IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 6**

	Reference No. HRRT 009/2012
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**SHANNON RICHARD ANDREWS**
	PLAINTIFF
AND	**COMMISSIONER OF POLICE**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Mr RK Musuku, Member
Mr BK Neeson, Member

REPRESENTATION:
Mr SR Andrews in person
Mr DJ Perkins and Ms S McKenzie for Defendant
Ms K Evans and Ms S Thompson for Privacy Commissioner

DATE OF HEARING: 12 and 13 November 2012

DATE OF DECISION: 4 March 2013

DECISION OF TRIBUNAL

Introduction

[1] During the course of a criminal prosecution against Ms Mowena Edmonds, the New Zealand Police disclosed to her certain text messages which had been authored by her partner, Mr Andrews, the plaintiff in these proceedings. Some of the messages suggested that he may have been unfaithful to Ms Edmonds. She is said to have then severed their relationship. Family Court proceedings followed. They were centred on a claim by Mr Andrews to visiting rights to the two children of the relationship. He says that the disclosure of the messages by the Police has caused him substantial emotional harm.

[2] This decision considers the relationship between the Privacy Act 1993 and the Criminal Disclosure Act 2008 (CDA). The former aims to promote and protect individual privacy. The latter has as its stated purpose (CDA s 3(1)) the disclosure of relevant information between the prosecution and the defence for the purposes of criminal proceedings. The Privacy Act limits the circumstances in which personal information may be disclosed. The CDA compels the disclosure of such information in specified circumstances. When these regimes are in conflict, the disclosure provisions of the CDA prevail but the controls which the Privacy Act imposes on the disclosure of personal information are not entirely displaced. They continue to operate "except as expressly provided" in the CDA. See s 42(1) of the CDA alongside which must be read the complementary provisions of s 7(1) of the Privacy Act.

[3] The degree of harmony between these provisions has not, apparently, been previously considered. Nor has the degree to which the Tribunal can examine decisions taken under the CDA by a prosecutor.

[4] To contextualise the legal issues a brief summary of the facts is necessary.

Mr Andrews – his current sentence of imprisonment

[5] Mr Andrews is currently at Rimutaka Prison serving a sentence of six years' imprisonment for burglary and receiving offences with a minimum non-parole period of three years. The circumstances in which these offences occurred will be returned to shortly in the narrative of facts.

Mr Andrews and Ms Edmonds – their relationship

[6] There are two key figures in the narrative of facts. First there is Mr Andrews himself. Second there is Ms Edmonds.

[7] Mr Andrews was born on 5 July 1987 and is currently 25 years of age. Since approximately 14 years of age he has been in a relationship with Ms Edmonds who was born on 25 August 1983 and is presently aged approximately 29 years. There are two children aged 12 years and two and a half years respectively. Mr Andrews is the natural father of the youngest child and regards himself as the father of the eldest child.

[8] Apart from the occasions when he has been in prison or required by bail conditions to live elsewhere, Mr Andrews has lived with Ms Edmonds. Mr Andrews described himself as a troubled youth with many appearances in the Hastings Youth Court. He observed that as he got older, the sentences he received got longer. Nevertheless the relationship with Ms Edmonds continued with her visiting him in prison every week. He acknowledges that at times she has been unhappy with him for "coming and going" as he pleased and for not being in employment. She has also on occasion provided information to the Police about his criminal activities. Nevertheless they have always made up. He believes they have strong feelings for each other. He concedes that he has twice been convicted (following guilty pleas) of assaulting her. The first conviction was in 2008 and the second in 2009. He described the relationship just prior to his being sentenced to his current term of imprisonment as "hot and cold" and as "love and hate" but by the time he was sentenced he claims that he and Ms Edmonds parted on good terms.

[9] Ms Edmonds did not attend the hearing before the Tribunal or give evidence. A witness summons was issued at the request of Mr Andrews but he was unable to tender

the required fees, allowances and expenses. We therefore do not know her version of events other than through what is contained in an unsworn statement of evidence.

Narrative of facts

[10] From April 2009 to August 2009 there were a large number of daylight burglaries of residential properties in Hastings and Napier. In July 2009 Ms Edmonds told the Police about burglaries which Mr Andrews was committing. Search warrants resulted in the location of a large amount of stolen property. One of the search warrants was executed at the house in which Mr Andrews and Ms Edmonds lived. Police found there a large amount of property stolen from 27 residential properties. The items included televisions, cameras, electronic items, jewellery, hunting gear, boots, telephones, make-up, electronic games, clothing and luggage. The Police alleged the house was used to store stolen property. Some of the items found in Ms Edmonds' possession were gifts from Mr Andrews that Ms Edmonds knew had been stolen.

[11] Mr Andrews was charged with a number of burglary offences. Those charges were laid indictably. Ms Edmonds was charged with receiving property from Mr Andrews. Those charges were also laid indictably. According to the sentencing notes of Judge AJ Adeane in the District Court at Napier (*R v Andrews* DC Napier CRI-2009-020-3923, 24 June 2011) both Mr Andrews and Ms Edmonds were first summonsed to appear on 8 September 2009.

[12] While Ms Edmonds was released on bail, Mr Andrews was remanded in custody. Eventually, after repeated applications, he was released on bail in August 2010. At that point he and Ms Edmonds resumed living together with their two children.

[13] A joint trial date was allocated for 28 March 2011. Mr Andrews did not appear in court on that date. Ms Edmonds did appear and pleaded guilty.

[14] Three days earlier, on 25 March 2011, a burglary occurred at an address in Hastings. Mr Andrews was identified as one of two offenders. Although initially detained at the crime scene by a member of the public, he managed to escape. By way of text messages he sought help from Ms Edmonds.

[15] The assistance she then gave to him led to her being charged with a new offence, namely being an accessory after the fact to the 25 March 2011 burglary. That charge was laid indictably. The case for the prosecution is conveniently set out in the following Summary of Facts:

> The accused Edmonds has been in a relationship with Shannon Richard Andrews for a number of years. In 2009 they were arrested after Police executed a search warrant at their address recovering property from 27 addresses. They were charged with a number of indictable laid offences for which they have both plead guilty. They were on bail conditions to reside at 23 Margate Place, Flaxmere, from 25 March 2011 having previously been on bail to 54 Margate Place.
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> They are due to appear for sentence on those matters on 27 May 2011.
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> On 23 February 2011 Police attended the bail address of Andrews and Edmonds as a result of a domestic dispute.
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> When spoke to by Police the accused Edmonds stated that the dispute had started over the fact that Andrews was once again doing burglaries.
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> On 25 March 2011 Shannon Richard Andrews was disturbed committing a burglary at 603 Southhampton Street West, Hastings.

> At one point he had been detained by the witness who attempted to hold him until Police arrived. Andrews somehow managed to get away and evade both the witness and attending Police.
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> Over the next four days Police made a number of enquiries to locate Andrews including making contact with the accused, questioning her and conducting searches of her property.
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> As late as 3.15pm on 30 March 2011 Police made contact with the accused and she advised them that she had heard that he had gone to Wellington two or three days ago.
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> Subsequent investigations revealed that the accused was always in contact with Andrews and received texts from him telling her that he had been caught followed by a text that he had gotten away and was at "Auntie Carol's". At which point she replied "I'll meet you there". Further texts were passed between Andrews and Edmonds detailing picking Andrews up, when to pick him up, where she was and the fact that she had been searched. The text data also revealed that they were clearly aware that Police may intercept their texts and as a result they corresponded to each other to delete all texts.
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> Text data revealed the accused and Andrews arranged to meet and did indeed meet at various times as well as discussing and implementing a plan to shift the Police attention for Andrews from Hastings to Wellington.
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> When Police located Andrews on 31 March 2011 they were together.
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> Even after being arrested they continued to correspond by text covering off issues as to how they could have remained together on the run and how they would approach the forthcoming hearing. Edmonds also texts family members telling them that Andrews still has his cellphone on him and not to text him as he doesn't want to get caught with it. She also tells them if they wait he will text when able.
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> In explanation the accused stated that she had not had any contact with Andrews whatsoever and only went to see him on 31 March 2011 at the request of his mother. She also claimed that her cousin had rung from Porirua indicating that she had seen Andrews there and that as a result she had advised the Police of that fact.

[16] Ultimately the accessory after the fact charge was dismissed and a new charge of attempting to pervert the course of justice laid. Ms Edmonds pleaded guilty to that charge and was sentenced on 17 May 2012 to community detention for five months.

[17] The focus must now return to the steps taken by the Police to locate Mr Andrews in the period between the burglary on 25 March 2011 and his arrest on 31 March 2011.

[18] By way of search warrant the Police received from Telecom text messages from and to two cellphones used by Mr Andrews in the period 1 March 2011 to 28 March 2011. Over this four week period there were approximately 7,723 entries. For the cellphone ending with the digits 4867 the entries, when first printed, ran to 600 pages. For the purpose of the hearing before the Tribunal the printout was compressed to 321 pages. For the cellphone ending with the digits 2261 the printout was four pages in length.

[19] A third cellphone, a 2 Degrees cellphone number ending with the digits 9645 comprised 60 pages for the period 25 March 2011 to 1 April 2011.

[20] The Police case against Ms Edmonds, initially framed as an accessory after the fact charge but later changed to perverting the course of justice, was largely based on text messages passing between her and Mr Andrews. The following summary will assist. It has been taken from the document at Tab 14 of the common bundle and has the heading Police Summary of Text Messaging to and from Mowena Edmonds cellular

phone 021 268 5187 with Shannon Andrews cellular phone 027 505 4867 and 022 097 9645:

1. On 25 March 2011, EDMONDS receives a two text messages from her partner, Shannon ANDREWS that he had been caught and was going to be locked up. Approximately ten minutes later ANDREWS has told EDMONDS that he had run away and was at "Auntie CAROL".
2. On receiving these messages, EDMONDS arranges to "meet" ANDREWS there.
3. Shortly after this text, ANDREWS asks EDMONDS to uplift clothing and phone chargers for him. He asks EDMONDS to keep an eye on the address where the clothing is and delete her texts from her phone to which EDMONDS replies "K".
4. At about 12:02pm EDMONDS warns ANDREWS that the Police have just driven past the address where she is at. Approximately ten minutes later EDMONDS further warns ANDREWS that she has been stopped and searched by the Police. She also warns him that his mothers address has been searched and that she has deleted her text messages.
5. In a series of text messages starting at 2:42pm on the 27th March 2011, EDMONDS warns ANDREWS that the Police have just searched the "house" and that someone has been watching the "house". After a number of texts about the search of the house, EDMONDS warns ANDREWS again not to come back as she believes "this place on watch".
6. During a further conversation later on the same day from about 3:11pm, EDMONDS further warns ANDREWS that his mothers address is not safe as the Police had been asking her if he would go there. ANDREWS asks her if she has told Police that he is out of town. EDMONDS replies that she forgot to but tells ANDREWS that she will ring the Police and "tell them".
7. At about 1.05pm on 29 March 2011 a series of texts begin with EDMONDS texting ANDREWS to his mother to ring Police telling them that he is down the line, and then talk about whether her phone is safe from police.
8. At about 9.03pm on 30 March 2011 a series of texts begin with ANDREWS texting EDMONDS to arrange to meet, and concerns about it being risky. Texting continues with ANDREWS reminding EDMONDS about deleting texts to which she replies Yp.
9. At 1.39pm on 31 March 2011 EDMONDS texts SULLIVAN (ANDREW'S mother) confirming that ANDREWS locked up and that she was with him. She also advises that ANDREWS has his 022 phone on him and that she should wait for him to text her.
10. At 2.35pm on 31 March 2011 EDMONDS texts ANDREWS asking if she could ring him, and enquires if he told Police that he had just come back from Wellington.

[21] The first appearance by Ms Edmonds on the accessory after the fact charge was in the Hastings District Court on 10 May 2011. She was represented by Mr GW Calver, a barrister who practises in Hastings. At that first appearance the officer in charge of the case, Constable PJ Potaka, made an initial disclosure to Mr Calver under the CDA. That disclosure included all the text data held at that point by the Police in relation to the two Telecom cellphones 4867 and 5187. His evidence, as set out in his amended brief of evidence (confirmed at the hearing) was:

> 24 At EDMOND's court hearing on 10 May 2011, initial disclosure was provided to the lawyer for EDMONDS (Mr Bill CALVER), which included all raw text data held at that point for EDMONDS's own cellphone 027 268 5187, and 027 505 4867 which was ANDREWS's. I recall that these documents were handed to CALVER in a bag at the courthouse. The raw text data in relation to ANDREWS's cellphone 027 505 4867 that was disclosed to CALVER is at Tab 34 in the common bundle. The disclosure was recorded in an INITIAL DISCLOSURE RECEIPT, which is at Tab 12.

In his supplementary oral evidence Constable Potaka added that this was the first occasion on which text messages obtained by the Police were disclosed to Ms Edmonds through her lawyer.

[22] On the following day, 11 May 2011, Mr Calver wrote to the Police to acknowledge the initial disclosure and to request "continuing disclosure". In a later letter dated 26 August 2011 addressed to the Crown Solicitor at Napier he asked that he receive "full and appropriate discovery". No indication was given as to what the defence might be.

[23] Further disclosures under the CDA were made to Mr Calver by the Police on 7 and 20 June 2011 and again on 30 August 2011. All of these disclosures related to the text messages. They included print-outs of the text messages sent and received by the cellphones held by Mr Andrews and ending with the digits 4867 and 2261 respectively and a summary of the text messages between Mr Andrews and Ms Edmonds.

[24] It is not in dispute that all the text messages obtained by the Police and which were sent from or received by the three cellphones used by Mr Andrews in the period from about 24 January 2011 to 22 April 2011 were disclosed to Ms Edmonds through her lawyer. As mentioned, she eventually entered a guilty plea to an indictably laid charge of perverting the course of justice.

The complaint made by Mr Andrews

[25] Mr Andrews does not complain of the disclosure to Ms Edmonds of the texts he sent to her and which he received from her.

[26] His complaint is that the Police disclosed more than this in that Ms Edmonds received also texts from Mr Andrews to third parties and texts from third parties to Mr Andrews. In particular, those third parties included women with whom he was either having a relationship or with whom he hoped to establish a relationship. A number of the texts are sexually explicit. Until the receipt of these texts Ms Edmonds (he believes) had been unaware of these relationships or intended relationships. Her discovery of what Mr Andrews was doing "behind her back" (Mr Andrews' expression) has led to difficulties in their relationship and more than usual difficulty in Mr Andrews maintaining contact with his children. He mentioned, for example, the return to him (unopened) of presents he had made in prison for the children. One description from a document attached to the statement of claim reads:

> I was not the one that, exposed all my personal private information via texts to Mowena and in doing so it has caused and created a significant interference into my personal life and relationship, with Mowena, not only that, it has now also reflected on my relationship with my kids, as now Mowena won't let me see or hear from them, whatsoever and I am now in the process of going through the family court to see and hear how they are progressing. It has caused, significant, frustration and depression, as well as stress and it has made me feel low in spirit, mind and body. I also stated that I now sit in my room all day and cry and stress of what the interference has caused and it has caused a heavy toll on me and created a enormous impact for me and also my kids.

[27] As mentioned, Ms Edmonds was summonsed to appear at the hearing before the Tribunal but did not appear, Mr Andrews not having tendered to her her conduct money. We nevertheless admitted into evidence her unsworn statement while recognising that the weight to be attached to it is problematical. To ensure that the case for Mr Andrews is expressed to its fullest possible extent we reproduce the following passage in which Ms Edmonds records her claimed reaction on seeing the texts passing between Mr Andrews and the other women in his life:

> I shouldnt have seen those texts in the first place. They didnt concern me and the police shouldnt have sent me a file of text messages that concerned other people. This has really affected me emotionally hard and the decision that I made with not wanting my kids to know

> their father because of these text messages that I have seen. This has affected my relationship and has affected me, my kids and their father Shannon Andrews. This has split my family apart.

[28] The veracity of these assertions by Ms Edmonds has not, for the reasons mentioned, been tested.

[29] Mr Andrews submits that the third party texts, particularly those relating to his communications with the other women in his life were not "relevant" in terms of the CDA and their release breached the prohibition on disclosure of personal information in information Principle 11. There were no "reasonable grounds" for the Police to believe that one or other of the exceptions listed from paras (a) to (i) of Principle 11 applied to justify disclosure of the information.

[30] He also submits that the disclosure of the third party communications was an act of bad faith on the part of the Police. This allegation is articulated, for example, in his letter to the Tribunal dated 14 June 2012:

> Disclosure of these texts were disclosed deliberately and this is due to previous experiences, this officer [Constable Potaka] has previously done the same thing, which led to Mowena giving him information about my offending. Unfortunately at that time I was unaware of this process and I have just learnt how this process. In this case I feel he took the texts as an advantage, as a tactic to put pressure on Mowena in hope that she would give more information.

It is an allegation which he pressed again in his post-hearing submissions dated 18 November 2012.

[31] As to this there is no evidence whatsoever to support the allegation of bad faith. Furthermore, having seen and heard Constable Potaka give evidence we have no hesitation in finding that he acted entirely properly. He impressed as an able, conscientious police officer who acted throughout with diligent application to the duties of the Police under the CDA.

The case for the Commissioner of Police

[32] For the Commissioner of Police it is submitted:

> **[32.1]** The disclosures were authorised and/or required by the CDA and as such, did not breach Principle 11.
>
> **[32.2]** Further and in the alternative, the disclosures came within two of the exceptions provided by Principle 11 itself, namely exceptions 11(e)(i) and (e)(iv).
>
> **[32.3]** The disclosure of the information was not the cause of the breakdown of the relationship between Mr Andrews and Ms Edmonds.

[33] In developing the first point (that disclosure was authorised or required by the CDA) Mr Perkins drew attention to the following:

> **[33.1]** All of the text messages obtained by the Police from Mr Andrews' mobile telephones, irrespective of when or between whom they were sent, were "relevant" in the sense of s 8 of the CDA in that the Police had to establish that the cellphones were in the possession of Mr Andrews. In that regard:
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> > **[33.1.1]** A case could be made that the text messages tended to support the prosecution case that Mr Andrews (and not some third party) was in possession of the mobile telephones; and

[33.1.2] On the other hand, some of the text messages may have contained information which tended to rebut the prosecution case that Mr Andrews was in possession of the mobile telephones, and thus may have been potentially relevant to Ms Edmonds' defence. There was always the potential that Ms Edmonds could say that she knew Mr Andrews to be a person who was always faithful to her and that the text messages of a salacious nature were evidence that some person other than Mr Andrews was using the cellphones at the relevant time.

[33.2] If the Police were in doubt whether all of the text messages were "relevant" it was appropriate to take a conservative approach and resolve this doubt in favour of disclosure: *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 397 and *Cornelius v Commissioner of Police* [1998] 3 NZLR 373 (HC) at 378. This was submitted to be consistent with:

[33.2.1] The common law obligations of prosecutors to "act with the utmost candour and fairness in making a full, adequate and impartial presentation of the facts": *R v Hall* [1987] 1 NZLR 616 (CA) at 628.

[33.2.2] The stated purpose of the CDA namely, to promote fair, effective and efficient disclosure of relevant information between the prosecution and defence, and avoiding the need for unnecessary interlocutory hearings to resolve issues regarding disclosure.

[33.2.3] The practical reality that defence counsel are better placed than prosecutors to determine what evidence may be relevant to any possible defences under consideration. Relevance may not always be evident to prosecutors on the face of the document: *Cornelius v Commissioner of Police* [1998] 3 NZLR 373 at 382.

[33.3] Disclosure of the text messages between Mr Andrews and third parties was authorised and/or required by the CDA because they were, in terms of s 8 of the CDA, relevant in that they tended to support or rebut or had a material bearing on the case against Ms Edmonds. In addition they had been requested by her counsel.

[33.4] Section 19(1) of the CDA deals with exhibits. It provides that if an exhibit is reasonably capable of reproduction, the prosecutor must disclose a copy of it to the defendant upon request. The exhibit does not have to be "relevant" for the obligation to arise. As the exhibits were reasonable capable of reproduction, were encompassed by the request by counsel for Ms Edmonds for "continuing disclosure" and "full and appropriate discovery", they were required to be disclosed in accordance with s 19(1)(b).

[34] As to the exceptions to Principle 11 it was submitted that the restriction on the disclosure of personal information to third parties does not apply where an agency believes, on reasonable grounds, that disclosure is necessary:

[34.1] To avoid prejudice to the maintenance of the law by any public sector agency, including the prosecution of offences; or

[34.2] For the conduct of proceedings before any court.

[35] In this regard it was submitted that the disclosure took place in connection with the prosecution of Ms Edmonds before the District Court and not for any other reason.

Constable Potaka had firmly and unmistakeably rejected the suggestion made by Mr Andrews that there had been an ulterior motive in making the disclosures to Ms Edmonds. He was, as a matter of law, required to make the disclosure under the CDA and, in any event, was required to comply with the common law obligations of prosecutors to "act with the utmost candour and fairness in making a full, adequate and impartial presentation of the facts": *R v Hall* [1987] 1 NZLR 616 (CA) at 628.

[36] On the question whether the disclosure caused the breakdown in the relationship between Mr Andrews and Ms Edmonds, it was submitted that the causes of the breakdown cannot be attributed to the disclosure of the third party texts. Reference was made to Mr Andrews' own description of the relationship as being "hot and cold" and "on again, off again". It was submitted that the relationship was characterised by regular and significant fallings out between the two which led to Ms Edmonds on two occasions giving information to the Police regarding Mr Andrews' criminality and a significant domestic dispute between Mr Andrews and Ms Edmonds on 21 February 2011, resulting in property damage. Reference was made to the two convictions of common assault arising out of these domestic incidents. Furthermore, the relationship had been seriously affected by Mr Andrews' previous sentences of imprisonment. It was within this matrix that the causes of the breakdown of the relationship were to be found, rather than in the disclosures made by the Police under the CDA. Beyond that, Mr Andrews had said in his evidence that Ms Edmonds had strongly suspected and perhaps even known of his past infidelities.

The submissions made by the Privacy Commissioner

[37] By letter dated 23 March 2012 the Privacy Commissioner gave notice that she intended appearing in these proceedings. The Tribunal acknowledges the substantial assistance it has received from the submissions by Ms Evans and Ms Thompson.

[38] It is not practicable to set out in detail the written submissions of the Privacy Commissioner and the supplementary oral submissions made at the hearing. Hopefully the following summary will do justice:

> **[38.1]** Section 7 of the Privacy Act, which provides that Principles 6 and 11 do not derogate from other provisions authorising or requiring personal information to be made available, should not be read too widely. The Privacy Act reflects fundamental and internationally recognised human rights. As such, any override must be very clear. It should either be express or (more commonly) so clearly incompatible with the provisions of the Privacy Act that the two statutes cannot be read together. While it is important not to frustrate the purpose of the other statute, the Privacy Act should be given as full a scope of operation as possible.
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> **[38.2]** It is incontrovertible that the CDA provides a disclosure regime for information, including personal information, that is capable of overriding Principle 11.
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> **[38.3]** However, the CDA is not a complete code. Section 42 of the CDA states that except as expressly provided, it does not limit other statutes that govern disclosure of information. The Privacy Act is one such statute. So if the CDA does not expressly govern the disclosure of the personal information in question, the Privacy Act will apply as normal.
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> **[38.4]** The Commissioner proposes the following test for establishing whether the disclosure of information falls within the scope of the CDA:

[38.4.1] Have criminal proceedings, as defined in s 6 of the CDA, commenced?

[38.4.2] Did the criminal proceedings commence after the date the CDA came into force (29 June 2009)?

[38.4.3] Was the information disclosed in connection with these criminal proceedings?

[38.4.4] Does the CDA require disclosure of this type of information?

[38.5] On the present facts the main point of contention relates to the fourth issue namely, whether the CDA required disclosure of the information.

[38.6] While the Commissioner (and the Tribunal) should be slow to second-guess what information is relevant in criminal proceedings, people should not be deprived of their rights to claim a breach of privacy if it is clear that the information is not relevant. Section 13(2) of the CDA is simply not engaged in such circumstances.

[38.7] Prosecutors should abide by the spirit of the CDA and release the information that they have to release. Non-release of information is risky as it can lead to exclusion of evidence and undermine a party's case. It is also understandable, and in the public interest, that unnecessary arguments with the defence should be avoided along with delays in proceedings or inefficient use of court time. These are all public policy arguments in favour of the Privacy Commissioner declining to intervene or to entertain complaints too readily.

[38.8] However, if personal information clearly does not fit within the s 8 CDA definition of relevance, disclosure of it should attract consequences. The CDA itself does not provide for those consequences, it is silent on the issue. On the other hand the Privacy Act provides individuals with the only real ability to remedy the harm that they suffer as a result of the disclosure of irrelevant information to the defence. While a complaint can be taken to the Independent Police Conduct Authority if the Police improperly release information, the Independent Police Conduct Authority Act 1988 does not provide for an award of compensation for harm done to the individual.

[38.9] If information which is not "relevant" under s 8 of the CDA definition is nevertheless disclosed, then third parties can claim a breach of privacy under the Privacy Act without being inhibited by the CDA. It is a proper function of the Tribunal to review decisions made under the CDA.

[38.10] The decision in *Director of Human Rights Proceedings v Commissioner of Police* HC Christchurch CIV-2007-409-002984, 14 August 2008 (French J), states that it is not the function of the Tribunal to review the quality of a decision under the Official Information Act 1982 (OIA). To the extent that this might be taken to apply also to the CDA, the decision is distinguishable as it addresses the immunity provision in s 48 of the OIA. The CDA contains no such provision. In addition s 42 of the CDA expressly stipulates that, except as expressly provided in the CDA, nothing in the CDA limits or affects any provision in any other enactment that (inter alia) imposes a prohibition or restriction in relation to the availability of any information. There is no analogue in the CDA to the OIA provision.

DISCUSSION

Background note on discovery in criminal cases

[39] As this is the first occasion on which the Tribunal has been called on to consider the relationship between the CDA and the Privacy Act it may be helpful were the discussion to begin with a brief overview of the context in which the current regime for disclosure in criminal cases arose.

[40] Discovery in criminal cases has long been a vexed issue. It has been the subject of at least two major reports. The first was the comprehensive report by the Criminal Law Reform Committee *Discovery in Criminal Cases* (1986). The second was the report by the New Zealand Law Commission *Criminal Procedure: Part One - Disclosure and Committal* NZLC R14 (1990). Neither the OIA (which in its original form made provision for individuals to access personal information) nor the later Privacy Act were enacted for the purpose of either facilitating or restricting discovery in criminal cases, though they have been deployed for that purpose, with limited efficacy. We say "limited" because the principles which underlie criminal discovery are substantially different to those underlying access to official information and the collection and use of private information. As the Law Commission observed in its report at [66]:

> 66 The central principle in our system of criminal justice is implicit in that word justice and depends upon promoting a fair balance between the general public interest and important personal rights of individual citizens. In the present context it means that accused persons ought not to be left handicapped by a lack of relevant information and by the imbalance of resources available to them in preparing a defence compared with those at the disposal of the State. So that all relevant information in the hands of the prosecution should be made available to the defence subject only to exceptions needed to avoid prejudice to the wider public interest.

[41] In all cases involving criminal discovery the test must be relevance to the accusation in issue. This is not a concept addressed by the OIA or by the Privacy Act. As observed by the Law Commission at [6]:

> 6 Defendants have made recent use of the Official Information Act 1982 to obtain information from the police or other prosecuting agency which might bear upon an alleged offence. The practice has developed since the Court of Appeal held in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 that the right under the Act to "official" or "personal" information could be used for purposes of a pending trial. However, the Act is unable to meet all the needs of defendants and it is quite unable to meet any need of the prosecution. In addition it gives appropriate access to official or personal information but can do nothing in respect of other material which may be highly relevant in defending a criminal charge. And its use in practice varies from district to district. Disclosure for purposes of criminal cases should be the subject of direct legislative provision.

[42] Whereas the stated purpose of the Privacy Act, as set out in the Long Title, is to "promote and protect individual privacy in general" and to establish "certain principles" with respect to (inter alia) the disclosure, by public and private sector agencies, of information relating to individuals, the underlying policy imperatives of a criminal discovery regime are entirely different. In such context privacy interests must, at times, be of secondary importance. The point was expressed by the Law Commission at [85] as follows:

> 85 There is a question as to the right to privacy of other persons. Should there be any general provision enabling information to be withheld to protect that right? The answer turns on the purpose for which disclosure is sought. Unlike the Official Information Act 1982 the criminal law is concerned with accusations levelled on behalf of an agency of the State against individuals who for obvious reasons need to be given every proper opportunity of defending themselves.

> And for purposes of trial relevant evidence has never been regarded as inadmissible on grounds merely that it may have an injurious effect upon the privacy of others. Nor as a matter of justice could considerations of privacy alone override necessary and proper interests of accused persons to have access to information that was relevant to their defence. The power of the courts in proper cases to prohibit publication of evidence would be a means of protecting those privacy interests.

[43] In its later report *Criminal Prosecution* NZLC R66 (2000) at [195] the Law Commission repeated the recommendation made in 1990 that a comprehensive criminal disclosure code be introduced. On 3 November 2000 the Minister of Justice and the Minister for Courts announced the intention of the government to introduce a new statutory regime governing the disclosure of information in criminal cases. At the same time the Court of Appeal was urging the enactment of comprehensive legislation governing disclosure in criminal cases. See *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740 at [19], [20] and [21]. At [19] the Court of Appeal recalled that in *Commissioner of Police v Ombudsman* none of the judgments saw the OIA regime as an adequate substitute for a criminal discovery statute:

> [19] Before leaving *Commissioner of Police v Ombudsman* it is important to note two points. The first is that none of the judgments saw the Official Information Act regime (and the same would now apply to the Privacy Act 1993 regime) as an adequate substitute for a criminal discovery statute. Cooke P (with Somers J concurring) said flatly at p 395 that the Act was not a criminal discovery measure; McMullin J at p 407 considered it an unsuitable instrument for criminal discovery; Casey J at p 413 characterised it as an unwieldy instrument of pretrial criminal discovery and at p 414 as a poor substitute for rules of discovery properly developed for use in criminal proceedings, as recommended by the Criminal Law Reform Committee's "Report on Discovery in Criminal Cases" (December 1986); and Bisson J at p 415 saw it as only going some way in overcoming inconsistencies in current practice. The second and associated point is that the judgments recognised the desirability of a statutory code of discovery and referred with approval to the report of the Criminal Law Reform Committee, McMullin J noting at p 407: "The adoption of its recommendations by legislation would result in rules of general application, remove the differences in practice which pertain in different localities and result in a useful set of working rules of general application throughout New Zealand."

[44] Against this background we turn to a more detailed consideration of the provisions of the Privacy Act and of the CDA.

The Privacy Act – limitations

[45] While, as mentioned, the Long Title of the Privacy Act states that it is an act to promote and protect individual privacy in general and to establish certain principles with respect to (inter alia) the disclosure of personal information, there is an important limitation in s 7. It relevantly provides:

> **7 Savings**
>
> (1) Nothing in principle 6 or principle 11 derogates from any provision that is contained in any enactment and that authorises or requires personal information to be made available.
> (2) Nothing in principle 6 or principle 11 derogates from any provision that is contained in any other Act of Parliament and that—
>
> (a) imposes a prohibition or restriction in relation to the availability of personal information; or
>
> (b) regulates the manner in which personal information may be obtained or made available.

[46] In the present context it is subs (1) which is important. It stipulates that nothing in Principle 6 or Principle 11 derogates from any provision in any enactment that authorises or requires personal information to be made available. As it is beyond doubt that the CDA is an enactment that authorises or requires personal information to be made available, s 7(1) of the Privacy Act is triggered in the context of criminal discovery. So

that the effect of this provision on Principle 11 can be better appreciated, the text of Principle 11 follows:

> 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.

[47] For reasons we will shortly explain, the provisions of Principle 11 are displaced to the extent that the CDA expressly requires disclosure of the personal information in question.

[48] The subordinate position of the Privacy Act in relation to the CDA in this regard is reinforced by the fact that s 39 of the CDA amended the withholding grounds in s 29 of the Privacy Act. An agency is now permitted to refuse to disclose any requested information if:

> (ia) the request is made by a defendant or a defendant's agent and is—
> (i) for information that could be sought by the defendant under the Criminal Disclosure Act 2008; or
> (ii) for information that could be sought by the defendant under that Act and that has been disclosed to, or withheld from, the defendant under that Act; or.

The Criminal Disclosure Act

[49] The purpose of the Criminal Disclosure Act is enunciated in the following terms by s 3(1):

> (1) The purpose of this Act is to promote fair, effective, and efficient disclosure of relevant information between the prosecution and the defence, and by non-parties, for the purposes of criminal proceedings.

[50] It can be seen that the criterion which governs disclosure is that of relevance. The term "relevant" is defined in s 8:

> **8 Meaning of relevant**
>
> In this Act, *relevant*, in relation to information or an exhibit, means information or an exhibit, as the case may be, that tends to support or rebut, or has a material bearing on, the case against the defendant.

[51] This definition is in harmony with s 7 of the Evidence Act 2006 which similarly uses the terms "relevant" and "tends":

> **7 Fundamental principle that relevant evidence admissible**
>
> (1) All relevant evidence is admissible in a proceeding except evidence that is—
> (a) inadmissible under this Act or any other Act; or
> (b) excluded under this Act or any other Act.
> (2) Evidence that is not relevant is not admissible in a proceeding.
> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

We will return to s 7 of the Evidence Act later.

[52] Given that the criminal disclosure, official information and personal information regimes will often overlap, it is unsurprising that the CDA expressly provides that it is to prevail – but only in certain circumstances. See s 42 of the CDA:

> **42 This Act not to limit or affect other enactments relating to availability of information**
>
> (1) Except as expressly provided in this or any other enactment, nothing in this Act limits or affects any provision in any other enactment that—
> (a) authorises or requires any information to be made available; or
> (b) imposes a prohibition or restriction in relation to the availability of any information; or
> (c) regulates the manner in which any information may be obtained or made available.
> (2) Without limiting subsection (1), nothing in this Act applies in respect of any videotape made under the Evidence (Videotaping of Child Complainants) Regulations 1990 or any copy or transcript of such a videotape (as that term is defined in those regulations).

Conclusions on the relationship between the Privacy Act and the CDA

[53] The conclusions we draw are:

[53.1] The primary provision governing the disclosure of personal information is information privacy Principle 11. An agency holding such information "shall not" disclose the information to a person or body or agency unless the agency believes, on reasonable grounds, that the disclosure is permitted by one or more of the grounds specified in paras (a) to (i) of Principle 11.

[53.2] Where personal information is to be the subject of disclosure in the context of criminal proceedings, the provisions of the Criminal Disclosure Act 2008 prevail over Principle 11 but only to the extent that the provisions of the CDA "expressly" provide. See s 42(1) of the CDA and s 7 of the Privacy Act.

[53.3] The word "expressly" means that only when there is an obvious inconsistency is the CDA to prevail. See *Harding v Coburn* [1976] 2 NZLR 577 (CA) at 584 per Cooke J:

> First, the provisions to which s 7 [of the Illegal Contracts Act 1970] is declared to be subject are the *express* provisions of any other enactment. The limiting word "express"

> is significant. It suggests that Parliament meant to rule out arguments based on implication or inference. Only when there is obvious inconsistency is the other enactment to prevail.

It is possible, however, that the term “expressly” does not necessarily require that there be a specific reference to the Privacy Act in the relevant provision of the CDA. Reasonable intendment is sufficient. See *Re AIC Merchant Finance Ltd* [1990] 2 NZLR 385 (CA) at 390 (Richardson J) and 395 (Casey J).

[53.4] The CDA is not a code. Neither the OIA nor the Privacy Act are displaced from the criminal context. This is made clear by s 42 of the CDA itself and by the amendments made by ss 38 and 39 of the CDA to s 18 of the OIA and s 29(1) of the Privacy Act respectively. That the information could be sought under the CDA is a discretionary, not mandatory, ground for refusing a request under the OIA or Privacy Act as the case may be. Reference might also be made to the helpful discussion in the Law Commission report *Criminal Procedure: Part 1 – Disclosure and Committal* at [99]:

> … pending or during a trial a defendant ought not to be deprived of the access to the Official Information Act 1982 enjoyed by everyone else.

[54] We turn now to the submission by the Privacy Commissioner that if personal information clearly does not fit within the definition of relevance in s 8 of the CDA, disclosure of that information can be the subject of a complaint under Part 8 of the Privacy Act and in turn, to proceedings before the Tribunal in which the remedies in s 85 of the Privacy Act may be sought. Reduced to its essential terms, the submission is that the Privacy Commissioner and the Tribunal have jurisdiction to second guess a decision made by a prosecutor under the CDA to disclose information to a defendant.

Whether disclosure decision under the CDA is reviewable under the Privacy Act

[55] There are formidable practical obstacles to the proposal that the Privacy Commissioner and the Tribunal review the disclosure of personal information under the CDA. It does not necessarily follow, however, that as a matter of law such exercise cannot be undertaken.

[56] In the context of the full disclosure regime governed by s 13 of the CDA a prosecutor “must” disclose to the defendant the information described in subs (2). Essentially, that information is “any relevant information”. The term “relevant” is defined in s 8 of the CDA and means any information “that tends to support or rebut, or has a material bearing on, the case against the defendant”.

[57] The difficulty is that the issues raised by this definition can only be determined within the concrete circumstances of the particular proceeding and in addition, relevancy must be determined as at the date of disclosure. Relevancy can, of course, alter and change during the course of a proceeding. A new charge can be laid (as here) and in addition, as new or further evidence comes to hand there may well be a change in the way in which the prosecutor intends to present the case and/or the way in which the defence intend resisting the case. Relevancy is a fluid concept and is both time and context specific. An ex post facto analysis carried out under the Privacy Act in relation to decisions made by prosecutors in the criminal system is therefore fraught with difficulty.

[58] There is also the point made by Goddard J in *Cornelius v Commissioner of Police* [1998] 3 NZLR 373 at 382:

> Although the jobsheets may have no relevance to the prosecution case so far as the police are concerned, I think they ought to be disclosed to the plaintiffs. Whether they contain any material relevant to their case or not can only be determined by them. As I observed to counsel during the course of their submissions, knowledge of relevance depends on the information one already has and on one's perspective of matters. What may not appear relevant to the police, or to me, may nevertheless assume some relevance for the defence.

[59] Furthermore, the relevance test in s 8 of the CDA is not an exacting one. It is information which has a tendency to support or rebut, or has a material bearing on, the case against the defendant. Assistance in interpreting s 8 can be derived from the analogous s 7(3) of the Evidence Act 2006 which provides that evidence is relevant "if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding". See more particularly the decision in *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 where at [8] Tipping J for the Court stated:

> [8] This is not an exacting test: nor should it be. Any definition of relevance has to accommodate all kinds of evidence and in particular circumstantial evidence, individual pieces of which are often of slender, and sometimes very slender, weight in themselves. The question is whether the evidence has some, that is any, probative tendency, not whether it has sufficient probative tendency. Evidence either has the necessary tendency or it does not. As Lord Steyn said in *R v A*:
>
>> [31] … to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue.
>
> The approach of the common law was not always consistent in this respect. That inconsistency has now been resolved by the Act.

[60] From these few observations it will be clear that any ex post facto and potentially de-contextualised inquiry conducted by a decision-maker under the Privacy Act, if it is to be undertaken at all, will need to proceed with considerable caution.

[61] Nevertheless, relevance as defined in s 8 of the CDA must logically terminate at a certain point. That point is reached when the information does not tend to support or rebut, or have a material bearing on, the case against the defendant. Or as more recently stated in *R v Bain* [2009] NZSC 16, [2010] 1 NZLR 1 at [50] and [59], relevance ends when speculations begins. While the line between relevance and speculation is not an easy line to draw in all cases, it is one that must be attempted.

[62] As a matter of logic, where personal information clearly falls outside the s 8 CDA meaning of "relevant" but is nevertheless disclosed by a prosecutor under the purported authority of the CDA, such disclosure is not protected by s 42 of the CDA. In those circumstances the non-derogation provisions of s 7 of the Privacy Act cease to operate and the information privacy principles apply with undiluted effect.

Conclusion on whether CDA disclosure decision reviewable under Privacy Act

[63] While the practical difficulties may be formidable, where personal information clearly falls outside the meaning of "relevant" in s 8 of the CDA and is improperly disclosed under the CDA, any consequential interference with privacy falls to be addressed under the Privacy Act. In particular, a complaint may be made to the Privacy Commissioner and if in subsequent proceedings the Tribunal is satisfied on the balance of probabilities that any action of the defendant agency is an interference with the privacy of an individual, the Tribunal has jurisdiction to grant one or more of the remedies under s 85 of the Privacy Act. It is not to be overlooked, however, that s 85(4) of the Privacy Act stipulates that while it is not a defence to proceedings that the interference was unintentional or without negligence on the part of the defendant agency, the fact that a

prosecutor has acted in good faith when making the disclosure under the CDA will be directly relevant when the Tribunal decides what, if any, remedy to grant.

[64] The decision in *Director of Human Rights Proceedings v Commissioner of Police* HC Christchurch CIV-2007-409-002984, 14 August 2008 (French J) is plainly distinguishable. The issue there was the interface between the Privacy Act and the OIA. The decision (that the Tribunal did not have jurisdiction to undertake a qualitative assessment of disclosure decisions made under the OIA) turned on the immunity provision in s 48 of the OIA. That provision bears no similarity to s 42 of the CDA.

Whether personal information disclosed to Ms Edmonds was "relevant"

[65] There is no doubt that the text messages disclosed by the Police to Ms Edmonds contained personal information about Mr Andrews. It was information "about" him in the sense recently discussed in *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [47] and in *Groupen v Director of Human Rights Proceedings* [2012] NZHC 580 at [32] to [36]. Such was not disputed before the Tribunal.

[66] The substantive issue is whether the text messages, particularly those from Mr Andrews to third parties and which suggested that Mr Andrews may have been unfaithful to Ms Edmonds, being personal information about Mr Andrews, were improperly disclosed to Ms Edmonds. The issue is whether these texts were "relevant" as defined in s 8 of the CDA. That is, whether they tended to support or rebut, or had a material bearing on, the case against Ms Edmonds [being an accessory after the fact to the 25 March 2011 burglary].

[67] We are of the view that they were clearly "relevant" in the CDA sense:

> **[67.1]** First, as submitted by Mr Perkins, all of the text messages obtained by the Police from Mr Andrews' cellphones, irrespective of when or between whom they were sent, were relevant in that the Police had to establish that the cellphones were in the possession of Mr Andrews (and not some third party) and used by him. The messages tended to support the prosecution case in that regard. At the same time some of the text messages may have contained information potentially relevant to Ms Edmonds' defence. There was always the possibility that she could say that she knew Mr Andrews to be a person who had always been faithful to her and that the text messages which were of a salacious nature were evidence that some person other than Mr Andrews was using the cellphones at the relevant time.
>
> **[67.2]** Second, it was open to Ms Edmonds to argue, either at trial or at sentence, that her offending occurred under duress. She would be able to point to Mr Andrews having been convicted of assaulting her and to his infidelities (see the third party texts) as tending to support a claim that she was in a violent, abusive and dysfunctional relationship. Mr Andrews himself conceded in evidence that Ms Edmonds "had to do what she had to do" to minimise her role and shift the blame to Mr Andrews. She had the responsibility for caring for the two children and could not do so from prison.

[68] In these circumstances we can see no proper ground to call into question the disclosure by the prosecution to Ms Edmonds of the text messages in question, being personal information relating to Mr Andrews.

[69] It follows that the claims made by Mr Andrews must be dismissed.

[70] We should add that we would in any event conclude, in the alternative, and for the same reasons, that the personal information was properly disclosed under Principle 11 paras (e)(i) and (e)(iv).

Costs

[71] No application for costs has been foreshadowed and we presume that given Mr Andrews' current circumstances no application for costs will be made. In case we are wrong any application for costs will be dealt with according the following timetable:

> **[71.1]** Any application by the Commissioner of Police is to be filed and served, along with any submissions, by 5pm on Friday 22 March 2013.
>
> **[71.2]** The submissions by Mr Andrews are to be filed and served by 5pm on Friday 12 April 2013.
>
> **[71.3]** The Tribunal will then determine the issue of costs on the basis of the papers that will by then have been filed and served without any further oral hearing.
>
> **[71.4]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

Formal order

[72] For the foregoing reasons the decision of the Tribunal is that the proceedings by Mr Andrews are dismissed.

....	....	....
Mr RPG Haines QC **Chairperson**	**Mr RK Musuku** **Member**	**Mr BK Neeson** **Member**