IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 54**

	Reference No. HRRT 001/2014
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**DIRECTOR OF HUMAN RIGHTS PROCEEDINGS**
	PLAINTIFF
AND	**NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Mr MJM Keefe JP, Member
Ms ST Scott, Member

REPRESENTATION:
Mr RW Kee, Director of Human Rights Proceedings with Ms JV Emerson
Mr DA Laurenson QC and Mr MJ Ferrier for defendant

DATE OF HEARING:	**3 and 4 June 2015**
DATE OF LAST SUBMISSIONS:	**30 November 2015 (Plaintiff) and 3 December 2015 (Defendant)**
DATE OF DECISION:	**18 December 2015**

DECISION OF TRIBUNAL[1]

[1] Mr KD Newson is a Chartered Accountant practising in Wellington. He holds a Certificate of Public Practice and is a member of the New Zealand Institute of Chartered

[1] [This decision is to be cited as: *Director of Human Rights Proceedings v New Zealand Institute of Chartered Accountants* [2015] NZHRRT 54]

Accountants (NZICA) which has the statutory duty under s 5A of the New Zealand Institute of Chartered Accountants Act 1996 to control and regulate the practice of the profession of accountancy by its members.

[2] In performing this function NZICA is required by s 5A (inter alia) to monitor members' compliance with, and to enforce, professional and ethical standards, including the Code of Ethics. To this end NZICA carries out regular practice reviews of its members.

[3] Mr Newson's practice was reviewed in March 2010 and again in February 2011. In the course of the 2011 review and in discussion with Mr Newson, one of the reviewers made reference to a handwritten document which Mr Newson was told came from one of the Institute's tax team and related to the earlier 2010 practice review. Mr Newson asked for a copy of the document but was refused. Mr Newson then made formal request under information privacy Principle 6 for access to the document and to the other material compiled by the various reviewers. While the Institute initially agreed to the request, the final response was that the documents comprised evaluative material and access was refused on the grounds allowed by s 29(1)(b) of the Privacy Act 1993.

[4] In these proceedings brought pursuant to s 82(2) of the Act the Director challenges that decision.

[5] The effect of the reverse onus provisions of s 87 of the Act is that NZICA must establish the preconditions to the operation of s 29(1)(b). Particularly it must be shown the material compiled by the reviewers was evaluative material and that disclosure of that material would breach an express or implied promise made to the reviewers to the effect the information would be held in confidence. The principal dispute in these proceedings is whether the material compiled by the reviewers meets the definition of "evaluative material" in s 29(3) and whether the express or implied promise required by the Act has been proved. The Director points to the fact none of the reviewers gave evidence at the hearing as to whether an express or implied promise was made to them (and relied on) and further submits the term "evaluative material" is to be narrowly construed. If these submissions are accepted the withheld information should have been disclosed. In opposition NZICA contends direct evidence of an express promise is not required as such promise can be (and should be) implied from the circumstances. It also submits the ambit of the term "evaluative material" should not be artificially narrowed.

Witnesses called

[6] Mr Newson was the only witness to give evidence in support of the Director's case. For its part, NZICA called only one witness being Ms GA Hawkesby, Senior Manager, New Zealand Regulation. She was not personally involved in the events at issue. Her evidence was based on a review of the documentation on the files in question and her knowledge of NZICA and its procedures.

Descriptions and references

[7] NZICA and the Institute of Chartered Accountants Australia amalgamated in December 2014, the new entity being known as Chartered Accountants Australia and New Zealand. As the amalgamation occurred after the events in question this decision will make reference to NZICA only.

[8] Between the 2010 and 2011 reviews of Mr Newson's practice NZICA amended the Rules of the New Zealand Institute of Chartered Accountants (rev ed November 2009).

The amended rules were reissued as the Rules of the New Zealand Institute of Chartered Accountants (rev ed December 2010). Both versions of the rules relevant to the present case are not materially different and for convenience reference will be made to the December 2010 Rules only.

[9] Similarly the Review Procedures Manual (April 2007) governing the process for carrying out reviews was amended in October 2010. In this decision reference will be made only to the October 2010 version given that once again there is in the present case no material difference between the two versions.

Procedure followed at the hearing – open and closed hearings

[10] As foreshadowed by the Chairperson's case management *Minute* issued on 10 September 2014, it was inevitable the Tribunal would be required to conduct a closed hearing to view the withheld documents and to receive NZICA's closed evidence and submissions. The documents in question were filed as a closed bundle of documents not made available to the Director.

[11] All of Mr Newson's and most of Ms Hawkesby's evidence was given in open hearing. It was necessary, however, for Ms Hawkesby to give evidence also in the closed hearing to address the closed bundle. In the context of the closed hearing NZICA presented those of its legal submissions which could not be presented in open hearing without compromising the withholding claim.

[12] Conscious of the fact the Director had been excluded from a significant aspect of the case, the Tribunal took care to ensure the hearing was closed to the minimum degree necessary while allowing NZICA full opportunity to present its case in support of the refusal decision.

Post-hearing submissions

[13] By *Minute* dated 24 November 2015 the parties were given opportunity to make submissions on case law and associated material which the Tribunal came across in the course of drafting this decision. Those submissions (filed on 30 November 2015 and 3 December 2015 respectively) have been taken into account in the preparation of this decision.

Dispute limited in nature – only a summary of evidence given

[14] Much of the evidence is not in dispute. It is acknowledged by NZICA Mr Newson was not given access to certain material compiled during the course of the two reviews of his accountancy practice and that such material comprises or contains personal information ordinarily subject to disclosure on request under Principle 6. The real issue in this case is whether NZICA has established the withheld material is "evaluative material" within the meaning of s 29(3) and that disclosure of the information would have breached an express or implied promise made to the reviewers to the effect the information would be held in confidence.

THE PLAINTIFF'S EVIDENCE

[15] Mr Newson told the Tribunal he has been a Chartered Accountant and a member of NZICA for approximately 40 years and has been in public practice for the past 35 years. Correspondence in the common bundle of documents refers to his membership of the National Council and to his extensive interest in Institute affairs. In 2006 he was made a

NZICA Fellow for outstanding contribution to the accountancy profession and service to the community.

[16] For most of his time in public practice Mr Newson has been a sole practitioner, providing accounting services to members of the public. He currently works from a small office comprising himself and two other persons, one an employee and the other a contractor. They provide a wide range of accounting services, including tax compliance, audit, business advisory and insolvency.

[17] Mr Newson chooses to be a member of NZICA because it has traditionally been the body which represents members of the accounting profession. He also chooses to hold a Certificate of Public Practice because that designation denotes a level of quality service delivery to clients.

[18] Mr Newson's practice was reviewed in March 2010 by Mr J Gray of Tauranga. The outcome of the review was that NZICA decided to carry out a re-review of the practice within 12 months.

[19] The re-review was conducted on 24 February 2011. On that occasion the reviewers were Mr S Cann and Mr J Vague, both of Auckland. At the feedback session held at the end of the day Mr Newson and Mr Cann discussed various issues concerning particular files. In the course of those discussions Mr Cann made reference to a file which Mr Newson understood to be the NZICA file relating to the 2010 practice review. Specifically Mr Cann referred to a document which Mr Cann explained had been provided by someone in NZICA's tax team. Mr Newson had not previously been aware the tax team had been approached or that they had made comments. Mr Newson asked for a copy of the document. Mr Cann declined but did read extracts from it.

[20] The same day Mr Newson sent a letter to NZICA requesting a copy of the handwritten comments to which Mr Cann had referred. He also asked to inspect the file relating to the 2010 review. Initially NZICA responded the information would be made available but subsequently by email dated 20 May 2011 from NZICA's General Counsel Mr Newson was advised the material would be withheld in reliance on s 29(1)(b) of the Act.

[21] On or about 26 May 2011 Mr Newson made a complaint to the Privacy Commissioner and the present proceedings by the Director eventuated.

[22] Mr Newson told the Tribunal it was clear to him that in the course of both reviews some criticism of his work and expertise was made but since he was unable to see the material he could not challenge or rebut those criticisms. Not knowing what has been said about him has been frustrating and unfair.

THE DEFENDANT'S CASE

Overview of NZICA case

[23] The essence of the case for NZICA is that it is imperative for an effective system of practice review that the practice reviewers engaged by the Institute do not feel constrained and in particular are able to freely and frankly express their evaluations and opinions as part of the process. Knowledge that the evaluative and opinion material generated by them in the process of reporting to the Institute with the recommended outcome for any particular practice review could be made available to the member concerned would inhibit the process. It would undermine NZICA's statutory obligation to promote, control and regulate the profession of accountancy in New Zealand.

[24] Whether the evidence establishes the preconditions to the operation of s 29(1)(b) is the issue to be determined, the outcome depending in part on the overall context, including the statutory obligations of NZICA and its procedures for conducting reviews. It is to that context we now turn.

The statutory setting

[25] Well after the events in question the New Zealand Institute of Chartered Accountants Act 1996 was amended by the New Zealand Institute of Chartered Accountants Amendment Act 2014 which (with three exceptions) came into force on 25 November 2014. The three exceptions came into force on 1 July 2015. See first, the New Zealand Institute of Chartered Accountants Amendment Act 2014 Commencement Order 2014 and second, the 2015 analogue. For the purpose of determining the present case the changes effected by the 2014 amendments are not materially relevant. The statutory functions of NZICA have always included:

> **[25.1]** The control and regulation of the profession of accountancy by its members.
>
> **[25.2]** The promotion of quality, expertise and integrity in the profession of accountancy by its members.

[26] See s 5 of the version of the Act in force as at 1 July 2012:

> **5 Functions of Institute**
>
> The functions of the Institute are—
> (a) to promote quality, expertise, and integrity in the profession of accountancy by its members in New Zealand:
> (b) to promote, control, and regulate the profession of accountancy by its members in New Zealand:
> (c) to promote the training, education, and examination of persons practising, or intending to practise, the profession of accountancy in New Zealand or elsewhere:
> (d) any other functions that are conferred on it by the rules.

[27] Because the issues in this case are not unique to the pre-2014 setting of this case and because the ruling in this decision will have ongoing relevance it is necessary to provide cross-references to the provisions of the Act as now amended. Any material difference in the wording of the provisions will be indicated.

[28] The list of NZICA's statutory functions in s 5 (in both the 2012 and 2014 versions) includes the promotion of quality, expertise and integrity in the profession of accountancy by its members. The 2014 version follows:

> **5 Functions of Institute**
>
> The functions of the Institute are—
> (aa) to carry out the duty imposed under section 5A:
> (a) to promote quality, expertise, and integrity in the profession of accountancy by its members in New Zealand:
> (b) to promote the profession of accountancy by its members in New Zealand:
> (c) to promote the training, education, and examination of persons practising, or intending to practise, the profession of accountancy in New Zealand or elsewhere:
> (d) any other functions that are conferred on it by the rules.

[29] NZICA is also required by the Act to have Rules which provide for (inter alia) admission, complaints and disciplinary proceedings. See s 6(1) which is materially the same in both versions of the statute:

6 Rules of Institute

(1) The Institute must have rules that provide for—
…
(b) the admission of members of the Institute and the cessation of membership; and
…
(f) a Professional Conduct Committee to investigate complaints against members and former members of the Institute and the powers and procedure of that Committee; and
(g) a Disciplinary Tribunal to hear complaints and matters referred to it by the Professional Conduct Committee and the powers and procedure of that Tribunal; and
…
(i) the kinds of conduct, including criminal offences, professional misconduct, and financial misconduct, for which a member or former member may be disciplined; and
(j) the actions that may be taken in respect of, and the penalties that may be imposed on, a member or former member by the Professional Conduct Committee or a disciplinary body for such conduct; and
…

[30] As earlier mentioned, two sets of Rules are relevant to the present proceedings but only the December 2010 re-issue will be referred to. Specifically, Rule 20 requires NZICA to review the operation of a member's practice "from time to time to ensure that professional standards are being maintained". In the course of this practice review NZICA has power (inter alia) to require the production of any document in the member's possession or power which may be required for the practice review, interview any member, examine any document or undertake any other form of enquiry which may be required for the review and employ any person to undertake the review on the Institute's behalf. The member is charged a fee for the review of their practice. On completion of a practice review NZICA may (inter alia) determine no further action is required, determine further action should be taken, lodge a complaint with the Professional Conduct Committee or direct the member not to undertake specified assignments except under the supervision of a member approved by the Institute.

The Code of Ethics

[31] Section 7 in both the 2012 and 2014 versions of the Act requires NZICA to have a Code of Ethics that governs the professional conduct of its members. That Code is (as may be expected) a substantial document. Only certain features need be referred to.

[32] First, the Code is based on a number of Fundamental Principles which express the basic tenets of ethical and professional behaviour and conduct. Observance of these Fundamental Principles is stated to be "central to the public interest" and all members must abide by these Fundamental Principles at all times. The Fundamental Principles are:

> **[32.1] Integrity** – members must behave with integrity in all professional and business relationships. Integrity implies not merely honesty but fair dealing and truthfulness.
>
> **[32.2] Objectivity and Independence** – members must be fair, impartial and intellectually honest and must not allow prejudice or bias, conflict of interest or influence of others to override Objectivity. Members undertaking certain types of engagements must be, and be seen to be, independent.
>
> **[32.3] Competence** – members must only undertake professional work in which they have the competence necessary to perform the work to the technical and professional standards expected.

[32.4] Quality Performance – members must perform their professional work with due care and diligence, ensuring that all professional obligations are completed in a timely manner and are carried out in accordance with the relevant technical and professional standards appropriate to that work.

[32.5] Professional Behaviour – members must act in a manner consistent with the good reputation of the profession and refrain from any conduct which might bring discredit to the profession.

[33] The Introduction to the Code of Ethics emphasises that observance of the prescribed ethical principles is part of being a member and a positive "point of difference" in a competitive marketplace:

> 1. The Code of Ethics recognises that the objectives of the accountancy profession are to work to the highest standards of professionalism, to attain the highest levels of performance and generally to meet the public interest requirement. This Code is designed to provide members with authoritative guidance on minimum acceptable standards of professional conduct. The Code focuses on essential matters of principle and is not to be taken as a definitive statement on all matters.
> 2. Members are recognised as trusted expert business professionals, probably more so than any other professional group. Ask someone what sets an Institute member apart from other "professional" groups that provide services to business and the community, and the responses you get will likely include competence, integrity, objectivity, quality and professionalism. These are the key concepts or principles that you will find throughout this Code of Ethics.
> 3. Your clients and employers and others who rely on your work expect these ethical principles to be a fundamental part of your professional work and behaviour every day. This is all part of being a member and is a positive "point of difference" in a competitive marketplace.

[34] The Code of Ethics emphasises that adherence to ethical standards is designed to maintain public confidence that the accountancy profession will act in the public interest:

> 14. Members of the Institute have an important role and position in society. Members can remain in this position only if they are seen to be regulated, and can demonstrate that their services are provided to high levels of performance in accordance with ethical standards designed to maintain public confidence that the accountancy profession will act in the public interest.
> 15. The public interest is defined as the collective well-being of the community of people and institutions the profession serves …

Discipline

[35] Although no issue of discipline arises on the present facts it is relevant to note a practice review can have disciplinary consequences. In this regard NZICA's statutory duty to control and regulate the profession of accountancy practised by its members in New Zealand was in 2014 moved from the originally enacted "function" provision in s 5(b) to the new s 5A. Subsection (1) refers to NZICA's disciplinary responsibilities while s 5A(2)(b) makes specific reference to a duty to maintain, monitor and enforce members' compliance with professional and ethical standards, including the Code of Ethics:

> **5A Duty to control and regulate profession of accountancy practised by members in New Zealand**
>
> (1) The Institute must, with reasonable skill and care, control and regulate the practice of the profession of accountancy by its members in New Zealand.
> (2) The duty under subsection (1) includes—
> (a) maintaining, complying with, monitoring compliance with, and enforcing the rules referred to in section 6(1)(f) to (ja) (which relate to the investigation and hearing of complaints and other matters, appeals, disciplinary matters, and the recognition of auditors); and

(b) maintaining, monitoring members' compliance with, and enforcing professional and ethical standards, including the code of ethics required by section 7; and
(c) monitoring members' compliance with the Auditor Regulation Act 2011 and other enactments that relate to the practice of accountancy; and
(d) monitoring compliance with, and enforcing, section 14; and
(e) complying with the Institute's duties—
  (i) as an accredited body under the Auditor Regulation Act 2011; and
  (ii) that are imposed on the Institute (by name) under any other enactment.

Membership

[36] Ms Hawkesby deposed any person in New Zealand can offer accounting services to the public. The profession is not regulated in the same way as, for example, the medical and legal professions. Membership of NZICA is voluntary but any person becoming a member does so with the full knowledge they are bound by the Rules, the Code of Ethics and all other relevant professional standards. There are currently three types of membership being Chartered Accountant, Associate Chartered Accountant and Accounting Technician. A Chartered Accountant is the highest designation and the use of this designation is protected by s 14 of the New Zealand Institute of Chartered Accountants Act.

[37] The benefits of being a member of NZICA include but are not limited to:

[37.1] Use of the Chartered Accountant (CA) designation.

[37.2] Access to technical and business resources.

[37.3] Ability to promote quality at the highest level.

[37.4] Guaranteed quality enhancement through continuous professional development.

[37.5] Reciprocal recognition internationally as a member of the Global Accounting Alliance.

[37.6] The ability to undertake restricted and regulated activities (for example, statutory audits).

Practice review – the Review Procedures Manual

[38] The regular practice review conducted by NZICA is in many respects the cornerstone to the discharge by the Institute of its statutory obligations under ss 5 and 5A of the Act to (inter alia) maintain and monitor members' compliance with professional and ethical standards and to enforce those standards. As mentioned Rule 20.1 of the Rules requires NZICA to "review the operation of a member's practice from time to time to ensure that professional standards are being maintained".

[39] Ms Hawkesby deposed that at the times relevant to these proceedings, practice reviews were undertaken every three years, although a member could be subject to an earlier "re-review" if issues were identified that merited it. The Institute has since moved away from this cyclical process and now undertakes practice review using a risk-based framework.

[40] Practice reviews are performed in accordance with the Review Procedures Manual which sets out the purpose and objectives of practice review, how reviewers are selected, how reviewers are allocated to each review, the review process including the scope of the review, reporting and review finalisation. The Manual is supported by a

number of standard checklists for use by the member and by the reviewer as well as some standard template letters.

[41] In the Review Procedures Manual the explicitly stated purpose of a practice review is to provide quality assurance. Protection of the public interest is stated to be "fundamental":

> **1.2 Purpose**
>
> The primary purpose of Practice Review is to provide quality assurance in relation to activities of members in public practice.
>
> Protection of the public interest is fundamental. By protecting the public interest we protect the New Zealand Institute of Chartered Accountants brand and the membership as a whole.

[42] The scope of the review is to assess compliance with the professional, ethical and legislative standards and includes an assessment of the quality of the practitioner's performance against pre-determined measures. Risk is assessed at three levels, being risk to the Institute's professional reputation, risk to clients and the general public and risk to the practitioner, including the risk to personal reputation and business risk:

> **2.5 Scope of the Review**
>
> The scope of practice review is to assess compliance with the professional, ethical and legislative standards and includes an assessment of the quality of the practitioner's performance against predetermined measures.
>
> These measures include the relevant professional and ethical standards prescribed by the Institute, various legislative requirements including but not limited to the Financial Reporting Act 1993, Companies Act 1993, Securities Act and Regulations, Receivership Act, together with the Financial Reporting Standards.
>
> …
>
> The review is limited in its nature and the focus of discussions with the member(s) and the files selected for review will be directed at establishing areas of risk. Risk is defined as any action or inaction, or non-compliance identified during the course of the limited review that could represent a threat, or the possibility or probability of a threat, to the professional reputation of the member or the Institute as a whole. The assessment will consider the potential risk, potential consequence and the potential exposure.
>
> Risk is assessed at three levels:
>
> - Risk to the Institute's professional reputation,
> - Risk to the clients and general public, and
> - Risk to the practitioner – this includes the risk to personal reputation and business risk.

[43] At the relevant time reviews were selected on a three year cycle based on the previous review date. In some cases where remedial action was required by the firm, a "re-review" would take place, usually 12 months after the date of completion of the previous review. The re-review would focus on the areas of deficiency identified in the previous review and would not necessarily be a full review of the practice, although it could be if deficiencies were pervasive. If the outcome of the re-review was satisfactory the firm would return to the three year cycle based on the date of the previous full review.

Practice review – the process

[44] In view of Mr Newson's complaint that he was unfairly treated by not being given access to the evaluative or opinion material provided by the practice reviewers to NZICA it is necessary to observe that the Tribunal's jurisdiction is confined to determining

whether there has been an interference with Mr Newson's privacy, not whether the two practice reviews were conducted fairly, reasonably and in accordance with the law as those concepts are understood in the context of administrative law. However, in view of the complaint a summary is provided of the practice review process as described by Ms Hawkesby. It will be seen the procedures do provide more than one opportunity for the member to respond to the opinions and concerns of the reviewers.

[45] Ms Hawkesby stated at the relevant time the process was that once a firm had been selected for review two questionnaires were sent for completion. First, the Practitioner Information Questionnaire (PIQ) which provided information about the firm's practice including the range of services provided and other information needed to plan the review. Second, the Client Moneys Questionnaire (Trust-1) which required the firm to answer a number of questions regarding operation of the client trust account and client bank accounts. Firms were required to return the completed questionnaires in good time before the planned review date to enable the reviewer to plan the review, taking into account any risk factors identified in the questionnaires.

[46] The review site visit normally comprised an initial interview at which the reviewer discussed the information provided by the firm in the questionnaires and identified the information needed for review; a review of the information provided including a number of engagement files and a closing meeting at which the results of the review were discussed. In the course of the review the reviewer was required to complete a number of standard forms and checklists to record the review. These included:

> **[46.1]** Risk and Planning Assessment (RAP). This was completed at the start of the review to record risks identified and areas of focus for the review.
>
> **[46.2]** A number of checklists for different types of engagement or service. For example: Review of client moneys (Trust-2); Compilation engagements (SES-2); Audit engagements (AUD-1); Insolvency engagements (INSOL-1 and INSOL-2); Continuing professional development (CPD); Practice Entity Checklist (APE); Compliance with practice quality control requirements (QAL-1).
>
> **[46.3]** Control documents to ensure the file was completed appropriately: Standard review file index (RFI) and File completion checklist (FCC).
>
> **[46.4]** A review summary form used to support the Institute's decision-making process regarding the outcome of the review was called the Final Assessment Review form (FAR).

[47] Following the site visit the reviewer drafted a report for the firm. This was considered a draft report as it was subject to the firm's comments. The reviewer was also at this stage required to complete the first section of the Final Assessment Review form (FAR), a document not disclosed to the firm. The FAR required the reviewer to note his or her provisional view of the result of the review against each service line and for the review as a whole. The reviewer also summarised the key matters from the review for purposes of NZICA quality control and decision process.

[48] Before the draft report was sent to the firm a first peer review was undertaken of it and of the FAR by a senior reviewer. The peer reviewer did not at this stage have access to the review file. The purpose of the first peer review being a sense check of the draft report and ensuring it was consistent with the information documented in the FAR and the provisional review outcomes.

[49] The draft report was then sent to the firm for comment. The firm's responses were thereafter sent to the original reviewer(s) who would consider the responses and record on the FAR their review of the responses. They were required to complete a final assessment of each area of the review and the review as a whole, taking into account the firm's responses. They would also summarise their comments on the firm's responses including any factors that led them to change their view from the provisional assessment.

[50] At this stage a second peer review was performed to finalise the review. This was usually performed by a different senior reviewer and included a review of the firm's responses, the updated FAR and the review file. The peer reviewer decided on the final outcome of the review, amending the FAR where necessary and drafted a final letter to the firm setting out the result of the review. No final version of the report was issued to the firm.

[51] Ms Hawkesby stressed the FAR (which is not made available to the member or firm) was an important part of the NZICA's decision-making process and said if the reviewers could not rely on the confidentiality of the FAR and the other evaluative and opinion material generated during a practice review and retained on practice review files, this would likely inhibit a frank assessment of the firm's strengths and weaknesses and limit the effectiveness of the review process.

[52] The range of review outcomes has changed in recent years. At the relevant time Rule 20 provided four possible outcomes:

> **[52.1]** Satisfactory – meaning no further action was required.
>
> **[52.2]** Fair – meaning a partial re-review would take place in 12 months.
>
> **[52.3]** Unsatisfactory – meaning a full review conducted in 12 months.
>
> **[52.4]** Unacceptable – meaning the issues were serious enough to warrant referral to the Practice Review Advisory Group. Action could thereafter be taken under the complaints provisions. The member could also be required to appoint a mentor or undergo further training.

Mr Newson's practice reviews

[53] It is not intended to recite at length the course of the 2010 review. It is sufficient to note the Review Procedures Manual was followed. Specifically, by letter dated 14 May 2010 the contracted reviewer (Mr Gray) wrote to Mr Newson attaching his draft findings and inviting Mr Newson's written comments on those findings. In this letter Mr Gray stated:

> The report has noted a number of shortcomings in your practice. It may be that you are attempting to offer too wide a range of services and this factor, along with your extensive interest in Institute affairs and other matters outside your practice, may have prevented you from putting sufficient time into your own practice.

[54] The draft report provided by Mr Gray was 24 pages in length. On the left hand side of each page were Mr Gray's comments. The right hand side made provision for Mr Newson to insert his response. Mr Newson did in fact make a detailed reply and returned the draft report to Mr Gray on 26 June 2010.

[55] Subsequently, by letter dated 26 August 2010 the then Director – Practice Review (Mr JF Kennerley) advised Mr Newson the Practice Review Board had recommended Mr Newson's practice be re-reviewed within 12 months. That further review would consider his responses to the issues identified from the 2010 review, especially in relation to:

> **[55.1]** Audit engagements and in particular, the shortcomings reported to Mr Newson.
>
> **[55.2]** Insolvency engagements, particularly the process of liquidations.
>
> **[55.3]** Compilation engagements, particularly the attendance by Mr Newson to the shortcomings reported to him.

[56] The re-review was carried out in February 2011 by Mr Cann and Mr Vague who like Mr Gray, had been contracted to the Institute as practice reviewers.

[57] By letter dated 29 March Mr Cann wrote to Mr Newson enclosing the proposed findings from the 2011 review and inviting Mr Newson to provide written comments on the 2011 draft report (38 pages) so that his views could be considered when the review was finalised. By that stage Mr Newson had already by letter dated 24 February 2011 requested access to the file relating to the 2010 review, including the handwritten comments and opinion from the Institute's tax team. It is not intended to recite the exchange of correspondence. It is sufficient to note Mr Newson responded to the draft report on 14 June 2011.

[58] As to Mr Newson's claim that he was unable to respond to what the reviewers reported to NZICA it is sufficient to note that both in 2010 and 2011 he had opportunity to respond in detail to the respective draft reports as provided for in the Review Procedures Manual. The adequacy or otherwise of this opportunity to be heard is not within the Tribunal's jurisdiction to determine.

[59] By letter dated 27 January 2012 the Director – Practice Review (Mr Kennerley) advised Mr Newson NZICA had determined the outcome of the 2011 practice review was that a mentor be appointed by Mr Newson in relation to his (Mr Newson's) insolvency work and that a re-review of Mr Newson's insolvency and taxation work be undertaken in September 2012:

> **Insolvency Work**
> With respect to the insolvency work you undertake NZICA has determined that it:
> - Requires you to immediately appoint a mentor acceptable to NZICA;
> - Requires you to ensure that the mentor meets the NZICA procedural requirements (as advised); and
> - Will further review your insolvency work in September 2012, being 18 months from the date of your last review.
>
> **Taxation Work**
> With respect to the taxation work you undertake NZICA has determined that it:
> - Remains concerned with some of your tax planning, practices and advice;
> - Will provide you separately with a list of some suggested issues to address; and
> - Will further review your taxation work in September 2012, to coincide with the re-review of your insolvency work.

The reasons for withholding the information sought by Mr Newson

[60] In her open evidence Ms Hawkesby stated the position of NZICA is that the supply of information from the practice reviewers to NZICA (both generally and in this particular case), to the extent that it constitutes evaluative or opinion material, was subject to at

least an implied promise to the practice reviewers to the effect the information provided by them would be held in confidence.

[61] Expanding on this statement she said such a promise was implied because:

> **[61.1]** NZICA expects, and the effectiveness of the practice review process depends on, practice reviewers frankly recording their evaluation and opinion of a member's practice and supplying the same to NZICA.
>
> **[61.2]** Practice reviewers are senior members of the accounting profession who are either still in practice or have retired from practice. They are contracted to NZICA to do this type of work but generally they also maintain their own practices or perform other roles such as consultancy assignments for accounting firms or providing accounting training. When they review the practice of a member of NZICA, they are therefore making an evaluation about the competence of a colleague and expressing a view as to that person's fitness to continue in practice as a Chartered Accountant and holder of a Certificate of Public Practice.
>
> **[61.3]** It would be counter-productive if practice reviewers were not confident that their evaluations and opinions (generated in the process of reviewing the member's practice, preparing the draft report for the member's comment, assessing the member's response, then preparing the FAR with recommendations to NZICA on the outcome of the practice review) would be held in confidence by NZICA.
>
> **[61.4]** In particular, if the practice reviewers were aware the information would or could be disclosed to the member concerned, their freedom to frankly record their evaluations and opinions would be inhibited. It would create a tension between the expectation and need for frankness, and a desire not to appear overly antagonistic, critical or pedantic in the eyes of the member and colleague concerned. This would be detrimental to the efficacy of the review process.

[62] Ms Hawkesby emphasised the final assessment report (FAR) in particular was (and is) an important part of the NZICA decision-making process in relation to the review.

[63] In responding to Mr Newson's contention that the withheld information could have assisted him to advise one of his clients Ms Hawkesby said it was important to recognise that the primary purpose of the practice review is to provide quality assurance in relation to activities of members in public practice and to assess a member's compliance with professional, ethical and legislative standards and it includes an assessment of quality. It is not to undertake a detailed peer review of the files selected for review.

Findings on the evidence – whether an implied promise established

[64] It is common ground no express promise was made by NZICA to the three practice reviewers to the effect the evaluative material supplied by them to NZICA would be held in confidence. With the benefit of hindsight it would have been preferable were NZICA to have made explicit such promise in the Independent Contractor agreements entered into with the reviewers and perhaps such change has already been made given the challenge in the present case.

[65] But the absence of an express promise is not fatal given s 29(1)(b) of the Privacy Act expressly accepts an implied promise is sufficient.

[66] It would also have been preferable (as the Director submits) had the three reviewers who carried out the practice reviews given evidence that they were aware of the implied promise and acted in reliance on it. The absence of their evidence certainly made more difficult (but not impossible) the establishment by NZICA that the s 29(1)(b) exception applies to the facts.

[67] In our view the evidence we have heard from NZICA through Ms Hawkesby does establish to the balance of probabilities standard there was an implied promise of the kind required by s 29(1)(b) and that both NZICA and the three practice reviewers knew of the implied promise and acted in reliance on it. Our reasons follow:

[67.1] Any person in New Zealand can offer accounting services to the public. In a competitive marketplace the point of difference offered by NZICA is the high level of performance and ethical standards designated by membership of NZICA and in particular the right to (inter alia) describe oneself as a Chartered Accountant. It also opens the door to undertaking restricted and regulated activities such as statutory audits.

[67.2] NZICA has (as it did in 2010 and 2011) a statutory responsibility to promote quality, expertise and integrity in the profession of accountancy by its members. The Code of Ethics explicitly recognises the objectives of the accountancy profession are to work to the highest standards of professionalism, to attain the highest levels of performance and generally to meet the public interest. The Code goes on to state:

> 2. Members are recognised as trusted expert business professionals, probably more so than any other professional group. Ask someone what sets an Institute member apart from other "professional" groups that provide services to business and the community, and the responses you get will likely include competence, integrity, objectivity, quality and professionalism. These are the key concepts or principles that you will find throughout this Code of Ethics.

[67.3] While membership of NZICA is voluntary, the obligations assumed are onerous, including submission to regular practice reviews. Those reviews can be highly intrusive and result in outcomes which include re-reviews, a direction (by the Practice Review Board) that a member not undertake certain work without supervision or to undertake further training. Disciplinary action can also follow. Put another way NZICA is not any agency. Rather it is an agency tasked by statute to control and regulate the practice of the profession of accountancy by its members in New Zealand. There is a public interest in ensuring practice reviews are conducted rigorously and that the reviewers are free to express their opinions and evaluations frankly without fear of disclosure to the member via Principle 6.

[67.4] It is abundantly clear from both the open and closed evidence that the reviewers and the Practice Review Board take their responsibility seriously. The opinions, comments and observations made by the reviewers in the closed documents can only be described as plain spoken, direct, candid and at times brutally frank. It is unmistakably clear from the language and tenor of the closed documents that the reviewers did not ever expect Mr Newson to have access to their opinions and evaluative material. It is not without significance the Final Assessment Reports which are never disclosed to the member are clearly marked "Internal Use Only".

[67.5] The inherently intrusive nature of a practice review and the potentially embarrassing, if not serious outcome of a review creates the conditions for

resentment, suspicion and hostility towards the reviewers. They must be able to do their work unhindered by self-censorship. The more so when the member may be a senior and otherwise respected member of NZICA and perhaps a person of some influence and power. Reviewers must be able to record and report their candid and often highly personal opinions without fear of disclosure to the member. The member will be given an opportunity to respond to the draft report as provided for in the Review Procedures Manual but not to the opinion and evaluative material drawn on in the course of compiling that report.

[67.6] It must also be borne in mind that in the present case the reviewers were commenting adversely on and assessing the quality, expertise and integrity of a senior practitioner who himself had held office in NZICA. There are indications in Mr Newson's response of 14 June 2011 to the 2011 review that his relationship with the reviewers was at times less than cordial. For example, Mr Newson said of one reviewer that his [the reviewer's] loose use of legal terminology "betrayed lack of legal expertise" and Mr Newson wondered why NZICA "would bring a specialist reviewer down from Auckland who could not only not find his way around a liquidation file but also was not familiar with the electronic filing process". It was asserted the reviewers were "point scoring", reviewing files in a manner that was "brief and superficial", giving non-existent references to the Code of Ethics, displaying a "lack of understanding" of the scheme of the Code and displaying "several misunderstandings" as to the operation of the Companies Act 1993. Finally, there was a complaint the reviewers approached their task with the wrong attitude:

> I did find that the reviewers attitude was very much one of "I'm the expert – here are my findings". Rather than "There seem to be some anomalies, why don't we see if we can sort them out – like let's have a look for the 'missing' documents and explore why the solvency resolution might not have got on to the Companies Office file". However I find that is fairly typical of practice reviewers. It must be part of the training.

[67.7] The response by the reviewers to these criticisms is included in the closed bundle of documents. Their comments and opinions are characteristically forthright and unmistakeably of a kind one would expect to be made in confidence to the Practice Review Board secure in the knowledge they would not be disclosed to Mr Newson.

[67.8] The final point is possibly a restatement of the foregoing but it needs to be emphasised that the 2010 and 2011 reviews identified concerns serious enough to warrant first, two consecutive re-reviews within 12 to 18 months and second, a requirement that a mentor be immediately appointed in relation to Mr Newson's insolvency work. Given Mr Newson's status as a Fellow of NZICA, his long service on the Institute and his qualifications in accountancy and law, some fortitude on the part of the reviewers was required. Circumstances made plain a clear need for fearless candour on the part of reviewers and in turn for their evaluative or opinion material to be kept confidential. We accept the evidence given by Ms Hawkesby in which she explained the reasons why NZICA withheld the information sought by Mr Newson. It will be evident from what has been said above that we accept those reasons are genuine and that the reviewers not only understood and believed there was an implied promise the evaluative material compiled by them would be held in confidence, they relied on that promise.

[68] For these reasons we are persuaded to the civil standard that the evidence establishes the reviewers were aware of and indeed relied on an implied promise by NZICA that their evaluative and opinion material would be held by NZICA in confidence.

THE LEGAL ISSUES

The legislation

[69] Information Privacy Principle 6 entitles an individual to access his or her personal information held by an agency. The grounds on which a request for access can be refused are tightly circumscribed. Only the reasons set out in ss 27 to 29 of the Privacy Act can justify a refusal to disclose the requested information. See s 30 of the Privacy Act.

[70] NZICA acknowledges Mr Newson was not given access to certain material compiled during the course of the two reviews of his accountancy practice and that such material comprised or contained personal information ordinarily subject to disclosure on request under Principle 6.

[71] In its defence NZICA relies on s 29(1)(b) and (3) which provide:

> **29 Other reasons for refusal of requests**
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
> (a) …
> (b) the disclosure of the information or of information identifying the person who supplied it, being evaluative material, would breach an express or implied promise—
> (i) which was made to the person who supplied the information; and
> (ii) which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence; or
> …
> …
> (3) For the purposes of subsection (1)(b), the term *evaluative material* means evaluative or opinion material compiled solely—
> (a) for the purpose of determining the suitability, eligibility, or qualifications of the individual to whom the material relates—
> (i) for employment or for appointment to office; or
> (ii) for promotion in employment or office or for continuance in employment or office; or
> (iii) for removal from employment or office; or
> (iv) for the awarding of contracts, awards, scholarships, honours, or other benefits; or
> (b) for the purpose of determining whether any contract, award, scholarship, honour, or benefit should be continued, modified, or cancelled; or
> (c) for the purpose of deciding whether to insure any individual or property or to continue or renew the insurance of any individual or property.
> (4) …

A reverse onus

[72] As s 29(1)(b) is an exception from conduct that is an interference with the privacy of an individual it is for NZICA to prove application of the exception:

> **87 Proof of exceptions**
>
> Where, by any provision of the information privacy principles or of this Act or of a code of practice issued under section 46 or section 63, conduct is excepted from conduct that is an interference with the privacy of an individual, the onus of proving the exception in any proceedings under this Part lies upon the defendant.

The issues

[73] The primary issues are first, whether an express or implied promise was made to the reviewers to the effect the information compiled by them would be held in

confidence. This is essentially an issue of fact. Second, whether the withheld information was "evaluative material" within the meaning of s 29(3). This is largely an exercise in statutory interpretation.

Whether an express or implied promise – that the information would be held in confidence – reliance

[74] Section 29(1)(b) requires the agency to prove an express or implied promise the information would be held in confidence. In *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [94] and [95] the Tribunal held:

> **[74.1]** The promise by the agency to hold the information in confidence must be made prior to or at the time of the supply of the information, being evaluative material.
>
> **[74.2]** It must also be shown the promise (that the information would be held in confidence) was relied on when the information was supplied. Authority for this proposition is *Westwood v University of Auckland* (1997) 4 HRNZ 107 (CRT) at 114. That was a case where doctoral supervisors gave evidence they relied on a promise of confidentiality when they supplied their reports. The statement by the Complaints Review Tribunal that the person supplying the evaluative material must be asked whether reliance was placed on the promise when the material was being supplied must be read in that context. The Tribunal was not asked to determine whether reliance could be implied. We are of the view that as the Act embraces both express and implied promises, reliance on an implied promise can be inferred if the evidence supports such inference, a point properly conceded by the Director in argument.

[75] For the reasons already given we find NZICA has established to the civil standard both requirements have been met. That is, there was an implied promise, made prior to the supply of the information that the evaluative material would be held by NZICA in confidence and that on the evidence it is to be inferred that when supplying the material the reviewers relied on the implied promise.

[76] It follows that subject to the information being shown to be "evaluative material" within the meaning of s 29(3), the requirements of s 29(1)(b) have been satisfied by NZICA.

EVALUATIVE MATERIAL

[77] The primary contest between the parties is over the interpretation to be given to the subs (3)(b) limb of the definition of "evaluative material" in particular:

> **[77.1]** Whether the material compiled by the reviewers was, in terms of subs (3)(b) so compiled:
>
> > for the purpose of determining whether any contract, award, scholarship, honour, or benefit should be continued, modified, or cancelled.
>
> **[77.2]** Whether the evaluative or opinion material was compiled solely for the subs (3)(b) purpose.

Summary of submissions for NZICA

[78] NZICA submits the withheld material is "evaluative or opinion material compiled solely … for the purpose of determining whether any … benefit should be continued, modified, or cancelled". The "benefit" is Mr Newson's membership of NZICA, which at the time entitled him to offer accounting services to the public under a Certificate of Public Practice, without restriction, using the designation "Chartered Accountant".

[79] As to the term "benefit" NZICA submits the natural (dictionary) meaning should be adopted namely "an advantage or profit gained from something". Reliance is placed on the interpretation adopted by the Court of Appeal in *Watchorn v R* [2014] NZCA 493 at [81] in the context of a charge under s 249 of the Crimes Act 1961 (accessing a computer system and thereby dishonestly obtaining any benefit). The Court observed there was no proper basis to limit the scope of the term "benefit" (as used in s 249) to financial advantage or to limit its normal meaning of anything that is of advantage to the person concerned. NZICA submits that when the term benefit in s 29(3)(b) of the Privacy Act is similarly given its natural meaning it is sufficiently wide to encompass membership of the NZICA and there can be no question that membership is of advantage to the member concerned.

[80] In *Dixon v R* [2015] NZSC 147 (20 October 2015) *Watchorn* was found to have been wrongly decided insofar as it held information is not "property". Nevertheless the Supreme Court at [51], relying on the *Shorter Oxford English Dictionary*, held that a benefit is an "advantage", "good" or "profit". Whether this definition is any different to that relied on by the Court of Appeal in *Watchorn* may be a moot point. The essential point is that both the Court of Appeal and the Supreme Court gave the term "benefit" its ordinary and natural meaning.

Summary of submissions for Director

[81] The Director challenges the argument that Mr Newson's right to continue to offer accounting services to the public as a Chartered Accountant without restriction is a "benefit" for the purposes of s 29(3)(b). It is submitted a dictionary definition would give the term too wide a meaning and inappropriately render the surrounding words in s 29(3)(b) meaningless. For that reason a narrower interpretation of "benefit" is required. Such narrow interpretation would be consistent with:

> **[81.1]** The ejusdem generis principle of statutory interpretation.
>
> **[81.2]** Case law and the position previously taken by the Ombudsman and Privacy Commissioner.
>
> **[81.3]** The purpose of s 29(3) when viewed in the wider scheme of the Act.

[82] The Director points to the fact s 29(3)(b) has most often been applied in the employment and education contexts and that the Privacy Commissioner is recorded in a 2010 decision as saying application of the provision should be limited to these two contexts. See *Case Note 211497* [2010] NZ Priv Cmr 22. The Director further argues a narrow framing properly reflects the importance placed by Parliament on the Principle 6 and 7 rights of access and correction and the significant impact that denial of access to, and the inability to challenge inaccurate or incomplete evaluative material can have on a person. The Director nevertheless recognises that even taking a narrow approach there may be a level of ambiguity surrounding what is and is not a benefit and submits that in

the face of any ambiguity it is appropriate to take a conservative, rights-consistent approach to its interpretation.

Discussion – overview

[83] We conclude the information in question was evaluative or opinion material. We have done so by applying the orthodox rule of interpretation which emphasises the centrality of text and purpose. The drafting history is also of significance, including the fact s 29(1)(b) and (3) of the Privacy Act have their origin in s 27(1)(c) and (2) of the Official Information Act 1982 (OIA). The evolution of the original OIA provision into the forms now found in the OIA, the Privacy Act and the Local Government Official Information and Meetings Act 1987 (LGOIMA), while hardly of fascination to the ordinary reader, is nevertheless of substantial importance. Finally, we are of the view the ejusdem generis rule does not have application. We start with the drafting history.

Drafting history

[84] The OIA was enacted following publication by the Committee on Official Information (the Danks Committee) of its General Report entitled *Towards Open Government* (December 1980). A Supplementary Report was presented in July 1981 which contained a draft Official Information Bill (with comments).

[85] As noted by Ian Eagles, Michael Taggart and Grant Liddell in *Freedom of Information in New Zealand* (Oxford, Auckland, 1992) at 2 the Government of the day then introduced, without alteration, the Danks Committee's draft Bill into the House. After some important changes were made at the Select Committee stage the Official Information Act became law on 17 December 1982 and came into force on 1 July 1983.

[86] Clause 25 of the Danks Committee draft Bill was the prototype of the present provisions and relevantly provided:

> A Department or Minister of the Crown or organisation may refuse to disclose any personal information requested under section 22(1) of this Act if, and only if, -
>
> (c) the disclosure of that information or of information identifying the person who supplied it, being evaluative or opinion material compiled solely for the purpose of determining the suitability, eligibility, or qualifications of the individual for employment or for appointment to office or for the awarding of contracts, awards, scholarships, honours, or other benefits, would breach an express or implied promise -
>
> (i) Which was made to the person who supplied the information; and
>
> (ii) Which was to the effect that the information or the identity of that person or both would be held in confidence.

[87] The commentary on this provision by the Danks Committee in its Supplementary Report at p 81 was that this provision addressed "[t]he protection of confidential references and similar personal evaluations".

[88] The important point for present purposes is that the "as enacted" OIA s 27(1)(c) and (2) was modelled on clause 25 of the draft Bill proposed by the Danks Committee. While the formatting differed, the phrase "contracts, awards, scholarships, honours, or other benefits" in OIA s 27(2)(a)(iv) did not deviate from the wording in the Bill. The as enacted form follows.

27. Reasons for refusal of requests for personal information-(1) A Department or Minister of the Crown or organisation may refuse to disclose any personal information requested under section 24 (1) of this Act if, and only if,-

…

(c) The disclosure of the information or of information identifying the person who supplied it, being evaluative material, would breach an express or implied promise-

(i) Which was made to the person who supplied the information; and

(ii) Which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence; or

…

(2) For the purposes of subsection (1) (c) of this section the term "evaluative material" means evaluative or opinion material compiled solely-

(a) For the purpose of determining the suitability, eligibility, or qualifications of the person to whom the material relates-

(i) For employment or for appointment to office; or

(ii) For promotion in employment or office or for continuance in employment or office; or

(iii) For removal from employment or office; or

(iv) For the awarding of contracts, awards, scholarships, honours, or other benefits; or

(b) For the purpose of determining whether any contract, award, scholarship, honour, or benefit should be continued, modified, or cancelled; or

(c) For the purpose of deciding whether to insure any person or property or to continue or renew the insurance of any person or property.

[89] The subsequent enactment of the Privacy Act (assented to on 17 May 1993 and in force on 1 July 1993) necessitated change. To understand that change it is necessary to recall the OIA introduced (inter alia) two significant reforms:

[89.1] A right of access to reasons (s 23); and

[89.2] A right of access to personal information (s 24).

[90] The right of access to reasons in OIA s 23 remains in place today. The right of access to personal information, however, has (for natural persons) been transferred out of the OIA into the Privacy Act 1993, particularly into Principle 6. The right of access to personal information in the present day version of the OIA is a right which attaches only to body corporates. This was done by the Official Information Amendment Act 1993 which amended s 27 by removing from the definition of "evaluative material" the references in subs (2)(a) to employment, appointment to office and the awarding of scholarships and honours, being concepts which attach appropriately to natural individuals, not to corporate entities. The term "evaluative material" was restricted to the shortened phrase of contracts, awards and benefits. Section 27(1)(c)(ii) of the OIA presently provides:

27 Reasons for refusal of requests for personal information

(1) A department or Minister of the Crown or organisation may refuse to disclose any personal information requested under section 24(1) if, and only if,—

(c) the disclosure of the information or of information identifying the person who supplied it, being evaluative material, would breach an express or implied promise—

(i) which was made to the person who supplied the information; and

(ii) which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence; or

…

(2) For the purposes of subsection (1)(c), the term *evaluative material* means evaluative or opinion material compiled solely—

(a) for the purpose of determining the suitability, eligibility, or qualifications of the person to whom the material relates for the awarding of contracts, awards, or other benefits; or

(b) for the purpose of determining whether any contract, award, or benefit should be continued, modified, or cancelled; or

(c) for the purpose of deciding whether to insure any person or property or to continue or renew the insurance of any person or property.

[91] Identical changes were made at the same time to s 26 of the LGOIMA which is the analogue to s 27 of the OIA in respect of requests for access to personal information. It too applies only to body corporates and is not materially different to the provision in the OIA. The "full" phrase of "contracts, awards, scholarships, honours, or other benefits" was retained in the context of the reasons which can be given for denying access to reasons for decisions. See OIA s 23(2A) and (2B) and LGOIMA s 22(1A) and (1B). In the result the OIA and LGOIMA use the original or "full" phrase as well as the shortened version of "contracts, awards, or other benefits":

"contracts, awards, scholarships, honours, or other benefits"	**Reasons for decision** OIA s 23(2A) and (2B) and LGOIMA s 22(1A) and (1B) – request by a natural person or by a body corporate for reasons for a decision
"contracts, awards or other benefits"	**Requests for personal information** OIA s 27(2)(a) and (b) and LGOIMA s 26(3)(a) and (b) – reasons for refusing a request made by a body corporate for access to personal information

[92] The original (full) definition of "evaluative material" is deployed in s 29 of the Privacy Act which applies only to natural persons in the context of requests by them for access to personal information:

> **29 Other reasons for refusal of requests**
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
> (a) …
> (b) the disclosure of the information or of information identifying the person who supplied it, being evaluative material, would breach an express or implied promise—
> (i) which was made to the person who supplied the information; and
> (ii) which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence; or
> …
> …
> (3) For the purposes of subsection (1)(b), the term *evaluative material* means evaluative or opinion material compiled solely—
> (d) for the purpose of determining the suitability, eligibility, or qualifications of the individual to whom the material relates—
> (i) for employment or for appointment to office; or
> (ii) for promotion in employment or office or for continuance in employment or office; or
> (iii) for removal from employment or office; or
> (iv) for the awarding of contracts, awards, scholarships, honours, or other benefits; or
> (b) for the purpose of determining whether any contract, award, scholarship, honour, or benefit should be continued, modified, or cancelled; or
> (c) for the purpose of deciding whether to insure any individual or property or to continue or renew the insurance of any individual or property.
> (4) …

[93] In the result at the present time the circumstances in which a request for personal information can be declined differ according to whether the requester is a natural person or a body corporate:

> **[93.1]** If a body corporate, the evaluative material which can be withheld is confined to the awarding of contracts, awards or other benefits.

[93.2] If a natural person these circumstances are expanded to include also employment, appointment to office and the awarding of scholarships and honours.

[94] Given the provisions of the Privacy Act, OIA and LGOIMA relating to requests for access to personal information form part of a comprehensive statutory scheme and further given their common parentage, it is clear the terms "contracts, awards or other benefits" must have a consistent meaning in all three statutes. The principle is that these statutes must be read together. See Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 268. It is difficult to see how the three terms "contracts, awards, or other benefits" can bear a different meaning depending on whether they appear as a group of three or (along with "scholarships" and "honours") as a group of five. The three terms must retain a stable, consistent meaning whether or not they sit alongside the additional terms.

[95] Furthermore, there is no reason to give "contracts, awards, or other benefits" a meaning different to their natural and ordinary meaning given the statutory context does not require the terms to be read down. The decisions in *Watchorn* and *Dixon* assist in this respect.

[96] We turn now to other aspects of the interpretation exercise.

Interpretation – text

[97] The textual analysis required by s 5(1) of the Interpretation Act 1999 cannot be carried out by examining s 29(3)(b) of the Privacy Act in isolation. It must be read alongside s 29(1)(b) and all of subs (3). That is the section must be interpreted as a coherent whole. There are three distinct elements to the operation of the exception:

[97.1] The promise element – that the information would be held in confidence.

[97.2] The **purpose** element – the material must have been compiled solely for the purpose of determining suitability, eligibility or qualifications.

[97.3] The **categories** element – the material must relate to one of the three fields listed in s 29(3):

[97.3.1] Employment or appointment to office.

[97.3.2] Awarding of contracts, awards, scholarships, honours or other benefits.

[97.3.3] Insurance of any individual or property.

[98] Before personal information can be withheld the stipulated cumulative requirements include:

[98.1] an express or implied promise that the information will be held in confidence.

[98.2] the information is evaluative material.

[98.3] compiled solely.

[98.4] for the purpose of determining the suitability, eligibility or qualifications of an individual.

[98.5] for employment or appointment to office or for promotion or removal from employment or office; **or**

[98.6] for the awarding of contracts, awards, scholarships, honours, or other benefits or for the purpose of continuing, modifying or cancelling such contracts, awards, scholarships, honours, or other benefits; **or**

[98.7] for the purpose of deciding whether to insure any individual or property or to continue or renew such insurance.

[99] Because subs (3)(a)(iv) and (3)(b) are counterparts, the two provisions must be given the same meaning. It is not material that subs (3)(a)(iv) uses the plural form of the terms "contracts, awards, scholarships, honours, or other benefits" and the other the singular. Nor is it material the one refers to "other benefits" and the other to simply "benefits". The symmetry of subs (3) is clear. It applies either to the gaining of employment or appointment to office (plus promotion and removal) or the gaining of a contract, award, scholarship, honour, or benefit (plus the continuation, modification or cancellation thereof). Put another way, subs (3)(a)(iv) and (b) are not separate categories or classes.

[100] Just as there is no explicit restriction on what kinds of employment or office are within subs (3)(a)(i) to (iii), there is no explicit restriction on the width of the terms of "contracts, awards, scholarships, honours, or other benefits" in subs (3)(iv) and (b) apart from the restriction inherent in the requirement that the evaluative material must be compiled:

[100.1] solely

[100.2] for the purpose of determining the suitability, eligibility, or qualifications of the individual to whom the evaluative or opinion material relates.

[101] In our view the text does not require or permit a reading down of any of the three categories of employment or appointment to office, insurance and contracts, awards, scholarships, honours or other benefits.

[102] This reading is reinforced by the fact the shortened version of s 29(3) of the Privacy Act as now set out in the post-1993 version of s 27(2)(a) and (b) of the OIA and s 26(3)(a) and (b) of the LGOIMA. It is clear from these contexts that the terms "contracts, awards, or other benefits" are unrestricted in meaning where access to personal information is refused to incorporated bodies. A different reading for natural individuals in the context of the Privacy Act counterpart would be entirely at odds with the text and context of s 29(1)(b) and (3).

Interpretation: purpose

[103] Read as a coherent whole it is clear the purpose of s 29(1)(b) of the Privacy Act is that stated by the Danks Committee namely, the protection of confidential references and similar personal evaluations.

[104] It is true s 29(1)(b) creates an exception to the Principle 6 entitlement to have access to personal information but that on its own is not sufficient to read down the language. As noted in the New Zealand Law Commission Issues Paper *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC IP17, March 2010) at [5.2], privacy is not an absolute right and other rights or interests will sometimes take precedence over it. By providing for exclusions, exemptions and exceptions, information privacy laws recognise the need for privacy to be balanced against such other interests.

[105] In the present case the purpose of the provision is to protect confidential references and similar personal evaluations. It is this purpose which restricts the operation of s 29(1)(b), not an artificial reading down of the terms "contracts, awards and benefits". On the face of the provision there is no justification for giving these terms a meaning other than their natural and ordinary meaning. The Director's concern as to the ambit of the operation of the exception is addressed by the balance of the text and there is no reason to resort to an artificial or strained reading down of the terms in question. As the textual analysis shows, there are a number of tightly circumscribed limitations to the operation of the subsection. The Tribunal should not legislate by adding to these restrictions by reading down the general words of "contracts" and "benefits". For those concerned about opening the door too widely, it must be remembered the only contracts and benefits covered by s 29(1)(b) are those in respect of which evaluative or opinion material has been compiled solely for the purpose of determining the suitability, eligibility or qualifications of the individual to whom the material relates to be awarded a contract or benefit or to make a decision whether such contract or benefit should be continued, modified or cancelled and then only if all the other requirements of s 29(1)(b) and (3) are satisfied.

[106] We are reinforced in this view by the fact that the ejusdem generis principle so heavily relied upon by the Director does not in truth have application. It is to that issue we now turn.

Whether ejusdem generis principle of application

[107] As mentioned NZICA submits Mr Newson's right to continue to offer accounting services to the public as a Chartered Accountant without restriction is a "benefit" within the meaning of that term as used in s 29(3) of the Privacy Act. It is said the normal meaning of "benefit" is anything of advantage to the person concerned and *Watchorn* at [81] is relied on as well as *Dixon* at [51].

[108] In the present case the Director submits (inter alia) defining "benefit" in such broad terms would render the surrounding words (contract, award, scholarship, honour) meaningless and a narrow interpretation is required. The "rule" of interpretation relied on to achieve such narrowing is the ejusdem generis (limited class) rule which is described in the following terms in Ross Carter *Burrows and Carter Statute Law in New Zealand* at 254:

> It relates to a common drafting practice: the list of specific words followed by a "catch-all" general word. The rule provides that if the specific words in the list are of the same class, the general word following them is construed as also being limited to that class.

[109] However, as noted in this text at 254-255 reservations to the rule are necessary:

> **[109.1]** Before it can apply the specifics have to form a *class*. If they are quite diverse, there is no room for the application of the rule.

[109.2] The rule is only a guide. It gives way readily to other indications of parliamentary intent and must not be allowed to override the clear purpose of the legislation. Since the ascendency of the purposive approach to interpretation, its influence has lessened.

[110] The Director is not alone in arguing for application of the ejusdem generis rule:

[110.1] The Ombudsman applied the "rule" to the "as enacted" version of s 27(2)(a)(iv) of the OIA to restrict the scope of application of "benefit". See *Freedom of Information in New Zealand* at 531-532:

> But note the Ombudsman's invocation of the *ejusdem generis* rule of statutory interpretation to limit the scope of "benefits" in sections 27(2)(a)(iv) and 27(2)(b). In one case, a war pension was held not to come within the genus of the preceding words "contracts, awards, scholarships, honours …" which coloured the meaning of "other benefits". In a similar vein, the Ombudsman said, in a case involving access to school certificate scripts, that something more difficult to achieve or of a rarer quality than school certificate was contemplated by section 27(2)(a)(iv).

[110.2] In *Case Note 211497* [2010] NZ Priv Cmr 22 the then Privacy Commissioner confined benefit to "the primary concessions in s 29, being 'employment and education'".

[110.3] In Taylor and Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [9.60] and in the earlier Taylor and Roth *Access to Information* (LexisNexis, Wellington, 2011) at [3.7.5] it is stated:

> There is little to be said about those ordinary language words "suitability, eligibility and qualifications" which can readily be understood, nor about "employment or office" which are equally clear. None of those words seem to have posed difficulties for the Ombudsmen or Privacy Commissioner. The same cannot be said about "contracts, awards, scholarships, honours, or other benefits". It may be argued that that phrase raises two classes. Contracts arguably could be a separate class from "awards, scholarships, honours", in which case, on ordinary principles of statutory interpretation, "other benefits" would be released from limitation. There is, however, considered to be a single class contained in the first four listed items. What all have in common is a competitive or potentially competitive situation in relation to something of significant monetary or status value. Theoretically contracts need not involve any competitive element, but if there were none, it is hard to see the relevance of evaluative material. Even if there were some relevant evaluative material the purpose of having this particular ground for withholding the information becomes doubtful in the absence of actual or potential competition. It would follow from this that, for example, a social welfare benefit is not covered. The definition says "other benefit" not "any other benefit", indicating that the general word "benefit" refers to a concept which it would not be out of place to use in reference to a contract, award, scholarship or honour.

[111] There are difficulties with these approaches. First, they pay insufficient attention to the text and purpose of the provision, thereby violating the fundamental principle of statutory interpretation. Second, no account is taken of the history of the provision and the need for it to be read with those in the OIA and LGOIMA referred to earlier. Finally, no class [or genus] can be found in s 29(3). The subsection embraces a wide spectrum of activity in relation to which decisions are made to determine suitability, eligibility or qualifications. Those activities are employment, appointment to office, contracts, awards, scholarships, honours, or other benefits. The terms "contracts" and "benefits" are prima facie broad in application as was underlined by the 1993 amendment to the mirror provision in OIA s 27(2). The as enacted version was stripped of references to terms which can apply only to individuals, specifically employment, appointment to office, scholarships and honours leaving standing in the post-1993 version of OIA s 27(2) only the broader terms of "contracts, awards or other benefits". These terms

cannot sensibly be confined to a "competitive or potentially competitive situation in relation to something of significant monetary or status value" as suggested by Taylor because there is nothing in the text or context to justify reading in such restriction. The statutory interpretation exercise cannot become an exercise in re-drafting the words of the provision. The text of OIA s 27(2) and of s 26(3) of the LGOIMA clearly require the three terms (contracts, awards or other benefits) to receive their natural and ordinary meaning.

[112] Given the shared parentage of the "held in confidence" provisions in the OIA, the LGOIMA and the Privacy Act, it would be an odd result were the common provisions to receive different meanings. The more so given both the full as well as the short versions of the phrase appear in OIA s 23(2A) and (2B), LGOIMA s 22(1A) and (1B).

[113] In summary, the major shortcoming of the argument in favour of a restrictive reading of "benefit" is the inappropriate reliance on the ejusdem generis rule and the failure to take into account the need for the OIA, LGOIMA and Privacy Act provisions to be read together as a comprehensive statutory scheme.

Held in confidence

[114] Although we have held there was an implied promise by NZICA to the reviewers that their evaluative and opinion material would be held by NZICA in confidence (and that the reviewers and NZICA acted on and relied on that promise) we briefly explain our understanding of the term "held in confidence".

[115] In *R v X (CA553/2009)* [2010] 2 NZLR 181 (CA) at [37] the Court of Appeal held the common law has never restricted the subject matter of confidentiality and no all encompassing definition should be attempted. The test at [45] is a "reasonable expectation of confidentiality". We interpolate that in the present context s 29(1)(b) itself sets out the circumstances in which a reasonable expectation of confidentiality arises. Subsection (3) simply defines the purpose and categories which limit the material to which the expectation refers. In *R v X (CA553/2009)* the Court of Appeal also observed at [48] that there does not need to be any particular kind of relationship or agreement. In this regard s 29(1)(b) is in accord. No relationship is required and the promise can be express or implied.

Compiled solely

[116] Section 29(1)(3) stipulates that the evaluative material must have been compiled "solely" for one of the purposes listed in (3)(a), (b) or (c).

[117] In *Geary* at [107] the Tribunal noted the phrase "compiled solely" excludes mixed purposes. See further Taylor and Taylor *Judicial Review: A New Zealand Perspective* at [9.60]. As will be seen below, we find on the evidence the "compiled solely" element has been established.

Evaluative or opinion material

[118] The term "evaluative or opinion material" was considered by the Tribunal in *Pointu v Employrite Ltd* [2002] NZHRRT 11:

> 32. We deal first with the question of whether the information given by the referee was 'evaluative or opinion material'. In doing so we note that the Act refers to 'evaluative'

material disjunctively from 'opinion' material. Plainly information can be withheld under this definition even if it is not limited to the expression of an opinion.

33. We have been unable to find an authority which discusses the meaning of the word 'evaluative' in a directly relevant way. However it seems to us that the word is intended to convey the idea of assessment and appraisal in a way that is consistent with the definition of the word 'evaluate' in the Oxford English Dictionary (2nd Ed.), i.e., *"To work out the 'value' of … To 'reckon up', ascertain the amount of …".* 'Evaluation' is defined as *"The action of appraising or valuing (goods, etc.) … The action of … determining the value of (a mathematical expression or physical quantity) …".* 'Evaluative' is defined as *'Of pertaining to, or tending to evaluation; appraisive, estimative'*.

[119] The Tribunal did not need to determine the "nuances of interpretation" because it was satisfied on the evidence the information at issue fell "squarely within the phrase "evaluative or opinion material" in s 29(1)(b).

[120] As in *Pointu* it is not necessary on the facts of the present case for an extended examination of "evaluative material" to be undertaken because the evidence is clear. After a close examination of the withheld information we are satisfied that it was evaluative or opinion material. In view of the fact we cannot explain our finding by reference to the contents of the withheld documents, the point cannot be developed beyond what has been said earlier in the discussion of the evidence.

Application of the law to the facts

[121] We have held on the facts an implied promise was made to the reviewers, prior to the supply of their evaluative or opinion material, that such material would be held by NZICA in confidence. We have further held that when supplying the material the reviewers relied on the implied promise. In these circumstances disclosure of the information would be a breach of that promise.

[122] The question is whether the information was "evaluative material" as defined in s 29(3). As to this:

[122.1] Given our rejection of the narrow interpretation of "benefit" as it appears in s 29(1)(3)(a)(iv) and (b), we conclude the benefit as contended by NZICA was a benefit within the meaning of the s 29 provisions. That is the "benefit" was Mr Newson's membership of NZICA, which at the time entitled him to offer accounting services to the public under a Certificate of Public Practice, without restriction, using the designation "Chartered Accountant".

[122.2] The sole purpose for the compilation of the material was to determine whether, in terms of subs (3)(b) the benefit would be continued, modified or cancelled. The evidence does not reasonably permit any other purpose to be found. That is, on the facts, we find there were no mixed purposes.

[122.3] Having examined the Closed Bundle we are of the view the withheld information was evaluative or opinion material.

CONCLUSION

[123] For the reasons given we are satisfied on the balance of probabilities that NZICA has established in terms of s 87 of the Privacy Act that it properly refused to disclose the information requested by Mr Newson. All the preconditions to the operation of s 29(1)(b) have been established.

[124] It follows the proceedings brought by the Director must be dismissed.

COSTS

[125] Costs are reserved. Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

> **[125.1]** NZICA is to file its submissions within 14 days after the date of this decision. The submissions for the Director are to be filed within a further 14 days with a right of reply by NZICA within 7 days after that.
>
> **[125.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without an oral hearing.
>
> **[125.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Mr MJM Keefe JP**	**Ms ST Scott**
Chairperson	**Member**	**Member**