(1) PERMANENT ORDER PROHIBITING RELEASE OF UNREDACTED DECISION TO PERSONS OTHER THAN THE ATTORNEY-GENERAL AND NEW ZEALAND POLICE.

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2024] NZHRRT 7**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 051/2021
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**STEPHEN JAMES RENDELL**
	PLAINTIFF
AND	**ATTORNEY-GENERAL (ON BEHALF OF NEW ZEALAND POLICE)**
	DEFENDANT

AT AUCKLAND

BEFORE:
Ms SJ Eyre, Chairperson
Mr JS Hancock, Deputy Chairperson
Dr SJ Hickey, Member
Ms N Baird, Member

REPRESENTATION
Ms D Brabant and Mr L Donnelly for plaintiff
Ms D Harris for defendant

DATE OF HEARING: **8 and 9 September 2023**

DATE OF DECISION: **5 March 2024**

REDACTED DECISION OF TRIBUNAL[1]

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[1] This decision is to be cited as *Rendell v Attorney-General* [2024] NZHRRT 7. Note publication restrictions.

[1] Mr Rendell made an information privacy request to the Police under the Privacy Act 1993 (the Act).[2] The request stems from dealings he had with the New Zealand Police (Police) which resulted in a conviction for dangerous driving in 2018.

[2] The Police refused to provide Mr Rendell with the information he sought in his information privacy request. Mr Rendell alleges that Police have interfered with his privacy. The Police deny they interfered with Mr Rendell's privacy on the grounds that the refusal to provide the information was in accordance with the Act.

BACKGROUND

[3] Mr Rendell had concerns about the way the Police investigation into him in relation to the 2018 conviction for dangerous driving had been conducted. Accordingly, he engaged an independent investigators company, Zavest. Zavest made personal information requests to the Police on Mr Rendell's behalf in November and December 2019. These were responded to and do not form part of Mr Rendell's claim, but are referenced in the request that is considered in this claim.

[4] On 22 April 2020 Mr Rendell made the following information privacy request that is the subject of this claim.

1. All records of Police employees who accessed information about Stephen Rendell and/or licence plates CAA993 and NM1083 via the Police NIA system or other computer system between 1 November 2013 and 22 April 2020. Specifically who, and on which dates.
2. All records of Police employees accessing driving complaints made against Stephen Rendell, specifically who accessed these records, and the time and date on which they did so.
3. I also seek confirmation that Police checked their records for "all correspondence, including documents, emails and text messages, from Sergeant Gregory Wilson that refers to relate to either Stephen Rendell or licence plate CAA993, dated between 1 November 2013 and 8 November 2019" as per our original request as no information has been provided on this point.
4. All phone contacts between Gregory Wilson and Gareth Baker between 1 November 2013 and 22 April 2020.
5. File cover sheets and file assignment dates for all complaints against Stephen Rendell between 1 November 2013 and 22 April 2020.

[5] On 26 June 2020, the Police responded to Mr Rendell's request. The Police informed Mr Rendell that his request was refused on the grounds that it was frivolous or vexatious; that information was not readily retrievable, did not exist or could not be found; prejudice to the maintenance of the law and prejudice to free trial rights. The Police informed Mr Rendell that the Police had previously provided him with all the information

[2] The Privacy Act 1993 was repealed and replaced by the Privacy Act 2020 on 1 December 2020. However, the transitional provisions in Privacy Act 2020 sch 1, cl 9(1) provide that these proceedings must be continued and completed under the 2020 Act, but that does not alter the relevant legal rights and obligations in force at the time that actions subject to this claim were taken. Accordingly, all references in this decision are to the Privacy Act 1993, which was in force at the time of the information privacy request and the response from the Police.

he had requested and did not provide him with any further information at that time. The Police have not pursued the submission that Mr Rendell's request was vexatious or frivolous before the Tribunal.

[6] Mr Rendell disagreed with the Police grounds for refusing the request and complained to the Privacy Commissioner accordingly.

THE CLAIM

[7] Mr Rendell claims that the Police have interfered with his privacy by refusing to make available the following information:

> **[7.1]** Which Police employees accessed information about him and his vehicles on the National Intelligence Application (NIA) and on what date the access was made (points one and two of the request); and
>
> **[7.2]** Correspondence (including documents, emails and text messages) from Sergeant Wilson that relates to Mr Rendell or his vehicles and all phone contacts between Sergeant Wilson and Constable Baker (points three and four of the request).

[8] The Police deny Mr Rendell's claim on the grounds that their refusal is justified under the Act. The Police submit that disclosure of the NIA transaction logs recording the information he requests would prejudice the maintenance of the law so may be withheld under s 27(1)(c) of the Act. The Police submit that the correspondence and phone records sought by Mr Rendell do not exist and were therefore lawfully refused under s 29(2)(b) of the Act.

[9] On the first day of the hearing, the Police provided Mr Rendell with a document that had not been provided in response to his request. The delay by the Police in making the document available to Mr Rendell raises an additional issue for the Tribunal to determine.

ISSUES

[10] To determine the claim, the Tribunal must consider the following issues:

> **[10.1]** Whether the Police were entitled to withhold the NIA transaction logs of times, dates and identification details of Police employees who accessed Mr Rendell's personal information, under s 27(1)(c) of the Act on the basis that to release the information would likely prejudice the maintenance of the law.
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> **[10.2]** Whether the Police were entitled to refuse to disclose correspondence under s 29(2)(b) of the Act on the basis the information does not exist or could not be found.

[10.3] If the answer to question [10.1] or [10.2] is no, there has been an interference with Mr Rendell's privacy,[3] and the Tribunal must then determine whether an order should be made providing Mr Rendell with access to the withheld information.

[10.4] Whether the late document was provided in accordance with the Act and, if not, whether that amounts to an interference with privacy and Mr Rendell is entitled to a remedy.

WERE THE POLICE ENTITLED TO WITHHOLD THE NIA TRANSACTION LOGS UNDER S 27(1)(c)?

[11] The Act allows agencies to withhold information that would otherwise be required to be provided in response to an information privacy request, in a number of circumstances specified in ss 27 to 29.

[12] Section 27(1)(c) provides that an agency may withhold information on the basis detailed below:

> **27 Security, defence, international relations, etc**
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if the disclosure of the information would be likely—
>
> […]
>
> (c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial

[13] The Police rely upon this exception as grounds for withholding the NIA transaction logs which record the times, dates and identification details of Police employees who accessed Mr Rendell's personal information on the NIA system.

[14] When previously considering this exception the Tribunal has noted that the inclusion of the words "the prevention, investigation and detection of offences" are indicative of the importance placed by the legislature on protecting all those activities in maintaining the law.[4] Disclosure of the operational methods used by law enforcement agencies for those purposes could potentially nullify their effectiveness.[5] A case-by-case assessment of the merits is required; an agency may not simply create a blanket rule to withhold information in a particular set of circumstances.[6]

[15] The Police have the onus of proving this exception by showing that the release of the information would be likely to prejudice the maintenance of the law. This phrase has been interpreted to mean there is a distinct or significant possibility of a real and

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[3] Privacy Act 1993, s 66(2).
[4] See *Beattie v Official Assignee* [2021] NZHRRT 21 at [79.1] and [79.4].
[5] See *Beattie v Official Assignee* at [79.4].
[6] *Director of Human Rights Proceedings v Commissioner of Police* (2007) 8 HRNZ 428 (NZHRRT) at [54]-[55], citing *Nicholl v Department of Work and Income* [2003] 3 NZLR 426 (HC).

substantial risk.[7] To determine this, the Tribunal must undertake an objective assessment of whether there was a proper basis available (on the date the decision was made)[8] that the disclosure of the information would be likely to prejudice the maintenance of the law.

[16] To undertake this assessment, the Tribunal conducted part of the hearing in a closed courtroom only open to counsel for the Police and the relevant witness. Closed evidence and submissions were presented in accordance with orders made under s 109 of the Privacy Act 2020. Where the closed evidence is referred to in the analysis below, it is in red font and it will be redacted from the version of this decision provided to Mr Rendell and published.

Is there a real and substantial risk of prejudice to the maintenance of the law?

[17] The NIA transaction logs are an electronic record of the date and time a Police employee has accessed the NIA system to conduct a search of a person or vehicle. The NIA transaction logs also record the employee identification number for each person who accessed the NIA system. The NIA transaction logs do not record which portion of a person's NIA file is read, nor what records are accessed. The Police maintain the access to the NIA system is a vital investigative tool.

[18] The Police described the risk that would arise from disclosure of the requested information in the NIA transaction logs. Senior Sergeant Boyd-Clark emphasised that the NIA transaction logs can indicate whether the Police have had cause to be interested in an individual, even where that interest has not led to any Police interaction. Disclosure may therefore compromise Police operational methods by revealing to an individual the level of Police interest in them at any particular time, including whether any offending has escaped Police attention. We found this submission compelling, particularly given the fact that an individual may be able to ascertain from the release of the information in the NIA transaction logs, times when their offending has not been detected, or perhaps has not (yet) been investigated. The closed evidence in this claim demonstrated that there is a distinct possibility of a real and substantial risk of prejudice to the maintenance of the law if the NIA transaction logs, containing the information Mr Rendell has requested, are released.

[19] Mr Rendell has submitted that in the circumstances of this case, the disclosure of his personal information in the NIA transaction logs would not risk revealing Police informants, investigative techniques and strategy, as his request is confined to which Police employees accessed the files concerning him and his vehicle, how often this occurred and at what times. However, we do not accept this submission. The protected

[7] See *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10 at [31], citing *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at pp 391, 404 and 411.
[8] *Beattie v Official Assignee* as above n 4, at [76] and [78]; and *Gorgus v Chief Executive, Department of Corrections* [2023] NZHRRT 22 at [24].

interest in this exception is the wider interest of the maintenance of the law, not just the details of Police employees or techniques.

[20] Mr Rendell also submits that the Police have failed to outline the nature and scope of the claimed prejudice. However, as discussed above, we consider the potential prejudice to be clear, namely that Mr Rendell may be able to establish that he has or has not been investigated in relation to a particular matter, or whether he may currently be under investigation. The Tribunal is satisfied for the reasons outlined that, where there is a distinct possibility of a real and substantial risk of prejudice, an agency relying on this exception is not required to detail the exact nature and scope of how the prejudice might occur. To require otherwise would set the bar for reliance on this exception too high and potentially undermine the very reason the agency withheld the information in the first instance.

[21] Mr Rendell also submitted that, in his case, there is no likelihood of any prejudice to the maintenance of the law as there was no ongoing legal or investigative action into him being taken by the Police in April 2020 when the request was made. However, Mr Rendell is not in a position to make that assertion and, in any event, active Police investigative or prosecution work is not a pre-requisite for the s 27(1)(c) exception to apply. As the Tribunal held in *Beattie v Official Assignee*, personal information may be withheld on the basis that disclosure would likely prejudice any future investigation or detection of offences.[9] Accordingly, even if there were no current investigations into Mr Rendell at the time the Police responded to the request, the Police may still rely on this exception if there is a serious or real and substantial risk of disclosure prejudicing the maintenance of the law.

Redaction of decision commences

[22] [Redacted]

[23] [Redacted]

[24] [Redacted]

[25] [Redacted]

Redaction of decision ends

[26] Given the nature of the closed evidence, the Tribunal finds that the disclosure of all the information Mr Rendell seeks from the NIA transaction logs creates a distinct possibility of a real and substantial risk of prejudice to the maintenance of the law, including future work by Police in preventing, investigating, or detecting offending.

[9] *Beattie v Official Assignee* as above n 4, at [79.5].

[27] Having considered the closed evidence and having regard also to the submissions made on this matter, the Tribunal finds that for the reasons discussed above, the Police were entitled to refuse Mr Rendell's request for specific information from the NIA transaction logs under s 27(1)(c).

[28] It is acknowledged that Mr Rendell has sought an anonymised summary of the NIA transaction logs as an alternative remedy. However, as the Tribunal has found the Police were entitled to withhold this information, it is not appropriate to order that the Police provide any documents to Mr Rendell, nor that they create any documents for Mr Rendell.

[29] The Police indicated at the hearing they may consider providing an anonymised summary of the NIA information, but it is not appropriate for the Tribunal to order that in this claim.

WERE THE POLICE ENTITLED TO REFUSE TO DISCLOSE CORRESPONDENCE UNDER S 29(2)(b)?

[30] Under s 29(2)(b), an agency may refuse a request for personal information on the grounds that "the information does not exist or cannot be found", as detailed below:

> **29 Other reasons for refusal of requests**
>
> …
>
> (2) An agency may refuse a request made pursuant to principle 6 if—
>
> …
>
> (b) the information requested does not exist or cannot be found; or

[31] To rely on s 29(2)(b), the Police must show they made reasonable attempts to find the information requested and efforts to search for the information must be thorough and intelligent, rather than mechanical.[10] A diligent approach is required but an agency is not required to invest unlimited time and resources to search for information that may not exist or which cannot, despite diligent search efforts, be found.[11]

Did the Police make reasonable, diligent attempts to find the information?

[32] Mr Rendell submits that the Police did not take reasonable, diligent steps to find the information he requested and therefore cannot rely on s 29(2)(b).

[33] However, the evidence indicates that in the circumstances the Police applied a reasonable amount of time and effort into searching for the email and text correspondence requested by Mr Rendell. Senior Sergeant Wilson gave evidence that, after he was asked by the File Support Officer[12] to confirm that he had checked his records regarding

[10] See discussion in *Turner v University of Otago* [2021] NZHRRT 18 at [142] for the most recent summary of the relevant case law.
[11] *Yiasoumi v Attorney-General* [2017] NZHRRT 12 at [55.7].
[12] Who had the overall responsibility for managing the response to Mr Rendell's request.

Mr Rendell's request, he manually searched his email folders. He described the process and search terms used in doing so. He also stated that he had previously carried out a search for emails in response to Mr Rendell's November 2019 request, during which he sought assistance to search for emails in the Police Enterprise Vault archive system (the Police archives).

[34] Senior Sergeant Boyd-Clark also searched the Police archives as part of the Police response to the Privacy Commissioner investigation and provided evidence that emails cannot be permanently deleted. The only email he located was the one dated 5 June 2018 that had been provided to Mr Rendell in response to his November 2019 request.

[35] Mr Rendell also submitted that it was not clear if Police had followed their own policy on the retention of text records. That policy provided that if a text was required to be retained for evidential purposes, the Police should take a photo of the text or copy its content then transfer it onto a file. The same policy applied when Police received new phones between 2019 and 2022. Senior Sergeant Wilson's undisputed evidence is that he did not recall exchanging any text messages at all regarding Mr Rendell nor his vehicles. He also stated that he found no such texts in his search efforts in response to Mr Rendell's November 2019 request and so did not undertake further efforts to search for texts in response to the April 2020 request. We accept Senior Sergeant Wilson's consistent evidence on this matter as credible and note that, as no such text records existed, none would have been available to be provided to Mr Rendell.

[36] Senior Sergeant Wilson also recalled one telephone conversation with Constable Baker in respect of this matter. The call was around July 2018 and was regarding his victim impact statement (which was never actually completed). The phone call was not recorded, as is standard practice, so could not be provided to Mr Rendell. Senior Sergeant Boyd-Clark gave undisputed evidence that only calls through the 111, 105 or 555 phone systems are recorded by Police.

[37] The Tribunal finds that the Police efforts in locating information in response to Mr Rendell's request were reasonable and appropriate in the circumstances. As we have accepted Senior Sergeant Wilson's evidence that there were no texts exchanged between him and Constable Baker regarding Mr Rendell or his vehicle, it was reasonable for him to limit his search for correspondence to his email records. Similarly, we accept the undisputed Police evidence regarding the absence of phone records. Thorough searches were undertaken on more than one occasion of email folders including the Police archives. Search terms related to Mr Rendell and his vehicle number plates were appropriately used.

[38] The approach taken by the Police was therefore not mechanical or cursory but was thorough and reflected a reasonable level of diligence. We find that the Police were

entitled to rely on s 29(2)(b) to refuse to provide emails, text messages and phone records to Mr Rendell on the grounds that they did not exist.

WAS THE LATE DOCUMENT PROVIDED IN ACCORDANCE WITH THE ACT?

[39] There are two key components to an agency's response to an information privacy request:

> **[39.1]** First, a decision must be made whether the request will be granted, in what manner and for what charge (if any). This decision must be made as soon as reasonably practicable and no later than 20 working days after the date on which the request was received.[13]
>
> **[39.2]** Secondly, the information requested must be provided without undue delay.[14]

[40] If a decision is not made within the timeframe specified in s 40 or the information is not provided without undue delay, it is deemed to be a refusal to make available the information requested. If there is no proper basis for that refusal it will be an interference with privacy as detailed in s 66 below:

> **66 Interference with privacy**
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> …
>
> (2) Without limiting subsection (1), an action is an interference with the privacy of an individual if, in relation to an information privacy request made by the individual,—
>
> (a) the action consists of a decision made under Part 4 or Part 5 in relation to the request, including—
>
> (i) a refusal to make information available in response to the request;
>
> …
>
> (b) the Commissioner or, as the case may be, the Tribunal is of the opinion that there is no proper basis for that decision.
>
> …
>
> (3) If, in relation to any information privacy request, any agency fails within the time limit fixed by section 40(1) (or, where that time limit has been extended under this Act, within that time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 40(1), that failure shall be deemed, for the purposes of subsection (2)(a)(i) of this section, to be a refusal to make available the information to which the request relates.
>
> (4) Undue delay in making information available in response to an information privacy request for that information shall be deemed, for the purposes of subsection (2)(a)(i), to be a refusal to make that information available.

[13] Privacy Act 1993, s 40.
[14] Privacy Act 1993, s 66(4).

[41] The Police initially refused to provide Mr Rendell any documents in response to point 5 of his request, which was for file cover sheets and file assignment dates for all complaints against him, as they maintained they had already provided the documents. While that reason of itself is not a proper basis for refusal, it was not challenged before the Tribunal.

[42] However, the Police then decided on the morning of the hearing to provide Mr Rendell with a recently located case summary report dated 17 October 2017. The document included the file cover sheet and file assignment dates. The Tribunal finds that this information is within the scope of point 5 of Mr Rendell's request.

[43] This means the Police decision to provide this document was made over three years after the decision should have been made. The Police have, appropriately, not argued that there is any proper basis for this delayed decision and the resulting late provision of the document. Senior Sergeant Boyd-Clark explained to the Tribunal that the case summary report had been amalgamated into another file and that this was the likely reason it was overlooked by the Police during its initial response to Mr Rendell's request.

[44] The Tribunal finds that while the late decision and provision of this information was due to an administrative error, it does not constitute a proper basis under the Act upon which the deemed refusal can be justified.

[45] The Tribunal finds that these actions amount to a decision to grant the request outside of the timeframe specified in s 40(1) of the Act. Accordingly, this decision is deemed a refusal to make information available in accordance with s 66(3) and in accordance with ss 66(2)(a) and (b) amounts to an interference with Mr Rendell's privacy.

CONCLUSION

[46] The Police were entitled to withhold information from Mr Rendell on the basis that the disclosure of the information would be likely to prejudice the maintenance of the law (s 27(1)(c)) and that the information requested does not exist or cannot be found (s 29(2)(b)). There has been no interference with Mr Rendell's privacy by the withholding of these documents.

[47] The document provided to Mr Rendell by Police at the commencement of the hearing was not provided in accordance with the requirements of the Act and there was no proper basis for the deemed refusal to provide the document. This amounts to an interference with Mr Rendell's privacy.

REMEDIES

[48] When the Tribunal determines on the balance of probabilities that there has been an interference with privacy it may grant one or more of the remedies set out in s 85 of the Act.

[49] The Tribunal has found that the Police have interfered with Mr Rendell's privacy in respect of the late decision and provision of the case summary report. Accordingly, the Tribunal must consider what remedies, if any, should be ordered.

[50] Mr Rendell has confined the remedies he seeks to the following:

> **[50.1]** A declaration.
>
> **[50.2]** An order for access to his personal information comprised in the NIA transaction logs withheld by the Police under s 27(1)(c) of the Act, either in full or by way of anonymised summary.
>
> **[50.3]** An order for access to any additional information that exists and is covered by the terms of his April 2020 request, as clarified in his letter of 20 January 2021 to the Privacy Commissioner.

Declaration

[51] The grant of a declaration by the Tribunal under s 85(1)(a) of the Act is discretionary. However, the Tribunal will not normally deny such relief where it finds there has been an interference with privacy.[15]

[52] As the Tribunal has made such a finding in this case, it is appropriate for it to issue a formal declaration that the Police interfered with Mr Rendell's privacy in respect of the late decision and provision of the case summary report. This declaration is accordingly made.

An order for access to information

[53] The Tribunal has found that the Police decision to withhold information from Mr Rendell was in accordance with the Act. There is therefore no basis for the Tribunal to make any order for access to information.

[15] *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [107] and [108].

NO SEARCH OF THE FILE

[54] The Tribunal issued an order restricting search of the file prior to the hearing.

[55] It is appropriate for the order to remain in place permanently, given that the personal details of Police employees are contained in the file for this claim.

[56] The Tribunal is guided in these matters by the Senior Courts (Access to Court Documents) Rules 2017. Of particular relevance to this request is r 11. The procedure described in r 11 is substantively adopted in this proceeding, with appropriate modifications for the Tribunal's unique jurisdiction. Mr Rendell and the Police are to be notified of any request to search the file and given the opportunity to be heard on that application.

ORDERS

[57] The Tribunal is satisfied on the balance of probabilities that the Police interfered with Mr Rendell's privacy for the reasons detailed above. The following order is made:

> **[57.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that the New Zealand Police interfered with Mr Rendell's privacy by failing to fully respond to his information privacy request dated 22 April 2020 in accordance with the Privacy Act 1993.

[58] The following non-publication and search orders are made:

> **[58.1]** There is to be no publication of the unredacted decision of the Tribunal.
>
> **[58.2]** The unredacted decision of the Tribunal is to be released only to the Attorney-General, the New Zealand Police and their legal representatives. A redacted version, redacted by deletion of paragraphs [22]–[25] in their entirety, will be published and released to Mr Rendell.
>
> **[58.3]** There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal.

COSTS

[59] Both parties have attained a measure of success in this claim. The Police have been found to have interfered with Mr Rendell's privacy, but the Police have also successfully defended Mr Rendell's substantive claim. Accordingly, having regard to the Tribunal's general approach to costs,[16] we are of the view that this is not a case where costs should be awarded.

[16] See by way of example *Beauchamp v B & T Co (2011) Ltd (Costs)* [2022] NZHRRT 30 at [14]–[16].

[60] Costs are to lie where they fall.

.....	.....	.....	.....
Ms SJ Eyre	**Mr JS Hancock**	**Dr SJ Hickey**	**Ms N Baird**
Chairperson	**Deputy Chairperson**	**Member**	**Member**