

WELLINGTON REGISTRY

Under The Judicature Amendment Act 1972, Part 30 of the High Court Rules, the Bill of Rights Act 1990, and the Search and Surveillance Act 2012

In the matter of An application for judicial review

And in the matter of A search warrant issued by Judge IM Malosi of the Manukau District Court on 30 September 2014

Between **N A HAGER**
Applicant

And **HER MAJESTY'S ATTORNEY-GENERAL**
First Respondent

And **THE NEW ZEALAND POLICE**
Second Respondent

And **THE MANUKAU DISTRICT COURT**
Third Respondent

Second affidavit of David James Fisher

Affirmed: June 2015

This is the annexure marked _____
referred to in the within affidavit of _____
sworn at Auckland this <u>18th</u>
day of <u>JUNE</u> 20 <u>15</u> .

Deputy Registrar, District Court, Auckland

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Lorna Perkins
 Deputy Registrar

I, David James Fisher, journalist of Auckland, solemnly and sincerely affirm:

Introduction

1. I provided a previous affidavit in these proceedings affirmed on 27 March 2015. I have been asked to complete this further affidavit to reply to some affidavit evidence for the respondents.

Code of conduct

2. In my first affidavit, I affirmed that I had read the code of conduct for expert witnesses set out in Schedule 4 of the New Zealand High Court Rules. I continue to agree to comply with it in relation to this second affidavit.

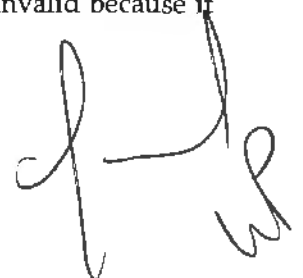
Instructions

3. I have not provided a signed confidentiality undertaking in relation to the Police disclosure in this case. I have therefore not been provided with a copy of any of the Police disclosure documents. I have also not been provided with a complete copy of the Police affidavit evidence. I have been shown a draft copy of a reply affidavit from Mr Hager, and I have only been shown the extracts from the 1 May 2015 affidavit of Detective Inspector David Christopher Lynch and the 4 May 2015 affidavit of Simon Andrew Beal as they are set out in Mr Hager's affidavit.
4. I have been asked to comment on the opinions expressed by DI Lynch and DS Beal and the reply by Mr Hager to the extent that that falls within my expertise as set out in my first affidavit.

Is there a valid distinction between leaking and obtaining document by crime?

Police position

5. As Mr Hager notes, DI Lynch tries to draw a distinction between leaked information and the source information for *Dirty Politics*.
6. DI Lynch suggests, at paragraph 60, that *Dirty Politics* is unique in its use of documents obtained by a crime. DI Lynch then concludes, at paragraph 66, that the evidence in relation to the chilling effect is invalid because it fails to take account of this distinction.



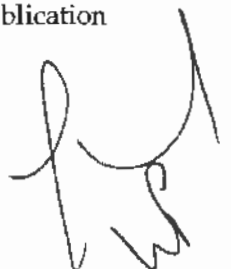
7. In my view, the distinction that DI Lynch is attempting to draw is not valid.

The nature of leaking

8. Leaking is almost always someone doing the "wrong" thing for the right reasons. Providing the information to a journalist will almost always break some rule. It may not always be a crime, but it frequently can be. The crime could be in the act of leaking, but it could also be in the act of obtaining the information.
9. Most obviously, the obtaining of a document may frequently constitute theft. On one occasion, a confidential informant of mine took all of the contents of his manager's desk and delivered them to me. In doing so he was clearly stealing things that belonged to the company (part owned by his manager) and giving it to someone who would likely hurt the manager's interests.
10. That may be an extreme example. However, anyone who gives me a paper document could well be guilty of stealing the piece of paper on which it is printed. For example, this would likely be the case if they had obtained the copy by using the office photocopier.
11. Information is ubiquitously stored on computer systems. Informants who accessed documents on computers for the purpose of providing them to a journalist will know that they lacked the authority to do so and may therefore be committing a crime. There are crimes of copying some government documents. In relation to official information, it can also be a crime to leak it.
12. This is just one of the reasons why journalists have the obligations I discussed in my previous affidavit to ensure that they are acting in the public interest. It may be obvious that the theft of a piece of paper has occurred in providing me with some information. I need to ensure that the public interest in my using the information is sufficient to justify its use in those circumstances.

A handwritten signature in black ink, appearing to be 'J. W.', located in the bottom right corner of the page.

13. In the extreme example above, the manager's desk disclosed evidence of some serious criminal offending.
14. Many famous overseas leaking cases have resulted in criminal charges, or the threat of them, again relating both to the way they were obtained and disclosed. Daniel Ellsberg, who leaked the Pentagon Papers in 1971 that revealed the US government misleading the public about the Vietnam War, was charged with theft of government property and under the Espionage Act.
15. In recent times Edward Snowden came to prominence for leaking US and British intelligence documents showing unlawful, mass surveillance activities. In another case, Chelsea Manning (formerly Bradley Manning) famously leaked classified files starting with a video of US military personnel shooting civilians in Iraq. Snowden and Manning have both been charged with obtaining documents from crime (theft of government property) and charged under the Espionage Act for publicising them. Manning was also charged under the US Computer Fraud and Abuse Act.
16. These are just illustrative well known examples. In general, DI Lynch's distinction between proper leaks and information obtained from a crime is not consistent with the history of leaking.
17. I understand the reason for the protection of journalist sources is to protect the availability of information with a high public interest that is not accessible through other means. The need for such protection is for leakers who are breaking some law or rule by leaking. If a leaker is not "doing something wrong", it is very often not a real leak but just a backdoor release of information by people in positions of authority for their own ends. The need for journalistic privilege is to protect the ongoing availability of sources in the full knowledge that leakers frequently face the possibility of criminal charges. The role of the journalist - however the information was obtained - is to ensure that the source's motives for providing the information are not suspect and that the information itself is reliable and has sufficiently high public interest to justify its publication notwithstanding its source.

A handwritten signature in black ink, appearing to be 'J. Lynch', is located in the bottom right corner of the page.

Not possible to draw a line

18. It is also not possible to draw a clear line, as DI Lynch appears to think one can, between leaks where the leaker has obtained the document lawfully and unlawfully.
19. First, in some cases, the journalist may not know whether or not a crime was committed. There is a spectrum of examples, including espionage and computer crimes, and through to possible charges of theft just because a leaker used the office photocopier. Sometimes it is not clear what the circumstances were because the journalist does not know the precise mechanism by which the information was obtained.
20. Secondly, when journalists do know whether or not a crime has been committed by their source in obtaining the information they may not set that out in their reporting. Journalists will usually say nothing about the source of their information so as to provide no information that might identify the confidential informant. The reader is therefore unable to tell if it was obtained in a way that constitutes a crime. Mr Hager's decision to comment on the source of the documents in *Dirty Politics* is an unusual exception to this rule.

Other examples involving hacks

21. However, *Dirty Politics* is not unique for being known to have been based on hacked materials. A very high profile example is the hacked material taken from Sony and released late last year. That has led to a large number of stories.
22. There are many other examples. Another high profile example involves the American politician, Hilary Clinton. She has been involved in two recent controversies. One concerned her role in relation to the attack on an American diplomatic compound in Benghazi, Libya. The other involved her use of a private email server for conducting State business. Both of these stories are said to have originating from a hack of an account belonging to her husband, former president Bill Clinton. Both stories were of enormous public interest in the United States. The revelations resulted

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in Court action and a court order for the release of tens of thousands of pages of emails, including emails related to the Benghazi attack.

23. New Zealand had its own example of this when Foreign Minister Murray McCully's personal email was hacked, revealing that he had used his private email accounts. The report on this was in early 2012 claiming the hack had occurred in 2011. In doing so, he was circumventing the Official Information Act in a similar way to Hilary Clinton. The stories which followed revealed an unlawful pattern of handling information by a government minister which he has since pledged to correct. The content of the information was also reported. TV3 broke the story. To the best of my knowledge TV3 was not contacted by authorities. The New Zealand journalism community is small and I would have expected to have heard if any such contact had occurred.
24. A common type of story based on hacking is where the fact that the hacking was possible is itself the story. A hacker tells a journalist that they are able to access information that should not be accessible. The journalist then reports on this security flaw.
25. There was a high profile New Zealand example of this kind of a story in 2012. Blogger Keith Ng broke the story that it was possible to access large amounts of highly confidential information through WINZ self-service kiosks. In order to protect his source, Mr Ng initially suggested that he had found this flaw himself, but that source was later revealed. This was a major national news story of significant public importance. It led to urgent government reviews of information security.
26. Another example of possibly hacked information used for news purposes was the access by Cameron Slater of the Labour Party website. I was the first person to report on 12 June 2011. Mr Slater made contact with me in my capacity as a journalist for the Herald on Sunday, my employer at the time. He made contact because he said he wanted wider coverage of an exploit which had seen him take personal and confidential information from the Labour Party website. Mr Slater claimed that he had found unguarded open directories. The information as he accessed it was not

possible to be viewed or used in a coherent way, so he claimed that he had rebuilt it using software tools which were available. These events are discussed in *Dirty Politics* which gives a slightly different account to the one given to me by Mr Slater at the time.

27. The action taken by Mr Slater was widely reported as a "hack". It was information the Labour Party did not want made public and it required a level of technical proficiency to acquire it. Mr Slater, in contrast, said he had simply found access to the content of computers and used available software tools to rebuild the material so it could be used. Mr Slater had professed in the story I wrote there was no illegality in the access he had to the Labour Party website. A criminal complaint was made by the Labour Party to Police but as far as I am aware the Police say that they are yet to decide whether an investigation will take place.

Police themselves prioritise receiving information over some crimes

28. It appears that DI Lynch's intention in drawing this distinction between people who obtain the information in the course of a crime and other leakers is to suggest that the public interest in protecting the former is lower. However, I note that the Police themselves sometimes prioritise the public interest in receiving information above prosecuting crimes committed in the course of obtaining that information.
29. This is seen, for instance, in cases where a burglar decides to report something they have discovered in the course of a burglary. Attached and marked as "DJF-2" is a true copy of a media report of such a case in New Zealand. In that case the burglar reported finding a dead body. Given the burglar's decision to report this information in the public interest the Police in that case decided to take no action against the burglar. I am aware of similar cases in Spain and the UK, where the burglars reported finding child pornography, and in the United States of America, where a person broke into a car and found what they thought might be a terrorist's bomb.



Mr Hager's other sources

30. Lastly, I note that by attempting to draw this distinction DI Lynch clouds over a significant issue. The Police actions in this case do not just jeopardise the confidentiality of Mr Hager's source for *Dirty Politics*. By seeking to review Mr Hager's files they threaten the confidentiality of all of his sources. Indeed, I understand it to be Mr Hager's position that that source for *Dirty Politics* is in no jeopardy.

The police approach to journalistic privilege

31. DS Simon Beal adopts the position in his evidence at paragraphs 43 and 44, that issues of journalistic privilege would only arise if Mr Hager actively claimed the privilege and then, if he did claim it, that they would be dealt with by seizing and sealing evidence and leaving it for a judge to decide the privilege issues. I understand that this position is used to justify a claim that the Police can raid a journalist without considering, in advance, whether journalistic privilege might mean they were not entitled to do the raid at all.
32. I have seen Mr Hager's response to this proposition. His personal experiences in relation to this process are reflected in my own concern. The idea that the Police can come and seize a journalist's documents in this way without any prior consideration of whether such action is justified is a frightening thought. If implemented generally it could be expected to seriously impede the ability of the media to do their work.
33. Mr Hager is no less of a journalist than I or my colleagues at the NZ Herald. I do not understand how this rationale, if correct, would not also apply to our offices. I have already given evidence in my first affidavit describing how the Police have treated the organisations I work for differently, both before and after the introduction of the Search and Surveillance Act 2012.

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34. My instinct is that the Police would have approached the NZ Herald in a completely different way, not the least because of the resources it could bring to bear to oppose such treatment. The wrongfulness of DS Beal's proposition would also be more obvious when it affects the country's leading newspaper rather than an independent journalist.

Affirmed at Auckland)
on the 18th day of June 2015)
before me)



A Solicitor of the ~~High Court~~ of New Zealand

Lorna Perkins
Deputy Registrar



The New Zealand Herald

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DJF-2

This is Exhibit DJF-2 referred to in the affidavit of David James Fisher affirmed at Auckland on 16 June 2015

before me:

The New Zealand Herald



A (Deputy) Registrar of the

DISTRICT COURT ~~High Court~~ of New Zealand



Natalie Akoorie

Natalie Akoorie is a reporter at the NZ Herald based in Hamilton.

Lorna Perkins
Deputy Registrar

No charges likely for burglar who found body

Horrified, screaming intruder phones police after coming upon hanging victim.



11:30 AM Thursday Jun 20, 2013

Inspector Greg Nicholls. Photo / Sarah Ivey

A burglar who discovered a dead body hanging in a Hamilton house is unlikely to face charges for the break-in.

The 26-year-old man made the grisly discovery early yesterday morning while attempting to burgle the vacant house in the suburb of Fairfield.

Hamilton Police city tactical coordinator Senior Sergeant Freda Grace said the burglar, who called police himself to raise the alarm, had been arrested but not charged.

Mrs Grace said the man was released after helping police with their inquiries.

The incident unfolded in the early hours of yesterday morning when the burglar stumbled across the dead body hanging in the dark. His screams alerted neighbours who also phoned police. It's understood they thought the screaming was a domestic dispute.

Mrs Grace said the victim had died hours before the burglary but if not for the break-in he may not have been found for days.

She said the death of the man, whose age is unknown, was not being treated as suspicious and had been referred to the coroner.

The burglar was known to police and Mrs Grace hoped the "weird" circumstances would alter his behaviour.

"Hopefully there will be a positive out of it and that he will decide it's not the thing to do. I would be taking that as pretty bad karma."

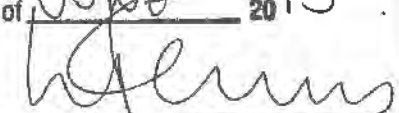
Mrs Grace said the whole situation was incredibly sad".

"It's sad for the guy who felt so bad that that's what happened to him. Really the whole set of circumstances are just horrid."

She did not know if the dead man's next of kin had been notified.

- NZ Herald

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This is the annexure marked <u>DJF-2</u>
referred to in the within affidavit of <u>DAVID JAMES FISHER</u>
sworn at Auckland this <u>18th</u>
day of <u>JUNE</u> 20 <u>15</u>

Deputy Registrar, District Court, Auckland



Lorna Perkins
Deputy Registrar