Rafiq. Having seen and heard both witnesses give evidence we have no hesitation in concluding that they went about their tasks carefully, professionally and conscientiously. Their evidence is supported by their contemporaneous notes as well as the audio transcript of their interview with Ms Jubeda Khan. Mr Rafiq did not attend the hearing or submit admissible evidence of his own. The witness statement by Ms Munashra Rafiq is unsworn. No reliance can be placed on it, particularly given her absence from the hearing. No weight at all can be attached to it.

[78] We accordingly find that there was no breach of information privacy Principle 4.

Decision on the Principles 1-4 and 11 claim

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

> **[79.1]** There has been no breach of information privacy Principles 1-4 and 11 by the defendants. Mr Rafiq has accordingly failed to satisfy the Tribunal on the balance of probabilities that any action of the defendants was an interference with his privacy. It follows that the Tribunal does not have jurisdiction under s 85 of the Act to grant a remedy.
>
> **[79.2]** Mr Rafiq's claim is dismissed.

Further ground for determining case

[80] We are also satisfied under s 115 of the Human Rights Act 1993 (incorporated into the Privacy Act by s 89 of that Act) that these proceedings are vexatious or not brought in good faith:

> **115 Tribunal may dismiss trivial, etc, proceedings**
>
> The Tribunal may at any time dismiss any proceedings brought under section 92B or section 92E if it is satisfied that they are trivial, frivolous, or vexatious or are not brought in good faith.

[81] Our reasons are:

> **[81.1]** Mr Rafiq instituted two separate proceedings against the defendants and then failed to attend the hearing to give evidence in support of his many allegations.
>
> **[81.2]** Proper grounds for his complaints and allegations never existed.
>
> **[81.3]** Through the statements of claim and the "statements of evidence" runs a consistent theme of Mr Rafiq taking revenge against the defendants for cancelling his private pilots licence, thwarting his attempt to gain a commercial pilots licence and prosecuting him for offences under s 49 of the Civil Aviation Act. See by way of illustration the following extracts from his "statement of evidence" dated 23 February 2012:

> The cost of Pilot training was the sum of $90,000. Out of this figure, large portion was borrowed from BNZ and was never repaid. The matter was referred to the Baycorp NZ. I had informed Baycorp with my abusive swear of European people that ask CAA to pay for the debt as it was CAA who caused hindrance in the Pilot training programme I was enrolled in …
>
> In order to advance these witnesses need to be called in by the Defendants which means multiple hearings shall take place which mean substantial costs to the tax payer …
>
> The Plaintiff is now fully on benefit for lifetime as I need to eat tax payers fund to bring the economy down like other people …
>
> I believe if all the Europeans are gone from this country Maoris will give me my licences back such as a Maori Director of CAA! …

[81.4] The delays have been inordinate. The Principle 6 request was made on 27 December 2008 but it was not until two years later, on 19 January 2011, that the defendants were notified of Mr Rafiq's complaint to the Privacy Commissioner. In relation to the claim based on Principles 1-4 and 11, the interviews by Mr Pawson and Ms Penney were conducted on 17 January 2008. The defendants did not learn of Mr Rafiq's complaints until notification was given by the Privacy Commissioner on 3 December 2009. Again, a delay of nearly two years.

[81.5] Given that Mr Rafiq had on three occasions signed forms authorising the Director to obtain, use and disclose information about Mr Rafiq for the purpose of the Civil Aviation Act (copies of which had been provided to Mr Rafiq in response to his Principle 6 request), all of Mr Rafiq's complaints relating to Principles 1-4 and 11 were inevitably bound to fail.

OVERALL CONCLUSION

[82] In summary our conclusions are:

[82.1] All of the information the defendants have refused to disclose to Mr Rafiq in response to his Principle 6 request dated 27 December 2008 has been properly and justifiably refused under the Privacy Act 1993, ss 27(1)(c), 29(1)(a) and 29(1)(f).

[82.2] There has been no breach of information privacy Principles 1-4 and 11 by the defendants.

[82.3] Mr Rafiq has accordingly failed to satisfy the Tribunal on the balance of probabilities that any action of the defendants was an interference with his privacy.

[82.4] Each and every of the claims made by Mr Rafiq are dismissed.

[82.5] These proceedings are vexatious or not brought in good faith.

Formal orders

[83] Our formal orders are:

[83.1] The proceedings in HRRT040/2011 and 041/2011 are dismissed.

[83.2] Costs are reserved.

Costs

[84] Any application for costs will be dealt with according to the following timetable:

[84.1] Any application is to be filed and served, along with any submissions or other materials put forward in support of the application, within 28 days after this decision is issued to the parties.

[84.2] Any notice of opposition to the making of an award of costs is to be filed and served, along with any submissions or other materials put forward in opposition to the application, within a further 28 days.

[84.3] The Tribunal will then determine the issue of costs on the basis of the papers that will by then have been filed and served and without any further oral hearing.

[84.4] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Dr SJ Hickey**	**Dr AD Trlin**
Chairperson	**Member**	**Member**