(1) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 40**

	Reference No. HRRT 011/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**BRIAN GREGORY MULLANE**
	PLAINTIFF
AND	**ATTORNEY-GENERAL**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms DL Hart, Member
Ms ST Scott, Member

REPRESENTATION:
Mr BG Mullane in person
Ms D Harris and Ms A Dixon-Blake for defendant

DATE OF HEARING: **25, 26 and 27 September 2017**

DATE OF DECISION: **25 October 2017**

DECISION OF TRIBUNAL[1]

INTRODUCTION

[1] At the relevant time Mr Mullane was a self-employed taxi driver in Wellington. As such he was required to satisfy the New Zealand Transport Agency (NZTA) that he was a "fit and proper person" to hold a P endorsement on his driver licence and to hold a Passenger Service Licence. To that end he gave written authorisation to the NZTA to

[1] [This decision is to be cited as *Mullane v Attorney-General* [2017] NZHRRT 40.]

obtain from the Police not only details of all his charges and convictions, but also "any other information" the Police held about him.

[2] On 20 June 2013 the Police Vetting Service reported to the NZTA that, based on intelligence held, the Police recommended that Mr Mullane did not have unsupervised access to children, young people, or more vulnerable members of society.

[3] By letter dated 5 November 2013 the NZTA required Mr Mullane to submit himself for an assessment by a psychologist for the purpose of determining whether, on the balance of probabilities, he constituted a risk to unsupervised children, young persons or more vulnerable members of society. No response having been received from Mr Mullane the NZTA wrote again on 6 December 2013 in similar terms.

[4] Unbeknown to the NZTA the address to which the letters had been sent (being the address provided by Mr Mullane for the purpose of communications regarding his licence renewal) was not the address at which Mr Mullane was then living.

[5] On 18 December 2013 the NZTA wrote to Mr Mullane at the given address revoking his P licence but indicating the licence might be reinstated were the requested assessment from a psychologist to be submitted.

[6] Having again had no response from Mr Mullane, NZTA on 29 January 2014 served Mr Mullane personally with notice of revocation of his licence.

[7] Mr Mullane thereafter submitted a psychologist's report which expressed the opinion that he (Mr Mullane) did not constitute a risk to public safety. The NZTA promptly restored Mr Mullane's P licence on 26 February 2014.

[8] Mr Mullane says the 29 day interruption to his business from 29 January 2014 to 26 February 2014 led to unsustainable losses which, in turn, led to the repossession of his taxi and the closure of his business. He blames the Police for his predicament, asserting that before the vetting response was provided to the NZTA, the Police were under a duty to afford him an opportunity to answer the concerns expressed about him. In addition the Police had failed to comply with information privacy principle 8 which, in his submission, required that the information used by the Police in arriving at their vetting response to have first been the subject of investigation and to have been verified to be true.

[9] The issue in these proceedings is whether Mr Mullane has established the Police action breached Principle 8 and that there was a consequential interference with Mr Mullane's privacy as defined in s 66(1) of the Privacy Act 1993. Only if liability is established will the Tribunal have jurisdiction to consider whether a remedy should be granted to Mr Mullane who seeks damages of between $165,000 to $200,000, the latter figure being the ceiling to the Tribunal's jurisdiction at the time of the events in question.

PRELIMINARY MATTERS

Complaints made to other agencies – relevance of the outcome of those complaints

[10] The events in question have led not only to the present proceedings under the Privacy Act but also (inter alia) to complaints to the Ombudsman, to the Independent Police Conduct Authority, the NZTA and to the Privacy Commissioner. The outcome of those complaints and the conclusions reached by other agencies were relied on by Mr

Mullane at the hearing before the Tribunal, especially the findings made by the Ombudsman in a report dated 18 September 2017.

[11] However, as stressed to Mr Mullane at the hearing, the Tribunal is not bound by findings and conclusions reached by other agencies in the context of quite different statutory settings. In addition it is the Tribunal alone which has heard oral evidence tested by cross-examination. It has also received detailed written and oral submissions in the course of a hearing which lasted three full days. No challenge has been made to the principle that the Tribunal has a duty to reach its findings only on the evidence and submissions received by it and at no time during the hearing did the Police agree that the Tribunal receive the various reports as proof of the correctness of the findings and conclusions reached therein.

[12] In relation to the findings made by the Privacy Commissioner at first instance, the same point must be made. The hearing before the Tribunal proceeds as a de novo hearing, not as an appeal. The fundamental principle is that the Tribunal must decide the case on the evidence and submissions received during the course of the hearing. In this case as in all others under the Privacy Act, the Tribunal inevitably receives more detailed evidence than that made available to the Privacy Commissioner during the course of his "on the papers" investigation of any complaint.

Procedure followed at the hearing – open and closed hearings

[13] As foreshadowed by the Chairperson's case management *Minute* issued on 24 March 2017, it was inevitable that in the particular circumstances of the case the Tribunal would be required to conduct a closed hearing to view documents withheld by the Police from Mr Mullane.

[14] Those documents were filed as a closed bundle of documents and there was an additional volume of supplementary closed documents.

[15] The only oral evidence received in the closed hearing was that given by Mr MJ Sadd, the Continuous Improvement Advisor in the New Zealand Police Vetting Service. That evidence was narrowly confined and Mr Sadd's open statement of evidence clearly indicated the context in which his closed evidence was given. The Police legal submissions on the closed evidence (and which could not be presented in open hearing without compromising the Police case) were also received in the context of the closed hearing.

[16] Conscious of the fact that Mr Mullane had been excluded from a potentially significant aspect of the case, the Tribunal took care to ensure the hearing was closed to the minimum degree necessary to mitigate his exclusion while allowing the Police fair opportunity to present their case.

[17] No objection was made by Mr Mullane to the receipt of the closed evidence and to the holding of the short closed hearing.

THE FIT AND PROPER PERSON TEST IN THE LAND TRANSPORT ACT 1998

The context in which Principle 8 is to be applied

[18] Information privacy principle 8 provides that before an agency uses any personal information about an individual, it must take such steps as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, it is accurate, up to date, complete, relevant and not misleading.

[19] For good reason Principle 8 is framed in general terms and does not attempt to prescriptively provide for every circumstance to which it has application. It is, after all, a "principle", not a compendious manual, code or set of "bright line" rules. This is an issue to which we return later in this decision.

The Land Transport Act

[20] As the context of the present case is the licensing provisions of the Land Transport Act 1998 (LTA), it is to those provisions we turn.

[21] Under the LTA any person operating a passenger service (which includes a taxi) must hold a transport service licence. Such licence can only be granted if the NZTA is satisfied (inter alia) the applicant is a fit and proper person to hold a licence. See LTA, s 30L. A taxi driver must also hold a P endorsement on his or her driver licence.

[22] The assessment criteria are addressed in some detail in Part 4A, Subpart 2 of the LTA. For present purposes it is sufficient to note only that in assessing whether or not a person is a fit and proper person in relation to a transport service, the NZTA must take into account the interests of public safety and may also consider (inter alia) the person's criminal history, any history of serious behavioural problems and "any other matter" that the NZTA considers appropriate in the public interest to take into account. The NZTA can also take into account "any other matters and evidence as the Agency considers relevant". See s 30C:

> **30C General safety criteria**
>
> (1) When assessing whether or not a person is a fit and proper person in relation to any transport service, the Agency must consider, in particular, any matter that the Agency considers should be taken into account—
> (a) in the interests of public safety; or
> (b) to ensure that the public is protected from serious or organised criminal activity.
> (2) For the purpose of determining whether or not a person is a fit and proper person for any of the purposes of this Part, the Agency may consider, and may give any relative weight that the Agency thinks fit having regard to the degree and nature of the person's involvement in any transport service, to the following matters:
> (a) the person's criminal history (if any):
> …
> (c) any history of serious behavioural problems:
> …
> (f) any other matter that the Agency considers it is appropriate in the public interest to take into account.
> (3) …
> (4) Despite subsection (3), the Agency may take into account any other matters and evidence as the Agency considers relevant.

[23] Additional criteria which must be considered in relation to taxi drivers are any history of serious behavioural problems and any offending in respect of offences of violence, sexual offences, drugs offences, arms offences, or offences involving organised criminal activities. See s 30D.

[24] For the purpose of determining whether a person is a fit and proper person, the NZTA has a wide statutory discretion to seek and receive any information it thinks fit and may consider information obtained from any source. See s 30G:

> **30G Agency may require information for fit and proper person assessment**
>
> The Agency may, for the purpose of determining whether or not a person is a fit and proper person for any of the purposes of this Act,—
> (a) seek and receive any information that the Agency thinks fit; and
> (b) consider information obtained from any source.

[25] The statutory safeguard is that any prejudicial information must be disclosed and the individual given opportunity to refute or comment on it. See s 30H:

> **30H Agency's duties concerning prejudicial information**
>
> If the Agency proposes to take into account any information that is or may be prejudicial to the person, the Agency must, subject to section 30I(1) and to subpart 5, disclose that information to the person and, in accordance with subpart 5, give the person a reasonable opportunity to refute or comment on it.

[26] This provision is supplemented by s 30W which requires (inter alia) the NZTA to give notice of the proposed decision, to disclose the grounds for the proposed decision, to specify a date by which submissions may be made and to notify the person of the person's right of appeal to the District Court:

> **30W Agency to notify proposal to make adverse decision**
>
> (1) If the Agency proposes to make an adverse decision under this Part in respect of any person, the Agency must, by notice in writing,—
>
> (a) notify the person directly affected of the proposed decision; and
>
> (b) subject to subsection (3), inform that person of the grounds for the proposed decision; and
>
> (c) specify a date by which submissions may be made to the Agency in respect of the proposed decision (which date must not be less than 21 days after the date on which the notice is given); and
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> (d) if appropriate, specify the date on which the proposed decision will, unless the Agency otherwise determines, take effect, being a date not earlier than 28 days after the date the notice is given; and
>
> (e) notify the person of the person's right of appeal under section 106, in the event of the Agency proceeding with the proposed decision; and
>
> (f) specify such other matters as in any particular case may be required by this Act or any other Act.

[27] However, nothing in s 30H requires the NZTA to disclose any information the disclosure of which would be likely to endanger the safety of any person. See s 30I(1).

[28] Unsurprisingly, the provisions which empower the NZTA to revoke a transport service licence mirror those governing the grant or removal of licences. In particular, the NZTA can revoke such licence if satisfied the holder of the licence is not a fit and proper person to be the holder of a transport service licence. See s 30S.

[29] At the very end of the statutory process prescribed by Part 4A of the LTA there is a general right of appeal to the District Court under s 106 followed by a right of appeal to the High Court and then to the Court of Appeal on a question of law. See LTA ss 111A and 111B.

Mr Mullane's consent to disclosure of his personal information

[30] In June 2009 Mr Mullane filed an application for renewal of his P endorsement intending that it (and his payment) cover a period of five years, an approach he had taken when previously renewing his endorsement. As provided in this form Mr Mullane signed a consent authorising the disclosure by the Police not only of any charges or convictions, but also of "any other information they hold about me". He also authorised the NZTA to make "all enquiries as to [his] character and suitability to be the holder of a [P licence]":

> I consent to the disclosure by the New Zealand Police and other relevant persons or authorities of all charges and convictions against me and any other information they hold about me to the Director of Land Transport. I confirm that I am aware that my full criminal record may be

released even if I meet the eligibility criteria stipulated in section 7 of the Criminal Records (Clean Slate) Act 2004 by the application of the exception contained in section 19(3) of that Act. I authorise the Director to make all enquiries as to my character and suitability to be the holder of a P, V, I or O licence endorsement for the period of the term of the endorsement as the Director may consider necessary.

The Memorandum of Understanding between the Police and the NZTA

[31] The Police Vetting Service does not process vetting requests directly from individuals, with the exception of overseas visa requests. Instead, the Vetting Service has agreements with organisations known as "approved agencies". The NZTA is one of these approved agencies.

[32] In 2013 the agreement was known as a memorandum of understanding (MoU) and it specified the terms and conditions under which the NZTA could interact electronically with the Police to obtain vetting services. The only relevant terms of the MoU necessary to record here are that:

> **[32.1]** A vetting application could only be made in respect of a person who had given prior written consent to the disclosure of the information to the NZTA.
>
> **[32.2]** It was the responsibility of the NZTA to determine the suitability of the individual based on NZTA's own assessment of the information provided by the Police Vetting Service.
>
> **[32.3]** It was the responsibility of the NZTA to:
>
> > **[32.3.1]** Ensure the individual understood all interactions with the Police could be released, not only convictions.
> >
> > **[32.3.2]** Explain to the individual the purpose of the vetting check and to discuss the outcome of any Police comments.

The vetting request

[33] It was in this context that that NZTA in May 2013 submitted a vetting request to the Police Vetting Service.

[34] The key points to emphasise are that:

> **[34.1]** The NZTA request to the Police Vetting Service was based on Mr Mullane's consent.
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> **[34.2]** That request was made in the context of legislation which has as its purpose the protection of public safety.
>
> **[34.3]** The LTA sets out an explicit code for the fit and proper person test, the assessment criteria and the information which the NZTA may take into account. That code also contains fairness requirements, specifically disclosure of information that is or may be prejudicial to the person and the affording of a reasonable opportunity for the person to refute or comment on that information.

[35] These factors are relevant to the determination of the context in which Principle 8 is to be applied and in particular identifying the "circumstances" in which the Police must take reasonable steps to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant and not misleading. These factors also make it more difficult for Mr Mullane to

sustain his contention that Principle 8 requires that before the Police Vetting Service can provide any information to the NZTA, that information must first be investigated and verified to be true and in addition, that before that information is used in the form of a vetting release by the Police, the individual concerned must be given an opportunity to be heard.

THE POLICE VETTING SERVICE

[36] The Tribunal received detailed evidence about the Police Vetting Service and it is not intended to recite that evidence in full. The summary, as set out in the submissions for the Attorney-General, is largely adopted in the paragraphs which follow.

The rationale for Police vets

[37] Police vetting is the process by which approved agencies request information from the Police about people being considered for certain roles (eg employment, licences, vocational training or volunteer positions). These roles typically involved contact with children, young people and other vulnerable persons. Unlike a criminal conviction check which is undertaken by the Ministry of Justice, Police vetting canvasses all information held by the Police, including information obtained in the course of investigations that did not give rise to any charges, unsolicited information and complaints not investigated because, for example, the complainant has requested that no investigation take place or requests anonymity.

[38] The rationale for seeking a Police vet is that the Police may hold relevant information about a person demonstrating behaviour which, if repeated, could place vulnerable people at risk. That information may not have resulted in a criminal investigation or in a conviction.

[39] An essential component of Police vetting is that the subject of the vet must consent to the disclosure of information to the requesting agency. Without this consent, the Police can only disclose information under the provisions of the Official Information Act 1982 and the Privacy Act.

[40] Only approved agencies can seek vets from the Police Vetting Service. The service is not for individual or personal use. To become an approved agency, an organisation must meet certain criteria. Examples include organisations whose functions involve community safety and security, or which have a legislative obligation to obtain a Police vet (eg for children's workers under the Vulnerable Children Act 2016).

[41] Approved agencies bear certain responsibilities in making vetting requests, including:

> **[41.1]** Explaining the purpose of the vet to the subject;
>
> **[41.2]** Ensuring that the subject understands that all interactions with the Police may be released, not only convictions;
>
> **[41.3]** Making an independent assessment of the candidate's suitability for the role applied for (not merely relying on the vetting results).

Police vets – whether a statutory basis

[42] Police vetting has no explicit statutory basis. However the Policing Act 2008, ss 79B(2) and (3) (inserted in the Policing Act in 2016) mentions vetting as an example of a

demand service constituting "policing" provided by the New Zealand Police. This suggests Parliament intended the provision of vetting services to fall within the remit of the lawful functions of the Police as set out in the Policing Act, s 9, such as maintaining public safety and crime prevention.

[43] In addition to the provisions of the LTA already referred to, Police vetting is required by the following legislation and legislative instruments:

> **[43.1]** The Vulnerable Children Act. Part 3 has the stated purpose (s 21) of reducing the risk of harm to children by requiring people employed or engaged in work that involves regular or overnight contact with children to be safety checked. The requirements of a safety check are set out in s 31. The risk assessment must assess "the risk the person would pose to the safety of children if employed or engaged as a children's worker". The Vulnerable Children (Requirements for Safety Checks of Children's Workers) Regulations 2015 at regs 6 and 11 makes specific reference to what is termed "a Police vet" obtained from the "New Zealand Police Vetting Service". The responsibility for assessing the person in respect of whom a safety check is undertaken as well as the determination of the question whether that person poses any risk is explicitly made the responsibility of the organisation requesting the safety check. See regs 8 and 13.
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> **[43.2]** The Education Act 1989. Under s 413 and under the Education Council Rules 2016, the Education Council must establish a system for "Police vetting" in relation to teacher registration, issuing practising certificates and granting authorities to teach.
>
> **[43.3]** The Education Act 1989. Under ss 319D to 319FA all non-teaching and unregistered employees as well as contractors who work at licensed early childhood services are required to undergo Police vetting before they have unsupervised access to children. Specific reference is made to "a Police vet" and a hearing procedure is prescribed by s 319FA. That procedure imposes obligations on the agency, not on the Police.
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> **[43.4]** The Education (Hostels) Regulations 2005. Regulation 61 requires that anyone who has regular access to a hostel or who has unsupervised contact with boarders must undergo a vigorous suitability check, including Police vetting.
>
> **[43.5]** The Health and Safety at Work (General Risk and Workplace Management) Regulations 2016. Regulations 49 to 52 create a duty to ensure all workers at limited-attendance childcare centres are Police vetted before they have unsupervised access to children. This is under the Health and Safety at Work Act 2015, s 211(h)(iv) which allows the Governor-General to make regulations requiring workers who work with children to undergo Police vetting.
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> **[43.6]** The Psychoactive Substances Regulations 2014. Regulation 3A(f) requires that applicants for a licence to sell approved products under the Psychoactive Substances Act 2013, s 13 to give written consent allowing a Police vet.
>
> **[43.7]** The Social Workers Registration Legislation Bill. This government bill introduced on 9 August 2017 proposes a requirement that a Police vet be obtained in the course of assessing whether a person is a fit and proper person to practise as a social worker.

[44] We agree with the submission for the Attorney-General that these legislative requirements to obtain Police vets in certain circumstances indicate the executive intended to allow for the checking of relevant personal information (beyond conviction history) when a role involves contact, including unsupervised contact, with children, young people or vulnerable people.

Some statistics

[45] According to the evidence given by Mr MJ Sadd, in 2013 there were on average about 16 staff members of the Police Vetting Service who processed 457,651 applications received over the year. Presently there are 29 staff members who will process over 630,000 vetting requests received this year. Most vetting applications are processed within 20 working days.

[46] The vast majority of applications are not contentious:

> **[46.1]** Mostly, the Police do not hold any relevant information about the applicant; or
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> **[46.2]** The Police release the applicant's conviction history information unless they are eligible to have it concealed under the Criminal Records (Clean Slate) Act.

[47] At present, approximately 10,000 applications each year (around 2% of the total received) involve non-conviction information that may be relevant to the position applied for. It is not possible to tell how many such applications there were in 2013.

[48] It is known that a minimum of 2,758 vets (0.385% of total vets) were subject to some form of internal review in 2013. Those reviews were dealt with by Team Leaders who decided whether or not the information should be disclosed to the approved agency or referred to a Vetting Manager to make the decision on disclosure. In turn, the Manager could refer the decision to the Vetting Review Panel. In 2016 around 250 (0.04%) of all applications were referred to the Vetting Review Panel due to their complexity or sensitivity. There are no specific figures for 2013 but Mr Sadd explained that it is expected a similar number would have been considered by the Panel. These requests mostly involved decisions about whether to release non-conviction information.

[49] Mr Sadd further explained that while the Police do not have statistics for 2013, in the 2014 year the 2,701 vets that were subject to review either by a Team Leader or the Vetting Review Panel, 2,009 of them (0.41% of total vets) involved the release of non-conviction information. The remaining 692 were responded to without any conviction information released.

[50] Mr Sadd emphasised that the statistics provided must be approached with caution as they are based on manual data entry and there is the possibility of data entry errors.

A system undergoing evolution

[51] The evidence given by Superintendent DE Trappitt, National Manager: Communications Centres (which includes responsibility for the Police Vetting Service) was that Police vetting is undergoing constant evolution and the Police are always thinking about ways to improve the vetting process. This is because the service delivered by the Police entails inherent risk and is ever-expanding. It also requires the Police to make judgment calls of potentially high consequence both for people seeking employment or licences and for children and other vulnerable people.

[52] It was with these responsibilities in mind, as well as the then forthcoming Vulnerable Children Act, that Superintendent Trappitt in 2014 invited the Independent Police Conduct Authority and the Privacy Commissioner to conduct a joint review of the Police Vetting Service.

[53] That review, published in October 2016, was relied on by Mr Mullane as if the recommendations made in it represented findings in Mr Mullane's favour. For the reasons already explained this contention cannot be accepted. The document is a review governed by the Terms of Reference set out in its text at para 28. Neither those terms nor the set of recommendations listed in Appendix A address the issue presently before the Tribunal, namely the application of Principle 8 to the vetting process as it was in 2013 and in particular, to the circumstances of Mr Mullane's case.

[54] While the Tribunal has read the joint review with interest, it does not consider it relevant or helpful to the issues which fall to be determined.

The vetting process – an overview

[55] The vetting process (as it was in 2013) was described in some detail by Mr Sadd and Superintendent Trappitt. It is not intended to go into detail. An overview will be sufficient for the purposes of the present decision.

[56] Generally speaking there are two types of information disclosed in Police vets:

> **[56.1]** An applicant's conviction history; and
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> **[56.2]** Relevant information held by the Police as a result of any other interactions the applicant may have had with the Police. Such information also includes all other information held by the Police regarding the applicant.

[57] The conviction history is disclosed subject to the Criminal Records (Clean Slate) Act.

[58] Whether non-conviction information is disclosed is governed by policies specific to the Vetting Service and by the information privacy principles in the Privacy Act.

[59] The test used by the Vetting Service for disclosure is based on:

> **[59.1]** The relevance of the information to the role the applicant has applied for; and
>
> **[59.2]** Whether the information has been substantiated to a level commensurate with risk. The test requires considering whether the information is sufficiently substantiated to justify disclosure to the approved agency to inform its decision-making as to an applicant's suitability.

[60] Vetting staff must balance the competing interests involved in the vetting process. Those interests are:

> **[60.1]** The applicant's privacy; and
>
> **[60.2]** The need to protect the safety of children, young people and other vulnerable people.

[61] As at 2013, if the Police reached the view that it was appropriate to disclose non-conviction information in order to protect the safety of children, young people and other

vulnerable people, the vetting request was responded to in the form of a statement that the Police recommended that an applicant "does not have unsupervised access to children, young people or more vulnerable members of society". This response is sometimes (inaccurately) referred to as a "red stamp" response.

[62] A "red stamp" recommendation (as distinct from providing the information on which the recommendation is based as happened in *EFG v Commissioner of Police* [2006] NZHRRT 48) was issued when, for example, Police held information which met the test for disclosure but could not to be disclosed because:

> **[62.1]** It was subject to name suppression; or
>
> **[62.2]** It was provided in confidence; or
>
> **[62.3]** It was likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial. An example is when it related to an investigation of which the applicant was unaware or in respect of which he or she had yet to be interviewed; or
>
> **[62.4]** Was in the nature of intelligence.

[63] In 2013 the decision to release such recommendation would have been made by the Vetting Manager following a referral by a Team Leader. The Vetting Manager, in turn, could refer the case to the Vetting Review Panel.

[64] In arriving at their decision vetting staff could, in 2013, refer to three guide documents being first, a general document describing the vetting process; second, a guide to assessing intelligence and finally, a document addressing in some detail the process to be followed where intelligence information identified a concerning pattern of behaviour on the part of the applicant. These guide documents were for the internal use of vetting staff.

[65] Although Mr Sadd, in some detail, described the step by step process that was employed in 2013 it is not necessary to repeat that description in this decision. It is sufficient to note that the process involved a detailed and thorough examination of the information held by the Police not only in the National Intelligence Application database (known as NIA) but also other records holding Police information and intelligence relating to the specific applicant. The assessing officer could, inter alia, call for the relevant Police file(s) and speak to the investigating officer or the officer in charge of the investigation.

[66] The Vetting Review Panel was then (and is now) the highest point of escalation in the vetting system. The panel's role is to consider the most complex or sensitive vetting applications. After considering the application of the various vetting policies referred to and the legal tests established by the information privacy principles, the Panel decides what information (if any) should be disclosed. On average, the Panel meets weekly with additional meetings scheduled if there is a backlog in processing applications.

[67] The Vetting Review Panel is made up of senior staff from different business units within the Police. In 2013, a Panel typically consisted of Superintendent Trappitt as the Communications Centres National Manager, a senior ranking member of the Criminal Investigation Branch and a Police legal adviser. Other staff from the vetting management team would also attend to present the vets for review or to gain a greater appreciation of the process. In 2013, when a panel was convened, each member would

be provided with a full printout of the information held by the Police about the relevant applicant drawn from the NIA.

[68] In the present case, the Vetting Review Panel met on Thursday 19 September 2013 to consider the Police response to the vetting request relating to Mr Mullane and in particular, a request by the NZTA for the evidence held by the Police. That meeting will be described shortly. First it is necessary to explain the particular circumstances of Mr Mullane's case and the information held about him by the Police.

The particular circumstances of Mr Mullane's vet

[69] When on 20 June 2013 the Police released their recommendation to NZTA that Mr Mullane not have unsupervised access to children, young people or more vulnerable members of society they (the Police) had taken into account two information sets. Details relating to the first information set can be disclosed in this decision as that information was subsequently disclosed by the Police to the NZTA who, in turn, disclosed the information to Mr Mullane. The second information set cannot be disclosed in this decision as it was this information which was the subject of the closed hearing. As we have come to the view that that information was properly used by the Police and also properly withheld by the Police from the NZTA, it remains properly withheld from Mr Mullane.

[70] The background circumstances to the first information set can be briefly stated. In January 1998 a young man, then aged 14 years and eight months shot and killed his father north of Auckland. This led to a manslaughter conviction.

[71] In January 2001 Mr Mullane saw a television documentary about the case and, as a consequence, wrote to the young man inviting him to Wellington either for a holiday or to live with Mr Mullane at the conclusion of the young man's sixth form year. Mr Mullane says that his motive for making this offer was his interest in helping troubled youth. In communications which followed Mr Mullane offered the young man opportunity to do an Outward Bound course at Anakiwa, an offer the young man was keen to accept.

[72] Communications ended abruptly when the mother of the young man's then girlfriend intervened, accusing Mr Mullane of being a paedophile.

[73] On 14 December 2001 the Police received information from a Whangarei psychologist (since retired) who had once treated the young man and who had been shown correspondence from Mr Mullane to the young man and to the young man's girlfriend. The psychologist told Police he was concerned because in his view the correspondence was of a paedophile nature. He provided the Police with copies of the correspondence. The information provided by the psychologist as well as the correspondence referred to was placed on the Police file but even though the information was concerning, no action was taken at that time as no offence was disclosed.

[74] In fairness to Mr Mullane it is noted that the young man befriended by him gave evidence to the effect that Mr Mullane had paid for him to attend the Outward Bound course, that the young man had stayed with Mr Mullane for about 12 months and that Mr Mullane had been a great mentor and support for him during a difficult period of his life, that he was a good man and allegations that Mr Mullane had acted improperly were misguided, if not scurrilous.

[75] The second information set cannot be disclosed in this decision because the information was provided by a person who, while concerned about Mr Mullane's alleged actions, sought anonymity. The information is recorded on NIA.

[76] When in 2013 Mr Sadd processed the vetting request by the NZTA in respect of Mr Mullane he took into account the information provided by the Whangarei psychologist in December 2001 as well as the correspondence provided by that person. Mr Sadd was of the view the information needed to be considered because it had been provided by a professional in the field of psychology and in addition, Mr Mullane's correspondence had the appearance, even to a lay person, of being inappropriate to say the least. Mr Sadd also took into account the second information set which, for reasons detailed in his closed evidence, was considered sufficiently substantiated and highly relevant to the role of a taxi driver. Overall he considered the two information sets were sufficiently substantiated and indicated a pattern of concerning behaviour.

The Police vetting response

[77] Once he had recommended that a "red stamp" be issued, Mr Sadd passed the papers to a Vetting Manager who on 20 June 2013 released to the NZTA a response in the following terms:

> In reply to your request for information, the following information is recorded against a person/organisation with the same/similar name who may be identical to your applicant, however enquiries have not been made to establish identity.
>
> Comments:
>
> Based on intelligence held, Police recommend this person does not have unsupervised access to children, young people, or more vulnerable members of society. No Further Information Available.

The subsequent NZTA request for evidence

[78] By email dated 5 July 2013 Mr Stewart Guy, Senior Adjudicator employed by the NZTA wrote to the Police acknowledging the vetting recommendation and advising that in the light of that recommendation he had been asked to review the fitness and propriety of Mr Mullane continuing to hold a Passenger endorsement on his driver licence and to continue to hold a current Passenger Service Licence. He asked what evidence the Police would be able to provide to him for the purpose of the proposed review and if suspension followed, for any subsequent appeal by Mr Mullane.

The Vetting Review Panel consideration of Mr Mullane's vet

[79] On 19 September 2013 the Vetting Review Panel met at Wellington. The meeting was chaired by Superintendent Trappitt. The other members of the Panel were the National Manager, Criminal Investigations and the Senior Adviser: Information and Privacy (Legal Services). Also present at the meeting were the then acting Vetting Manager and a Team Leader in the Police Vetting Service. The meeting:

[79.1] Discussed the vetting response issued on 20 June 2013; and

[79.2] Considered the NZTA request for further information.

[80] The Panel:

> **[80.1]** Reached the same conclusion as Mr Sadd namely, that the two sets of information were both relevant and substantiated. The vetting response had been properly issued.
>
> **[80.2]** Determined that all information relating to the second information set would be withheld from the NZTA because the complainant had requested anonymity and confidentiality. In relation to the first set inquiry would be made to ascertain whether the psychologist had any objection to the Police disclosing to NZTA the information and material he (the psychologist) had provided to the Police. It would be necessary to ensure he was made aware that any information provided by him would, in turn, likely be disclosed also to Mr Mullane.

[81] In relation to the first set of information the retired psychologist was contacted on 19 September 2013 as directed. He advised the Police that he did not expect the information provided by him to be held in confidence and reiterated the concerns he held about Mr Mullane's communications and the risk he considered Mr Mullane posed as a taxi driver. Those concerns he repeated in an email sent to the Police on 19 September 2013.

[82] On 23 September 2013 the Police disclosed to the NZTA the retired psychologist's email of 19 September 2013 as well as his contact details.

Conclusions on the evidence

[83] Having seen and heard Mr Sadd and Superintendent Trappitt give evidence we are satisfied the vetting request of 28 May 2013 by NZTA in respect of Mr Mullane received careful and conscientious consideration. The evaluation of the information held by the Police was principled, logical and carried out with an awareness of the sensitivity of the information and its potential impact on Mr Mullane while at the same time addressing the legitimate need to protect the vulnerable in society, particularly children and young persons. Having seen the second information set we agree that for the purpose of determining whether to issue a "red stamp" recommendation to the NZTA, the information provided by the anonymous complainant was sufficiently substantiated and, together with the first information set, indicated a pattern of concerning behaviour.

[84] Couched as it was in intentionally opaque terms, the vetting response was a warning to NZTA that it was for NZTA to conduct its own due diligence with regard to the licence applications. The subsequent NZTA request to the Police for the information used in the vetting process received the careful consideration of a Panel comprising officers of considerable experience and of equally considerable rank. After appropriate inquiry, the release of one category of information was authorised by the Panel but not the other, leaving what Superintendent Trappitt described as a vacuum in relation to non-disclosable but relevant information.

[85] Against this background it is possible to turn to the legal issues. Those issues are focused on information privacy principle 8.

INFORMATION PRIVACY PRINCIPLE 8

[86] Information Privacy Principle 8 provides:

> Principle 8
>
> *Accuracy, etc, of personal information to be checked before use*
>
> An agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading.

Open texture

[87] As noted by the Law Commission in *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC IP17, 2010) at [2.6] a key feature of the Privacy Act is that it is not rules-based. It is principles-based and open-textured, and regulates in a rather light-handed way. The open-textured nature of the Act means that judgment is required in its application since it does not set out detailed steps for agencies to follow or provide a checklist for compliance. The privacy principles must be applied and assessed in relation to each individual set of facts as they arise. See similarly the subsequent Law Commission Report *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at [2.9] to [2.13] which emphasises that the principles do not provide the certainty of "bright line" rules.

The question of "use"

[88] Principle 8 is only engaged if and when personal information held by an agency is "used", a term which is not defined in the Act.

[89] The facts of the present case do not require discussion of the terms "use" or "used" in Principle 8. We are content to apply *Henderson v Commissioner of Inland Revenue* [2004] NZHRRT 27 at [85] where, citing *R v Brown* [1996] 1 All ER 545 (HL), the Tribunal held that information is "used" when the information is passed from one person to another (at least being someone outside the agency).

[90] In the context of Mr Mullane's case, "use" must be considered in two separate contexts. It is in those different contexts that the requirements of Principle 8 must be assessed. The uses were:

> **[90.1]** First, the assessment by the Police Vetting Service of the personal information held regarding Mr Mullane with a view to determining the nature of the response to be given to the NZTA vetting request and in providing that response. In this regard we consider the evidence establishes both sets of information were used.
>
> **[90.2]** Second, the provision to NZTA of the communication from the retired Whangarei psychologist in which that person expressed his concerns regarding Mr Mullane. This usage applied only to the first set of information, not the second which remained confidential and fell into the "vacuum" of non-disclosed but relevant information.

Mr Mullane's key points

[91] Although Mr Mullane came to the hearing with a large number of complaints regarding (inter alia) the Police, the NZTA and the Privacy Commissioner, nearly all

were irrelevant to the interpretation and application of Principle 8. The two key contentions which did relate to Principle 8 were:

> **[91.1]** In coming to a decision on a vetting request the Police cannot use information which has not been investigated and verified. In addition, only fact, not opinion can be used.
>
> **[91.2]** Before personal information is used by the Police in the context of a vetting request the individual to whom the personal information relates must be given an opportunity to first see the information and to comment on its proposed use.

[92] Bearing in mind that the sole issue before the Tribunal is whether Principle 8 has been breached, neither contention can be upheld.

Claim 1: Only information which has been investigated and proved to be true can be taken into account in the vetting process

[93] This contention is unsustainable. First, the provisions of the LTA make it clear that the NZTA can take into account a broad spectrum of information, not only information which has been proved to the criminal standard to be true or which has been explicitly accepted to be true by the applicant. Under the general safety criteria listed in s 30C of the Act the NZTA is required to consider any matter that is relevant in the interests of public safety or which will ensure that the public is protected from serious or organised criminal activity. Matters explicitly listed in this section as being relevant include both the person's criminal history (which would be allegations proved beyond reasonable doubt or allegations formally admitted) and "any history of serious behavioural problems" and "any complaints made" in relation to the individual. There is a catch-all "any other matter" that the NZTA considers appropriate in the public interest to take into account. None of these categories require verification to a criminal or civil standard, a point underlined by the inclusion in s 30C(2)(d) of "any complaints made". In addition, when ss 30D and 30E refer to "any offending" in respect of certain offences, the emphasis is on offending, not on such offending as has been translated into a conviction. Under s 30G the NZTA has a broad mandate to seek and receive any information that the NZTA thinks fit and to consider information obtained from any source.

[94] In these circumstances it would be illogical in the context of a vetting request by the NZTA were the Police to be restricted to allegations and information which have been investigated and verified to be correct. The public interest purpose of the vetting requirements in the LTA and in the other legislation referred to earlier in this decision (for example, the Vulnerable Children Act) indicate Parliament intended Police vets to go beyond a person's conviction history and beyond that which has been investigated and proved to be true.

[95] Second, there is the operational independence of the Police. The Police receive what counsel described as a vast amount of information about possible criminal activity. It is neither possible nor necessary for the Police to investigate all information received and the operational independence of the Police governs decisions whether or not to do so. Individuals, the subject of such information, may not be aware of the information or that it has been provided to the Police. In some circumstances it may not be appropriate for the Police to disclose such information (for example, where it has been provided in circumstances of confidence or where disclosure will prejudice the investigation and detection of offences or the right to a fair trial or endanger the safety of any individual). It might be that the information cannot be substantiated to any litigation standard. However, it is still necessary and appropriate for such information to be held for

intelligence purposes and used by the Police in carrying out their functions as set out in s 9 of the Policing Act such as keeping the peace, maintaining public safety, law enforcement, crime prevention, community support and reassurance and national security.

[96] Third, it is not a requirement of the Privacy Act that an agency only hold information that is factually correct; it is permissible for agencies to also collect and hold personal information in the form of subjective information or opinion. That subjective information or opinion does not have to be factually correct, but it must be accurately reported. See *Jones v Waitemata District Health Board* [2014] NZHRRT 52 at [40] and [41].

[97] Principle 8 did not require the Police to investigate whether Mr Mullane had in fact engaged in criminal behaviour. The Police only needed to be satisfied that the information recorded was relevant to the requested vetting request and was an accurate and complete record of the intelligence received. The accuracy with which second hand information has been recorded must not be confused with the accuracy of the content of the information. The distinction between the accurate recording of personal information (which includes opinion) and the truth of that information or opinion was drawn in *L v J* (1999) 5 HRNZ 616 at 622. There the fact that a relative had provided the information was accurate but whether or not the actual content of that information was accurate was a different issue.

[98] In the present case the information sets could be regarded as accurate because the Police received them directly from the persons concerned and what those persons said is supported by other information. Whether the Police Vetting Service reached the "correct" decision on that information is not a Principle 8 issue. The Privacy Act is not concerned with whether an opinion is justified. See *Case Note 225627* [2012] NZPrivCmr2 (June 2012).

Claim 2: A duty to hear

[99] Principle 8 requires that before personal information is used, steps be taken (which in the circumstances are reasonable) to ensure that the information is accurate. It does not impose an obligation to afford an opportunity to comment on potentially prejudicial information. Such obligation comes from the common law duty to act fairly or from the New Zealand Bill of Rights Act 1990, s 27, not from the information privacy principles. Expectations of fairness and considerations of natural justice should not be conflated with the requirements of Principle 8. See for example *NOP and TUV v Chief Executive, Ministry of Business, Innovation and Employment* [2014] NZHRRT 16 at [78] and [93]. The Tribunal does not have a judicial review jurisdiction and Principle 8 is not a backdoor to the review of administrative action.

[100] Sight must not be lost of the fact that fairness and a duty to disclose potentially prejudicial information are addressed by the LTA itself. In addition Mr Mullane gave his unqualified consent to the disclosure by the Police not only of "all charges and convictions", but also of "any other information they hold about me". The Police were tasked with providing information to the NZTA, not to Mr Mullane. Both the LTA and the MoU provided that it was the responsibility of the NZTA, not the Police, to determine the suitability of an applicant. That determination was to be based on the NZTA's own assessment of the information provided and the MoU further provided that the NZTA must discuss the outcome of any Police comments with the applicant. Superimposed on all these factors is ss 30H and 30W of the LTA which require the disclosure by the NZTA of information that is or may be prejudicial to the person and in addition notice must be given of any proposal to make an adverse decision. The person must also be told the

grounds of the proposed decision. In the circumstances we can see no basis for reading into Principle 8 a duty on the Police to "hear" before using personal information when processing a vetting request.

[101] As we stress in the following paragraphs, Principle 8 must be applied contextually and in the present case the foregoing factors are very much part of the context.

THE APPLICATION OF PRINCIPLE 8 TO THE FACTS

[102] The phrasing of Principle 8 underlines that in its application, context is everything. The key words or phrases (which are themselves of some imprecision) are:

- such steps (if any).
- as are in the circumstances.
- reasonable.
- having regard to the purpose for which the information is proposed to be used.

[103] It must also be remembered that Principle 8 is open-textured and does not impose the "certainty" of a bright line rule. A degree of flexibility as to how an agency complies with it must be allowed. The elements of "reasonableness" and "circumstances" also underline the need to avoid reading the Principle 8 requirements as an inflexible test to be applied in a literal and mechanical manner.

[104] In a case such as the present the key to the application of Principle 8 is the identification of the purpose for which the information was proposed to be used. Earlier in this decision two "usages" were identified:

> **[104.1]** First, the assessment by the Police Vetting Service of the personal information held regarding Mr Mullane with a view to determining the nature of the response to be given to the NZTA vetting request. Both sets of information were used.
>
> **[104.2]** Second, the provision to NZTA of the communication from the retired Whangarei psychologist in which that person expressed concerns regarding Mr Mullane. That is, this second usage applied only to the first set of information, not the second which remained confidential and fell into the "vacuum" of non-disclosed but relevant information.

Use 1 – deciding the response to the vetting request

[105] The first category of "use" had as its purpose putting NZTA on notice it should conduct its own inquiries in respect of Mr Mullane when assessing the "safety" and "fit and proper person" criteria in the LTA.

[106] The question posed by Principle 8 is, whether, having regard to that purpose (and having regard to the scheme of the LTA and the public safety issues at stake), the steps taken by the Police were reasonable to ensure that the information they used was accurate, up to date, complete, relevant and not misleading. The full context having earlier been detailed will not be repeated here.

[107] In the present case the vetting staff conscientiously examined both information sets to ascertain whether the information was relevant to the role of taxi driver. They correctly concluded that it was. The first information set was then assessed as being sufficiently substantiated to justify use in the vetting process because it had been provided by a professional in the field of psychology and was supported by relevant

correspondence on the file. As Mr Sadd observed, even to him, not a professional in the field, the correspondence appeared inappropriate at least. Mr Mullane might disagree and dispute the accuracy of the content of the information but there can be no doubt that the information was relevant, sufficiently substantiated and accurately recorded on the Police file.

[108] In relation to the second information set, having heard from Mr Sadd during the closed hearing we have been satisfied that again, the confidential information held by the Police about Mr Mullane was highly relevant to the role of a taxi driver. We also agree with his opinion that the two sets of information were sufficiently substantiated and indicated a pattern of concerning behaviour. We are satisfied that the NIA entry to which Mr Sadd referred is an accurate, relevant record of the information provided by the anonymous complainant.

[109] We find that in the circumstances the steps taken by the Police were reasonable to ensure that, having regard to the purpose for which the information was proposed to be used, the information was accurate, up to date and relevant.

Use 2 – providing information to the NZTA

[110] The second category of "use" was the release to the NZTA of the 19 September 2013 email from the retired Whangarei psychologist.

[111] There could hardly be dispute that the email was relevant to the NZTA inquiry or that it represented the up to date view of the psychologist. While Mr Mullane disputes the opinions expressed by the psychologist, those views were nevertheless accurately recorded.

[112] We accordingly conclude Principle 8 was properly complied with.

CONCLUSION

[113] It follows from these conclusions on the facts that we are of the clear view no breach of Principle 8 by the Police has been established.

[114] Consequently, Mr Mullane's claim that there has been an interference with his privacy in terms of s 66(1) fails at the first hurdle because no breach of an information privacy principle has been established. The claim is accordingly dismissed.

Name suppression

[115] Mr Mullane sought name suppression for the (then) young man befriended by him in early 2001. As we explained to Mr Mullane at the hearing, the application cannot be granted for the simple reason that the name of the individual has been in the public domain for a large number of years including via the television documentary mentioned by Mr Mullane in his evidence. On the facts, it is not possible for the application to satisfy the test in *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4.

[116] Mr Mullane did not seek name suppression for himself.

[117] We do, however, accept that there may be a case for prohibiting public disclosure of the correspondence passing between Mr Mullane and the young man and between Mr Mullane and the young man's then girlfriend. That issue is best dealt with if and when it ever arises. For that reason we make an order preventing search of the Tribunal file without leave of the Tribunal or of the Chairperson. Mr Mullane and the Police are to

be notified of any request to search the file and given an opportunity to be heard on that application.

Costs

[118] It is not known whether the Police will apply for costs. Should such application be made the following timetable is to apply:

> **[118.1]** The Police are to file their submissions within 14 days after the date of this decision. The submissions for Mr Mullane are to be filed within the 14 days which follow. The Police are to have a right of reply within 7 days after that.
>
> **[118.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.
>
> **[118.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Ms DL Hart**	**Ms ST Scott**
Chairperson	**Member**	**Member**