IN THE SUPREME COURT OF NEW ZEALAND SC 5/2010

BETWEEN **WILLIAM PATRICK JEFFRIES**

Appellant

AND **THE PRIVACY COMMISSIONER**

Respondent

Hearing:	21 July 2010
Court:	Elias CJ Blanchard J Tipping J McGrath J Anderson J
Appearances:	P D McKenzie QC and D H O'Leary for the Appellant K E Evans for the Respondent

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CIVIL APPEAL

MR MCKENZIE QC:

May it please the Court, I appear with my learned colleague, Mr O'Leary, for the appellant.

ELIAS CJ:

Yes, thank you, Mr McKenzie, Mr O'Leary.

MRS EVANS:

May it please the Court, Mrs Evans for the Privacy Commissioner.

ELIAS CJ:

Thank you, Mrs Evans. Yes, Mr McKenzie.

MR MCKENZIE QC:

If Your Honours please, this is an appeal of small compass, in that it turns on a narrow matter, the one matter that Your Honours granted to the appellant on, one matter for consideration by the Court today, but it is an issue of considerable significance to practising lawyers and, of course, of considerable moment to the appellant himself in that because of an amendment that was, I might add, slipped through on the third reading to the Privacy Act, the Privacy Commissioner is entitled, and Your Honours have not granted leave on this particular point, the Privacy Commissioner is entitled to require any person, and that includes a barrister therefore, to provide privileged information or what might be claimed to be privileged information to the Privacy Commissioner for her to determine whether or not that information is privileged, and that of course is a provision of some extensive impact. It does mean that, in this case, the appellant is in a position where, having received unsolicited information, he is naturally very concerned that that information not be disclosed, and particularly the source of the information which, it will be submitted to Your Honours, is wrapped into the privilege, be not disclosed, having been information of an unsolicited kind in these circumstances naturally there is apprehension about the disclosure of the identity as well as the information itself, the identity of the source.

I have, to assist Your Honours, reduced my opening comments to a speaking note, which I've placed before Your Honours, and respond in that note briefly to very helpful points that were made by counsel for the respondent and that also repeat the major points that I wish to draw to Your Honours' attention.

ELIAS CJ:

Mr McKenzie, we're usually rather reluctant to take up further submissions, they look relatively substantial.

MR MCKENZIE QC:

That's because there's a bundle of them, I think, Your Honour.

ELIAS CJ:

All right.

MR MCKENZIE QC:

But they do run to –

ELIAS CJ:

If they cover the reply –

MR MCKENZIE QC:

– seven pages.

ELIAS CJ:

– they may be useful to have, thank you.

MR MCKENZIE QC:

Coming then to the speaking note, it will, as I've indicated to the Court, briefly recapitulate the appellant's arguments and respond to points raised in the submissions presented by Mrs Evans, which have helpfully been provided for the assistance of the Court. At paragraph 16 of her submissions, Mrs Evans submits that the unsolicited communication in this case predates the enactment of the Evidence Act 2006 and that the relevant law is therefore the common law applying prior to the commencement of this part of the Evidence Act, and that is so. However, the Court of Appeal in paragraph 43 of its judgment held that the test for litigation privilege is codified in section 56 of the Evidence Act and treated the statement of litigation privilege in that section as being the same as under the common law.

TIPPING J:

Does the Evidence Act directly deal with this? Because I would have thought, at least as a matter of first impression, that evidence law, being adjectival law, applies to all proceedings that come before the Court after the Act comes into

force. But it may not make any difference, but as this point is being apparently ventilated, Mr McKenzie.

MR MCKENZIE QC:

It's my submission that –

TIPPING J:

You said, "And that is so," and I understood you to be agreeing with what Mrs Evans was propounding.

MR MCKENZIE QC:

I agree with the point she makes as to the timing of the communication, but it –

TIPPING J:

Oh, I see.

MR MCKENZIE QC:

– preceded the Evidence Act. The point that I then make is that the way in which the Court of Appeal approached the matter was to treat the common law in substance and effect as encapsulated in section 56, and therefore the Court proceeded to make its decision on the basis of section 56 and the Court of Appeal considered that it would be helpful to in fact develop the law on that basis for the future.

ELIAS CJ:

What is your position though? Is your position that it's that the common law preceding enactment of the legislation applies? I know you say it doesn't matter, because it's codified.

MR MCKENZIE QC:

Well, the technical point I make to the Court is that there's been no cross-appeal on the particular approach that was taken by the Court of Appeal

in determining the matter under section 56, so that that course may not be open to the respondent.

ELIAS CJ:

Well, I'm not sure that it really is an appeal point, but it's rather that we would want to be accurate in the approach we take and, for my part, it's not clear, although I suppose there could be an argument that although contained in the Evidence Act privilege is a matter of substantive law rather than adjectival law, I suppose there could be that argument.

MR MCKENZIE QC:

Yes, the point that His Honour Justice Tipping – but that may be a point that could be raised but it, in my submission, need not concern the Court on this appeal, insofar as both parties have approached the matter on the basis that the common law is encapsulated in the section, that there is no difference in approach.

ELIAS CJ:

So, it can be taken that the parties are content that the appeal proceeds on the basis of the statute?

MR MCKENZIE QC:

That's certainly the position of –

ELIAS CJ:

Section 56.

MR MCKENZIE QC:

– the appellant, and from the respondent's submission I would understand that to be the respondent's approach.

ELIAS CJ:

Yes, thank you, that's probably fine.

TIPPING J:

It's quite sensible in a way, because everyone will be interested in the Act rather than the previous common law.

MR MCKENZIE QC:

Quite so. But Your Honour will notice from both parties' submissions that they move in and out of the common law and the statute. And I simply mention, in relation to the way in which the Court should approach the statute, that there is, I've become aware, a Court of Appeal decision in the Criminal Law Reports which really encapsulates the same arguments that I was seeking to put before the Court in the appellant's principal submission, and that's *R v Healy* (2007) 23 CRNZ 923 (CA) in 2007, where reference is also made to the longstanding statement on codification by Lord Herschell in the *Bank of England v Vagliano Brothers* [1891] AC (HL) 107 case, and that's actually cited in *Healy.* So I just draw Your Honours' attention to that, I don't think it's a point of moment as far as this appeal is concerned.

Coming on then to the rationale for litigation privilege. The appellant accepts that, as has been pointed out in Mrs Evans' submissions, a clear distinction has emerged in the common law between the two aspects of legal professional privilege, and that is legal advice privilege and litigation privilege and, as Mrs Evans pointed out, these now, well, that approach is reflected in the two sections, section 54 and section 56 of the Act. The respondent has drawn attention to the Supreme Court of Canada in *Blank v Canada* [2006] 2 SCR 319 and the clear differences in approach that were pointed out by Fish J in the Supreme Court of Canada. I don't probably need to repeat what was said in the respondent's submissions, but note that Fish J in his judgment appears to reject the concept put forward by Lord Nicholls, which I referred to my earlier principal submission, I thought I should draw attention to that, where Lord Nicholls in House of Lords in *Re L (a minor)* [1997] AC 16, took the view that there were two sub-headings of legal professional privilege which were integral parts of a single privilege. Justice Fish considered, however, that the two forms of privilege were not two branches of the same

tree and appears to have rejected that approach. Again, I think it's academic so far as this case is concerned.

TIPPING J:

They're two trees in the same forest.

ELIAS CJ:

These analogies are not always helpful.

MR MCKENZIE QC:

Yes, I won't labour the point, because I would agree with Your Honour in that respect, and it doesn't take us very far in the matter that we have to approach today.

So, it's accepted that the Evidence Act does not conflate the two privileges, each has its own rationale, and I agree again with the respondent that in certain respects litigation privilege is narrower in scope than solicitor/client privilege. It's related to and restricted to the litigation process. In certain respects it's wider in scope. The solicitor/client privilege protects the solicitor/client relationship and operates in the context of that relationship whereas litigation privilege protects communications between other parties, third parties, and the party to the proceedings or that party's legal advisor. And then litigation privilege is not necessarily restricted to confidential communications whereas section 54 restricts solicitor/client privilege in that way, to confidential communications. An issue of particular significance in the present case is, however, that both privileges are based on a foundational policy of securing the effect of the administration of justice according to law, and this was stated in *Blank*, by a conceptually distinct litigation privilege and legal advice privilege serving common cause to secure –

ELIAS CJ:

Sounds like two branches of one tree to me.

MR MCKENZIE QC:

Yes again to cut back to the same picture, indeed. They are complementary and not competing in their operation. So that's the point really I wish to draw to Your Honour's attention here is that both those privileges rest on a foundation, if one can put it that way, of securing the administration of justice according to law. In promoting that policy the Courts have considered it to be essential that a party should be entitled to insist on there being withheld from the Court any material which came into existence wholly or mainly for the purpose of preparing this case and litigation and I emphasise the words "they came into existence." That's a very wide approach however the material came into existence there is potentially protection.

TIPPING J:

Well the "came into existence" is reflected by the "made" essentially in the section –

MR MCKENZIE QC:

Yes.

TIPPING J:

76 isn't it?

ELIAS CJ:

56.

TIPPING J:

56?

ELIAS CJ:

Is it?

MR MCKENZIE QC:

Yes I'll be coming to the work.

TIPPING J:

The drafters of this have picked up that concept of the bringing into existence by using, as well as other words, the word "made" in section 56(1).

MR MCKENZIE QC:

Yes and it would be my submission that an unsolicited communication is a matter that is brought into existence at a particular point in time –

ANDERSON J:

What if it's in writing? If it's in writing it's not made for the purpose of litigation but it may be received for the purpose of it.

MR MCKENZIE QC:

The section doesn't refer to in writing Your Honour and I'll be coming to that.

TIPPING J:

I think, with respect, I would have thought you'd make the writing with that purpose.

ANDERSON J:

But it might – I'm envisaging a situation where it already exists before there's any litigation prospect and it's then received.

MR MCKENZIE QC:

Indeed Your Honour and indeed almost all the cases are concerned with that situation, I would have to acknowledge that *Waugh v British Railways Board* [1980] AC 521 (HL), *Re L* and other cases. On litigation privilege the leading cases all concern documentary evidence that was made and often requested, well almost invariably requested by the party's legal advisor or the party.

ANDERSON J:

The most common expression in practice is whether an expert's report is commissioned with litigation in mind.

MR MCKENZIE QC:

Yes but it's my submission that the privilege is not restricted to that situation. And again I refer to the foot of the page, the second page of note 2, the very broad statement again in *Waugh*, material collected by or on behalf of the client for the use of his lawyer in pending or actually in pending or anticipated litigation is protected. Those words are actually pending, anticipated, have been picked up in "apprehended", it's stated, in the section itself. *Waugh* refers at page 537 to the competing policies and perhaps I could draw Your Honours' attention to *Waugh* in that respect at tab 10 where there's – well going back to page 536 there's the broad statement about the need in adversary forensic procedure for the development of a privilege of this kind, litigation privilege. Then at page 537 the adversary's brief will contain much relevant material nevertheless you cannot see it because that would be inconsistent with the adversary forensic process based on legal representation. Then His Honour goes on to discuss the effect of the competing principles.

Yes it was 535 I really wished to draw Your Honours' attention to so far as the principles are concerned. Page 535, the preceding page in the casebook, where at B or B+ if one can put it that way, here indeed the Court says, "Both principles, the two valid legal principles, both principles subserve the same legal end, the administration of justice." And those principles are those as mentioned by the respondent, one of openness of justice and the other protection or creating a zone of secrecy, one could put it that way, in relation to the preparation, the lawyer's preparation of the proceedings in an adversarial system of justice. But the important point that I do emphasise there from Lord Simon is both principles, that's the openness principle and the zone of secrecy principle, subserve the same legal end, the administration of justice, and that becomes important in this case when we look at the question of whether the identity of the source of the information should be disclosed or whether it is protected.

So at paragraph 9, it is accepted, as pointed out in the respondent's submission, that the law is concerned with balancing two public interests, and

I've mentioned those. I'll perhaps pass on to 10. It's submitted that the balance in relation to the communication received in the present case comes firmly down in favour of protecting information gathered by an advocate for the purpose of conducting a proceeding. There is no issue in this case of denying access to relevant documents. The facts are much closer to those cases involved in protecting the advocate's brief including notes of discussions with potential witnesses and the names of potential witnesses which would form part of that brief.

ELIAS CJ:

Are you going to refer us to authority in support of the last proposition in particular?

MR MCKENZIE QC:

Yes there's a further case that was not, that I had not come across at the time of my principal submission that is relevant on that issue relating to the names of potential witnesses and I will draw that to Your Honours' attention.

ELIAS CJ:

Do it in the sequence that you've proposed.

MR MCKENZIE QC:

Yes it comes up later in the submissions.

TIPPING J:

Mr McKenzie, I'm just a little curious as to where you're heading here. Are you going to try and persuade us the rule that this is privilege because the question is whether unsolicited communications are capable of being privileged? That's the question before us and the question of whether this one is privileged is another matter all together.

MR MCKENZIE QC:

Yes well I would submit, Your Honour, that the two are wrapped together in this appeal. That –

TIPPING J:

Well I wasn't a participant in the leave question formulation but I understand it to be a pure question of principle whether unsolicited communications are capable, as a matter of law, of attracting privilege.

ELIAS CJ:

I had understood that too.

MR MCKENZIE QC:

Yes well that's the position that I think the two parties are not really apart on because the respondent would in her submissions acknowledge that the privilege may arise and then, as I understand the submissions, it's a question of balance that arises also.

TIPPING J:

Then the question is, who makes that decision. The Privacy Act seems to suggest that it's the Privacy Commissioner in the first instance.

MR MCKENZIE QC:

Yes.

TIPPING J:

Now I don't want to interfere but it just seemed to me, if you're going to go on and try and persuade us to make that decision, we have to be very clear as to whether that's within the scope of this appeal.

BLANCHARD J:

Well, the problem would be we simply wouldn't have enough facts. The scope of the leave was deliberately framed the way it was because we could only look at the principle to see whether the Court of Appeal had gone wrong on that first question, but we don't have enough information to be able to do more than, if so minded, refer the matter back to the Privacy Commissioner.

MR MCKENZIE QC:

I agree that the matter would need to go back to the Privacy Commissioner and submissions were framed to that end but whether I had suggested in the appellant's submission that with a direction to the Privacy Commissioner and –

TIPPING J:

How can we do that, tell her what to do?

MR MCKENZIE QC:

Well, -

TIPPING J:

Is that what you mean by direction, Mr McKenzie?

MR MCKENZIE QC:

Well, a direction as to the privilege being available –

ELIAS CJ:

Capable.

TIPPING J:

Capable, well let's hypothesise, we've already reached that point. If we don't reach that point.

ELIAS CJ:

The parties are in agreement that that one sentence in the Court of Appeal decision is wrong. Is that the position?

MR MCKENZIE QC:

Your Honours are still to hear from the respondent but –

ELIAS CJ:

Well that's what I'd understood from her written submission. You see Mr McKenzie, and it's related to this, I'm not at the moment persuaded that

the Court of Appeal was right to entertain judicial review on this point in any event. It can't be the case surely where an agency has a power to request information, the response, if someone wants to assert privilege is to bring immediately, an application for review, there would have to be a decision of the agency first, and that certainly seems to be what's envisaged by The Privacy Act.

MR MCKENZIE QC:

Yes, well one of the issues on the review application was of course the scope and width of the provisions in The Privacy Act and whether they have been correctly applied by the Commissioner.

TIPPING J:

I would have thought there were two things you could ask of us. One, the ruling about capacity, which may not be in dispute and, two, perhaps the question of the source, whether the source is part of the information because that - we may not be able to give a definitive answer to that, but at least that sort of smacks of a point of law.

BLANCHARD J:

I can understand how this situation has arisen because there were arguments, which have failed, designed to show that the Privacy Commissioner couldn't even look at the material. This argument that we're now looking at has rather sneaked through under the radar. The appropriate thing would have been for the Court of Appeal to determine those other questions against your client and then refer the whole thing back to the Privacy Commissioner, and if she came up with a ruling that was adverse to the claim of privilege then that could have been tested. But it would be tested at a point where the facts were on the table, that more things were known.

ELIAS CJ:

And a reasoned decision obtained.

BLANCHARD J:

So this matter we have had to give leave on because of concerns about whether the Court of Appeal were right in what they said but it is actually premature for the reason I have given. It's just unfortunate it's come up in this form, and I'm not saying that as a criticism.

MR MCKENZIE QC:

Yes, there were a whole raft of issues that of course that Your Honours will be aware, came forward from the Court of Appeal of which this was only one.

BLANCHARD J:

Yes.

MR MCKENZIE QC:

And I think that, perhaps, is part of the reason why we've ended up where we are. Well it may be, to assist Your Honours that what I should do is to address Your Honours on the principle. That is the scope and application of section 56 and the related common law and the extent to which an unsolicited communication is covered by the litigation privilege.

BLANCHARD J:

You may not need to go into that in much detail given that we've got very full written submissions and the parties are largely in agreement. The more difficult question it seems to me, is the one about whether the identity of the person who provided the information is also protected by privilege or perhaps protected in some other way.

MR MCKENZIE QC:

Yes, and that is an issue of course, of very great concern as far as the appellant –

TIPPING J:

This is really what this case is all about.

MR MCKENZIE QC:

It comes back to that Your Honour. Of course it's wrapped into the privilege but that is a very important issue, yes.

ELIAS CJ:

But why would we entertain that in a factual and decision-making vacuum. We're not really seized of any determination on the point.

BLANCHARD J:

Yes, it may be that again, we don't have enough facts to be able to say more than it is possible that it is covered by the privilege but equally possible that it isn't. That's the problem of prematurity again.

MR MCKENZIE QC:

Yes, although there is the – perhaps the prior question, whether the Court of Appeal was right in the way in which it seems to have read the word "received."

BLANCHARD J:

Well, no, no, no, that's drifting back to the point in which I thought counsel were agreed and in which I was trying to hint to you that we probably didn't need much in the way of amplification of submissions.

TIPPING J:

They've simply concentrated on the word "received." They haven't taken into account the word "made." I mean, it's extremely simple and it appears on the face of it to be an error.

MR MCKENZIE QC:

I think both counsel would probably have a common approach on that. There is the difficult question where counsel are apart –

BLANCHARD J:

Well don't push on an open door then.

MR MCKENZIE QC:

There is a further question on which counsel are apart. It's the meaning to be given to the word "or" in section 56.

ELIAS CJ:

Does that arise on the question on which leave has been given? It's simply whether unsolicited communications are capable of attracting litigation privilege. If both counsel are in agreement that they are and, I mean the Court would have to itself be of that view, but if we get to that point, isn't that end of story?

MR MCKENZIE QC:

It's not perhaps quite as straight forward as that in the sense that, as I understand the respondent's submissions, she would be with the appellant as to the meaning to be given to the word "received" in subsection (1). So where the subsection says – the subsection (2) which, the privilege "applies to a communication or information only if the communication or information is made, received, compiled or prepared."

ELIAS CJ:

Well what's compiled?

MR MCKENZIE QC:

Well there's been some argument put before the Court.

ELIAS CJ:

Yes.

McGRATH J:

But there's a common law line of authorities that deal with compilation.

BLANCHARD J:

What's that got to do with the present case? It's not about a compilation.

MR MCKENZIE QC:

Well there is a question of compilation in that the appellant, in his affidavit says that he compiled, or he doesn't use that word but his affidavit refers to his having used the information to incorporate it into a chronology that was then used for the purposes of cross-examination in trial.

BLANCHARD J:

But we're not concerned with the chronology, we're concerned with a particular piece of information.

ELIAS CJ:

Which has been both, however received and compiled, in the sense of being assembled.

BLANCHARD J:

But if it's received, it's capable of attracting the privilege at that stage.

MR MCKENZIE QC:

That's my submission and I'm not sure, Your Honour, whether Mrs Evans would agree with that. My submission essentially to the Court is that the word "or" should be read disjunctively so that received on its own for the dominant purpose for preparing for proceeding, gives rise to privilege likewise made and likewise compiled.

McGRATH J:

I think that must be, Mr McKenzie, because they're different situations, aren't they? I mean the notion of something being received is, I think, generally thought to cover a situation where the barrister knows the nature of what he or she is getting whereas the notion of making covers situations also where the barrister does not and one then looks at the purpose of making, at that stage, and so it seems to me that the matter must be, as you say. As far as compilations are concerned I don't think we need get into that because the Court of Appeal haven't made any statements about compilations. They've only made statements about unsolicited communications.

MR MCKENZIE QC:

Yes and the view that I seek to persuade Your Honours to it's not necessary to get into the compilation at all. My friends –

McGRATH J:

But then it could be that before the Commissioner your client might, as the circumstances come out at that stage, might have some ability to raise compilations if that's how the circumstances turn out to be but we needn't be concerned with that at all.

MR MCKENZIE QC:

Yes that both parties, as I understand my friend's submissions, would read the word "received" as encompassing an unsolicited oral, as well as written communication.

BLANCHARD J:

If it weren't read that way it would lead to ridiculous distinctions. Take a telephone call for example. If I ring a lawyer for the purpose of telling the lawyer something which might be useful in his case, you wouldn't want a distinction depending upon whether I blurted it all out before the lawyer had a chance to say he was interested in receiving the information and exactly the same situation where I proceeded in stages by asking the lawyer first whether he wanted the information and having received an affirmative response then giving it to him. There would be some very tricky and indeed silly distinctions.

ELIAS CJ:

Artificial.

McGRATH J:

Just on another point Mr McKenzie. Is it the case that this litigation is, albeit hibernating, nevertheless still alive?

MR MCKENZIE QC:

It's certainly hibernating. Perhaps Mr O'Leary would be able to indicate to Your Honours to what extent it is capable of any resurrection.

McGRATH J:

The reason I ask is whether the privilege would still apply if the litigation had completely finished?

MR MCKENZIE QC:

Yes the company itself has gone into liquidation and that is a complicating factor.

McGRATH J:

If the litigation privilege ends with the litigation then you'd have to rely on other grounds under section 29 of the Privacy Act wouldn't you?

MR MCKENZIE QC:

Yes that may be so.

TIPPING J:

But it doesn't come to an end. It's hibernating.

McGRATH J:

It's hibernating if you're right.

MR O'LEARY:

Your Honour is correct. The litigation proceedings have not come to an end. The application was stayed in the event that the arbitration petered out so it's still technically alive.

ANDERSON J:

Thank you.

MR MCKENZIE QC:

Yes well I just wonder to what extent I need to persuade Your Honour further. Perhaps after – there are one or two matters that I do wish to put before Your Honours on the identity of the source question but perhaps in relation to the general application of the section if in a reply I could deal with any issues that might arise from the way in which the appellants approach the section, that is to read the word "or" disjunctively so that each of "received", "made", "compiled", "prepared" are to be looked at separately –

TIPPING J:

What it was –

MR MCKENZIE QC:

– giving rise to privilege.

TIPPING J:

What way is it suggested it should otherwise be read because it doesn't seem naturally to do anything other than disjunctive.

MR MCKENZIE QC:

It's the question then of the dominant purpose. Do you have to show a dominant purpose on the part of the person who makes the communication as well as on the part of the person who receives it, in my submission it is sufficient to look at the receiving on its own and if there is a dominant purpose so far as the receipt of the information is concerned, then that would give rise to the privilege even though the person making the communication may not have made it with any particular purpose.

McGRATH J:

Well the person making the communication just might not know. A barrister might request particular information knowing that it's been requested for the purpose of litigation. The person who is providing it may simply have no knowledge, they're just asked to provide the information, in it comes, but the

barrister, knowing what the communication is about, as it comes in in written or oral form, is receiving it in terms of the section.

MR MCKENZIE QC:

That's right.

McGRATH J:

And that's why it seems to me that the distinction between "received" and "made" is that it's almost in the mind of the barrister as far as "received" is concerned and the maker otherwise.

MR MCKENZIE QC:

Yes that would certainly be the way I would see it Your Honour.

TIPPING J:

But the common law didn't suggest, did it, that the dominant purpose might apply in certain circumstances but not in others. In other words, it might apply to a receipt but not a making. You have to have a dominant purpose in there somewhere on the part of somebody who was involved in either producing the information or making the communication.

MR MCKENZIE QC:

Well clearly it has to be there on the part of someone.

TIPPING J:

Someone, yes. So as long as it's there on the part of someone, you don't have to sort of – it doesn't have to be there on the part of everyone or both.

MR MCKENZIE QC:

That would be my submission.

TIPPING J:

I don't understand the common law to have suggested that.

MR MCKENZIE QC:

Yes well I move then to page 6, third – it should be third person's identity without more be privileged. And that, as I've indicated Your Honours, does give rise to some important issues of policy, which are mentioned in the submissions of both parties. It becomes of particular importance in the context of unsolicited communications as to whether the identity of the source is required to be disclosed or whether it does attract the privilege. The respondent refers to *Rosenberg v Jaine* [1983] NZLR 1 (HC) as a case which although it does not resolve the issue entirely as it involves consideration of legal advice privilege, not litigation privilege, it's useful as indicating that a person's identity without more may not be privileged. Now the case did indicate that in the context of legal advice privilege but my submission there is that that case really is of little assistance here. In the case of a client, that is a party to the litigation, the identity of the client will have no significance so far as protection under the privileges are concerned and our client will no doubt be, in many cases be, a litigant. In other cases involving clients such – in the absence of litigation there's unlikely to be any issue of confidentiality which is the component of the solicitor/client privilege under section 54. So for that reason again identity may not be of great significance.

ELIAS CJ:

Mr McKenzie, speaking simply for myself here, I would be most reluctant to be drawn too far into this matter because it does seem to me that it would benefit from a reasoned decision of the primary decision-maker in context and subsequent appeals if appropriate. We'd be addressing it in a vacuum and there are substantial issues which have been touched upon in the written submissions including the context of other protections for informants which would need to be considered. So surely whether litigation privilege attaches to the identity of an informant is intensely contextual. In other words it would have to be surely something that is relevant to the – that the identity is relevant to the litigation as opposed to the content of the communication.

MR MCKENZIE QC:

In my submission – my submission is that the underlying policy would take it further. That if the Court, in developing the privileges as *Waugh* indicates, has – well he builds those on the foundational principle of securing the administration of justice. This case, when one is confronted with an unsolicited communication, accessibility to evidence becomes crucial. That the name of the informant may not be particularly, in most cases, won't be relevant to the litigation.

ELIAS CJ:

Well that's the very point, "In most cases," and so therefore, one would expect a claim of privilege wouldn't succeed. So there'll have to be some additional factor to make it an appropriate claim of privilege and we don't have any of that context here.

MR MCKENZIE QC:

In my submission the additional factor is the factor of policy which would apply in all cases here, unless there were clearly circumstances that took the case out of the policy and that is the policy of providing access to evidence, not inhibiting access to evidence, if persons who may otherwise provide unsolicited information, ring up a barrister and provide that barrister with some confidential facts about a case –

ELIAS CJ:

But how do we know this?

MR MCKENZIE QC:

– know that their name will be revealed. That source of information would be seriously affected.

ELIAS CJ:

How do we know it is though, in this context because the facts haven't been explored on that basis? And it may be a different point, it may be a different,

the protection of a different interest, the confidence that the informant thinks that he is entitled to expect. It's really for the informant to put forward those reasons otherwise it's wholly speculative. And it does arise in the context of other protections for informants.

BLANCHARD J:

If the name of the informant is of no significance in the case that the barrister is preparing for, maybe it doesn't come within the wording of section 56(1) and maybe the question of confidentiality about which I agree there is a significant policy implication, is covered more under section 69. That's a very tentative thought.

ANDERSON J:

I rather think that there's been too much focus on the Evidence Act and not enough on the Privacy Act because section 29 of the Privacy Act sets out a whole raft of reasons for refusing to disclose information, one of which is legal professional privilege, and that's how the Evidence Act is invoked into the Privacy Act. But what I'm not so sure of is, suppose your client had, as he may well have been entitled to do, said to the Privacy Commissioner's request, "I claim legal professional privilege under section 29(1)(f) of the Privacy Act for declining to answer your question, your request." I'm just not sure what the Privacy Commissioner can do then. I don't know what the actual process is but whatever the process is, that would then focus on the validity of the claim for privilege, whereas your client has responded to the request with judicial review proceedings, instead of simply saying, "It's privilege. Take me on over that if you want to."

MR MCKENZIE QC:

Yes, that has been the client's response because of the concern that a barrister has of providing the information and the identity of the source to an agency that is involved, potentially, in investigating –

ANDERSON J:

I understand that.

MR MCKENZIE QC:

– and taking action in relation to the source.

ANDERSON J:

That's why it can refuse under –

MR MCKENZIE QC:

One has an acute, you know, whatever.

ANDERSON J:

I understand all of that. My point is why wasn't the response, "It is legally covered by legal professional privilege. I decline your request." And then the Privacy Commissioner would have taken whatever steps were necessary to test the ground of refusal. Probably by Court proceeding I suppose under the Act.

TIPPING J:

The actual relevant section here is sections 90, 91 et cetera, aren't they?

MR MCKENZIE QC:

That's so, Your Honour, yes.

TIPPING J:

And section 94 is the one which says, "That if a person claims privilege, the -," this is 1(A), you've got to cough up and the Privacy Commissioner then has to adjudicate on whether or not your claim is valid. I speak very colloquially when I say, "You've got to cough up." 1(A) says despite the claim of privilege, you've got to actually answer the request but on the basis that it's privileged and then the Commissioner then rules whether or not it is privileged and, as I think the Chief Justice and others in the Court have said, you can then challenge that ruling by judicial review if you're so minded. So there's a very clear scheme here as to how these things are to be dealt with.

MR MCKENZIE QC:

That's so Your Honour and that's perhaps where we've reached now because Mr Jeffries was unsuccessful in challenging the way in which the Commissioner was reading the width of the power in section 91(4). That is a very broad power, any person – you know, there are many cases –

BLANCHARD J:

Well we don't want to get into that.

MR MCKENZIE QC:

– with any persons you believe otherwise, and Mr Jeffries argued that this was one of them. Now that argument I know has not been accepted but that lies behind the reasons His Honour, Anderson J's question as to why things got to where they have.

ANDERSON J:

Because there was a difference of opinion as to the scope of the privilege.

MR MCKENZIE QC:

Yes.

McGRATH J:

Mr McKenzie, if we reach a decision – at least it's the Court of Appeal's statement – that the communications cannot attract litigation privilege is wrong, the questions you're raising about whether privilege extends to the name of the informant can be dealt with in the context of all the circumstances by the Privacy Commissioner can they not? I mean, there's nothing in the decision that would impede you from going to the Privacy Commissioner on those issues. I appreciate that that was not the way your client initially read the Act but the issue can then be raised by the Privacy Commissioner who would have to rule on whether the name of the informant was covered by the privilege or not, knowing all the circumstances, including who the informant was presumably.

MR MCKENZIE QC:

That's so Your Honour, but I think the difficulty that the appellant would raise at that point is that guidance from this Court may well be a matter of considerable importance in relation to that question because the Privacy Commissioner has, if I can put that way, an inherent conflict, a role which requires her to investigate and take action in relation to any breaches of the privacy legislation, and so at the same time, at the same time as the Commissioner has that role, the Commissioner is called on to make a determination as to whether a privilege, which will deny her access to that information, is available.

ELIAS CJ:

Well that's a conflict faced by every Judge when faced by a claim of privilege surely?

MR MCKENZIE QC:

Yes but the Privacy Commissioner, with respect, is not a Judge.

ELIAS CJ:

But the legislature has given the Privacy Commissioner the decision, subject to the supervision of the Courts.

MR MCKENZIE QC:

It has, and well I don't want to go over again the difficulties that the appellant sees in the legislation, but yes we have – that is the position in which the Privacy Commissioner is placed. But not being a Judge, with great respect, guidance from the Court as to whether or not –

TIPPING J:

Well, look, the whole elaborate code here involves the Commissioner taking advice if necessary and so on. This is a hopeless proposition. Your client may not like the legislation, but it's all clearly set out here. She can make the decision with or without advice. (1B) –

ELIAS CJ:

Which section?

TIPPING J:

94(1B) of the Privacy Act sets out a clear code as to what she can do with the information which she's received, subject to the claim to privilege, and one of the things she can do to it is to supply it to a barrister or solicitor she engages for the purpose of giving advice, on the very question of whether there's privilege. So it's all clearly set out here, and it's futile for your client to say he doesn't like it.

MR MCKENZIE QC:

It becomes important, Your Honour, when you look at section 94(1B) and then sub-paragraph (b), the point where the Commissioner has reached the view that this information is privileged, then at that point the Commissioner is barred from releasing, at the top of the next page, "Either generally or to any particular person the opinion," that is, that it is privileged, "in a form that does not identify either the producer of the information... or any person who is the subject of the information, document or thing." Now, that does become very important in terms of the process.

TIPPING J:

Well, you simply can't spill the beans at the same time as saying you've upheld the privilege.

MR MCKENZIE QC:

Yes.

TIPPING J:

I mean, that's elementary.

MR MCKENZIE QC:

But if the Commissioner were to reach the prior view that the identity of the person providing the information cannot be privileged, then the protection of that sub-paragraph never arises.

TIPPING J:

No, and there is a potential. But surely, if a judicial review were forecast, the Privacy Commissioner would be morally obliged at least not to disclose it pending the hearing of the review.

MR MCKENZIE QC:

That's so, but in an inherently –

TIPPING J:

And then being a statutory officer, surely the person would –

McGRATH J:

Interim declarations could be obtained if necessary.

TIPPING J:

Yes, if necessary. I know that there is a slight possibility that the horse would have bolted before you knew that it had, if you know what I mean, but surely a statutory officer isn't going to behave like that.

MR MCKENZIE QC:

Yes, it's simply, if I can put it this way to Your Honours, guidance from this Court that the identity of the source, even though not relevant to the proceeding –

TIPPING J:

But how can we possibly give guidance in the abstract, Mr McKenzie?

MR MCKENZIE QC:

– may still be protected under the section, could well be a critical matter in the determination that the Privacy Commissioner has to make.

TIPPING J:

But how can we give guidance in the abstract? I mean, if we were to say that the identity is capable of, in the same way, using the same word “capable”, that wouldn't tell anyone anything.

MR MCKENZIE QC:

I think there is a principle here, a general principle, to this extent, Your Honour, that in most unsolicited communications the identity of the person providing the information will not be relevant to the proceeding, almost invariably it will not be. Now, if the correct approach to the section is that the identity of the person providing the information must be relevant to the litigation and be an important aspect of the lawyer’s brief for it to be protected, then there’s no privilege. That particular issue, in the case of unsolicited communications, is the very important one, and guidance from this Court on that issue may well be important to the Commissioner.

McGRATH J:

The problem, as I see it, Mr McKenzie, is that really the Privacy Commissioner’s approach is not adversarial. Under the Act, as I see it, it’s inquisitorial.

MR MCKENZIE QC:

Yes.

McGRATH J:

And it envisages that the Privacy Commissioner will go in and ascertain all the relevant facts in order to make the decision.

MR MCKENZIE QC:

Exactly, Your Honour, yes.

McGRATH J:

If you think about it for a moment, this probably explains why a Court's not involved, because Courts inherently are dealing with adversarial approaches rather than inquisitorial ones. But the real thing is that as it's an inquisitorial approach, any advice that we were to give, any, if I can put it that way, would be without knowing all the circumstances, they will only come out in the course of the Privacy Commissioner's inquiry. And it is therefore, I suggest, better that issues of this kind, which I appreciate are profound issues, the secrecy of persons who provide the information in certain circumstances should be, the legal aspects of them can only be determined with the factual matrix determined and the initial decision maker's reasoned decision available to the Courts. So I just really think that for us to get into it, without knowing the specific facts at all, may really compromise what the Act is contemplating the decision-making process will be, which includes ultimately a role for the Courts if there's legal error on the part of the decision maker.

MR MCKENZIE QC:

Yes, I recognise, Your Honour, that there could be opportunity for judicial review of the Privacy Commissioner's determination down the track, but what I'm seeking to persuade Your Honours is that given the inherent conflict in the – with great respect, I mean, in a sense one can – it's a necessary conflict, given the process. But, given the conflict that the Commissioner faces in making that determination, guidance from the Court on what is essentially a principle of law, the availability or not within the privilege of the identity of the source does become important.

TIPPING J:

What would you wish us to say in your client's interests, Mr McKenzie? Let's have it right up front. What does he want us to say?

MR MCKENZIE QC:

Well, what he would want Your Honours to say is that section 56, outlining the availability of litigation privilege, covers, in terms of the communication or information, information as to the identity of the third party providing the information, where that has been provided by an unsolicited, in an unsolicited way.

TIPPING J:

Irrespective of whether the identity is relevant to the proceedings?

MR MCKENZIE QC:

Yes, because it invariably will not be.

BLANCHARD J:

Well, not necessarily.

MR MCKENZIE QC:

Not necessarily, I agree, Your Honour, there will be situations where the person will be related to the litigation in some way and the identity could well be relevant, but in many cases it will not be.

TIPPING J:

I would have thought that the identity of the person giving the information might, at best, from your client's point of view, march whether the information itself is privileged. I'm not saying that's my view, but I was just saying at best from your – if the information itself is privileged then you might be able to say that inherently the source was privileged.

MR MCKENZIE QC:

Exactly, that's it, exactly.

TIPPING J:

If the information is not privileged –

MR MCKENZIE QC:

Yes.

TIPPING J:

– then the source is not privileged, at best from your client's point of view, I would have thought.

MR MCKENZIE QC:

That's so, no, Your Honour puts it in the way in which I would seek to do.

TIPPING J:

Yes, but whether that's the correct approach or whether any such approach should be taken in the abstract, is a very – I'm not unsympathetic to the position of barristers getting information and the idea of a ruling stifling free flow of information that assists in the administration of justice, it's just having to do it in the sort of abstract, without any foundation for it anywhere. It's not even part of the ground of appeal.

MR MCKENZIE QC:

Yes, but it is a matter, in my submission, that could be determined as a matter of principle, without Your Honours necessarily needing to determine it in the context of the factual situation here. But perhaps that's as far as I can take this particular matter. It is obviously a matter of great importance, not only to the appellant but to legal advisors, counsel and solicitors who receive communications of this kind, which are not uncommon, and if there is doubt as to whether the identity of the source will be protected, then that may seriously affect the administration of justice in that that kind of evidence may not be forthcoming.

ELIAS CJ:

Isn't it circular though because if it does affect the administration of justice it will be because the identity is properly the subject of privilege, the claim of privilege, for some particular reason? If it's not the fact that information was

received from a named source doesn't come within the policy of protection of administration of justice.

MR MCKENZIE QC:

I agree but as His Honour Justice Tipping said one – the Court would need to determine whether the information –

ELIAS CJ:

Yes.

MR MCKENZIE QC:

– that that source provided was itself entitled to privilege but on that determination being made then the identity of the source is wrapped into the privilege and that may be an important issue for the Privacy Commissioner herself to deal with.

TIPPING J:

Well I think that's probably where it ought to be dealt with and then her ruling can be reviewed because that's really the way it should have been set up in the first place, quite frankly.

MR MCKENZIE QC:

Well I'm seeking to persuade Your Honours otherwise but I leave it there. I think I can't probably – it would be going over the same ground again to endeavour to pursue that issue.

There's one further matter that Her Honour Chief Justice raised the question of, whether there was a case dealing with the identity of the witness and whether that's protected by litigation privilege and the case that I indicated there was at tab 13 which is a decision of the High Court in England of the Vice Chancellor, *China National Petroleum Corp v Fenwick Elliott* [2002] EWHC 60 (Ch) and at paragraphs 44 to 47 the Court deals with litigation privilege –

ELIAS CJ:

Which is this Vice Chancellor? His name doesn't appear. Do you know who it was? I suppose it's at the end, is it, or do they just call him the Vice Chancellor and you have to work it out from the date?

MR MCKENZIE QC:

I'll see if I can find out for Your Honour.

ELIAS CJ:

It is information which if relevant we can find out –

TIPPING J:

The identity of the source.

ELIAS CJ:

Yes, it is helpful.

MR MCKENZIE QC:

Indeed. So in those passages the Court looks at –

ELIAS CJ:

Paragraph sorry?

MR MCKENZIE QC:

– litigation privilege.

ELIAS CJ:

Paragraph?

MR MCKENZIE QC:

44 and through to 46.

BLANCHARD J:

But this is about a potential witness.

MR MCKENZIE QC:

Yes.

BLANCHARD J:

Which is a rather different case than what may be the situation here.

ELIAS CJ:

It might be though, we don't know.

MR MCKENZIE QC:

It's an extension that I'm seeking on the facts of this case. That an unsolicited informant in one sense is perhaps always a potential witness, frequently of course for a variety of reasons counsel will not call that person to give evidence but it is someone who is witness in the sense of being able to provide information that's relevant to the litigation. And counsel's brief protects the names of witnesses whether or not they're called as potential witnesses. So that's relevant to draw Your Honours' attention to that authority.

ELIAS CJ:

This is really an example of what Justice Tipping was putting to you about the privilege of the identity of the informant marching with the content or the privilege attached to the information provided.

MR MCKENZIE QC:

Yes. So unless there are further matters Your Honour wishes to raise with me it's perhaps as far as I can take things and perhaps reserve any reply.

ELIAS CJ:

Thank you Mr McKenzie. Yes Mrs Evans?

MRS EVANS:

May it please the Court. Given the discussion to date I think I'll keep these submissions fairly brief. Clearly as Your Honours have noted the decision as to whether this particular information is privileged is one for the Commissioner to make and the Commissioner is in no better position than Your Honours to know exactly what the facts are in this individual case. So it was difficult to do the written submissions based purely on speculation about what might be the case.

I concur, however, with my friend that there may be some value in the Court, if it can, giving the Commissioner some general advice about whether unsolicited communications, what the general law is on unsolicited communications being able to be covered by privilege. As a general matter we obviously agree that they can be covered by privilege but under what circumstances might that arise.

There are two points I think that this case raises and that Your Honours may be able to assist us with. The first, I think, is reasonably clear that oral communications should be equally covered as documentary communications or equally capable to be privileged as documentary communications. As far as I know there's no argument about that but it would be good to have that confirmed. The second point as my learned friend mentioned is whether the identity of a source alone, outside any information that that source might provide, can be subject to privilege. Given the written submissions on the point, and the discussions that we've had in the Court so far, there may not be any further discussion that we need on that. But just to indicate, the Commissioner is not the specialist obviously on the general law of privilege and if it were possible for the Court to give advice on that point, that would not be too general –

TIPPING J:

It would be a very difficult ruling to make to say that it can be anything and never be privileged.

MRS EVANS:

I appreciate that Sir.

TIPPING J:

That would seem to run against the common law at least where, just this case we've just been looking at, albeit in the case of witnesses.

MRS EVANS:

Witnesses and potential whistle blowing situations and so on, yes.

TIPPING J:

Yes. But you couldn't really get us to say more than it's possible.

MRS EVANS:

I could try.

TIPPING J:

You could try but what more do you want us to say?

MRS EVANS:

If one were to get, yes – under what circumstances can the identity of a person who gave unsolicited information, under what circumstances can that identity be privileged. If a person is a potential witness, that might be a situation. The privilege will probably inure if the person is a police informer as we've seen from the *R v Kissling* [2009] 1 NZLR 641 (CA) case, that's a standard sort of public policy argument, and also in the *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 (HL) case, child abuse situations –

ELIAS CJ:

But are those properly claims of legal or litigation privilege or – don't they come under other heads of protection of confidence or the whistle blowing legislation for example?

McGRATH J:

Or public interest immunity which the Act expressly addresses.

ELIAS CJ:

Yes.

MRS EVANS:

In my reading, Your Honours, the latter but again having the confirmation for that might be useful.

ELIAS CJ:

Well are you inviting us to roam around the law identifying possible –

MRS EVANS:

Perhaps I'll move on.

ELIAS CJ:

It's very hard to do it –

MRS EVANS:

Yes, no I appreciate that.

ELIAS CJ:

– in the abstract, isn't it?

MRS EVANS:

I appreciate that, it certainly is.

ELIAS CJ:

We might be shutting off cases in which the privilege should be able to be asserted.

MRS EVANS:

Certainly.

TIPPING J:

We would just take an example. A person who rings up a barrister one can say from one's experience quite often is a potential witness. They may be more than just giving you the nod. They may be willing to actually come along and say something and of course at times it's very hard to know which side of that rather elusive line they may be on.

MRS EVANS:

And you need to get a little bit down the track before you –

TIPPING J:

Exactly.

MRS EVANS:

– actually ascertain that.

TIPPING J:

So if you rush into preparing a handwritten brief on the basis that there – over the telephone, there's some awfully subtle stuff in here, isn't there?

MRS EVANS:

Yes, yes.

TIPPING J:

Lines crossed, that's why it's so difficult to give abstract advice.

MRS EVANS:

I thought it might be a vain hope Your Honours.

McGRATH J:

Mrs Evans, in paragraph 45 of your written submissions, you touch on this and you're really, you're making the general proposition that usually the identity of the third party having unsolicited information will not be the subject of privilege, but you go on to say that in some circumstances it may be. Did you have any authority in mind for that first proposition because one of the things I've noticed from the submissions is the dearth of authority? I mean, the *Rosenberg v Jaine* case doesn't seem hugely helpful as you say. Is there anything that you could point to on these issues?

MRS EVANS:

The *Police v Mills* [1993] 2 NZLR 592 (HC) case ditto again –

McGRATH J:

Sorry?

MRS EVANS:

The *Police v Mills* case was similarly caught up in legal advice privilege under very, very different circumstances from the one we have here. The *China Petroleum* case at tab 13 involves the potential witness. I agree Sir, there's a dearth of authority. The experience – it may not be of assistance to the Court but the experience under the Privacy Act is that – and Your Honour, Anderson J referred to section 29 and the withholding grounds under the Privacy Act, that usually an identity of a person is intricately tied up with the information. In those circumstances the identity of the person may be exactly what one would want to protect. There's a case called *Director of Human Rights Proceedings v Commissioner of Police*. Unfortunately there are several cases with that name but in 2007 that dealt with a person who gave information, wasn't a police informant, but a person who gave information to the police that a police officer was behaving inappropriately when he should have been on duty. He was off fishing and the only thing at issue was that the police officer in question wanted to know who had said that about him. He had all the information. He had everything that the person had said and the Court determined that that was capable of protection but under the Privacy Act withholding grounds which are quite specific.

McGRATH J:

So that was a High Court decision wasn't it, it wasn't a tribunal?

MRS EVANS:

No that was a tribunal decision.

McGRATH J:

Human Rights Review Tribunal.

MRS EVANS:

Human Rights Review Tribunal decision and I can send up the reference to Your Honours.

BLANCHARD J:

So that was dealt with under the Privacy Act.

MRS EVANS:

It was, and under the withholding grounds of the Privacy Act, section 29(1A), the unwarranted disclosure of someone else's affairs, so balancing the requester's privacy interest in getting the information against the source's privacy interest and protecting their identity. Perhaps not hugely helpful for the Court because it deals with completely different statutory provisions but it's about the closest I can get.

ANDERSON J:

Could I refer you Mrs Evans to paragraph 82 of your submission and ask what the authority is for the first sentence in that paragraph?

MRS EVANS:

"The Courts have finally determined that the Commissioner is entitled to the information she's asked for." Every – these judicial review proceedings throughout were a challenge to the validity of the notice that the Commissioner issued, and some of the grounds, all the way through,

from the High Court, within the Court of Appeal and the grounds that were pleaded to ask for leave for this Court. All those grounds that related to the validity of the notice, whether it was properly issued, whether there was natural justice given and so on, all those grounds have fallen by the wayside now. The only thing we have is a valid notice to which Mr Jeffries now has to respond and then the Commissioner has to determine that there's privilege.

ANDERSON J:

Yes, but why does the Commissioner have to determine? If it's disclosed to the Commissioner, the Commissioner may determine but what if someone in Mr Jeffries's position simply said, "I invoke legal professional privilege pursuant to section 29(1F)?"

MRS EVANS:

Sir, section 29, the grounds throughout section 29 are exceptions to principle 6 of the Privacy Act, which is a right of access to one's own personal information, the information about oneself. So if Mr Jeffries – no, so if I were to ask the police, for example, for access to information about me, the police might say generally, "Yes, you've got a right of access but in certain circumstances, we're going to withhold it," for example, for prejudice to the maintenance of the law or because it's professionally privileged. This is quite a different situation Sir.

ANDERSON J:

And what's the governing section here then?

MRS EVANS:

The governing section here is section 91(4) for the notice.

ANDERSON J:

Yes.

MRS EVANS:

And section 94(1A) as His Honour, Tipping J has referring to, so 94(1A) and 94(1B).

ANDERSON J:

Well let's suppose the claim was made under section 91(4) and the person or the agency to use the – said, "I'm not giving it to you because it's protected by legal privilege."

MRS EVANS:

The answer to that is in section 94(1A) but –

ANDERSON J:

What does that say?

MRS EVANS:

But despite the fact it is privileged the Commission – that does not affect the validity of the notice in itself. The Commissioner is entitled to get the information as long as the notice is otherwise valid and then must determine whether that claim of privilege is correct.

ANDERSON J:

Because if there wasn't a mechanism like that, a person would be in jeopardy of conviction.

MRS EVANS:

Absolutely, absolutely and that's the mechanism that the statute sets up to make sure that that is protected, and Your Honour, the Commissioner is very well aware of her statutory duty to protect privilege and to maintain privilege. Moreover it may be useful to bring to Your Honours' attention that privilege isn't the only protection available to those who provide information to the Commissioner. For example, communications between the Commissioner and a respondent in an investigation are not official information as defined under the Official Information Act, so they're not susceptible to release there. Nor are they subject to access requests under the Privacy Act, section 55(e),

and possibly most importantly, section 116, which is included at tab 2 I think of the materials, requires the Commissioner to maintain secrecy in relation to her investigations except if she believes that disclosure is necessary for the purposes of the Act. There's a broad discretion in section 116(2) but I wouldn't want the Court to believe that the source was without protection here, very far from it.

ANDERSON J:

No doubt you would say that the appropriate course here would have been to disclose everything necessary to support the claim and ask the Commissioner to advise of any prospective adverse ruling on the points that judicial review proceedings could be taken.

MRS EVANS:

Yes Sir, that would've have been one option but no doubt there are others. So the Commissioner, she's required to observe privilege and will clearly do so.

Short of that Your Honours, unless you have any further questions I probably really can't expand too much on the written submission.

ELIAS CJ:

Thank you Mrs Evans. Yes Mr McKenzie.

MR MCKENZIE QC:

Very briefly Your Honours, dealing with the question that was raised as to whether there's any assistance in other cases, such as *National Society for the Prevention of Cruelty to Children* case, there dealt with in my principal submissions at paragraphs 58 to 61, and also His Honour, Blanchard J's, helpful decision in the *Mills* case, which sets out, that's discussed in paragraph 57, four principles in relation to privilege of a client's name and identity, this is in a case of legal professional privilege, solicitor client privilege. Those are helpful observations which, in my submission, similarly cover a

situation in relation to litigation privilege at paragraph 57. The client disclosed his or her identity in confidence. The solicitor was acting as legal advisor –

TIPPING J:

Isn't that a rather different situation? The privilege between solicitor and client is a materially different situation from what we are grappling with here.

MR MCKENZIE QC:

Oh, indeed Your Honour but –

TIPPING J:

Are you inviting us to simply translate the law from that field into this?

MR MCKENZIE QC:

No, but I think there are parallels so far as the disclosure and confidence is concerned, particularly the identity is a crucial item of confidence in these kinds of communications. The solicitor receives that, or the barrister, in acting in litigation. The client's not a party to the litigation in question, well the person here similarly, but satisfied, and with, acting either in the public interest or the client's, identity would be incriminating information and there are, you know, issues there that arise also, in my submission, in relation to litigation privilege, so that I know one cannot equate the two, there are policies that similarly favour extension of the privilege to the name and identity of the person providing the information, and I think some help can be discerned from that case. The *National Society* case is helpful only insofar as it indicates the underlying policy, which is the same policy that I sought to advance to the Court here, that policy that the administration of justice is best served if sources of information are not inhibited.

TIPPING J:

The informants type of situation is more a public interest immunity, isn't it, than a privilege?

BLANCHARD J:

It's dealt with as a privilege in section 64.

TIPPING J:

Is it? Well, maybe they've decided to bring in –

BLANCHARD J:

But the policy perhaps is the same.

TIPPING J:

The policy is similar.

MR MCKENZIE QC:

Yes.

BLANCHARD J:

It's what underlies section 69.

TIPPING J:

That's your best point, isn't it, Mr McKenzie, that the policy that supports informer's privilege, if it's now called privilege, really should be translated into the civil arena?

MR MCKENZIE QC:

Yes. I draw attention to the same policy that underlies these particular protections, one discovery that the *D* case – informer's privilege, which was a very narrow privilege and can't possibly apply here, but the underlying policy is for protection, section 69, Your Honour, properly draws attention to that. Therefore, in the context of section 56, I am seeking to persuade the Court that that policy is also present and it is the underlying policy of litigation privilege, securing the administration of justice, the effect of administration of justice, and that is best secured in these circumstances if unsolicited sources of information are not discouraged.

McGRATH J:

These provisions you're talking about generally proceed on a balancing of the public interest involved, don't they?

MR MCKENZIE QC:

They do, they do.

McGRATH J:

So that you really do have to look at the particular circumstances and decide whether the particular interest in protecting the confidential relationship is outweighed by other public interest circumstances. So it's a case that has to be decided on the circumstances before the Court.

MR MCKENZIE QC:

That is so, although I suppose what I would seek to put forward there is that in the privilege context the Courts have not been prepared to engage in a balancing exercise, you're either in or you're out, on the particular facts. And, given the important other policies that apply to the effect of administration of justice with regard to availability of that privilege, then I would submit that the balancing exercise should not be undertaken, that as a matter of principle –

McGRATH J:

Not undertaken in matters of privilege, but if you –

MR MCKENZIE QC:

Yes.

McGRATH J:

Once you start to look more widely at matters of public interest immunity or protecting confidential relationships –

MR MCKENZIE QC:

Indeed.

McGRATH J:

– the law does contemplate a balancing effect.

MR MCKENZIE QC:

Then it does contemplate a balance, whereas I would submit that in this case if the privilege is otherwise available in relation to the information provided, the dominant purpose, preparing for litigation, et cetera, if that's satisfied, then without a balancing exercise the administration of justice is best served here if its source is protected.

And then, just finally, Mrs Evans mentioned certain protections that are available under the Privacy Act, for example there would not be access under the Official Information Act, and protections of that kind, that would not, those are limited protections that might protect the source in some circumstances, but would not provide the protection that is sought here, in that if the privilege is available then the Commissioner is not able to proceed further with an investigation in relation to the source. But if the privilege is not available then the source potentially may be at risk, and that brings us back to the policy that once third parties become aware that they may well expose themselves under the Privacy Act to investigation, they will be reluctant to provide this kind of information to barristers or other legal advisors.

So, that really, unless Your Honours have any further questions, would conclude what I have to say.

ELIAS CJ:

Thank you. Thank you, counsel, we've had excellent submissions and we thank you for that help. We'll reserve our decision.

COURT ADJOURNS: 11.26 AM