IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 37**

	Reference No. HRRT 004/2015
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**LAWRENCE WAYNE DEEMING**
	PLAINTIFF
AND	**WHANGAREI DISTRICT COUNCIL**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr LW Deeming in person
Ms KE Candy for defendant

DATE OF HEARING: **On the papers**

DATE OF DECISION: **26 August 2015**

DECISION OF TRIBUNAL ON DISCOVERY ISSUES[1]

Introduction

[1] In these proceedings to be heard on 30 November 2015 and 1 December 2015 Mr Deeming alleges the Whangarei District Council (WDC) breached Principle 11 of the Privacy Act by disclosing to a third party (or parties) that Mr Deeming had lodged a complaint with the Mayor of Whangarei. That complaint related to an incident at the Mid-Western Rugby Club on 8 August 2009 which, in Mr Deeming's view, raised issues about the adherence of the club to the provisions of the then Sale of Liquor Act 1989 which were administered by the WDC. Mr Deeming says he sought an investigation into

[1] [This decision is to be cited as: *Deeming v Whangarei District Council (Discovery)* [2015] NZHRRT 37]

the Mid-Western Rugby Club. In doing so he relied on a policy by which the WDC protected the identity of complainants. His case is that his complaint was disclosed to a Councillor who, in turn, disclosed the complaint to the President of the Mid-Western Rugby Club. As a result Mr Deeming was harassed at his home and other places and received a life-time ban from the club. Media reports led to hurt and humiliation not only to Mr Deeming but also to his family.

[2] At a teleconference convened by the Chairperson on 22 April 2015 a direction was made that discovery and inspection of documents were to be attended to on an informal basis in the first instance and achieved to the satisfaction of both parties by 5pm on Friday 7 August 2015. See the *Minute* issued by the Chairperson on 22 April 2015.

[3] By memorandum dated 18 August 2015 Ms Candy reported that in the discovery process both parties had sought additional information from the other. Each party had refused to provide the requested information.

[4] Mr Deeming seeks from the WDC:

> **[4.1]** An unredacted version of an email chain in which some of the councillors, staff of the WDC and third parties discussed the events in relation to which Mr Deeming lodged his complaint as well as the complaint itself.
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> **[4.2]** Evidence of the "process" said to have been followed by the WDC in investigating a complaint by Mr Deeming under the WDC Code of Conduct.

[5] The WDC in turn seeks:

> **[5.1]** All correspondence between Mr Deeming and the Northland Rugby Union about the incident; and
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> **[5.2]** All correspondence between Mr Deeming and the Mid-Western Rugby Club about the incident.

[6] Mr Deeming has provided the Tribunal with copies of the documents sought by the WDC and Ms Candy has provided copies of the relevant correspondence as well as the redacted version of the email chain in question.

[7] By memoranda dated 18 and 19 August 2015 respectively, Ms Candy and Mr Deeming have set out their submissions. In his submissions Mr Deeming advises he no longer pursues the application for further discovery in relation to the "proper process" point. Consequently it is necessary to determine only whether Mr Deeming should be provided with an unredacted version of the email chain and whether the two categories of documents sought by the WDC should, in turn, be disclosed by Mr Deeming to the WDC. In an email dated 21 August 2015 Mr Deeming says that while he contends the documents sought by WDC are irrelevant, should the Tribunal reach a contrary view he would be happy to use (and would use) them in evidence.

DISCOVERY SOUGHT BY MR DEEMING – THE EMAIL CHAIN

[8] The pleading in the first amended statement of claim dated 7 May 2015 is that on 14 August 2009 Mr Deeming sent a complaint by email to the Mayor of the WDC relating to an incident at the Mid-Western Rugby Club that raised issues about the adherence of the club to the provisions of the then Sale of Liquor Act 1989. It is alleged disclosure of the making of the complaint (in breach of Principle 11) was between 14 August 2009

and 19 August 2009. The email chain covers the same period and relates to what was said and done by those allegedly involved in the unlawful disclosure.

[9] The redacted version of the email chain currently in Mr Deeming's possession was released to him by the WDC on 11 June 2010 following a request by Mr Deeming under the Local Government Official Information and Meetings Act 1987 (LGOIMA). From the copy of the documents made available to the Tribunal it would appear redactions were made to most, if not all of the emails to conceal the identity of individuals referred to in the text of the emails, the identity of the persons to whom the emails were sent and in some instances, the identity of the sender of the email.

[10] When Mr Deeming complained to the Ombudsman his complaint was not upheld, the Ombudsman forming the view that it was open to the WDC to withhold the deleted information in reliance on s 7(2)(a) of the LGOIMA (protection of the privacy of natural persons).

[11] In its amended statement of reply dated 11 June 2015 the WDC appears to admit most of the central allegations made by Mr Deeming. That is it is acknowledged that subsequent to Mr Deeming's complaint being received by the WDC it was sent to the Councillor concerned and also to the President of the Mid-Western Rugby Club. It is also accepted the WDC had a policy of protecting the identity of complainants to protect their (the complainants') privacy. The defence raised by the WDC is, in effect, that the disclosure fell within one of the exceptions listed in Principle 11.

[12] Mr Deeming submits the email chain is highly relevant and important to his case, showing what happened within the WDC once his complaint had been made and the context in which the disclosure was, in turn, made to the rugby club. This information is of potential relevance to whether the WDC can establish one of the exceptions listed in Principle 11. Mr Deeming further submits that having access to the unredacted documents will allow him and the Tribunal to both read and assess the documents without hindrance. He will also be assisted in deciding what additional evidence is available to support his case and whether there are further potential witnesses.

[13] The WDC resists disclosure on the basis the redaction to the emails has been upheld by the Ombudsman and there will be no prejudice to Mr Deeming by the continued withholding of the redacted personal information. In addition the emails are irrelevant to the issues before the Tribunal.

[14] At the present time neither party has filed witness statements or evidence. Consequently any decision on the discovery issues must necessarily be determined on the limited information disclosed by the pleadings filed to date and on the content of the disputed documents themselves.

Discovery – general

[15] The Tribunal's power to order discovery was recently discussed in *Hood v American Express International (NZ) Inc (Discovery)* [2015] NZHRRT 1 (23 January 2015) at [5] to [10] and in *Boyce v Westpac New Zealand Ltd (Non-Party Discovery)* [2015] NZHRRT 31 (21 July 2015) where at [9] it was stated:

> **[9]** Neither the Privacy Act 1993 nor Part 4 of the Human Rights Act 1993 (incorporated into the Privacy Act by s 89 of the Privacy Act) employ the term "discovery" when setting out the powers of the Tribunal or its Chairperson. The Tribunal nevertheless has jurisdiction to order parties before it to give discovery either on a formal or informal basis. This power flows from three primary sources:

[9.1] Section 106(1)(a), (b) and (c) of the Human Rights Act which confers power on the Tribunal to call for evidence and information from the parties or any other person and to require the parties or any other person to attend the proceedings to give evidence. The "any other person" phrase is of particular relevance to non-party discovery:

> **106 Evidence in proceedings before Tribunal**
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> (1) The Tribunal may—
> (a) call for evidence and information from the parties or any other person:
> (b) request or require the parties or any other person to attend the proceedings to give evidence:
> (c) fully examine any witness:

[9.2] Section 104(5) which confers power on the Tribunal to regulate its own procedure:

> (5) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal may regulate its procedure in such manner as the Tribunal thinks fit and may prescribe or approve forms for the purposes of this Act.

[9.3] Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002 which confers power on the Chairperson to give such directions as may be necessary or desirable for the proceedings to be heard, determined or otherwise dealt with, as fairly, efficiently, simply and speedily as is consistent with justice:

> **16 Conduct of proceedings: power to give directions, etc**
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> (1) Subject to decisions of the Tribunal, the Chairperson may give any directions and do any other things—
> (a) that are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice; and
> (b) that are not inconsistent with the Act or, as the case requires, the Privacy Act 1993 or the Health and Disability Commissioner Act 1994, or with these regulations.

[16] These provisions give the Chairperson and the Tribunal a wide discretion. In the exercise of that discretion account can be taken, if appropriate, of the procedure prescribed by the High Court Rules. While those Rules do not apply to the Tribunal, they are often drawn on to provide guidance subject to the proviso the Rules are to be appropriately modified and adapted to the Tribunal's distinctive jurisdiction. In the present case the dispute between the parties is to be resolved by the application of the analogous discovery rules in the High Court Rules.

[17] The discovery obligation as formulated in High Court Rules, r 8.7 is that the parties must give discovery of the documents in their possession or control and on which they intend to rely or which adversely affect their own case, or which adversely affect the opposing party's case or which supports the opposing party's case.

[18] Given the dates and content of the email chain it is clear the exchanges were contemporaneous with the sequence of events as pleaded by Mr Deeming, especially the circumstances in which the alleged disclosure took place. In our view there can be little doubt the email chain is relevant to the issues central to this case and in particular, the application of Principle 11. The documents meet the "adverse affect" test in r 8.7.

[19] The WDC relies on the fact the redactions were "upheld" by the Ombudsman in February 2011. While any view reached by the Ombudsman is entitled to respect, her enquiry was confined to the application of the LGOIMA. The context of the inquiry by

the Tribunal is, however, entirely different. In addition, in adversarial litigation "privacy" interests are not a trump to the disclosure of otherwise discoverable documents. Broader issues of public interest come into play and the balancing of those interests is different in kind to the limited enquiry conducted by the Ombudsman. Context is everything. Because the 2011 ruling by the Ombudsman was made at a time when no proceedings were in train, little or no weight can be given to it.

[20] In the alternative, to the extent the redactions made in 2010 were justified by the "protection of the privacy of natural persons" provisions of s 7(2)(a) of the LGOIMA, s 69 of the Evidence Act 2006 has potential application. That provision provides:

> **69 Overriding discretion as to confidential information**
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> (1) A *direction under this section* is a direction that any 1 or more of the following not be disclosed in a proceeding:
> (a) a confidential communication:
> (b) any confidential information:
> (c) any information that would or might reveal a confidential source of information.
> (2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
> (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
> (b) preventing harm to—
> (i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
> (ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
> (c) maintaining activities that contribute to or rely on the free flow of information.
> (3) When considering whether to give a direction under this section, the Judge must have regard to—
> (a) the likely extent of harm that may result from the disclosure of the communication or information; and
> (b) the nature of the communication or information and its likely importance in the proceeding; and
> (c) the nature of the proceeding; and
> (d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
> (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
> (f) the sensitivity of the evidence, having regard to—
> (i) the time that has elapsed since the communication was made or the information was compiled or prepared; and
> (ii) the extent to which the information has already been disclosed to other persons; and
> (g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.
> (4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.
> (5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

[21] In our view there are two important public interest factors weighing in favour of disclosure to Mr Deeming in the context of the present proceedings:

> **[21.1]** Ensuring that agencies which hold personal information do not disclose such information unless the disclosure falls within one of the circumstances permitted by Principle 11. Given the Long Title of the Privacy Act emphasises that the purpose of the Act is to promote and protect individual privacy, the information privacy principles are not to be read down.

> **[21.2]** There is a compelling public interest in ensuring the Tribunal is able to get at the truth so that justice may be done between the parties. See by analogy *Riddick v Thames Board Mills Ltd* [1977] QB 881 at 895-896. Experience shows the discovery process is essential for the achievement of this objective.

[22] Beyond the Ombudsman's ruling, no "public interest" factors are established by WDC in favour of withholding the information.

[23] In these circumstances we see no public interest favouring the withholding of the information. All factors favour disclosure.

[24] The remaining argument advanced by WDC is that the emails are not relevant. That submission, however, is untenable for the reasons given earlier.

[25] Also to be taken into account is the fact that Mr Deeming is bound by the implied undertaking that attaches to all parties who receive information in the discovery process. That is, an undertaking that the documents so received may be used for the purpose of the proceedings in which discovery is given and except for the purposes for those proceedings, the documents cannot be made available to any other person without leave of the Chairperson or of the Tribunal (unless the document has been read out in open hearing). The undertaking is also to maintain the confidence of the documents, to store them securely and to return or destroy copies after the final determination of the proceedings.

[26] See *Waters v Alpine Energy Ltd (Discovery No. 3)* [2015] NZHRRT 13 at [17]:

> **[17.3]** Confidentiality concerns can be addressed by different mechanisms, depending on the strength of the privacy interest in issue. For example, limiting inspection (see High Court Rules, r 8.28(3)) and the undertaking as to use of the document (refer High Court Rules, r 8.30(4)). As to such undertaking we refer to the judgment of Rodney Hansen J in *Telstra New Zealand Ltd v Telecom New Zealand Ltd* (2000) 14 PRNZ 541 at [47] and [48]:
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> > [47] It was agreed that the terms of the express undertaking did not differ materially from the terms in which the implied undertaking is customarily expressed. The implied undertaking is, however, an undertaking to the Court imposed by operation of law by virtue of the circumstances in which the documents are obtained: *Taylor v Serious Fraud Office* [1999] 2 AC 177, 207; *Crest Homes plc v Marks* [1987] 1 AC 829, 853 (HL). The rationale for the undertaking was put this way by Lord Denning in *Riddick v Thames Board Mills* [1977] QB 881, 895-896; [1977] 3 All ER 677, 687:
> >
> > > "The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties …
> > >
> > > Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts, therefore, should not allow the other party, or anyone else, to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice … In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed. "
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> > [48] The undertaking is sometimes expressed in the negative, not to use the documents for any ulterior, alien or collateral purpose, but often as a positive obligation to use discovered documents only for a particular purpose. That purpose was said in *Taylor* to be "the conduct of the litigation" (at p 207), in *Crest Homes* "the proper conduct of that action on behalf of his client" (at p 853) and frequently as "the purposes of the proceedings in which they are

disclosed": see most recently in *Bourns Inc v Raychem Corp* [1999] 3 All ER 154, 169.

[27] In the result we direct that the email chain marked "B" and attached to Ms Candy's memorandum dated 18 August 2015 is to be provided to Mr Deeming without redactions of any kind.

DISCOVERY SOUGHT BY THE WDC – MR DEEMING'S CORRESPONDENCE

[28] It is now intended to address the request by WDC that Mr Deeming give discovery of:

> **[28.1]** All correspondence between him and the Northland Rugby Union about the incident at the Mid-Western Rugby club in August 2009; and
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> **[28.2]** All correspondence between Mr Deeming and the Mid-Western Rugby Club (or the Maungakaramea Rugby club) about the incident at the club in August 2009.

[29] As to the first category of documents, it is said by WDC that reference has been made in documents already discovered by Mr Deeming to a communication from him to the Northland Rugby Union made on or around the same time as Mr Deeming sent to the WDC his email complaint dated 14 August 2009. The WDC wishes to see this communication to determine what may already have been in the public arena and also to establish Mr Deeming's intentions when he emailed the WDC.

[30] Conceivably the documents sought are relevant to the defences allowed by Principle 11 though caution must be exercised. To escape the statutory prohibition on disclosure of personal information, an agency must establish that at the time of disclosure it possessed the requisite belief on reasonable grounds. There is a subjective component (the belief) and an objective component (the reasonable grounds). It must be established that both elements existed as at the date of disclosure. There must be an actual belief based on a proper consideration of the relevant circumstances. An explanation devised in hindsight will not suffice. It follows the WDC cannot use the documents to arrive at an ex post facto justification of the disclosure. See *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [201] – [203].

[31] However, it is premature for any firm view to be reached on the issue. Having seen the correspondence we are satisfied it meets the "adverse affect" test as to both liability and remedies. On that basis the class of documents sought by WDC is discoverable. It must be stressed, however, that the class sought is confined strictly to correspondence between Mr Deeming and the Northland Rugby Union about the August 2009 incident. Any other correspondence is irrelevant.

[32] Turning now to the second category of documents (correspondence between Mr Deeming and the Mid-Western Rugby club about the August 2009 incident) the same comments apply. The correspondence satisfies the "adverse affect" test as to both liability and remedy with the result an order for disclosure must be made.

DISCOVERY ORDERS

[33] The following orders are made:

> **[33.1]** By 5pm on Monday 31 August 2015 the Whangarei District Council is to provide Mr Deeming with an unredacted version of the email chain referred to in Ms Candy's memorandum dated 18 August 2015 and marked "B".

[33.2] By 5pm on 31 August 2015 Mr Deeming is to provide to the WDC:

[33.2.1] All correspondence between him and the Northland Rugby Union about the incident at the Mid-Western Rugby club in August 2009; and

[33.2.2] All correspondence between him and the Mid-Western Rugby club about the incident at the club in August 2009.

TIMETABLING ISSUES

[34] Mr Deeming points out the timetable of 22 April 2015 anticipated discovery and inspection would be completed by 7 August 2015 and in that context his written statements of evidence were to be filed by 28 August 2015. Given the process has been derailed by the dispute over discovery it is plain the timetable must be reset but without jeopardising the fixture for Monday 30 November 2015 and Tuesday 1 December 2015.

[35] With that in mind the following timetable is to apply:

[35.1] Mr Deeming and the WDC are to implement the terms of this decision forthwith and provide the ordered further discovery and inspection by 5pm on Monday 31 August 2015.

[35.2] Written statements of the evidence to be called at the hearing by Mr Deeming are to be filed and served by 5pm on Friday 18 September 2015. By the same date he is to provide Ms Candy with a list of documents he wishes to have included in the common bundle of documents.

[35.3] Written statements of the evidence to be called at the hearing by the Whangarei District Council are to be filed and served by 5pm on Friday 9 October 2015. By the same date Ms Candy is to provide Mr Deeming with a list of documents the Whangarei District Council wishes to have included in the common bundle of documents.

[35.4] Should Mr Deeming wish to file any statements of evidence in reply, such statements are to be filed and served by 5pm on Friday 16 October 2015.

[35.5] In consultation with Mr Deeming, Ms Candy is to prepare the common bundle of documents and that bundle is to be filed and served by 5pm on Friday 30 October 2015.

[35.6] The proceedings are to be heard at Whangarei on Monday 30 November 2015 and Tuesday 1 December 2015. The venue is to be advised by the Secretary.

[35.7] Leave is reserved to both parties to make further application should the need arise.

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Mr RPG Haines QC	**Ms GJ Goodwin**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**