Decision No. 24/09

Reference No. **HRRT 4/09**

BETWEEN	**ROBIN TE KOETI**
	Plaintiff
AND	**OTAGO DISTRICT HEALTH BOARD**
	Defendant

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

Mr R D C Hindle	Chairperson
Ms J Grant MNZM	Member
Mr S R Solomon	Member

HEARING: 2 September 2009 (Dunedin)

APPEARANCES:

Mr R Te Koeti, plaintiff in person.
Mr J Coates for defendant.

DATE OF DECISION: 11 September 2009

DECISION

[1] On 29 January 2008 the plaintiff made a request to the defendant ('the ODHB') for a copy of all information relating to his (the plaintiff's) Emergency Department admissions since 1998. The request was received and treated by the ODHB as having been made pursuant to Principle 6 of the Privacy Act 1993 ('the Act'; in fact the information at issue is health information so that, strictly speaking, it is the Health Information Privacy Code 1994 that applies rather than the Act. We make the point for the sake of accuracy only; nothing turns on the distinction between the Act and the Code in this case).

[2] Almost all of the relevant information held by the ODHB was provided to the plaintiff well within the time limits prescribed by Part 4 of the Act. However when the plaintiff made his request he had also made it particularly clear that he wanted to see the names of the various nurses who had attended him at the Emergency Department. The ODHB declined to give the names to the plaintiff.

[3] The ODHB accepts that, in the context of the plaintiff's information access request, the names of the relevant nurses are a part of the plaintiff's 'health information' as defined by Clause 4 of the Health Information Privacy Code. As Mr Coates observed, quite apart from the Act a consumer of health services is usually entitled to know the identity of the provider of those services: see Right 6(3) of the Health and Disability Commissioner (Code of Health and Disability Sevices Consumers' Rights) Regulations 1996.

[4] Nevertheless the ODHB says that there were and are good reasons to withhold the names of the nurses from the plaintiff in this case. It has relied on s.27(1)(d) of the Act, which applies in this case by virtue of Rule 6(3)(a) of the Health Information Privacy Code. Section 27(1)(d) provides:

> *"An agency may refuse to disclose any information requested pursuant to Principle 6 if the disclosure of the information would be likely —*
>
> *. . .*
>
> (d) *to endanger the safety of any individual. . ."*

[5] The matter has been investigated by the Privacy Commissioner, who agreed with the OBHD's assessment. Unsatisfied, the plaintiff filed this proceeding in the Tribunal. He asks for an order that the ODHB must supply him with the names of the Emergency Department nurses who have attended him in the period from 1998 to 2008, and for an award of damages amounting to $1000 *". . . because the names were withheld and I was treated unfairly."*

[6] The ODHB accepted that the plaintiff was and is at least *prima facie* entitled to all health information held by the ODHB about him, and that it has the burden of justifying its decision to refuse to give the nurses' names to the plaintiff. On that basis it was agreed that the ODHB's evidence would be given first. The evidence established:

[a] The plaintiff is well-known to staff at the Emergency Department of the Dunedin Public Hospital;

[b] When the plaintiff made his request on 29 January 2008 he had called into the Patient Affairs Office at the Hospital. His request was taken down by a Privacy Officer for the ODHB. She had had contact with the plaintiff over the previous three to four years, and in that time had dealt with other information access requests made by him. As a result, she was aware that the plaintiff had presented as a difficult patient at the Emergency Department from time to time, and that he had a history of confrontational behaviour;

[c] It was of immediate concern to her that when the plaintiff made his request on 29 January 2008 he made a 'big deal' about wanting the nurses' names. She regarded that as an unusual request, and one which troubled her having regard to the plaintiff's history of interactions with the Dunedin Public Hospital (and the Emergency Department in particular);

[d] The Privacy Officer asked the plaintiff why he wanted the nurses' names. It was her evidence that upon doing so, the plaintiff became more determined to obtain the names, although he did not give a reason for his request;

[e] The Privacy Officer who took the plaintiff's request made enquiries after he had left her office. Those enquiries tended to confirm for her the concerns she had about giving the plaintiff the names of individual nurses who had attended him over the years;

[f] Amongst the enquiries, the Charge Nurse Manager at the Emergency Department was consulted. She also had significant concerns about the nature of the plaintiff's request. In particular, she expressed a fear that the information might be used by the plaintiff to obtain the nurses' addresses.

> The Charge Nurse Manager (who also gave evidence to the Tribunal) said that from what she understood of the plaintiff's history of dealings with the Emergency Department, she considered that he was capable of inflicting harm.

[7] Much of the evidence that was given by the ODHB witnesses was not direct evidence of actions or events from which the conclusion that it would be unsafe to give this plaintiff access to the nurses' names leaps out. There was, for example, some rather unsatisfactory evidence that one of the Privacy Officers had been told at an earlier time that the plaintiff carried a knife. Another of the witnesses gave evidence of some kind of fracas in a public place that she had seen the plaintiff involved in, but when pressed it was clear that there was no physical violence and indeed that, despite her concerns about the plaintiff, the witness had never seen him hit or behave violently to anyone. There were also some rather non-specific references to a possibility that the plaintiff might have had previous criminal convictions, and of mental health issues. We do not think it unfair to say that the Tribunal's search for evidence from the ODHB witnesses at the hearing for direct, uncomplicated and clearly probative evidence of conduct by the plaintiff justifying a decision to withhold under s.27(1)(d) was not entirely successful.

[8] The relevant Emergency Department records were of some assistance. They show a pattern of frequent visits by the plaintiff to the Emergency Department, which he obviously uses as if the Emergency Department were effectively his GP service. There are several references in the notes to abusive and other unwanted behaviours by the plaintiff. Three examples will illustrate:

[a] There was an occasion on 23 January 2005 when the plaintiff presented for the change of a dressing on a wound. The notes describe his behaviour on that day as aggressive, unco-operative and refusing to answer questions. They record that in the end Security was called to escort the plaintiff from the Emergency Department;

[b] On 29 January 2006 the plaintiff attended the Emergency Department after he had allegedly been assaulted. He complained of pain, but the notes show that the medical staff were unable to complete an assessment because he was unwilling to allow nursing staff to discuss the matter or undertake any observations;

[c] The notes of a visit on 11 February 2006 describe the plaintiff as having refused to leave the Emergency Department, and show that he became very aggressive, and that Security was contacted. On that occasion the plaintiff had to be escorted from the Emergency Department.

[9] As the ODHB witnesses were questioned it became clear that - while their concerns were informed to an extent by their perceptions of the plaintiff's past behaviours - the most significant concerns were really that he wanted the information at all, and that he had asked for it (and then persisted in asking for it) in a way that lead them to be concerned about what he might do with it. They did not find his explanation that he only wanted the names so as to have 'complete information' to be at all reassuring.

[10] For these reasons, by the end of the ODHB's evidence we had some reservations as to whether the decision to withhold under s.27(1)(d) was justified on the evidence to that point. At the same time, there were some aspects of the plaintiff's situation that called for explanation and further detail.

[11] Our hesitation about the OBHD's decision to withhold the names of the relevant nurses from the plaintiff was altogether removed by the evidence that the plaintiff then gave us.

[12] It is neither necessary or desirable to discuss the plaintiff's health issues in detail in this decision. We will say, however, that as a witness he was evasive, forgetful, and at points quite disingenuous. He admitted to one criminal conviction for an offence of violence in the early 1990's, but Mr Coates' questioning made it clear that there are almost certain to have been other criminal matters that the plaintiff did not mention (or, at very least, that the offence that was admitted was more recent than the plaintiff had initially told us).

[13] It is also clear that the evidence the plaintiff first gave concerning his mental health status was significantly under-stated.

[14] The Tribunal has discussed the meaning of the word 'likely' in s.27(1)(c) of the Act in cases like *Director of Human Rights Proceedings v Police* [2007] NZHRRT 22 and *Stoves v Police* [2008] NZHRRT 30. Reference can also be made to *Nicholl v Chief Executive of the Department of Work and Income* [2003] 3 NZLR 426 and *Commissioner of Police v Ombudsmen* [1988] 1 NZLR 385. Of particular relevance, in the *Commissioner of Police v Ombudsmen* case Cooke P stated:

> *"To cast on the Department or organisation an onus of showing that on the balance of probabilities a protected interest would be prejudiced would not accord with protecting official information to the extent consistent with the public interest, which is one of the purposes stated in the long title of the Act. At first sight it might seem otherwise, but what has just been said becomes obvious in my view when one considers the range of protected interests in s 6, including as they do, for instance, the security or defence of New Zealand, the New Zealand economy and the safety of persons.* ***To require a threat to be established as more likely to eventuate than not would be unreal. It must be enough if there is a serious or real and substantial risk to a protected interest, a risk that might well eventuate****. ...*
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> ***Whether such a risk exists must be largely a matter of judgment****."* (at p. 391; the emphasis is ours).

[15] Although *Commissioner of Police v Ombudsmen* was decided under the Official Information Act 1982 there is no doubt that the same approach applies to the provisions of the Privacy Act with which we are concerned in this case: see *M v Ministry of Health* (29 April 1997) CRT 16/96; Decision No. 12/97 and *M v New Zealand Police* (29 April 1997) CRT 17/96; Decision No 13/97.

[16] The question for us in this case, therefore, is whether the disclosure of the nurses' names to this plaintiff would give rise to a serious or real and substantial risk (that is, a risk that might well eventuate) that their safety would be endangered.

[17] We find that the plaintiff is capable of being an intimidating person, is not immune from abusive and even aggressive outbursts, and has a history that raises legitimate concerns as to how he might conduct himself if prompted by events and circumstances when he is not in control of himself. Like the ODHB witnesses, we consider that after weighing the interests of the nurses in question against the plaintiff's rights under the Health Information Privacy Code, the proper course is not to require disclosure of the names of the nurses to him.

[18] We recognise, of course, that under Rule 6 the plaintiff has a *prima facie* right of access to the nurses' names, and that in seeking to exercise that right it is not his responsibility to explain why he wants the information. But given the particular circumstances of this case, we think it would be unreal not to recognise that release of the names of individual nurses to this particular plaintiff includes a risk that at some future time he could track some or all of them down and, while in an unfortunate frame of mind, confront them and perpetrate some harm. Like the ODHB witnesses, we are not reassured by this particular plaintiff's single-minded pursuit of the names after all other information has been provided, and without any more robust reason than that he wants to have a complete file.

[19] For these reasons we have come to share the ODHB's judgement as to the risks involved in releasing the relevant names to the plaintiff. We agree with and uphold the ODHB's decision to refuse to disclose the names of the relevant nurses to the plaintiff.

[20] The plaintiff's claim is dismissed.

[21] If the ODHB wishes to ask for an award of costs then a memorandum should be filed and served within 21 days of the date of this decision. The plaintiff must respond within a further 21 days. The Tribunal will then deal with the issue on the basis of those papers, and without any further *viva voce* hearing. As a precaution and in case it should be thought necessary to do so, we will leave it to the Chairperson of the Tribunal to vary this timetable as he may consider appropriate.

Mr R D C Hindle Chairperson	Ms J Grant MNZM Member	Mr S R Solomon Member