

Reference No. HRRT 006/2013

UNDER THE PRIVACY ACT 1993

IN THE MATTER OF AN APPLICATION BY *THE NEW ZEALAND HERALD* FOR ACCESS TO THE TRIBUNAL FILE

BETWEEN DIRECTOR OF HUMAN RIGHTS PROCEEDINGS

PLAINTIFF

AND THE SENSIBLE SENTENCING GROUP TRUST

DEFENDANT

TRIBUNAL: Rodger Haines QC, Chairperson

**REPRESENTATION:**

Mr SRG Judd for plaintiff

Mr DA Garrett for defendant

Mr D Fisher for *The New Zealand Herald*

DATE OF DECISION: 14 May 2013

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**DECISION OF CHAIRPERSON REGARDING APPLICATION BY *THE NEW ZEALAND HERALD* FOR NON-PARTY ACCESS TO THE TRIBUNAL FILE**

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**Background**

[1] On 17 April 2013 I heard an application by the Director of Human Rights Proceedings for an interim order prohibiting publication of the name, address or identifying particulars of the aggrieved person and of his partner. In a decision given on 22 April 2013 and published as *Director of Human Rights Proceedings v Sensible Sentencing Group Trust (Application for Interim Non-Publication Orders)* [2013] NZHRRT 14 the following formal orders were made at [64]:

**FORMAL ORDERS**

[64] Pursuant to ss 95 and 107(3)(b) of the Human Rights Act 1993 and s 89 of the Privacy Act 1993 the following orders are made:

[64.1] Publication of the name and occupation or of any other details which might lead to the identification of the aggrieved person in these proceedings is prohibited pending further order of the Tribunal or of the Chairperson.

[64.2] Publication of the name, address, occupation or of any other details which might lead to the identification of the partner of the aggrieved person in these proceedings, including the name of her business, is prohibited pending further order of the Tribunal or of the Chairperson.

[64.3] Publication of the name and occupation or of any other details which might lead to the identification of the victims of the aggrieved person is prohibited pending further order of the Tribunal or of the Chairperson.

[64.4] There is to be no search of the Tribunal file without leave of the Chairperson.

[2] By letter dated 22 April 2013 Mr David Fisher, Senior Writer for *The New Zealand Herald* requested permission to access, copy and reproduce submissions, exhibits and other documents held on the Tribunal file. Cited in support of the application were *Television New Zealand Ltd v Rogers* [2007] NZSC 91, [2008] 2 NZLR 277 at [67] and [74] and *Peters v Birnie* [2010] NZAR 494 (Asher J) at [21] to [25].

[3] The parties, having a right to be heard on the application, were invited by *Minute* dated 29 April 2013 to advise whether the application was opposed. In formulating their response they were invited to consider (inter alia) s 107 of the Human Rights Act 1993 and *IHC New Zealand v Ministry of Education (Non-Party Access to Tribunal File)* [2013] NZHRRT 2 (31 January 2013) and *Adoption Action Incorporated v Attorney-General (Non-Party Access to Tribunal File)* [2013] NZHRRT 4 (22 February 2013).

### **Position of the parties**

[4] By memorandum dated 6 May 2013 Mr Judd advised that the Director neither consented to nor opposed the application but submitted:

[4.1] If access was to be permitted, such access should be restricted to Mr Fisher rather than to *The New Zealand Herald*.

[4.2] It should be sufficient to allow access to the file by way of visual inspection rather than by Mr Fisher being allowed to take a copy away with him.

[5] By memorandum dated 10 May 2013 Mr Garrett advised that the Sensible Sentencing Group Trust conditionally supported the application, the condition being that Mr Fisher “ought not to be permitted to take [the file] away, but may only make notes from it”.

### **Discussion**

[6] It will be seen from the two decisions cited above that the Tribunal has adopted, with all necessary modifications, the High Court Rules, Part 3, Subpart 2 – Access to court documents, being rr 3.5 to 3.16. As no substantive hearing has yet taken place, the relevant Rule (by analogy) is r 3.13 which, in turn, brings into play r 3.16 which prescribes the matters to be taken into account on such application.

[7] All that needs to be added is that the two Tribunal decisions cited at [3] above must now be read in light of *Schenker AG v Commerce Commission* [2013] NZCA 114 (17 April 2013) which largely approved the decision of Asher J in *Commerce Commission v Air New Zealand Ltd* [2012] NZHC 271 on which the Tribunal’s two decisions are based. The Tribunal’s adoption of the High Court Rules, rr 3.5 to 3.16 also accords with *Patterson v Commissioner of Inland Revenue* [2013] NZCA 4, [2013] NZAR 136. In that case the High Court Rules, especially r 3.16, were drawn on to better inform decisions

on non-party access to documents filed in the Court of Appeal. The *Dominion Post* had sought permission to access certain documents pertaining to the forthcoming appeal by Mr Patterson, who had been adjudicated bankrupt and was appealing from that decision. The newspaper wished to obtain the decision under appeal, the notice of appeal and any documents filed to advance or to oppose the appeal. The application was successful in part only in that permission was declined in relation to documents which included a significant amount of private information for which redaction would be a time-consuming process. The decision of Wild J (sitting as a single Justice) noted, however, that a fresh application could be made later as the Court of Appeal (Access to Court Documents) Rules 2009 differentiate (as do the High Court Rules) between access prior to the hearing and access thereafter.

## **Decision**

**[8]** As neither party opposes the application and there being no proper grounds for declining the application, it is granted.

**[9]** Both parties have opposed the taking of photocopies. It is noted, however, that the Ministry of Justice *Media Guide for Reporting the Courts and Tribunals* (3<sup>rd</sup> ed, January 2012) at [6.2], [6.3] and [6.4] appear to contemplate the taking of photocopies. The case for the copying of documents is stronger after the substantive hearing has taken place by analogy with High Court Rules, r 3.9. Here the substantive hearing has not yet taken place. As against this, however, the hearing of the interim order application took place in open court. The public gallery was full, if not overflowing with representatives from the media. In these circumstances it would seem artificial to treat the affidavits, witness statements and submissions referred to at the hearing as not being governed by the post-hearing access regime. Accordingly copying is to be permitted in relation to the statement of claim, the statement of reply, applications, affidavits, witness statements, exhibits, memoranda, submissions, Minutes and Decisions. However, such copying is subject to reasonable limits, to be charged on an actual cost basis and is to be done under the supervision of a court staff member.

**[10]** There remain, however, two concerns. The first arises from the fact that the Secretariat is based in Wellington at the Tribunals Unit of the Ministry of Justice. That is where the Tribunal file is kept. The proceedings being in the pre-trial preparation stage both the Secretariat and the Chairperson require daily, immediate and ready access to the file. The Chairperson must be in a position to deal with urgent matters as they arise, including teleconferences, interim order applications, the enlargement of timetable dates and other case management issues. Access by Mr Fisher to the Tribunal file must not hinder the Tribunal's own access to the file. In the words of High Court Rules, r 3.16, access by him to the Tribunal file must not interfere with the ordinary and fair administration of justice.

**[11]** The second concern relates to the fact that there are operative non-publication orders as set out in the decision given on 22 April 2013 at [64]. In this regard it is noted that in his letter dated 22 April 2013 Mr Fisher acknowledges that he is aware of the existing suppression orders and says that he and *The New Zealand Herald* will comply with those orders.

**[12]** The terms on which the application is granted follow below.

## **Orders**

**[13]** The application by Mr Fisher for access to the Tribunal file is granted subject to the following conditions:

**[13.1]** Access by Mr Fisher must not interfere with or impede access to the file by the Tribunal itself or by the Secretariat.

**[13.2]** All non-publication orders must be strictly adhered to by Mr Fisher and by *The New Zealand Herald* unless or until such orders are rescinded.

**[13.3]** Access is granted to the statement of claim, the statement of reply, applications, affidavits, witness statements, exhibits, memoranda, submissions, Minutes and Decisions. Access is not granted to communications between the Tribunal, its Chairperson and Ministry of Justice officials.

**[13.4]** Copying of documents is permitted subject to reasonable limits and is to be charged on an actual cost basis. The taking of photocopies is to be done under the supervision of a court staff member.

**[13.5]** Access to the Tribunal file is to be arranged through and controlled by the Case Manager, Ms Kelly Curran of the Tribunals Unit, Wellington.

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**Mr RPG Haines QC**  
**Chairperson**