Release of a Police file regarding Tony Veitch

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IPCA
Independent Police Conduct Authority
Whaia te pono, kia puawai ko te tika

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Introduction and Background

INTRODUCTION

1. On 20 July 2009, the Authority reported to the Commissioner of Police and Mr Veitch on the results of an investigation it had conducted into complaints by Mr Veitch about the manner in which Police had investigated a number of assault allegations made by his former partner, Ms Dunne-Powell.

2. On 10 September 2009, Mr Veitch's counsel, Mr Grieve QC, laid a further complaint with the Authority on behalf of Mr Veitch. That further complaint, which is the subject of this report, related to a decision by Police to release information to the news media relating to six assault charges which had been dismissed by the Court without first honouring an undertaking to consult over the release of such information.

BACKGROUND EVENTS

3. On 7 July 2008 the Dominion Post reported that Tony Veitch, a television presenter and radio broadcaster, had assaulted his partner, Kristin Dunne-Powell, on a number of occasions between 2002 and 2006.

4. The newspaper further reported that Mr Veitch had paid Ms Dunne-Powell a sum of money in return for her agreement that a serious assault by him on 29 January 2006, which resulted in her requiring medical treatment for injuries to her back, would not be reported to Police.

5. On 9 July 2008, Mr Veitch addressed a media conference in Auckland in which he admitted that he had "lashed out" at Ms Dunne-Powell in January 2006. On 17 July 2008 he resigned from Television New Zealand and from Newstalk ZB.

6. On 10 July 2008, Auckland City Police commenced an assessment of the extensive news media coverage which followed Mr Veitch's public admissions, and on 17 July 2008 confirmed that a criminal investigation was in progress, following receipt of a formal complaint by Ms Dunne-Powell.

7. On 18 August 2008 Mr Veitch was arrested and charged under the Crimes Act 1961 with six counts of male assaults female and one of injuring with reckless disregard.

8. On 16 April 2009, following lengthy discussions between the Crown and defence counsel, Mr Veitch pleaded guilty in the Auckland District Court to the charge of injuring Ms Dunne-Powell with reckless disregard for her safety and was fined $10,000, placed under supervision for nine months and ordered to complete 300 hours of community work. In relation to the six charges of male assaults female, the Crown offered no evidence and they were dismissed.

9. On 16 April 2009, following Mr Veitch's guilty plea and the sentence imposed, Police received requests under the Official Information Act 1982 (OIA) from two news media organisations asking for information from the Police investigation file, including information relating to the six charges of male assaults female in respect of which the Crown had offered no evidence.

10. On 20 April 2009 Police received two further requests under the OIA from news media organisations.

11. On 29 April 2009, following advice from Police National Headquarters, the officer overseeing the investigation sent a letter to Mr Veitch's counsel, Stuart Grieve QC, notifying him of the OIA requests and advising that he would be in touch when it was determined what information would be released. The officer has acknowledged that he meant, and Mr Grieve took him to mean, that Mr Veitch would be provided with an opportunity to review the documents before they were released to the news media.

12. However, on 20 May 2009, without first having consulted with Mr Grieve, Police released a bundle of 358 documents from the investigation file to news media. This documentation included statements containing the allegations relating to the six assault charges which the Crown had elected not to proceed with and thus had not been proven in Court. Following publication of some of the released material later that same day, Mr Veitch applied to the High Court for an injunction to prevent further publication.

13. A brief timeline of the relevant events of that day, a number of which are discussed in more detail later in this report, is as follows:

    13.1 Morning: 358 documents released to the media relating to the investigation of Mr Veitch.

    13.2 2:05 pm: *"Tony Veitch Police file released"* article appears on the *Stuff* website. The article included details of charges which were withdrawn and quotes from the Summary of Facts first prepared by Police to address all seven of the charges initially laid, six of which were not proceeded with.

13.3 3:12 pm: *"Police evidence against Tony Veitch released"* article appears on *The New Zealand Herald* website.

13.4 4:00 pm: Ex parte application for an injunction against various media defendants and Police placed before the High Court.

13.5 5:30 pm: Telephone conference in relation to injunction application convened by the High Court.

13.6 Pre 6:00 pm: Orders made in the High Court prohibiting the defendants from publishing material not already published.

14. Subsequently, on 26 May 2009, acting on legal advice, Mr Veitch discontinued his proceedings in the High Court.

15. The action by Police in releasing the documents to the news media attracted public criticism from Mr Grieve and from other senior members of the legal profession, as well as from the Law Society.

DETAILS OF THE COMPLAINT

16. In this current complaint Mr Grieve made it clear that one of the factors taken into account in Mr Veitch's decision to plead guilty to one of the seven charges laid was the Crown's agreement that the other six charges would not be proceeded with. It was expected the unproven allegations underpinning those six charges would not be publicised. However, in the event, the unproven allegations became widely reported by the news media

17. Mr Veitch's complaint is that, had there been any indication that Police intended releasing information to the news media about charges which were not substantiated in Court, he would have proceeded to defend all of Ms Dunne-Powell's allegations. He asserted this had been his position right up until the time the Crown confirmed it would not proceed with six of the assault charges.

18. Of further concern to Mr Veitch was the fact that Police released all of the information relating to Ms Dunne-Powell's allegations and not simply information relating to the charge of injuring with reckless disregard, the veracity of which he had acknowledged by his guilty plea.

19. He said Police were also selective in the documents they released and in contrast deliberately withheld information about Ms Dunne-Powell that would have been potentially damaging to her; that Police released original statements made by witnesses, including by Ms Dunne-Powell, instead of the briefs of evidence and there were significant

differences between the two; that Police also released a summary of facts not agreed to; and that media had used the original witness statements as if they contained proven facts.[1]

20. Mr Veitch has alleged that, as a direct consequence of the release of this information without consultation, he was subjected to extensive 'trial by media' in respect of unproven allegations against him, with no effective means of publicly defending his position; and that as a further consequence he has suffered irreparable damage to his professional and public reputation, and this has severely affected his ability to secure employment.

[1] The Authority observes that it is not uncommon for there to be differences between original statements and briefs prepared for a court hearing, often for reasons of evidential admissibility.

The Authority's Investigation

THE AUTHORITY'S ROLE

21. The Authority's role in investigating a complaint is to form an opinion on whether or not any decision, recommendation, act, omission, conduct, policy, practice, or procedure on the part of Police was contrary to law, unreasonable, unjustified, unfair, or undesirable.

22. The Authority is required to convey its opinion on the matter, with reasons, to the Commissioner of Police, and the Authority may make such recommendations as it thinks fit.

THE AUTHORITY'S INVESTIGATION

23. In the course of the Authority's investigation into Mr Veitch's complaint about the release of unproven information about him, the following persons were interviewed: the officer overseeing the Police investigation; the officer in charge of the investigation and responsible for collating the response to the news media requests under the Official Information Act 1982; the Communications Manager at Auckland City Police; the Police Privacy Officer who is a Senior Legal Advisor at Police National Headquarters; the Police National Manager: Policy & Legal Services; other advisers consulted by Police and by Mr Veitch; Mr Grieve QC; and the Deputy Ombudsman.

24. In addition, the Authority examined the 358 pages of disclosed material, emails and correspondence released to the news media.

25. The Authority also considered the application and effect of relevant principles in the Privacy Act 1983; the application of the Official Information Act 1982; *the Police Review of Procedures for Responding to Official Information and Privacy Requests September 2009*; Police policy for dealing with disclosure of information; the report prepared for

Government by Sir Alan Danks K.B.E. as Chair of the *Committee on Official Information*[2] which proposed the abolition of the Official Secrets Act and adoption of the Official Information Act; and a formal opinion provided by the Chief Ombudsman clarifying the principles the Ombudsmen have developed in relation to the protection of personal privacy under section 9(2)(a) of the Official Information Act and the application of those principles in Mr Veitch's case.

ISSUES RAISED BY THE COMPLAINT

26. The Authority has found no precedent in which documents of the type released in this case, following a decision by Police not to proceed with charges and their dismissal by a Court, have subsequently been publicly released by Police to the news media.

27. Police sought to refer the Authority to an earlier case in which an alleged offender, who was not charged because the complainant withdrew the complaint, was later identified through a DNA match. Police had received but declined a number of Official Information Act requests from the media for disclosure of the criminal investigation file in that case, but had declined those requests.

28. Subsequently, the alleged offender was convicted and sentenced for another unrelated offence. Police advised defence counsel of their intention to distribute previously unreleased documents to the news media to refute allegations of inappropriate influence over the decision not to prosecute the offender for the earlier offence. No response was received from defence counsel and the documents were made public.

29. The Authority has considered the situation arising in that case, where no charges were ever laid following the withdrawal of a complaint, and where the identity of the parties was protected during the disclosure process, and is satisfied it is readily distinguishable from Mr Veitch's case, in which charges were laid by Police but later dismissed by a Court following a plea bargaining process between the Crown and defence counsel.

THE ISSUES RAISE QUESTIONS OF PUBLIC IMPORTANCE

30. The issues raised in Mr Veitch's case, including the apparently unprecedented nature of the Police decision to release unproven allegations following due process, have implications beyond their personal and professional effect on him and raise questions of public importance.

[2] *Sir Alan Danks K.B.E. Chair of a Committee on Official Information, 20 July 1981*

31. One such question is the degree of confidentiality that should properly attach to personal information held by an agency. Police hold a great deal of personal information, and the security in which that information is held and the extent to which it can properly be used is an important public issue. There are overlaps between the law of confidentiality and the law of privacy and the former is a developing area of the law with important divergences between the approach taken by the English and New Zealand Courts. The development of the law in this area is for the Courts. The Authority simply notes that there should be a strong public interest, consonant with Police duty, before information obtained in the course of an investigation is released into the public arena. The Authority further notes that, under the heading *Confidentiality* in the Police ***Code of Conduct***, (GI C303), the following requirements are set out:

> *"Information which comes into an employee's possession in the course of their duties must be treated in confidence and used only for official purposes.*
>
> *Care is taken with the handling of information, including ensuring it is used only in accordance with applicable legislation and recognised standards, policies and directives.*
>
> *Official and private information is released only in accordance with applicable legislation and Police procedures, and by employees authorised to deal with requests for information."*

32. Another closely related issue of public importance is the extent to which Police can properly use personal information obtained during an investigation (such as witness statements), other than for the purposes of that investigation or for some related line of inquiry, or in any subsequent court processes: that is, beyond the extent necessary for the administration of justice.

33. In Mr Veitch's case, the Crown and defence had reached a considered plea bargain after a number of weeks of negotiation and discussion and based on a careful balancing of the competing interests.

34. As noted in paragraph 16 above, Mr Veitch's decision to plead guilty to the most serious charge on Mr Grieve's advice was in part consequent upon the Crown's agreement that the other six charges would not be proceeded with. His guilty plea was entered on the basis of an agreed summary of facts that was confined to the facts underpinning the single charge that was to be proceeded with, and did not include reference to any of the other six charges that the Crown no longer sought to prove. Due process then took its course. Once that process was completed, Mr Veitch contends that he was entitled to expect finality and to expect that unproven allegations he had not been required to answer to in Court would not subsequently be published.

35. Mr Grieve expressed his views on the effect of this unprecedented action by Police in a media statement made on May 22, 2009. He said:

> *"The only allegation that the complainant made which was accepted by Mr Veitch was that which he acknowledged in Court. In my experience, the Police have never acceded to similar Official Information Act requests by releasing material of this type. In my opinion the Police responsible for condoning or approving this release have disregarded the position of the Courts in this country as being the proper forum for dealing with criminal allegations.*
>
> *I regard the actions by the Police as being totally irresponsible; they are actions which have contributed to a serious erosion of our system of justice as we know it. As a result of the actions of the Police, for all practical purposes the New Zealand justice system has been rendered irrelevant and secondary to trial by news media".*

36. In an affidavit filed in the High Court in relation to the injunction proceeding, Mr Grieve further said:

> *"It simply did not occur to me that, in the context of this case, namely where a plea of guilty had been entered on the basis of a negotiated and agreed summary of facts coupled with a number of other charges being withdrawn, that the material containing untested factual allegations, apparently inconsistent with the agreed summary of facts, and untested allegations relating to the charges that the Police had elected not to pursue, that the Police would then release material which undermined the whole basis upon which the matter had been dealt with by the Court.*
>
> *I reiterate that never in my experience has such material been released by the Police. I can add that, having discussed this with other senior colleagues at the Bar in the wake of the release, their experience is the same as mine.*
>
> *I can say, without hesitation, that if this new Police practice is to become the norm, then it is going to have a significant and far-reaching impact on the practice of criminal law in New Zealand."*

THE BASIS OF THE POLICE DECISION TO RELEASE THE INFORMATION

37. The Privacy Officer at Police National Headquarters told the Authority that even if Mr Veitch and Ms Dunne-Powell had been consulted as intended, Police would not necessarily have reached a different decision in this case, citing the public interest in receiving the information requested by the news media as outweighing any privacy interests of the individuals concerned.

38. Notwithstanding this approach, Police did concede that consultation in this case would have been an effective mechanism for ensuring that Police fully understood the depth of Mr Veitch's privacy interests, which Police acknowledge they were required to consider before disclosure; and that while consultation may not have resulted in a different decision to release the information, it would have strengthened the judgement Police brought to bear when balancing the public and privacy interests.

39. Police say that the Official Information Act does not provide the ability to withhold classes of information or documents - such as the allegations contained in Ms Dunne-Powell's statements, and in other witness statements.

40. The reasons for Police placing their perception of the public interest ahead of Mr Veitch's privacy interests is set out in the following extract from an email by the Privacy Officer at Police National Headquarters. Her approach in this regard was subsequently confirmed during interview with the Authority's investigator:

> *"One of the major difficulties with this file is the level of publicity that has centred around the incident and the subsequent charges and the outcome last week. A lot of information is already in the public domain and whether the reported information is accurate or not, the public interest aspect regarding Police being transparent and accountable in its dealings with Veitch and Dunne-Powell, the decision to charge and then "plea bargain" means that whether Veitch or Dunne-Powell agree or not we are going to have to be prepared to release as much as*

possible to provide a balanced and accurate picture of the facts that sit behind this matter, which is why it will be important to manage their respective expectations re release of any information."

41. Thus the Police justification for releasing the information was the Police's view that it was for Police to consider and balance Mr Veitch's privacy interests against any public interest in receiving the unproven information, based on a perception that it is Police's role to *"provide a balanced and accurate picture…."*. Against that Police have acknowledged that it is not apparent what precisely the Police considered to be Mr Veitch's privacy interest; what precisely was the public interest in being provided with a balanced and accurate picture; and exactly what criteria were used to arrive at the conclusion that the public interest outweighed any privacy interests.

42. In terms of providing a "balanced and accurate picture" the Authority is aware that the Ombudsman's Office has received a complaint from a news media organisation under the Official Information Act, regarding a Police decision to decline a request for a related file, that of Kristen Dunne-Powell. At the time of publication of this report, the Ombudsman has not publicly reported on that complaint.

THE REQUESTS FOR INFORMATION AND THEIR PROCESSING

43. The chronology of events during the Police processing of the Official Information Act requests from the news media highlights a number of important procedural issues.

44. On the day Mr Veitch pleaded guilty to *injuring with reckless disregard* and was sentenced, Police received the requests for information under the OIA from the *Herald on Sunday* and the *Dominion Post*. No OIA requests from news media had been received in relation to Mr Veitch's case prior to that date.

45. The request from the *Herald on Sunday* was for *"the police file on the Tony Veitch investigation, in relation to charges brought following allegations by Kristin Dunne-Powell*". The *Dominion Post* specified *"…copies of every document held by police on the inquiry including every witness statement, job sheet, all video statements and all other exhibits obtained by police…….please note there are precedents for such information being released once a guilty plea has been obtained*". The Authority knows of no such precedent.

46. These first two news media requests made no distinction between documents relating to the charge which had resulted in a conviction being entered and those which were withdrawn and thus were unproven.

47. It is clear from the above requests that as much information as possible from the Police file was sought.

48. After receiving the requests, the officer overseeing the investigation emailed the Privacy Officer at Police National Headquarters in Wellington on 17 April 2009 enclosing the request from the *Herald on Sunday* and seeking advice regarding the appropriate police response. He advised the Privacy Officer that further official information requests from the news media were anticipated and that a detective who was the officer in charge of the case would be tasked with collating documents from the police investigation file and preparing the proposed responses. Police did not ask either media organisation to be more particular in their requests or refuse to provide documents containing allegations not tested in Court.

49. The Privacy Officer emphasised a number of points to the officer overseeing the investigation. One was that on the day of his Court appearance Mr Veitch had said during a press conference that he was considering filing defamation proceedings against some news media in respect of reports about his case made prior to 16 April 2009.

50. For that reason the Privacy Officer's advice was that Police would need to take care in processing all news media requests for information from the Police file. In particular, the Privacy Officer emailed the Police Communications Manager advising that: *"Both Veitch and Dunne-Powell should be told about the OIAs and if appropriate their views sought about the release of information about themselves. Their views will not determine what we release per se but will be one of the factors we have to consider regarding the release on* (sic) *information about him/her."*

51. Later in the same email the Privacy Officer said….."*It is my opinion that Veitch and Dunne-Powell are also provided with a copy of what ultimately is released to the media or any other requestors."*

52. Following this, the officer overseeing the investigation wrote a letter to Mr Grieve stating……."*I am writing to advise you that Police have received a number of Official Information Act requests from different media organisations……..At such time when it is determined what information will be released, I will advise you."*

53. This letter raised the clear expectation, which Police acknowledge, that Mr Grieve and consequentially Mr Veitch, would receive a copy of the documents Police were proposing to release to the news media prior to their release and thereby have an opportunity to comment on them. Police did not, however, follow through on this undertaking.

54. The officer overseeing the investigation confirmed to the Authority that it was always his intention to provide Mr Grieve and Mr Veitch with an opportunity to review the documents before they were released. The reason he did not ultimately do so was, he explained, due primarily to other operational demands on him at the time. As he explained to the Authority, *"If I didn't have the other work pressures at the time I would have disclosed to*

Mr Grieve QC prior to the media. Due to that work pressure I got my timing wrong and I apologise."

55. The Authority is also aware that Ms Dunne-Powell was told about the OIA requests but was not consulted about any information Police proposed to release.

56. On 20 April 2009, Police received two further Official Information Act requests from the news media. TV3 *60 Minutes* requested *"The police file in the Tony Veitch case……because 60 minutes hopes to broadcast a programme relating to this case as soon as possible."* The *Weekend Herald* requested …."*Copies of all the evidence compiled by Auckland police in regards to the charges laid against Tony Colin Veitch. This includes the evidence amassed in relation to charges later withdrawn by the Crown* (emphasis added). *The information sought in this request is to be used as part of a report by the New Zealand Herald into the criminal charges brought against Tony Veitch."*

57. Again, Police did not ask either media organisation to be more particular. Nor did Police refuse to provide documents containing allegations not tested in Court.

58. On 20 April 2009, Police National Headquarters was formally advised by the Auckland City Police Communications Manager that the OIA requests had been received. This was for the purpose of informing the Commissioner and Police Executive Management and setting the proper audit process in motion prior to release of any information.

59. An exchange of emails then followed within Police National Headquarters over the question of whether or not the news media information requests should be managed centrally or by District, noting that the detective in charge of the case or file manager would need to be heavily engaged, as would the Privacy Officer.

60. The issues regarding the lack of clarity in 'ownership' of the process from this point are dealt with in the next part of this report.

61. On 29 April 2009, the detective tasked with collating the documents sent the Privacy Officer the first draft of documents for release, together with a draft disclosure cover sheet listing the documents to be withheld in accordance with section 6 and/or section 9 of the Official Information Act, and a four-page index of the documents Police proposed to disclose.

62. The Privacy Officer reviewed all of the material and in the absence of the detective who had collated the documents and who was by then on annual leave, returned the material on 6 May 2009 to another detective involved in the investigation, with a note of some changes required before final release to the news media.

63. On 7 May 2009, the officer overseeing the investigation asked the other detective to contact him when all the material was available for disclosure and at that point said he

would attach a signed letter to each requestor. The officer overseeing the investigation added...*"I will also need to advise Veitch and Dunne-Powell of what is being disclosed."*

64. On 20 May 2009 the Auckland City Police Communications Manager advised the District Commander and Police National Headquarters that all four media organisations had received disclosure under covering letter that day.

65. Subsequent media coverage the same day prompted the urgent injunction application to the High Court that evening (later withdrawn) by counsel for Mr Veitch; and an immediate internal Police investigation on instructions from the Commissioner as to why his office had not been advised of the date of the intended release and the related issues.

66. For their part, Auckland City Police told the Authority that having advised Police National Headquarters of the date on which requests for information had been received and were being processed, it was for Police National Headquarters staff to diary the date on which the 20 day period required under the Official Information Act for a response would expire.

67. The Authority also notes the following passages from an email advisory sent by Auckland City Police*…."The file was prepared for final release by the Privacy Officer at PNHQ after a preliminary consultation/edit by the detective tasked"* and *"the officer in charge advised the requestors this morning that the file was ready for collection from Auckland Central and has subsequently advised Mr Veitch's legal counsel of its release."*

68. This email is further indication that staff in the Auckland City District believed the Privacy Officer at Police National Headquarters had approved the final disclosure and also confirms that neither Mr Veitch nor Mr Grieve were afforded an opportunity to review the documents before they were released.

69. The officer overseeing the investigation further explained why they had released original witness statements rather than briefs of evidence, stating that it was *"…for expediency's sake and to reduce the volume of material to be released".* In the Authority's opinion this action was not justified and was undesirable.

FINDING

The release of personal information by Police containing untested factual allegations and a summary of facts that did not form part of the charge to which Mr Veitch pleaded guilty but related to charges that the Crown elected not to proceed with and which were subsequently dismissed by a Court, was unjustified and undesirable.

ULTIMATE RESPONSIBILITY FOR THE FINAL DECISION OVER RELEASE

70. The detective tasked with collating the documents and preparing the proposed responses had no previous experience of dealing with requests under the OIA but was tasked to do so in this case because of her role as officer in charge of the investigation and her consequential detailed knowledge and understanding of the investigation file. She read the relevant legislation and Police guidelines and sought guidance from the Privacy Officer and others.

71. The officer overseeing the case had rarely been involved in the handling of OIA requests and said he placed heavy reliance on the Privacy Officer to give advice about compliance with the OIA. He accepted, however, that a closer degree of assurance by him had been called for in this case. However, both he and the detective collating the documents for release believed the Privacy Officer had approved and signed off the final release of documents.

72. Both officers also believed that if the release of information relating to unproven allegations made by Ms Dunne-Powell were in breach of the Official Information Act, this would have been highlighted by the Privacy Officer in the course of her review of the draft bundle of documents. However, no issues or concerns were raised in that regard at Police National Headquarters.

73. The Privacy Officer was of a different view. She said that where information is requested under the OIA, her role and that of other legal advisers at Police National Headquarters is to provide advice, not to give directives or provide approval for releasing information. Her view was that the latter responsibility remains at all times with the officer in charge of the case.

74. What is clear is that both the officer overseeing the case and staff at his District Headquarters believed that Police National Headquarters were ultimately responsible for approving the final release. On the other hand Police National Headquarters and the Privacy Officer were of the view that final responsibility lay with the District and with the officer in charge of the case.

FINDING

The lack of clearly defined ownership of the business processes including assurance and signoff of the information requests was undesirable.

75. Concerns about this lack of clear ownership were reflected in the swift reaction of the Commissioner of Police following release of the documents and the subsequent public criticism expressed by Mr Grieve QC and the legal profession about the apparently

indiscriminate disclosure of information to the news media, and the associated failure to consult.

76. The Commissioner instituted an internal investigation into why Police National Headquarters were apparently unaware the information had been released until advised by Auckland City District on 20 May 2009. The internal investigation resulted in three recommendations:

a) that a process should be introduced within Police National Headquarters for recording and monitoring requests under the Official Information Act likely to be of interest in the public domain;

b) that consideration be given to a policy requiring certain OIA requests to be escalated to a member of the Police Executive for approval before the release of any information; and

c) that the question of where 'ownership' and accountability for an Official Information Act request should lie be addressed.

77. These recommendations, and similar issues raised in relation to other high profile OIA cases, resulted in a review of Police procedures for responding to Official Information and Privacy requests [see *Review of Police Procedures* at paragraph 101).

The applicable law

78. The following are the operative provisions of the **Official Information Act 1982.**

79. **Section 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."*

This principle is a cornerstone of the Act and was a key recommendation in the Danks Report.

80. **Section 9 (1) – Other reasons for withholding official information** states:

> *"Where this section applies, good reason for withholding official information exists, for the purposes of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available."*

81. **Section 9(2)(a)**:

> *"Subject to sections 6, 7, 10 and 18, this section applies if, and only if, the withholding of the information is necessary to protect the privacy of natural persons, including that of deceased natural persons."*

82. **Section 48 (1) – Protection against certain actions** :

> *"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."*

83. New Zealand Police is an 'agency' within the meaning of **section 2** of the **Privacy Act 1993**. As such, all Police staff must be aware of their obligations with regard to the handling of 'personal information' – or, any information held about an identifiable person.

84. **Sections 4 and 126** of the Privacy Act also state that agencies are responsible for the actions of, and information disclosed by, their employees in the performance of their duties as an employee – whether or not the employer knew or approved of the employee's actions.

THE VIEW OF THE OMBUDSMAN

85. The complaint about the release of the information in this case was made to the Authority rather than to the Ombudsmen because it concerned Police conduct.[3]

86. However because it is the Ombudsmen's role to investigate complaints about decisions made on official information requests and the Office of the Ombudsmen is the acknowledged expert in the interpretation and application of Official Information Act principles, the Authority invoked its powers under section 32(2) of the Independent Police Conduct Authority Act to disclose the underlying facts and the issues to the Ombudsmen [for the purpose of advancing its investigation into Mr Veitch's complaint], in order to seek clarification of the principles the Ombudsmen have developed over time to the application of section 9(2)(a) of the OIA to the protection of personal privacy.

87. On 6 August 2010 the Chief Ombudsman wrote to the Authority advising as follows:

[3] Section 13(7)(d) Ombudsmen Act 1975; sections 12(1)(a) and 27 Independent Police Conduct Authority Act 1988

"... there have been several cases over the years in which successive Ombudsmen have clarified the principles which they have consistently adopted in cases where the fundamental issue is the application of section 9(2)(a) of the OIA to allegations of a negative nature about identifiable persons which are unproven or which have not been put to them to afford an opportunity for comment or rebuttal.

Those general principles are:

- *The extent to which a person's name and personal details should properly be disclosed in response to an OIA request depends on the circumstances of the case. The presumption under the OIA is that official information should be released unless there is good reason under the Act to withhold it.*

- *However, often personal information comes to be held by state sector agencies and Crown entities, such as the Police in circumstances where disclosure would infringe personal privacy. In such cases, the OIA provides good reason to withhold such information unless the need to protect privacy is outweighed by the countervailing public interest in disclosure of the particular information. That is a value judgment to be made in the circumstances of the particular case. As a matter of both law and good administrative practice a judgement to override an important privacy interest should not be made lightly. Section 4(c) of the OIA recognises that one of the purposes of the OIA is to protect official information consistent with the public interest and the preservation of personal privacy. Agencies therefore need to weigh carefully the competing interests before deciding where the balance of public interest lies.*

- *Section 9(2)(a) provides specific protection for personal privacy under the OIA. Subject to any countervailing public interest in disclosure, section 9(2)(a) enables requests for information to be refused to protect personal privacy. It is not enough for an agency to simply contend that there is a public interest in release to justify overriding personal privacy. The public interest in disclosure must be strong enough to outweigh the interest in withholding. If the competing interests are evenly balanced or it is too close to call then the presumption under the OIA is that the information should be withheld. This has been the established general principle for over 20 years.*

- *If a state sector agency or Crown Entity genuinely believes in good faith that disclosure is warranted in the public interest, then disclosure*

is lawful under the OIA. (Though it is yet to be tested to what extent a good faith belief must be grounded reasonably).

- *However, the fact that a decision to release may be lawful does not necessarily mean that the decision is administratively reasonable. The Ombudsmen have on occasion concluded that decisions to disclose information under the OIA were administratively unreasonable and that the requests should have been refused. Remedies recommended can include a simple apology, an authoritative statement clarifying any inaccurate or misleading perception created by the information released' or an ex gratia payment to compensate for legal or other expenses incurred as a result of the disclosure or for humiliation and stress suffered as a result of it.*

- *Should the decision to disclose information under the OIA have been taken in a manner that suggests it was not made in good faith, then the protection afforded to the agency against Privacy Act complaints may fail. For example, where an agency solicits a request under the OIA before releasing personal information, then that tends to raise the issue of whether the disclosure was made in good faith and attracts the protection of section 48 of the OIA. Two circumstances which Ombudsmen have identified as likely to evidence a lack of good faith are:*

  - *where the requester had no idea any information existed and would not have contemplated a request but for an invitation to do so from the agency; and*

  - *where an agency is not confident that voluntary release would be justified under the Privacy Act and solicits a request under the OIA to avoid the application of the Privacy Act.*

- *Where a lack of good faith in disclosing information under the OIA is established, then the OIA will no longer oust the application of the Privacy Act and the disclosure can be found to be an interference with the privacy of the person concerned.*

……

In the Veitch case, I understand that the information at issue comprised allegations of a serious nature about Mr Veitch which were not otherwise publicly known, had not been put to him for comment, and were never proven. While the allegations were the subject of six charges of assault, they were subsequently withdrawn by the Police and

dismissed by the Court. Clearly, in these circumstances, withholding the information was necessary to protect Mr Veitch's privacy and there is no doubt that section 9(2)(a) of the OIA applied.

The issue under the OIA would therefore simply be whether, in the circumstances of the particular case, there were public interest considerations favouring disclosure which outweighed the interest in withholding the information to protect personal privacy. Given the serious nature of the allegations and the clear risk that disclosure by the Police would colour them with an unwarranted air of authenticity, there would need to be a particularly strong countervailing public interest to justify disclosure under section 9(1) of the Act. The argument that disclosure was warranted to "balance" information already in the public domain via the media is manifestly inadequate. The Police do not have a public interest role to "balance" media debate or discussion. Even if the Police did have such a role, it is difficult to see how it can reasonably be argued that disclosure of unproven allegations would bring "balance" to media debate, especially where the allegations were not put to the person concerned to afford an opportunity for rebuttal or comment.

……from our Office's experience in OIA investigations, the decision to release in this case appears to be inconsistent with the decisions taken by the Police, in past similar cases which the Ombudsmen have had cause to consider, where allegations which were either unproven or which the Police decided not to act on have been withheld.

THE AUTHORITY'S VIEW

88. The Authority notes the opinion of the Chief Ombudsman that it is not part of Police's role to balance media debate and discussion.

89. However, the key issue in the circumstances of Mr Veitch's case is not whether balancing media debate is part of Police's role but whether Police were correct to have regard to this factor in determining whether to release the information about him under the OI Act.

90. It was that legislation Police were acting under (and had to act under) in responding to the media OI Act requests. As emphasised by the Chief Ombudsman, the fundamental principle in the OI Act is that official information should be made available on request unless there is a good reason for withholding it (s 5).

91. In Mr Veitch's case Police were required to consider whether there were any circumstances which rendered it desirable in the public interest to disclose the file relating to Mr Veitch. In doing so they were required to balance the protection of his privacy against public interest considerations. In the context of this exercise, it is conceivable the public interest in informed and public debate could be a consideration rendering it desirable to make the information available. For this reason, the Authority does not consider that Police were wrong to consider *whether* there was a public interest in balanced media debate.

92. However, in the Authority's view Police were in error in Mr Veitch's case, in considering there was a public interest in balanced debate to be served by releasing the information and that such an interest outweighed his privacy interests.

93. The release of the information did not contribute to a balanced public debate because it comprised unproven allegations (including evidence inadmissible in a Court) and formed no part of the Police case once the Crown had agreed to the plea bargain. The release of the information *by the Police* gave those unproven allegations an air of credibility. For these reasons, the Authority is unable to see how balanced debate was encouraged.

94. The relevant "balance" was defined by the plea bargain, and by the agreed summary of facts tendered in Court on 16 April 2009. The release of the unproven and untested information effectively recalibrated a balance already set.

CONTROL OF THE INFORMATION

95. Police have suggested that Mr Veitch was responsible for the adverse consequences of the disclosure of personal information about him because he "relinquished control over the release of the information by withdrawing his application for an injunction". In relation to this, the Authority makes three points.

96. First, this suggestion is factually inaccurate. By the time Mr Veitch made his application for an interim injunction, the Police had already released the information and articles had already been published on the *Stuff* and *The New Zealand Herald* websites (see the chronology above in paragraph 13). Substantial information was therefore already in the public domain at the time the injunction was granted. By that time the horse had essentially bolted.

97. Second, the High Court's judgment cannot be read as exculpatory or as drawing the inference there was nothing of substance in the material released before the interim injunction was granted. To argue thus confuses the statutory obligations of Police to act in accordance with the OI Act and the subsequent (and consequential) opportunity to bring private law claims (based on confidentiality or privacy) against media organisations in possession of information following an OI Act disclosure.

98. The comment in the High Court's judgment that the information already available on the two websites *"does not appear to contain information which the plaintiff could claim ought not to have been released on confidential grounds"* related to Mr Veitch's claim against the media for breach of common law obligations of confidence. The fact that the High Court did not consider the information to be subject to an (ongoing) obligation of confidence is not a finding that Police had been correct to release the information under the Official Information Act.

99. The question whether Police were right to release the information and whether media defendants, who had in no way acted wrongly, could be restrained from publishing information on the basis that it was subject to an obligation of confidence were two separate and unrelated questions.

100. Third, in any event Mr Veitch never had any control of the release of the information. The information was official information held by and in the control of Police. Whether the information was released was always a matter for Police.

REVIEW OF POLICE PROCEDURES

101. Police acknowledge there is scope to improve processes for dealing with Official Information Act requests and Privacy Act requests.

102. On 22 June 2009 the Police Executive reviewed a *'Stocktake of Police Procedures for responding to Official Information and Privacy Requests'* which was undertaken prior to the Veitch case.

103. Issues identified included:

a) a lack of clarity as to the roles and responsibilities of different business groups, which results in Legal Services or Ministerial Services processing requests, rather than providing an advisory role;

b) lack of a central tracking or reminder system for information requests which can result in complaints to the Office of the Ombudsmen and the Office of the Privacy Commissioner;

c) absence of clear guidelines to assist staff in deciding whether the disclosure of information poses significant risk and therefore requires sign-off by a member of the Police Executive;

d) no documented system for responding to personal information requests and inconsistency regarding how or whether they are recorded.

104. The Police Executive and Ministerial Services subsequently led a project to address these and related issues which culminated in the *Review of Police Procedures for responding to Official Information and Privacy Requests* published in September 2009 as a consequence of which Police Executive Management and the Police Executive Conference agreed to:

a) a new process for responding to information requests using mapping and decision-making tools;

b) guidelines to assist staff to respond to information requests;

c) using the same new processes whether a request for information is received in District or at Police National Headquarters;

d) the business group which "owns" the information requested being responsible for ensuring an appropriate response is provided to the requestor within the legislated time frames;

e) complaints made to the Office of the Ombudsmen or the Office of the Privacy Commissioner to be investigated by someone other than the person who signed out the response to the request;

f) appointment by District Commanders of a senior manager as the person responsible for the co-ordination of information requests in their Districts; and

g) investigation into the most appropriate centralised computer system for Police to log, track and monitor information requests.

105. Police also acknowledge a greater need to audit responses and to clearly articulate in each case what is the public interest; what are the privacy interests; and what criteria are used in exercising the judgement that one outweighs the other. The notion in practice is to have the decision-maker write these down and have them reviewed.

106. The interests that were considered in the Tony Veitch case before deciding that the public interest outweighed any privacy interests were not documented. It is the Authority's view that they should have been.

FINDING

The factors Police consider when weighing public interest and privacy interests should be recorded and independently peer reviewed within Police. In this case they were not, which is undesirable.

107. Police have advised the Authority of the following changes to procedures:

a) each Police District has a nominated Information Officer responsible for all information requests in the District;

b) full implementation of the new procedures is ongoing at both national and District level;

c) changes to computer systems for tracking and monitoring information requests are expected to be completed and training completed by 1 July 2010;

d) all District Information Officers will take part in a workshop before 1 July 2010 to discuss computer system changes and share information issues in general;

e) the appointment of Information Officers has seen the implementation of a sign off process and greater awareness of the need to seek legal input, particularly for high profile cases where information is sought from Police;

f) all District Information Officers will bring any 'highly sensitive' requests for information to the attention of the District Commander and to Ministerial Services. The District Commander will determine whether the request needs to be signed out by Police National Headquarters;

g) staff at Ministerial Services at Police National Headquarters log information requests and allocate a business owner. This is now also a requirement of District Headquarters.

h) the new peer review process on behalf of the designated business owner, once information has been collated and a draft response is available, can be carried out by anyone within the business group. The emphasis is on conducting a robust risk assessment and ensuring the disclosure process is appropriate and takes into account any sensitivities or other relevant information;

i) whether peer review should be conducted at national or District level depends on several factors including the nature of the risk and the source of the information request. The new sign off process ensures the response is vetted by several parties including the business group peer reviewer; Information Officer; and if necessary, the District Commander;

j) the final decision to release information now rests with a District Commander, Assistant Commissioner or Deputy Commissioner; and

k) Police told the Authority's investigator there has been a heightened need for caution when handling information requests but say it is too early to comment on benefits arising from the review of procedures until the information and technology changes for tracking requests for information are fully operational.

CONCLUSIONS

108. As a result of its investigation of the available documented evidence and information provided by witnesses, and after considering the applicable legal principles and relevant Police policies, practices and procedures, the Authority has reached the following conclusions:

- That the officer overseeing the case intended to consult appropriately with Mr Veitch and Mr Grieve prior to the release of information personal to Mr Veitch and held by Police. The Authority accepts that the officer only omitted to do so because of the work pressures he was under. He has apologised for his omission.

- The release of personal information by Police containing untested factual allegations and a summary of facts that did not form part of the charge to which Mr Veitch pleaded guilty, but related to charges that the Crown elected not to proceed with and which were subsequently dismissed by a Court, was unjustified and undesirable within the meaning of section 27(1) of the Independent Police Conduct Authority Act 1988.

- The lack of clearly defined ownership of the business processes including assurance and signoff of the information requests in this case was undesirable within the meaning of section 27(1) of the Independent Police Conduct Authority Act 1988.

- While Police have a duty to properly inform the public about investigations and other law enforcement activities, Police do not have a public interest role to "balance" media debate or discussion. That is not consistent with the role of Police in the administration of justice.

- In a situation where Police are required to apply the principles of section 9(2)(a) OIA in responding to an OIA request, the factors Police consider when weighing public interest and privacy interests should be recorded and independently reviewed. In this case they were not, which is undesirable within the meaning of section 27(1) of the Independent Police Conduct Authority Act 1988.

- The Authority notes that Police have carried out a review of procedures for dealing with OIA requests and Privacy Act requests and have taken the actions outlined in paragraph 107 above.

RECOMMENDATION

The Authority recommends that:

109. Police consider making a public apology to Mr Veitch, the wording of which should be consulted and agreed beforehand with Mr Veitch and Mr Stuart Grieve QC.

HON JUSTICE L P GODDARD

CHAIR

INDEPENDENT POLICE CONDUCT AUTHORITY

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