IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 3**

	Reference No. HRRT 004/2012
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**ANDREW RONALD MACMILLAN**
	PLAINTIFF
AND	**NEW ZEALAND PAROLE BOARD**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Dr SJ Hickey, Member
Mr RK Musuku, Member

REPRESENTATION:
Mr AR MacMillan in person
Ms VJ Owen for Defendant

DATE OF DECISION: 31 January 2013

DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM

The application

[1] This is an application by the defendant that these proceedings be summarily dismissed ahead of trial on the grounds that the proceedings are clearly untenable as a matter of law.

[2] In *Mackrell v Universal College of Learning* High Court Palmerston North CIV2005-485-802, 17 August 2005 at [48] Wild J held that the Tribunal has a wide discretionary power to strike out or dismiss a proceeding brought before it and the exercise of this power will be appropriate in situations similar to those contemplated by High Court Rules, r 15.1.

[3] The principles to be applied are clear and well established. They are set out by Richardson P in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267:

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed …; the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material …; but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction …

[4] For more recent authority see *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [25] (Elias CJ) and [146] (Blanchard, McGrath and William Young JJ).

The facts

[5] Mr MacMillan was on 10 March 1989 convicted of murder and is serving a sentence of life imprisonment.

[6] In late June 2006 the New Zealand Parole Board received from the New Zealand Police a submission containing information about Mr MacMillan. On 26 June 2006 the Chairperson of the Board (Judge DJ Carruthers) made an order under s 13(3) of the Parole Act 2002 that the submission not be made available to Mr MacMillan.

[7] Mr MacMillan has twice requested access to the submission and has been twice refused. The first refusal by the New Zealand Parole Board was by letter dated 25 August 2006. That letter makes reference to the order under s 13(3) and to the savings provisions in s 7 of the Privacy Act 1993. By subsequent request dated 30 November 2010 Mr MacMillan sought various documents held by the New Zealand Parole Board, including the submission in question. The document was once again withheld under s 13(3) of the Parole Act.

[8] Mr MacMillan then complained to the Privacy Commissioner. Following an investigation the determination made was that the New Zealand Parole Board had a proper basis to withhold the information from Mr MacMillan and was not in breach of principle 6 of the Privacy Act nor had the New Zealand Parole Board caused any interference with privacy.

[9] Mr MacMillan has now instituted proceedings before the Tribunal seeking a copy of the submission from the Police and damages of $5,000 for mental anguish and hurt feelings. In his statement of claim he says that he believes that the submission from the Police is in part the reason why he has not been released on parole. He points out that if he does not know the content of the letter he is unable to rebut it.

The legislation

[10] Principle 6 of the information privacy principles confers a right to personal information:

> **Principle 6**
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> Access to personal information
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> (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—
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> (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.

[11] Although the entitlement conferred on an individual by subclause (1) of Principle 6, insofar as that subclause relates to personal information held by a public sector agency, is a legal right, it is not an absolute right. For present purposes there are two exceptions. First, there is the exception recognised by subclause (3) of Principle 6. That is, application of the Principle is subject to the provisions of Parts 4 and 5 of the Privacy Act.

[12] Second, it is expressly provided by s 7(2) of the Privacy Act that Principle 6 does not override any provision in any other Act that imposes a prohibition or restriction in relation to the availability of personal information or regulates the manner in which personal information may be obtained or made available:

7 Savings
(1) ...
(2) Nothing in principle 6 or principle 11 derogates from any provision that is contained in any other Act of Parliament and that—
(a) imposes a prohibition or restriction in relation to the availability of personal information; or
(b) regulates the manner in which personal information may be obtained or made available.

It is this second exception which has relevance to Mr MacMillan's case.

[13] The submission for the New Zealand Parole Board is that s 13(3) of the Parole Act is a provision which, in terms of s 7(2) of the Privacy Act, either imposes a prohibition or restriction in relation to the availability of personal information or regulates the manner in which personal information may be obtained or made available. It follows that in proceedings before this Tribunal under the Privacy Act Mr MacMillan is not able to rely on Principle 6 (access to personal information) to override the order made by Judge DJ Carruthers on 26 June 2006.

[14] To better understand this submission it is necessary to have regard to the relevant provisions of the Parole Act.

[15] Section 7 of the Parole Act stipulates that when making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Parole Board in every case is the safety of the community. The other guiding principles in s 7 are not "paramount" and require the Board to balance the interests of offenders with other competing interests. There is specific recognition that the rules of fairness require that offenders be provided with information about decisions that concern them and be advised how they may participate in decision-making that directly concerns them. But as can be seen from the text of s 7, this principle is not an absolute one and is subject to exceptions:

7 Guiding principles

(1) When making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is the safety of the community.
(2) Other principles that must guide the Board's decisions are—

(a) that offenders must not be detained any longer than is consistent with the safety of the community, and that they must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community; and

(b) that offenders must, subject to any of sections 13 to 13AE, be provided with information about decisions that concern them, and be advised how they may participate in decision-making that directly concerns them; and

(c) that decisions must be made on the basis of all the relevant information that is available to the Board at the time; and

(d) that the rights of victims (as defined in section 4 of the Victims' Rights Act 2002) are upheld, and submissions by victims (as so defined) and any restorative justice outcomes are given due weight.

(3) When any person is required under this Part to assess whether an offender poses an *undue risk*, the person must consider both—

(a) the likelihood of further offending; and

(b) the nature and seriousness of any likely subsequent offending.

[16] Sections 13 to 13AE of the Parole Act make comprehensive provision for the making of confidentiality orders and specify the circumstances in which such orders may be applied for and made. We do not intend to set out all of these provisions as it is sufficient for present purposes to refer to s 13 only:

13 General rules about information to be given to offenders

(1) The Board must take all reasonable steps to ensure that the information received by the Board on which it will make any decision relating to an offender is made available to the offender—

(a) at least 5 working days before the relevant hearing; or

(b) if that is not possible, as soon as practicable before the hearing.

(2) Despite subsection (1), the Board must ensure that—

(a) no information is given to the offender that discloses the address or contact details of any victim (as defined in section 4 of the Victims' Rights Act 2002) of the offender; and

(b) if any written submissions by a victim (as so defined) or any victim impact statements are shown to an offender, they are not retained by the offender.

(3) Despite subsection (1), the Board may, in exceptional circumstances, order that any information referred to in that subsection not be made available to an offender if, in the opinion of the relevant panel convenor, it would prejudice the mental or physical health of the offender, or endanger the safety of any person.

(4) Subsections (2) and (3) apply despite anything in the Official Information Act 1982 or the Privacy Act 1993.

(5) Information withheld under subsection (3) may be provided to the offender's counsel.

(5A) Subsection (1) does not apply to any information that may not be disclosed under a confidentiality order made under section 13AB.

(6) Information provided or shown to an offender under this section must be used only for the purpose of assisting the offender to make submissions to the Board.

(7) The Board must give a written copy of every order or determination to the offender who is the subject of the order or determination, along with information about how the offender may exercise any review or appeal rights that he or she has in relation to the order or determination.

(8) Any person who publishes information provided under this section in a form that identifies, or enables the identification of, a victim (as defined in section 4 of the Victims' Rights Act 2002) commits an offence and is liable on summary conviction to,—

(a) in the case of an individual, a term of imprisonment not exceeding 3 months or a fine not exceeding $2,000; and

(b) in the case of a body corporate, a fine not exceeding $10,000.

[17] It will be seen that while under s 13(1) the Board must take all reasonable steps to ensure that the information received by the Board on which it will make any decision relating to an offender is made available to the offender, subs (3) expressly stipulates that "despite" subs (1), the Board may, in exceptional circumstances, order that any information not be made available to the offender if, in the opinion of the relevant panel convenor, it would prejudice the mental or physical health of the offender, or endanger the safety of any person.

[18] The effect of s 13(4) is that where an "exceptional circumstances" order is made the decision to withhold information from the offender cannot be circumvented by deployment of the Privacy Act; an order that information not be made available to an offender cannot be the subject of collateral attack via Principle 6 of the information privacy principles. The Parole Act provisions are reinforced by s 7(2) of the Privacy Act which expressly recognises that nothing in Principle 6 derogates from a provision such as s 13(3) of the Parole Act because s 13(3) of the Parole Act imposes "a prohibition or restriction in relation to the availability of personal information" or "regulates the manner in which personal information may be obtained or made available". Principle 6 cannot be deployed to obtain access to information which is the subject of an order under s 13(3) of the Parole Act.

[19] It is therefore plain that once it is established that an order has been made under s 13(3) of the Parole Act, Mr MacMillan's proceedings must inevitably fail.

Application of the law to the facts

[20] Because it is necessary that the Tribunal satisfy itself that the document sought by Mr MacMillan is in fact a document to which a s 13(3) order relates the following procedure was prescribed by the Chairperson in his *Minute* dated 11 July 2012:

> **[4]** For the New Zealand Parole Board to succeed on a strike out application it will need to establish the s 13(3) order. It is plain that in doing so precautions must be taken to preserve the integrity of the order. At the same time the Tribunal must be able to satisfy itself that the document sought by Mr MacMillan is in fact the document to which the order relates. The proposal made by Ms Owen would not achieve that end as the Tribunal would see an order, but not the document to which it relates.
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> **[5]** The way forward is for the Tribunal to adopt "open" and "closed" processes, a 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.
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> **[6]** The "open" evidence will be the redacted document proposed by Ms Owen. It will be disclosable to Mr MacMillan. Simultaneously the Tribunal will receive the unredacted evidence as "closed" evidence. Mr MacMillan will not have access to that evidence.
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> **[7]** Because a successful application to strike out will summarily terminate these proceedings it would be preferable for the s 13(3) order to be established by way of affidavit from an officer of the New Zealand Parole Board Administrative Support Service. That affidavit will be filed in two separate and distinct versions – the open version which is to be served on Mr MacMillan and the closed version for viewing by the Tribunal alone.
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> **Directions**
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> **[8]** The following directions are made:
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> > **[8.1]** Any application by the New Zealand Parole Board for these proceedings to be struck out are to be filed and served by 5pm on Friday 10 August 2012.
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> > **[8.2]** The affidavit in support of that application is to be filed in two versions. First, a redacted open version and second, an unredacted closed version. The open version is to be filed and served by 5pm on Friday 10 August 2012. The closed version is not to be made available to Mr MacMillan. It is to be filed with the Tribunal for the Tribunal alone to see. It is not to be made available to Mr MacMillan or any other person and is to be withheld from disclosure should any person apply to search the Tribunal file.
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> > **[8.3]** The submissions in support of the strike out application are to be filed and served by 5pm on Friday 10 August 2012.
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> > **[8.4]** Any evidence and submissions by Mr MacMillan in opposition to the strike out application are to be filed and served by 5pm on Friday 7 September 2012.

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[21] The Tribunal subsequently received two affidavits by Mr AM Spierling in support of the application to strike out. The first annexes a redacted version of the order made by Judge DJ Carruthers on 26 June 2006. The second annexes an unredacted closed version of the order together with an unredacted closed copy of the Police submission. We are satisfied by these affidavits that the order made on 26 June 2006 does relate to the document sought by Mr MacMillan, namely the submission by the New Zealand Police. For the purpose of this decision we intend setting out only the redacted (open) version of the *Minute* of Judge DJ Carruthers made on 26 June 2006. It provides:

> As a preliminary matter, the Board has today received a written submission from Detective Senior Sergeant [balance of paragraph redacted].
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> The Board is of the view that in this case there are exceptional circumstances and is satisfied that showing it to the offender may endanger the safety of [redacted].
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> Accordingly, the submission is withheld from Mr MacMillan pursuant to Section 13(3) of the Parole Act 2002.

[22] Because it is not possible for this Tribunal to go behind an order made under s 13(3) of the Parole Act the claim by Mr MacMillan must inevitably fail. As a matter of law he is not entitled under Principle 6 to have access to the information to which the Parole Board order relates. His complaint that if he does not know the content of the letter he is unable to rebut it is not a complaint which can be made to this Tribunal. The whole point of the relevant provisions of ss 7 and 13 of the Parole Act is that the paramount consideration for the Board in every case is the safety of the community. The general principle that offenders be provided with information about decisions that concern them is expressly qualified by the jurisdiction of the Board to make an order under s 13(3) that any information not be made available to the offender. This is entirely consistent with the safety of the community being the paramount consideration. Once an order is made under s 13(3) of the Parole Act, Principle 6 of the information privacy principles has no application to the information which is the subject of the order.

[23] The proceedings brought by Mr MacMillan under Principle 6 of the Privacy Act are clearly untenable as a matter of law and they must be struck out.

Formal order

[24] For the foregoing reasons the decision of the Tribunal is that the statement of claim is struck out.

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Mr RPG Haines QC	**Dr SJ Hickey**	**Mr RK Musuku**
Chairperson	**Member**	**Member**