(1) ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF THE PLAINTIFF OR HIS DAUGHTER

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE CHAIRPERSON OR OF THE TRIBUNAL

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2022] NZHRRT 31**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 003/2017
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**VAB**
	PLAINTIFF
AND	**CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS**
	DEFENDANT

AT WELLINGTON

BEFORE:
Ms SJ Eyre, Deputy Chairperson
Ms L Ashworth, Member
Ms SM Kai Fong, Member

REPRESENTATION:
The plaintiff in person
Ms M Graham and Ms J Ongley for the defendant

DATE OF HEARING: **17 to 18 March 2020**

DATE OF DECISION: **23 August 2022**

(REDACTED) DECISION OF TRIBUNAL[1]

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[1] [This decision is to be cited as *VAB v Corrections* [2022] NZHRRT 31. Due to publication restrictions this decision has been anonymised by the redaction of the true name of the plaintiff.]

[1] In May 2010 the plaintiff was a new father to a baby girl and completing a sentence of home detention. As part of his home detention sentence, he met with Sonya Bakker, a psychologist employed by the Department of Corrections (Corrections) for a psychological assessment. After two appointments the plaintiff withdrew from the psychological assessment process. Ms Bakker was concerned about this and the risk it posed, when combined with other risk factors, so she disclosed personal information about the plaintiff to Early Start, a home support service which was working with his family.

[2] The plaintiff claims this was an interference with his privacy. Corrections denies there has been any interference with the plaintiff's privacy and maintains that it was entitled to disclose the information in accordance with the exceptions to IPP 11.

BACKGROUND

[3] The plaintiff served a sentence of home detention from 30 September 2009 to 29 June 2010. As part of that sentence the plaintiff's probation officer referred him to Ms Bakker for psychological assessment regarding his risk of reoffending and possible treatment recommendations. The plaintiff's daughter was born in [redacted] 2010.

[4] The plaintiff met with Ms Bakker twice in May 2010. His first appointment was on 6 May 2010. He missed his second appointment on 13 May 2010, but he attended again on 20 May 2010.

[5] On 3 June 2010 the plaintiff advised his probation officer he would not be attending the appointment that day. Later that day, Ms Bakker phoned the plaintiff to see how he was and then phoned Early Start to collect information from them about the plaintiff (as had been agreed by the plaintiff). During that call, Ms Bakker became aware of a notification made to Children, Young Persons and their Families Service (CYFS) regarding violence by the plaintiff towards his partner (the mother of his daughter).

[6] On 8 June 2010, Ms Bakker discussed the plaintiff's circumstances including his relationship and any risk he posed, with his probation officer. They agreed there was no immediate risk, but that Ms Bakker would reassess after the next appointment with the plaintiff or after her report was completed.

[7] However, the plaintiff then advised his probation officer that he would not be attending the scheduled appointment on 10 June 2010 and did not wish to attend further appointments with Ms Bakker. After Ms Bakker realised the plaintiff had fully disengaged from the psychological assessment process, she was concerned she would not be able to work with him to mitigate any risk and concerns about his disclosure of what she described as "past sexualised behaviour" towards minors within his household. Ms Bakker discussed this with a senior psychologist, and it was agreed that it was necessary for Early Start to know as they were in a position to monitor the situation.

[8] On 11 June 2010, Ms Bakker disclosed to Early Start that in his sessions with her the plaintiff had described "past sexualised behaviour" and that he had expressed some concerns about inter-generational transmission and changing his daughter's nappies because of this. Ms Bakker advised Early Start that she could not assess the risk further as the plaintiff had refused to attend any further appointments. Ms Bakker's evidence was that she intended to work with the plaintiff's probation officer and the plaintiff to agree on an approach to informing the plaintiff's partner. However, before Ms Bakker could do that, Early Start informed the plaintiff's partner of what they had been told and the plaintiff became aware of that disclosure.

[9] In August 2010, the plaintiff complained to the Ombudsman about that disclosure to Early Start and a subsequent disclosure made by Corrections to CYFS. In April 2012 the Ombudsman referred the plaintiff's complaint about the disclosure to Early Start to the Privacy Commissioner. The Ombudsman advised the plaintiff she could not investigate the complaint regarding the disclosure to CYFS as that was allowed for under s 15 Children, Young Persons and their Families Act 1989. The disclosure to CYFS in July 2010 is therefore not part of this claim.

[10] In November 2012, after investigating the complaint against Early Start, the Privacy Commissioner issued his view that Corrections did not interfere with the plaintiff's privacy as Ms Bakker was entitled to make the disclosure in accordance with the exception in IPP 11(f)(ii).

THE PLAINTIFF'S CLAIM

[11] On 20 January 2017, the plaintiff filed this claim. The plaintiff claims that Corrections breached IPP 11 and interfered with his privacy by disclosing personal information he provided to Ms Bakker, to Early Start.

[12] The plaintiff seeks a declaration that Corrections interfered with his privacy, and an order restraining Corrections from continuing or repeating the interference with his privacy and from engaging in or causing or permitting others to engage in similar conduct. The plaintiff seeks $250,000 for damages for humiliation, loss of dignity and injury to his feelings. The plaintiff claims this disclosure significantly damaged his relationship with his partner and child.

[13] Corrections acknowledges the disclosure by Ms Bakker to Early Start, but disputes there has been any interference with the plaintiff's privacy as it submits Ms Bakker was entitled to disclose the information in accordance with IPP 11(d) and 11(f)(ii) of the Privacy Act.

[14] As Corrections has accepted there was a disclosure of the plaintiff's personal information, the remaining issues the Tribunal must determine are:

> **[14.1]** Did the disclosure of the plaintiff's personal information to Early Start fall within one of the exceptions detailed in IPP 11?
>
> **[14.2]** If not, does the disclosure of the plaintiff's personal information amount to an interference with privacy under s 66 of the Privacy Act?
>
> **[14.3]** If there has been an interference with the plaintiff's privacy, what is the appropriate remedy?

THE LEGAL FRAMEWORK

[15] The Privacy Act 1993 requires agencies, such as Corrections, who dealt with personal information of individuals prior to 30 November 2020 to comply with the IPPs prescribed in that Act. While the Privacy Act 1993 was repealed and replaced by the Privacy Act 2020 on 1 December 2020, this claim was filed and heard under the Privacy Act 1993. The transitional provisions in the Privacy Act 2020 enable this claim to be continued and completed under the 2020 Act, but do not alter the relevant legal rights and obligations in force at the time the disclosure to Early Start was made. Accordingly, this claim is assessed against the IPPs as detailed in the Privacy Act.

[16] The plaintiff alleges that Corrections disclosed his personal information in breach of IPP 11. Changes were made to IPP 11 in 2013, which was after the disclosure of the plaintiff's information. The law that applies to the disclosure is that which was in force at the time of the disclosure, so all references to IPP 11 are to the version in force in 2010, as set out below:

> Principle 11
>
> *Limits on disclosure of personal information*
>
> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
> (a) …
> (d) that the disclosure is authorised by the individual concerned; or
> (e) …
> (f) that the disclosure of the information is necessary to prevent or lessen a serious and imminent threat to—
> (i) public health or public safety; or
> (ii) the life or health of the individual concerned or another individual;

[17] Corrections maintains that there was no breach of IPP 11, in reliance on the exceptions in IPP 11(d) and 11(f)(ii).

[18] To determine if Corrections can rely on these exceptions, the issues the Tribunal must determine are informed by the process set out in *L v L* HC Auckland AP95-SW01, 31 May 2002, Harrison J (*L v L*) at [20]. Those steps have been applied by this Tribunal in a number of decisions including *Ruddelle v ADHB* [2021] NZHRRT 5 at [16] and *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 (*Geary*) at [190].

[19] Applying *L v L*, given Corrections' acceptance that there was a disclosure of personal information, the Tribunal's consideration of the plaintiff's claim starts with an assessment of Corrections' reliance on the exceptions to IPP 11. For Corrections to successfully rely on the exceptions to IPP 11, the Tribunal must be satisfied to the standard of the balance of probabilities that:

> **[19.1]** Ms Bakker believed, on reasonable grounds at the time of the disclosure that:
>
> > **[19.1.1]** The disclosure was authorised by the plaintiff (IPP 11(d)); and/or
> >
> > **[19.1.2]** The disclosure was necessary to prevent or lessen a serious and imminent threat to the life or health of another individual (IPP 11(f)(ii)).

[20] A belief on reasonable grounds, has a subjective component (the belief) and an objective component (the reasonable grounds). Corrections must be able to prove that both components existed at the time of disclosure to successfully rely on one or both of the exceptions in IPP 11. See *Geary* at [201]-[203].

> [201] Returning to Principle 11, it is to be noted that to escape the statutory prohibition on disclosure of personal information, an agency must establish that at the time of disclosure, it possessed the requisite belief on reasonable grounds:
>
> > An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds, ….
>
> [202] There is a subjective component (the belief) and an objective component (the reasonable grounds). It must be established that both elements existed as at the date of disclosure.

[203] The need for reasonable grounds for belief requires the agency to address its mind to the relevant paragraph of Principle 11 on which it intends to rely. See by analogy *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [63]:

> We consider that the need for reasonable grounds for belief in the necessity of disclosure requires the agency concerned to first inspect and assess the material being disclosed. The exception is not engaged where there is a failure to check the contents of the disclosure material before transmission.

There must be an actual belief based on a proper consideration of the relevant circumstances. An explanation devised in hindsight will not suffice.

THE EXCEPTIONS TO IPP 11

The IPP 11(d) exception

[21] The exception in IPP 11(d) allows personal information to be disclosed if the agency believes on reasonable grounds "that the disclosure is authorised by the individual concerned".

[22] Corrections submits Ms Bakker believed on reasonable grounds that the plaintiff authorised the disclosure to Early Start and that accordingly she could rely on the exception in IPP 11(d). This submission is made in reliance on a form the plaintiff signed at the beginning of his sessions with Ms Bakker, in which he acknowledged that Ms Bakker may disclose information about him in certain circumstances, including if he posed "a risk of serious harm to myself or others"

[23] However, the exception in IPP 11(d) and the case law is very clear that to rely on this exception Corrections would need to demonstrate that Ms Bakker believed, at the time she made the disclosure, that the plaintiff authorised the disclosure. It is not enough for an agency to obtain an agreement to disclosure at some earlier date and rely on it without further consideration to make a later disclosure. The agency, in this situation Ms Bakker, must actually turn their mind at the time the disclosure was made, to whether the plaintiff had in fact authorised the disclosure. Ms Bakker has provided no evidence that she believed she had the plaintiff's authority to disclose this information, at the time she made the disclosure and there is no reference to this in her case notes written at the time of the disclosure.

[24] Rather, Ms Bakker's written statement of evidence and her evidence presented orally is that, at the time of the disclosure, she had no consent from the plaintiff and that she tried (unsuccessfully) to arrange a meeting with the plaintiff to explain the need for the disclosure to him. Ms Bakker specifically stated "ideally you would get consent of the person whose information you were disclosing". This statement is inconsistent with the submission that Ms Bakker believed on reasonable grounds that she had the plaintiff's authority to disclose.

[25] There is no evidence that Ms Bakker thought, at the time of the disclosure, that the plaintiff had consented to her disclosing his personal information. In fact she was concerned by the fact that she did not have his consent.

[26] The submission by Corrections that the plaintiff consented to the disclosure appears instead to be an attempt to justify the disclosure in hindsight. *Geary* at [203] is very clear that an explanation for a disclosure that is devised in hindsight, is not sufficient.

[27] The Tribunal needs to be satisfied to the standard of the balance of probabilities that Ms Bakker believed "at the time of the disclosure" that the plaintiff consented. There is no evidence she did. Accordingly, Corrections cannot rely on the exception in IPP 11(d).

The IPP 11(f)(ii) exception

[28] The exception in IPP 11(f)(ii) allows personal information to be disclosed if the agency, in this instance Ms Bakker, believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of another individual.

[29] Corrections submitted that Ms Bakker believed on reasonable grounds that the disclosure was necessary due to a serious and imminent threat to the safety of the plaintiff's daughter and that "Ms Bakker had significant concerns regarding the immediate safety of the plaintiff's daughter […] exacerbated by the fact that there was no independent person who could give protective support".

[30] However, the plaintiff submitted there was no evidence of a serious and imminent threat and that if Ms Bakker did believe there was a serious and imminent threat the disclosure should have been made to CYFS or the Police, not to Early Start. The plaintiff noted that the information brochure about Early Start clearly described Early Start as being "not an alternative to emergency or crisis help". He further submitted that there was no mention of immediate or urgent concerns in Ms Bakker's own clinical notes made at the time of disclosure and in fact there was reference two days before the disclosure to no immediate concerns.

[31] The Tribunal must assess whether on the balance of probabilities, Ms Bakker held a subjective belief that the disclosure was necessary to prevent or lessen a serious and imminent threat to the plaintiff's daughter and if so, whether that belief was objectively reasonably based on the information available at the time and the evidence before the Tribunal.

[32] The Tribunal accepts that Ms Bakker held the necessary subjective belief at the time she made the disclosure to Early Start. Ms Bakker explained in evidence that the plaintiff's disengagement from the assessment process, "along with reports indicating he was experiencing escalating and significant conflict with his partner gave rise to concerns regarding the immediate safety of the baby, in the reported absence of a person who could act protectively".

[33] This evidence is corroborated by Ms Bakker's case notes, which were provided in full as evidence to the Tribunal. In particular Ms Bakker's notes made two days prior to the disclosure (at a time when she thought the plaintiff would continue to attend sessions with her) recorded that while there was no immediate risk there were some dynamic factors which may change the risk. The Tribunal is satisfied that Ms Bakker subjectively believed and specifically turned her mind, at the time the disclosure was made to the decision to disclose the plaintiff's "past sexualised behaviour" to Early Start to prevent or lessen a serious and imminent threat to the plaintiff's baby daughter. It was clear from Mr Bakker's evidence that she felt strongly that Early Start was the appropriate agency as it had regular contact and established connections with the plaintiff, his partner and baby and this would enable efficient and prompt protective action and monitoring.

[34] Having accepted Ms Bakker's subjective belief, the Tribunal must now consider if this was objectively reasonable by assessing what information was available to her at the

time the disclosure was made. Where a disclosure is made in a professional context by a psychologist such as Ms Bakker, or as occurred in *Tamplin v Boizard* [2021] NZHRRT 42, where a medical doctor disclosed information, the Tribunal must be mindful that an inquiry into whether a belief is objectively reasonable does not invite the substitution of the medial professional's opinion with that of the Tribunal. The Tribunal must review and weigh the evidence provided to support or to challenge the subjective belief and consider whether the defendant has proven to the standard of the balance of probabilities that, that subjective belief was objectively reasonable.

[35] In this claim, Corrections points to the disengagement of the plaintiff from the psychological assessment process, the previous violence in the parental relationship, the vulnerability of the plaintiff's partner, the age and vulnerability of his daughter and lack of a protective adult, as well as the plaintiff's "past sexualised behaviour" and his concerns about having a baby daughter as providing an objective basis for Ms Bakker's belief that it was necessary to make the disclosure.

[36] The plaintiff's response to Corrections submissions, relies on the notes from 8 June 2010 where it was recorded that there was no "immediate risk". The test is however whether there was an "imminent" risk. As discussed in *Director of Human Rights Proceedings v Henderson* [2011] NZHRRT 1 at [56] and [58]-[59] the meaning of imminent in the context of Rule 11 of the HIPC (which is materially the same as the IPP 11(f)(ii) exception) is:

> [imminent] conveys a sense of something which is about to happen; that which is threatened or impending; something that is near at hand. We think it would go too far to say that the word requires proof of that which is critically urgent or is in the nature of an immediate emergency. Nor is it necessary to show that the event that is said to be 'imminent' will inevitably occur at some point.

[37] Imminent does not mean that something will inevitably occur, but that something is near at hand and impending.

[38] As Ms Bakker explained in her evidence, the decision by the plaintiff not to attend further sessions with Ms Bakker, meant the risk changed. Ms Bakker says the risk increased. The individual who Ms Bakker was intending to prevent or lessen the harm to, was a [redacted] month old baby girl, the vulnerability of which is unquestionable. Any risk of harm to her health by the plaintiff is serious.

[39] Ms Bakker says she did not have time to obtain the plaintiff's consent, as she felt she needed to disclose as quickly as possible. Ms Bakker decided the risk required her to disclose and then discuss it with the plaintiff afterwards. Ms Bakker discussed her concerns with a senior psychologist at Corrections and they agreed that the safety of the baby was paramount, and a disclosure was justified.

[40] The Tribunal accepts that there is an objective basis to Ms Bakker's subjective belief utilising her professional clinical judgment. On 8 June 2010, Ms Bakker already considered the plaintiff's home circumstances to be a potentially volatile situation, although not posing an immediate risk. It is reasonable to consider that when the plaintiff chose not to engage further with the psychologist assigned to work with him to manage his risk, the risk to the plaintiff's vulnerable [redacted] month old daughter increased.

[41] The Tribunal finds that Corrections has established to the standard of the balance of probabilities that it was objectively reasonable for Ms Bakker to conclude that there was

a serious and imminent threat, which she considered was near at hand and impending and which she sought to prevent or lessen.

[42] In reaching this conclusion, the Tribunal did have regard to the plaintiff's submission that a protection order against him was discharged in 2013, however that is not relevant to this particular case, as it was issued and discharged well after Ms Bakker disclosed information to Early Start.

[43] The Tribunal understands that the plaintiff is aggrieved by this situation. It is unfortunate that while Ms Bakker had a careful plan for how to manage the disclosure, the speed and manner in which Early Start told the plaintiff's partner meant that the impact of this disclosure on the plaintiff and his relationship with his partner was made worse than it perhaps could have been if managed differently. The Tribunal acknowledges this was a fast moving and challenging situation requiring careful balance between all factors involved, most specifically the plaintiff's privacy and the health of his baby daughter.

[44] The Tribunal finds that Corrections have established to the standard of the balance of probabilities that Ms Bakker believed on reasonable grounds that the disclosure was necessary to prevent or lessen a serious and imminent threat to the health of the plaintiff's daughter.

NON-PUBLICATION ORDERS

[45] The Tribunal may order non-publication of the name and identifying details of a participant in a proceeding, or any account of the evidence, in accordance with s 107(3)(b) of the Human Rights Act 1993, if the Tribunal is satisfied that it is desirable to do so.

[46] To determine whether it is desirable to do so, the Tribunal must consider whether there is material before the Tribunal to show specific adverse consequences sufficient to justify an exception to the fundamental rule of open justice. The Tribunal must also consider whether an order is reasonably necessary to secure the "proper administration of justice" in proceedings before it and ensure it does no more than is necessary to achieve that (see *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4 at [66] (*Waxman*)).

[47] Open justice is an essential legal principle. It was described in *Waxman* at [56] where the Tribunal cited *Erceg v Erceg* [2016] NZSC 135, as follows:

> [2] The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges". The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language. [Footnote citations omitted]

[48] A non-publication order can be made of the Tribunal's own motion or on the application of any party to the proceeding. No application for non-publication orders has been made, however, the Tribunal has, for the reasons set out below, decided of its own motion to issue a non-publication order.

[49] This claim arises from the disclosure of personal information provided by the plaintiff in sessions he was attending with a psychologist as part of his criminal sentence. The disclosure references the plaintiff's "past sexualised behaviour" and consideration of any risk to the plaintiff's daughter. Corrections defence to this claim was also based on significant consideration of the need to protect the plaintiff's daughter. At the time of the disclosure, the plaintiff's daughter was [redacted] months old, she will now be [redacted] years old. However, the plaintiff's daughter is not a party to this claim and may have no knowledge the claim is even before this Tribunal.

[50] The Tribunal considers that the material before the Tribunal, including the nature, content and purpose of the disclosure made by Corrections to Early Start and the plaintiff's daughter and her mother's vulnerabilities means that the identification of the plaintiff's daughter would result in specific and significant adverse consequences for her. The Tribunal is not aware if the plaintiff's daughter is currently known by his surname or not. Even if she is not the Tribunal is satisfied that the relationship between a parent and a child of this age is such that there would be many people who would easily connect her to her father irrespective of whether have a different surname. The consequences to the plaintiff's daughter of being identified in relation to this decision would in the Tribunal's view, based on all the material before it, be damaging and would certainly amount to specific adverse consequences.

[51] Furthermore, the Tribunal considers there is no public interest in the plaintiff's name being known or identified in connection with the circumstances of this claim. The principle of open justice can be maintained by the publication of the Tribunal's decision with only the plaintiff's name and reference to his daughter's age redacted. This enables transparency of the reasons for this decision and does not undermine the ability of the public to understand or the media to report on the decision in accordance with open justice.

[52] The Tribunal is satisfied that it is desirable to prohibit publication of the names and identifying details of the plaintiff and his daughter, including her date of birth and age.

ORDERS

[53] The claim by the plaintiff against the Chief Executive of the Department of Corrections is dismissed.

[54] A final order is made prohibiting publication of the name and identifying details of the plaintiff and his daughter and her age.

[55] There is to be no search of the Tribunal file without leave of the Chairperson or Deputy Chairperson or of the Tribunal. The parties are to be notified of any request to search the file and given the opportunity to be heard on that application.

COSTS

[56] No submissions have been made regarding costs. However, given the circumstances of this claim, the fact that both parties have engaged in this proceeding with good faith, it would appear to be appropriate that costs lie where they fall.

[57] If the parties do not agree with this view they are to file a joint memorandum within 10 working days of this decision. If agreement over a joint memorandum is not achievable, then the parties are to file separate memoranda.

.....	.....	.....
Ms SJ Eyre	**Ms L Ashworth**	**Ms SM Kai Fong**
Deputy Chairperson	**Member**	**Member**