(1) INTERIM ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF PLAINTIFF

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 49**

	Reference No. HRRT 006/2014
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**WVU**
	PLAINTIFF
AND	**REAL ESTATE AGENTS AUTHORITY**
	FIRST DEFENDANT
AND	**VALUER-GENERAL**
	SECOND DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Mr BK Neeson, Member

REPRESENTATION:
Plaintiff in person
Ms K Lawson-Bradshaw for first defendant
Mr J Burns for second defendant

DATE OF DECISION: 10 October 2014

DECISION OF TRIBUNAL ON JURISDICTION OBJECTION BY SECOND DEFENDANT

Background

[1] In 2013 the plaintiff entered a plea of guilty to a charge of misconduct brought before the Real Estate Agents Disciplinary Tribunal under s 73(a) of the Real Estate Agents Act 2008. As a consequence he was fined $1,500 and his licence cancelled for six months.

See *Real Estate Agents Authority v Mr D* [2013] NZREADT 23. In a subsequent decision given on 10 May 2013 a non-publication order was made suppressing the plaintiff's name and any details likely to identify him. See *Real Estate Agents Authority v Mr D* [2013] NZREADT 36.

[2] The plaintiff is also a registered valuer under the Valuers Act 1948 and has held an Annual Practising Certificate from 1994 up to and including 2013.

[3] On 22 August 2013 the Valuer-General sent a letter to the Real Estate Agents Authority (REAA) advising that under s 32(1) of the Valuers Act 1948 he was required to investigate a complaint made against the plaintiff. That complaint was based on the same circumstances which had led to the proceedings before the Real Estate Agents Disciplinary Tribunal.

[4] By letter dated 3 September 2013 the REAA sent a letter to the Valuer-General advising that the plaintiff had voluntarily surrendered his licence and enclosing the REAA complaint file, stating that the information was being provided in terms of Information Privacy Principle 11(e)(i).

[5] In the present proceedings the plaintiff alleges that this disclosure of information by the REAA under Principle 11 was wrong and that there has been an interference with his privacy.

The Valuer-General and the jurisdiction issue

[6] The Certificate of Investigation dated 12 February 2014 issued by the Privacy Commissioner identifies the REAA as the only agency investigated as a consequence of the complaint made by the plaintiff. In a subsequent letter dated 9 April 2014 the Privacy Commissioner has alerted the Tribunal to the question whether there is jurisdiction over that part of the case against the Valuer-General given that the investigation by the Commissioner focused solely on the disclosure of information by the REAA:

> However, there is one difficulty with jurisdiction. The Valuer General has been named as the second defendant but our investigation did not examine the actions of the Valuer General in collecting information. We did not consider the Valuer General's request for information about [the plaintiff] to the Real Estate Agents Authority amounted to an interference with privacy under the Privacy Act. Our investigation solely focused on the disclosure of [the plaintiff's] personal information by the Real Estate Agents Authority.

[7] In a detailed statement of reply filed by the Valuer-General the jurisdiction point is specifically pleaded as an affirmative defence.

[8] At a teleconference convened by the Chairperson on 12 August 2014 attention was drawn to the decision of the Tribunal in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation* [2014] NZHRRT 1 (30 January 2014) in which the Tribunal examined at some length the effect of ss 82 and 83 of the Privacy Act 1993 on the question of jurisdiction.

[9] In response the plaintiff told the Chairperson that he (the plaintiff) needed time to take legal advice on the affirmative defences raised by the Valuer-General and the Tribunal's jurisprudence. He asked the Tribunal not to determine the issue until he had had such opportunity. Mr Burns did not oppose the request but expressed concern that the Valuer-General was being put to unnecessary expense in defending proceedings which should not have been brought.

[10] To allow the plaintiff full opportunity to be heard the Chairperson directed Mr Burns to file a succinct memorandum summarising the grounds on which the jurisdiction of the Tribunal was disputed and the plaintiff would then have opportunity to respond. The timetable directions were as follows:

> **Directions**
>
> **[24]** The following directions are made:
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> > **[24.1]** Submissions by the Valuer-General on the jurisdiction of the Tribunal are to be filed and served by 5pm on Friday 15 August 2014.
> >
> > **[24.2]** Written submissions by [the plaintiff] on the jurisdiction issue are to be filed and served by 5pm on Friday 29 August 2014.
> >
> > **[24.3]** Any reply submissions by the Valuer-General are to be filed and served by 5pm on Friday 5 September 2014.
> >
> > **[24.4]** Any application (and supporting documentation) by [the plaintiff] for a non-publication order are to be filed and served by 5pm on Friday 26 September 2014.
> >
> > **[24.5]** If the Real Estate Agents Authority wishes to oppose the application it is to file and serve its submissions and evidence by 5pm on Friday 10 October 2014.
> >
> > **[24.6]** A further teleconference is to be convened at 10am on Friday 24 October 2014 to review the case in the light of the foregoing timetable steps and to determine what then needs to be done to allow the case to be set down for hearing.
> >
> > **[24.7]** Leave is reserved to all parties to make further application should the need arise.

[11] The submissions by Mr Burns were received on 14 August 2014.

The second defendant's challenge to jurisdiction

[12] The second defendant submits that while in the present proceedings the Tribunal has jurisdiction to hear the plaintiff's complaint against the REAA, it has no jurisdiction in relation to the second defendant because:

> **[12.1]** The second defendant is not a person in respect of whom an investigation was conducted by the Privacy Commissioner.
>
> **[12.2]** A complaint has been made in relation to the actions referred to in the statement of claim where conciliation under s 74 of the Privacy Act has not resulted in settlement.

[13] These assertions have not been contested by the plaintiff.

[14] By email dated 29 August 2014 the plaintiff advised that the jurisdiction objection is conceded and that he will be approaching the Privacy Commissioner to now investigate the complaint made against the Valuer-General:

> I have consulted by Counsel, Mr Magnus Macfarlane of Napier, regarding this matter. We are both somewhat mystified having made a complaint to the Privacy Commission, naming both the REAA and the Valuer General, about my private information being in the hands of the latter that the latter cannot be made party to the HRR Tribunal's decision on the Privacy Commissioners investigation and report outcome. This being so I have asked the Privacy Commissioner to do what I originally asked and to investigate the complaint as involving the Valuer General as the recipient and holder of my private information so as to find a way in which the Valuer General can then be bound by any HRR Tribunal's decision forthcoming.
>
> If that means the VG should be allowed to drop out now, I accept that be so for jurisdiction reasons that have been put to us by the HRRT and according to the authority that I was asked to look at (and of course, took advice on as well).

[15] This concession is determinative of the outcome of the objection to jurisdiction. We are nevertheless required to outline our reasons for upholding the submissions for the Valuer-General.

Jurisdiction – discussion

[16] The circumstances in which the Tribunal has jurisdiction to hear matters under the Privacy Act are not unlimited. Indeed they are tightly circumscribed by ss 82 and 83 of the Act. This is fully explained in *Director of Human Rights Proceedings [NKR] v Accident Compensation Corporation (Strike Out Application)* [2014] NZHRRT 1 (30 January 2014) (hereinafter *[NKR]*) at [18] to [42] and no point is served by repeating what is said there. It is sufficient to note that the scheme of the Act is that in the first instance complaints must be dealt with by the Privacy Commissioner. Proceedings before the Tribunal are permitted by ss 82 and 83 only where an investigation has been conducted by the Commissioner under Part 8 or where conciliation (under s 74) has not resulted in settlement. Before either ss 82 and 83 are engaged the following statutorily prescribed steps must be taken (see *[NKR]* at [25]):

> **[16.1]** There must be a complaint alleging that an action is or appears to be an interference with the privacy of an individual (s 67(1)).
>
> **[16.2]** The Privacy Commissioner must decide whether to investigate the complaint, or to take no action on the complaint (s 70(1)).
>
> **[16.3]** The Privacy Commissioner must advise both the complainant and the person to whom the complaint relates of the procedure that the Commissioner proposes to adopt (s 70(2)).
>
> **[16.4]** The Privacy Commissioner must inform the complainant and the person to whom the investigation relates of the Commissioner's intention to make the investigation (s 73(a)).
>
> **[16.5]** The Privacy Commissioner must inform the person to whom the investigation relates of:
>
> > **[16.5.1]** The details of the complaint (if any) or, as the case may be, the subject-matter of the investigation; and
> >
> > **[16.5.2]** The right of that person to submit to the Commissioner, within a reasonable time, a written response in relation to the complaint, or as the case may be, the subject-matter of the investigation.

[17] While it is correct that satisfaction of the statutory process and in particular, of s 73, can occur by necessary implication (*[NKR]* at [27]) such implication must be "necessary" as compliance with prescribed statutory steps going to jurisdiction must not be easily left to be inferred. In the present case there is no room for implication or inference. The unchallenged evidence is that the second defendant was not aware of the complaint to the Privacy Commissioner or of the Commissioner's investigation until he was served by the Tribunal with the present proceedings.

[18] As stated in *[NKR]* at [29], the critical and determinative point is whether the Commissioner complied with the mandatory duty in ss 70(2) and 73 to:

> **[18.1]** Notify the person to whom the complaint relates that the Commissioner intends making an investigation into the matter; and

> **[18.2]** Inform that person of the details of the complaint and of the right of that person to submit a written response to the complaint.

[19] On the facts neither step was taken.

Conclusion

[20] It follows that the Tribunal does not, in the present proceedings, have jurisdiction to hear and determine the allegation that the second defendant has interfered with the plaintiff's privacy.

Jurisdiction – ruling of limited effect

[21] Our conclusion on jurisdiction does not mean that the plaintiff is without remedy as against the second defendant. It would be open to the plaintiff to make a complaint to the Privacy Commissioner under ss 67 and 68 of the Privacy Act that the second defendant has interfered with the plaintiff's privacy.

[22] Whether such complaint should be made is not for the Tribunal to say.

Whether non-publication order to be made

[23] At the teleconference on 12 August 2014 the plaintiff foreshadowed an application for name suppression. The *Minute* issued by the Chairperson on 12 August 2014 stipulated that any application and supporting documentation were to be filed and served by 5pm on Friday 26 September 2014.

[24] On 26 September 2014 the plaintiff filed the same papers submitted to the Real Estate Agents Disciplinary Tribunal in April 2013.

[25] By memorandum dated 6 October 2014 the REAA opposed the application, pointing out that the materials relied on by the plaintiff are well out of date and in any event establish no case for name suppression. Reliance was placed on *Haydock v Gilligan Sheppard* HC Auckland, CIV-2007-404-2929, 11 September 2008 at [31] where Harrison J stated:

> [31] … The legislature and the Courts are well aware that the hearing of a case in public requires individuals to give evidence which may be embarrassing or humiliating. Nevertheless, the public interest, demanding the fair and efficient administration of justice, consistently trumps any personal features. A party who chooses to initiate a hearing which Parliament stipulates is to be held in public must take all the unpalatable consequences, not only of an adverse substantive decision but also on publicity and costs.
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> [32] The last word on this subject belongs, as Ms Grace points out, to Lord Woolf CJ in *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 at 978 as follows:
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> > ... It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation. In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule.

[26] In our view no persuasive case for name suppression is made out on the now dated materials relied on by the plaintiff. That having been said, however, were no order to be

made by this Tribunal, the non-publication order made by the Real Estate Agents Disciplinary Tribunal on 10 May 2013 could be substantially undermined and its efficacy put at risk. As a matter of judicial comity such outcome is inherently undesirable. Name suppression for an unmeritorious applicant is sometimes required to protect the interests of others. For a recent illustration of this principle see *Dr X v Director of Proceedings* [2014] NZHC 1798, [2014] NZAR 1055 where name suppression for Dr X was required to ensure that the suppression orders made in favour of his wife could be properly exercised.

[27] The submissions for the REAA do not address this point.

[28] In the circumstances we believe that by the slimmest of margins the plaintiff has established a case for interim name suppression. Whether such order is to be made permanent is an issue to be argued either on the prior application of the REAA or at the substantive hearing. Given, however, that the plaintiff has intimated he will be making a complaint to the Privacy Commissioner against the Valuer-General we make it a condition of the interim order that in relation to communications passing between the plaintiff, the Privacy Commissioner, the REAA, the Valuer-General and the Tribunal, the suppression of the plaintiff's name is not to apply.

DECISION

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

> **[29.1]** In the present proceedings the Tribunal has no jurisdiction to hear that part of the plaintiff's claim which alleges that the second defendant interfered with the plaintiff's privacy.
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> **[29.2]** The second defendant is dismissed as a party to these proceedings.

[30] As further case management directions will be required we leave it to the Chairperson to convene such further teleconferences as may be necessary.

NON-PUBLICATION ORDERS

[31] An interim order is made prohibiting publication of the name, address and any other details which might lead to the identification of the plaintiff. Such order is made subject to the following terms:

> **[31.1]** The order is not to apply to communications passing between the plaintiff, the Privacy Commissioner, the REAA, the Valuer-General and the Tribunal.
>
> **[31.2]** Leave is granted to the Privacy Commissioner, the REAA and the Valuer-General to apply for the order to be varied or rescinded.
>
> **[31.3]** There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.
>
> **[31.4]** Leave is reserved to the parties to seek further directions if and when the need arises.

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Mr RPG Haines QC	**Mr GJ Cook JP**	**Mr BK Neeson**
Chairperson	**Member**	**Member**