

**Reference No. HRRT 061/2015**

**UNDER** **THE PRIVACY ACT 1993**

**BETWEEN** **YIASOUMI YIASOUMI**

**PLAINTIFF**

**AND** **ATTORNEY-GENERAL**

**DEFENDANT**

**AT WELLINGTON**

**BEFORE:**

**Mr RPG Haines QC, Chairperson**

**Ms WV Gilchrist, Member**

**Hon KL Shirley, Member**

**REPRESENTATION:**

**Mr Y Yiasoumi in person**

**Ms H Carrad for defendant**

**DATE OF HEARING: 8 March 2017**

**DATE OF DECISION: 11 April 2017**

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**DECISION OF TRIBUNAL<sup>1</sup>**

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**INTRODUCTION**

**[1]** On the evening of 10 April 2013 Mr Yiasoumi was involved in an incident in which he sustained serious injuries. Uniformed Police officers attended the incident. One of them (Constable KJT Upton) accompanied Mr Yiasoumi in the ambulance to Hutt Valley Hospital. At 10.20pm that officer took two photographs of Mr Yiasoumi's facial injuries. For this he used his Police issue iPhone. In entirely innocent circumstances those photographs were not subsequently attached to the Police file.

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<sup>1</sup> [This decision is to be cited as: *Yiasoumi v Attorney-General* [2017] NZHRRT 12.]

[2] Because the Police doubted the credibility of Mr Yiasoumi's account of the incident no prosecution of the alleged offenders followed. Mr Yiasoumi believes that in making this decision the officer in charge of the investigation thereby perverted the course of justice.

[3] One year and four months later Mr Yiasoumi on 26 August 2014 requested a copy of the photographs taken at the hospital. Because at that point in time the photographs could not be found on the Police file the request was declined on the grounds allowed by s 29(2)(b) of the Privacy Act 1993, namely that the information requested did not exist or could not be found.

[4] In the present proceedings Mr Yiasoumi challenges that decision. We now give our reasons for finding that the refusal of the request was a correct decision and that Mr Yiasoumi has not established a breach of his privacy as defined in s 66 of the Act.

[5] Before the narrative becomes too detailed a brief overview of Mr Yiasoumi's information request follows.

### **A BRIEF OVERVIEW REGARDING THE INFORMATION REQUEST**

[6] As mentioned, while Mr Yiasoumi sustained his injuries on 10 April 2013 it was not until 16 months later that he on 26 August 2014 requested the photographs.

[7] The Police responded promptly by letter dated 29 August 2014 to the effect Mr Yiasoumi would need to confirm his identity and right of access to the requested information by producing an identity document showing his date of birth. This precaution is permitted by s 45 of the Act. Mr Yiasoumi complied with this request.

[8] Subsequently, by letter dated 1 October 2014 the request for the photographs was declined by the Police on the grounds the information did not exist or could not be found.<sup>2</sup>

[9] When Mr Yiasoumi complained to the Privacy Commissioner his complaint was not upheld, the Commissioner indicating as early as 31 October 2014 a view that the Police had correctly established s 29(2)(b) of the Privacy Act applied.

[10] Nevertheless, the Police continued their inquiry into the question whether photographs had been taken at the hospital. It was only when Mr Yiasoumi explained the photographs had been taken by a uniformed police officer that it was discovered Constable Upton had accompanied Mr Yiasoumi to the hospital and had there taken two photographs of the injuries.

[11] The two photographs were thereupon located in a digital file stored by Constable Upton in the Police computer system and sent to Mr Yiasoumi on 4 December 2014.

### **MR YIASOUMI'S EVIDENCE**

[12] It is not intended to recite Mr Yiasoumi's evidence at length. A summary only is sufficient.

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<sup>2</sup> Note the request by Mr Yiasoumi had been framed as a request made under the Official Information Act 1982. The Police, in turn, responded under the same Act. However, the fact that the request and response were mistakenly framed under the wrong statute is not material, a proposition challenged neither by Mr Yiasoumi nor by Ms Carrad. Section 18(e) of the Official Information Act applies where the document alleged to contain the information does not exist or cannot be found. This corresponds to s 29(2)(b) of the Privacy Act. In these circumstances the concession made by Mr Yiasoumi and by Ms Carrad was properly made.

[13] Mr Yiasoumi told the Tribunal he is the landlord of a residential property located in Taita. Wastewater pipes traverse the property and the system includes a manhole. The Hutt City Council told Mr Yiasoumi vehicles should not be parked on top of these fixtures. Mr Yiasoumi had agreed to keep an eye on the matter.

[14] On the evening of 10 April 2013 Mr Yiasoumi visited the address to check where his tenants had parked their vehicles. While looking over the fence he was set upon by assailants who, without provocation, beat him with an iron bar and other metallic weapons until he lost consciousness. While he was on the ground he was kicked in the face about a dozen times with steel capped boots and injured in other parts of his body, including his kidneys, a wrist and an elbow. He was also pinned in a choke-hold. Mr Yiasoumi believes he would have died had the attack continued longer than it had.

[15] Mr Yiasoumi also believes the two uniform Police officers who arrived at the scene of the attack (Constables Upton and S Fergusson) held back from intervening notwithstanding they could see Mr Yiasoumi was being held to the ground and that one of the assailants was repeatedly kicking him in the head. He alleges the fact that the Police reports make no mention of Police officers witnessing the assault is evidence of the fictitious nature of the Police investigation report. He also alleges the failure to prosecute the alleged assailants is a perversion of the course of justice. He intends bringing a private prosecution against the officer in charge of the case, Detective Sergeant RS Orr (DS Orr).

[16] Be that as it may, the assault did come to an end and Mr Yiasoumi was taken to Hutt Hospital. Constable Upton accompanied Mr Yiasoumi in the ambulance and later in the evening he (Constable Upton) used his Police iPhone to take two photographs of Mr Yiasoumi's facial injuries.

[17] On the following day Mr Yiasoumi was interviewed at the hospital by officers of the Hutt Valley Criminal Investigation Branch (CIB) Detective Sergeant Carroll (DS Carroll) and Detective McBriar. A further interview took place at the Lower Hutt Police Station on 12 May 2013. The interviewing officer on that occasion was DS Orr.

[18] As mentioned, the outcome of the Police investigation was a decision that no prosecution be brought against the alleged assailants or against Mr Yiasoumi.

[19] It would be an understatement to say Mr Yiasoumi is unhappy with that decision and as mentioned he has accused DS Orr of creating a "fictitious" police report and of concealing the two hospital photographs to prevent their use in the intended private prosecution against DS Orr for perverting the course of justice and in a related complaint that has been made to the Independent Police Conduct Authority (IPCA) regarding the failure by the Police to prosecute Mr Yiasoumi's alleged assailants.

[20] By letter dated 26 August 2015 he made a request for "the photo the Police took of my head namely my face after my attack of the 10<sup>th</sup> of April 2013 whilst I was in the Lower Hutt Hospital's emergency department. I request under the Official Information Act 1982 a copy of the photo a Policeman took".

[21] We address now the evidence given by the three Police witnesses.

### **THE POLICE EVIDENCE**

[22] As in the case of Mr Yiasoumi's evidence, we do not intend to repeat the Police evidence at length. A summary only follows.

## **Constable Upton**

[23] As mentioned, Constable Upton attended the scene on the evening of 10 April 2013 and accompanied Mr Yiasoumi to the hospital. There he took two photographs of Mr Yiasoumi's face which, although heavily bandaged, showed Mr Yiasoumi to have been injured in the incident. He had also taken four photographs at the scene of the incident.

[24] The four scene photographs were attached to the Police file but not the two photographs taken at the hospital. The latter were saved to Constable Upton's personal folder on the Police computer system.

[25] On 30 November 2014 Constable Upton was contacted by Inspector Anna Jackson of Police National Headquarters (PNHQ) and asked whether he knew what had become of the hospital photographs and why they had not been attached to the file. On 2 December 2014 Constable Upton sent to Inspector Jackson all six photographs taken by him on 10 April 2013 being the four "scene" photographs and the two hospital photographs. He told Inspector Jackson that he was not sure why the photographs were not on the file.

[26] In further exchanges with Inspector Jackson, Constable Upton explained that the Uniform branch had passed the file to the CIB very quickly either on the night of 10 April 2013 or on the following day so that the CIB could conduct the inquiry. Technical constraints affected the instant transfer of the photographs held on the iPhone to the investigation file which existed in hard copy only. This was because Constable Upton had to email the photographs to himself and there was a maximum of about four which could be sent at any one time. In addition there was often a delay between transmission of the emails and their receipt. He believes the two hospital photographs had not arrived in time to be included in the initial documentation handed over to the CIB. However, once those photographs arrived by email he had placed them in his folder on a shared drive in the Police computer system in case they were required at a later date and that is where they remained until Inspector Jackson made contact with him. He also assumed that as no prosecution had resulted there had been no need to have the photographs placed on the file for evidential purpose.

[27] Constable Upton had no access to the physical file post-handover to the CIB and said he had no knowledge of anyone removing anything from it.

## **Detective Sergeant Orr**

[28] On 11 April 2013 DS Orr was in charge of the CIB On Call Squad for the Hutt Valley tasked with responding to serious crime incidents. In that capacity he was advised of the alleged assault on Mr Yiasoumi the previous evening. He assigned two officers (DS Carroll and Detective McBriar) to speak to Mr Yiasoumi at the hospital with a view to obtaining a statement from him outlining what had occurred.

[29] DS Orr was later advised either by DS Carroll or by Detective McBriar that Mr Yiasoumi had been seen at the hospital and had given his account of what had occurred. A formal statement had been prepared for Mr Yiasoumi to sign. It would turn out that Mr Yiasoumi would not sign that statement. However, an unsigned copy was produced in evidence to the Tribunal. The account as there recorded is much the same as that outlined earlier in this decision. That is, the attack was entirely unprovoked.

[30] Neither DS Orr nor the other CIB officers were then aware photographs had been taken by Constable Upton the previous night.

**[31]** DS Orr told the Tribunal that subsequent inquiries made by the CIB led to the discovery of CCTV footage of the incident. Mr Yiasoumi was shown damaging the tyres of a vehicle owned by one of the persons responsible for the alleged assault. The assault had followed.

**[32]** On 12 May 2013 Mr Yiasoumi was interviewed by DS Orr and told that the Police held evidence which showed the account given to the CIB officers at the hospital was not a true account. Mr Yiasoumi was cautioned and told of the CCTV footage showing him in the act of damaging tyres. At this Mr Yiasoumi went silent and appeared very uncomfortable. He then agreed the footage was accurate. DS Orr told Mr Yiasoumi that the Police could proceed with a Crimes Act assault complaint as one of the individuals had admitted to hitting Mr Yiasoumi on the legs with a stick. He further advised Mr Yiasoumi that he (Mr Yiasoumi) would also face charges of criminal damage. At the conclusion of the meeting Mr Yiasoumi advised he did not want to proceed with charges and would not make a statement.

**[33]** After DS Orr had consulted with his supervisor the parties involved were advised no charges would be laid against any party. The file was then closed.

**[34]** This meant that forensic (ie for use in court) photographs of Mr Yiasoumi were not taken.

**[35]** The next relevant involvement by DS Orr in this matter was on 4 November 2014 when he received an email from Inspector Jackson advising him that while Mr Yiasoumi had requested a photograph (taken in hospital) of his injuries no such photograph could be found on the file. DS Orr replied on 6 November 2014 that he was unsure whether photographs had been taken at the hospital but suggested that DS Carroll or Detective McBriar might be able to assist as they were the officers who interviewed Mr Yiasoumi there. He added that if photographs were available there would be no reason for their not being attached to the file. DS Orr copied his email to DS Carroll and Detective McBriar asking whether they could assist.

**[36]** On 7 November 2014 DS Carroll responded that he did not have any photographs and could not recall if Detective McBriar had taken photographs while they were at the hospital. Detective McBriar was not able to respond at that time as she was ill and absent from work. She had in fact on 29 September 2014 earlier notified the police File Management Centre (FMC) at PNHQ that as far as she was aware no photographs of Mr Yiasoumi had been taken at the hospital.

**[37]** On 17 November 2014 DS Orr was copied into Inspector Jackson's email to Detective McBriar asking her about the photographs. In that email Inspector Jackson mentioned Mr Yiasoumi had said the photographs had been taken by a male uniformed officer. DS Orr replied on the same day that as no member of the CIB staff had been in uniform the officer referred to by Mr Yiasoumi must have been the constable who had attended the incident on the night in question. This suggestion proved to be correct.

**[38]** In his evidence DS Orr stressed that photographs had not been required by the CIB because the matter had not proceeded to trial and if photographs had been taken at the hospital they had unfortunately not been attached to the file. Had he (DS Orr) been aware of the existence of the photographs taken by Constable Upton there was no reason or incentive for him not to have provided copies to Mr Yiasoumi.

**[39]** It is to be borne in mind that in replying to the inquiries made by the FMC and by Inspector Jackson none of the CIB officers or Constable Upton had access to the physical file which by then was held at PNHQ. All their responses were from memory.

## **Inspector Jackson**

[40] Inspector Jackson explained that the procedure for processing a request such as that made by Mr Yiasoumi is that the request and the file are sent to the police FMC. As Mr Yiasoumi had requested a photograph the FMC had gone through the file looking for photographs showing an injured person in hospital. Staff in the FMC would not have read the file or endeavoured to understand what the case was about, the nature of the inquiries made by the first response and investigating officers, the decisions reached by them and the reasons for those decisions. In addition individual staff folders on any shared Police drive would not be accessible to the FMC nor is there an ability to search across the entire Police database. The FMC would work from the hard copy file. While there is an e-database known as the National Intelligence Application (NIA) it contains only basic information and photographs are seldom attached to it. In the present case the FMC had in fact checked the NIA database.

[41] Inspector Jackson said that the FMC deals not only with requests under the Official Information Act but also under the Privacy Act. The volume of such requests is substantial and of necessity there is a limit to the degree to which the FMC can “play detective” in tracking down the requested information.

[42] After the FMC had unsuccessfully searched through the file and checked the NIA database it had contacted Detective McBriar by email on 26 September 2014 asking her whether any photographs had been taken of Mr Yiasoumi at hospital. On 29 September 2014 Detective McBriar had replied that as far as she was aware no such photographs had been taken. It was in these circumstances that by letter dated 1 October 2014 the FMC had advised Mr Yiasoumi the information requested did not exist or could not be found.

[43] Following complaint by Mr Yiasoumi, Inspector Jackson on 3 November 2014 took over the search for the photographs and made direct inquiry by email with DS Orr and Detective McBriar. She was also in telephone contact with Mr Yiasoumi who told her the photographs had been taken by a male, uniformed officer.

[44] On 19 November 2014 Inspector Jackson retrieved the file from the FMC. On close inspection she noted a uniformed officer (Constable Upton) had made a notebook entry to the effect that he had taken photographs at the scene and at the hospital. On contacting Constable Upton, Inspector Jackson discovered the existence of the two photographs taken at the hospital.

[45] Those two photographs were sent to Mr Yiasoumi on 4 December 2014.

## **CREDIBILITY ASSESSMENT**

[46] Mr Yiasoumi makes serious allegations against the Police. They include:

[46.1] The Police officers (Constables Upton and Fergusson) who attended the scene of the incident on the evening of 10 April 2013 stood by and did nothing to stop the attack on Mr Yiasoumi.

[46.2] The photographs of Mr Yiasoumi’s injuries taken by Constable Upton at the hospital were removed from the Police file to prevent Mr Yiasoumi from obtaining them. The motivation was to prevent the IPCA from making a finding in Mr Yiasoumi’s favour in respect of his complaint that DS Orr negligently investigated the complaint and failed to prosecute Mr Yiasoumi’s alleged

assailants. The photographs were also withheld to frustrate Mr Yiasoumi's intended private prosecution against DS Orr for perverting the course of justice.

**[47]** Our assessment of Mr Yiasoumi's credibility and of his allegations now follow.

**[48]** Mr Yiasoumi impressed as a man with a fixed, inflexible belief that the decision not to prosecute his alleged attackers was a wrong and unjustifiable decision and that the photographs were removed from the file to frustrate his complaints against the Police.

**[49]** In our view Mr Yiasoumi has become so obsessed with the incident and with his complaints against the Police that he has reached the point of being irrational about these subjects. We do not, however, detect any malice on his part. It is more than possible the head injuries he undoubtedly received on the evening of 10 April 2013 have affected him deeply. While we have not seen the medical evidence it is noted that his solicitor's letter dated 31 March 2015 to the IPCA makes reference to Mr Yiasoumi continuing to suffer the consequences of the assault including memory problems, concentration lapses and dizziness.

**[50]** By contrast, the evidence of Constable Upton and DS Orr was given in careful, measured and accurate terms. We have no hesitation in accepting them as honest, truthful witnesses. Our finding is supported by the following:

**[50.1]** Constable Upton impressed as a person motivated to help others and to do his best as a Police officer. He is not a person who would stand by passively at a scene where an assault was taking place. He would intervene immediately.

**[50.2]** Constable Upton's conscientious attention to his duties as a Police officer is evidenced by the fact that on the evening in question he took photographs at the scene and at the hospital.

**[50.3]** His account of the difficulty involved in transferring the photographs from his Police issue iPhone to his Police email account is both plausible and convincing. The delay between transmission of the photographs and receipt by him coupled with the rapidity with which the file was assembled and handed over to the CIB provides a clear, convincing explanation for the absence of the hospital photographs from the file.

**[50.4]** Similarly the decision not to prosecute meant there was no need for forensic photographs to be taken or for the documentation on the file to reach the same standard as a file where there is to be a prosecution. In an ideal world perhaps a standard of perfection should be aspired to but it is understandable that Police officers working under substantial pressure will prioritise their time. For good reason they reached the view Mr Yiasoumi had not given a truthful account of the incident and that a prosecution would be unwise. There was little point in thereafter spending time unnecessarily assembling a comprehensive, complete file in which nothing was overlooked or missed.

**[50.5]** The existence of the hospital photographs was never concealed. Constable Upton's notebook entry (which was on the file) made explicit reference to photographs being taken at 10.20pm on 10 April 2013.

**[50.6]** As soon as the existence of the photographs was discovered by Inspector Jackson they were passed on to Mr Yiasoumi by letter dated 4 December 2014.

**[50.7]** When Mr Yiasoumi's lawyer wrote to the IPCA on 31 March 2015 asking that the assailants be charged, she and Mr Yiasoumi had the photographs as

they are expressly referred to in that letter. The delay did not result in any significant disadvantage to Mr Yiasoumi.

**[51]** In summary, we do not accept any of the allegations made by Mr Yiasoumi against Constable Upton, DS Orr or the Police generally. For completeness we mention that Inspector Jackson's credibility was not challenged by Mr Yiasoumi.

**[52]** Against these findings of fact we now turn to the legal issues.

### **THE LEGAL ISSUES**

**[53]** Section 29(2)(b) of the Privacy Act permits an agency to refuse an access request made pursuant to principle 6 if "the information requested does not exist or cannot be found".

**[54]** In *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 the Tribunal held at [125] and [126] that an agency relying on this ground must show that reasonable attempts have been made to find the information. The search must not only be a reasonable one but also thorough, intelligent rather than mechanical.

**[55]** For the following reasons we find such search was made in the present case:

**[55.1]** For sound management reasons, Privacy Act and Official Information Act requests addressed to the Police are dealt with not by individual frontline staff but by a central processing unit in the form of the FMC at PNHQ.

**[55.2]** On receipt of Mr Yiasoumi's request for "the photo the Police took of my head namely my face after my attack of the 10<sup>th</sup> of April 2013 whilst I was in the Lower Hutt Hospital's emergency department" the FMC called for and received the Police file.

**[55.3]** That file related to an incident which had occurred one year and four months earlier and in respect of which no prosecution proceedings had been taken.

**[55.4]** The FMC checked the file for the photographs requested by Mr Yiasoumi and correctly concluded no photographs of that description were held on the file. A search of the NIA database was also conducted. Again, no photographs of Mr Yiasoumi were held there.

**[55.5]** The FMC contacted one of the CIB officers who had interviewed Mr Yiasoumi at the hospital on the day following the alleged attack. That officer correctly reported that she was not aware of any photographs being taken of Mr Yiasoumi at the hospital. As no decision to prosecute had been made no forensic photographs had been ordered by DS Orr. There was nothing to alert the FMC to the fact that when the file was handed over by the uniformed officers to the CIB the hospital photographs were still in transit and did not catch up with the file prior to the investigation being closed.

**[55.6]** While it is now known the two photographs taken by Constable Upton were held in his folder on a shared drive, the Police have no ability to search across such folders.

**[55.7]** With the benefit of hindsight it is now known a painstaking search involving the separate interrogation of each uniform and CIB officer who had an involvement with the file coupled with an equally painstaking examination of each



document on the file as well as telephone contact with Mr Yiasoumi would have eventually led to the tracking down of the photographs. But the circumstances of the case did not justify the Police resorting to such lengths. The ground allowed by s 29(2)(b) for refusing a principle 6 request is legislative recognition that an agency which holds personal information does not have to apply unlimited resources to the location of the requested information. Although Inspector Jackson did subsequently carry out an exhaustive inquiry into the question whether photographs had been taken, a “no stone unturned” inquiry is not the standard set by the Privacy Act. An agency is not required to invest unlimited time and resources in the search for information which may well not exist or which cannot with reasonable diligence be found.

**[55.8]** Each case will turn on its own facts. On the present facts it was sufficient that the file and the NIA database be searched for the photographs and that a Detective who interviewed Mr Yiasoumi at the hospital be approached in person and asked whether any such photographs had been taken. There was nothing in the circumstances to alert the Police to the fact that Mr Yiasoumi would subsequently identify the photographer as a male person in Police uniform. Nor could the FMC know that for technical reasons the two hospital photographs had not reached the Police file at handover to the CIB.

### **CONCLUSION**

**[56]** In the present case we are of the view a search of the file and of the NIA database coupled with direct inquiry with one of the CIB investigating officers who interviewed Mr Yiasoumi at the hospital was sufficient for the Police to discharge their obligations under the Privacy Act. The Police were justified in refusing Mr Yiasoumi’s request under s 29(2)(b) of the Privacy Act on the grounds the information requested did not exist or could not be found. There was no interference with Mr Yiasoumi’s privacy in terms of s 66 of the Act.

**[57]** The proceedings are dismissed.

**[58]** We reserve the question of costs but in so doing are not suggesting that an application be filed by the Attorney-General. The injuries sustained by Mr Yiasoumi on the evening of 10 April 2013 might largely explain his obsessive pursuit of his complaints against the Police and as a litigant in person he is unlikely to be aware of the reasons for judicial restraint in the review of prosecutorial discretion, as to which see the recent summary in *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [34] to [49].

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**Mr RPG Haines QC**  
Chairperson

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**Ms WV Gilchrist**  
Member

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**Hon KL Shirley**  
Member