IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2014-404-1297
[2014] NZHC 2550

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	an Application for Judicial Review
BETWEEN	KIM DOTCOM First Applicant
	FINN BATATO Second Applicant
	MATHIAS ORTMANN Third Applicant
	BRAM VAN DER KOLK Fourth Applicant
AND	THE UNITED STATES OF AMERICA First Respondent
	THE DISTRICT COURT OF NORTH SHORE Second Respondent

Hearing:	15-17 September 2014
Counsel:	P Davison QC, W Akel, H Steel and L Stringer for First Applicant F Pilditch for Second Applicant G Foley for Third and Fourth Applicants C Gordon QC, M Ruffin and F Sinclair for First Respondent No Appearance for Second Respondent
Judgment:	17 October 2014

JUDGMENT OF SIMON FRANCE J

This judgment was delivered by me on 17 October 2014 at 3pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

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Paragraph No.

Introduction

[1] The United States of America is seeking the extradition of Messrs Dotcom, Batato, Ortmann and Van Der Kolk. The matter has been before the Courts on numerous occasions, and no further recitation of the facts is needed.[1] It is convenient to standardise descriptions so in this judgment the party seeking

[1] See *United States of America v Dotcom* [2013] NZCA 38, [2013] 2 NZLR 139 and *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355.

extradition (United States of America) will be referred to as the applicant, and the persons whose extradition is sought will be called the respondents.

[2] This judgment has as its background two applications made by the respondents to the extradition court (the District Court) requesting it to make discovery orders against various New Zealand government agencies, Ministers and departments. The District Court declined and the respondents are seeking judicial review of that decision.

The discovery applications

(a) The first application for discovery

[3] The first application for discovery was by Mr Dotcom alone. It was made on 29 November 2013 and was directed to Immigration New Zealand (INZ) and to the New Zealand Security Intelligence Service (NZSIS). It asked the District Court as extradition court to require those agencies, and their Ministers, to:

> … provide by way of affidavit full and comprehensive discovery and disclosure of all communications and information held by them regarding Kim Dotcom, and his application for New Zealand residence.

[4] The supporting grounds indicated that Mr Dotcom believed there had been political interference in the decision to grant him New Zealand residency. It appears that initially NZSIS had put a block on the application whilst it made security checks. Then on 31 October 2010 that block was lifted and on 1 November 2010 the application was granted. This happens to have been the deadline date Mr Dotcom's advisers had set, and notified to INZ. If not granted by then, the application was to be withdrawn.

[5] I was advised at the hearing that Mr Dotcom will, at the extradition hearing, advance an argument that the extradition hearing should not proceed because there has been an abuse of process. The abuse of process claim will rely on various strands, one of which is political interference in his immigration process. The theory that Mr Dotcom wishes to explore, and concerning which discovery is sought, is that in the normal course of events Mr Dotcom's application would not have been granted at that time. It will be suggested the normal rules were waived by

immigration officials at the government's direction and at the behest of the applicant. The alleged theory behind this is that granting Mr Dotcom residency would lead him to physically live in New Zealand which is a country with an extradition arrangement with the applicant. It would mean Mr Dotcom's whereabouts would be known and extradition would be possible.

[6] The application for discovery was opposed by the applicant. It countered with its own application, namely for summary dismissal of Mr Dotcom's discovery application upon the grounds that:

(a) the court had no power to make non party discovery orders;

(b) even if it did, there was no basis for such orders as Mr Dotcom's allegations, even if substantiated, could have no relevance to the extradition process; and

(c) the lawfulness of executive conduct of the New Zealand government was not a matter within the jurisdiction of the extradition court.

[7] On 5 March 2014 Mr Dotcom filed a notice of opposition to the applicant's application for summary dismissal. The applicant's application for summary dismissal came on for hearing, along with other matters, on 8 May 2014.

(b) The second application for discovery

(i) AN INTERVENING EVENT

[8] On 21 March 2014 the Supreme Court issued its decision in relation to efforts by the respondents to obtain further information from the requesting state (the applicant).[2] In the course of that decision, McGrath and Blanchard JJ observed:

> [121] On this basis, we turn to consider what information a requested person is entitled to be given, and a requesting state required to provide, for the purpose of an extradition hearing.
>
> [122] This issue is to be distinguished from that of the availability to requested persons of information held by New Zealand authorities. We

[2] *Dotcom v United States of America*, above n1.

accept that, in extradition cases, as in domestic criminal proceedings, information in the hands of public bodies may be accessible under the Official Information Act 1982 and under the principles stated in the Court of Appeal's judgment in *Commissioner of Police v Ombudsman*. These avenues are available, however, only against New Zealand authorities that are subject to the Official Information Act and against the prosecution respectively. A person whose extradition is sought may seek disclosure from any New Zealand agencies involved in the process, including the Ministry of Justice. But neither the Official Information Act nor the common law entitles requested persons to disclosure of information that is held by a foreign state (footnote omitted).

[9] Further, William Young J stated:

> [230] I consider that an extradition court can require pre-hearing disclosure of information in two respects:
>
> (a) an extradition court may rely on the Official Information Act and s 22(1)(a) of the Extradition Act to require any New Zealand public agency to disclose information in its possession; and
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> (b) an extradition court is entitled to prescribe the timing of the provision of information that the requesting state is required to make available, pre-hearing, to the requested person.
>
> Both points warrant some explanation.
>
> [231] As to the first, a person whose extradition is sought may seek pre-hearing disclosure against any *New Zealand* agencies involved in the extradition process, including, and most particularly, the Minister of Justice. Such disclosure is available by reason of the Official Information Act. Except to the extent that its operation was displaced by the Criminal Disclosure Act, the Official Information Act is able to be directly enforced and it seems to me that the power of direct enforcement of a right to access personal information recognised in *Commissioner of Police v Ombudsman* is therefore vested in an extradition court under s 22(1)(a) (footnote omitted).

[10] Finally, Glazebrook J observed:

> [274] I also agree with McGrath J that the appellants would, under the principles stated in *Commissioner of Police v Ombudsman*, have access to relevant information held by New Zealand authorities. As McGrath J notes, however, the Official Information Act does not apply to information held by a foreign state and the common law does not support general disclosure of all inculpatory material held by the foreign state for the purpose of the stage of the proceedings relating to extradition (footnote omitted).

(ii) THE SECOND APPLICATION

[11] Seemingly responding to these observations, on 3 April 2014 all respondents made application to the extradition court for discovery orders against the Minister of Justice, the Ministry of Justice, the New Zealand Police, the Government Communications Security Bureau, New Zealand Customs and the Department of Corrections. The orders sought were for:

> … all information held by them concerning the respondents and any steps taken by them in relation to the respondents, including but not limited to, actions pursuant to the request for the respondents' extradition.

[12] This application was made at the same time as two other applications, namely for an order vacating the extradition hearing fixture of 7 July 2014, and for an order allowing access to information seized from the respondents at or around the time of their arrest. On 11 April 2014 the applicant filed a notice of opposition to all three applications. These applications were also heard at the 8 May 2014 hearing.

District Court decision

(a) The first decision[3]

[13] The District Court dealt first with an application that the record of the case no longer be subject to publication restriction. It then addressed the discovery applications.

[14] The Court regarded the applicant's summary dismissal application as being a request to strike out the discovery application. The Court concluded it had no jurisdiction, as an extradition court, to strike out Mr Dotcom's discovery application. Its powers were defined by s 22 of the Extradition Act 1999 which said the Court had the same powers as if the proceedings were a committal hearing of an information. Striking out was a remedy available in civil proceedings but not one exercised by a criminal committal court.

[15] Having rejected the applicant's bid for summary dismissal, the Court then went on to determine the respondents' application for discovery. This decision by

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3 *United States of America v Dotcom* DC North Shore CRI-2012-092-001647, 23 May 2014.

the Court to address the respondents' substantive applications is Mr Dotcom's primary procedural challenge on judicial review. It is contended that the Court was only dealing at that time with the applicant's summary dismissal application. A breach of natural justice (right to be heard) is said to have arisen as a result of the Court not stopping there.

[16] The Court noted in its judgment that it had heard submissions that it should not determine the substantive applications for discovery and that the applications should instead be set down for a full hearing. However, the Court noted it had received the relevant evidence and had heard submissions over several days. It could not imagine there was more to say, so it would proceed to determine the matter.

[17] The Court took from the recently released Supreme Court decision, *United States of America v Dotcom*,[4] that the applicant was under a duty of candour, but that the respondents needed to demonstrate an air of reality to their applications. In that regard the Court concluded Mr Dotcom's theory was based on speculation and on reading too much into what had not been shown to be more than coincidental meetings between Ministers and American entities with an interest in copyright. The Court also considered any evidence of improper political involvement in the handling of Mr Dotcom's residency application could have no impact on the extradition hearing. The application by Mr Dotcom was accordingly dismissed.

[18] Concerning the second discovery application made by all the respondents, the Court noted the respondents could seek the information under the Official Information Act 1982. However, it understood the applications to be going further and to be seeking information not available under that Act. The Court considered this second application did not sufficiently particularise what information was being sought, nor how it would assist at the extradition hearing. The application was assessed as having all the hallmarks of a fishing expedition and was dismissed.

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4 *United States of America v Dotcom*, above n 1.

(b) A further hearing

[19] Subsequent to the District Court's decision, further information was obtained from NZSIS that encouraged Mr Dotcom to return to the District Court to renew his application for discovery against INZ and NZSIS. The Director of Security of NZSIS had written to Mr Dotcom advising that his Privacy Act 1993 application had been further assessed and that 19 further emails were being disclosed. These emails were either newly discovered by NZSIS or involved reconsideration of the decision to previously withhold information.

[20] Probably the key new disclosure was an internal NZSIS email which recorded:

> INZ … has phoned me to advise that the INZ CEO (Nigel Bickle) is questioning why this case is on hold. Apparently there is some "political pressure" to process this case.

[21] There was then an apparent reply to this email which advised that Mr Dotcom was not of security concern but was likely soon to be the subject of a joint FBI/NZ Police criminal investigation. This led in turn to a further email which directed:

> Since DOTCOM is not of security concern, there is no reason for this application to be on hold with us. Please can you inform your INZ contacts of this, also noting that DOTCOM is the subject of a criminal investigation and that they will need to discuss the case with NZ Police before they proceed with granting him [permanent residency].

[22] Mr Dotcom's submission to the District Court was that this material furthered his argument that there had been political interference and that an air of reality had been established. The District Court disagreed, holding that its assessment was unchanged.[5] The Court considered other material explained the political pressure comment and that there was no evidence to suggest the Minister of Immigration had any interest in attracting Mr Dotcom to New Zealand so as to facilitate his extradition to the United States of America.

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5 *United States of America v Dotcom* DC North Shore CRI-2012-092-001647, 25 August 2014.

(c) Further discovery

[23] To complete the narrative, it can be noted that shortly prior to the hearing of this judicial review application, Mr Dotcom filed a further affidavit appending another tranche of material recently released by the Director of Security for NZSIS. It seems counsel for Mr Dotcom had written to NZSIS asking for it to do a thorough review of its disclosure pursuant to previous Official Information Act and Privacy Act requests. The request made the point that some previously withheld but now disclosed material called into validity the basis on which NZSIS was withholding material.

[24] On 12 September 2014 the Director replied saying that a different search methodology had been used and as a consequence some new documents, primarily internal email chains, had been located. These new documents, along with already known material, had all been reassessed against the scope of Mr Dotcom's original request and the permitted grounds for withholding. Consequently, a collection of further material was being released. Twenty-six documents were withheld in full, and the rest released either in full or partly redacted.

The application for judicial review

[25] The respondents bring judicial review proceedings. Concerning Mr Dotcom's application, the first cause of action is procedural unfairness. This is the claim that the first District Court hearing only concerned the applicant's application for summary dismissal and that it was an error on the part of the Judge to determine the respondent's application for discovery. If successful in this, Mr Dotcom would prefer this Court to address the substance rather than send it back.

[26] The second ground of review is that the District Court erred in law. Mr Dotcom says the air of reality test was an incorrect test. In the alternative, if it was the right test, the District Court misunderstood it and treated it as involving an inappropriately high threshold.

[27] Concerning the second application by all respondents, it is said the Court erred in law in that its decision was contrary to the Supreme Court decision allowing

for discovery orders.[6] Finally, it is contended that the subsequent decision of the District Court, when presented with further evidence, suffers from the same errors as the earlier decision (other than the alleged procedural mistake).

Competing submissions

(a) A preliminary matter

[28] The procedural challenge as to whether the substantive applications should have been determined can be quickly disposed of. Mr Davison QC as lead counsel says he expected a further hearing and I accept that was his expectation. In support of it being a reasonable expectation, he points to exchanges with the Court (a transcript is available) that are said to show a further hearing was indicated. For the applicant, Ms Gordon QC queries the reasonableness of the expectation, saying it was always part of the applicant's summary dismissal application that there was no factual basis to support the respondents' discovery application. It should therefore have been expected the Court would address this, and she points to significant passages in the transcript where Mr Davison is making submissions on the topic.

[29] It seems obvious to me that the parties had different understandings of what was being talked about in relation to the second hearing. Mr Davison thought it was a hearing to determine his substantive application for discovery. Ms Gordon, and I suspect the Court, were instead referring to the potential need for a further hearing if the Court decided the threshold had been met. It has to be recalled that these were applications for non party discovery, and the non parties were not represented. Indeed, I understand they have yet to be served. Obviously if the Court were to consider directing discovery, an opportunity to be heard would need to be afforded each agency. It was that hearing that Ms Gordon was referring to.

[30] There are two reasons why it is not necessary to consider this issue further. First, I accept the applicant's point that as regards Mr Dotcom's application, the renewed application which was heard in August 2014 cured any earlier procedural issues. It was apparent by that point what issue was being addressed, and the respondents had opportunity to make such submissions as they wished.

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6 *Dotcom v United States of America*, above n 1.

[31] Second, the respondents' preference is for this Court to address the substance of the application rather than refer it back to the District Court and that is plainly the preferable course. I also add, however, that I am far from convinced that the respondent has been disadvantaged by the misunderstanding. The reality is that the original hearing did involve submissions on whether the threshold was met. Perhaps Mr Davison's emphasis may have differed had he understood the Court's intention, but I cannot see that any actual disadvantage has been shown.

[32] I turn then to an overview of counsel's submissions on whether the Court erred in its approach to the applications.

(b) Respondents' submissions

[33] Mr Davison presented submissions which were adopted by all respondents. Counsel for the second, third and fourth respondents made supplementary oral submissions.

[34] The relevant background propositions are that an extradition court has inherent power to order disclosure against non-parties. The provisions of the Criminal Disclosure Act 2008, whilst not directly applicable, are said to provide guidance as to how the court might exercise these powers. It is accepted that a disclosure application must be about something relevant to the extradition proceeding. Here the discovery request is aimed at obtaining information to support an abuse of process argument, and abuse of process is an available argument to make at an extradition hearing. Particularly as regards Mr Dotcom's initial discovery application directed at INZ and NZSIS, it has been explained how improper political interference in the immigration process is one strand of the abuse claim. Mr Dotcom's request for information about his residency application is a focussed application, and plainly relevant to the abuse of process argument.

[35] Turning to specific errors said to have been made by the Court, it is submitted the Court was mistaken to apply a threshold test of "air of reality". That test was sourced primarily in Canadian jurisprudence and any scope for its application here has been overtaken by the recognition of a right to discovery as articulated by the

Supreme Court in its *United States of America v Dotcom* decision.[7] Alternatively, if an air of reality test does apply, the Court has erred in its application by treating it as imposing a higher threshold than it does. The essence of this argument is that the Court strayed into determining the correctness or strength of the respondents' position on the immigration matter, rather than keeping in mind it was only an application for discovery. All that needed to be shown was that there was some material that allowed the argument to be advanced. When viewed in this proper light, it is submitted there is ample material to suggest political involvement. The Court erred in its understanding of the test and hence reached an incorrect decision.

(c) Applicant's submission

[36] The applicant makes an initial point that the Court should decline to consider an application for judicial review at this stage of the proceedings. There has already been excessive delay and it is inappropriate to take preliminary matters such as disclosure on judicial review. The applicant likened the situation to the tax area where the courts have discouraged judicial review in favour of requiring taxpayers to follow the statutory processes.

[37] The respondents countered on this by pointing to the very limited appeal rights available subsequent to the extradition hearing. They also emphasised that the Supreme Court had confirmed that s 27 of the New Zealand Bill of Rights Act 1990 (the natural justice provision) applied and that it was an area where natural justice had a high content. The respondents submit they need the information in order to have a fair hearing and so it is appropriate to pursue avenues of redress in advance of the substantive hearing.

[38] I have decided not to address this further. Different aspects of these proceedings have been the subject of numerous court decisions at all levels. There has been and no doubt will be opportunity for the appeal courts to comment if they choose. I consider at this point it is preferable for me simply to determine the application.

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7 *United States of America v Dotcom*, above n 1.

[39] Turning to the substantive matters, the applicant submits a threshold test of "air of reality" is correct and the respondents failed to discharge it. The respondents have also failed to show the Court erred in its approach to applying that test. The applicant disputes the respondents' interpretation of the Supreme Court judgment in *Dotcom*, saying it has not created a separate disclosure regime. It submits the case law applicable to applications under the Official Information Act and Privacy Act remain relevant. The Supreme Court did not intend to create a new and unqualified right to disclosure which would be much more expansive than has previously been generally recognised in extradition jurisprudence.

[40] The applicant appears to accept there may be a power in the extradition court to direct disclosure against a non-party but submits that power must be understood within the context of extradition proceedings. The scope for challenging an extradition request is limited, and the process is meant to be one conducted with a degree of expedition. For this reason courts have guarded against fishing expeditions and delaying tactics. The "air of reality" test is one means by which focus is kept.

[41] Finally, addressing the facts, the applicant contends, as it did before the District Court, that the respondents' propositions, even if they could be established, fall well short of being capable of amounting to an abuse of process that would prevent extradition occurring.[8] It is emphasised that the alleged malpractice, if it has occurred, has been done by New Zealand agencies. This, it is submitted, cannot be a basis on which to deny the requesting state's application.

Discussion

(a) The effect of the Supreme Court decision in Dotcom

[42] It is plain that the respondents' position is being driven by its interpretation of the Supreme Court decision which it sees as recognising a power in the extradition court to order disclosure against New Zealand agencies. The primary source of this proposition is the passage cited earlier from William Young J, supported, it is said,

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[8] *R v Antonievic* [2013] NZCA 806, [2013] 3 NZLR 806 is relied on as pointing to the extreme conduct needed before a stay will be ordered.

by the other passages also cited.[9] For convenience the relevant passage from William Young J is again set out:

> [230] I consider that an extradition court can require pre-hearing disclosure of information in two respects:
>
> (a) an extradition court may rely on the Official Information Act and s 22(1)(a) of the Extradition Act to require any New Zealand public agency to disclose information in its possession; and
>
> (b) an extradition court is entitled to prescribe the timing of the provision of information that the requesting state is required to make available, pre-hearing, to the requested person.
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> Both points warrant some explanation.
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> [231] As to the first, a person whose extradition is sought may seek pre-hearing disclosure against any *New Zealand* agencies involved in the extradition process, including, and most particularly, the Minister of Justice. Such disclosure is available by reason of the Official Information Act. Except to the extent that its operation was displaced by the Criminal Disclosure Act, the Official Information Act is able to be directly enforced and it seems to me that the power of direct enforcement of a right to access personal information recognised in *Commissioner of Police v Ombudsman* is therefore vested in an extradition court under s 22(1)(a) (footnote omitted).

[43] It is important to put this in context. The Supreme Court was considering whether an extradition court had power to order further disclosure from the requesting state. In the course of concluding there was no such power it found that:

(a) the Criminal Disclosure Act 2008 does not apply to extradition proceedings;

(b) the extradition court is a committal court which has the powers of enforcement under the Official Information Act, as contemplated in *Commissioner of Police v Ombudsman*;[10]

(c) those powers do not, however, assist in relation to the requesting state because the requesting state is not subject to the Official Information Act; and

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9 See [8]–[10].

10 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA).

(d) there is otherwise no power to require information be provided by the requesting state, although there is a mechanism by which requests can be made.

[44] Earlier William Young J had noted that the innovative feature of the Court of Appeal judgment in *Commissioner of Police v Ombudsman* was its conclusion that the obligations under the Official Information Act could be directly enforced by trial courts in the context of existing criminal proceedings. It is important to note that this direct enforcement related only to personal information and not to all official information. One can see this innovation carried through in the present decision with the conclusion in the extract cited that the extradition court similarly has "the power of direct enforcement". Although this was not a conclusion expressly reached by the other Judges, there is nothing in the passages cited to suggest disagreement.

[45] That said, I do not accept the respondents' position that some separate disclosure regime was thereby being recognised. The Supreme Court's observations were wholly linked to the access that is permitted by the Official Information Act and now the Privacy Act. Other than the conclusion that the extradition court could enforce access, the passages are doing no more than observing what the law is. Prior to the Supreme Court judgment the respondents had the ability to use the Official Information Act and the Privacy Act, and indeed had done so.

[46] There is nothing to suggest the Supreme Court, which was not formally considering non-party disclosure, was intending to create some jurisdiction that existed independently of the New Zealand legislation it referred to.

[47] By way of summary I consider the three key points to emerge from the Supreme Court's decision, in relation to information held by domestic agencies, is that:

(a) the source of the extradition court's authority to order pre-trial disclosure is the Official Information Act and the Privacy Act (hence the requesting state is unaffected because those Acts do not apply to it);

(b) the extradition court is an enforcement court as contemplated by *Commissioner of Police v Ombudsman*; and

(c) the Criminal Disclosure Act 2008 does not apply.

[48] Against that background I now consider the current status of the legislative regime dealing with access to personal information.

(b) The Official Information Act regime and its applicability to the extradition proceedings

[49] Originally the Official Information Act dealt with both personal information (s 24 of the Act as it then was) and official information (effectively all official information that was not about an identifiable person). The subject of the decision in *Commissioner of Police v Ombudsman* were prosecution briefs of evidence of witnesses to be called in a criminal trial. A request was made to the Commissioner of Police for pre-trial access to the briefs. The Commissioner declined citing the withholding ground in s 6(1)(c) of the Act, namely the maintenance of the law including the right to a fair trial. By the time the case reached the Court of Appeal it was common ground that the briefs were personal information within the meaning of the Act.

[50] At the time of the Court of Appeal decision, refusals to provide personal information could be referred to the Ombudsman, whose function was only recommendatory. As the Court noted, the Ombudsman's powers did not perfect the access right given by the Act. The Court concluded, however, that the personal information rights were directly enforceable in a court. It then further indicated that in the context of a criminal trial it would be inefficient to require an applicant to undertake separate enforcement action. Hence it was concluded that a court exercising criminal jurisdiction could as a corollary to that function enforce the defendants' rights to personal information without needing separate proceedings.

[51] Subsequent to that decision two significant pieces of legislation have been enacted. First, the Privacy Act 1993, and second, the Criminal Disclosure Act 2008. The latter now governs disclosure in criminal proceedings and has been able to

provide a regime specifically tailored to the needs of the criminal process. However, it does not apply to the extradition process.

[52] The Privacy Act removed control of access to personal information from the Official Information Act (other than for corporate persons who are still under the Official Information Act). It established a new regime with the creation of a Privacy Commissioner and the enunciation of information privacy principles. Principle 6 concerns access to personal information. It entitles an individual to confirmation of whether personal information is held by an agency and entitles the individual to have access to that information. Part 4 of the Act sets out what are classed as "good reasons" for refusing access. They are the only basis on which personal information can be withheld.

[53] Part 8 of the Act establishes a complaints process which includes situations where good reasons for refusal have been claimed by the agency holding the information. A complaint is made to the Privacy Commissioner who may then investigate. If the Privacy Commissioner is satisfied as to the validity of a complaint but cannot secure a settlement, the matter may be referred to the Director of Human Rights Proceedings whose function is to determine whether proceedings should be instituted before the Human Rights Review Tribunal. If the Director declines to do so, an aggrieved person may institute their own claim before the Tribunal.

[54] Although the Privacy Commissioner and the Director of Human Rights Proceedings are the normal route for access and enforcement, s 11 of the Act provides an alternative:

> **Enforceability of principles**
>
> (1) The entitlements conferred on an individual by subclause (1) of principle 6, in so far as that subclause relates to personal information held by a public sector agency, are legal rights, and are enforceable accordingly in a court of law.
>
> (2) Subject to subsection (1), the information privacy principles do not confer on any person any legal right that is enforceable in a court of law.

[55] This provision reflects the conclusions of the Court of Appeal in *Commissioner of Police v Ombudsman* about direct enforceability in relation to personal information.[11] It is notable this alternative is specifically limited to principle 6(1) which is access to personal information held by a public sector agency. Agency is broadly defined in s 2, but includes a list of exclusions none of which are relevant to these proceedings. There is no equivalent provision in the Official Information Act. Complaints under that Act must proceed under the processes provided in the Act.

[56] The effect of all this in my view is that the reference by William Young J in *Dotcom* to the extradition court having the power of direct enforcement of a right to access personal information must be taken as being a reference to s 11 of the Privacy Act. Consistent with *Commissioner of Police v Ombudsman*, it must be contemplated that in an appropriate case the extradition court can accept responsibility for enforcing the rights given a person under the Privacy Act.

[57] I make three points, however. First, there is nothing to suggest the court's role is other than to ensure compliance with the Act. In other words, and it was not contended otherwise, the good reasons for withholding still apply. This is in contrast to the Criminal Disclosure Act 2008 where the court is given a wider brief. There, s 30(1)(b) allows a court to override validly claimed withholding grounds. Further, that Act establishes a regime for directing disclosure by non-parties. Here, however, the extradition court, when wearing the hat of enforcer of privacy information rights, is limited to giving effect to the Privacy Act.

[58] The second point is the obvious one that the s 11 power is limited to information that comes within the Privacy Act, that is personal information. Direct enforcement through the Court has always been limited to that.

[59] The third point is that there is no obligation on the Court to assume this function as part of the extradition proceeding. If an extradition court declines to do

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[11] The Departmental report to the Justice and Law Reform Select Committee cited in John Lulich (ed) *Privacy Law and Practice* (online looseleaf ed, Lexis Nexis) at [PVA 11.3], notes that s 11 has been included because of the principle that a right once conferred by statute should not be lightly taken away. Relevant to the later discussion ([66] below) the report saw the enforcement options as being alternatives.

so, it will be open to an applicant to commence separate proceedings, but those proceedings will be subject to the normal rules of court. Whether the extradition court assumes responsibility must be a case specific assessment which no doubt will be influenced by a large number of factors – the timing of the request and its impact on any scheduled proceedings; the apparent importance of the dispute to the proceeding; whether the matter has been referred to the Privacy Commissioner; and the scale of the request are some obvious considerations.

[60] My conclusion, therefore, is that the real questions for determination in the present case are:

(a) Did the Court err in a reviewable way when declining to make the discovery orders?

(b) Where Privacy Act requests had been made by the applicants, and responded to by the agencies, should the Court have treated the respondents' application as a request to act as an enforcement court under s 11 of the Privacy Act. If so acted, should the Court have acted as an enforcement court?

(c) Is there any power outside the Privacy Act to make these discovery orders?

(c) Did the Court err in declining the applications as framed?

[61] The extradition court was faced with two applications that asked it to make, in effect, original discovery orders. I do not consider that is the correct process. The Privacy Act provides a speedy mechanism for requests to be made of agencies. A clear set of rules governs how agencies are to respond and sets timeframes for response. The agencies are familiar with these and can be expected to process the requests in accordance with the Act's requirements. I see no reason why the Court should involve itself at this point. Its role is to enforce the rights and the sensible

course is to require a party to first seek the information and obtain an answer. That will immediately define the scope of the dispute.[12]

[62] This is the approach taken in the Criminal Disclosure Act 2008. In relation to non-party disclosure, an application to the Court for assistance must be accompanied by:[13]

> … written evidence indicating that the defendant has made reasonable efforts to obtain the information from the person or agency that the defendant alleges holds the information.

It was similarly the case under the criminal disclosure regime operating pursuant to the Official Information Act. Although over time disclosure became routine, in the initial days the trigger was a formal letter to the police requesting disclosure. The fact of a prior request was assumed by the Select Committee when commenting on why a power of direct enforcement by the Courts was being maintained:[14]

> The right that is being preserved is that of an individual who is refused his or her own information by a public sector agency to bring an action as an alternative to complaining to the Ombudsman.

[63] For this simple process reason, it is my view that the District Court made no error in declining the respondents' applications as they were framed. There was no reason for the extradition court to make disclosure orders in the way sought. The correct response was to direct the respondents to apply directly to the agencies concerned, and then when a response was had, to articulate a basis for the Court to intervene in relation to documents that had been withheld. There will no doubt be occasions when a matter emerges that requires more immediate action, and the preferable course will be to require the agency to attend. But that did not apply here.

[64] As it happens, the respondents had made Privacy Act requests and had responses. There were documents being withheld and so there was a s 11 enforcement role that the Court might have undertaken. Although it was not

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12 In *BIR v R* HC Rotorua T65/96, 18 December 1996 Robertson J observed that the personal information regime in the Privacy Act did not amount to "a discovery statute".

13 Criminal Disclosure Act 2008, s 24(3)(c)). The concept of request had been integral from the outset and was a feature of s 24 of the Official Information Act 1982 when it dealt with all personal information.

14 Cited in *Privacy Law and Practice*, above n7, at [PVA 11.3].

presented to the Court in this way, I consider it is appropriate to assess what the correct response would be to such a request. In the context of judicial review proceedings it is relevant to relief.

(d) Should the Court have exercised its available review function under the Privacy Act 1993?

[65] It is convenient to begin by noting where matters had actually reached pursuant to a variety of Privacy Act requests. I begin with NZSIS and INZ which are the subject of Mr Dotcom's first discovery application.

[66] Request was first made of NZSIS in October 2012. A response was received. As noted, some documents were withheld, and the rest provided. Of these most had redactions to some degree. In April 2013 complaint was made to the Privacy Commissioner. In July the Commissioner's office advised it was satisfied that NZSIS had properly withheld the information.

[67] Sometime after that, NZSIS conducted a review and released some further information. This prompted a further complaint to the Privacy Commissioner who again looked at it. The Assistant Privacy Commissioner (Mr Flahive) advised that the Commissioner remained satisfied that the withholding powers had been properly used. It was observed:

> Nevertheless, our view on the withheld information remains unchanged and we believe that the Service is entitled to withhold it. I also reiterate that the fact that the Service has released further information to Mr Dotcom does not mean that it did not have a proper basis to withhold that information at the time of his request.
>
> The interests being protected under sections 27(1)(a) and 27(1)(b) of the Privacy Act are wider than prejudicing the security or defence of New Zealand. The Service's decision to withhold information has not been made solely on the basis of the level of risk Mr Dotcom may pose to the security or defence of New Zealand if any. Sections 27(1)(a) and 27(1)(b) also allows the Service to withhold information if the disclosure of the information would be likely to prejudice the international relations to the Government of New Zealand, or the entrusting of information to the Government of New Zealand.
>
> The withheld information includes information received by the Service from international agencies. Our view is that the Service needs to protect sources of information, methods of obtaining information and strategies that it applies to investigate and acquire intelligence. In my view, if that

> information was released to Mr Dotcom, the security and defence of New Zealand would be likely to be prejudiced as would the international relations of the Government of New Zealand by the government of other countries or agencies of those governments. Prejudice may manifest in a multitude of ways from, prejudice that an intelligence target may acquire an understanding of agencies interest through to specific interests and methods of operation being exposed beyond the agencies control. I am satisfied that were the information that remains withheld, to be released there would be a likely resultant prejudice to the interests in 27(1)(a) and (b).
>
> In the circumstances, and having reviewed this file, my final view is that the Service has not breached principle 6 of the Privacy Act. I am satisfied that the Service has provided Mr Dotcom with all his personal information which he is entitled to under the Privacy Act.

[68] Subsequently, at the request of Mr Dotcom's solicitors, the Director of Security of NZSIS has undertaken a further review with the consequence of more documents being located and disclosed shortly prior to this hearing.

[69] An interesting question arises as to the interplay between the two review options provided by the Privacy Act 1993. As has been seen, it is open to an applicant to make complaint to the Privacy Commissioner, and separately the rights are also enforceable in a court pursuant to s 11.[15] The question which arises is whether, having chosen the Privacy Commissioner route, a dissatisfied applicant can then simply issue proceedings pursuant to s 11, rather than complete the complaints' route initially chosen. On the face of s 11 there is nothing to require this.

[70] The converse situation was discussed in *Commissioner of Police v Ombudsman*. There the Ombudsman indicated to the Court that if a court assumed jurisdiction, the Ombudsman would exercise his power to decline to investigate.[16] Within that context, and considering the issue of whether a court should wait for the Ombudsman, Cooke P observed that it would not be right for a court to renounce the ordinary jurisdiction reserved to it by the Act.

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15 The availability of direct enforcement has seemingly translated into actual application. In I Eagles, M Taggert and G Liddell, *Freedom of Information in New Zealand* (Oxford University Press, Auckland, 1992), the authors note there had yet to be any standalone court proceedings seeking to enforce the right. None of the present privacy texts note any applications under s 11(1) of the Privacy Act.

16 *Commissioner of Police v Ombusdman*, above n 6, at 399.

[71] The situation is somewhat more advanced here as there has been a complete review by the Privacy Commissioner.[17] The process next contemplated by the Act is referral to the Director of Human Rights Proceedings and if the Director declines to act, a power in the individual to initiate their own proceedings in the Human Rights Review Tribunal.[18] In *Siemer v Privacy Commissioner* this Court considered judicial review proceedings were inappropriate because the processes available under the Act had not been fully utilised.[19] It was noted an appeal lies to the High Court against decisions of the Tribunal. On the other hand, the power in s 11 is not expressed to be limited by prior decisions of the Commissioner and the jurisdiction is plainly conferred.

[72] In the end it is not necessary to resolve this issue for the purposes of these proceedings. What is being considered here is whether the District Court as part of the extradition proceedings should accept this function. The Court plainly has a discretion whether to do so and I consider it a relevant and important factor that the Privacy Commissioner has already done the exercise.

[73] A second related factor is that some of the documents have been withheld on the basis of the security of New Zealand. It can be a complex process for the Court to undertake review of this as access to documents and security clearance can be issues. This is not a decisive factor, but it is relevant when the review has been done already by the Commissioner.

[74] It is necessary to consider at this point what message should be taken from the fact that NZSIS has now twice released further material. On both occasions it has occurred subsequent to the Privacy Commissioner upholding a prior NZSIS decision on the request. Mr Davison submits the process shows a court needs to involve itself. I disagree and continue to place more weight on the Privacy Commissioner's assessment. There is no reason to consider newly discovered documents would have been approached by NZSIS in a manner different from that already endorsed by the Commissioner. As for those situations where past redactions

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17 There will be a small collection of recently identified documents that have not been subject to the prior process.

18 Privacy Act 1993, s 83.

19 *Siemer v Privacy Commissioner* [2013] NZHC 1483.

have been reassessed, I note the points made by the Privacy Commissioner on this (at [65]).

[75] The second agency involved in Mr Dotcom's request is INZ. A request was made in September 2011 and a response received. Some documents have been redacted. This response does not seem to have been referred to the Privacy Commissioner, although the agency's decision was received by the respondents, it seems, in late 2011.

[76] At the time Mr Dotcom's discovery application was made, which was in late November 2013, and even when the matter was argued in May 2014, there was still a July 2014 fixture date for the substantive extradition hearing. The potential impact on that date of undertaking the disclosure exercise would have been a relevant factor. As at the time of writing this judgment, the substantive hearing is scheduled for February 2015, so impact on the fixture remains an issue. I also consider it relevant to the Court's assessment that the INZ response was to hand for nearly three years without a review being sought.

[77] Another relevant factor is the purpose of the request. Here it is to facilitate an abuse of process argument, and indeed just one limb of that proposed argument. I remind myself of Mr Davison's criticisms that the Court confused the threshold inquiry for a discovery order with the task of resolving the legitimacy of the abuse claim. However, when considering the exercise of the discretion to accept a s 11 role it is difficult not to venture some view on the perceived importance of the argument for which the material is sought.

[78] I limit myself to observing that it is a far from immediately compelling argument. The basic proposition is that powers were used for an improper purpose and that is always an abuse of process. However, the reality is that as a result of the alleged abuse, Mr Dotcom got what he was seeking, permanent residence. Further, it was he who created the time pressure by imposing a deadline on when a decision had to be made. It is not easy in these circumstances to see that he is a victim of the alleged abuse. Accordingly, as a factor relevant to whether the extradition court

should undertake this exercise, I assess the underlying purpose as peripheral to the core function, and not of apparent significance.

[79] Next, it can be observed that the task involved could be quite onerous. A lot of documents are involved and there is no reason to believe the exercise will yield anything of relevance. The scale of the exercise is a far cry from the very limited non-party disclosure issues that will normally arise in a criminal process.

[80] I consider it is also important that an alternative review option exists. Mr Davison contended that the District Court, seized of the extradition matter and aware of the obligation to afford natural justice and ensure a fair trial, is best suited to perform the function. I do not agree. The task, as I have defined it, is to assess whether the grounds for withholding have been properly claimed. There is no power to override in the interests of justice such as is provided for in the Criminal Disclosure Act. The Privacy Commissioner is a specialist body and I cannot see why a court would be better suited.

[81] Considering all these factors I have reached a clear view that it would have been incorrect in this case for the District Court, in the context of the extradition process, to agree to undertake an enforcement role under the Privacy Act in relation to Mr Dotcom's first application.

[82] The second application needs little consideration. I am grateful to Mr Davison for the information provided during the hearing as to the history of Privacy Act requests for each agency, the responses received, and what steps, if any, were taken with the Privacy Commissioner. However, I consider it is unnecessary to detail these.

[83] The second application is hopelessly broad being simply a request for all personal information held by all these agencies in relation to each respondent. It is a perfectly permissible request,[20] but not one with which an extradition court should concern itself. There is no basis at all to consider that the request is relevant to the

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[20] The Privacy Act does not require requests to be specific. The contrast is with s 12(2) of the Official Information Act which requires requests for official information to be "specified with due particularity".

extradition proceedings. It was rightly described in the court below as a fishing expedition. All the reasons discussed previously apply, but with the added factor of total irrelevance, as cast, to the extradition proceeding.

(e) Conclusion on discovery applications when assessed as being made under the Privacy Act

[84] I consider the relevant effect of the Supreme Court decision in *Dotcom* to these proceedings is to confirm that the Criminal Disclosure Act does not apply, and to confirm that the extradition court may exercise the functions given to a court under s 11 of the Privacy Act 1993. It is, however, the case that the court need not perform that function within the framework of the extradition proceedings. If it declines to do so, it is open to an applicant to pursue the matter with the Privacy Commissioner or institute separate proceedings under s 11 of the Privacy Act.

[85] A range of factors will be relevant to whether the Court accepts a party's request to act under s 11. Relevance and importance to the extradition proceeding are obvious ones, as is impact on the proceeding from a delay viewpoint. The nature and breadth of the request will also be relevant as affecting the likely resources needed. Generally, the Court should insist on the Act's processes being used by an applicant unless the particular issue has arisen unexpectedly late in the course of the proceeding. Once the Act's processes have been used, the Court will be better informed by knowing the amount of information in issue and what grounds for withholding have been claimed. It may, as here, also have the advantage of a prior decision by the Privacy Commissioner.

[86] Concerning Mr Dotcom's initial request which related to NZSIS and INZ, it is appropriately targeted and relates to an identified argument to be advanced at the extradition hearing. It is, however, a collateral argument which on its face is far from compelling. In relation to NZSIS the Privacy Commissioner has endorsed the agency's approach to the withholding grounds and there has been a second thorough review undertaken by the agency. The grounds claimed by the agency carry their own process complexity that would require considerable resource on the part of the court if it were to review the withholding decisions. The application was filed relatively proximate to the scheduled hearing. Balancing all these factors my

assessment is that there is no good reason for the extradition court to undertake the Privacy Act task in relation to the NZSIS decisions.

[87] The same analysis holds true for the related request of INZ. The difference there is the matter has not been to the Privacy Commissioner so the Court does not have the comfort of that expert assessment. However, the fact it has not been to the Privacy Commissioner raises a different factor, namely the delay in seeking the District Court's help. This application was filed three years after the agency replied. I see no good reason for the delay and consider this relevant to the Court's assessment. For this and the reasons given in relation to NZSIS, I consider the Court was correct to decline involvement.

[88] The second disclosure application, which relates to numerous agencies does not require serious assessment. It was an unspecific request of several agencies for all personal information held by those agencies in relation to all respondents. There is no basis at all on which an extradition court should accept a s 11 function within the context of the extradition proceedings.

[89] For broadly similar reasons to those advanced by the District Court, but analysed within a different framework, I am of the view that the District Court decision to decline the applications for disclosure was correct.

[90] For completeness I observe that I consider the applicant's application for summary dismissal of the respondents' application was incorrect. The subject matter of the disclosure application was personal information. When held by an agency as defined in the Act, everyone is entitled to access that information, subject to a recognised withholding ground otherwise applying. Under s 11 of the Act a court is empowered to enforce a person's right to their personal information. Further, I consider the observations of William Young J in *Dotcom* make it plain that the s 11 power is one an extradition court can exercise as an ancillary function within the extradition proceedings. For that reason, summary dismissal is inapt, although one might contemplate an immediate preliminary hearing into whether the extradition court will consider the Privacy Act challenges within the framework of the extradition proceedings.

[91] Finally, I see no scope for pre-trial disclosure applications in relation to non-parties outside the existing legislative framework. The Supreme Court rejected the idea a general power of discovery in relation to the requesting state, and rejected the idea that the Criminal Disclosure Act provided jurisdiction. It was in this context that it pointed out there was, however, an alternative legislative framework that could be employed. Against that background it is hard to see there could be some other independent power to make pre-trial non-party disclosure orders. However, if wrong in that, for completeness I will briefly address the propositions discussed at the hearing.[21]

(f) Analysis outside the Privacy Act framework

[92] I agree with the respondents that some care is needed in transporting across the Canadian authorities. Their extradition structure seems somewhat different, with several levels of decision and review built in. Many (but not all) of the cases which speak of a disclosure application requiring an "air of reality" concern applications made in the later stages of the process when there has already been held to be a prima facie case.

[93] That said, it is common sense that there must be some threshold inquiry before an extradition court potentially halts proceedings in order to become a vehicle for the respondent to obtain further information. If the request relates to the requesting state, the Supreme Court in *Dotcom* was clear that exceptional circumstances are required. It would be surprising if no standard or threshold existed in relation to requests to compel disclosure of information by domestic agencies who are not parties.

[94] In *R v Larosa*, the Ontario Court of Appeal identified three questions or assessments that were required:[22]

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[21] I am here addressing Mr Dotcom's application for discovery by NZSIS and INZ. I still regard the second application as too broad and unspecific to merit further analysis.

[22] *R v Larosa* (2002) 166 CCC (3d) 449 (Ont CA) at [74].

(a) the allegations must be capable of supporting the remedy sought;

(b) there must be an air of reality to the allegations; and

(c) it must be likely the documents or testimony sought would be relevant to the allegations.

These seem, with respect, to capture the main issues although it would still be contextual. The timing of the application and the specificity of the request are likely to be other matters relevant to some applications.

[95] Concerning the first of these factors, the District Court considered the allegation of political interference in the residency application was incapable of leading to a stay of the extradition proceedings. One of Mr Davison's criticisms is that the Judge assessed the significance of the abuse allegation as if it were a standalone complaint rather than as one strand of many that will be used to support the overall application for a stay of proceedings. I agree that the way the respondents intend to frame their abuse agreement makes this first *Larosa* inquiry difficult to apply. Standing alone, the claim for a stay based on improper manipulation of Mr Dotcom's residency application could not conceivably support the remedy sought, even if it could be shown the requesting state was complicit in the New Zealand Government's alleged actions.

[96] I accept some weight can be given to the fact it is only one part of the argument, but it still needs to be assessed for its own merit. My own view is that if I were hearing the extradition case, I would not stop the point being argued in the sense that it is not wholly irrelevant, but beyond that I cannot imagine it would seriously add anything of significance to an abuse claim. Accordingly, I agree with the conclusion of the District Court and do not consider it erred in its approach to this issue. My reasoning may be slightly different but that is to be expected in relation to what is a reasonably pliable question. If there was some error in approach, which I reject, I anyway consider the conclusion of the District Court on this first inquiry was correct.

[97] As for the second factor, the air of reality inquiry, the respondents' primary challenge is that the Judge erred in his approach. Several facts were pointed to as showing the possibility of political interference. Rather than accepting this material met the test for authorising disclosure, the Judge noted that contrary explanations or interpretations were available on each point. It is submitted this was an error in approach. The question is not whether ultimately the evidence can be explained. The question is whether it is presently capable of supporting the respondents' allegation. If so, the respondent has met its air of reality onus.

[98] I consider there is some merit in the respondents' point. There was, for example, an email which suggested INZ were coming under political pressure to grant the application. As part of the disclosure material INZ created an explanation document which seeks to explain the comment and claims that the decision was taken independent of political interference. The Judge gave weight to the explanation and I accept it was incorrect to do so at this stage. The explanation may well prove 100 per cent correct, but one cannot resist the air of reality assessment by simply providing a statement from the impugned person saying that the contended for inference is incorrect.

[99] That said, I consider an air of reality was still not established. There are, as I understand it, four primary planks on which the respondents' rely:

(a) Ministers were meeting at the time with Hollywood personnel who had an interest in copyright enforcement;

(b) NZSIS imposed a stop and then suddenly removed it;

(c) there is an email asserting INZ were under political pressure; and

(d) Mr Dotcom did not meet the criteria yet was granted permanent residency.

[100] Concerning the last of these, some explanation is needed. The normal policy is that if an applicant is subject to a criminal investigation, the application is put on

hold for six months. It can be shown that Mr Dotcom was under FBI investigation, and that there had been talk of commencing a joint FBI/NZ Police investigation. Accordingly, it is submitted that the application, on normal policy, would not have been granted. In response, the decision maker has deposed that he did not understand there to be a current investigation, and that he considered talk of a future operation was just that – it was talk about something in the future, and therefore not relevant in terms of the policy.

[101] In my view the four factors, individually or taken together, do not establish an air of reality. The proposition being advanced is that the United States of America asked the New Zealand Government to direct its officials to give Mr Dotcom permanent residency even though he was not entitled to it so that the applicant would know where he was when they came to get him. It is, as the District Court held, all supposition and the drawing of links without a basis. Listing the four matters together does not of itself provide a connection. Nothing suggests involvement of the United States of America, and nothing suggests the New Zealand Government had turned its mind to extradition issues. These are the key matters and there is no support for either contention.

[102] Accordingly, I again agree with the District Court. I do consider that an error in approach as regards some aspects is arguable, but the outcome reached is in my view demonstrably correct.

Conclusion

[103] The application for judicial review is dismissed.

[104] In relation to the alleged process error, I do not consider it has been shown the respondents were disadvantaged. Further, the subsequent hearing in August cured any deficits.

[105] In relation to the applications as filed, I consider the District Court was correct to decline them. It is not the extradition court's role to make broad disclosure orders in relation to the respondents' personal information. The respondents should themselves seek that from the relevant agencies.

[106] If the applications were framed, as I consider they should have been, as requests under s 11 of the Privacy Act for the extradition court to review the grounds for withholding information, I consider the extradition court would inevitably decline the application. This means that no error has been occasioned by the decision to decline the application.

[107] The extradition court does not have any general power to make pre-trial non-party discovery orders other than pursuant to the role given it by s 11 of the Privacy Act . If wrong in that, then I agree with the criteria applied by the District Court. I also agree with the Court's conclusions that the first disclosure application had no air of reality, and that the allegations could not support the remedy sought. I consider the second disclosure application, seeking all personal information about all the respondents from several agencies, was too broad to be of interest to the extradition court.

[108] These are judicial review proceedings. I have concluded the District Court made no error of significance and so would have declined relief. For myself I consider the matter was presented to the Court on an incorrect basis, but also consider the outcomes reached by the Court are the correct ones, however the matter is approached.

[109] The United States of America as respondent in these proceedings is entitled to costs. Memoranda may be filed if agreement is not reached.

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Simon France J

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