

Reference No. HRRT 042/2011

UNDER THE PRIVACY ACT 1993

BETWEEN RAZDAN RAFIQ

PLAINTIFF

AND SECRETARY FOR THE DEPARTMENT OF INTERNAL AFFAIRS

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson
Dr SJ Hickey, Member
Dr AD Trlin, Member

REPRESENTATION:

Mr R Rafiq in person (no appearance)
Mr S Cohen-Ronen for Defendant

DATE OF HEARING: 12 and 13 April 2012

DATE OF DECISION: 8 April 2013

DECISION OF TRIBUNAL

Introduction

[1] On 9 November 2009 Mr Rafiq requested access to the personal information held about him by the Department of Internal Affairs. By letter dated 18 November 2009 the Department provided some information but other information was withheld pursuant to s 27(1)(c) of the Privacy Act 1993 (disclosure would be likely to prejudice the maintenance of law). The issue in these proceedings is whether the withheld information should have been released to Mr Rafiq.

Non-appearance of Mr Rafiq at the hearing

[2] The circumstances in which Mr Rafiq did not appear at the hearing at Wellington on 12 and 13 April 2012 are explained in *Rafiq v Commissioner of Inland Revenue* [2012] NZHRRT 12 (23 May 2012) at [2] to [6] and in *Rafiq v Commissioner of Police* [2012] NZHRRT 13 (23 May 2012) at [2] to [4], being decisions given by this Tribunal in related proceedings brought by Mr Rafiq and heard in the same week as the present proceedings.

[3] The hearing proceeded in the absence of Mr Rafiq, as permitted by Regulation 19(3) of the Human Rights Review Tribunal Regulations 2002. The Department's only witness, Mr BG Ross, Investigations Officer of Wellington, gave oral evidence and answered supplementary questions from Mr Cohen-Ronen and from the Tribunal.

The information privacy request

[4] The narrative of events which follows has been taken from the evidence given by Mr Ross. The chronology is not exhaustive.

[5] On 10 December 2007 the Department received from Mr Rafiq an application for New Zealand citizenship. Almost immediately, on 7 January 2008, he made a request under the Privacy Act 1993 for a full copy of his citizenship file. At that time it contained only the documents filed by Mr Rafiq. The requested documents were provided. None were withheld. On 11 February 2008 Mr Rafiq changed his name by statutory declaration to Rayshane Mallan. He did not notify this change to the Citizenship Office of the Department, despite being required to do so. On 17 March 2008 the Department's Investigations Unit requested Mr Rafiq's Fiji birth certificate. On 20 March 2008 Mr Rafiq advised that he was experiencing difficulty in obtaining one from the Fiji Passport Office and by later letter dated 26 March 2008 he said that the authorities in Fiji were not cooperating with him. On 31 March 2008 he wrote again giving notice of his name change and reiterating his inability to obtain a Fiji birth certificate.

[6] On 11 April 2008 Mr Rafiq made a second request under the Privacy Act for a copy of his citizenship file. Given the close proximity of this request to the first one made on 7 January 2008 he was asked by Mr Ross to clarify what he was seeking. On 17 April 2008 Mr Rafiq telephoned Mr Ross to discuss a disorderly behaviour conviction and his second Privacy Act request. On the same day Mr Rafiq wrote again requesting a full copy of his citizenship file but clarifying that he wanted his criminal records held by the Department. On 22 April 2008 Mr Ross released a copy of Mr Rafiq's police report dated 20 March 2008 which Mr Rafiq had submitted with his citizenship application.

[7] On 25 May 2008 Mr Rafiq wrote to Department asking whether his application had been allocated to a case officer. On 30 May 2008 he was advised that his application had not been allocated to a case officer and remained with the Investigations Unit. On 13 June 2008 Mr Rafiq provided his original Fiji identity documentation.

[8] Following a request by the Department, Mr Rafiq attended an interview on 19 June 2008.

[9] On 6 July 2008 Mr Rafiq requested the reasons for the delay in processing his citizenship application and on 9 July 2008 he lodged a complaint with the Minister of Internal Affairs about the alleged delay.

[10] On 17 July 2008 Mr Rafiq was interviewed. In that interview the requirement that he be of “good character” was discussed as was the possible impact of character issues on any recommendation by the Department to the Minister of Internal Affairs. As a consequence of what was said during that interview Mr Rafiq was asked by letter dated 21 July 2008 to confirm that it was his intention to withdraw the citizenship application.

[11] On 22 July 2008 the Department received from Mr Rafiq a letter withdrawing his citizenship application.

[12] On 28 July 2008 the Department wrote to Mr Rafiq advising him that consequent upon the withdrawal of his application there would be a partial refund of the application fee. On 6 August 2008 Mr Rafiq instructed the Department that the refund be directed to Jubeda Khan.

[13] On 7 August 2008 Mr Rafiq made a fourth request under the Privacy Act. He asked for a copy of the entire file. On 14 August 2008 the Department responded that there were no further documents to be released.

[14] On 9 November 2009 Mr Rafiq again submitted a request for a full copy of his citizenship file. This was his fifth request. On 18 November 2009 the Department released the documents on the file which were post-7 January 2008. The Department did, however, withhold some information under s 27(1)(c) of the Privacy Act on the basis that the disclosure of the withheld information would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences and the right to a fair trial. When Mr Rafiq wrote seeking the withheld material the Department replied that the information would not be released. A complaint by Mr Rafiq to the Privacy Commissioner followed.

The withheld information

[15] In the course of processing a citizenship application the Department of Internal Affairs makes enquiry with several government departments and receives information from them. Should the Department of Internal Affairs subsequently receive a request by a citizenship applicant under information privacy Principle 6 for access to personal information held by the Department, it consults with such of the government agencies as may have provided the information. If that other agency has good reason for refusing access to personal information under ss 27, 28 and 29 of the Act, the Department of Internal Affairs similarly asserts that reason as the ground for refusing to disclose the information in question. Because circumstances may change, an agency which once had good reason for refusing access to personal information may at a later point determine that those reasons no longer have application. If the source agency comes to the view that personal information may now be released, the Department of Internal Affairs likewise withdraws its decision to refuse to disclose the information and the information is released.

[16] In the present case the withheld information related to three documents. The first was a page containing information provided by the (then) Department of Labour from its Applicant Management System (AMS). The second was a Department of Internal Affairs Investigation Report dated 25 July 2008. One of the paragraphs in this report had been redacted. This paragraph recorded that some information on the investigation file had been classified as confidential and was to remain with the Investigations Units in a secure environment. The information had temporarily been removed from the citizenship file relating to Mr Rafiq and would be merged at the time his citizenship

application was considered by the Minister. The third document contained information provided by the New Zealand Police.

[17] All of the above information was withheld under s 27(1)(c) of the Privacy Act .

[18] The Privacy Commissioner determined that the Department of Internal Affairs had good reason to withhold the information under s 27(1)(c) and found no breach of Principle 6.

[19] Mr Rafiq filed his statement of claim with the Tribunal on 10 November 2011 and the Department's statement of reply followed on 20 December 2011. By *Minute* dated 23 December 2011 the Chairperson directed (inter alia) that a written statement of the evidence for the Department of Internal Affairs be filed and served by 17 February 2012.

[20] The brief of evidence by Mr Ross was filed on 16 February 2012. In his statement Mr Ross said that the Department now understood that the Department of Labour and the Police were satisfied that the previously withheld AMS record and the previously redacted paragraph could now be released to Mr Rafiq. Attached to his brief of evidence were both the AMS record and an unredacted version of the Investigation Report.

[21] Disclosure of this information having been made, it follows that in these proceedings the issues are whether the Department of Internal Affairs originally had good reason for refusing access to the information and whether there is now good reason for the continued withholding of the remaining item of information, being the information received from the Police.

The refusal to disclose

[22] We address first the AMS record and the redacted passage from the Investigation Report.

[23] Viewed from the perspective of November 2009 (the refusal date) we are satisfied that the decision not to disclose was a proper one. Just a year before Mr Rafiq had applied for New Zealand citizenship. On the information available to the Department and which had been provided by Mr Rafiq, the Department of Labour and the Police, there were good grounds to doubt whether Mr Rafiq was of good character. While the application had been withdrawn in July 2008, it could always be re-submitted. The repeated requests for the file both during the course of the application and after it had been withdrawn suggested a fishing expedition in which Mr Rafiq was looking for material he could use to monitor the officials dealing with his case and to possibly attack anyone who may have said something adverse about him. Of necessity, the Department needed to be proactive in protecting the disclosure of the immigration and police information to prevent this happening and to enable a more effective assessment of Mr Rafiq's "character" in the event of the citizenship application being revived. The Department had ample grounds for withholding the information it did.

[24] Our ruling, however, is now academic given that with the effluxion of time the agencies concerned have come to a determination that the information can be disclosed. We understand Mr Rafiq no longer pursues this aspect of his case. See his "statement of evidence" dated 22 February 2012 filed in his proceedings against the Commissioner of Police (HRRT032/2011):

As you may recall in that in another proceeding Rafiq vs. Internal Affairs Department full disclosure was filed. I was extremely happy that Internal Affairs had disclosed all the information as claimed in my statement. I promised to myself that no European staffs of Internal Affairs will face my abuse in the future! I really do not like to swear Europeans on their faces – make their white skin red even though I like it and has become my hobby. I want to live happy with European people like European ladies and get marry to a beautiful blond European girl and have 10 children like Pacific islanders and be on benefit all the time since this country has plenty of money said by the Police.

...

Disclose me that information and go home happy like the Internal Affairs Department.

[25] The remaining issue for consideration is whether there was a proper basis for the decision to withhold the information provided by the Police. To determine this issue it has been necessary for the Tribunal to see for itself the withheld information.

[26] The procedure adopted by the Tribunal on 12 and 13 April 2012 for determining whether the information was properly withheld followed the practice established in *Dijkstra v Police* [2006] NZHRRT 16; (2006) 8 HRNZ 339, *Reid v New Zealand Fire Service Commission* [2008] NZHRRT 8 and *NG v Commissioner of Police* [2010] NZHRRT 16. The opening submissions of Mr Cohen-Ronen were received in open hearing. Thereafter, after he had been sworn, the evidence of Mr Ross was received in open hearing. Once the hearing reached the point where it was necessary that the Tribunal see the withheld information the hearing was closed to all except for Mr Ross (the witness) and Mr Cohen-Ronen. In the closed part of the hearing the Tribunal received the closed evidence of Mr Ross together with the closed documentation, being the information which the Department continues to withhold from Mr Rafiq. Once this process had been concluded the hearing returned to “open” format.

[27] This process has been devised by the Tribunal to accommodate those cases where the defendant agency cannot adequately explain the nature of the withheld information and its reasons for withholding it without compromising the very matters that the agency submits warrant withholding the information from the plaintiff. In addition, the Tribunal needs to see the information at issue to form its own view as to whether or not the information ought to be disclosed. But the plaintiff cannot see the closed information unless and until the Tribunal decides that it ought to be disclosed.

[28] We turn now to the withheld information. It is contained in one of the documents the subject of Mr Rafiq’s proceedings against the Commissioner of Police. The document in question had already been considered by the Tribunal just a few hours earlier on 11 and 12 April 2012 in the context of the proceedings brought by Mr Rafiq against the Commissioner of Police in HRRT032/2011. Because the Commissioner asserted in those proceedings that there were proper grounds for refusing to disclose the information, the Secretary for Internal Affairs in HRRT042/2011 similarly resisted disclosure of the information. It was, after all, the same information and contained in the same document.

[29] The decision of the Tribunal in HRRT032/2011, following inspection of the withheld information in a closed hearing, was that all of the information which the Commissioner refused to disclose in response to Mr Rafiq’s Principle 6 request had been properly and justifiably refused under the Privacy Act 1993 ss 27(1)(c) and 29(1)(a). See the decision in *Rafiq v Commissioner of Police* [2012] NZHRRT 13 (23 May 2012).

[30] As the document in question in the present proceedings (HRRT042/2011) has already been the subject of an inquiry and ruling by the Tribunal it must follow that the same outcome must be achieved in these proceedings. Even without this prior ruling we would in any event have reached the view that the information had been properly withheld under s 27(1)(c) of the Act.

[31] We accordingly conclude that, for the reasons given by us in *Rafiq v Commissioner of Police* [2012] NZHRRT 13, the information provided by the Police to the Secretary of Internal Affairs has at all times been properly and justifiably withheld from Mr Rafiq.

Decision

[32] For the foregoing reasons the decision of the Tribunal is that:

[32.1] All of the information provided by the New Zealand Police to the Secretary of Internal Affairs and which the Secretary has refused to disclose in response to Mr Rafiq's Principle 6 request has been properly and justifiably refused under the Privacy Act 1993, ss 27(1)(c).

[32.2] Mr Rafiq's claim is dismissed.

[32.3] Costs are reserved.

Costs

[33] Any application for costs will be dealt with according to the following timetable:

[33.1] Any application is to be filed and served, along with any submissions or other materials put forward in support of the application, within 28 days after this decision is issued to the parties.

[33.2] Any notice of opposition to the making of an award of costs is to be filed and served, along with any submissions or other materials put forward in opposition to the application, within a further 28 days.

[33.3] The Tribunal will then determine the issue of costs on the basis of the papers that will by then have been filed and served and without any further oral hearing.

[33.4] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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Mr RPG Haines QC
Chairperson

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Dr SJ Hickey
Member

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Dr AD Trlin
Member