IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2016] NZHRRT 31**

	Reference No. HRRT 037/2015
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**DANIEL LOHR**
	PLAINTIFF
AND	**ACCIDENT COMPENSATION CORPORATION**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Dr JAG Fountain, Member
Mr MJM Keefe JP, Member

REPRESENTATION:
Dr D Lohr in person (via Skype)
Mr PA McBride and Ms FM Lear for defendant

DATE OF HEARING: **8 and 9 September 2016**

DATE OF DECISION: **29 September 2016**

DECISION OF TRIBUNAL[1]

INTRODUCTION – THE CENTRAL FACTS

[1] Dr Daniel Lohr, a citizen of the United States of America, is a chiropractor and acupuncturist who moved to New Zealand in 2009. In 2010 he opened a clinic in Tauranga. When that business closed in March 2013 he moved to Wellington, opening a clinic there in May 2013. That business, in turn, ceased operating in around 2014 and it would appear Dr Lohr returned to the USA some time in 2015.

[1] [This decision is to be cited as: *Lohr v Accident Compensation Corporation* [2016] NZHRRT 31]

[2] In about July 2011 the Accident Compensation Corporation (ACC) commenced an investigation into Dr Lohr's practice with a view to determining whether ACC payment claims submitted by him (and by entities associated with him) were bona fide. The more particular concerns, as outlined by Ms K Eland for ACC in her evidence, included:

> **[2.1]** Duplication of claims made.
>
> **[2.2]** Questions about accident cause for treatment.
>
> **[2.3]** Questions whether Dr Lohr (or others) had provided any treatment.
>
> **[2.4]** Issues about whether, for instance, Dr Lohr could invoice ACC as both a chiropractor and an acupuncturist under two identities for the same consultation or treatment.

[3] To find out what was being alleged against him and to limit the damage to his practice, Dr Lohr made a large number of requests to ACC for information under both the Privacy Act 1993 and the Official Information Act 1982. He hoped that once he found out what was behind the investigation he would be able to correct what he believed to be the misinformation held by ACC.

[4] While the Tribunal was not given details of the number of information requests made by Dr Lohr to ACC under the Privacy Act, its attention was drawn to the reference in a 13 December 2012 letter from ACC to the Chiropractic Board to the effect Dr Lohr had at that point sent to ACC 24 emails with 88 requests for information under the Official Information Act.

[5] The present proceedings have their origin in one of Dr Lohr's many requests to ACC for access to his personal information under information privacy principle 6. The particular request was an eleven page letter dated 17 December 2014 seeking access to (inter alia) ACC's investigation file.

[6] Within the 20 working days allowed by s 40 of the Act, ACC on 17 March 2014 notified Dr Lohr it was extending the s 40(1) time limit. The requested information was subsequently provided on 8 May 2014 except for two categories of information:

> **[6.1]** The entire investigation file. ACC justified the withholding of this information under s 27(1)(c) of the Act which permits an agency to refuse disclosure of information requested under Principle 6 if the disclosure of the 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.
>
> **[6.2]** Information redacted from some of the disclosed documents. The redactions were made in reliance on s 29(1)(a) of the Act which permits an agency to refuse to disclose information requested pursuant to Principle 6 if the disclosure of the information would involve the unwarranted disclosure of the affairs of another individual.

[7] However, subsequent to the ACC investigation being discontinued in approximately mid to late 2014, almost all of the information previously withheld from Dr Lohr was then disclosed in releases made on 13 November 2014 and 15 December 2014 by way of three USB drives. Two categories of information remained withheld:

> **[7.1]** Information which detailed ACC's investigative techniques and the names of informants (s 27(1)(c)); and

[7.2] Information which would involve the unwarranted disclosure of the affairs of other persons (s 29(1)(a)).

Identifying the issue for determination

[8] During the course of the hearing it became apparent the parties were not (at least initially) in agreement as to the issue the Tribunal was to determine.

[9] To understand the manner in which the jurisdiction issue was raised and ultimately resolved, reference must be made to the Privacy Act and to the Tribunal's established case law.

[10] As explained in *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 (20 September 2013) at [58] to [64], the effect of s 82 of the Privacy Act is that in proceedings under Part 8 of the Act an aggrieved individual (ie a plaintiff) is required to establish the defendant in the proceeding is a person in respect of whom an investigation has been conducted by the Privacy Commissioner under Part 8 in relation to "any action alleged to be an interference with the privacy of the aggrieved individual".

[11] To bring clarity to what "action alleged" was the subject of the investigation, the Commissioner issues a Certificate of Investigation particularising the subject of the investigation. It is this certificate which sets the boundary of the Tribunal's jurisdiction. The certificate does not have statutory basis and in that respect is informal and capable of challenge. See further *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike-Out Application)* [2014] NZHRRT 1, (2014) 10 HRNZ 279 at [18] to [40].

[12] Where the aggrieved individual has made multiple complaints to the Privacy Commissioner and more than one investigation has been conducted, there will be more than one Certificate of Investigation. Plainly the aggrieved individual can choose which "action investigated" by the Commissioner to challenge before the Tribunal.

[13] In the present case the correspondence before the Tribunal shows at one point there were at least two virtually contemporaneous investigations by the Privacy Commissioner. The first was identified as C/25998 and the second as C/26619. Two certificates of investigation were issued in relation to the second and both were filed by Dr Lohr with his statement of claim. The existence of two certificates for C/26619 led to some confusion. This was compounded by the fact they are identical except that the second, apparently issued at the request of Dr Lohr, has greater particularity in the "Matters investigated" field.

[14] The first certificate stated:

Certification of Investigation for Human Rights Review Tribunal

Complainant	**Dan Lohr (Our Ref: C/26619)**
Respondent	**Accident Compensation Corporation ("ACC")**
Matters investigated	Whether ACC provided Dr Lohr with all the information he requested about an investigation ACC made into his practice. Some of this information was withheld under s 29(1)(a) and s 27(1)(c) of the Privacy Act 1993.
Principle(s) applied	Principle 6 of the Privacy Act.
Commissioner's opinion:	The Commissioner is satisfied ACC has provided Dr Lohr with the information he is entitled to receive. The information withheld under s 29(1)(a) and s 27(1)(c) was done so lawfully.

• **application of principle(s)**	
• **adverse consequences**	Not required under Principle 6.
• **interference with privacy**	No.

[15] The second certificate stated:

Certification of Investigation for Human Rights Review Tribunal

Complainant	**Dan Lohr (Our Ref: C/26619)**
Respondent	**Accident Compensation Corporation ("ACC")**
Matters investigated	Whether ACC provided Dr Lohr with all the information he requested about an investigation ACC made into his practice. The requested information includes: • A copy of any information sent by ACC to the Chiropractic Professional Practice Committee; • A summary of the allegations made against Dr Lohr and supporting information; • Information regarding the relationship between Dr Anthony Close and Dr Lohr; and • All information held by ACC regarding an email dated 17 February 2014 from John Gaulter. Some of this information was withheld under s 29(1)(a) and s 27(1)(c) of the Privacy Act 1993.
Principle(s) applied	Principle 6 of the Privacy Act.
Commissioner's opinion:	The Commissioner is satisfied ACC has provided Dr Lohr with the information he is entitled to receive. The information withheld under s 29(1)(a) and s 27(1)(c) was done so lawfully.
• **application of principle(s)**	
• **adverse consequences**	Not required under Principle 6.
• **interference with privacy**	No.

[16] Neither of these two certificates mesh with the only complaint made in the statement of claim, namely that Dr Lohr was declined a list of clients spoken to by ACC in the course of its investigation.

[17] Initially, the parties adopted extreme positions on jurisdiction. Dr Lohr wanted any and every withholding decision reviewed by the Tribunal as well as the propriety of ACC's actions from the time the investigation and audit began. For its part, ACC submitted the Tribunal's jurisdiction was confined to determining the only complaint articulated in the statement of claim, being Dr Lohr's request for a list of clients spoken to during the investigation.

[18] Resolution of these competing claims was not assisted by the fact that it was not entirely clear what, at any particular point in time, had been the subject of investigation by the Privacy Commissioner. This was no doubt due to the multiplicity of requests for personal information made by Dr Lohr and the equally multiple complaints lodged by him with the Commissioner. Each complaint and each investigation seemed to generate even further requests for information and in turn, further complaints and further investigations. For example, when ACC on 8 May 2014 released information to Dr Lohr,

he made a further Privacy Act request on 18 May 2014 and lodged a further three on 19 May 2014.

[19] It was nonetheless clear that at the core of both Dr Lohr's complaint and of ACC's defence as articulated in its evidence lay the issue whether, in releasing the previously withheld investigation file, ACC had properly continued to withhold two restricted categories of information. It was this issue they had come to contest before the Tribunal.

[20] The Tribunal accordingly put to the parties that the issue to be determined was whether, when releasing the previously withheld investigation file, ACC had properly continued to withhold information relating to investigative techniques and information which would involve the unwarranted disclosure of the affairs of other persons. Both Dr Lohr and Mr McBride expressly agreed to this formulation and it is that issue the Tribunal now determines.

Open and closed documents and open and closed hearings

[21] Given the issue for determination it was inevitable the Tribunal would need to hold a closed hearing.

[22] Good reasons for an agency to refuse access to personal information are exhaustively enumerated in ss 27, 28 and 29 of the Act. An agency wanting to rely on any of these provisions has the onus of proving the exception applies. See s 87:

> **87 Proof of exceptions**
>
> Where, by any provision of the information privacy principles or of this Act or of a code of practice issued under section 46 or section 63, conduct is excepted from conduct that is an interference with the privacy of an individual, the onus of proving the exception in any proceedings under this Part lies upon the defendant.

[23] A plaintiff cannot, by bringing proceedings before the Tribunal, gain access to the withheld information unless and until the Tribunal arrives at a determination that the onus under s 87 has not been discharged. In reaching its decision the Tribunal must necessarily inspect the information for itself in the context of a closed hearing from which the plaintiff is excluded. It is the closed hearing which provides opportunity for the agency to disclose the information, to call evidence in support of its decision to withhold and to make submissions on the evidence and the law.

[24] As explained in the Chairperson's *Minute* of 26 February 2016, the established procedure followed by the Tribunal in such cases is for the opening submissions of the agency to be received in open hearing. So too is the evidence called by that agency up to the point where it becomes necessary for the Tribunal to see the withheld information itself. The hearing is then closed to all except for counsel for the agency and the witness. In the closed part of the hearing the Tribunal receives, in the absence of the plaintiff, the closed evidence and closed submissions. Once this process has been concluded the hearing returns to "open" format and the plaintiff resumes participation in the hearing.

[25] This was the procedure followed in the present case. The Tribunal received from ACC a four volume bundle of closed evidence in which the withheld and redacted information was identified by the use of red borders. In addition two of the witnesses called by ACC (Mr D Mitchell and Ms M Jones) gave both open and closed evidence while the third witness (Ms K Eland) gave open evidence only.

[26] For his part Dr Lohr filed in evidence the entire (open) copy of the investigation file disclosed to him in November and December 2014. This open evidence was the counter-foil to the closed bundle. Read together, the open and closed versions of the documents allowed ready verification of what had been withheld.

[27] The Tribunal acknowledges the assistance it has received from both parties by the careful preparation of the documentary evidence. The presentation of the ACC closed bundle was exceptional in both layout and presentation.

[28] Before making our findings on the open and closed evidence it is necessary to first identify the issues on which findings are required.

THE LEGAL FRAMEWORK

[29] Prima facie, the Principle 6 request made by Dr Lohr on 17 February 2014 obliged ACC to provide access to the information without "undue delay" (s 66(4)). That obligation was, however, "subject to the provisions of Parts 4 and 5" of the Act. Information privacy principle 6 provides:

> Principle 6
> *Access to personal information*
>
> (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—
> (a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
> (b) to have access to that information.
> (2) Where, in accordance with subclause (1)(b), an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
> (3) The application of this principle is subject to the provisions of Parts 4 and 5.

[30] The three provisions of the Act (ss 27, 28 and 29) which list the permitted "good reasons" for refusing access to personal information are all contained in Part 4. If the good reasons relied on by ACC are established, Dr Lohr's claim must inevitably fail.

[31] We now address, in turn, the two provisions relied on by ACC.

Section 27(1)(c) – likely to prejudice the maintenance of the law

[32] Withheld from the November-December 2014 release was information relating to ACC's investigative techniques, methodologies and informants. To justify the withholding of this information ACC relies on s 27(1)(c) which provides:

> **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; or

[33] The relevant date on which the agency must have good reason under ss 27 to 29 for refusing access to personal information is the date on which the decision is made whether the request is to be granted: *Geary v Accident Compensation Corporation* at [74] and *Watson v Capital and Coast District Health Board* [2015] NZHRRT 27 (7 July 2015) at [84].

[34] The term "likely" is to be understood as requiring the agency to show there is a real and substantial risk to the interest being protected: *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391, 404 and 411 and *Nicholl v Chief Executive of the Department of Work and Income* [2003] 3 NZLR 426 at [13]. See also *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10 (8 April 2013) at [31]. To similar effect (but in a different context) see *St Peter's College v The Crown* [2016] NZHC 925, [2016] NZAR 788 at [10].

[35] As to the meaning of the phrase "to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences and the right to a fair trial" we do not in the context of the present case attempt an exhaustive analysis. It is sufficient to note:

[35.1] Law enforcement is not the whole of the provision (see the reference to the right to a fair trial) but the specific mention of "the prevention, investigation, and detection of offences" indicates the importance placed by the legislature on protecting these activities. See Ian Eagles, Michael Taggart and Grant Liddell in *Freedom of Information in New Zealand* (Oxford, Auckland, 1992) at 177 commenting on the identical provision in s 6(c) of the Official Information Act 1982.

[35.2] By inserting into s 6(c) of the Official Information Act the words "including the prevention, investigation, and detection of offences" after the words "the maintenance of the law" the framers of the Official Information Act have recognised that one of the ways in which the law can be maintained is in the prevention, investigation and detection of offences against it. See *Commissioner of Police v Ombudsman* at 405 per McMullin J. In our view the same must necessarily apply to the identical s 27(1)(c) of the Privacy Act.

[35.3] Disclosure of the methods by which crimes are uncovered and criminals apprehended could easily render such methods nugatory. Those who are minded to commit offences should not be able to anticipate and forestall the means by which their activities are detected. See Eagles, Taggart and Liddell op cit 178.

[35.4] It is well-established that in a proper case, s 27(1)(c) may be relied on to deny access to the name of an informant. As stated by Rodney Hansen J in *Nicholl* at [16]:

> The decisions are firmly grounded in the words of the statute and in the pragmatic concerns which, since *R v Hardy* (1794) 24 St Tr 199, have conferred public interest immunity on police informants. For more than two centuries it has been accepted that the public interest favours preserving the anonymity of police informers by keeping open avenues of information which will assist in the detection and investigation of crime.

[35.5] As in the case of other agencies administering public money, ACC has a duty to prevent, investigate and detect offences concerning the receipt of ACC payments. To discharge this duty it must encourage members of the public to provide relevant information. As observed by Rodney Hansen J in *Nicholl* at [19] and [20] in the analogous context of social welfare payments, the detection and investigation of benefit fraud (or, we might add, ACC fraud) is peculiarly reliant on a flow of information from the public:

> I think Mr Stevens was right to say that the detection and investigation of benefit fraud is peculiarly reliant on a flow of information from the public. A government department

> is singularly ill-equipped to carry out the observations which frequently bring such offending to light. It is not just a matter of insufficient resources, though that too must play a part. It is the nature of the activities which tend to reveal benefit abuses. They would often escape detection if it were not for the intervention of members of the public.
>
> [20] In my view, the respondent's fears that disclosure of the identity of the informant could discourage other potential informants from giving information are fully justified. It undoubtedly would prejudice the maintenance of the law, and by the means identified in s 27(1)(c) – the prevention, investigation and detection of offences.

[36] Drawing on these observations it is our view the specific reference to "prevention, investigation, and detection of offences" must necessarily include information relating to investigative techniques, methodologies and the use of informants. See also *Commissioner of Police v Ombudsman* at 397 per Cooke P.

Findings of fact in relation to s 27(1)(c)

[37] Having inspected the four volumes of closed evidence filed by ACC and applying the principles of law set out above, we are of the view the information withheld under s 27(1)(c) has been properly withheld. That is, the information relates to ACC's investigative techniques and methodologies and includes the names of confidential informants. Disclosure of the information would be likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences.

[38] We turn now to the second withholding ground.

Section 29(1)(a) – the unwarranted disclosure of the affairs of another individual

[39] Withheld by way of redaction from the November-December 2014 release was information in the form of the names and contact details of people who provided information to the investigators, including patients and employees. It also included identifying information about those people including, for example, the nature of their injuries and how those occurred. Such information could be used by Dr Lohr to identify them. In deciding whether disclosure was unwarranted ACC took into account assurances provided to witnesses by ACC, including that all information supplied would be treated as confidential. One example of that approach is the online form that members of the public can use to report suspected fraudulent activity. That states that a person's identity will be kept confidential to ACC.

[40] To justify the withholding of the redacted information ACC relies on s 29(1)(a) which provides:

> **29 Other reasons for refusal of requests**
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
> (a) the disclosure of the information would involve the unwarranted disclosure of the affairs of another individual or of a deceased individual; or

[41] In the application of this provision we are guided by the following statements of principle taken from *Watson* at [91] to [93].

> **[41.1]** Section 29(1)(a) has two requirements. First, that the disclosure of the information would disclose the affairs of another person and second, that such disclosure would be unwarranted.
>
> **[41.2]** As to the first requirement, it is clear from our inspection of the documents that the information does indeed contain the names and contact details of people

who provided information to the ACC investigators, including employees and patients. In the case of the latter the nature of their injuries and how those occurred is also recorded.

[41.3] As to the second requirement, it has been correctly said that particular weight needs to be given to the word "unwarranted". This, together with the use of the phrase "the affairs of another individual" rather than "privacy" appears to narrow the scope of the provision. See Taylor and Roth *Access to Information* (LexisNexis, Wellington, 2011) at [3.5.4]. In our view the term "unwarranted" requires the Principle 6 right of access held by the requester to be weighed against the competing interest recognised in s 29(1)(a). In that exercise consideration must be given to the context in which the information was collected and to the purpose for which the information was collected, held and used. How the balance is to be struck in a particular case and a determination made whether disclosure of the information would involve the "unwarranted disclosure" of the affairs of another individual will depend on the circumstances. See *Director of Human Rights Proceedings v Commissioner of Police* [2007] NZHRRT 22 at [63]. In that decision the Tribunal at [64] made reference to some of the considerations which may be relevant when weighing the competing interests. See also *Geary v Accident Compensation Corporation* at [78] to [88].

[42] Concealment of the identity of informers could, depending on the circumstances, be justified under both s 27(1)(c) and (d) as well as s 29(1). In the present case ACC relies not only on s 27(1)(c) but also s 29(1)(a).

Findings of fact in relation to s 29(1)(a)

[43] We do not intend addressing, paragraph by paragraph, the considerations suggested in *Director of Human Rights Proceedings v Commissioner of Police* at [64]. Helpful though the list may be, we have concentrated our analysis on weighing the competing interests of Dr Lohr on the one hand and on the other, those whose identity has been withheld.

[44] The salient point is that information about Dr Lohr was provided to ACC by a range of persons, but particularly by those working with him and by patients. It is clear from what we have seen and heard the information was provided in expectation the identity of the informants would be withheld from Dr Lohr.

[45] In determining what weight is to be given to that expectation we take into account:

[45.1] Dr Lohr's reaction to the ACC investigation was described by Ms Eland as "threatening, litigious and obstructive".

[45.2] In evidence Dr Lohr confirmed one of the reasons for his request for information was so that the relevant information could be displayed on the website www.FYI.org.nz which is accessible by members of the public both in New Zealand and elsewhere. FYI is a website that allows the online lodgement of (inter alia) Official Information Act requests. The website then sends the request to the government department concerned. Any response is automatically published on the website for the requester and "anyone else to find and read".

[45.3] Disclosure by ACC of the identity of those who have assisted ACC in the course of its inquiries or who have been spoken to by ACC could well lead to a very public "outing" and humiliation if not by Dr Lohr, by others.

[45.4] Patients who have provided information about Dr Lohr or about entities associated with him will be at risk of being identified as ACC claimants and in some cases their accident, injury and treatment details will also be disclosed.

[45.5] Dr Lohr will experience little or no prejudice by the continued withholding of the information. He now has almost all of the investigation file and the concerns held by ACC did not, in the end, lead to a prosecution.

[46] Standing back and looking at the evidence as a whole, we are of the view disclosure of the redacted identification information would be unwarranted. The information has little direct relevance to the matters in issue between Dr Lohr and ACC but there is a real risk the information will be misused, including on the internet. We find the information has been properly withheld under s 29(1)(a) of the Act.

OVERALL CONCLUSION

[47] ACC has discharged its burden of proving the information withheld from Dr Lohr falls within the exceptions in ss 27(1)(c) and 29(1)(a) of the Privacy Act. As there has been no breach of information privacy principle 6 there has consequently been no interference with Dr Lohr's privacy as that term is defined in s 66 of the Act.

[48] Dr Lohr's claim is accordingly dismissed.

Costs

[49] At the request of ACC costs are reserved.

[50] The following timetable is to apply:

[50.1] ACC is to file and serve its submissions within 14 days after the date of this decision. The submissions for Dr Lohr are to be filed and served within a further 14 days with a right of reply by ACC within 7 days after that.

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

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

.....	.....	.....
Mr RPG Haines QC	**Dr JAG Fountain**	**Mr MJM Keefe JP**
Chairperson	**Member**	**Member**