(1) ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS AND ANY OTHER IDENTIFYING PARTICULARS OF AGGRIEVED INDIVIDUALS OR THEIR CHILDREN

(2) ORDER PROHIBITING PUBLICATION OF NAMES, CRIMINAL RECORDS OR OTHER IDENTIFYING PARTICULARS OF CERTAIN THIRD PARTIES

(3) ORDER PROHIBITING PUBLICATION OF ALL ADDRESSES OR LOCATIONS REFERRED TO IN THE PROCEEDING

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2020] NZHRRT 32**

I TE TARAIPIUNARA MANA TANGATA

Reference No. HRRT 004/2018

UNDER **THE PRIVACY ACT 1993**

BETWEEN **DIRECTOR OF HUMAN RIGHTS PROCEEDINGS**

PLAINTIFF

AND **COMMISSIONER OF POLICE**

DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson

REPRESENTATION:
Ms E Tait for plaintiff
Mr RS May and Ms NI Burt for defendant

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **5 August 2020**

(REDACTED) DECISION OF CHAIRPERSON ON APPLICATION BY PLAINTIFF FOR FURTHER AND BETTER DISCOVERY[1]

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[1] [This decision is to be cited as: *Director of Human Rights Proceedings v Commissioner of Police (Discovery)* [2020] NZHRRT 32]

[1] These proceedings will be heard at Wellington on 5 October 2020. Three weeks have been set aside. On 8 June 2020 the plaintiff filed his fourth statement of claim and simultaneously applied for further and better discovery. That application fails for two broad reasons. First, there are no grounds for believing the Commissioner of Police (Commissioner) has not discovered documents which should have been discovered and second, an order for further discovery would be disproportionate.

BACKGROUND – THE FACTUAL CONTEXT TO THE APPLICATION

[2] In March 2010, the persons aggrieved notified suspicious activity to the Police. As a consequence an individual was arrested and charged with a criminal offence. After the inadvertent disclosure by the Police to the offender that the aggrieved persons were the informant, an associate of the offender set alight their home, destroying the entire house and contents. The Director of Human Rights Proceedings (DoHRP) has now brought proceedings alleging the Police breached IPP 5 (security of personal information) and IPP 11 (limits on disclosure of personal information).

BACKGROUND – THE PROCEDURAL CONTEXT

[3] Informal discovery was directed by *Minute* dated 5 July 2019 following a teleconference held on that date.

[4] The subsequent complexities involved in setting this case down for hearing are fully described in my *Minutes* dated 5 June 2020 and 19 June 2020 respectively. Largely because the DoHRP filed an out of time statement by an expert witness the hearing originally scheduled for 6 July 2020 had to be vacated. Faced with the need to instruct their own expert witness, it was only on 3 July 2020 that the Police were able to commit to the new hearing date of 5 October 2020.

The application

[5] As mentioned a fourth statement of claim was filed by the DoHRP on 8 June 2020 together with the present application for further and better discovery which is supported by submissions and an affidavit sworn on 3 February 2020 by a legal executive in his employ, annexing correspondence between the DoHRP and the lawyers representing the Commissioner. That correspondence spans the period from 5 August 2019 to 29 January 2020.

[6] The purpose of the application is to gain access to Police internal emails.

[7] The Commissioner is opposed to the application. On 22 July 2020 a particularised notice of opposition was filed together with detailed submissions and an affidavit sworn by Mr Steven Whooley, an engineer within the Technical Support team with the New Zealand Police. In this role he conducted a search of the Police internal email systems for the purpose of the discovery application.

[8] The DoHRP has, in turn, filed submissions in reply.

Some issues resolved

[9] On 10 July 2020 the Tribunal was advised the parties had entered into discussion regarding the disputed discovery issues. However, it is evident from the subsequent submissions filed by the DoHRP on 15 July 2020 that while some issues have been resolved, others have not.

[10] Being unclear what issues remain for determination, by *Minute* dated 16 July 2020 I directed that the Commissioner provide the following information:

> **[5.1]** Identification of those documents (or class of documents) in relation to which discovery is still opposed. Is it only the 6,934 "results" referred to by Mr Whooley in his affidavit sworn on 3 July 2020?
>
> **[5.2]** The grounds of opposition now relied on.
>
> **[5.3]** The Commissioner's response to the "inconsistent search terms" point made by Ms Tait in her memorandum at paras 11, 17 and 18.

[11] The requested information was provided by counsel for the Commissioner in their memorandum dated 22 July 2020.

THE DISCOVERY ISSUES

The issues raised by the plaintiff's application

[12] The alleged breaches of IPP 5 and IPP 11 occurred in March 2010. However, the first statement of claim was not filed in the Tribunal until 13 February 2018, approximately eight years later.

[13] The Commissioner has pleaded an affirmative defence that the claim is time-barred by analogy with the Limitation Act 1950, s 4(1)(d).

[14] In his fourth statement of claim (dated 8 June 2020) the DoHRP asserts, for the first time, that the Police, including an individual named Doug Brew "discouraged [the aggrieved individuals] from complaining about the oral and written disclosures by advising them that it may prejudice the ongoing criminal processes involving the offenders".

[15] Broadly speaking, the application for further and better discovery is focused on obtaining internal Police emails relevant to the following allegations:

> **[15.1]** That the Police directly contributed to the delay by the DoHRP in bringing these proceedings.
>
> **[15.2]** That the Police told the persons aggrieved their details would not be disclosed to the offender.
>
> **[15.3]** The effect of the Privacy Act 1993 (PA), s 85(4) is that, should liability be established, the conduct of the Police will have to be taken into account by the Tribunal in deciding what, if any, remedy is to be granted:
>
> > (4) It shall not be a defence to proceedings under section 82 or section 83 that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.
>
> Therefore virtually all internal emails about Police interaction with the aggrieved individuals since March 2010 must be discovered as there might be something there the DoHRP could use in evidence.

[16] The Commissioner denies the first allegation, admits the second and challenges the third.

[17] The Director's primary complaint is that the Police have not disclosed internal Police emails going to each of the three identified allegations.

The Commissioner's response

[18] By notice of opposition dated 3 July 2020 the Commissioner has responded that:

> **[18.1]** The Commissioner has already complied with his obligations of informal discovery as required by the Tribunal.
>
> **[18.2]** The emails required by the application for further and better discovery have little, if any relevance, to the matters at issue before the Tribunal. Effectively the DoHRP is seeking documents that go to the state of mind of the Police, without having established any factual foundation for any relevant culpable intent.
>
> **[18.3]** The discovery already provided by the Commissioner addresses the issue whether disclosure of the address of the aggrieved individuals was made to the offenders as part of the Police criminal disclosure obligations. The Commissioner does not contest that such a disclosure was made.
>
> **[18.4]** Regardless, the Commissioner has undertaken the searches sought by the application. The Commissioner is willing to provide the searches outlined in the affidavit of Steven Whooley filed with the notice of opposition.
>
> **[18.5]** As the Commissioner has accepted that the disclosure (to the offender) was made, it would not be reasonable to require the Commissioner to search the remaining large number of emails as required by the application for further and better discovery. These emails amount to almost 7,000 results which all require a manual search for relevance and security issues.
>
> **[18.6]** Nor would it be reasonable to require the Commissioner to undertake the required remaining extensive search of the Police email systems.
>
> **[18.7]** Even if the internal correspondence of the Police did potentially include references to the amount of damages available and the availability of a limitation defence, the further discovery sought would not be proportional. While previously counsel had understood that in order to obtain the emails sought by the application, the Police would have to compile separate spreadsheets for all of the basic data relating to each separate email account for the requested time period, it is now understood that searches can be undertaken relatively easily, but the time-consuming aspect is the manual review of the emails. While the Commissioner maintains that the emails are not helpful over and above the discovery already provided, the Police are willing to undertake a review of the around 800 email results returned as outlined in the affidavit of Steven Whooley at paras 19 and 20. However the Commissioner considers that it would not be proportional for the Police to be required to complete a review of the almost 7,000 results returned on the search of the name of the aggrieved individuals.
>
> **[18.8]** The work involved in reviewing a very large pool of emails is therefore significant. Further, due to the security clearance issues involved in reviewing the emails of a District Commander and Assistant Commissioner, this task can only be completed by a very limited group of individuals.

[19] The evidence of Mr Whooley establishes that while some of the emails in the categories sought by the DoHRP can be retrieved from the Police system, the search has revealed that in relation to the Inboxes of Nigel Allen, Susan O'Neill and Susan Schwalger there are 6,934 "results" when the search term used is the family name of the persons aggrieved. This would suggest it is likely a large number of irrelevant items have been

returned, making the search not reliable. Each email would have to be manually processed, that is read individually, to determine whether there is a potential relevance to the present case. This would be a resource intensive undertaking owing to the seniority of the three employees. One is currently the Acting Assistant Commissioner and one is District Commander for Central. Because of their seniority only certain people with the required security clearance will be able to review the emails.

[20] In their most recent memorandum dated 22 July 2020 counsel for the Commissioner advised the Police maintain their opposition to the 6,934 emails being discovered.

[21] As to the balance of the categories in dispute, the 22 July 2020 memorandum is to the effect that where practicable, the Police will endeavour to locate and scrutinise the emails which are potentially relevant to the other categories sought by the DoHRP but no undertaking can be given that further emails will in fact be discovered. There is also the fact that part of the system used to search the system has broken and that the index has had to be rebuilt. It is not clear exactly when it will be possible to conduct the searches. However, counsel understand that the searches have been set up and are ready to be run as soon as the system is up.

[22] The submissions conclude that:

> **[22.1]** With regard to the remaining searches requested, the Commissioner cannot advise whether he opposes or consents to completing the further discovery for the further search terms sought as it is not yet clear exactly how many results will be returned.
>
> **[22.2]** Counsel is continuing to check on the developments in addressing the issues with the system and can provide an update to the Tribunal as soon as the searches are able to be completed.

RELEVANT DISCOVERY PRINCIPLES

[23] As a ruling on the discovery application must be given with some expedition, the reference to principle will be brief.

[24] The basic structure of discovery before the Tribunal is (subject to all necessary modifications) that found in the discovery rules set out in High Court Rules, Part 8, rr 8.1 to 8.33. See *O'Hagan v New Zealand Police (Discovery)* [2017] NZHRRT 51 at [11] and *Matsuoka v E Tū Incorporated (Preservation Orders)* [2018] NZHRRT 49 at [23] and [24]. Only the provisions relating to standard discovery need be set out here:

> **8.7 Standard discovery**
>
> Standard discovery requires each party to disclose the documents that are or have been in that party's control and that are—
> (a) documents on which the party relies; or
> (b) documents that adversely affect that party's own case; or
> (c) documents that adversely affect another party's case; or
> (d) documents that support another party's case.

[25] It is a general principle that the discovery process under the High Court Rules starts with a process of self-assessment by litigants and that assessment will not be disturbed without reason being shown.

[26] On an application for further and better discovery, the relevant rule is r 8.19:

> **8.19 Order for particular discovery against party after proceeding commenced**
>
> If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—
> (a) to file an affidavit stating—
> (i) whether the documents are or have been in the party's control; and
> (ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control and who now has control of them; and
> (b) to serve the affidavit on the other party or parties; and
> (c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the other party or parties.

[27] The DoHRP has an onus to show there are "grounds for believing" that the Commissioner has not discovered documents that should have been discovered. It is not sufficient for a party applying under r 8.19 to nominate possible documents and then require the party resisting discovery to show that those documents are not relevant or do not exist. See *RHH Ltd v Anderson* [2018] NZHC 2032 at [13]:

> [13] In an application under r 8.19 there is an onus on the party seeking further discovery to show that there are grounds for believing that a party has not discovered one or more documents that should have been discovered. The matter does not have to be proved on the balance of probabilities. It is necessary to show only that there are grounds for belief. Yet there is still an onus on the party seeking discovery to show that there may be documents in existence that are relevant but have not been disclosed so far. It is not sufficient for a party applying under r 8.19 to nominate possible documents and then require the party resisting discovery to show that those documents are not relevant or do not exist. To allow that would reverse the onus set out in r 8.19 and can lead to speculative applications.

[28] In cases under r 8.19 it is common to follow the four-stage approach suggested by Asher J in *Assa Abloy NZ Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760 at [14] (*Assa Abloy*):

> **[28.1]** Are the documents sought relevant? And if so, how important will they be?
>
> **[28.2]** Are there grounds for belief that the documents sought exist? This will often be a matter of inference. How strong is that evidence?
>
> **[28.3]** Is discovery proportionate, assessing proportionality in accordance with part 1 of the discovery checklist in the High Court Rules?
>
> **[28.4]** Weighing and balancing these matters, in the court's discretion applying r 8.19, is an order appropriate?

[29] Before these factors are addressed it is to be noted, as held in *RHH Ltd v Anderson* at [12], that:

> **[29.1]** Standard discovery does not require a party to disclose documents that are no more than background.
>
> **[29.2]** If a matter is no longer in issue between the parties, for example, if a matter is common ground, there is no requirement for documents on that matter to be disclosed.

ANALYSIS

[30] The starting presumption must be that proper discovery has been given. The Commissioner is represented by experienced, responsible counsel. Their memoranda make it clear the Commissioner's discovery obligations have been approached with proper regard to his responsibilities. There has been a willingness to carry out searches which go beyond what the Commissioner says are his proper obligations.

[31] The onus is on the DoHRP to establish that there are proper grounds for believing there remain undisclosed but relevant documents. For the reasons which follow I find that onus has not been discharged. There are no grounds for believing the Commissioner has not discovered documents that should have been discovered. The three limbs of the application are now separately addressed.

The allegation the Police contributed to the delay in filing the proceedings

[32] As mentioned, in his fourth statement of claim (dated 8 June 2020) the DoHRP now asserts that the Police and Mr Brew discouraged the persons aggrieved from complaining about the oral and written disclosures. However, the DoHRP has not established there are "grounds for believing" the Commissioner has not discovered relevant documents. Instead there is simply a submission that if the Commissioner wishes to avail himself of a limitation defence he "should be prepared to discover material relevant to whether [he] comes to the proceeding 'with clean hands'". Then it is further submitted that evidence concerning potential Police contribution to the delay is most likely to be ascertained through a thorough review of email communications concerning how the Police planned to respond (or were responding) to the possibility of the aggrieved individuals making a complaint against the Police, and Police communications about limitation periods and potential compensation for the family.

[33] These bare assertions fall well short of providing "grounds for believing" the Police have not discovered relevant emails. The application is an expression of hope that if further discovery is ordered, something will turn up. But as noted in *RHH Ltd v Anderson* at [13] it is not sufficient for a party applying under r 8.19 to nominate possible documents and then require the party resisting discovery to show that those documents are not relevant or do not exist.

The allegation that the Police told the persons aggrieved their details would not be disclosed to the offender

[34] The submission by the Commissioner is that:

> **[34.1]** The discovery already provided addresses the issue whether a disclosure of the address of the persons aggrieved was made to the offender as part of the Police criminal disclosure obligations. The Commissioner does not contest that such disclosure was made.
>
> **[34.2]** Regardless, the Commissioner has undertaken the searches sought by the DoHRP.
>
> **[34.3]** As it is accepted the disclosure was made it would not be reasonable to require the Commissioner to search the remaining large number of emails as would be necessitated by the application. These emails amount to almost 7,000 results.

All will require a manual search for relevance and in addition security issues limit the number of persons who can carry out such search.

[35] The principle is that if a matter is no longer in issue between the parties, there is no requirement for documents on that matter to be disclosed. See *RHH Ltd v Anderson* at [12]. The question of proportionality is also relevant.

[36] The DoHRP contests the proposition that the facts pleaded in para 24 of the fourth statement of claim are no longer in issue between the parties. In particular he characterises the Commissioner's pleaded admissions as "limited".

[37] However, the admissions are clear and unambiguous. The basis on which it is said the admissions are limited appears to be that the exact terms of the Director's allegations have not been admitted. But that does not satisfy the onus of showing there are reasonable grounds to believe the Commissioner has not discovered internal emails which should have been discovered. It has not been explained why a conclusion can be drawn that because there is no complete congruence between the claim and the admission, there is reason to believe there are internal emails which have not yet been discovered.

[38] In any event as the matter is in substance no longer in issue it is even more important that the DoHRP discharges the onus set out in r 8.19. That onus is not discharged by assertion and speculation.

[39] The DoHRP suggests that in the event of contradictory evidence from witnesses as to the particulars of what was promised, email evidence "could potentially be determinative". As to this:

> **[39.1]** The submission is couched in hypothetical terms "[i]n the event of contradictory evidence … email evidence could potentially be determinative". This falls well short of the grounds for believing onus in r 8.19.
>
> **[39.2]** Generally discovery of documents will not be ordered if the only purpose is to impeach the credit of those who might give evidence for the other side. See *Robert Jones Holdings Ltd v McCullagh* at [55] as well as *Minister of Education v H Construction North Island Ltd* [2018] NZHC 20 at [6] and AC Beck and others *McGechan on Procedure* (loose leaf ed, Thomson Reuters) at HR8.7.01.
>
> **[39.3]** In any event, the fact that some 7,000 emails must be manually processed raises issues of proportionality. Applying the *Assa Abloy* steps:
>
> > **[39.3.1]** Substantively, the Commissioner admits the disclosures alleged by the DoHRP and if the emails exist, they will be of marginal relevance.
> >
> > **[39.3.2]** The DoHRP has not discharged the onus of showing that there are grounds for belief the documents sought exist. Everything is left to inference but that inference is weak.
> >
> > **[39.3.3]** The evidence of Mr Whooley establishes that there is a substantial volume (almost 7,000) of emails of potential relevance. Each will have to be reviewed manually and only limited categories of persons can perform this task given the security clearances required. The task is both large and onerous while the prospect of discoverable emails being found is marginal.

> **[39.3.4]** Weighing and balancing these matters I decline to exercise my discretion in granting the application. There is no obligation on a party to seek out and discover every theoretically relevant document. See *NSK Ltd v General Equipment Co Ltd* [2015] NZHC 1979 at [24].

[40] In the present case the Commissioner has gone beyond what is required of him by undertaking further searches as described in Mr Whooley's affidavit and in the memoranda filed by counsel for the Commissioner. These additional efforts have faced substantial difficulty. Part of the search system has broken and an index is having to be rebuilt with the consequence the Commissioner cannot advise whether he opposes or consents to completing the further discovery with the further search terms sought by the DoHRP. In my opinion the Commissioner has complied not only with the letter of the law but also with its spirit.

At the remedy stage the conduct of the Police must be taken into account

[41] The DoHRP correctly submits that should liability be established, the conduct of the Police will have to be taken into account by the Tribunal in deciding what, if any, remedy is to be granted. But from this he infers that virtually all internal emails about Police interaction with the aggrieved individuals since March 2010 must be discovered as there might be something there the DoHRP could use in evidence.

[42] This inference is not correct. The legal position is that a defendant's conduct is relevant under PA, s 85(4) only to the degree it is relevant to remedies. In addition, the conduct is not taken into account to punish or censure the defendant. Damages are awarded to compensate the plaintiff for humiliation, loss of dignity and injury to feelings, not to punish the defendant. As stated in *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66 at [170.3] to [177] the conduct of the defendant may, however, exacerbate (or, as the case may be, mitigate) the humiliation, loss of dignity or injury to feelings and therefore be a relevant factor in the assessment of the quantum of damages to be awarded for the humiliation, loss of dignity or injury to feelings.

[43] If a plaintiff wishes to put specific conduct in issue, he or she is free to do so in the statement of claim. This will put the defendant on proper notice of the range of potentially discoverable documents. But in the absence of a specific pleading, reliance without more on PA, s 85(4) will not provide a proper foundation for a claim that every document a defendant has in his or her possession about the alleged interference with privacy is therefore discoverable. Once again it is necessary to point out that as held in *RHH Ltd v Anderson* at [13], it is not sufficient for a party applying under r 8.19 to nominate possible documents and then require the party resisting discovery to show that those documents are not relevant or do not exist. The DoHRP has not shown that there may be documents in existence that are relevant to s 85(4) but have not been disclosed so far. He has not discharged the onus set out in r 8.19. The application is speculative.

CONCLUSION

[44] Balancing these factors it is my conclusion that the discovery sought by the Director of Human Rights Proceedings should not be ordered.

[45] The application for further and better discovery is dismissed.

Costs

[46] Costs are reserved.

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Mr RPG Haines ONZM QC
Chairperson