(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND IDENTIFYING PARTICULARS OF AGGRIEVED PERSON OR HIS STEP-DAUGHTER

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2020] NZHRRT 45**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 091/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**DIRECTOR OF HUMAN RIGHTS PROCEEDINGS**
	PLAINTIFF
AND	**ATTORNEY-GENERAL**
	DEFENDANT

AT AUCKLAND

BEFORE:
Ms GJ Goodwin, Deputy Chairperson
Ms DL Hart, Member
Ms ST Scott QSM, Member

REPRESENTATION:
Mr M Timmins, Director of Human Rights Proceedings and Mr J Suyker for plaintiff
Ms D Harris for defendant

DATE OF HEARING: **2-6 March 2020**

DATE OF DECISION: **6 November 2020**

(REDACTED) DECISION OF TRIBUNAL[1]

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[1] Mr Smith, being the aggrieved person in this case, says he lost his job because the Police included a damaging statement about him in the Police vetting report (Police Report) Mr Smith was required to obtain under his employment terms and conditions.

[1] [This decision is to be cited as *Director of Human Rights Proceedings v Attorney-General* [2020] NZHRRT 45.]

[2] The damaging statement was that Mr Smith should not have unsupervised access to children, young people or more vulnerable members of society. Mr Smith says that the Police failed to properly check his personal information, specifically, whether name suppression applied to him, before including this statement in his Police Report.

[3] Mr Smith claims that, but for this damaging statement, he would not have lost his job. He seeks damages of $50,000 for significant hurt, humiliation and embarrassment. He also seeks recovery of loss of wages and loss of use of a vehicle. Finally, he seeks an order requiring management staff of the Police vetting service to attend an on-line privacy workshop run by the Privacy Commissioner.

BACKGROUND

Loss of employment

[4] By way of background, in September 2012 Mr Smith was employed as an operations manager. His employer contracted with its clients to provide management, operations and support services. The New Zealand Defence Force (NZDF) was a client of Mr Smith's employer. Mr Smith was specifically employed to provide management and support services to NZDF.

[5] Pursuant to the terms of the client engagement between NZDF and Mr Smith's employer, each employee working at NZDF bases was required to have a security clearance granted by NZDF. Mr Smith's continued employment was, accordingly, conditional on him obtaining a security clearance. Should his security clearance not be granted or withdrawn, his employment was to be terminated immediately.

[6] A preliminary step in the granting of a security clearance (which NZDF refers to as a Defence Site Clearance) was for NZDF to request a Police Report on the employee. On receipt of the Police Report NZDF would determine whether or not that employee was to be granted a Defence Site Clearance.

[7] On 28 September 2012 Mr Smith signed a consent form, allowing NZDF to request the Police Report. Pursuant to the consent form, Mr Smith authorised the Police to disclose any information that might be held about him to NZDF. The authorisation was not limited to just criminal convictions. NZDF proceeded to request the Police to provide a Police Report on Mr Smith.

[8] Following receipt of the Police Report on Mr Smith, on 14 November 2012 NZDF notified Mr Smith's employer that Mr Smith's Defence Site Clearance had been declined. The employer advised Mr Smith of this and also advised him that he could seek clarification from NZDF as to the reasons for the decision to decline.

[9] On 4 January 2013, Mr Smith did ask NZDF why it had declined his Defence Site Clearance. By letter dated 9 January 2012 (which must have been 2013) NZDF replied:

> The decision was based on caveat information, obtained from the NZ Police (contained in your Police Criminal and Traffic History record) that you should not have unsupervised access to children, young people or more vulnerable members of society.
>
> If you believe this caveat does not apply to you, or that you believe [it] has been incorrectly applied to your file, you should contact the NZ Police. If, subsequently, the NZ Police agrees to remove the caveat from your file, you may contact me and I will direct a reassessment of your DSC.

[10] This "caveat" information is referred to by the Police in a shorthand description as a "red stamp". As referred to in [9] above, in 2013 the red stamp was accompanied by the

damning phrase “Police recommend this person does not have unsupervised access to children, young people or more vulnerable members of society”. This was the first time that Mr Smith became aware of the red stamp.

[11] Mr Smith engaged a lawyer to contact the Police on his behalf, to attempt to have the red stamp removed. Despite further correspondence between Mr Smith’s lawyer and the Police, the position of the Police remained unchanged. The Police would not remove the red stamp. By letter dated 29 January 2013 from the Police to Mr Smith’s then lawyer, the Police advised:

> Noting the Court had imposed name suppression on these charges the vetting panel decided to advise NZDF that Police recommended that [the Aggrieved Individual] do not have unsupervised access Had name suppression not been in place the list of charges and the outcomes would have been provided to NZDF.

[12] While the red stamp remained NZDF would not grant Mr Smith a Defence Site Clearance. Accordingly, Mr Smith’s employment was terminated.

[13] Against this background we briefly set out certain historical allegations made against Mr Smith. These are relevant as they go to the decision of the Police to attach the red stamp to Mr Smith’s Police Report.

Historical allegations against Mr Smith

[14] In 2005 Mr Smith was charged with sexually assaulting his stepdaughter, Eve. At the time of the alleged offences Eve was 14 years old. The background leading up to these charges is as follows.

[15] Mr Smith met his current partner, Ms Jones in 1996. They became a couple and still live together. Eve is Ms Jones’ daughter by her previous relationship. Eve was a child when Mr Smith and Ms Jones moved in together.

[16] When Eve was a young teenager she started seeing a young man. Mr Smith and Ms Jones did not approve of this relationship. They imposed restrictions on Eve’s social interaction with the young man.

[17] In April 2004 Eve alleged to the young man that Mr Smith had sexually assaulted her. She repeated this allegation in November 2004 and in the same month she made a complaint to the Police. Several months later Eve again complained to the Police, this time alleging that Mr Smith had raped her.

[18] Following a Police investigation, in 2005 Mr Smith was charged with indecent assault and sexual violation against Eve.

[19] When Mr Smith went to trial he faced seven charges in all. Ms Jones gave evidence on Mr Smith’s behalf. Mr Smith was found not guilty of all but one of the charges. On that charge the jury was unable to reach a verdict and Mr Smith was discharged.

[20] Mr Smith and Ms Jones lost contact with Eve for some years. They have now reconnected. Mr Smith’s and Ms Jones’ evidence is that they are now a close family, with Mr Smith and Ms Jones being involved grandparents of Eve’s child.

Name suppression in Mr Smith's criminal case

[21] When Mr Smith first appeared before the court in relation to the allegations by Eve he was granted interim name suppression, with Police consent. Following a preliminary hearing before Judge Ryan, the Police withdrew their consent to Mr Smith's name suppression and the Judge refused to extend it. Judge Ryan did, however, make an interim order for suppression, providing an appeal was lodged within three days. That interim order was to continue until the appeal was determined.

[22] An appeal was lodged, and the matter was decided by the High Court in May 2006. Justice Harrison allowed the interim name suppression to continue. In allowing Mr Smith's appeal Harrison J relied on s 139 of the Criminal Justice Act 1985. Section 139 prohibits publishing any report or account with the name of any person upon or with whom certain sexual crimes are alleged to have been committed or any report or account with any name or particulars likely to lead to the identification of that person.

[23] In applying s 139 and allowing the appeal, Harrison J said that he was in no doubt that publication of Mr Smith's name would inevitably lead to Eve's identification. The Judge also noted that Mr Smith was entitled to the presumption of innocence. Harrison J said that Mr Smith's reputation would never be restored, even if he was acquitted at trial, if his name were published.

[24] The concluding paragraph of Harrison J's decision was that the name suppression had an end point; it continued only to the commencement of the trial. However, this must be read in context, as Harrison J assumed name suppression would be dealt with by the judge presiding over Mr Smith's case, as follows:

> [12] …I order that suppression of publication of X's name continue until the date of commencement of his trial in the District Court at [ ]. I assume that the presiding Judge will continue the order until the conclusion of the trial. At that stage, depending on the result, he or she will be in a position to make an informed decision on whether to make the order permanent or order publication.

[25] It is not clear whether Mr Smith's continuing name suppression was dealt with at his trial. Although it would be usual for this to be dealt with, the court records do not show that name suppression was revisited. We discuss this subsequently.

THE CASE BEFORE THE TRIBUNAL

[26] The Director says that the Police breached information privacy principle (IPP) 8 by failing to take reasonable steps to check that the name suppression information they had in relation to Mr Smith was accurate, up to date, complete, relevant and not misleading, before using it.

The Director's case

[27] In summary, the Director's case is:

> **[27.1]** The Police failed to take reasonable steps, as required by IPP 8, to check whether name suppression applied to Mr Smith. They knew that the court records showed that interim name suppression still applied, and the Police should have checked with the court as to whether name suppression was actually still in place for Mr Smith.

[27.2] If the Police had checked, they would have found that name suppression had lapsed.

[27.3] As name suppression had lapsed, the Police would have disclosed the non-conviction information they had about Mr Smith, instead of the red stamp statement.

[27.4] If the non-conviction information had been disclosed to NZDF Mr Smith would have been granted a Defence Site Clearance and so would have retained his employment.

The Attorney-General's case

[28] In summary, the Attorney-General's case is:

[28.1] The failure of the Police to check with the court as to Mr Smith's name suppression did not amount to a failure to take reasonable steps to check information under IPP 8. It was reasonable for the Police to rely on the court records relating to Mr Smith's name suppression.

[28.2] Had the Police specifically checked on whether court ordered name suppression applied to Mr Smith the position would not have been clear. The red stamp would not have been removed and the non-conviction information would not have been released by the Police, as there were other reasons, particularly s 139 of the Criminal Justice Act, preventing such release.

[28.3] It was only if the red stamp had been removed that Mr Smith could have been granted a Defence Site Clearance, but this would not have occurred given the other factors preventing the removal of the red stamp.

[28.4] There is no causal link between the actions of the Police in relation to name suppression and Mr Smith's loss of employment.

MATTERS TO BE DETERMINED BY THE TRIBUNAL

[29] The Tribunal must determine whether Mr Smith's privacy has been interfered with. The test for an interference with privacy under the Privacy Act 1993 is two-limbed. In this case it requires both a finding that there has been a breach of IPP 8 and also a finding that Mr Smith has, as a consequence of that breach, suffered one of the forms of harm in s 66(1)(b) of the Privacy Act. The onus is on the Director to prove both of those limbs.

[30] Only if an interference with Mr Smith's privacy is established, will the Tribunal have jurisdiction to consider whether any remedy should be granted.

[31] Accordingly, the Tribunal must first determine whether the Police failed to take reasonable steps to check Mr Smith's name suppression, in breach of IPP 8. The Director must prove that before using the name suppression information to prepare the Police Report, the Police failed to take such steps as were, in the circumstances, reasonable to ensure that the name suppression information was accurate, up to date, complete, relevant and not misleading, before using that information.

[32] If there has been a breach of IPP 8 (as required for the first limb of the definition of an interference with privacy under s 66(1)(a)(i) of the Privacy Act), the Tribunal must then consider whether the second limb required for an interference with privacy is made out;

namely that, as a consequence of the IPP 8 breach, Mr Smith suffered one of the forms of harm in s 66(1)(b) of the Privacy Act.

RELEVANT STATUTORY PROVISIONS

[33] The relevant statutory provisions are IPP 8 and s 66 of the Privacy Act. IPP 8 provides as follows:

> **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.

[34] Section 66 defines what is required for an interference with privacy. Only ss (1) is relevant on these facts:

> **66 Interference with privacy**
>
> (1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—
>
> (a) in relation to that individual,—
> (i) the action breaches an information privacy principle; or
> (ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or
> (iia) the action breaches an information privacy principle or a code of practice as modified by an Order in Council made under section 96J; or
> (iib) the provisions of an information sharing agreement approved by an Order in Council made under section 96J have not been complied with; or
> (iii) the provisions of Part 10 (which relates to information matching) have not been complied with; and
>
> (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—
> (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or
> (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
> (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

DID THE POLICE TAKE REASONABLE STEPS AS REQUIRED BY IPP 8

[35] We first proceed to consider whether the Police failed to take reasonable steps to check Mr Smith's name suppression information, in breach of IPP 8.

[36] There are a number of matters which must be considered in relation to any allegation of a breach of IPP 8. There is a helpful discussion of these matters and as to how IPP 8 should be approached in *Mullane v The Attorney-General* [2017] HRRT 40 at [102] and [103]:

> [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.

[37] It is settled that the quality of the decision is not part of an IPP 8 determination. IPP 8 looks only to whether, in the relevant circumstances, reasonable steps were taken to check the information was accurate, up to date, complete, relevant and not misleading. IPP 8 does not look at whether a correct decision was made. IPP 8 is not a judicial review of Police administrative actions. The case of *Mullane v Attorney-General* [2017] HRRT 40 at [98] and [99] is on point.

[38] In determining whether the steps taken by Police were reasonable, the Tribunal must have regard to the relevant circumstances. The relevant circumstances are important, as they will impact on the determination of what are the "reasonable" steps required of the Police to check information.

[39] In this case those circumstances include:

[39.1] The court records in relation to Mr Smith's name suppression.

[39.2] Section 139 of the Criminal Justice Act.

Court records in relation to Mr Smith's name suppression

[40] The court records are important as they show the information that was available to the Police in relation to name suppression. The Tribunal had the benefit of the written evidence of Mr Neems, a Deputy Registrar of the District Court. Mr Neems was a witness for the Director. His evidence was taken as read (by agreement with the Attorney-General). In his evidence Mr Neems set out how the District Court records are kept and maintained.

[41] He explained the CMS system, being the electronic information system used by the court. He said that:

[41.1] The permanent court records are kept in both electronic and hard copy form. The presiding judicial officer will make a handwritten *Minute* of the relevant event on the criminal record sheet for the charge in question. The responsible registrar will then enter the details of the directions and orders made by the presiding judicial officer into CMS.

[41.2] While the maintenance of CMS is, as a matter of practice, carried out by the registrar of the court, the registrar is acting for the court and under the supervision of the judges of the court. Changes will only be made if authorised by the relevant judicial officer.

[41.3] The Police have access to the CMS information, as part of their Police vetting checks

[42] In connection with Mr Smith's name suppression in the court records, Mr Neems' evidence was that:

[42.1] At 14 February 2020, being the date of his signed brief of evidence, CMS still showed an order for suppression of Mr Smith's name was active. This was indicated by a striped yellow/black flag. The purpose of this flag was to alert

any user of CMS that a suppression order was in force. To determine whether it is an interim or a final order, the CMS user must refer to the "latest direction" tab in the system.

[42.2] The reason why the yellow/black flag still showed on Mr Smith's file was because it was not possible for the registry to enter an end date for the order made by Harrison J (presumably because the order referred to the start of the trial rather than a particular date) and apparently no further direction or order was made by the District Court in relation to name suppression either during the trial or subsequently.

[43] Whether or not court ordered name suppression in fact existed for Mr Smith is not the focus of IPP 8. The Tribunal must confine its consideration as to whether reasonable steps were taken to determine the accuracy of the information about name suppression that was available to the Police. That information clearly showed name suppression to be a live issue.

Section 139 of the Criminal Justice Act

[44] Section 139 is important as it goes to whether the Police were, in any event, prevented from disclosing Mr Smith's non-conviction information. Section 139 provides for name suppression which applies independently of court ordered name suppression. It prohibits the publication of any report or account relating to any proceedings in respect of certain sexual offending against a person under the age of 16. For convenience, we set out below the relevant portions of that section:

> **139 Prohibition against publication of names in specified sexual cases**
>
> (1AA) The purpose of this section is to protect persons upon or with whom an offence referred to in subsection (1) or subsection (2) has been, or is alleged to have been, committed.
>
> (1) No person shall publish, in any report or account relating to any proceedings commenced in any court in respect of an offence against any of sections 128 to 142A of the Crimes Act 1961, or in respect of an offence against section 144A of that Act, the name of any person upon or with whom the offence has been or is alleged to have been committed, or any name or particulars likely to lead to the identification of that person, unless—
>
> (a) That person is of or over the age of 16 years; and
>
> (b) The court, by order, permits such publication.

[45] Section 139 applies automatically. It has the following limbs:

[45.1] There must be a report or account which relates to proceedings.

[45.2] There must be an action which constitutes publication of that report or account.

[45.3] The publication must be likely to lead to the identity of the person who has the benefit of the name suppression.

[46] Having considered the parties' submissions on s 139, we make the following observations.

[47] As to what constitutes a "report or account relating to any proceedings", in *Police v News Media Auckland Limited* [1998] DCR 134 a reference to the convictions of a man fostering a child, six months after conviction, was found to be a report of proceedings. In *Karam v Solicitor-General* HC (Auckland) AP 50/98, 20 August 1998, at [8] Gendall J

stated that "proceedings" includes a much wider ambit and involves preliminary hearings, depositions and the investigation itself. In *Slater v Police* [2011] DCR 6, at [132] the District Court (upheld in the High Court at [67] to [71]) defined "report or account" as "any narrative or information relating to proceedings in respect of an offence". We have no doubt Mr Smith's non-conviction information was a report or account relating to proceedings.

[48] In relation to the publication limb, in 2012 there was a lack of clarity as to whether disclosure to an employer would count as publication. The issue had been considered by the Tribunal in *EFG v Commissioner of Police* [2006] NZHRRT 48. The following passage from that decision is of note:

> [73] Disclosure of the information at issue raises a question as to whether it was a contempt of the High Court's suppression order to have done so. In argument it was suggested that, notwithstanding an High Court order prohibiting the publication of a person's name or identity, information of the kind might still be properly be released by the Police through the Vetting Centre, on the basis (so it was argued) that - since the information is given to a prospective employer who has an interest in knowing what the Police know about a particular individual - that somehow justifies taking a relaxed or pragmatic view of the Court's suppression order. But, with respect, **we think it behoves the Police to be very clear that they have a proper basis upon which to release that kind of information when there is a name suppression order in force.** It should not be necessary to have to resort to an uncertain (and potentially self-serving) assessment that what is being done is not a contempt of the Court order. [Emphasis added]

[49] Whether disclosure to an employer amounted to publication was not clarified until 2017 in *ASG v Hayne* [2017] NZSC 59, [2017] 1 NZLR 777 at [33], [79]–[80]. Following that case, dissemination of information can be made to persons (including employers) with a genuine need to know, where genuineness of the need or interest is objectively established.

[50] It was Inspector Trappitt's evidence that after the decision in *ASG v Hayne* the Police adopted a policy to release relevant information subject to court suppression orders, where the threshold referred to in [49] above is met. The red stamp is not now used and Police vetting continues to evolve.

[51] However, in 2012 it was unclear whether disclosure of non-conviction information to an employer (or in this case to NZDF) would constitute publication in breach of s 139, and so be in contempt of court. Accordingly, at that time a cautious approach by the Police to disclosure was warranted.

[52] As to the width of the prohibition on publication in s 139, this is not limited to just the name of the person afforded the protection of that section. It extends to any particulars likely to lead to the identification of that person. The phrase "likely to lead" to the identification of the young person means that there is an "appreciable risk" of the identification; see *R v W* [1998] 1 NZLR 35 (CA) at 40 per Richardson P. For the reasons set out in Harrison J's decision granting Mr Smith interim name suppression, had the Police disclosed Mr Smith's non-conviction information there would have been an appreciable risk that Eve's identity would be disclosed.

[53] The Director submitted that s 139 did not prevent publication of information that did not disclose the identity of Eve, so that the Police could have provided more detailed information than a red stamp.

[54] In 2012 the Police understood the law to be that where there were grounds for making some disclosure in a Police Report, but that disclosure was otherwise prohibited

by, inter alia, name suppression or the operation of s 139, the only disclosure that could be made was that of the red stamp.

[55] The short point is that s 139 remained a relevant consideration for the Police in connection with the type of disclosure that they understood they were able to make in relation to Mr Smith's non-conviction information.

[56] Against these relevant circumstances the reasonableness of the steps taken by the Police to check the name suppression information must be assessed.

The standard of care required of the Police in this case

[57] Any determination of reasonable steps must be influenced by the standard of care required of the Police. Both parties made submissions on what standard of care was required to be exercised by the Police in this case.

[58] The Director said:

> **[58.1]** Privacy Commissioner case (case no. 17749 [1999] NZ Priv Com 13 (August 1999)) which held that:
>
> > It is not enough to rely on information provided by a third party. In certain circumstances, an agency using third party information will need to make further enquiries to investigate its accuracies …
>
> is authority for the proposition that all information cannot simply be accepted on its face.
>
> **[58.2]** *EFG v Commissioner of Inland Revenue* [2006] NZHRRT 20 (*EFG*) is authority for the proposition that a decision to release information in the context of a Police vetting application will require a high level of care. *EFG,* like the present case, was decided on IPP 8. In *EFG* name suppression was, in fact, in place but the Police files had not noted this. The Police were found by the Tribunal to have released information without sufficient checking. The Tribunal found that a high degree of care is needed in the conduct of Police vetting where a decision to release highly prejudicial information was to be made and where that disclosure had a high potential for adverse impact on the person being vetted.

[59] The position of the Attorney-General was that the degree of care required is influenced by the circumstances, as described in *Taylor v Orcon* [2015] NZHRRT 15.

[60] In *Taylor v Orcon* Mr Taylor was, unbeknown to him, incorrectly registered with a credit reporting agency as owing a debt to the telecommunications company, Orcon. As a result of this registration Mr Taylor could not get a suitable credit reference, he could not get rental accommodation and he could not secure a line of credit with G E Money. The Tribunal, in considering the degree of care required to check information under IPP 8, said:

> **[44]** In legal proceedings there is opportunity to challenge the claim before a court or tribunal skilled in the adjudication of disputes and bound by the rules of fairness. At a minimum a hearing of the dispute can be required. None of these protections apply when a credit reporting agency provides a credit rating. **The request for a credit rating and the response occurs without notice to the person inquired about, without their knowledge and without an opportunity to be heard. There is little or no practical recourse when a person's credit rating is reported in negative terms and there is no right of appeal**. The right to request correction of credit information under the Credit Reporting Privacy Code is most often an ex post facto exercise and

the individual affected may not even know an adverse credit report has been provided. [Emphasis added]

[61] In reliance on this the Attorney-General said:

> **[61.1]** Where, as in *Taylor v Orcon,* the request for information is made without the knowledge of (or notice to) the individual and there is no opportunity for the individual to be heard, no recourse when a negative report is provided and no right of appeal (or even knowledge of an adverse recommendation existing) the degree of care required of the agency will be great.
>
> **[61.2]** A corollary of this must be that where the request for information is made with the knowledge of (or notice to) the individual, where an opportunity is provided to the individual to be heard, where a recourse is provided if a negative report is issued (or a right of appeal), the threshold for establishing that "reasonable" steps were taken before the information was used will be lower.
>
> **[61.3]** IPP 8 does not require the Police to conduct their own investigation. They need only be satisfied that the information used was relevant to the vetting request and was an accurate and complete record of the intelligence received (noting that subjective intelligence received need not be true, just well recorded).
>
> **[61.4]** IPP 8 does not require that the truth of the information be substantiated to any civil or criminal standard; see *Mullane v Attorney-General* at [95].

[62] While we accept the submissions in [61.1], [61.3] and [61.4], in this case the level of care required must be considered in light of the importance of the Police vetting service and the consequences flowing from it. Police vetting was crucial to Mr Smith's continued employment. The Police were aware of the importance of their report in this context. Pursuant to the Defence Act 1990, NZDF had the responsibility to ensure the safety of personnel at its bases. This is an important responsibility. The evidence of the Attorney-General's witnesses Mr Sadd, Superintendent Trappitt and Inspector Green, given in cross-examination, was that the Police vetting was an important public service, involving difficult decisions and requiring special care.

[63] Police vetting does generally require a high standard of care.

[64] The Director's case is not, however, that in Mr Smith's case the Police vetting overall did not meet the standard required by IPP 8 before the information obtained was used. This case is concerned only with the narrow point as to whether, in the circumstances, the Police failed to take reasonable steps to check that the information they had on Mr Smith's name suppression was accurate, up to date, complete, relevant, and not misleading. The standard of care required in connection with checking name suppression in this case is tempered by the operation of s 139, as considered in Harrison J's decision.

The steps taken by the Police to check Mr Smith's name suppression information

[65] In determining whether the Director has discharged the onus on him to prove that the Police failed to take reasonable steps, in the circumstances, to check on Mr Smith's name suppression we must look at the steps the Police actually took in relation to that name suppression.

[66] To understand the steps that were taken by the Police a brief explanation of the operation of the Police vetting service, as it operated in 2012, is needed:

> **[66.1]** Police vetting is the process by which organisations request information from the Police about people being considered for certain roles (for example working in areas with a high degree of contact with young children). 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. The rationale for seeking a Police Report is that Police may hold relevant information about a person demonstrating behaviour which, if repeated, could place young or vulnerable people at risk. That information may not have resulted in a criminal investigation or a conviction.
>
> **[66.2]** The Police vetting service does not generally process vetting requests directly from individuals. Rather, the vetting service has agreements (each of which is called a Memorandum of Understanding) with organisations which, in 2012, were known as "trusted agencies". NZDF was a trusted agency.
>
> **[66.3]** In 2012, in limited circumstances, where the Police held non-conviction information and they considered that some disclosure was warranted as part of their Police Report, the Police did not disclose relevant non-conviction information. Rather, the Police issued the red stamp. A red stamp was issued when Police held information which met the test for disclosure, but which could not be disclosed because, for example, it was subject to name suppression.

[67] On 1 October 2012, NZDF submitted a vetting request for Mr Smith to the Police. On 4 October 2012 the request was assigned for a review by a Police officer called a QA officer. The QA officer reviewed the information held about Mr Smith in NIA. NIA is the application used by the Police to update and keep a record of the Police information and intelligence on individuals who have had any interaction with the Police.

[68] Mr Sadd, who was a Police vetting officer in 2012, gave evidence that at this time the QA officer would have seen the records in NIA for Mr Smith's 2007 case, which showed that interim name suppression had been granted. The Police had access to CMS, when conducting Mr Smith's vetting check. They would have been able to see that an order for suppression of Mr Smith's name was still shown as active on those records.

[69] Mr Smith's vetting request was then escalated to Mr Green (at that time Inspector Green), as vetting manager. Inspector Green's evidence was that, in reviewing Mr Smith's vetting application, he had access to a comprehensive number of documents including a checklist for the Panel, Mr Smith's clearances/charges sheet and the Police investigation file.

[70] The clearances/charges sheet lists all charges, whatever the outcome. That information did include the allegations of sexual misconduct. Inspector Green said that he would have referred to the Police investigation file to understand whether the non-conviction outcome might be relevant and as to what actually happened. He would review the entire Police investigation file, focussing particularly on whether information existed which disclosed behaviour that was concerning and indicative of risk for the trusted agency.

[71] Inspector Green's evidence was that he recommended a red stamp for Mr Smith's assessment because he (Inspector Green) understood Mr Smith's charges to be the subject of name suppression. He said he understood this because:

> **[71.1]** He would have seen from the Police report form on the prosecutor's file records that name suppression was in place.
>
> **[71.2]** He had seen the decision of Harrison J which stated that interim name suppression applied until the trial and, once that concluded, the trial judge would make a decision on whether or not to make the order permanent.
>
> **[71.3]** Having seen the suppression order issued by Harrison J and the Police report form he would either have been informed that name suppression continued or would have asked the QA officer if it was still in place. He said the QA officer would likely have checked and told him.
>
> **[71.4]** He would have assumed that name suppression would stay in place, due to the nature of the case. Where there is alleged child sexual offending against a family member, name suppression remains to protect the complainant but also because Mr Smith was acquitted.

[72] In answer to a question put by the Tribunal, Inspector Green said he would have been aware of s 139 of the Criminal Justice Act.

[73] Instead of making the decision himself, which as vetting manager he could have done, Inspector Green referred the matter to the vetting review panel (Panel). On about 12 October 2012 the Panel met and considered Mr Smith's case. The Panel was in 2012 (and is now) the highest point of escalation in the vetting system. The Panel considers the most complex or sensitive vetting applications. In 2012, this included the consideration of whether it was appropriate to add a red stamp to the vetting information disclosed.

[74] The Panel agreed with Inspector Green's recommendation to provide NZDF with a red stamp on Mr Smith's Police Report. The Report was released to NZDF on 12 November 2012.

[75] In Mr Smith's case the Police had decided that it was appropriate to make some disclosure to NZDF. The Tribunal cannot "second guess" that decision. Equally, the Tribunal cannot look at the usefulness of the red stamp statement or whether other wording might have been more appropriate.

[76] There is, however, one step the Police did not take to check on the information they had in relation to Mr Smith's name suppression information. The Police relied on the face of the court records and did not check with the court as to the then current status of Mr Smith's name suppression. The Director's case is that this failure gave rise to a breach of IPP 8.

[77] The requirement to check with the court as to the then current status of name suppression is set out in one of the procedural documents available to the Police to assist with the vetting process. It is contained in a 12-page document entitled "Name Suppression". Pursuant to that document the relevant Police procedure was that a check, by way of an email enquiry, should be made to determine whether temporary or interim name suppression still applied.

[78] Mr Sadd's evidence was that between 1 October 2012 and 30 November 2012 there were no searches on Mr Smith's personal record number (or PRN). The PRN for Mr Smith is his identity within the criminal records of CMS. The specified internal procedure for checking the status of the interim name suppression, as set out in [77] above, was therefore not followed in Mr Smith's case.

Conclusion as to whether the Police breached IPP 8

[79] The Police did check the information about Mr Smith's name suppression on their own and the court files. They considered Harrison J's decision. They had before them the information about name suppression in the Ministry of Justice court management system. CMS still showed an order for suppression of Mr Smith's name was active. This was indicated by the striped yellow/black flag, the purpose of which was to alert any user that a suppression order was in force. The Police did not, however, send an email to the court to check about the then current status of Mr Smith's court ordered name suppression.

[80] For the reasons set out below we conclude that, notwithstanding their failure to email the court, the Police did take reasonable steps, in the circumstances, to check that Mr Smith's name suppression information was accurate, up to date, complete, relevant and not misleading. As previously referred to, the circumstances, namely the operation of s 139 Criminal Justice Act and the court records, are important.

[81] The Director submitted that, had the Police specifically checked with the court as to whether name suppression still applied to Mr Smith, they would have found that it had lapsed. We do not find the position would have been so clear cut.

[82] Had the Police followed their internal procedure and made enquiries of the court as to whether name suppression applied, the response would be as set out in Mr Neems' evidence, namely that the position was not clear and that the matter would have to be referred to the judge for clarification. Mr Neems said at paragraph 11 of his evidence:

> The registry will not make an entry in CMS unless the entry reflects an express order or direction made by a judicial officer. In particular, the registry will not speculate on the effect of a particular decision (or lack of decision) by a judicial officer.

[83] Mr Neems' further evidence was that in 2016, in preparation for this case, the previous Director had made enquiries of Mr Neems as to whether Mr Smith's name suppression was still active. Mr Neems referred the matter to the trial judge, Judge McAuslan. Her Honour said that if she had been asked to continue the order she would have recorded her opinion on the formal court record. However, while she was of the view that the existence of Mr Smith's name suppression order seemed to be an oversight, she could not recall the matter, given the time that had elapsed since the trial. Unfortunately, her Honour passed away before the matter could be further considered.

[84] Even if the Police had asked the court about name suppression in 2012, judicial clarification would not have been readily forthcoming. In relation to making the judicial note required to clarify the matter, the issue of functus officio would require consideration. We do not accept the Director's submission that, had the Police specifically checked on whether name suppression applied to Mr Smith in 2012, they would have been advised that it had lapsed.

[85] In any event, even if court ordered suppression had lapsed, that would not mean that the Police would have removed Mr Smith's red stamp and instead disclosed his non-conviction information.

[86] In making their decision to release the red stamp, the Police had Harrison J's decision, which indicated that s 139 of the Criminal Justice Act was a relevant consideration. That section remained a relevant consideration. It was reasonable for the Police to conclude that disclosure of Mr Smith's non-conviction information (whether or not Mr Smith had ongoing court ordered name suppression) would breach s 139. Accordingly, because of the operation of s 139 in this case, court ordered name suppression had little importance. The failure to check on this therefore had little or no relevance.

[87] In making their decision to release the red stamp, the Police also had access to the court records. Those records indicated that interim name suppression was still in force. Mr Neems' evidence was that CMS would have shown that an order for suppression of Mr Smith's name was active. While Police should generally be able to rely on the court records, in some cases it might be necessary to check whether name suppression still remained. This might be the case where there were no other reasons for information to be withheld. In this case, once again because of the operation of s 139, court ordered name suppression was not the only factor indicating that the non-conviction information could not be released.

[88] The Police did check their own files and the court files. The additional step of asking the court about name suppression, for the reasons described in [82] to [87], was really an irrelevance. It follows that the Police did take reasonable steps to check the name suppression information before using it.

[89] It must follow also that the Director has not established that the Police breached IPP 8. That being the case, we are not called upon to consider whether, as a consequence of a breach, Mr Smith suffered any of the forms of harm in s 66(1)(b) of the Privacy Act, nor to give any consideration as to remedies.

[90] For the sake of completeness, we do, however, record that had we concluded that the Police had breached IPP 8, for the reasons set out below, we would have determined that there had not been an interference with Mr Smith's privacy.

NO CAUSAL LINK TO ALLEGED HARM

Elements for an interference with privacy

[91] Having found that the Police did not breach IPP 8, the Director has failed to satisfy the first limb required for an interference with privacy. If, however, we had concluded that there had been a breach of IPP 8, section 66 then requires the Director to establish that the breach:

> **[91.1]** Has caused or may cause Mr Smith loss, detriment, damage or injury; or
>
> **[91.2]** Has adversely affected, or may adversely affect his rights, benefits, privileges, obligations or interests; or
>
> **[91.3]** Has resulted in or may result in significant humiliation, significant loss of dignity or significant injury to his feelings.

[92] For the reasons set out below, even if IPP 8 had been breached, we would not have found that there was an interference with Mr Smith's privacy.

[93] Mr Smith was an honest and compelling witness, who found himself in a sad predicament. He just wanted to get on with his life after the court proceedings but then five years later he was confronted with it again when the red stamp was issued by Police in his vetting application. We have no doubt that Mr Smith's loss of his employment did result in harm of the type described in ss 66(1)(b)(i)-(iii). Mr Smith's and Ms Jones' evidence was that the loss of his opportunity to work as operations manager had a devastating financial impact on his family. Mr Smith was shocked, dismayed, distressed and angry. He said that when he lost his employment his social life became non-existent outside of the family unit. This was due to financial constraints and embarrassment. It was humiliating for him to have to explain to people what had happened. This was especially because it was related to the charges, which in itself was a humiliating topic for him to talk about with friends and family.

[94] The Tribunal accepts the evidence that Mr Smith suffered harm by virtue of the loss of his employment. It is, however, not sufficient for harm to be suffered. There must be a causal link between the harm and the action of the Police. The causal link in this case must be between the failure of the Police to check whether name suppression applied and Mr Smith's loss of employment.

[95] It cannot be assumed that the Police failure to check name suppression caused Mr Smith's loss of employment. That would have to be established by the Director. The matter which would have to be considered, if a breach of IPP 8 had been found, would be whether there was sufficient causal link between the failure of the Police to check on Mr Smith's name suppression and the loss of his employment.

Causal link between the actions of the Police and the harm suffered

[96] The causation standard is as set out in *Taylor v Orcon* at [60] and [61]. At [61] the Tribunal said:

> **[61]** Given these factors a plaintiff claiming an interference with privacy must show the defendant's act or omission was a contributing cause in the sense that it constituted a material cause. The concept of materiality denotes that the act or omission must have had (or may have) a real influence on the occurrence (or possible occurrence) of the particular form of harm. The act or omission must make (or may make) more than a de minimis or trivial contribution to the occurrence (or possible occurrence) of the loss. It is not necessary for the cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. No form of words will ultimately provide an automatic answer to what is essentially a broad judgment.

[97] Questions of causation must be answered in the legal and factual context in which they arise. The statutory framework in this case, specifically the Defence Act, places responsibility for access to NZDF sites with NZDF, not the Police. This is in accordance with the Memorandum of Understanding between the Police and NZDF, pursuant to which NZDF, as the trusted agency, was required to determine the suitability of Mr Smith based on NZDF's own assessment of the information provided by the Police.

[98] It would have been open for NZDF to ask Mr Smith about the background to the red stamp. It would have been open for Mr Smith to approach NZDF to explain the background to the red stamp.

[99] In relation to causation the Director referred to a letter of 29 January 2013, written by the Police to Mr Smith's then counsel, which advised that had name suppression not

been in place Mr Smith's list of charges and the outcomes would have been provided to NZDF. Inspector Green's evidence was, however, that he was involved in drafting that letter and it had been prepared in the belief that there was, in fact, court ordered name suppression. Given Inspector Green's other evidence, as referred to in [71], it cannot be assumed from the letter of 29 January 2013 that if the Police thought that there was no court ordered name suppression they would actually have disclosed Mr Smith's list of charges and the outcomes.

[100] The Director says that had the Police checked on name suppression they would have been able to disclose additional information to NZDF, sufficient to allow Mr Smith's employment to continue. As already discussed, we do not consider this to be the case. The evidence from the Police is that they were aware of the prohibition against publication of information likely to identify Eve under s 139 of the Criminal Justice Act.

[101] The understanding that the Police had in 2012 was that prohibition of non-conviction information applied not only where there was court ordered name suppression but also where there were other matters, including s 139 of the Criminal Justice Act, which precluded publication of such information. Given this, disclosure of non-conviction information would not have been made by the Police, even if they reached the view that court ordered name suppression had lapsed. In the circumstances of this case the red stamp would have continued to be used. This would not suffice for NZDF, which would not grant a Defence Site Clearance while the red stamp remained. Once NZDF refused to grant a Defence Site Clearance, Mr Smith's employer would terminate his employment.

[102] The Director also relies on the evidence of Mr Turner, the Director of Security at NZDF, that if the Police had released Mr Smith's non-conviction information, rather than merely the red stamp, NZDF would have granted a Defence Site Clearance to Mr Smith and he would not have lost his employment. Mr Turner's evidence is as follows:

> 15. The Director of Human Rights Proceedings, Robert Kee, has asked me if I could assist with a response to the following hypothetical question:
>
> "Would you necessarily have denied [Mr Smith] a DSC if Police had instead of the caveat provided the following information?
>
> 2007: applicant is acquitted on three charges of indecently assaults female 12-16 and three charges of male rapes female aged 12-16.
>
> The applicant was also discharged without conviction under s 347(2) of the Crimes Act on a further two charges of indecently assaults female aged 12-16.
>
> All charges relate to an allegation the applicant sexually abused a girl in his care over a number of years.
>
> Please note that name suppression exists in respect to the information released by Police to you as a government agency. You must not release or deal with this information in a manner that would risk breach of the suppression order, but it may be disclosed to the applicant."
>
> 16. I consider that in the hypothetical circumstances given that I would very likely have granted [Mr Smith] a DSC. Although the charges were serious, [Mr Smith] was acquitted or discharged of all the charges after the court process had taken its course.

[103] There are difficulties with accepting this hypothetical could ever have become a reality. Had the Police asked the Ministry of Justice about the continuation of court ordered name suppression a clear answer would not have been forthcoming. Rather, if the Police followed their internal procedure and made enquiries of Ministry of Justice as to whether name suppression applied, the response would be as set out in Mr Neems' evidence, referred to at [82].

[104] Even if, following a judicial direction, the court ordered name suppression had been removed from the Ministry of Justice records for the reasons previously discussed, this does not mean that the Police would have removed the red stamp and considered themselves able to disclose Mr Smith's non-conviction information to NZDF.

[105] The evidence from NZDF is that it would not have reconsidered its refusal to grant Mr Smith a Defence Site Clearance while his Police Report contained the red stamp.

[106] Accordingly, even if the Police had followed their own internal procedure and checked on name suppression, there would have been no change to the result for Mr Smith. The Police would still have only issued the red stamp, rather than disclosed the non-conviction information. It follows that there is a break in the causation between the failure of the Police to follow their own procedures in checking name suppression and the subsequent loss of Mr Smith's employment.

[107] The chain of causation having been broken, had the Tribunal been called upon to decide that matter, it would have found that the Police had not interfered with Mr Smith's privacy.

NAME SUPPRESSION

The interim name suppression orders

[108] On 17 February 2017, in *Director of Human Rights Proceedings v Attorney-General (Application for Non-Publication Orders)* [2017] NZHRRT 6, a decision made in relation to this case, the Tribunal made certain interim name suppression orders.

[109] Those interim name suppression orders were made in reliance on the reasoning advanced by Harrison J and as referred to in [23]. The following passages of the Tribunal's 2017 decision are also relevant:

> **[11]** While the suppression order made by Harrison J continued only until the date of the commencement of the trial, the logic of the decision continues to apply to the circumstances of the aggrieved person and his step-daughter.
>
> **[12]** The derivative protection conferred on accused persons was also referred to in *Director of Human Rights Proceedings v Sensible Sentencing Group Trust (Application for Interim Non-Publication Orders)* [2013] NZHRRT 14 at [50].
>
> **[13]** The statutory protection which continues to apply to the step-daughter (and through her, to the aggrieved person) makes it unnecessary to apply the principles which apply to "ordinary" suppression applications. Those principles were recently addressed in *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4. It is beyond doubt the governing principle of open justice can be overridden by statute, as has happened in the present case.

Final name suppression orders

[110] The reasons advanced for granting interim name suppression still apply. If Mr Smith's name is disclosed the Tribunal is satisfied that this will identify Eve and so breach s 139 of the Criminal Justice Act. Final name suppression will therefore be granted.

[111] Pursuant to s107(3)(b) of the Human Rights Act 1993 and s 89 of the Privacy Act 1993 the following orders are made:

> **[111.1]** Publication of the name, address, occupation and of any other details which might lead to the identification of Mr Smith in these proceedings is prohibited.

[111.2] Publication of the name, address, occupation and of any other details which might lead to the identification of the step-daughter of Mr Smith in these proceedings is prohibited.

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

COSTS

[112] Costs are reserved. Unless the parties come to an arrangement on costs the following timetable is to apply:

[112.1] The Attorney-General is to file his submissions within 14 days after the date of this decision. The submissions for the Director are to be filed within the 14 days which follow. The Attorney-General is to have a right of reply within 7 days after that.

[112.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

[112.3] In case it should prove necessary, the Chairperson or Deputy Chairperson of the Tribunal may vary the foregoing timetable.

.....	.....	.....
Ms GJ Goodwin	**Ms DL Hart**	**Ms ST Scott QSM**
Deputy Chairperson	**Member**	**Member**