IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2012] NZHRRT 13**

Reference No. HRRT 032/2011

IN THE MATTER OF	**A CLAIM UNDER THE PRIVACY ACT 1993**
BETWEEN	**RAZDAN RAFIQ**
	PLAINTIFF
AND	**COMMISSIONER OF POLICE**
	DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson
Dr S Hickey, Member
Dr A Trlin, Member

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

DATE OF HEARING: **11 and 12 April 2012**

DATE OF DECISION: **23 May 2012**

DECISION OF TRIBUNAL

Introduction

[1] By letter dated 20 December 2010 Mr Rafiq requested access to the personal information held about him by the New Zealand Police. By letter dated 22 February 2011 the Police provided some information but other information was withheld pursuant to s 27(1)(c) of the Privacy Act 1993 (disclosure would be likely to prejudice the maintenance of law) and s 29(1)(a) (disclosure would involve the unwarranted disclosure

of the affairs of another individual). The issue in these proceedings is whether the withheld information should have been released to Mr Rafiq.

Non-appearance of Mr Rafiq at the hearing

[2] Mr Rafiq did not appear at the hearing of these proceedings in Wellington on 11 and 12 April 2012. A brief explanation is necessary. A more detailed account is to be found in *Rafiq v Commissioner of Inland Revenue* [2012] NZHRRT 13 published simultaneously with this decision.

[3] In September 2011 Mr Rafiq commenced two sets of proceedings before this Tribunal under the Privacy Act. The first, filed on 5 September 2011, involved a claim by Mr Rafiq against the Commissioner of Inland Revenue. The complaint was that in a response to a request for access to personal information held by Inland Revenue, certain information had been withheld. On 22 September 2011 these present proceedings were filed against the Commissioner of Police similarly alleging the wrongful withholding of information following a request for access to personal information.

[4] The proceedings against the Commissioner of Inland Revenue were the first to be set down and were originally to be heard at Auckland. At that time the current proceedings against the Commissioner of Police were the only other proceedings before the Tribunal. The circumstances in which a change of venue (to Wellington) for the proceedings relating to the Commissioner of Inland Revenue was ordered included the following:

> **[4.1]** Mr Rafiq refused to participate in pre-hearing teleconferences, insisting that all communications "be done by post only". This made dialogue difficult. It is to be observed that in his proceedings against the Commissioner of Police Mr Rafiq adopted the same stance. See the statement of claim dated 20 September 2011.
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> **[4.2]** When by *Minute* issued on 18 October 2011 (in the proceedings against the Commissioner of Inland Revenue) a direction was made that those proceedings be heard at Auckland on 10 February 2012, Mr Rafiq was directed to file his briefs of evidence by 18 November 2011. By letter dated 10 November 2011 he advised he would not be filing any evidence.
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> **[4.3]** When the Commissioner of Inland Revenue sought a change of venue to Wellington Mr Rafiq replied on 14 November 2011 that he wanted the hearing to be in Auckland and added, inter alia, that:
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>> (iii) There shall be no evidence provided by the way of affidavit;
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>> ...
>>
>> (vi) There shall be no paper submissions of any nature in respect to the dealing of this case;
>>
>> (vii) The Plaintiff does not have to provide any evidence as the onus is on the Defendant to provide evidence to support its ground for the failure to disclose information as requested and withholding of critical information;
>>
>> (viii) The above is a full and final decision of the Plaintiff and there shall be no further procrastination in having the case moving forward;
>>
>> ...

[4.4] In his submissions on the change of venue application Mr Rafiq gave no meaningful information as to his personal circumstances. It is to be observed that in these proceedings against the Commissioner of Police Mr Rafiq has similarly given little information apart from endorsing the statement of claim by hand to the effect that he holds a Bachelor of Business Studies/Commercial Studies, two Diplomas in Management and 23 certificates "in areas of marketing, accounting, economics, business administration etc".

[4.5] When the Chairperson considered the application by the Commissioner of Inland Revenue for a change of venue to Wellington, Mr Rafiq had by then also filed multiple proceedings under the Privacy Act against a number of additional defendants loosely categorised as the Department of Labour, the Civil Aviation Authority and the Department of Internal Affairs. This meant that there were eight separate proceedings against government departments or agencies based in Wellington. The earlier decision that the proceedings against the Commissioner of Inland Revenue be heard in Auckland required revisiting given the substantial expense which the taxpayer now faced in relation to the travel costs and accommodation for the lawyers and witnesses involved in defending multiple proceedings at a distance.

[4.6] In these changed circumstances the Chairperson concluded, in terms of Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002, that all eight proceedings would be more fairly, efficiently, simply and speedily heard in Wellington. The Auckland fixture was accordingly adjourned to Wellington. See the *Minute* of 23 December 2011 issued in the claim against the Commissioner of Inland Revenue.

[4.7] By *Minute* dated 23 December 2011 issued in these proceedings against the Commissioner of Police, the Chairperson similarly directed that the proceedings be heard at Wellington and timetable directions were given for the filing by the parties of their respective briefs of evidence.

[4.8] The change of venue from Auckland to Wellington was again addressed in the Chairperson's *Minute* of 2 March 2012 in the proceedings against the Commissioner of Inland Revenue after Mr Rafiq sought a change of venue back to Auckland. For convenience paras [9] and [10] follow:

> **[9]** In balancing the interests of Mr Rafiq against those of the Commissioner and of the other government agencies the following considerations have been taken into account.
>
>> **[9.1]** In almost every case the cause of action (ie alleged breach of the Privacy Act) occurred in Wellington or was inextricably connected to an administrative decision-making process based in Wellington.
>>
>> **[9.2]** The lawyers representing the Commissioner and the other government agencies are based in Wellington as are most, if not all of the witnesses who will be called by them to give evidence.
>>
>> **[9.3]** The transport and accommodation costs which will be incurred by the taxpayer as a result of a hearing in Auckland will be substantial.
>>
>> **[9.4]** The only real connection between the eight proceedings and Auckland is the fact that Mr Rafiq lives in that city.
>>
>> **[9.5]** While Mr Rafiq claims to be now a welfare beneficiary he has given no meaningful information as to his current personal or financial circumstances.

> > **[9.6]** The impression given by Mr Rafiq is that he believes that having instituted the several proceedings, it is now for each defendant to satisfy him (Mr Rafiq) that they are innocent of each and every alleged impropriety (of which there are many) and that Mr Rafiq is to be the sole judge of their "innocence". The additional cost and inconvenience (to the defendants) of a hearing in Auckland appears to be part of a strategy to "punish" the various departments for their alleged transgressions against Mr Rafiq.
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> **[10]** The conclusion I draw from these considerations is that the interests of justice, fairness and efficiency, decisively favour a hearing in Wellington (Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002 (SR2002/19)). The application for a change of venue to Auckland is declined.

[4.9] At the commencement of the three day hearing at which all eight of his matters would be heard Mr Rafiq was contacted by the Registrar on his (Mr Rafiq's) cellphone. Responding to an inquiry by the Registrar, Mr Rafiq confirmed that he had not travelled to Wellington, would not be attending any of the hearings and would be relying on his "paper submissions". The hearing accordingly proceeded in the absence of Mr Rafiq, as permitted by Regulation 19(3) of the Human Rights Review Tribunal Regulations 2002. The Commissioner's only witness, Ms Katherine Baird, Legal Adviser of Wellington, gave oral evidence in accordance with her brief of evidence and answered supplementary questions from Mr Child and from the Tribunal.

The information privacy request

[5] The narrative of events which follows has been taken from the evidence given by Ms Baird.

[6] Mr Rafiq has made a number of information requests to the Police under different names. Prior to the events in question, the Police had on 5 February 2008 provided him with a copy of information recorded in the Police database, the National Intelligence Application (NIA), with some deletions having been made pursuant to s 27(1)(c) of the Act. Mr Rafiq made two complaints to the Privacy Commissioner; one was resolved and the other was not investigated because the Privacy Commissioner considered it had not been made in good faith and was vexatious.

[7] The request for personal information which is the subject of these present proceedings was made by Mr Rafiq in a letter dated 20 December 2010. The significance of its aggressive and confrontational terms will be addressed later in this decision:

> RE: Request for Personal Information
> BY: Razdan Rafiq
> …
>
> i. This letter serves you full and final notice to release all the personal information held by your department.
>
> ii. The request is filed herein under Privacy Act 1993, Principle 6-Access to Information.
>
> iii. You are tendered by 28 January 2011 and prior to 5 pm to discharge the above information for my meticulous inspection.
>
> iv. Thereafter, should you fail to reply I shall file a Privacy Act complaint to the Privacy Commissioner without your prior notification bearing in mind that the matter may advance to the Human Review Tribunal.

v. Further should you withhold any valuable personal information without testimony I shall advance the matter to the Tribunal.

vi. You shall be liable for all the action then.

vii. I have incurred costs in respect to all the dealings with your department over the years. Accordingly, I am dismissing the sum of $10,000 student loan of the government forever. Any European snakes (Maori country invaders) of Inland Revenue Department resisting this decision will be fully expelled from my matters and further dismissal of student loans shall headway and sum shall be the sum of not less than $20,000 then. In the interim the full dismissal of tax returns remains in full force. This country needs to go down economically and staffs of government departments need to lose their jobs. I want to view high government budget deficit.

viii. I am fully optimistic that you shall consider the elements of this letter and disclose my full personal information bearing in mind that if the matter transpires to the Tribunal a further dismissal of student loans shall advance and the amount shall be greater than $20,000 to cover the costs involved.

[8] The reference in the penultimate paragraph to “student loans” relates to Mr Rafiq’s student loan account. His assertion appears to be that in the circumstances outlined he would consider the balance reduced by the indicated amount.

[9] By letter dated 23 December 2010 the Police acknowledged receipt of the letter and advised that a response would be sent in due course.

[10] By letter dated 22 February 2011 the Police wrote to Mr Rafiq providing a copy of the information about him which had been recorded on the NIA database since the previous release of NIA information on 5 February 2008. The letter went on to record that some information had been withheld pursuant to s 27(1)(c) (disclosure likely to prejudice the maintenance of the law) and some information had been withheld pursuant to s 29(1)(a) (disclosure would involve the unwarranted disclosure of the affairs of another individual).

[11] Mr Rafiq lodged a complaint with the Privacy Commissioner. He also wrote to the Police on 4 April 2011 in highly offensive terms:

> European Traitor of this Maori country and snake face- [John] fucken [Doe]
> …

i. I refer to your fucken racist letter dated 22 Feb 2011. You snake and son of a bitch, I want to see all the hard copy form on Police files- all the physical files. You European shit from England.

ii. I hate all Europeans and the day I become a Leader of NZ I am going to kick all the European shits back to England!

iii. Your mother must have slept with so many men to give birth to you, European bastard. Go and spit on your mother’s face for giving you birth.

iv. If you don’t give the above files, then the matter will be referred to the Tribunal.

v. Europeans have no right of existence in this world.

vi. Feel like spitting on Europeans’ dirty faces.

vii. Maori people are sick and tired of you European devils; nobody wants European people in this world. Europeans only want to invade other countries.

A handwritten endorsement at the foot of the letter read:

I want all Europeans to stay off my matters. NZ is not your country.

[12] By letter dated 23 May 2011 the Privacy Commissioner, having reviewed the withheld information, advised that she was satisfied that the Police had a proper basis to withhold that information from Mr Rafiq and had not breached Principle 6 of the privacy principles.

[13] Mr Rafiq then filed these proceedings on 22 September 2011.

Scope of the inquiry before the Tribunal

[14] Since the filing of the proceedings there have been two factual developments:

> **[14.1]** Mr Rafiq, by letter dated 4 October 2011, has made a further request for information ("the Further Request"). That request has been dealt with and responded to substantively by the Police in a letter dated 23 December 2011. The Further Request involved the assessment of different information from the Original Request.
>
> **[14.2]** The Commissioner in January 2012 realised that when he responded to the Original Request he overlooked information that was held on a different database at that time (the "Overlooked Information"). The Commissioner accepts that the Overlooked Information was within the scope of the Original Request and would have included it in the material provided to the Privacy Commissioner in responding to the complaint that preceded the current proceedings. The Commissioner, on his own initiative, assessed the Overlooked Information and decided that it ought to be withheld. A letter was sent to Mr Rafiq on 2 February 2012 advising him of these developments.

[15] As to the Further Request, it is simply to be noted that that request can not be considered within the context of the current proceedings and neither Mr Rafiq nor the Commissioner have argued to the contrary.

[16] As to the Overlooked Information, Mr Child advised that the Commissioner was willing to accept that this information could be regarded as within the scope of the Original Request and therefore within the scope of the present proceedings. Consequently, in the event of Mr Rafiq wishing to argue in these proceedings that the Overlooked Information ought to have been released, the Commissioner was content to address that matter in these proceedings without a further complaint having to go through the Privacy Commissioner.

[17] By way of *Minute* dated 13 February 2012 the Chairperson ruled that the Overlooked Information was to be regarded as in substance part of the same subject matter already before the Tribunal:

> **[5]** The Tribunal appreciates the two matters being drawn to its attention.
>
> **[6]** As to the Further Request, the Tribunal presently has no jurisdiction as no investigation has been conducted by the Privacy Commissioner. See ss 82 and 83 of the Privacy Act 1993 and *Steele v Department of Work and Income* [2002] NZHRRT 12; *DAS v Department of Child, Youth and Family Services* [2004] NZHRRT 45 and *Lehmann v Radioworks* [2005] NZHRRT 20.
>
> **[7]** As to the Overlooked Information, there is no similar jurisdictional hurdle. Mr Child is correct is submitting that provided any argument about the Overlooked Information is limited to the question of whether it should have been withheld in terms of principle 6, then it can be regarded

as in substance part of the same subject matter that is already before the Tribunal: *Waugh v New Zealand Association of Counsellors Inc* [2005] NZHRRT 24 at [93] – [97].

> **[8]** Mr Child suggested that if Mr Rafiq wishes to argue in these current proceedings that the Overlooked Information ought to be released, Mr Rafiq might want to amend his pleadings or to file further evidence in respect of the Overlooked Information. The Commissioner, being content to address the Overlooked Information in these proceedings, would not object provided the amendment and filing of further evidence was done within a reasonable time.
>
> **[9]** I am of the view, however, that in view of the history of Mr Rafiq's dealings with the several government departments referred to in the *Minute* dated 23 December 2011 it is to be presumed that he will want to argue in these proceedings that the Overlooked Information ought to be released. Further, given that the Commissioner has disclosed the fact of the Overlooked Information (though simultaneously determining that it be withheld), there would seem little point in requiring anything further of Mr Rafiq, unless there is in fact anything further he wishes to file.
>
> **[10]** To avoid these proceedings drifting further the better approach is for the Commissioner to assume that the Overlooked Information is to be regarded as in substance part of the same subject matter that is already before the Tribunal. The Commissioner's evidence will accordingly need to address the Overlooked Information and the grounds on which it has been withheld. This will allow the case to continue without delay or disruption.

[18] There are two further factors affecting the scope of the inquiry before the Tribunal. First, it is to be recalled that in his letter dated 20 December 2010 requesting access to the information held by the Police about him, Mr Rafiq correctly relied on Principle 6 of the information privacy principles. It was the application of this principle which was investigated by the Privacy Commissioner and the scope of the inquiry before this Tribunal is accordingly restricted to Principle 6 and the withholding grounds relied on by the Police. To the extent that Mr Rafiq's later statement of claim seeks to broaden the inquiry to Principles 1, 3, 4, 5, 7, 8, 10 and 11, that attempt must fail. See the Chairperson's *Minute* published on 23 December 2011:

> **[2]** By letter dated 4 October 2011 the Office of the Privacy Commissioner advised that the Commissioner does not intend appearing in these proceedings. The letter went on to note jurisdictional difficulties:
>
>> The matters that Mr Rafiq recounts in the Statement of Claim are among the matters considered by the Commissioner, but go beyond the matters that the Commissioner investigated. As such, there are some difficulties with jurisdiction.
>>
>> The Privacy Commissioner only investigated the complaint as involving a possible breach of principle 6 of the Privacy Act 1993. In Mr Rafiq's Statement of Claim he refers to principles 1, 3, 5, 7, 8, 10 and 11 and these matters were not investigated by the Commissioner as they were not brought to our attention. Accordingly, we consider that the Tribunal has no jurisdiction to consider them.
>
> **[3]** The point being signalled by the Privacy Commissioner is that in these proceedings the Tribunal has jurisdiction only to consider Principle 6 of the Privacy Act 1993. See further *Steele v Department of Work and Income* [2002] NZHRRT 12; *DAS v Department of Child, Youth and Family Services* [2004] NZHRRT 45 and *Lehmann v Radio Works* [2005] NZHRRT 20.

[19] Second, in a statement dated 25 March 2012, Mr Rafiq made reference to criminal charges he currently faces in the District Court at Auckland, stating that he requires the withheld information to defend himself:

> The Defendant, NZ Police has filed serious charges against me through Auckland District Court. The Complainants are Privacy Commissioner and Inland Revenue Department. The Defendant hearing fixture date is 10 May 2012 at 9.30am.
>
> The plaintiff requires full disclosure of personal information and physical files from the NZ Police to establish unsubstantiated and unwarranted allegations that could be utilised in reducing the creditability of the NZ Police prosecution.

[20] As to this, the discovery obligations of the prosecution in the criminal proceedings are governed by the Criminal Disclosure Act 2008. This Tribunal has no jurisdiction under that Act (see s 4(1)). The proceedings before this Tribunal are governed entirely by the terms of the Privacy Act 1993.

[21] It is now relevant to address in greater detail the decision by the Police to withhold the information in question.

The decision to withhold information

[22] From her review of Mr Rafiq's NIA record, Ms Baird noted that some information regarding Mr Rafiq had been recorded as intelligence and that he had used a number of aliases. She also noted that he had been involved in disputes with a number of people and organisations, as well as the Police, and that he had displayed a tendency to complain, deny facts, and to become argumentative and verbally abusive. As will be seen, the bulk of the information withheld from Mr Rafiq was withheld on the basis that disclosure would be likely to precipitate (further) abuse of the individuals and organisations identified in the NIA entries.

[23] Explaining the decision to withhold information, Ms Baird stated:

> 17. I consider that good grounds exist under the Privacy Act to withhold the information that was redacted. I consider that the disclosure of the withheld information would be likely to prejudice the maintenance of the law and/or would involve the unwarranted disclosure of the affairs of another individual for the following general reasons:
>
> 17.1 I withheld much of the information because of Mr Rafiq's history of misconstruing information provided to him, becoming aggravated about it, and making threats. Although Mr Rafiq may already be aware of the substance of some of this information, I considered providing the information would be likely to fuel further abusive contact with people or organisations. In my view there was a real risk that such contact would be the likely result of disclosure to Mr Rafiq, and that this could initiate offending by Mr Rafiq and/or inhibit people from contacting Police about him in the future, both of which outcomes would be likely to prejudice the maintenance of the law.
>
> 17.2 Some information was withheld because it was personal information about other people, in particular the identity of complainants in matters where intimidation by Mr Rafiq was an issue.
>
> 17.3 Some information was withheld because it was in the nature of intelligence.

The statutory provisions relied on to withhold the information were ss 27(1)(c) and 29(1)(a) of the Privacy Act.

[24] In an unsworn statement dated 22 February 2012 replying to Ms Baird's brief of evidence, Mr Rafiq provides illustration of the first two points made by Ms Baird. He alleges that:

> … she is an artist in false allegations with no evidence (this is apparent from her statement – brief of evidence) and an artist in generating false profiles/information and statement of correction of the members of the public like me.

Later in the statement he says:

> The witness accuse me that the information is being withheld as disclosure would fuel me to abusive more people and organisation. Once again there is no evidence provided that is instrumental to this defamatory statement. *I do admit that if I do not procure all the withheld information I am going to abuse more Europeans on this Maori land forever. As you may recall in that in another proceeding Rafiq vs. Internal Affairs Department full disclosure was filed.* I

was extremely happy that Internal Affairs had disclosed all the information as claimed in my statement. I promise to myself that no European staffs of Internal Affairs will face my abuse in the future! I really do not like to swear Europeans on their faces – make their white skin red even though I like it and have become my hobby. *I want to live happy with European people like European ladies and get married to a beautiful blond European girl and have 10 children* like Pacific islanders and be on benefit all the time since this country has plenty of money said by the Police.

> *The plaintiff adjudges that the Defendants have no single evidences to substantiate the withheld information apart from unwarranted false allegations particularised above which we do not have time for.* [italics in original]

Procedure for determining whether information properly withheld

[25] Following the practice established in *Dijkstra v Police* [2006] NZHRRT 16; (2006) 8 HRNZ 339, *Reid v New Zealand Fire Service Commission* [2008] NZHRRT 8 and *NG v Commissioner of Police* [2010] NZHRRT 16, the opening submissions of Mr Child were received in open hearing. Thereafter, after she had been sworn, the evidence of Ms Baird as set out in her brief of evidence dated 10 February 2012 (including the bundle of annexures to that brief of evidence) was read and received in open hearing. Both documents had been previously served on Mr Rafiq. Once the hearing reached the point where it was necessary that the Tribunal see the withheld information itself the hearing was closed to all except for Ms Baird (the witness) and Mr Child and Mr Hallett-Hook (counsel for the Commissioner). In the closed part of the hearing the Tribunal received the closed evidence of Ms Baird together with a closed bundle of documents, being the information withheld from Mr Rafiq. During the closed hearing Mr Child expanded on his opening submissions with the advantage of now being able to address freely the closed documents specifically. Once this process had been concluded the hearing returned to "open" format.

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

[27] We now address the withholding grounds relied on by the Commissioner of Police.

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

[28] Privacy Principle 6 provides that:

> Principle 6
> *Access to personal information*
> (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—
>   (a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
>   (b) to have access to that information.
> (2) Where, in accordance with subclause (1)(b), an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
> (3) The application of this principle is subject to the provisions of Parts 4 and 5.

[29] Principle 6 is subject to Part 4 of the Act which sets out the circumstances in which an agency may refuse access to personal information. Part 4 includes s 27 which relevantly provides:

> 27 Security, defence, international relations, etc
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if the disclosure of the information would be likely—
>
> (a) ...
>
> (b) ...
>
> (c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
>
> (d) ...

[30] As can be seen, s 27(1) permits an agency to refuse to disclose information if disclosure is "likely" to have any of the consequences which follow. The standard of proof is not the balance of probabilities ie "more likely than not". In this context "likely" means a distinct or significant possibility and to avail itself of one of the grounds in s 27, an agency must show there is a real and substantial risk to the interest being protected: *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391, 404 and 411 and *Nicholl v Chief Executive of the Department of Work and Income* [2003] 3 NZLR 426 (Rodney Hansen J) at 430. In *Commissioner of Police v Ombudsman* Cooke P, in relation to earlier but similar provisions in the Official Information Act 1982, stated that:

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

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

[32] In submissions in support of the deployment by the Police of s 27(1)(c) Mr Child drew attention to the following:

> **[32.1]** The Police play a central role in relation to the maintenance of the law. Their functions are expressly set out in s 9 of the Policing Act 2008 in the following terms: keeping the peace; maintaining public safety; law enforcement; crime prevention; community support and reassurance; national security; participation in policing activities outside New Zealand and emergency management.
>
> **[32.2]** In *Adam v New Zealand Police* [1997] NZCRT 16 the Complaints Review Tribunal considered whether details of an inquiry into threats made by the plaintiff could be withheld under s 27(1)(c) on the basis that their disclosure would prejudice any future investigation or detection of threats made in a similar manner. The Tribunal found that this information had been properly withheld as:

> There is some risk that the plaintiff may repeat this behaviour – he seems to have a very low frustration threshold and between 1986 and 1994 he made a number of threats which he apparently did not intend to carry out but which nonetheless involved the defendant's investigators. We think for these reasons that there is some likelihood that this information could be of value to the plaintiff in the future in a way which could prejudice any future investigation. Accordingly we find that there were sufficient grounds to withhold this information from him.

[32.3] As to the withholding of information in the nature of intelligence referred to by Ms Baird, in *Tonkin v Manukau District Court* HC Auckland M No. 437/SW01, 26 July 2001 at [10] Rodney Hansen J observed in the context of criminal disclosure and the equivalent withholding ground in the Official Information Act that:

> … I am of the view that these documents are entitled to the protection available under s 6(c) of the Official Information Act. In my view, it is necessary and desirable that Police officers should be able to communicate internally in writing without fear that matters of opinion and comment will later be disclosed. I see it as necessary to the efficient workings of the Police and in no way contrary to the right to a fair trial for internal memoranda to be protected from disclosure in proper cases. Informal communications in which tentative, provisional and subjective views are expressed, must be a necessary part of the investigation and detection of offences. As long as they do not contain evidence which is not available from other sources, I see no threat to the administration of justices in their being protected by s 6(c) of the Act.

[32.4] The Commissioner accepts that cases such as *Adam* and *Tonkin* do not provide the Police with carte blanche to withhold any and all personal information about Mr Rafiq. It must still be shown that disclosure of the information in question will be likely to prejudice the maintenance of the law. However, the cases do emphasise an important point, namely, that a degree of secure internal communication of information is required for the Police to be able to perform effectively their law enforcement functions.

[32.5] The Police often rely on information supplied by informants to prevent, investigate and detect offences. It is well established that the protection afforded by s 27(1)(c) extends to the protection of the identity of informants. See *Nichol v Chief Executive of the Department of Work and Income* at [16] and [17]:

> [16] There is therefore a substantial body of decisions dating from 1982 which have recognised that in a proper case, s 27(1)(c) may be relied on to deny access to the name of an informant. The decisions are firmly grounded in the words of the statute and in the pragmatic concerns which, since *R v Hardy* (1794) 24 St Tr 199, have conferred public interest immunity on police informants. For more than two centuries it has been accepted that the public interest favours preserving the anonymity of Police informers by keeping open avenues of information which will assist in the detection and investigation of crime.
>
> [17] The decisions under the New Zealand legislation have properly emphasised, however, that suppression is not automatic. Each case must be determined on its own merits. The question is whether in this case the respondent was entitled to decide that disclosure of the name of the informant would pose a serious risk to the maintenance of the law….

In *Nichol* the agency had statutory responsibility for the administration of the benefit system under the Social Security Act 1964 and for the purpose of discharging those obligations relied on information from the public as well as on the activities of its own staff. The Court agreed that the detection and investigation of benefit fraud is peculiarly reliant on a flow of information from the public. It therefore concluded that the agency's fears that disclosure of the identity of the informant could discourage other potential informants from giving

information were "fully justified" and would "undoubtedly" prejudice the maintenance of the law, the prevention, investigation and detection of offences. There were no special circumstances which could support a contrary view. The agency was therefore entitled to refuse disclosure. *Nichol* was applied in *Stoves v Commissioner of Police* (2009) 19 PRNZ 334 at [45] to [51].

[33] We are of the view that all of these points are properly made and have application to the facts.

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

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

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

[36] Section 29(1)(a) of the Privacy Act provides:

> 29 Other reasons for refusal of requests
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
>
> (a) the disclosure of the information would involve the unwarranted disclosure of the affairs of another individual or of a deceased individual

[37] This withholding provision has two limbs. First, that the disclosure of the information would disclose the affairs of another person and second, that such disclosure would be unwarranted. The term "unwarranted" requires the Principle 6 right of access held by the requester to be weighed against the competing privacy interest recognised in subs (1)(a). As to how the balance is to be struck and a determination made whether disclosure of the information would involve the "unwarranted disclosure" of the affairs of another individual will depend on the circumstances. See *Director of Human Rights Proceedings v Commissioner of Police* [2007] NZHRRT 22 at [63]. In that decision the Tribunal made reference to some of the considerations which can be relevant when weighing the competing interests. In the present case the Commissioner relies on the following: whether the informant may have expected anonymity at the time the information was given; the nature of the information considered for disclosure; the relationship between the requester and the person whose affairs are at risk of disclosure and the harm which disclosure might cause that person. The Commissioner also relies on the fact that it is possible to find that disclosure can be unwarranted because of what is known about the requester and what he or she is likely to do with the information. See *M v Ministry of Health* (1997) 4 HRNZ 79 (CRT).

[38] Having in the context of a closed hearing considered the withheld information we find first that disclosure of the information would disclose the affairs of another person (particularly the identity of the informants and complainants) and second, that such disclosure would be unwarranted. Intimidation and retaliation by Mr Rafiq is a real and substantial risk.

[39] Mr Rafiq's capacity to intimidate people for his own reasons, to engage in threatening behaviour and to react badly to matters he considers adverse to himself must not be underestimated. This much is established by the closed evidence and can also be seen from the terms in which his request dated 20 December 2010 for access to personal information was framed and in his subsequent letter to the Police dated 4 April 2011. Reference must also be made to his statement dated 22 February 2012 filed in these proceedings, the relevant extract having already been quoted earlier in this decision at [24]. To these examples can be added his email dated 8 May 2012 addressed to the Chairperson in which he alleges that the Case Manager from the Secretariat and Mr Child "are having some form of connection to each other" and accusing Mr Child of being deceitful. Mr Rafiq has also lodged a complaint with the Minister of Justice alleging that the Chairperson is biased and "was staging the proceedings by having personal detestation against me, as a Plaintiff". In the same letter of complaint Mr Rafiq alleges that the Case Manager was "leaking" confidential documents to the Office of the Privacy Commissioner and to Crown Counsel. He asserts: "As the Plaintiff, I am the boss and I make decisions as to how the proceedings should be staged and where and when". In a second email dated 8 May 2012 Mr Rafiq states that in the event of the Tribunal not ordering disclosure of the withheld information he will simply initiate new requests for access to the information, thereby starting the proceedings all over again. There is a pattern of conduct which leads us to the clear conclusion that virtually everyone who comes into contact with Mr Rafiq must be protected from him. We are sure that all the informants and claimants have provided information to the Police in the expectation that their anonymity will be respected.

[40] Overall it is our conclusion, by a wide and substantial margin, that the withholding of the information in question under s 29(1)(a) was fully justified for the reasons given in evidence by Ms Baird and elaborated on by Mr Child in his submissions. The evidence is overwhelming. Mr Rafiq's history of complaints, difficult behaviour and disproportionate responses to perceived injustices establish that disclosure of the information carries with it a real risk that he will again misconstrue events and make further serious and unfounded allegations about people and organisations he comes into contact with.

Decision

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

> **[41.1]** All of the information which the New Zealand Police have refused to disclose in response to Mr Rafiq's Principle 6 request has been properly and justifiably refused under the Privacy Act 1993 ss 27(1)(c) and 29(1)(a).
>
> **[41.2]** Mr Rafiq's claim is dismissed.
>
> **[41.2]** Costs are reserved.

Costs

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

> **[42.1]** Any application is to be filed and served, along with any submissions or other materials put forward in support of the application, within 28 days after this decision is issued to the parties.
>
> **[42.2]** Any notice of opposition to the making of an award of costs is to be filed and served, along with any submissions or other materials put forward in opposition to the application, within a further 28 days.
>
> **[42.3]** The Tribunal will then determine the issue of costs on the basis of the papers that will by then have been filed and served and without any further oral hearing.
>
> **[42.4]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

....	....	....
Mr RPG Haines QC **Chairperson**	**Dr S Hickey** **Member**	**Dr A Trlin** **Member**