

Reference No. HRRT 038/2016

UNDER THE PRIVACY ACT 1993

BETWEEN ANTONY RICHARDSON

PLAINTIFF

AND KIMBERLEY BURNS

FIRST DEFENDANT

AND WAITEMATA DISTRICT HEALTH BOARD

SECOND DEFENDANT

AT WELLINGTON – ON THE PAPERS

BEFORE:

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

REPRESENTATION:

Mr A Richardson in person  
Ms B Johns for first defendant  
Mr PN White for second defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 21 August 2017

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**DECISION OF TRIBUNAL  
DISMISSING CLAIM AGAINST SECOND DEFENDANT<sup>1</sup>**

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[1] In this decision the Tribunal sets out its reasons for dismissing Mr Richardson’s claim against the Waitemata District Health Board (WDHB). The claim against Ms Burns is not affected. Case management directions for that claim follow at the end of this decision.

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<sup>1</sup> [This decision is to be cited as *Richardson v Burns (Strike-Out of Second Defendant)* [2017] NZHRRT 30]

## **BACKGROUND**

[2] In his statement of claim filed on 15 July 2016 Mr Richardson alleges Ms Burns and the WDHB interfered with his privacy (as that term is defined in the Privacy Act 1993, ss 66(1)(a)(i) and 66(1)(b)(iii)) by using his health information for a purpose other than for the purpose for which it had been obtained. He relies on the Health Information Privacy Code 1994 (HIPC), r 10.

[3] The factual allegation is that the WDHB collected his health information for the purpose of providing mental health services to him. On one occasion in February 2008 and on three occasions in 2012 Ms Burns, a mental health nurse employed by the WDHB, allegedly accessed his file for a purpose not related to the provision of such services.

### **The jurisdiction challenge by WDHB**

[4] By strike-out application dated 3 May 2017 the WDHB challenges the jurisdiction of the Tribunal to hear the claim against it on the grounds that no investigation in relation to an alleged breach of HIPC r 10 by the WDHB was conducted by the Privacy Commissioner. It was only after the Commissioner closed his investigation into allegations the WDHB had breached HIPC rr 5, 6 and 11 that he (the Commissioner) then commenced a separate investigation into a complaint by Mr Richardson that Ms Burns (not the WDHB) had breached r 10. The WDHB says it had no involvement in or awareness of this separate investigation by the Privacy Commissioner which occurred after the WDHB had been told by the Commissioner that he had closed his investigation into the allegations made by Mr Richardson against the WDHB.

[5] The jurisdiction objection not being available to Ms Burns, she has understandably made no submissions in support of or in opposition to the application.

### **The relevant provisions of the HIPC**

[6] As this decision will make reference to HIPC rr 5, 6, 10 and 11 the subject of each of these rules must be distinguished. As the precise wording of each rule is not in issue a general summary only follows:

- Rule 5 - Agencies must ensure there are reasonable safeguards in place to prevent loss, misuse or disclosure of health information.
- Rule 6 - Subject to various exceptions, people have a right to ask for access to health information about themselves.
- Rule 10 - Agencies must use health information for the same purpose for which they obtained that information.
- Rule 11 - Agencies can only disclose health information in certain specified circumstances.

[7] The investigation by the Privacy Commissioner in relation to the WDHB was confined to rr 5, 6 and 11. The subsequent investigation into Ms Burns was confined to r 10.

## **The investigation by the Privacy Commissioner in respect of the WDHB**

**[8]** To support the strike-out application the WDHB has filed an affidavit sworn on 27 April 2017 by Ms AM Mark, General Counsel for the WDHB. In this affidavit Ms Mark describes the course of the investigation by the Privacy Commissioner. It is clear from that account and from the exhibited correspondence that when Mr Richardson's complaint was notified by the Commissioner to the WDHB by letter dated 13 July 2015 the HIPC provisions the subject of the investigation were rr 5, 6 and 11. The investigation number was C/26948. Although by letter dated 9 October 2015 the Commissioner expressed the preliminary view there had been a breach of r 5, the submissions made by the WDHB on 2 December 2015 persuaded the Commissioner otherwise. Accordingly, by letter dated 23 December 2015 the Commissioner notified the WDHB that his final view was that there had not been an interference with Mr Richardson's privacy by the WDHB. The letter concluded with the statement that "the file relating to this complaint will now be closed".

**[9]** It is clear from this evidence that the WDHB was never investigated for an alleged breach of HIPC r 10. This conclusion is confirmed by two other documents:

**[9.1]** When the Commissioner wrote to the WDHB on 23 December 2015 advising the investigation into the alleged breaches of rr 5, 6 and 11 had been closed with a finding of "no interference", the Commissioner on the same day wrote to Mr Richardson advising him that no breach of rr 5, 6 and 11 had been established against the WDHB and that the Commissioner's final view was that there had been no interference with Mr Richardson's privacy.

The letter then separately addressed the situation of Ms Burns. After recording his understanding that Mr Richardson wanted an investigation of Ms Burns as an individual, the Commissioner told Mr Richardson that he (Mr Richardson) would need to satisfy him (the Commissioner) that the actions of Ms Burns had caused Mr Richardson harm of the type required by s 66 of the Privacy Act. Mr Richardson was advised that should he decide to make "a new complaint" he would need to provide evidence to substantiate the harm he claimed to have been caused by Ms Burns. The relevant paragraphs of this letter are reproduced as they are of some importance:

From the information provided, it would appear Ms Burns accessed your file without having a proper basis for doing so on three occasions in 2012, and I understand you would like us to investigate Ms Burns as an individual. As previously advised, in order to find an interference with privacy we need to be satisfied Ms Burns has breached an information privacy principle, and that this breach has caused you some harm. The onus of proof is on you, to the balance of probabilities, to satisfy us of these legal elements and I can confirm the current investigation has provided evidence of a breach.

If you wish to complain about Ms Burns as an individual, you will need to also satisfy us that her actions have caused you harm of the type that is required by section 66 of the Privacy Act. Therefore, should you decide to make a new complaint you will need to provide evidence to substantiate the harm you say Ms Burns has caused you.

You have also learned your file was accessed by Ms Burns in 2008 and I understand the DHB will respond to you directly with an explanation for this access. If you are not satisfied with the explanation, then you can include that issue in your complaint about Ms Burns.

It is self-evident from these passages that if Mr Richardson was to complain against Ms Burns “as an individual”, a separate, particularised new complaint would be required.

**[9.2]** Following the filing of the statement of claim the Privacy Commissioner provided the Tribunal with a letter dated 3 August 2016 in which he confirms there were two separate investigations. One in relation to the WDHB under HIPC rr 5, 6 and 11 and the other in relation to Ms Burns under HIPC r 10. No investigation was conducted against the WDHB under HIPC r 10:

The Privacy Commissioner conducted two investigations in relation to Ms Burns accessing Mr Richardson’s file. The Privacy Commissioner investigated a complaint against the [WDHB] under rules 5, 6 and 11 of the [HIPC] in relation to Ms Burns accessing Mr Richardson’s file on three occasions in 2012. The Privacy Commissioner then investigated a complaint against Ms Burns under rule 10 of the Code in relation to her accessing Mr Richardson’s file on one occasion in 2008 and three occasions in 2012.

The matters in the Statement of Claim are therefore among the matters considered by the Commissioner. There is a difficulty with jurisdiction in respect of a claim being brought against the second defendant (WDHB) that it breached rule 10 of the Code and/or in respect of file access in 2008. As noted above the Privacy Commissioner did not investigate a complaint against the WDHB under rule 10 of the Code or in respect of file access in 2008.

**[10]** That the investigation into Ms Burns was a separate (and subsequent) investigation by the Commissioner is confirmed by the fact that that investigation was given a separate file reference being C/27705. The Certificate of Investigation dated 13 June 2016 issued by the Privacy Commissioner with that file reference and now relied on by Mr Richardson confirms that the only “Respondent” to that investigation was Ms Burns.

### **Mr Richardson’s response to the strike-out application**

**[11]** Mr Richardson does not dispute the WDHB was not investigated for a breach of HIPC r 10. He claims, however, that there is a conflict between what the WDHB said to the Commissioner and what Ms Burns has said in her statement of reply filed in these proceedings. In our view the perceived conflict rests on a possible misreading of the evidence but it is not necessary in the present context to explore the issue. The overarching point is that the Privacy Commissioner carried out no investigation of the WDHB regarding HIPC r 10. It was only subsequent to closing his investigation into the WDHB that the Commissioner then carried out an investigation in relation to Ms Burns and HIPC r 10.

### **Finding on the facts**

**[12]** The evidence placed before the Tribunal by the WDHB and by the Privacy Commissioner establishes that the investigation into the WDHB was confined to HIPC rr 5, 6 and 11 and preceded the investigation into Ms Burns. At no time was r 10 in issue vis-à-vis the WDHB. It was only after the investigation into the WDHB had been closed that a new and separate investigation was conducted by the Commissioner in relation to the alleged breach of HIPC r 10 by Ms Burns and by her alone.

## THE JURISDICTION CHALLENGE – FINDING

[13] The simple point made by the WDHB in support of the strike-out application is that for the Tribunal to have jurisdiction to hear a case under the Privacy Act 1993, it must be established that in terms of ss 82(1)(a) and 83 of the Act the defendant is a person “in respect of whom an investigation has been conducted” by the Privacy Commissioner under Part 8 of the Act as to HIPC r 10.

[14] The relevant statutory provisions and the Tribunal’s well-established case law were most recently reviewed in *Fehling v Ministry of Health (Strike-Out of Second Defendant)* [2016] NZHRRT 29 at [32] to [45] and it is not intended to repeat what has been said there. It is sufficient to note that for the reasons given our finding of fact is that the WDHB is not a person in respect of whom an investigation has been conducted under Part 8 of the Act in relation to HIPC r 10. Consequently the Tribunal does not have jurisdiction to hear these proceedings as against the WDHB.

## DECISION

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

[15.1] The Tribunal has no jurisdiction to hear that part of Mr Richardson’s claim which relates to the WDHB.

[15.2] All allegations in the statement of claim against the WDHB are struck out and the WDHB is dismissed as a party to these proceedings.

[15.3] Case management directions for the claim against Ms Burns follow below. Should it prove necessary we leave it to the Chairperson of the Tribunal to vary those directions.

## Costs

[16] Costs are reserved.

## CASE MANAGEMENT DIRECTIONS FOR CLAIM AGAINST MS BURNS

[17] Mr Richardson must now decide whether to continue with his proceedings against Ms Burns notwithstanding the WDHB is no longer a party.

[18] The Secretary to the Tribunal is directed to convene a teleconference so that case management directions can be given.

## **Directions**

**[19]** The following directions are made:

**[19.1]** The Secretary is to convene a case management teleconference on a priority basis.

**[19.2]** Leave is reserved to Mr Richardson and to Ms Burns to make further application should the need arise.

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**Mr RPG Haines QC**  
**Chairperson**

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**Dr SJ Hickey MNZM**  
**Member**

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**Mr RK Musuku**  
**Member**