IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2020] NZHRRT 26**
I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 014/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**JAMES LEONARD WILLIAMS**
	PLAINTIFF
AND	**NEW ZEALAND POLICE**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms SB Isaacs, Member
Mr M Koloamatangi, Member

REPRESENTATION:
Ms N Levy QC for plaintiff (Mr JL Williams observing by AVL from Waikeria Prison)
Mr M McKillop for defendant

DATE OF HEARING: **29 June 2020**

DATE OF DECISION: **15 July 2020**

DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM[1]

INTRODUCTION

[1] Eleven years ago Mr Williams' then partner made application to the Family Court for a protection order. There had been a history of domestic violence between them requiring Police assistance. In furtherance of that application the partner's Waihi-based lawyer on 20 August 2009 made request to the Police at Paeroa under the Official Information Act 1982 (OIA) for information held by them about Mr Williams and his partner. Responding on the same day the Police provided the lawyer with (inter alia) three pages of Mr Williams' criminal conviction history.

[1] [This decision is to be cited as *Williams v Police (Strike-Out Application No. 2)* [2020] NZHRRT 26.]

[2] Mr Williams complains that action breached IPP 11 which limits the circumstances in which an agency can lawfully disclose personal information held by it.

[3] The procedural history of this case has been extensive, resulting in 13 *Minutes* and one decision (*Williams v Police (Strike-Out Application)* [2017] NZHRRT 37). It is not necessary that that history be rehearsed here.

The strike-out application

[4] The Police challenge the jurisdiction of the Tribunal to hear the case. They rely on the Official Information Act, s 48 which prohibits civil proceedings where any official information is made available in good faith:

> **48 Protection against certain actions**
>
> (1) Where any official information is made available in good faith pursuant to this Act,—
> (a) no proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information, or for any consequences that follow from the making available of that information; and
> (b) no proceedings, civil or criminal, in respect of any publication involved in, or resulting from, the making available of that information shall lie against the author of the information or any other person by reason of that author or other person having supplied the information to a department or Minister of the Crown or organisation.
> (2) The making available of, or the giving of access to, any official information in consequence of a request made under this Act shall not be taken, for the purposes of the law relating to defamation or breach of confidence or infringement of copyright, to constitute an authorisation or approval of the publication of the document or of its contents by the person to whom the information is made available or the access is given.

[5] This provision is to be read with the Privacy Act 1993, s 7 the application of which was considered in *Tapiki and Eru v New Zealand Parole Board* [2019] NZHRRT 5 at [35] to [39].

[6] If the Police submission is upheld the proceedings must be struck out. See the Human Rights Act 1993, s 115A(1)(a) which provides:

> **115A Tribunal may strike out, determine, or adjourn proceedings**
>
> (1) The Tribunal may strike out, in whole or in part, a proceeding if satisfied that it—
> (a) discloses no reasonable cause of action; or
> …

THE EVIDENCE

The Police evidence

[7] In support of the strike-out application the Police have filed two affidavits. The first is by Ms Kelly Ross, a non-sworn member of the Police stationed at the Paeroa watch house. Understandably, she does not now specifically recall the events in question and has based her evidence on the terms of the OIA request and on an electronic transaction log.

[8] Ms Ross points out the documentation shows that at approximately 3pm on 20 August 2009 the lawyer representing Mr Williams' former partner made a request under the OIA which was in the following terms:

> I act for [name of partner] in applying for a Protection Order against Mr James Leonard Williams.

> I understand there is a history of domestic violence between these parties requiring police assistance.
>
> Under the Official Information Act 1982 would you please forward all information held by Police as regards [the partner] and Mr Williams. Please note I have a copy of the statement made by [the partner] on the 17th August 2009 so do not require that.

[9] The electronic access log shows that at 3:05pm a user with Ms Ross' Police identifier number accessed and printed the criminal history of Mr Williams, that history being sourced from the Ministry of Justice database.

[10] A short time later a sworn Police member (Sergeant Philip Caldwell), the watch house keeper, sent a fax to the lawyer providing (inter alia) the three page criminal history obtained by Ms Ross:

> I have faxed 3 x pages of criminal history for SMITH aka WILLIAMS. There is also 11 pages of occurrences for [the partner] where she is the complainant and he is the offender.
>
> There will also be hard copies of several enquiry and prosecution files that we would have to request from Hamilton if you require them.

[11] Ms Ross deposes that it appears no record of the request or of the response was kept by the Police so it is necessary to mention that the documents were subsequently in March 2018 obtained by Ms Levy QC directly from the lawyer who represented the partner in the application for a protection order. Until then Mr Williams and the Police could only speculate as to the circumstances in which Mr Williams' personal information had been disclosed.

[12] The second affidavit is by Mr Colin Gibson, Lead Business Analyst for the New Zealand Police and who, in that capacity, is in charge of the National Intelligence Application (NIA). The main points made by Mr Gibson are:

> **[12.1]** NIA is a database which contains Police prosecution information and is maintained by the Police. NIA is a comprehensive database, recording not only every conviction of an individual but also every charge filed that is not proceeded with, or is withdrawn or discharged.
>
> **[12.2]** NIA information includes some information provided to the Police from the Court Management System (CMS) which is maintained by the Ministry of Justice.
>
> **[12.3]** The CMS provides the Police with information on all charges progressing through the judicial process. This includes charges filed by other agencies. A CMS-generated criminal history may contain less information than one generated by NIA. This is because a CMS-generated criminal history only shows charges for which there are convictions.
>
> **[12.4]** Data is automatically populated in NIA from CMS in near real-time updates. In respect of criminal charges, when a court registrar inputs information into CMS regarding, for instance, a court date for the next appearance, issuing a warrant to arrest or final determination of a charge, this automatically populates NIA so that Police members have the latest information.
>
> **[12.5]** Not all information in CMS is also contained in NIA and vice versa. Each system contains information that the other does not. For example, CMS contains

civil and Family Court information to which the Police have no access, and NIA contains firearms licence holder details to which the court has no access.

[12.6] Police cannot access CMS itself. Nor do the Police have unfettered access to CMS information. Police do, however, have access to a limited subset of CMS information which displays in NIA against a person and their relevant charges. Police may also send an electronic request to CMS to supply a CMS-generated and sourced criminal history. This is returned to the Police and displays as a PDF document.

[13] Reduced to its essence, the Police case is that immediately upon receiving the OIA request from the partner's lawyer, an unsworn member of the Police (Ms Ross) accessed the NIA records relating to Mr Williams and lodged an electronic request to CMS which then generated a PDF criminal and traffic history report on Ministry of Justice letterhead. A short time later on the same day another (sworn) staff member at the Paeroa Police Station (Sergeant Caldwell) sent to the lawyer a return fax enclosing the criminal and traffic history report.

[14] It is submitted it is evident from Ms Ross' affidavit that, although she has no memory of processing the OIA request, her request to CMS to generate a criminal and traffic history report and the return fax to the lawyer enclosing that report, plainly occurred in response to that request. No ulterior motive or dishonesty on the part of Police staff is alleged, or evident in any of the affidavits. In these circumstances the protection of OIA, s 48(1) applies.

The notice of opposition

[15] The strike-out application is opposed on two grounds. Both grounds challenge the application of OIA, s 48 or at least raise issues which (it is submitted) cannot be determined outside the context of a substantive hearing:

[15.1] The criminal history record provided by the Police was not information "held" by the Police. Rather the information was held by the Ministry of Justice in the CMS and accessed there by the Police.

[15.2] A precondition to the operation of OIA, s 48(1) is that the information is made available in good faith and the Police have not established this positive pre-requisite. There must be good faith. Not an absence of bad faith.

The evidence called by Mr Williams

[16] Mr Williams did not himself give evidence on the strike-out application. Instead he relied on an affidavit by Ms Elizabeth Lewes, a lawyer practising family law in Wellington and who has more than 20 years experience working in the Family Court and in particular acting for parties and children involved in proceedings about protection orders. Her affidavit sets out her understanding of the ways in which (in her experience) criminal records are obtained for use in Family Court proceedings:

[16.1] A party's criminal history will often be potentially relevant to issues in proceedings about protection orders.

[16.2] To the best of her knowledge it has never been legally possible for the lawyer for one party to obtain the full criminal history of another party without the

consent of that other party, or a direction from the Family Court. Nor in her experience has this ever happened as a matter of common practice.

[16.3] If she wishes to obtain her own client's criminal history, a consent form is sent to the Police. If she wishes to obtain the criminal history of another party, she will ask that other party for their consent to do this and then send the consent form to the Police. If consent is refused, directions from the court will be sought.

[16.4] Since 1 July 2013 there has been a statutory process for obtaining criminal records. We do not intend describing that process here as it was not operative at the relevant date, namely 20 August 2009.

[16.5] Prior to the statutory process a Family Court Judge could make a direction that a party file their criminal record, summary of facts or sentencing notes or alternatively direct a s 132 report to cover the party's criminal record which is often obtained and disclosed in these reports.

[16.6] If Ms Lewes is acting for the child she will send a template letter to the Police making a request under the OIA. In that letter she refers specifically to OIA, s 9(1) which recognises a countervailing public interest in favour of releasing information that outweighs the privacy interests of the individual. Once the criminal record has been disclosed to her she must then consider whether it is to be attached to her reports and it would depend on the relevance to the safety of the child.

[16.7] Having been shown the 20 August 2009 request to the Police in the present case Ms Lewes observes that she has made similar requests to the Police. But what she would expect to receive in response is details of events between the two parties, not the criminal record of the intended respondent to the application for a protection order.

[17] Also relied on by Mr Williams are two features of the criminal record history faxed to his partner's lawyer:

[17.1] It is on the letterhead of the Ministry of Justice.

[17.2] At the foot of the last page there is an endorsement which reads:

> This information should not be released to anyone other than the individual concerned without Ministry of Justice authorisation.

[18] The submissions for Mr Williams also make reference to the following statement in the original Police statement of reply dated 18 March 2016:

> 4. Importantly, criminal histories in the format provided by Mr Williams in his claim belong to Justice, not Police. Police never provide these in disclosure under the Official Information or Privacy Acts – not even to the subject of their history. They are provided to the subjects of the histories or their defence counsel by Police only where the subject is facing an active criminal matter – for criminal disclosure purposes. If a person asks for a copy of his own criminal history under the Privacy Act they are referred to Justice.

[19] The Police submit the evidence of Ms Lewes does not assist the Tribunal to determine whether the Police "held" the information or whether a reasonable inference of "good faith" from the circumstances has been rebutted by Mr Williams.

[20] In any case it is submitted Ms Lewes has indicated in her affidavit that the Police do sometimes disclose criminal histories in response to official information requests, if the interests in disclosure outweigh the privacy interests of the person concerned.

The submissions by Mr Williams

[21] It is submitted by Mr Williams that the evidence of Ms Lewes is important because it establishes that what happened in August 2009 was so contrary to the usual process that Sergeant Caldwell, the watch house keeper, was compelled to give evidence as to why he sent the three page criminal history to the lawyer representing Mr Williams' partner. While it is accepted by Mr Williams that an allegation of actual bad faith cannot be made, it is submitted he is nevertheless entitled to assert that OIA, s 49 imposes on the Police a positive obligation to establish the presence of good faith. While the level of evidence required to discharge that burden in any particular case can be debated, and while the bar is not set high, there nevertheless is a bar. In the present case the response by the Police was, on the evidence of Ms Lewes, extraordinary and so it was not sufficient for Ms Ross to explain what happened at the Paeroa Police Station. It was necessary that Sergeant Caldwell, as the person who signed the fax cover sheet, give evidence as to why he provided the criminal history.

[22] Developing this point it was submitted that to establish good faith the police officer who released the information must affirmatively establish an honest belief that the OIA required disclosure. There must be evidence of the officer's reasoning processes, or lack of them, so that the court or Tribunal can assess whether information was made available in good faith and pursuant to an honest belief. To act with good faith or to have an honest belief there must be some thought process involved. The individual must know what they are providing and believe provision is appropriate, even if they are mistaken. Otherwise there is no faith or belief, good or bad, honest or dishonest. Silence as to what went on is not the same as good faith.

[23] It was accepted that in some cases, evidence from those other than the person who released the information may be sufficient if it is to the effect that the process followed was the correct and usual process and resulted in the release of the information that would normally be released in response to the request in question.

[24] In the present case:

> **[24.1]** There was no evidence from the police officer who released the information (Sergeant Caldwell).
>
> **[24.2]** What was released was not what was requested. A full criminal history was sent in response to a request for all information held by the Police regarding two persons (Mr Williams and his partner).
>
> **[24.3]** All the available information (ie the affidavit of Ms Lewes and the statement of reply filed by the Police on 18 March 2016) demonstrates that what was released was not what the Police would commonly provide in the Family Court circumstances that existed.
>
> **[24.4]** At the foot of the criminal history there is an endorsement imposing a mandatory restriction against the information being made available to anyone other than the individual concerned (ie the person to whom the criminal and traffic history relates).

[25] It is submitted that the preliminary onus must be on the Police to establish what happened so that good faith can be assessed by the person aggrieved before deciding whether to take the matter further. If good faith is the obvious or only inference from the Police explanation then the person aggrieved must plead why that is not so, providing particulars, to avoid a strike-out.

[26] But where, as here, the Police response is "confused" and lacking any evidence from the person who signed the fax, then the good faith component of the defence remains live and is a matter to be resolved at the substantive hearing. The absence of an explanation from Sergeant Caldwell as to why the information provided was broader than that requested (and broader than that which would normally be provided) and the "clear flouting" of the restricted basis on which the Ministry of Justice had made the criminal history available to the Police, weighed further towards a lack of good faith.

[27] For the foregoing reasons Mr Williams submits his claim should not be summarily struck out but determined at a substantive hearing.

DISCUSSION

WHETHER OFFICIAL INFORMATION WAS "HELD" BY THE POLICE

[28] The submission that Mr Williams' then list of convictions was not information "held" by the Police was not developed in the written and oral submissions and not strongly pressed. Nevertheless the point must be addressed. It could possibly be formulated as follows:

> **[28.1]** The release by the Police of official information not held by them was unlawful.
>
> **[28.2]** The release was therefore not protected by OIA, s 48(1) which applies only to information made available "pursuant to" the OIA.
>
> **[28.3]** It follows the good faith defence has no application.

[29] All of these objections are answered by the evidence given by Mr Gibson namely, that the released information was held by the Police in the NIA database:

> **[29.1]** Data is automatically populated in NIA from CMS in near real-time updates.
>
> **[29.2]** In the result information regarding Mr Williams' convictions was held both in NIA and in CMS.

[30] The "not held" challenge advanced by Mr Williams is therefore based on a misapprehension of the facts.

[31] While the information was provided on Ministry of Justice letterhead, format must not be conflated with content. The information in the CMS document was simultaneously held by both the Police and the Ministry of Justice. It is not necessary for the Police to gain Ministry of Justice authorisation to disclose information the Police also hold.

[32] The endorsement placed by the Ministry of Justice at the foot of the last of the three pages warning that the information was not to be released to anyone other than Mr Williams could not override the character of the information as being held by the Police. Nor could it override the obligation on the Police to comply with an access request under

the OIA in relation to information which was indisputably held by the Police. The CMS-generated report is simply a more succinct version of the same information held by the Police. There would be no reason for Police staff processing an official information request for information held on NIA to consider the implications of a Ministry of Justice notice.

[33] We agree with the submission for the Police that a narrow interpretation of the word "held" which excludes data replicated from the databases of other agencies would allow agencies to decline requests on a technical basis and frustrate the operation of the OIA and its expressly stated purpose of (see s 4) to increase progressively the availability of official information to the people of New Zealand. The point is underlined by OIA, s 5 which establishes the principle of availability. That is, information should be made available unless there is good reason for withholding it:

> **5 Principle of availability**
>
> The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

[34] We are reinforced in this conclusion by the August 2019 guide published by the Chief Ombudsman in which the view expressed is that the question whether information is "held" should be interpreted as broadly as possible. Cited in support of this proposition is *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, [2008] 1 WLR 1550, [2008] 4 All ER 851 at [15]. The following passage from the Chief Ombudsman's guide *Information not held: A guide to sections 18(e) and (g) of the OIA and sections 17(e) and (g) of the LGOIMA* (August 2019) expands on the broad interpretation adopted by the Ombudsman:

> **What does *'held'* mean?**
>
> The question of whether information is held should be interpreted as broadly as possible. The UK House of Lords [in *Common Services Agency*], when applying the equivalent of the OIA (the Freedom of Information Act), said *'this part of the statutory regime should be interpreted as liberally as possible'*.
>
> *'Held'* **does not just mean physically held**, though it includes it (subject to the exclusions discussed below). If information is physically held by an agency it will be held for the purpose of the OIA, even if it is seen as *'belonging'* in some way to a third party. Notions of information *'ownership'* or *'intellectual property'* are not relevant in the OIA context. The fact that a third party may hold copyright in the information does not affect its status as information *'held'* by an agency, nor is it a reason, in and of itself, to withhold copyrighted information.
>
> *'Held'* includes information **in the control** of the agency. The OIA has special provisions (called 'deeming provisions') aimed at ensuring that information that **should** be *'official'* is **deemed to be held**. So agencies are deemed to hold:
>
> - information held by unincorporated bodies established to assist, advise or perform functions connected with the agency;
> - information held by officers, employees, or members of the agency in their official capacity; and
> - information held by independent contractors to the agency, in their capacity as contractors.
>
> If this information is not in the agency's physical possession—for example, because it is held by the contractor, or on an employee's personal device (see case 411501) or email account (see case 439322)—the agency will need to take steps to obtain it, so that it can comply with its

> obligations under the OIA. Agencies should ensure that any contracts for service include standard terms and conditions enabling them to access official information held by contractors.
>
> *'Held'*, in the case of undocumented information, means that it must be **known** to people within the agency (meaning that it is clear, certain or established), and able to be **recalled**. For more discussion on this point, see Information held by employees.
>
> *'Held'* means that the information must be **in existence**. With the exception of providing a response to a request for a statement of reasons, there is no obligation to **create** information in order to respond to a request. For more discussion on this point, see Creation versus collation.
>
> [Footnote citations omitted]

[35] On the facts it is not necessary to explore in detail the proper meaning and application of the term "holds" in the Privacy Act, particularly IPPs 5 to 11. Not only does the issue not arise it was not the subject of argument. It is necessary, however, to observe that the now dated decision of the Tribunal in *Haydock v Sheppard* [2006] NZHRRT 31 is not necessarily good law. That decision held that an agency which had an access facility to credit information from a second agency's database did not "hold" the personal information on that database when it was displayed on the first agency's computer monitor. On one view it is unrealistic to say that the first agency never received, much less held, the information and the decision permits a gap in the law to exist where there need not be one. If the logic of the case is adopted there is a danger the Privacy Act will be interpreted as not applying to agencies which retrieve information from an external database. Arguably, that would be both artificial and contrary to the purpose of the legislation.

[36] We address now the issue of good faith.

INTERPRETING THE "IN GOOD FAITH" REQUIREMENT

[37] There is clear, binding senior court authority as to:

[37.1] The meaning of good faith in the context of OIA, s 48.

[37.2] The intended scope of s 48.

[37.3] The absence of any requirement in s 48 for an agency to establish its reasoning process when releasing official information.

[38] The initial responsibility to establish the application of OIA, s 48 has not, however, been the subject of direct consideration by the senior courts.

The initial responsibility to establish OIA, s 48 engaged

[39] In *X v Attorney-General* [1994] NZFLR 433 at 436 "good faith" was presumed to apply to an official information disclosure unless there is a pleading to the contrary. In that case the High Court held that the "only way to avoid … s 48 would be a specific allegation of breach of the duty of good faith … with sufficient particulars of those breaches".

[40] However, read in context the point being addressed was not whether there is an initial onus on the agency to establish that s 48 has been engaged, but the adequacy of the plaintiff's pleadings in which a direct but unparticularised allegation had been made that the Department of Social Welfare had acted in "contumelious disregard" of the plaintiff's rights and expectations.

[41] In oral submissions Mr McKillop accepted the Police do have an initial responsibility, albeit to a low standard, to establish that OIA, s 48 does have application on the facts of the case. It was necessary to establish only that:

[41.1] Official information was made available under the OIA; and that

[41.2] There is no evidence of dishonesty or of an ulterior motive.

[42] Once this low threshold had been satisfied the plaintiff is required to specifically allege breach of the duty of good faith and sufficiently particularise that allegation. The alleged breach must then be proved.

[43] We understood Ms Levy to agree in general terms with this formulation. Like Mr McKillop, she did not attempt to define the standard of proof which applies at the initial stage but accepted it was "not high".

[44] It is acknowledged that in *Ilich v Accident Rehabilitation and Compensation Insurance Corporation* [2000] 1 NZLR 380 at 383 there is a passage which can be read as requiring a plaintiff who claims an absence of good faith to establish such absence:

> Therefore, for the protection not to apply, it is necessary for the person claiming an absence of good faith to establish that, when the respondent made available to the appellant on behalf of his brother, the brother's file containing the information about the appellant, it did so dishonestly or with an ulterior motive.

[45] However, it would appear that as in *X v Attorney-General*, the question of the initial onus did not arise on the facts because a specific allegation had been made by the plaintiff that the agency had acted dishonestly or with an ulterior motive.

[46] In these circumstances we approach the present case on the basis that the Police have an initial responsibility to establish OIA, s 48 is engaged by the facts. That is that official information was made available by them and that the circumstances are not inconsistent with good faith. In determining whether this low threshold has been passed it is appropriate for inferences to be drawn from the circumstantial evidence.

[47] As a consequence the narrow issue for determination by the Tribunal is whether it can be inferred from the circumstances that the official information made available by the Police on 20 August 2009 was made available in good faith.

[48] If that threshold is passed the proceedings must be struck out as Mr Williams does not allege bad faith on the part of the Police.

Meaning of "in good faith"

[49] Information is made available in good faith if it is made available honestly and with no ulterior motive, even though it may be made available negligently. See *Ilich v Accident Rehabilitation and Compensation Insurance Corporation* [2000] 1 NZLR 380 at 383.

[50] Neither Mr Williams nor the Police have challenged this interpretation.

The intended scope of OIA, s 48 and the "reasoning process" issue

[51] In *Director of Human Rights Proceedings v Commissioner of Police* (2008) 8 HRNZ 749 (*DoHRP v Police*) the Director accepted the police officer had acted in good faith, that is, honestly and without any ulterior motive. It was nevertheless submitted that to establish

the official information had been made available "pursuant to" the OIA, the officer must first correctly identify the relevant interests (ie the interests requiring protection and those favouring disclosure in the public interest), and second, to then show consideration was given to those competing interests in good faith before a decision was made whether to make the information available. While the Human Rights Review Tribunal was not required to determine the substantive correctness of the officer's decision, it was, however, required to examine his decision-making process.

[52] In rejecting this submission the High Court noted that when originally enacted, s 48 opened with the phrase:

> Where any official information is made available in accordance with this Act.

In 1987 this phrase was replaced with the present "made available in good faith pursuant to this Act".

[53] The High Court held this amendment widened the scope of s 48. The purpose of the amendment was to ensure that officials are not inhibited in making information available. The protection applies even where the agency makes available official information it could have justifiably withheld. See *Attorney-General v Davidson* [1994] 3 NZLR 143 (CA) at 147.

[54] In *DoHRP v Police* the High Court, noting what was said in *Attorney-General v Davidson*, emphasised three points. First, there is a clear legislative intention to confer a wide immunity. Second, the purpose of that immunity is to ensure officials are not inhibited from releasing information. Third, an immunity provision needs to be straightforward and to provide a clear-cut test readily understood and readily applied:

> [44] In our view, that accords with the language used in s48 and gives effect to the legislative intention to confer a wide immunity as evidenced by the 1987 amendment. In our view, it also accords with the policy of the Official Information Act. The purpose of the immunity is to ensure officials are not inhibited from releasing information. In our view, the Director's interpretation would have an inhibiting effect and would undermine the benefit of the immunity. It would also have the potential to create arguments about the process that was adopted – witness the divergent views of the Director and the Police about public interest in the present case. An immunity provision needs to be straightforward, and provide a clear-cut test readily understood and readily applied.

[55] The High Court concluded the Tribunal is not required to consider whether the police officer correctly applied the OIA. It is sufficient the officer released the report in the honest belief the Act required disclosure:

> [47] It follows, in our judgment, that for the purposes of s48, the Tribunal was not required to consider whether Constable Tweedie correctly applied the Official Information Act with reference to either his reasoning processes or the correctness of his ultimate decision. What was sufficient was the Constable released the report in the honest belief the Act required disclosure. The immunity therefore applied and no claim under the Privacy Act was possible.

[56] In the present case neither party disputed these principles.

[57] On the face of the circumstances established by the evidence, the facts are unexceptional and allow the straightforward application of the principle that inferences can be drawn from facts. We see no basis to draw any inference other than that the information was made available in good faith. That is, shortly before 3pm on 20 August 2009 the Police received a request for official information relating to Mr Williams and his then partner. Almost immediately Ms Ross accessed and printed Mr Williams' then

criminal history and that same afternoon the document along with the rest of the requested information was dispatched by Sergeant Caldwell in response to the request. In these circumstances it is difficult to see what rational impediment can be found to the conclusion that the official information was made available in good faith.

[58] The first point raised by Mr Williams is that there must be evidence of Sergeant Caldwell's reasoning processes, or lack of them, so that the Tribunal can assess whether the information was made available in good faith and pursuant to an honest belief. The individual must know what he or she is providing and believe provision is appropriate, even if they are mistaken.

[59] In our view this submission is answered by the ruling in *DoHRP v Police* that s 48 gives effect to a legislative intention to confer a wide immunity so that officials are not inhibited from releasing information. The Tribunal is not required to consider whether the police officer correctly applied the OIA with reference to either his or her reasoning processes or to consider the correctness of the ultimate decision. What is sufficient is that the police officer released the report in the honest belief the Act required disclosure. On the facts the circumstances permit the rational inference that such honest belief was present.

[60] Mr Williams' then submitted that more information was provided than requested. As to this, account must be taken of two factors. First, the request for the information was itself in general terms. It explained that there had been a history of domestic violence between Mr Williams and his then partner, that she was applying for a protection order and the Police were asked to provide "all information held by Police as regards [the partner] and Mr Williams". A straightforward reading of the request would lead to the conclusion it included Mr Williams' criminal history, particularly bearing in mind that at that time it included convictions for assault on a female, breach of a protection order, common assault, drug offences, breach of periodic detention and indecent assault. All of these convictions would have potential relevance in the context of a protection order application particularly given that Sergeant Caldwell's fax refers to eleven pages of "occurrences" in which the former partner was the complainant and Mr Williams the offender. Rather than seeing cause to doubt whether the criminal history was made available in good faith, we see only grounds for drawing an inference that good faith was undoubtedly present. There was no oversupply of information.

[61] Mr Williams relied very much on the evidence of Ms Lewes. She says she would not expect to receive a criminal history report in response to the kind of request made in the present case. But this does not advance the case for Mr Williams. If there was an over-supply of information, this was consistent with the principle of availability in OIA, s 5. The decisions in *Attorney-General v Davidson* and *DoHRP v Police* establish the protection of s 48 applies even where the agency makes available official information it could have justifiably withheld. At worst it was an error by the Police. Even that error does not help Mr Williams because it was established in *Illich* that information is made available in good faith if it is made available honestly and with no ulterior motive, even though it may be made available negligently. The facts do not permit any adverse inference to be drawn against the Police on the issues of honesty and ulterior motive. They do, however, permit an inference of good faith to be drawn. As submitted for the Police, the evidence of Ms Lewes, taken at his highest, possibly calls into question the quality of the Police decision-making in response to a request for official information. But that is precisely the sort of inquiry the High Court in *DoHRP v Police* has held s 48 was intended to avoid. In any case, as Ms Lewes concedes, the Police do sometimes disclose criminal histories in response to official information requests if the interests in disclosure

outweigh the privacy interests of the person concerned. The alleged domestic violence background was in the present case made relevant by the terms of the request.

[62] Emphasis was also given to certain statements in the statement of reply filed by the Police in March 2016. It is important to note, however, that at the time the document was filed neither Mr Williams nor Ms Christine Scott of the North Shore Policing Centre, Auckland (the author of the statement of reply) knew what the facts of the case were and the document is simply a best attempt to respond to the limited information Mr Williams had provided in his statement of claim. This is not a criticism of Mr Williams or of Ms Scott. It was not until March 2018 that the two faxes dated 20 August 2009 were recovered by Ms Levy on behalf of Mr Williams and then made available to the Police. As Ms Scott explained in her memorandum dated 21 January 2019, up until that point the Police had not been able to ascertain how Mr Williams' criminal history had been supplied to his former partner. It was then the Police raised the application of OIA, s 48. In the circumstances we decline to give to the statement of reply the weight sought by Mr Williams. Not only was it prepared within a compressed timeframe (only 30 days were allowed by the terms of the then reg 15(1) of the Human Rights Review Tribunal Regulations 2002), the allegations made by Mr Williams related to events which (by then) had occurred six and a half years earlier. The statement of reply was also prepared without the relevant documents, without the benefit of hindsight and without the evidence of Mr Gibson as to the relationship between NIA and the Ministry of Justice Court Management System.

[63] We do not agree with the submission that the evidence of Ms Lewes establishes that the circumstances are so unusual or extraordinary that a full explanation is required from Sergeant Caldwell. The common practice described by Ms Lewes does not preclude a different approach being taken in good faith.

CONCLUSION

[64] In the result we see nothing to inhibit the drawing of an inference which flows naturally from the evidence namely, that the criminal history of Mr Williams as at August 2009 was provided under the OIA in good faith to the lawyer representing his then partner in proceedings before the Family Court. None of the evidence or submissions presented on behalf of Mr Williams is adequate to challenge this inference.

[65] As Mr Williams does not allege bad faith it follows the immunity conferred by OIA s 48(1) applies and the Tribunal has no jurisdiction to hear these proceedings. They must be struck out pursuant to the Human Rights Act 1993, s 115A(1)(a) which is incorporated into proceedings under the Privacy Act by virtue of s 89 of the latter Act.

[66] We are grateful to both counsel for their assistance.

Costs

[67] Costs are reserved. Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

> **[67.1]** The New Zealand Police are to file their submissions within 14 days after the date of this decision. The submissions for Mr Williams are to be filed within a further 14 days with a right of reply by the New Zealand Police within seven days after that.

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

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

ORDERS

[68] The following orders are made:

[68.1] The statement of claim filed by Mr Williams in these proceedings is struck out in whole.

[68.2] Costs are reserved.

.....	.....	.....
Mr RPG Haines ONZM QC	**Ms SB Isaacs**	**Mr M Koloamatangi**
Chairperson	**Member**	**Member**