



Request for affidavits relied on to establish diagnosis of Fetal Alcohol Spectrum Disorder

Legislation	Official Information Act 1982, s 9(2)(a)
Agency	New Zealand Police
Ombudsman	Peter Boshier
Case number(s)	405640
Date	15 September 2016

Section 9(2)(a) OIA applied—strong privacy interest in information about childhood, family life and health—privacy interest not extinguished by prior disclosure of certain information in court—no public interest override

Background

The New Zealand Police withheld affidavits relied on by Teina Pora’s defence team to establish that he suffered from Fetal Alcohol Spectrum Disorder (FASD), in order to protect the privacy of Mr Pora and his family. The requester complained to the Ombudsman.

Investigation

The Chief Ombudsman requested a copy of the information at issue and an explanation of the reasons for withholding. He also consulted the Privacy Commissioner before forming his opinion.

Privacy

Section 9(2)(a) of the Official Information Act (OIA) applies where withholding is ‘*necessary to protect the privacy of natural persons*’.

The Chief Ombudsman found there was a strong privacy interest in the information. The affidavits contained significant detail about Mr Pora's childhood and family life. They also set out in depth results of tests of Mr Pora's cognitive function (both current and historical). Medical information is inherently private to the individual to whom it relates. Mr Pora did not consent to that information being disclosed under the OIA. The affidavits also contained personal information about several members of Mr Pora's family and support network.

The Chief Ombudsman did not consider that Mr Pora's privacy interests had been extinguished by the prior disclosure of certain information in the Privy Council's judgment. He referred to *R v Mahanga*, [2001] 1 NZLR 641 at paragraph 41, where the Court of Appeal did not accept that privacy interests were extinguished simply because a videotape of a Police interview had been played in open court. The Court held (at para 41) that:

There is a significant difference in the impact on privacy between playing a videotape of a police interview in open Court, where the media can observe and report what was said, and the playing of it, or excerpts on national television. Furthermore, during the trial process the privacy interests of the accused will generally be outweighed by the greater interests of the public, and indeed all accused persons, in open justice. But once a criminal trial has concluded there is more room to recognise individual privacy interests in applications such as the present.

Public interest

Section 9(2)(a) is subject to a public interest test. This means the need to withhold must be balanced against the countervailing public interest in release. If the countervailing public interest weighs more heavily, the information must be released. If not, it can be withheld.

The Chief Ombudsman acknowledged the high profile nature of this case, but did not consider that the public interest in disclosure of the affidavits outweighed the need to withhold them in order to protect the privacy of Mr Pora and his family. The public interest in transparency and accountability had '*already been met through ventilation in the proper forum*' (ie, the courts).

Outcome

The Chief Ombudsman formed the opinion that section 9(2)(a) provided good reason to withhold the affidavits.

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