IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2022] NZHRRT 32**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 036/2021
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**JM**
	PLAINTIFF
AND	**MINISTER RESPONSIBLE FOR THE NEW ZEALAND SECURITY INTELLIGENCE SERVICE**
	DEFENDANT

AT WELLINGTON

BEFORE:
Ms GJ Goodwin, Deputy Chairperson
Dr SJ Hickey MNZM, Member
Ms SB Isaacs, Member

REPRESENTATION:
Mr P J Dale KC for plaintiff from 22 August 2022
Ms K Laurenson and Ms CN Tocher for defendant

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

DATE OF DECISION: **25 August 2022**

DECISION OF TRIBUNAL ON APPLICATION BY PLAINTIFF FOR NON-PUBLICATION ORDERS[1]

INTRODUCTION

The substantive case in summary

[1] JM alleges that the minister (Minister) responsible for the New Zealand Security Intelligence Service (NZSIS) has interfered with his privacy in breach of the Privacy Act 1993 (PA) as a result of the lack of timeliness in, and the nature of, the Minister's

[1] [This decision is to be cited as *JM v Minister for NZSIS (Application for Non-Publication Orders)* [2022] NZHRRT 32.]

responses to JM's requests for his personal information under information privacy principle (IPP) 6. The Minister generally denies any interference with JM's privacy.

The information requests and responses

[2] On 16 March 2020 JM requested any information about him held by the Minister, in his capacity as minister responsible for the NZSIS. The Minister's responses, the first of which was dated 4 May 2020, included advice that the information was not held by the Minister's office directly. The Minister noted that JM could direct a request for information to the NZSIS or that the request could be transferred to the NZSIS, if JM preferred. The Minister's statement of reply acknowledges this response was technically a refusal and that the grounds and reason for the refusal should have been given.

[3] On 16 July 2020 JM made a further request for information. This included whether the Minister had ever approved an intelligence warrant to surveil JM, whether the Minister had ever discussed information gathering or "surveilling" JM with anyone and whether the Minister had ever discussed a privacy request of JM's with anyone from the NZSIS.

[4] In his statement of reply the Minister says that, in relation to JM's questions about surveillance of him, the Minister advised JM, by letter dated 30 July 2020:

> As the Minister Responsible for the NZSIS, it is not my usual practice to comment on operational matters. As you can appreciate, it is necessary for the NZSIS to protect information about its area of focus, or areas it is not focusing on, to ensure it can operate effectively as an intelligence agency.
>
> For this reason, as provided by section 10 of the OIA, I can neither confirm nor deny whether I hold the information you have requested. I consider that to do so would be likely to prejudice the interest protected by section 6(a) of the Act, namely the security or defence of New Zealand.
>
> Receiving a section 10 "neither confirm nor deny" response should not lead you to conclude that the information you have asked for is either held, or not held.

[5] The Minister's statement of reply also acknowledges that JM's requests were actually under the PA and therefore reference should have been made to PA, s 32, rather than to the Official Information Act 1982.

[6] In a further request dated 18 August 2020 JM asked for certain other information. On 2 September 2020 the Minister responded advising that some draft responses to JM's earlier responses had not been given (as they were identical to the earlier formal responses disclosed), and other information did not exist.

[7] Being dissatisfied with the Minster's responses, JM brought his case to the Tribunal.

Application for non-publication orders

[8] The substantive case has not progressed. This is because prior to the filing of any evidence JM sought permanent non-publication orders. He sought suppression of his name, the names of his (as yet unspecified) witnesses and any details identifying them.

[9] JM also said that, in the event the Tribunal refused his application for permanent orders, he sought interim orders, pending his pursuing an appeal to the Senior Courts for permanent orders or for judicial review. Accordingly, this decision deals first with JM's application for permanent non-publication orders.

SUBMISSIONS ON NON-PUBLICATION ORDERS

JM's submissions

[10] JM's submissions are set out in his initial application dated 15 November 2021, his 55-page additional submissions dated 24 January 2022 and his 59-page amended submissions dated 1 February 2022. Subsequent to the filing of these submissions, on 22 August 2022 Mr Dale gave notice that he had been appointed as counsel for JM. In his memorandum dated 22 August 2022 Mr Dale said that (in line with JM's earlier submissions) in the event that name suppression was declined his client sought an interim order for a period of seven days to enable JM to consider the options available to him.

[11] JM's initial submissions refer to publicity surrounding the surveillance activities of the NZSIS following the 2019 Christchurch mosque terrorist attack and the 2021 LynnMall terrorist attack. He says that there would, likewise, be great public interest in any case where the Minister's response to requests for personal information was being challenged. Consequently, JM says he would fall under the suspicion of being a terrorist.

[12] In his subsequent submissions JM expands upon this theme submitting, as we understand it:

> **[12.1]** The nature of the Minister's responses lead to the conclusion that the Minister does hold information about JM.
>
> **[12.2]** Given this, it is a reasonable assumption that JM is on a watch-list of individuals brought to the attention of the Minister as potential terrorists and so as a threat to national security or public safety.
>
> **[12.3]** The consequences, if name suppression is not granted, would potentially be rifts in the family and relationship problems. JM, his witnesses and his wider family could be regarded by others with suspicion and shunned in society. JM would be unable to secure employment in his specialist field, if at all.
>
> **[12.4]** As a general proposition, where ministers fail to carry out their statutory duties potential plaintiffs should be able to hold those ministers to account, so that their actions are subject to judicial scrutiny. Should name suppression not be available in cases like JM's, there would be a chilling effect, or a frustration of the administration of justice and no such cases would be brought.

[13] With his application for suppression orders JM filed an affidavit and also affidavits from [redacted]. JM's affidavit simply states that all information in his submissions is true. [redacteds'] affidavits express their opinion as to the consequences referred to at [12.3] above. They say that without permanent name suppression they could not give evidence and that, in their opinion, the cost in proceeding without name suppression would be "devastating" and "permanent".

The Minister's submissions in response

[14] The Minister opposes JM's application for non-publication orders. The Minister submits that:

> **[14.1]** Individuals frequently make information requests to ministers, including the Minister, and such requests do not in any way reflect poorly on the individuals

making them. Rather, they are an exercise of those individuals' rights pursuant to the Privacy Act and the Official Information Act.

[14.2] His response to JM's request, that he (the Minister) could neither confirm nor deny the existence of the requested information, is likely to be understood by most members of the public as simply meaning what it says. He does not accept JM's arguments that members of the public would assume he had come to the Minister's attention and therefore was a potential national security threat.

[14.3] JM's belief that he will suffer adverse consequences is, of itself, insufficient to meet the high threshold required for permanent name suppression.

[15] We will briefly discuss the law relating to non-publication orders and then consider JM's non-publication application in light of that discussion.

THE LAW RELATING TO PERMANENT NON-PUBLICATION ORDERS

[16] As JM's application is for a final non-publication order, the lower threshold for an interim order pursuant to s 95 of the Human Rights Act 1993 (HRA) is not considered. Rather, we consider the Tribunal's jurisdiction to make final non-publication orders pursuant to HRA, s 107 and s 111 of the Privacy Act 2020. Section 107 provides:

> **107 Sittings to be held in public except in special circumstances**
>
> (1) Except as provided by subsections (2) and (3), every hearing of the Tribunal shall be held in public.
> (2) The Tribunal may deliberate in private as to its decision in any matter or as to any question arising in the course of any proceedings before it.
> (3) Where the Tribunal is satisfied that it is desirable to do so, the Tribunal may, of its own motion or on the application of any party to the proceedings,—
> (a) order that any hearing held by it be heard in private, either as to the whole or any portion thereof:
> (b) make an order prohibiting the publication of any report or account of the evidence or other proceedings in any proceedings before it (whether heard in public or in private) either as to the whole or any portion thereof:
> (c) make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing of the Tribunal.
> (4) Every person commits an offence and is liable on conviction to a fine not exceeding $3,000 who acts in contravention of any order made by the Tribunal under subsection (3)(b) or subsection (3)(c).

[17] The effect of HRA, ss 107(1) and (3) is that the Tribunal is under a mandatory duty to hold every hearing in public, which involves making parties' names public, unless the Tribunal is "satisfied" that it is "desirable" to make an order prohibiting publication of any name, report or account of the evidence.

[18] In the leading case of *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 (*Erceg*) the Supreme Court held that a non-publication order is only valid if it is really necessary to secure the proper administration of justice in the particular proceedings. On an application for a permanent suppression order an applicant must show specific adverse consequences which are sufficient to satisfy an exception to the fundamental rule of an open system of justice. The standard is necessarily a high one; see *Erceg* at [2], [3], [13] and [18].

[19] What is required for the Tribunal to be "satisfied" that it is "desirable" to make an order prohibiting publication in light of the Supreme Court's discussion in *Erceg*, was considered by the Tribunal in *Waxman v Pal (Application for Non-Publication Orders)*

[2017] NZHRRT 4 *(Waxman).* *Waxman* contains a discussion of how HRA, s 107 is to be approached. As this approach will be followed by the Tribunal in JM's case, relevant passages from *Waxman* are set out below.

> [66.3] The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule. The standard is a high one.
>
> [66.4] In deciding whether it is satisfied that it is desirable to make a suppression order the Tribunal must consider:
>
> > [66.4.1] whether there is some material before the Tribunal to show specific adverse consequences that are sufficient to justify an exception to the fundamental rule.
> >
> > [66.4.2] whether the order is reasonably necessary to secure the proper administration of justice in proceedings before it. The phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of individual cases as well as considerations going to the broader public interest.
> >
> > [66.4.3] whether the suppression order sought is clear in its terms and does no more than is necessary to achieve the due administration of justice.

[20] There is a discussion as to what the term "desirable" means in HRA, s 107 in *Director of Proceedings v Brooks (Application for Final Non-Publication Orders)* [2019] NZHRRT 33 *(Brooks)* at [77] to [89]. That discussion leads to a conclusion that in JM's circumstances a persuasive case will be required before the Tribunal can be satisfied that it is "desirable" that the relevant HRA, s 107(3) exception can be made.

[21] A permanent suppression order also involves a consideration of the New Zealand Bill of Rights Act 1990 (NZBORA). Since the Tribunal is required by s 3 to apply NZBORA, it will be necessary for the Tribunal to consider whether in the circumstances of the particular case the suppression order sought is a reasonable limitation on the NZBORA s 14 right to receive and impart information that can be demonstrably justified in a free and democratic society (the test provided by NZBORA, s 5). As stated by McGrath, William Young and Glazebrook JJ in *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [157], whether or not a suppression order is a limitation on freedom of expression that complies with NZBORA, s 5 will depend on the circumstances of the particular case.

[22] As the Tribunal in *Director of Proceedings v Smith (Application for Final Non-Publication Orders)* [2019] NZHRRT 32 (*Smith)* said:

> [100] In our view a final suppression order can be made consistently with the New Zealand Bill of Rights Act where the interests of justice require that the general rule of open justice be departed from and the order is a reasonable limit in terms of the New Zealand Bill of Rights Act. Such departure is permissible only to the extent necessary to serve the ends of justice.

[23] We now proceed to consider whether JM's submissions persuade us that without name suppression he and his witnesses will suffer specific adverse consequences sufficient to justify an exception to the fundamental rule of open justice and that such departure is necessary to serve the interests of justice.

ANALYSIS OF JM'S SUBMISSIONS ON NON-PUBLICATION APPLICATION

The responses of the Minister

[24] JM says there was a deliberate attempt by the Minister to avoid replying to his requests for personal information and that the nature of the Minister's responses were

such as to indicate that it would be reasonable to conclude that information was held about JM.

[25] JM says this submission is supported by a consideration of how requests for personal information must be dealt with pursuant to PA, s 39. He says that if the NZSIS was the correct agency to respond, under PA, s 39(b) the Minister would have been obliged to transfer the request to the NZSIS. As there was no such transfer the conclusion must be that the Minister did hold information.

[26] JM also says the fact that a response to his information request was sent under the name of an official rather than in the Minister's name, the incorrect reference to the Official Information Act and the "discrepancies, coincidences, and contradictions" in relation to dates of correspondence would make a reasonable member of the public suspicious that the Minister held information about JM and, therefore, that JM may have come to the Minister's attention.

[27] JM's submissions in the context of an application for permanent name suppression, are misplaced.

[28] They are premised on an assumption that the Minister has not complied with his obligations under the PA. While the Minister has made the concessions in [2] and [5] above, there is no evidence that there have been "blatant, numerous and repeated" breaches of the PA, as asserted by JM. Allegations of such breaches of the PA are to be considered and determined at the substantive hearing.

[29] In addition, in relation to a neither confirm nor deny response, as commented upon by the Privacy Commissioner in Case Note 210773 [201] NZPrivCmr 25 (16 December 2010), which accords with the submissions of the Minister in JM's case:

> Section 32 enables the Service to uphold the integrity of its intelligence gathering function which relies on discretion and the keeping of confidence. Section 32 allows that work to continue by allowing the Service to be consistent in responses to both subjects of interest and subjects of no interest when requests for information are made to it.

[30] There is no evidence to support the assertion that the Minister must hold information about JM. Mere supposition does not suffice.

Whether JM would be considered a potential threat

[31] JM then says his request for personal information to the Minister is "unique and unprecedented" and asserts:

> ...The uniqueness of such a case increases the risk that it may attract public attention. This is an additional risk factor in taking a legal case against the Minister responsible for the NZSIS without name suppression. The media and public interest in any case involving potential threats to public safety is very great.

[32] He relies on a statement made by the Minister around the time of the LynnMall terrorist attack that only a few dangerous individuals come to his attention. JM's argument is that as there are only a few people coming to the Minister's attention, anyone bringing a case against the Minster alleging a failure to properly comply with an IPP 6 request might reasonably be considered to be a dangerous individual. He says that if it became public knowledge that he was questioning the Minister's response to his (JM's) requests for personal information JM would fall under the suspicion of being a terrorist.

[33] First, there is no evidence to suggest that JM's request for personal information is unique or unprecedented.

[34] Secondly, JM's arguments conflate the Minister potentially holding information about him (which is not admitted by the Minister) with JM being under surveillance and so perceived as a dangerous individual. The leap to such a conclusion is not one that can logically be made.

[35] We do not accept that, on the facts before us, there are any parallels between the Christchurch mosque or LynnMall terrorist case and that of JM. JM has merely asked for his personal information and the Minister has given certain responses. There is nothing before the Tribunal to suggest that publicity given to JM's case will draw any comparisons with the Christchurch mosque or LynnMall attacks.

Alleged consequences for JM and his family

[36] On the assumption, however, that he is identified as a person who has been brought to the attention of the Minister and so potentially viewed as a terrorist JM says he and his family would be shunned by society and he would become unemployable.

[37] The only evidence to support these alleged specific adverse consequences are the affidavits from JM and [redacted], giving their views, as referred to in [12.3] and [13] above.

[38] In relation to JM's and [redacteds'] views, mere belief has been held insufficient to grant permanent name suppression; see *Waxman* at [81]. In that case Drs Waxman and Pal submitted that publication of their names could reflect badly on their careers. The Tribunal declined name suppression on the basis that there was a conspicuous absence of evidence that any of the feared consequences could reasonably be expected to occur. The same applies in JM's case.

[39] Nevertheless, JM places reliance on *Sandee Ryan v Auckland District Health Board* (HC Auckland) CIV 2007-404-006177, 5 December 2008 (*Sandee Ryan*). In that case Associate Judge Doogue did grant permanent name suppression to a second defendant, a senior and respected surgeon, allowing that potential harm could be caused to that defendant if persons who learned of the allegations in the statement of claim mistakenly viewed them as statements of established fact. In that case the plaintiff had made a series of allegations in a document that had been filed in the Court, but which would never be tested. This was because the proceedings were discontinued by the plaintiff after the filing of a statement of defence which denied liability and gave particulars of the reasons why the initial allegations were misconceived.

[40] This is not, however, JM's situation. No allegations have been made against JM. There are no pleaded allegations which could cause him harm. Rather, as plaintiff, he is seeking permanent non-publication orders, not just before and during the substantive hearing but thereafter, irrespective of any decision reached by the Tribunal. Accordingly, *Sandee Ryan* does not assist JM.

[41] JM then submitted, in reliance on *Erceg*, that his potential for employment is a financial asset which should be protected by way of a non-publication order. In *Erceg* the Supreme Court allowed that there might be a need to protect trade secrets or commercially sensitive information, the value of which would be significantly reduced or lost if publicised. That is not, however, JM's case. JM is referring to a potential loss of employment

opportunity, so that his case is similar to that of Drs Waxman and Pal, as referred to at [38] above and not to the protection of any financial asset.

[42] Overall, JM's and [redacteds'] unsubstantiated belief that they will suffer adverse consequences fails by a considerable degree to meet the high threshold of showing specific adverse consequences sufficient to justify an exception to the fundamental rule of open justice, as required for a permanent name suppression order.

Submissions on frustration of the administration of justice

[43] In addition, JM says that publication of his name will frustrate the administration of justice. As we understand it, JM's submission is that it is in the public interest that agencies be held to account in relation to compliance with the PA and that, without name suppression in cases like his, there is no likelihood of such accountability as plaintiffs will not bring cases because of the potential adverse consequences to them.

[44] JM relies on *Waxman* at [59], quoting Kirby P in *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) (*John Fairfax*):

> "...Otherwise powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported."

[45] JM says it is in the public interest that plaintiffs pursuing rights against powerful litigants, such as the Minister, should be able to do so. He says that in this case overly stringent adherence to the principle of open justice would defeat the proper administration of justice. JM says that without plaintiffs such as him having permanent name suppression available, the Minister will be able to benefit from "his own wrong".

[46] First, the extract from *John Fairfax* is taken out of context. The statement at [44] above was made in support of the proposition that a stringent approach to open justice is needed and that this applies notwithstanding embarrassment, invasions of privacy or damage by publicity.

[47] Secondly, as with JM's other submissions, there are unsubstantiated leaps from an allegation that a request for personal information has not been correctly responded to, to being seen to be a person coming to the attention of the Minister, to being shunned as potentially a terrorist. We do not accept that publication of JM's name will frustrate the administration of justice.

[48] JM also says there is no public interest in knowing his name in this case. He relies on *Y v Attorney-General* [2016] NZCA 474, [2016] NZAR 1512, where the Court of Appeal said that sometimes the legitimate public interest in knowing the names of those involved in the case (either as parties or as witnesses or as both) or in knowing the details of the case will be high. But in other cases, there may be little or no legitimate public interest in knowing the name or identifying particulars of the parties, or those of a witness, or in knowing particular details of the case.

[49] However, as was said in *Waxman*:

> **[84]** There is no suggestion, however, that name suppression turns on whether there is a legitimate public interest in knowing the names or details of the parties. Rather, the principle emphasised by the Supreme Court in *Erceg v Erceg* is that the administration of justice must take place in open court accessible to the public and media representatives must be free to provide fair and accurate reports of what occurs in court. This rule can only be departed from where its

observance would frustrate the administration of justice. It is within the administration of justice standard that the particular circumstances of individual cases are accommodated.

[50] Where suppression of the identity of one of the parties is sought the impact on open justice will be substantial and a persuasive case will have to be made before the Tribunal can be satisfied it is "desirable" that the relevant HRA, s 107(3) exception be made; see *Smith* at [91].

[51] In JM's case, there is no evidence of any frustration to the administration of justice that would support a departure from the principle of open justice.

Conclusion on final non-publication order

[52] Permanent name suppression prior to the filing of any evidence and prior to the hearing of the case is not justified nor supportable on the basis of the law as applied to JM's submissions.

Interim non-publication order

[53] As the Tribunal intends to dismiss JM's application for permanent non-publication orders, JM then seeks an interim order to enable him to consider the options available to him.

[54] To ensure these options are not rendered nugatory, an interim non-publication order is to be made for a period of 21 days following the date of this decision.

ORDERS

[55] The following orders are made:

[55.1] The application dated 15 November 2021 by JM for permanent non-publication orders is dismissed.

[55.2] An interim order is made pursuant to ss 95 and 107 of the Human Rights Act 1993 prohibiting publication of the name and other identifying particulars which could lead to the identification of JM.

[55.3] The interim order in [55.2] is to automatically lapse on the day which is 21 days after the date of this decision.

[55.4] Costs are reserved.

[55.5] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the time in [55.3] above.

.....	.....	.....
Ms GJ Goodwin	**Dr SJ Hickey MNZM**	**Ms SB Isaacs**
Deputy Chairperson	**Member**	**Member**