(1) PERMANENT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND ANY OTHER IDENTIFYING PARTICULARS OF SERVICE USERS OTHER THAN PLAINTIFF

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2019] NZHRRT 52**

	Reference No. HRRT 015/2017
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**EAMON HENNING MARSHALL**
	Plaintiff
AND	**IDEA SERVICES LIMITED**
	Defendant

CONT.

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson

REPRESENTATION:
Mr GW Marshall as agent for his son
Ms I Reuvecamp for defendant
Ms A Harding for NZME Publishing Ltd

DATE OF HEARING: **Heard on the papers**

DATE OF DECISION: **2 December 2019**

DECISION DECLINING APPLICATION BY DEFENDANT FOR INTERIM NON-PUBLICATION ORDERS[1]

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[1] [This decision is to be cited as: *Marshall v IDEA Services Ltd (Application for Interim Non-Publication Orders)* [2019] NZHRRT 52]

	Reference No. HRRT 029/2018
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**EAMON HENNING MARSHALL**
	Plaintiff
AND	**IDEA SERVICES LIMITED**
	Defendant
	Reference No. HRRT 041/2018
UNDER	**THE HEALTH AND DISABILITY COMMISSIONER ACT 1994**
BETWEEN	**EAMON HENNING MARSHALL**
	Plaintiff
AND	**IDEA SERVICES LIMITED**
	Defendant

[1] These three proceedings will be heard at the Napier District Court from 2 December 2019 to 11 December 2019.

[2] Two of the cases have been brought under the Privacy Act 1993. In those proceedings it is alleged IDEA Services Limited (IDEA Services) breached the Health Information Privacy Code 1994 (HIPC). The third proceeding has been brought under the Health and Disability Commissioner Act 1994 (HDCA). The allegation is that IDEA Services breached the Code of Health and Disability Services Consumers' Rights (Code). In broad terms the issues raised by the proceedings are:

HRRT015/17	Amended statement of claim (29 March 2019)	Whether IDEA Services breached HIPC: • Rule 6 (access to personal health information) • Rule 8 (accuracy of health information to be checked before use)
HRRT029/18	Amended statement of claim (15 February 2019)	Whether IDEA Services breached HIPC: • Rule 6 • Rule 8
HRRT041/18	Amended statement of claim (15 February 2019)	Whether IDEA Services breached the Code: • Right 4(1) (right to have health services provided with reasonable care and skill) • Right 4(2) (right to have health services provided that comply with legal, professional, ethical, and other relevant standards).

THE APPLICATION FOR INTERIM NON-PUBLICATION ORDERS

[3] By application dated 19 November 2019 IDEA Services has sought interim orders prohibiting the making public of the names or of any identifying details relating to any IDEA Services or IHC employees or independent contractors. The application is opposed by Mr Marshall and by NZME Publishing Limited.

[4] The grounds on which the interim orders are sought are that it is desirable or in the interests of justice that non-publication orders are made.

[5] The application is supported by two affidavits.

[6] The first is by Mr AJ Procter, General Manager Corporate Services, IHC. He deposes that Eamon's father, Glenn Marshall (who is acting as Eamon's representative) is likely to use these proceedings as a platform to make public unsubstantiated allegations about certain staff of or people contracted to work with, IHC and IDEA Services. It is anticipated these allegations will be unrelated to the claims before the Tribunal. Mr Procter has annexed to his affidavit 31 documents written either by Mr Marshall or written about Mr Marshall and which, in the submission of IDEA Services, establish that since early

2016 Mr Marshall has pursued an unabated campaign against IDEA Services, IHC and certain staff of and people contracted to work with IDEA Services and IHC.

[7] Mr Procter also says it is believed by IDEA Services and IHC that allowing Mr Marshall to make such allegations in a public forum during the course of the hearing when the Tribunal has not yet had the opportunity to make any findings would be very distressing for the individuals concerned and could significantly and detrimentally impact their reputations.

[8] The second affidavit is by Dr O Webb, a registered clinical psychologist. Her involvement with Eamon's care was very limited and ceased upon the provision of an opinion in April 2016. She deposes, however, that in the last two years Mr Marshall has made a number of complaints and commenced a number of proceedings against her in a variety of jurisdictions. She says none of his complaints or claims have been upheld. However, she feels extremely harassed as a result of his campaign and has found the last two years highly distressing as a result of his actions. One factor which has greatly aggravated her anxiety is that Mr Marshall's various complaints and proceedings have often been accompanied by reports in the news media which, so Dr Webb believes, Mr Marshall has arranged. It is her impression he seeks to use the news media to damage the reputations of persons involved in his son's case, regardless whether there is a legitimate basis to do so.

[9] An example given by Dr Webb is that after the Psychologists Board had dealt with a complaint by Mr Marshall against her, Mr Marshall provided selected documentary material from that process to a news media organisation for the purpose of an article about Dr Webb. Mr Marshall did this despite being notified by the Board that the process was confidential and the material was not to be published. After the Board intervened with the news media organisation the article was withdrawn.

[10] Dr Webb believes that should Mr Marshall be permitted to pursue his media campaign against her it would be impossible for her to fairly respond without further aggravating matters, including her own stress. She considers that the media coverage that Mr Marshall seeks for the present proceedings will cause unfair damage to her reputation, a matter which is of deep concern to her. She anticipates that if a suppression order is not made Mr Marshall will continue to seek to use the news media to cause personal distress and unjustified reputational damage to her and to others.

[11] In its supporting submissions IDEA Services stresses that it has not sought orders for the hearing to be held in private. It has applied for the suppression orders on an interim basis to avoid unfair publication of unsubstantiated allegations.

[12] In his submissions in opposition to the application Mr Marshall describes Mr Procter's affidavit as "rambling and largely irrelevant". He also alleges that parts of Dr Webb's affidavit are factually inaccurate and other parts are misleading.

[13] On one view the language used by Mr Marshall in his submissions reinforces the concerns held by IDEA Services. In fairness Mr Marshall has expressly accepted that at times in the last four years his conduct has been less than exemplary and acknowledges he has invited the media to attend the hearings before the Tribunal. However, he says that if in the course of the hearing he begins making comments not relevant to the claim he expects (and accepts) the Chairperson of the Tribunal will need to intervene to "bring [him] back into line".

THE RELEVANT LAW

Jurisdiction

[14] By virtue of s 95 of the Human Rights Act 1993 (HRA) and s 89 of the Privacy Act the Chairperson has jurisdiction to make an interim order if satisfied the order is necessary in the interests of justice to preserve the position of a party pending a final determination of the proceedings. Section 95(1) provides:

> **95 Power to make interim order**
>
> (1) In respect of any matter in which the Tribunal has jurisdiction under this Act to make any final determination, the Chairperson or a Deputy Chairperson of the Tribunal shall have power to make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings.

[15] The relevant principles applicable to interim order applications under s 95 were summarised in *IDEA Services Ltd v Attorney-General (No. 4) – Interim Order Application* [2013] NZHRRT 24 (10 June 2013) at [50] to [52]:

> **[50]** As discussed in *Deliu v New Zealand Law Society* [2012] NZHRRT 1 (8 February 2012) there are similarities as well as differences between s 95 of the HRA and s 8 of the JAA 72. As the differences are significant, s 95 is to be interpreted in its own terms although the established case law under the JAA 72 is a useful point of reference:
>
> > **[50.1]** Being "satisfied" in this context simply means that the Chairperson has made up his or her mind that the interim order is necessary in the interests of justice to preserve the position of one of the parties pending a final determination of the proceedings. The term "satisfied" does not require that the Chairperson should reach his or her judgment having been satisfied that the underlying facts have been proved to any particular standard. See by analogy *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [26] (Elias CJ) and [96] (Blanchard, Tipping and McGrath JJ).
> >
> > **[50.2]** The term "necessary" means reasonably necessary. See by analogy *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430 per Cooke J.
> >
> > **[50.3]** As to "the interests of justice" it was held in *X v Police* HC Auckland AP 253/91, 9 October 1991 by Barker J that the phrase "interests of justice" is a broad expression. There is no need in the present context for elaboration.
> >
> > **[50.4]** There is a clear distinction between preserving the position of a party on the one hand and improving it on the other. It is clear from s 95(1) of the HRA and from s 8(1) JAA 72 that the position of a plaintiff cannot be improved: *Movick v Attorney-General* [1978] 2 NZLR 545 (CA) at 551 line 35; *Nair v Minister of Immigration* [1982] 2 NZLR 571 at 575-576 (Davison CJ) and more recently *Squid Fishery Management Co Ltd v Minister of Fisheries* (2004) 17 PRNZ 97 at [29] (Ellen France J).]
> >
> > **[50.5]** The phrase "the position of the parties" must in this context be read as including the singular "party". See Interpretation Act 1999, s 33 and Burrows and Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 428. Were the position otherwise, an interim order could seldom, if ever be made, as it is difficult to envisage circumstances in which an interim order could be couched in terms which preserved, simultaneously, the position of both parties to the proceedings.
> >
> > **[50.6]** The phrase "pending a final determination of the proceedings" in the context of a case where a reference has been made from the Tribunal to the High Court under s 92R HRA means pending the final determination of the Tribunal under s 92U ie after the decision of the High Court on remedies has been remitted to the Tribunal; or alternatively, upon the reference coming to an end for some other reason and the Tribunal then making its final determination.

Non-publication orders, the open justice principle and freedom of expression

[16] Where interim name suppression orders are sought exercise of the discretion in HRA, s 95 must take into account that:

> **[16.1]** HRA, s 107 explicitly provides every hearing of the Tribunal must be held in public unless it is desirable for the hearing to be closed or for a non-publication order to be made.
>
> **[16.2]** Because the Tribunal is bound by the New Zealand Bill of Rights Act 1990 (see s 3) it is necessary that the Tribunal consider whether in the circumstances of the particular case the interim suppression order sought is a reasonable limitation on the s 14 right to freedom of expression and can be demonstrably justified in a free and democratic society (the test provided by s 5). Whether or not a suppression order is a limitation on freedom of expression that complies with s 5 will depend on the circumstances of the particular case. See McGrath, William Young and Glazebrook JJ in *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [157].

[17] For a recent discussion of these principles in the context of final suppression orders see *Director of Proceedings v Smith (Application for Final Non-Publication Orders)* [2019] NZHRRT 32 at [97] to [102] and *Director of Proceedings v Brooks (Application for Final Non-Publication Orders)* [2019] NZHRRT 33 at [87] to [92].

Freedom of speech and open justice

[18] The fundamental principle (reflected in HRA, s 107) is that justice is to be administered openly and publicly; and that any departure from that principle must depend not on judicial discretion but on the demands of justice itself. See *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at 123.

[19] The application of this principle is illustrated by the decision in *Gravatt v Auckland Coroner's Court* [2013] NZHC 390, [2013] NZAR 345 where a medical student had died of meningococcal disease. A Coroner investigating the circumstances of his death made multiple recommendations regarding systemic change to the assessment and treatment of patients. The Coroner had also ruled that the identities of the health professionals responsible for the student's care on the day he died should be prohibited from publication as it would effectively punish individuals for an overwhelmed and over-stressed system. The student's father challenged the ruling as being violative of freedom of expression and open justice.

[20] Upholding the challenge Whata J at [43] held that the proper observance of freedom of expression (and open justice) demands a three-step threshold inquiry. First, there must be express statutory authority to make the suppression order. Second, that authority must be, where possible, interpreted and exercised consistently with freedom of expression. Third, even where those two qualifying conditions exist, any discretionary infringement of that freedom must be justified.

[21] Relevant to the position of Dr Webb it is to be noted that while the Court accepted that publication of names and unfair media attention may deter health professionals from participation in the health system, it was not accepted that such generalised fear might lawfully justify breach of freedom of speech or open justice:

> [61] The speech prohibited by the Coroner from publication is the identification of names of affected health professionals without disproportionate criticism of them (if any). The non critical nature of the speech properly reflects the statutory role of the Coroner. I accept that publication of names might be very distressing to those named, especially when combined with wide media coverage of an inherently sensitive subject matter. But a concern or fear held by other health professionals about being named cannot by itself provide a justifiable basis for limiting freedom of speech. More specifically, to the extent that this fear deters participation in the health system by health professionals, it reflects an unreasonable intolerance to free speech that could not possibly have been contemplated by Parliament as a relevant impact on "public order". The position might be different had the speech involved heavy and disputed criticism, or breach of privacy or confidence. But a generalised fear about being named is not a sufficient condition under this head. The Coroner therefore erred when he placed emphasis on this deterrence effect. [Footnote citations omitted]

[22] While the Court dismissed the suggestion that a generalised fear about being named was sufficient to justify a non-publication order it was accepted at [64] that health professionals plainly have legitimate, justiciable and actionable interests in protecting their privacy and reputation. A Coroner could therefore weigh those interests in the mix when considering the interests of justice. The value attached to those interests was a matter for the Coroner. Privacy, in this context was taken to refer to personal facts in respect of which there is a reasonable expectation of privacy. A general claim to privacy would not be sufficient but the more intimate the facts, the more compelling the case would be for limits to be placed on freedom of speech and open justice principles. See [72]. In the present case it is to be noted that the privacy claim by Dr Webb relates to her professional life and does not include intimate personal facts.

[23] The High Court judgment stresses that a general fear of criticism does not meet the necessary threshold:

> [81] For completeness, I am not suggesting that work place privacy cannot provide a basis for suppression on personal privacy grounds. But there must be some aspect of that information that justifies suppression; for example, personal details or work place criticism altogether unrelated to the matters before the Coroner that if revealed could cause embarrassment to the affected person. A real prospect of improper pressure or harassment might also qualify as a legitimate reason to prohibit publication. But a general fear of criticism does not meet the necessary threshold.

The evidence by Dr Webb does not satisfy this test.

[24] The decision in *Matenga v Dunedin Coroner's Court* [2014] NZHC 2994, [2015] NZAR 289 can be noted as authority for the proposition that it is relevant to inquire whether there is an appropriate method of addressing an applicant's concerns in some other way. That is other than restricting the right to freedom of expression. Or as expressed by McGrath J in *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [106]:

> Consideration must also be given to whether there are other methods of addressing the conflict with free speech rights than the offence provision in question …

APPLICATION OF THE LAW TO THE FACTS

The evidence – analysis

[25] The submissions for NZME Ltd make the following points:

[25.1] The application for non-publication is made in respect of a nebulous group of employees, ex-employees and contractors who have been involved in the complaints as to Eamon's care, stretching back some years. With the exception of Dr Webb, it is unclear exactly to whom IDEA Services intends the order to apply.

[25.2] The application lacks specificity and there is an absence of evidence as to the adverse consequences were there to be publication of the (largely unspecified) names. This supports the submission that the orders sought should not be granted.

[25.3] While there is no doubt the affidavit evidence of Dr Webb and of Mr Proctor illustrate a *personal* desirability for non-publication, such is insufficient for the purpose of HRA, s 107. No evidence is given as to how publication of names will undermine the administration of justice or why it would be desirable from that perspective to apply such broad suppression.

[25.4] Mr Proctor's affidavit does not provide any evidence of any specific adverse circumstances which would arise from publication of the names of those related to this matter and again it is noted that these individuals are not clearly specified in the application or in the evidence:

> **[25.4.1]** Mr Proctor's evidence sets out correspondence from Mr Marshall over several years to various persons. The content of this correspondence, while undoubtably robust, is not evidence of any adverse consequences to those named in the correspondence, should their names be published in respect of the substantive matters before the Tribunal.
>
> **[25.4.2]** Further, while not specifically named in the application or evidence, NZME submits that Mr Ralph Jones in particular should be able to be named in these proceedings. Mr Jones has already been linked to Eamon's complaints in the media. Further, as Chief Executive of IHC, Mr Jones is the head of IHC and IDEA Services and should be subject to scrutiny in this role.

[25.5] Dr Webb's affidavit states that she considers that being named would cause her stress and "cause unfair damage to [her] reputation". As to this:

> **[25.5.1]** Dr Webb's involvement in the substantive matter before the Tribunal is not central to Eamon's case and any reporting of her involvement would therefore likely be ancillary.
>
> **[25.5.2]** Dr Webb has been referred to briefly in a previous interlocutory application related to these matters. See *Marshall v IDEA Services Ltd (Strike-Out Application)* [2019] NZHRRT 21 at [22]. It is already a matter of public record that she is tangentially involved.

[26] In my view each of these submissions is fully justified and are adopted by the Tribunal. The overarching point is that it is inherently undesirable that a suppression order be couched in terms which are so vague and non-specific as to leave the parties, the public and the media in a position where they cannot clearly identify whether publication of a name or detail would be in breach of the order. This, in turn, underlines the evidentiary weaknesses of the application. My conclusion is that the evidence placed before the Tribunal in support of the application for interim non-publication orders falls far short of establishing that the orders sought are necessary in the interests of justice and to preserve the position of IDEA Services pending a final determination of the proceedings.

Media and the Tribunal

[27] It would appear the real concern of IDEA Services is that there is a danger the media will not responsibly report the proceedings before the Tribunal, meaning there is a high risk that sensational and unsubstantiated allegations made by Mr Marshall during the course of the proceedings will be reported. But as pointed out by the submissions for NZME Ltd, the press is not an agent for Mr Marshall; nor does he have editorial control over content created by media. Ethical considerations require fair and balanced reporting, including seeking comment from those with opposing views and/or making it clear where, during proceedings, allegations are untested and therefore not fact.

[28] The point is already reflected in the Tribunal's jurisprudence. See most recently *Tucker v Real Estate Agents Authority (Application for Closed Hearing)* [2019] NZHRRT 49 at [27] where the Tribunal said:

> [27] … The Tribunal would be overreaching itself were it to order a closed hearing to forestall the bare possibility that media reporting of the proceedings might be considered by one or other of the parties to be either unfair or unbalanced.

[29] Although these comments were made in the context of an application for a closed hearing, the principle has equal application where interim suppression orders are made.

[30] The Tribunal has similarly rejected a submission that the terms which can be set for the media to be granted access to the Tribunal's file can be used to found an enforceable right to the fair and accurate reporting of proceedings. See *IHC New Zealand v Ministry of Education (Non-Party Access No. 2)* [2014] NZHRRT 20 at [16].

[31] In the result while there remains a bare possibility that media reporting of the present proceedings might be considered by one or other of the parties or by Dr Webb to be either unfair or unbalanced, that on its own cannot justify the grant of an interim non-publication order.

Whether there are other means to address the conflict between free speech rights and the right of the defendant to a fair hearing

[32] The decisions in *Morse v Police* and *Matenga v Dunedin Coroner's Court* underline that when addressing the conflict between free speech rights and the right to a fair hearing in the context of suppression orders it is necessary to consider whether there is some other way in which the conflict between rights or interests can be reconciled or addressed.

[33] In the present case there is a clear alternative to the making of suppression orders, namely the disciplined restriction of Mr Marshall to the issues relevant to the case and the evidence before the Tribunal. This is amplified in the following paragraph.

[34] The fears expressed by Mr Procter and Dr Webb relate to the potential harm which might be caused by allegations made by Mr Marshall in the course of the hearing, being allegations which are not based on evidence before the Tribunal or which are not relevant to the issues to be determined by the Tribunal. From my acquaintance with the proceedings since they were first filed with the Tribunal and with the evidence as now filed it would appear that most, if not all of the matters deposed to by Mr Procter and by Dr Webb will be irrelevant to the issues to be determined by the Tribunal and that vigilant policing of Mr Marshall's evidence, submissions and comments during the hearing will go a long distance to ensure that unfair, extravagant and unsubstantiated allegations are disallowed. Mr Marshall having himself acknowledged that his conduct over the last four

years has been less than exemplary, expressly accepts (see his written submissions dated 19 November 2019) that:

> In the event that I were to begin making comments "not relevant to the claim" then Mr Haines can bring me back into line.

[35] In these circumstances the freedom of expression rights guaranteed to Mr Marshall and to representatives of the press will be preserved while at the same time protecting the interests of IDEA Services, its employees and contractors.

Open justice – re-emphasised

[36] It is necessary to emphasise that the open administration of justice will result in embarrassing and damaging facts coming to light. Such considerations have never been regarded as a reason for the closure of the courts or the issue of suppression orders. See *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [14] where the Supreme Court cited with apparent approval the following passage taken from the judgment of Kirby P in *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 142-143:

> It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms: … A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

[37] As noted in *Director of Proceedings v Smith (Application for Final Non-Publication Orders)* [2019] NZHRRT 32 at [130]:

> [130] Embarrassment, invasions of privacy or damage by publicity to proceedings (which would include damage to reputation, standing and credibility) are not sufficient to justify name suppression. Such interests are sacrificed to the greater public interest in adhering to an open system of justice. These factors are, however, of potential relevance to the overall assessment of whether a suppression order is necessary to secure the proper administration of justice in the particular proceedings.

[38] Given the nature of the complaints made on behalf of Eamon the public have a legitimate interest in being informed about those complaints and the processes of IDEA Services and IHC. Both organisations provide services to vulnerable members of the community. There is strong public interest in the media (and through them, the public) having full access to the evidence and submissions. Not only will open justice reassure the community that the proceedings have been conducted fairly but also that there has been no judicial intervention to suppress potentially embarrassing or even damaging evidence.

CONCLUSION

[39] For the reasons given the application dated 19 November 2019 by IDEA Services for interim name suppression orders is dismissed.

PERMANENT SUPPRESSION ORDERS FOR OTHER SERVICE USERS

[40] Counsel for IDEA Services has properly drawn attention to the fact that the evidence currently before the Tribunal makes reference to other members of the disabled community who are service users of either IDEA Services or third party services. It is submitted permanent non-publication orders should be made in relation to those persons.

[41] Mr Marshall agrees.

[42] The need to protect other members of the disabled community from inadvertent disclosure of their intimate personal details is self-evident. Consequently the following permanent orders are made pursuant to s 107 of the Human Rights Act 1993:

> **[42.1]** Publication of the name, address, occupation and of any other details which could lead to the identification of any service user (other than Eamon Marshall) mentioned in the evidence in these proceedings is prohibited.
>
> **[42.2]** There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiff and defendant are to be notified of any request to search the file and given opportunity to be heard on that application.
>
> **[42.3]** Leave is reserved to both parties to make further application should the need arise.

.....
Mr RPG Haines ONZM QC
Chairperson