

- 1) By photographing Ms Z and her partner, Police were in breach of principles 1 and 3 of the Privacy Act 1993.
- 2) There was no evidence of overt racism in the planning or carrying out of this operation.

Analysis of the Issue

THE OPERATION

6. A gang member organised a 'fight night' event due to take place on 16 November 2019, which was to be held at a residential address on Takahiwai Road, Ruakākā. Police met with the organiser prior to the event to establish details, including who would be attending, and to notify him that they would be conducting a checkpoint nearby.
7. Police were acting under the assumption that there would be a number of gang members and associates at the event but were aware that not all attendees would have gang affiliations. They anticipated that if the organisers and attendees were aware that Police were looking to conduct some sort of operation nearby, those who did not wish to come to the attention of Police would not attend.
8. The plan for the operation included gathering intelligence such as photographs of persons or vehicles of interest. Officer A, an Intelligence Collection Coordinator, told the Authority that the benefit of taking photos during the checkpoint was that it would assist with determining who was present at the event if any crime did occur, and that the record of attendance could be used later on as intelligence.

WERE POLICE JUSTIFIED IN STOPPING MS Z AT THE CHECKPOINT, AND GETTING HER TO PULL OVER FOR THE PURPOSE OF INTELLIGENCE GATHERING?

The checkpoint

9. There were approximately 30 officers involved in the operation. The checkpoint itself was set up in two stages. A group of officers were stopping vehicles on the road, and another group were on the side of the road where they would gather intelligence from the occupants of the vehicles that had been directed to pull over.
10. As vehicles arrived at the checkpoint, the first group of officers were responsible for the road safety part of the checkpoint. They would breath-test the drivers and check their warrant of fitness, registration, driver's licence, and whether there were any other matters that needed enforcement action.
11. Based upon their initial assessment, these officers would deal with any issues relating to the vehicle or the driver. If further checks were needed in relation to the serviceability of the vehicle or potential offending, they would complete these on the side of the road.

12. If the occupants of a vehicle were attending the event and/or were suspected to have gang associations, most were asked to pull over to the side of the road so Police could record intelligence information about the occupants.
13. Officer B, a Field Intelligence Officer, told us that officers would direct vehicles off to a grass area on the side of the road where more officers were waiting if it was deemed that they were part of, or attending, the event. Locals were checked at the initial checkpoint and allowed to carry on. This prevented traffic from becoming backed up.
14. Officer C said there was an initial staging point with three or four officers doing breath-screening and checking licences. Further inquiries or inspection of vehicles was undertaken at the side of the road, where Officer A's team was. Officer C said the checkpoint was in place for "*quite a long time*". The operation orders state that it was to commence at 10am, and Officer C said it ended at approximately 2pm. He believed the event itself finished around 3 or 4pm and went off without incident. Police did not conduct a checkpoint afterwards.
15. Ms Z told the Authority that, when she turned onto Takahiwai Road, there were a number of Police vehicles present, and they appeared to be conducting a standard roadside safety check. She was aware that Police did not want the event to go ahead, and as such did not believe it was a 'random' checkpoint. She says Takahiwai Road is not a high traffic road, and there were no vehicles behind her.
16. At approximately 12.14pm Ms Z's car was stopped in the middle of the road and checked by an officer.¹ She says he checked her driver's licence, warrant and registration, and took a moment to look inside the vehicle. The officer then asked her to pull over to the side of the road, where there were more officers waiting.

Was the checkpoint lawful?

17. Section 114 of the Land Transport Act 1998 gives an enforcement officer the power to require a driver to stop and give specified particulars such as name, address, date of birth, occupation, and telephone number. If a vehicle is stopped under this provision the enforcement officer may require a driver to remain stopped on a road for as long as is reasonably necessary to enable them to establish the identity of the driver, but not for longer than 15 minutes. This provision applies only to the driver of the vehicle and not to any passengers.
18. This initial checkpoint was lawful under section 114 of the Land Transport Act, and Police were thereby authorised to initially stop Ms Z.

Were Police justified in requiring Ms Z to pull over to the side of the road after the initial check?

19. Officer D, who was in charge of setting up the checkpoint, did not believe that attendance at the event was a trigger for people to be directed to pull over. However, Officer E, who was conducting initial stops, and Officer F, a sergeant overseeing staff, accepted that the checkpoint

¹ The officer who initially stopped Ms Z is no longer with Police, and the Authority was unable to interview him.

had dual purposes: there was a road safety aspect, but they were also conducting intelligence gathering in respect of those attending the event.

20. Ms Z says when she was asked to pull over, she questioned why, and was told Police needed to complete more checks and they were holding up traffic, although there were no cars behind her. Officer B recalls there being a few other cars there at the time. However, he acknowledged traffic was very light.
21. The officer who initially stopped Ms Z, still holding Ms Z's licence, walked over to the side of the road, which meant she had to drive there in order to get her licence back. If she had not done so, and had driven away, she was concerned she could have been liable for driving without a licence. She says she was not advised that she had been detained.
22. Section 22 of the Bill of Rights Act 1990 states that *"everyone has the right not to be arbitrarily arrested or detained."*
23. The Police 'Arrest and Detention' policy states that a person is detained when they are *"deprived of their liberty and not free to go as they please"*. However, it correctly notes that some legislation allows people to be stopped and/or required to give particulars or information in limited situations, including under section 114 of the Land Transport Act, and that the transitory limitation on their freedom of movement in these circumstances does not constitute detention. We accept that the initial stop of Ms Z was undertaken for land transport purposes, was authorised by the Land Transport Act, and therefore fell into this category.
24. However, the direction that Ms Z pull over to the side of the road after her licence was taken is another matter. Although the versions of events provided by officers are inconsistent as to why people were pulled over to the side of the road, we believe that in most cases this was triggered if the initial stop established that they were attending the event. Police actions at that point were driven by intelligence gathering rather than the enforcement of the Land Transport Act; Ms Z rightly felt that she was not free to leave; and the limitation on her freedom of movement was no longer transitory.
25. Police policy rightly states that a detention becomes arbitrary when an officer arrests or detains a person and:
 - there is no legislative power to arrest or detain that person (an exception may be a detention essential for the person's personal safety); or
 - the arrest or detention is unreasonable or unnecessary in the particular case, or while the initial detention is appropriate, the detention continues for an unnecessarily long time.
26. The direction that Ms Z pull over to the side of the road amounted to detention that was not based on any legislative power to arrest or detain. It was accordingly arbitrary and unlawful.

Intelligence gathering at the side of the road

27. The Police 'operation order' outlined the photographer's role as including taking photographs of persons or vehicles of interest.
28. Based on the information provided by the officers interviewed, it appears that this approach was consistent with other gang-related targeting operations or one-off events, including a previous 'fight night' held by the same organiser in 2017. The officers believed they were authorised to take photographs according to Police policy, they had not been advised otherwise, and they did not believe they were breaching privacy by doing so. Officer C advised us that staff were not instructed to tell the occupants of the cars the purpose for the photographs.²

The officers' versions of events

29. Officer B was the designated photographer at the checkpoint. He had a single-lens reflex (SLR) camera, and an iPhone. Throughout the course of the day Officer B took photographs of cars, occupants, gang patches, and clothing.
30. When Ms Z's car pulled over to the side of the road Officer B approached the open passenger window. He immediately recognised the clothing of the passenger (Mr Y) as something the Head Hunters would wear. He asked Mr Y for his name, but he did not respond. Officer B was aware that Mr Y, as a passenger, was not required to speak to him. Ms Z then said Mr Y did not need to talk to Police and the passenger window began closing.
31. Officer B took two photographs of Mr Y with his iPhone as the window was closing.³ Ms Z, who was in the background of the photograph, put her hand in front of her face. Officer B believed she became agitated, had the car in gear and was trying to leave.
32. Officer A heard a woman's voice raised so he went over and introduced himself to Ms Z. He noticed that the engine was still running, and the tyres were moving slightly forward and backward. He believed Ms Z was "*obviously wound up*" and wanted to leave, so his intention was to try and calm the situation down.
33. Officer A was not aware of whether Ms Z's warrant and registration had been already checked, so he did so. He says he interacted with Ms Z for three or four minutes, and after he checked her warrant and registration, he believed he said she was free to go.
34. Officer B says Ms Z got out of the car and "*stormed*" over to where he was standing on the passenger's side. She said something along the lines that he could not take a photograph, and he responded that he could, as he was in a public place. Ms Z turned around and "*stormed back*". She asked for his badge number which he provided. He says that he had never met either Ms Z or Mr Y before.

² The Privacy Act 1993 defines personal information as information about an identifiable individual.

³ The SLR camera was out of battery at this point, but was hanging around his neck.

Ms Z's version of events

35. After Ms Z pulled over, she was speaking to the officer who had taken her licence when other officers started to *"interrogate"* her partner, Mr Y, and asking for his name and driver's licence.
36. She noticed that the officer she was dealing with had a camera on his phone.⁴ They looked to be taking photographs of her driver's licence and pointing the camera into her car. She told them they did not have permission to do so, and the officer responded that it was no different from them viewing her licence. At this point she believed that they were videoing.
37. She says that one of the officers stood in front of the car, which physically stopped her from leaving. She told him that they had no reason to keep her there, and he responded that he was checking her warrant and registration, which Ms Z believes was an *"afterthought"*. She said that they had already done so and started the car. When the officer moved away, she accelerated to leave. However, Police had a *"full on camera"* and were taking photos through the window. She believes she was probably at the side of the road for between four and five minutes.
38. Ms Z reversed back. She got out of the car and told the officers they had taken photos without permission, and requested they delete them. She believed they had breached her privacy. Officer B responded that they were able to take photos as they were in a public place.
39. Ms Z says Officer B *"came up directly into my face in an intimidating manner"*, and when she asked for his badge number, he *"basically screamed it in my face"*. She says the officers had *"closed in"* on her, and the mood had changed. She believed they were going to arrest her. At this point she got back into her car, said she would be making a complaint, and left.
40. Ms Z told us that she made a request under the Official Information Act 1982 for the photographs taken by Police. However, she says the photographs provided to her, and to the Authority, were the ones taken when she had gone back to speak with the officers. The photos that she believes were taken prior to this, including of her driver's licence, were not provided.

The Privacy Act 1993

41. The Privacy Act 1993 was in force at the time of the incident and governed the way in which Police collect, use, and disclose personal information about identifiable individuals. The taking of photographs is a collection of personal information. Accordingly, Police must ensure that their actions comply with the relevant privacy principles.
42. Principle 1 provides that personal information shall not be collected by any agency unless the information is collected for a lawful purpose connected with a function or activity of the agency (i.e. Police); and collection of the information is necessary for that purpose.
43. Principle 3 is interpreted as requiring that Police, when collecting personal information from an individual (in this case photographs), take reasonable steps to ensure that the individual is aware of the fact that the photograph is being taken, the purpose for which their photograph is being

⁴ She appears to be referring to the officer who first spoke to her on the road and took her licence, as opposed to Officer B. They have since left Police.

taken, who will receive and hold the photograph, the legal basis on which Police have taken the photograph, and the individual's rights of access and where the photograph will be held.

Were Police justified in taking photographs of Ms Z and her partner?

44. Ms Z and Mr Y were travelling to a lawful event when they were stopped, detained and their photographs taken. Indeed, Police stopped most people travelling to this event and photographed them. Police intended to enter all the photographs into the Police computer and use them for potential intelligence purposes. Photographing so many people was far too broad and not rationally or reasonably connected to a law enforcement purpose. Accordingly, we find that Police were not collecting the photographs for a lawful purpose and breached Principle 1 of the Privacy Act. Police also did not provide proper information to Ms Z about why the photographs were being taken, who would receive it and her rights of access. Failure to provide such information breached Principle 3 of the Privacy Act.
45. Officer A advised the Authority that the photographs from the event have not been used, and have been placed in a password-protected, secure folder pending the outcome of the Authority's investigation.

Were the attendees of the event racially targeted?

46. Ms Z recalled speaking to other attendees of the events, who said *"it happened to them too"*. She believed that other attendees thought *"it was normal and Police could do it"* and they did not feel distressed. She believes that Police thought they could get away with it and pushed boundaries that they would not otherwise push. That is, in her view, because the event took place in Northland, the attendees were all Māori who are used to being treated like this, and there were gang members present. Ms Z outlined in interview that she believes her treatment by the Police was racially motivated.
47. We note that Police have undertaken very similar operations where the occupants of vehicles that were targeted were not Māori. However, we accept Ms Z's point that the fact that Police were able to take photographs of the event attendees without challenge may be indicative of them being accustomed to dealing with Police. If Ms Z had not complained, the matter may not have come to the Authority's attention.
48. We do not consider that the event attendees were racially targeted. They were targeted because they were believed to be possible gang members or associates, not because they were Māori.

FINDINGS

Police were authorised in carrying out the initial checkpoint under section 114 of the Land Transport Act.

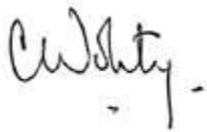
Although the initial checkpoint was lawful, at the point Police required Ms Z to pull over to the side of the road for intelligence purposes she was unlawfully detained.

Section 114 of the Land Transport Act was used as a pretext for intelligence gathering, which was a disingenuous use of the section.

By photographing Ms Z and her partner, Police were in breach of principles 1 and 3 of the Privacy Act.
There was no evidence of overt racism with regard to the planning or carrying out of this operation

Subsequent Police Action

49. Police conducted a review into the initial checkpoint and determined that it was compliant with the Land Transport Act 1998 and Police policy.
50. They also determined that photographing Ms Z and her partner did not comply with the powers conferred under the Land Transport Act or Principles 1 and 3 of the Privacy Act 1993 and was not justified. Police apologised to Ms Z and confirmed they have destroyed the photographs of her.
51. The Police review recommended the following:
 - That there is a review of national police policy to provide clear guidance on when photographs can be taken for intelligence purposes.
 - Northland District to have clear guidelines for operation orders to ensure Police are being lawful in their use of the Land Transport Act 1998, and understand the powers conferred by said Act.
52. Given the actions that Police are taking the Authority does not need to make any formal recommendations, but we will monitor Police's progress in these areas.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

13 April 2021

IPCA: 20-1815

Appendix – Laws and Policies

LAW

The Land Transport Act 1998

53. Section 114 gives an enforcement officer the power to require a driver to stop and give specified particulars such as name, address, date of birth, occupation, and telephone number. If a vehicle is stopped under this provision the enforcement officer may require a driver to remain stopped on a road for as long as is reasonably necessary to enable them to establish the identity of the driver, but not for longer than 15 minutes. This provision applies only to the driver of the vehicle and not to any passengers.

The Bill of Rights Act 1990

54. Section 22 states that *“everyone has the right not to be arbitrarily arrested or detained.”*

The Privacy Act 1993

55. The Privacy Act 1993 governs the way in which Police collect, use, and disclose personal information about identifiable individuals. The taking of photographs is a collection of personal information. Accordingly, Police must ensure that their actions comply with the relevant privacy principles.
56. Principle 1 provides that personal information shall not be collected by any agency unless the information is collected for a lawful purpose connected with a function or activity of the agency (i.e. Police); and collection of the information is necessary for that purpose.
57. Principle 3 is interpreted as requiring that Police, when photographing an individual, take reasonable steps to ensure that the individual is aware of the fact that the photograph is being taken, the purpose for which their photograph is being taken, who will receive and hold the photograph, the legal basis on which Police have taken the photograph, and the individual’s rights of access and where the photograph will be held.

POLICY

Arrest and detention policy

58. The policy outlines that arbitrary detention is when you arrest or detain a person and:
- You do not have a legislative power to arrest or detain that person (an exception may be a detention essential for the person’s personal safety).
 - The arrest or detention is unreasonable or unnecessary in the particular case, or while the initial detention was appropriate, the detention continued for an unnecessarily long time.

59. A detained person is “deprived of their liberty and is not free to go as they please”. The policy notes that some legislation allows people to be stopped and/or required to give particulars or information in limited situations, included under section 114 of the Land Transport Act.

Filming and audio recording of operations and events policy

60. The policy states that:

“Where approval is given, it is permissible to record everything in a public place or on private property so long as the employee records only what they personally see and hear (i.e. you can not leave a camera recording while you move to another place on private premises out of sight or hearing of the camera). The video recording may be done overtly or covertly, and with or without the other party’s permission.”

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

The Independent Police Conduct Authority is an independent body set up by Parliament to provide civilian oversight of Police conduct.

We are not part of the Police – the law requires us to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Colin Doherty.

Being independent means that the Authority makes its own findings based on the facts and the law. We do not answer to the Police, the Government or anyone else over those findings. In this way, our independence is similar to that of a Court.

The Authority employs highly experienced staff who have worked in a range of law enforcement and related roles in New Zealand and overseas.

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority receives and may choose to investigate:

- complaints alleging misconduct or neglect of duty by Police;
- complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- notifications of incidents in which Police actions have caused or appear to have caused death or serious bodily harm; and
- referrals by Police under a Memorandum of Understanding between the Authority and Police, which covers instances of potential reputational risk to Police (including serious offending by a Police officer or Police actions that may have an element of corruption).

The Authority's investigation may include visiting the scene of the incident, interviewing the officers involved and any witnesses, and reviewing evidence from the Police's investigation.

On completion of an investigation, the Authority must form an opinion about the Police conduct, policy, practice or procedure which was the subject of the complaint. The Authority may make recommendations to the Commissioner.

THIS REPORT

This report is the result of the work of a multi-disciplinary team of investigators, report writers and managers. At significant points in the investigation itself and in the preparation of the report, the Authority conducted audits of both process and content.



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