THE HIGH COURT OF NEW ZEALAND **CIV 2014-485-11344**

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***

Written submissions for the applicant

Dated: 1 July 2015 (updated references)

Next event: 10 am on 13 July 2015 for hearing before Clifford J

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May it please the Court:

I. INTRODUCTORY SECTION

Introduction

1.1. New Zealand's preeminent investigative journalist, Nicky Hager, was given emails taken from the computer of an attack blogger, Cameron Slater. The emails disclosed the immoral (and arguably criminal) acts of Mr Slater, public relations agents, and members of the governing National Party. Mr Hager wrote a book about them.

1.2. The Police then conducted an unprecedented search of Mr Hager's home. They gave no consideration to whether Mr Hager's rights, and those of his many confidential informants, meant the search should not have been made; they say that they did not have to. Nor did they have any regard for the requirements the Court of Appeal laid down in *TVNZ v Attorney-General*.[1] They seized Mr Hager's computers and many of his documents.

1.3. This search has grave implications for democracy in New Zealand. It damages the public's ability to receive vital information, through journalists, from people who are prepared to take great personal risks to expose wrongdoing and abuses of power. Once the Police arrived at his home and the story got in the news, much of the damage was done. The best hope to reduce this damage is an equally high profile decision that says that this raid on a journalist was wrong.

Summary of submissions

1.4. This is an application for judicial review and a claim for compensation for breaches of the New Zealand Bill of Rights Act 1990 (the "**Bill of Rights**"). By agreement, issues of quantum have been deferred. The purposes of these submissions are to show that the respondents acted unlawfully in:

[1] [1995] 2 NZLR 641 (**Applicant's bundle of authorities ("**ABoA**") at Volume 1, Tab 1 ("**1/1**").**

1.4.1. deciding to seek a warrant,

1.4.2. conducting warrantless searches of his private information,

1.4.3. applying for a warrant,

1.4.4. issuing a warrant,

1.4.5. executing that warrant, and

1.4.6. retaining his seized property.

These unlawful acts include breaches of the applicant's rights under the Bill of Rights.

1.5. The need for journalists to protect the identity of their confidential informants has been recognised by New Zealand statute and common law. It has been recognised by every comparable jurisdiction internationally. The source protection privilege has been seen as a vital component of the right of free expression, protected in New Zealand under s 14 of the Bill of Rights. It is not absolute, but can only be interfered with when it is necessary for an overriding public interest.

1.6. The object of the search in this case was to discover the identity of a confidential informant of Mr Hager's. In order to attempt to find the identity of that informant, the Police intended conducting a general search of all of Mr Hager's documents (physical and digital), inevitably violating the privilege attaching not only to the informant they were looking for but to many of Mr Hager's other confidential informants.

1.7. Mr Hager had not committed any offence. The Police say they were treating him as a witness. The nature of the search was such that it was inevitably going to cause a significant disruption to Mr Hager's work.

1.8. In every phase, the respondents had obligations to respect Mr Hager's rights under ss 14 and 21 of the Bill of Rights. This included, but was not limited to, considering s 68 of the Evidence Act 2006 and complying with the common law including *TVNZ v Attorney-General*. While the Police

recognised that s 68 was an issue, they decided that these issues did not have to be dealt with until after the search had been executed. They do not appear to have taken any account of *TVNZ v Attorney-General* at any stage.

1.9. Had the respondents properly considered Mr Hager's interests, and those of his informants and the public at large, they would not have conducted the search. Mr Hager's case is a canonical example of one where the privilege applies. The interests at stake in permitting Mr Hager to protect the identity of his confidential informant are high. The fact that the search would violate the privilege of other confidential informants makes these interests even higher. So too did the inevitable harm that the search would do to interests of Mr Hager and the public. The countervailing interest, while not insignificant, did not come close to overriding the public's interests in maintaining the privilege.

1.10. The Police breached the law in several respects when applying for the warrant:

1.10.1. the fact of the privilege was of central importance to whether or not the warrant should have been granted, yet the Police failed to bring it to the attention of the Judge;

1.10.2. the Police also failed to be candid with the Judge about the details of the investigations that had taken place so far, the fact that those investigations had been fruitless for reasons that meant that the search was also likely to be fruitless, and that they still had many alternative avenues of investigation open to them, some of which they were midway through pursuing;

1.10.3. the Police lacked reasonable grounds to believe that relevant evidence would be found at Mr Hager's property - they knew that the confidential informant had been taking steps to prevent leaving any forensic trace of his identity and the search was based on no more than the tenuous hope that he might not have been as careful in his dealings with Mr Hager;

1.10.4. the warrant that was sought was overly broad and essentially permitted the Police to seize and search through all of Mr Hager's correspondence; and

1.10.5. the warrant sought the right to search unspecified email accounts and cloud storage facilities in breach of s 103 of the Search and Surveillance Act 2012 (the "**SSA**").

1.11. The errors of law described above meant that the issuing of the warrant was also unlawful.

1.12. In executing the warrant the Police compounded their previous errors by:

1.12.1. commencing the search without giving the applicant a chance to claim privilege in violation of s 145(2) of the SSA; and

1.12.2. breaching their undertakings to Mr Hager, violating their own policies, and acting in bad faith, by breaching the applicant's claims of privilege over several documents.

1.13. Before applying for a warrant, the Police sought, and obtained, Mr Hager's private information from third parties without obtaining a production order. In doing so they made unsupported allegations of fraud against Mr Hager and asserted exceptions to the Privacy Act 1993 that did not apply.

II. FACTS

Background

The applicant

2.1. The applicant, Nicky Hager, is an investigative journalist.[2] In a 25-year career, he has published six acclaimed books and numerous articles exposing material of vital public interest.[3] His journalism concerns issues of state surveillance, security, defence and foreign policy, executive and Police misconduct, the ethics of the media and public relations industry, and the workings of democracy.[4]

2.2. Mr Hager has a reputation as a "fine journalist" and "someone who is a master of developing and protecting sources".[5] His reputation is international.[6] Pulitzer-Prize winning investigative journalist Seymour Hersh praises Mr Hager's "brand of fearless reporting" as "essential to democracy".[7]

2.3. In the course of his work, Mr Hager receives information from a large number of confidential informants.[8] The information is provided on the basis that he promises to keep their identities confidential, and on the understanding that he is going to use the information for the purpose of publishing news stories.[9] This facilitates the publication of important matters of public interest in Mr Hager's books and articles.[10]

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[2] Amended Statement of Claim ("**ASoC**") and Amended Statement of Defence ("**ASoD**") at 1; the affidavit of Nicolas Alfred Hager affirmed 2 April 2015 ("**Hager**") at 2 (**Key Evidence Bundle ("**KEB**") Volume 1, Tab 1, Page 2 ("**1/1/2**")**; affidavit of David James Fisher affirmed 27 March 2015 ("**Fisher**") at 79 (**KEB 1/3/78**).
[3] Hager at 2-53 (**KEB 1/1/2-14**).
[4] Ibid.
[5] Fisher at 79 (**KEB 1/3/78**).
[6] The affidavit of Bryce David Edwards affirmed on 31 March 2015 ("**Edwards**") at 68 (**KEB 1/2/60**).
[7] The affidavit of Seymour Myron Hersh affirmed on 26 March 2015 ("**Hersh**") at 40 (**KEB 1/4/89**).
[8] Hager at 4-53 (**KEB 1/1/2-14**).
[9] Hager at 12, 17, 20, 28, 37-38, and 53 (**KEB 1/1/4, 5, 6, 8, 10, and 14**).
[10] Hager at 4-53 (**KEB 1/1/2-14**).

2.4. Mr Hager takes careful steps to protect the identities of his confidential informants, and is regarded as an expert in this field.[11] Although there has frequently been intense speculation about who his confidential informants are, and some concerted hunts to find them, none has ever been revealed.[12]

2.5. Mr Hager is in the process of producing future works based on information provided by further confidential informants.[13]

Dirty Politics

2.6. Mr Hager's latest book, *Dirty Politics*, *How attack politics is poisoning New Zealand's political environment*, was published in August 2014.[14] The book is based on a raft of emails and other materials relating to Cameron Slater that were leaked to Mr Hager.[15] Mr Slater operates a blog called "Whale Oil Beef Hooked" that contains news and commentary on politics from a right-wing perspective.[16] It is frequently vitriolic.[17] Mr Hager had been doing related research for some time prior to being provided with these emails.[18]

2.7. *Dirty Politics* reveals that Mr Slater had been coordinating political attacks with senior members of the National Party, including people working in the Prime Minister's office.[19] It shows how they worked together to infiltrate the Labour Party's computer system without authority,[20] and make Official Information Act requests to embarrass opponents.[21] There were stories of abuse of government power, including misuse of the Official Information Act, and evidence of unethical behaviour by ministers of the

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[11] Hager at 93-96 (**KEB 1/1/24-25**).
[12] Hager at 88 (**KEB 1/1/23**).
[13] Hager at 54 (**KEB 1/1/15**).
[14] Hager at 55 (**KEB 1/1/15**); a copy of the book is at Exhibit **NAH-2** ("***Dirty Politics***").
[15] Hager at 58 (**KEB 1/1/16**); the affidavit of Simon Andrew Beal sworn 4 May 2015 ("**Beal**") at 2 (**KEB 2/11/192**); the affidavit of David Christopher Lynch sworn on 1 May 2015 ("**Lynch**") at 2 (**KEB 2/12/207**); and *Dirty Politics* at pp 10-15.
[16] Edwards 10-11 (**KEB 1/2/46**).
[17] Edwards at 11 (**KEB 1/2/46**).
[18] Hager at 56-57 (**KEB 1/1/15-16**).
[19] Edwards at 12.1 (**KEB 1/2/46-47**); and *Dirty Politics* at pp 28-43.
[20] Edwards at 12.2 (**KEB 1/2/47**); Hager at 67 (**KEB 1/1/17-18**); and *Dirty Politics* at pp 28-36.
[21] Edwards at 12.1.3 (**KEB 1/2/47**); Hager at 68 (**KEB 1/1/18**); and *Dirty Politics* at pp 37-43 and 128-130.

Crown and by a senior member of the Police.[22] It also revealed that public relations agents, political consultants, and business people paid Mr Slater to publish attacks on lobbyists, rivals, and laws they disliked.[23] It showed Mr Slater collecting private information about politicians' sex lives to use to smear and pressure them.[24] It arguably exposed criminal acts, it certainly exposed hypocrisy and untruthfulness by senior public figures including the Prime Minister.[25]

2.8. Political scientist Dr Bryce Edwards says "the revelations in the book go to the heart of how politics works in New Zealand. They show how politicians attempt to influence public opinion and debate, and how this has occurred in a surreptitious way that seeks to mislead the recipients as to the source of the opinions".[26] Dr Edwards says *Dirty Politics* "helps us understand how political tactics are used, and the relationship between media, politicians, and bloggers".[27] It casts doubt on whether senior politicians are keeping to the highest ethical standards required by the Cabinet Manual.[28] Dr Edwards finds that, "[i]n short, my view is that *Dirty Politics* is a work of significant public interest",[29] and he concludes "not just a work of public interest, it is a work of significant public importance".[30]

2.9. Dr Edwards' evidence is that "very little has been disproved in the book", despite "significant scrutiny since publication".[31]

2.10. *Dirty Politics* triggered unprecedented media coverage,[32] intense public concern and debate,[33] soul-searching by journalists,[34] calls for a royal

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[22] Hager at 68 (**KEB 1/1/18**); and *Dirty Politics* at pp 37-43, 46, and 49-54.
[23] Edwards at 12.2 (**KEB 1/2/47**); and *Dirty Politics* at pp 89-97.
[24] *Dirty Politics* at pp 19, 68-70, and 107-117.
[25] Edwards at 13 (**KEB 1/2/48**).
[26] Edwards at 14 (**KEB 1/2/48**).
[27] Edwards at 16 (**KEB 1/2/48**).
[28] Edwards at 15 (**KEB 1/2/48**).
[29] Edwards at 17 (**KEB 1/2/48**).
[30] Edwards at 69-72 (**KEB 1/2/60-61**).
[31] Edwards at 20-25, 53, and 57 (**KEB 1/2/49-50, 56, and 57**).
[32] Edwards at 38-39 (**KEB 1/2/52**).
[33] Edwards at 40-47 (**KEB 1/2/53-54**); Exhibit BDE-1 at 190-217; and Exhibit BDE-2 at 218-286.
[34] Edwards at 35-37 (**KEB 1/2/52**); and Exhibit BDE-1 at 185-189.

commission,[35] a university symposium,[36] and a series of complaints and inquiries,[37] including an inquiry by the Office of the Inspector-General of Intelligence and Security, who was highly critical of the releases of SIS information described in the book.[38] Leading political figures remarked on the importance of the book,[39] including journalist John Armstrong who described *Dirty Politics* as "the closest we've had to a New Zealand Watergate".[40] It is changing the way that New Zealand media operates.[41]

The writing of Dirty Politics

2.11. In the preface to *Dirty Politics*, Mr Hager explained his source material was provided in the form of a USB digital storage device and that it appeared to have originated from an attack on Mr Slater's website in February 2014. Mr Hager said that he had no part in obtaining the material.[42]

2.12. In or about March 2014, Mr Hager met with the Source.[43] He promised to keep the Source's identity secret.[44] The Source provided the materials on the understanding that they would be used to write a work intended to disseminate news and observations on the news to the public.[45] He took great care to preserve that confidentiality.[46] For instance, he never phoned or emailed the Source or wrote down the Source's name.[47]

2.13. Mr Hager satisfied himself that the Source was motivated by concern about Mr Slater's unethical activities, and not by money or partisan political

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[35] Edwards at 34 and 50 (**KEB 1/2/51-52, and 55**); and Exhibit BDE-2 at 287-288.
[36] Edwards at 49 (**KEB 1/2/55**).
[37] Edwards at 27-33 (**KEB 1/2/50-51**); and Exhibit BDE-1 at 1-184.
[38] Edwards at 27-28 (**KEB 1/2/50**); and Exhibit BDE-1 at 1-80.
[39] Edwards at 5-58 (**KEB 1/2/44-58**); and Exhibit BDE-2 at 289-295.
[40] Edwards at 52 (**KEB 1/2/55**); and Exhibit BDE-2 at 289-310.
[41] Edwards at 59-65 (**KEB 1/2/58-50**).
[42] *Dirty Politics* at p 12.
[43] Hager at 58 (**KEB 1/1/16**).
[44] Hager at 62 (**KEB 1/1/17**).
[45] Hager at 60-62 and 65 (**KEB 1/1/16-17**).
[46] Hager at 64 and 77-85 (**KEB 1/1/17, and 20-22**).
[47] Hager at 64 (**KEB 1/1/17**).

advantage.[48] The Source did not seek payment and Mr Hager did not provide any.[49]

2.14. Mr Hager read the material and concluded that some of it should be published in the public interest.[50] He persuaded the Source to allow him to write a book based on it.[51] Before that, the Source had planned to release the materials in largely unsorted, bulk form, using Twitter.[52]

2.15. Mr Hager spent the next months researching the book further: [53]

2.15.1. conducting interviews with other confidential sources,

2.15.2. making his own Official Information Act requests,

2.15.3. checking that the material was authentic,

2.15.4. cross-checking facts,

2.15.5. separating the material that was in the public interest from the parts that were private or unimportant,

2.15.6. anonymising the identities of many of the subjects, and

2.15.7. providing context to the material.

2.16. In media interviews after the publication of *Dirty Politics*, Mr Hager stated that he had promised to keep the Source's identity a secret,[54] and had returned the leaked materials to his source.[55] The Police were aware of both these things.[56]

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[48] Hager at 90-91 (**KEB 1/1/23**); the second affidavit of Nicolas Alfred Hager affirmed on 16 June 2015 ("**Hager2**") at 22-23 (**KEB 1/7/141-142**).
[49] Hager2 at 19-23 (**KEB 1/7/141-142**); and Hager 160 (**KEB 1/1/39-40**).
[50] Hager at 59, and 100 (**KEB 1/1/16, and 26**).
[51] Hager at 60 (**KEB 1/1/16**).
[52] Hager at 60 (**KEB 1/1/16**).
[53] Hager at 70-73 and 99-102 (**KEB 1/1/18-19 and 25-26**).
[54] Radio Live, 14 August 2014 in the Police Disclosure bundles exhibited by Linda Marie Cheesman at Volume 1, Page 73 ("**PD 1/73**") (**KEB 4/29/73**).
[55] Q And A, TVNZ, 17 August 2014, PD 1/67-69 (**KEB 4/29/67-69**); and Radio NZ, 17 August 2014, PD 4/608 (**KEB 4/29/608**).
[56] PD 8/1464 and 1466 (**KEB 4/29/1464 and 1466**).

Mr Slater improves his security

2.17. Mr Slater took steps to improve the security of his digital materials when he discovered the attack in February 2014.[57]

Whaledump/ Rawshark

2.18. After *Dirty Politics* was published, someone calling himself "Rawshark" set up a twitter account called "Whaledump".[58] Rawshark began to release the same documents as had been used as source materials for *Dirty Politics*.[59] Mr Hager says that this was his source.[60] The release was in response to a challenge by the Prime Minister.[61] Later, after Whaledump was suspended, Rawshark set up a second twitter account called "Whaledump2" and continued releasing materials.[62]

2.19. At around this time, Mr Hager's source made contact with other journalists, using software called "Tails" to hide his identity.[63] He provided them with some of the same material he had provided to Mr Hager.[64]

2.20. The Source demonstrated that he was competent in techniques to hide his identity.[65] Mr Slater said that an attempt to gain access to one of his accounts was made through TOR – The Onion Router – a system for obscuring the source of the communication.[66] In addition, the Source used the Tails software to defeat forensic analysis.[67] He was conversant with the

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[57] PD 12/2159. He had also changed the hosting service for www.whaleoil.co.nz since the attack, see the affidavit of Adam Julien Boileau affirmed on 2 April 2015 ("**Boileau**") at 94 (**KEB 1/6/21-22**).
[58] Lynch at 18 (**KEB 2/12/209**); the affidavit of Rex Arthur Cottingham sworn on 5 May 2015 ("**Cottingham**") at 11.4 (**KEB 2/14/235**); PD 8/1501 (**KEB 4/29/1501**).
[59] Hager at 78 (**KEB 1/1/20**); the second affidavit of Adam Julien Boileau affirmed on 16 June 2015 ("**Boileau2**") at 56 (**KEB 1/10/177**).
[60] Hager at 78 (**KEB 1/1/20**).
[61] Hager at 79 (**KEB 1/1/21**); and Boileau2 at 56 (**KEB 1/10/177**).
[62] Cottingham at 11.4 (**KEB 2/14/235**).
[63] Boileau at 109 (**KEB 1/6/131**); PD 5/872 (**KEB 4/29/872**); Beal at 41 (**KEB 2/11/200**).
[64] See, for example, PD 5/872 (**KEB 4/29/872**).
[65] Boileau at 103-117 (**KEB 1/6/130-133**).
[66] Boileau at 104-108 (**KEB 1/6/130-131**); and PD 8/1492 (**KEB 4/29/1492**).
[67] Boileau at 109-110 (**KEB 1/6/131**).

use of cryptography.[68] He pre-scheduled tweets to make identification more difficult.[69]

2.21. Before the search of Mr Hager's house, the Police were aware that the Source had demonstrated technical ability and had used TOR and other methods to cloak his activity.[70]

Injunction against Rawshark and Whaledump's exit

2.22. On 5 September 2014, the High Court granted Mr Slater's application for an interim injunction against the further publication of material by Rawshark.

2.23. The Court's order applied to "those persons who gained unauthorised access to the plaintiff's email or Facebook accounts and who took copies of any emails or messages" and restrained the copying, publishing, adapting, or broadcasting of that material.[71]

2.24. Also on 5 September 2014, the Whaledump2 Twitter account issued the following messages: "By the time you read this, every device used in this operation will have been destroyed and disposed of along with all the decryption keys" and "[BURN PROTOCOL ACTIVATED.] So long, Aotearoa!"[72]

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[68] Boileau at 111-112 (**KEB 1/6/130-131**).
[69] Boileau at 113 (**KEB 1/6/132**).
[70] Beal at 36 and 41 (**KEB 2/11/199-200**).
[71] *Slater v APN New Zealand Ltd* [2014] NZHC 2152, 5 September 2014, HC Auckland, Fogarty J, paras 2-3; *Slater v APN New Zealand Ltd No 2* [2014] NZHC 2157, 8 September 2014, HC Auckland, Fogarty J. The substantive application was discontinued by Mr Slater on 29 September 2014.
[72] PD 6/964-965 (**KEB 4/29/964-965**); and PD 4/520 (**KEB 4/29/520**).

The Police investigation

Mr Slater's complaint

2.25. On 19 August 2014 Mr Slater contacted the Police to make a criminal complaint about the hacking of his computer.[73] He completed a formal statement of complaint on 29 August 2014.[74]

2.26. Police commenced an investigation into a possible offence against s 249 of the Crimes Act: accessing a computer system for dishonest purpose.[75]

2.27. Assistant Commissioner Malcolm Burgess set the investigation in motion and it was assigned to the Counties-Manukau branch.[76] Detective Sergeant Beal was assigned as officer in charge of the investigation.[77] Detective Inspector David Lynch oversaw the investigation.[78] DI Lynch kept Assistant Commissioner Malcolm Burgess informed of developments.[79]

2.28. Over the following month, Police took a range of steps in relation to the investigation.[80] Police say 23 officers or Police staff have been involved in the investigation in some capacity.[81] From the discovery documents, the applicant has identified a list of 35 named people involved in the investigation.[82] These included staff from the Organised Financial Crime Agency of New Zealand, the National Computer Crime Centre, the Electronic Crime Laboratory, Police Intelligence, Police National Headquarters, and public affairs staff. Retired police detective Wayne

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[73] Beal at 2 (**KEB 2/11/192**); and PD 12/2146 (**KEB 4/29/2146**).
[74] Lynch at 4 (**KEB 2/12/207**); and PD 8/1441 (**KEB 4/29/1441**).
[75] Beal at 4 (**KEB 2/11/192**); and Lynch at 15 (**KEB 2/12/208**).
[76] Lynch at 8 (**KEB 2/12/207**).
[77] Lynch at 9 (**KEB 2/12/208**); and Beal at 4 (**KEB 2/11/192**).
[78] Ibid.
[79] Lynch at 64 (**KEB 2/12/216**).
[80] Lynch at 6-31; Beal at 2-20 (**KEB 2/12/207-211**); the affidavit of Brent Peter Whale sworn on 1 May 2015 ("**Whale**") at 15-26 (**KEB 2/16/252-254**); Cottingham at 8-13 (**KEB 2/14/233-237**); and the affidavit of Joseph Eng-Hoe Teo sworn on 1 May 2015 ("**Teo**") at 3-32 (**KEB 2/15/240-247**).
[81] The affidavit of documents of Joseph Eng-Hoe Teo sworn on 17 June 2015 ("**Teo3**") at 7.
[82] As listed in the applicant's application for further discovery of 18 June 2015.

Stringer said he was "very surprised to see how much effort and Police resource has been devoted to this case".[83]

Police are alert to media interest

2.29. Throughout the investigation, Police media personnel were kept informed and provided advice.[84] Police expected a high degree of interest from the public and the media in the investigation.[85]

Information requests

2.30. In September and October 2014, the Police sent an information request to 16 bank contacts,[86] and to Trade Me Limited,[87] Spark New Zealand Trading Limited,[88] Vodafone New Zealand Limited,[89] Air New Zealand Limited,[90] and Jetstar,[91] seeking personal information about Mr Hager.

2.31. Police received a range of responses to these request.[92] On 25 September 2014, Police received detailed information about Mr Hager's bank account from Westpac Bank including some of Mr Hager's bank statements.[93] On 30 September 2014, the Police received further detailed information from Westpac about Mr Hager's bank account in response to a follow-up requested.[94]

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[83] The affidavit of Wayne Leslie Stringer sworn on 22 June 2015 ("**Stringer**") at 7 (**KEB 1/9/159**).
[84] For example, PD 3/445-451 (**KEB 4/29/445-451**).
[85] For example, PD 8/1503, 1516 (**KEB 4/29/1503, 1516**); PD 8/1522 (**KEB 4/29/1522**); PD 12/2143 (**KEB 4/29/2143**); and PD 12/2176 (**KEB 4/29/2176**).
[86] See, for example, PD 14/2356 (**KEB 4/29/2356**), PD 15/2451; PD 14/2343-2344; PD 14/3117; and PD 4/562-563.
[87] PD 4/565 (**KEB 4/29/565**) (12 September 2014); and PD 4/564 (**KEB 4/29/564**) (26 September 2014).
[88] PD 4/558 (**KEB 4/29/558**).
[89] PD 4/561 (**KEB 4/29/561**).
[90] PD 7/1385 (**KEB 4/29/1385**).
[91] Ibid.
[92] PD 14/2337-2338, 2341-2342, 2345-2346, 2350, and 2353-2359 (**KEB 4/29/2355-2357**); PD 15/2446-2456, and 2459 (**KEB 4/29/2445**); PD 4/578 (**KEB 4/29/578**); and PD 7/1385-1386 (**KEB 4/29/1385-1386**).
[93] PD 5/712-719 (**KEB 4/29/713, 717, 719**) and 732-746 (**KEB 4/29/712A-712C**); PD 14/2355 (**KEB 4/29/2355**); and PD 8/1468-1469 (**KEB 4/29/1468-1469**).
[94] PD 14/2314-2317 (**KEB 4/29/2314 and 2317**); and PD 5/720-731 and 747-773 (**KEB 4/29/721, 723, 725, 729, 731, and 712D-712J**).

2.32. Police did not seek Production orders for any of this information.[95]

The process leading up to the warrant application

2.33. From an early stage in the investigation, Police regarded Mr Hager as a suspect. For example, one of the purposes recorded on the front of the Investigation Plan is "to assess the criminal liability of Mr Hager for his receiving of and use of the illegally obtained digital material from the complaints [sic] computer".[96]

2.34. On 1 September 2014, Police recorded on their Investigation Plan their thinking in relation to a search at Mr Hager's house:[97]

> Should there be no result from NC3/ECL examination of the Whaledump tweets or Slater's computer, a warrant at Hager's address is the next logical step in the investigation.

2.35. Police believed it was inevitable that Mr Hager's house would have to be searched at some stage in the investigation unless Rawshark was apprehended and a link was then established back to Mr Hager, or he pleaded guilty.[98]

2.36. The Police investigation plan lists "Nicky Hager phase" immediately after the phase dealing with attempts to trace the hacker through Facebook, Yahoo, Trade Me, and Whaledump data releases.[99]

2.37. On 20 September 2014 the New Zealand general election was held.

2.38. On 22 September 2014, in a directive headed "Suspect Enquiry" relating to Mr Hager, DS Beal ordered Det Teo to prepare a production order for his

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[95] ASoC/ASoD at 35P; Lynch at 30 (**KEB 2/12/211**); and the second affidavit of David Christopher Lynch sworn on 25 June 2015 ("**Lynch2**") at 18 (**KEB 2/19/263**).
[96] PD 8/1501 (**KEB 4/29/1501**); see PD 7/1382 (**KEB 4/29/1382**); letters to bank accusing Mr Hager of fraud above; see also Det Rachelle Smith who contacted Immigration on 18 September 2014 describing the case as a "high profile fraud case" PD 4/570 (**KEB 4/29/570**).
[97] PD 8/1515 (**KEB 4/29/1515**).
[98] PD 14/2224 (**KEB 4/29/2224**).
[99] PD 8/1505 (**KEB 4/29/1505**).

telephone and online data, and prepare a search warrant for his electronic devices at "any appropriate location".[100]

2.39. On Monday 29 September 2014 at noon, the Investigation Plan records: "Investigation must now proceed into the next phase which will include approaches to Hagar [sic] including consideration of search warrant/POs" [Production Orders].[101]

2.40. On 29 September 2014, DS Beal's first entry in his notebook is, at 7 am, "review search warrant/production order for 73 Grafton Road Roseneath".[102]

2.41. DS Beal's evidence is that he was told by DI Lynch to apply for a warrant was on 29 September 2014.[103]

2.42. At 9 am on Tuesday 30 September 2014, Police received legal advice that Mr Hager was not criminally liable and Police decided to treat him as an "uncooperative witness in possession of evidential material".[104]

2.43. According to the Criminal Investigation Database, on or after 30 September 2014, DS Beal was assigned to prepare the search warrant. This directive includes the instruction "Journalistic Privilege to be considered", and requires "Legal Section review the warrant prior to swearing out". [105]

2.44. At 12:56 pm on 30 September 2014, the Investigation Plan records that Police Legal Section "have reviewed warrant application and are happy with content. PLS express view which is already accepted that if Hager claims privilege we will have to respect and have claim determined by HC judge."[106]

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[100] PD 7/1382 (**KEB 4/29/1382**).
[101] PD 8/1516 (**KEB 4/29/1516**).
[102] PD 11/2108 (**KEB 4/29/2108**).
[103] PD 14/2225 (**KEB 4/29/2225**); and Beal at 21 (**KEB 2/11/196**).
[104] PD 8/1516 (**KEB 4/29/1516**).
[105] See PD 7/1389 (**KEB 4/29/1389**), directive number 27 to prepare warrant, dated (presumably wrongly) 15 October 2014, but coming after directive numbers 25 and 26 which are dated 30 September 2014: PD 7/1387 and 1388 (**KEB 4/29/1387 and 1388**).
[106] PD 8/1516 (**KEB 4/29/1516**).

2.45. At 1 pm on 30 September 2014, the Investigation Plan records that Superintendent Peoples was consulted about the issue of Mr Hager claiming privilege "and what court it would be appropriate to hear any application".[107]

2.46. At 1:16 pm on 30 September 2014, DS Beal emailed Clifford Clark at the National Crime Computer Centre, seeking advice on a further item he had added to the warrant seeking permission to access internet or other web-based storage systems.[108]

2.47. At 4 pm on 30 September 2014, the search warrant application was sent to the Manukau District Court.[109]

Who made the decision?

2.48. On 28 November 2014, DI Lynch stated in an affidavit that "a decision was made to apply for a warrant" and "[a]n application accordingly was drafted".[110]

2.49. On 19 December 2014, DI Lynch stated in an formal OIA response letter that:[111]

> The decision to apply for the search warrant to search Mr Hager's residence was made by myself in consultation with Assistant Commissioner Malcolm Burgess. This was a verbal process and no documents exist in relation to it. The exact date is not recorded but is recollected to be in late September 2014.

2.50. DI Lynch's 1 May 2015 affidavit states that he "considered therefore a search warrant should be executed",[112] that he "tasked [DS] Beal with completing a search warrant application",[113] and that he "obtained the approval of Assistant Commissioner Burgess prior to executing the

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[107] Ibid.
[108] PD 12/2174 (**KEB 4/29/2174**).
[109] PD 11/2109 (**KEB 4/29/2109**).
[110] PD 2/321.
[111] PD 2/329 (**KEB 4/29/329**).
[112] Lynch at 42 (**KEB 2/12/213**).
[113] Lynch at 43 (**KEB 2/12/213**).

warrant".[114] DI Lynch does not say that DS Beal was involved in the decision to obtain a warrant.

2.51. In his 4 May 2015 affidavit, DS Beal says that "on 29th September 2014, Detective Inspector Lynch reviewed the case and approved that I apply for a search warrant".[115] DS Beal makes no reference to the involvement of Assistant Commissioner Burgess.

2.52. In a revised formal OIA response on 2 June 2015, Carolyn Richardson, a solicitor for the Police, says that the decision to seek a warrant was made by "Detective Inspector Lynch on or about 29 September 2014", "DI Lynch consulted with Assistant Commissioner Burgess", and that "Assistant Commissioner Burgess endorsed DI Lynch's decision".[116]

Lines of inquiry not followed up before 30 September 2015

Mr Hager's travel

2.53. Mr Hager's bank records showed payments to Air New Zealand and Jetstar.[117] On 29 September 2014, Police contacted the Air New Zealand fraud department by telephone, seeking information about Mr Hager's travel dates and destinations and who he may have been travelling with. Air New Zealand indicated a willingness to respond to a written information request.[118] No written information request was sent to Air New Zealand until 10 October 2014, more than a week after the search of Mr Hager's house.[119]

2.54. Air New Zealand then said that, for some of the requested information, a production order would be required.[120] No such production order has been discovered.

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[114] Lynch at 53 (**KEB 2/12/215**).
[115] Beal at 21 (**KEB 2/11/196**).
[116] PD 14/2225 (**KEB 4/29/2225**).
[117] PD 7/1385-1386 (**KEB 4/29/1385-1386**).
[118] Ibid.
[119] Ibid.
[120] Ibid.

2.55. No attempt was made to contact Jetstar at all until 13 October 2014.[121]

Forensic analysis of Mr Slater's computer

2.56. On 15 September 2015, Mr Slater provided his computer to Police for forensic analysis.[122] The final results of that forensic analysis had not been obtained by the date of the search.[123]

Trade Me inquiry

2.57. On 12 and 26 September 2014, Police made information requests to Trade Me for information about Mr Hager, his contact details, links to other members and details of auctions dating back to 2010.[124] On 26 September 2014, in relation to the second request, Trade Me responded by asking the Police to obtain a production order.[125]

2.58. On the same day, DS Beal emailed the contact at Trade Me referencing a conversation and saying "we are probably not going to organise a production order for those two requests for a week or so".[126] It is not clear if this referred to this request. However, no such production order has been discovered.

Identifying capable suspects

2.59. On 5 September 2014, DS Beal asked Rex Cottingham of the National Computer Crime Lab to provide analysis or review of "any persons in New Zealand that have the capability to perpetrate this offending (People with the appropriate skill set and technology) if we can narrow the field down".[127]

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[121] Ibid.
[122] Beal at 12 (**KEB 2/11/194**).
[123] The second affidavit of Simon Andrew Beal sworn on 22 May 2015 ("**Beal2**") at 1 (**KEB 2/17/257**); Boileau2 at 14-30 (**KEB 1/10/169-172**). DS Beal says he was told informally before the search that it was "highly unlikely that anything of value to the investigation would be found". However, the validity of that statement is challenged by Mr Boileau.
[124] PD 4/564-6 and 578 (**KEB 4/29/564-565 and 578**).
[125] PD 4/578 (**KEB 4/29/578**).
[126] PD 15/2457.
[127] PD 8/1491 (**KEB 4/29/1491**).

2.60. On 17 September 2014, Mr Cottingham responded: "Generating a list of persons just within NZ who have the capability to perpetrate this offending would be impossible to quantify. However, perhaps applying those who are technically capable to a list of people who are close friends and associates of the victim may narrow the field down of potential suspects."[128]

2.61. No evidence has been disclosed suggesting that this exercise was conducted.

Twitter response

2.62. On 10 September 2014, Police sent a production order to Twitter seeking information regarding the accounts @whaledump and @whaledump2.[129] On 17 September 2014, Twitter responded saying Police would need to apply via a mutual legal assistance treaty or letter rogatory enforced by a US court.[130] No such steps have been discovered by Police.[131]

Google response

2.63. On 10 September 2014, Police sent a production order to Google NZ and Google Inc seeking information about Mr Slater's email account to help ascertain how it was accessed by the hacker, and a follow up email was sent on 16 September 2014.[132]

2.64. On 18 September 2014, Google Inc responded with some information, including relevant internet service providers and identifying, but refusing to supply details of, activities in other jurisdictions: South Korea, Israel, Fiji and the UK.[133] In that email, Google Inc suggested that the New Zealand

[128] PD 11/2121 (**KEB 4/29/2121**); and Cottingham at 12 (**KEB 2/14/236**).
[129] PD 4/638-649.
[130] PD 12/2138 (**KEB 4/29/2138**).
[131] Boileau2 at 99 (**KEB 1/10/187**).
[132] PD 14/2290-2301.
[133] PD 11/2124 (**KEB 4/29/2124**); and PD 4/693-702.

Police contact the FBI "to determine if there is a means to gain cooperation with the US government".

2.65. Police concluded on 18 September 2014 that production orders could be considered to trace the identified connections, since there was a possibility that one may reveal a login by someone other than Mr Slater.[134] No such production order has been discovered.

2.66. Police also concluded on 18 September 2014 that the connections from the foreign jurisdictions identified by Google were "potentially a mix of the victim and the offender" and said a Mutual Legal Assistance request would be needed for Google Inc to disclose connections relating to foreign jurisdictions.[135] No such request has been discovered.[136]

Contacting ISPs

2.67. On 30 September 2014, Police decided to contact New Zealand ISPs to follow up on Mr Slater's suggestion in his 29 August statement that his emails and Facebook account were compromised in an hour-and-a-half period on 2 March 2014. Police decided to find out whether there are IP addresses with a specific peak in email type data at that time which was via the TOR network.[137] Police have discovered no material that shows that this was done.

Wikisend response

2.68. On 10, 23, and 29 September 2014, Police emailed Webzilla, the host of Wikisend, seeking details of registration, dates, and times of uploading, etc, regarding three files publicly released by Whaledump.[138] On 1 October

[134] PD 11/2035 and 2122 (**KEB 4/29/2035 and 2122**).
[135] PD 11/2035 (**KEB 4/29/2035**).
[136] Boileau2 at 99 (**KEB 1/10/187**).
[137] PD 7/1388.
[138] PD 11/2328-2331 (**KEB 4/29/2328-2331**).

2014, Webzilla responded, noting that it was merely the host of the content, and offering to forward the request to its customer, Wikisend.[139]

2.69. On 1 October 2014, Police replied to Webzilla, asking it to forward the request to Wikisend.[140] Webzilla responded on the same date saying it had now done so.[141] At 3:04 am on 2 October 2014, Webzilla wrote again, forwarding Wikisend's response. Wikisend said all the information had been deleted or rewritten. However, it offered to provide the server access log.[142]

2.70. At 7:41 am on 2 October 2014, Police responded, asking for the access log "as this will provide verification of access origin."[143] Crown counsel has confirmed that the logs were received after the search, but Police have refused to discover further information about this inquiry.[144]

[redacted] ***interview***

2.71. On 3 September 2014, Det Teo was assigned to interview Mr Slater's IT consultant, [redacted] to see whether he had evidence that might help identify the hacker, whether a full written statement was required, and whether he or Mr Slater might have records for the Whaleoil site formerly hosted in the US (at the time the hack occurred).[145]

2.72. On 30 September 2014, Det Teo called and spoke to Mr [redacted] in a "brief conversation".[146] Mr [redacted] described the denial of service attack in February 2014,[147] his attempts to get the site running again,[148] and his recovery of Whaleoil data using his personal Linode account.[149]

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[139] Ibid.
[140] Ibid.
[141] PD 11/2326-2327 (**KEB 4/29/2326-2327**).
[142] Ibid.
[143] Ibid; and Boileau 2 at 100 (**KEB 1/10/187-188**).
[144] PD 15/2465; and Boileau2 at 100 (**KEB 1/10/187-188**).
[145] PD 7/1376 (**KEB 4/29/1376**).
[146] Teo at 23.9 (**KEB 2/15/246**).
[147] Teo at 23.3-23.4 (**KEB 2/15/245**); and PD 7/1376 (**KEB 4/29/1376**).
[148] Teo at 23.5 (**KEB 2/15/245**); and PD 7/1376 (**KEB 4/29/1376**).
[149] Teo at 23.6 (**KEB 2/15/245**); and PD 7/1376 (**KEB 4/29/1376**).

2.73. Mr [redacted] said his technical abilities were limited and when difficult problems arose, they would be outsourced to someone else.[150] He also said someone else had set up Mr Slater's personal home equipment and email and social media accounts.[151]

2.74. At the end of that conversation, Det Teo told Mr [redacted] he would contact him the following week to hold a more detailed discussion.[152] DI Beal and DC Smith made further contact with Mr [redacted] after the search warrant was executed.[153]

2.75. Police have discovered no record of any attempt to identify or communicate with any of the people Mr [redacted] identified as having worked on Mr Slater's website, personal home equipment, or email and social media accounts.[154] Nor did the Police have a more detailed conversation with Mr [redacted] before obtaining a warrant to search Mr Hager.[155]

Other journalists contacted by the Source

2.76. Police identified three other journalists who had been contacted by Mr Hager's source: Matthew Nippert, Patrick Gower and David Fisher.[156] All published stories based on material supplied by Mr Hager's source.[157] On 4 September 2014, Det Teo was tasked with identifying the method of communication and any relevant emails, social media, and phone numbers.[158]

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[150] Teo at 23.2 (**KEB 2/15/245**); and PD 7/1376 (**KEB 4/29/1376**).
[151] Teo at 23.7 (**KEB 2/15/245**); and PD 7/1376 (**KEB 4/29/1376**).
[152] Teo at 23.9 (**KEB 2/15/246**).
[153] Teo at 23.10 (**KEB 2/15/246**).
[154] Boileau at 48 (**KEB 1/6/130-133**); and Boileau2 at 93 (**KEB 1/10/185-186**).
[155] Boileau2 at 96 (**KEB 1/10/186**).
[156] PD 8/1464 (**KEB 4/29/1464**).
[157] See, for example, David Fisher "Hacker known as Rawshark quits: 'It is time to go'" NZ Herald 5 September 2014; Patrick Gower, "Hacker: Slater, Collins Facebook messages are authentic" 2 September 2014; Matt Nippert "The hacker revealed" Fairfax 5 September 2014: referred to at PD 4/515, 518, and 520 (**KEB 4/29/515, 518, and 520**).
[158] PD 7/1378, 1380, and 1381 (**KEB 4/29/1378, 1380, and 1381**).

2.77. The Police considered obtaining production orders on "telephones etc", "obtaining search warrants re Evidential Material held by such persons on the hacker", or even just approaching them.[159] Mr Cottingham also suggested that the Police request the email address Rawshark used to communicate with the media, which could then be used to obtain login IP addresses.[160]

Police discovery has disclosed no such steps.

Appeal to public for information

2.78. On 1 October 2014, Police media adviser Ross Henderson noted that "people may not even be aware that there is an investigation or where to go with any information" and recommended that "it would be good to have at least one appeal for information".[161]

Interview Mr Hager

2.79. Police had identified the possibility of interviewing Mr Hager.[162] But they did not do so before the search.

Production orders over Mr Hager's telephone and email

2.80. At various stages of the investigation, Police identified the possibility of applying for production orders or a remote access warrant over Mr Hager's telephone and/or email.[163] Police have confirmed that this was never done.[164] In noting that this was not done, Mr Hager does not suggest that it would have been lawful for the Police to have taken such a step.

Other steps not taken

[159] PD 8/1511 (**KEB 4/29/1511**).
[160] Cottingham at 11.7 (**KEB 2/14/236**); and Boileau2 at 101 (**KEB 1/10/188**).
[161] PD 13/2184 (**KEB 4/29/2184**).
[162] PD 8/1509 (**KEB 4/29/1509**).
[163] PD 8/1491, 1508, 1515, and 1516 (**KEB 4/29/1491, 1508, 1515, and 1516**); PD 7/1382 (**KEB 4/29/1382**); and PD 11/2108 (**KEB 4/29/2108**).
[164] PD 14/2230 (**KEB 4/29/2230**).

2.81. The following steps also not taken Police were identified by Mr Boileau in evidence:[165]

2.81.1. try to establish a complete list of everyone who had been granted privileged access to Mr Slater's system, either currently or in the past;[166]

2.81.2. try to establish a complete list of everyone who was a contributor or moderator or staff member on the Whale Oil site and who may have had access to the website they could exploit to obtain the leaked information;[167]

2.81.3. interview Mr [redacted] a contributor and moderator on the Whale Oil site mentioned on the site itself;[168]

2.81.4. try to establish a complete list of everyone who had physical access to Mr Slater's computers;[169]

2.81.5. focus the investigation on the WhaleOil website, the most likely point of security breach;[170]

2.81.6. examine the WhaleOil content database recovered from Mr Slater's US webhost Linode for any remaining access data;[171]

2.81.7. try to establish a complete list of people who had access to Mr Slater's Virtual Private Server on Linode and who might have taken a copy;[172]

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[165] Boileau at 47-86 (**KEB 1/6/116-125**); and Boileau2 at 14-32, 58-67, and 78-106 (**KEB 1/10/169-172, 178-180, and 182-189**).
[166] Boileau at 47 (**KEB 1/6/116**); and Boileau2 at 32 (**KEB 1/10/172**).
[167] Boileau at 49-51 (**KEB 1/6/116-117**).
[168] Boileau at 50 (**KEB 1/6/117**); and Boileau2 at 58-67 (**KEB 1/10/178-180**).
[169] Boileau at 52 (**KEB 1/6/117**).
[170] Boileau at 54-75 (**KEB 1/6/118-123**).
[171] Boileau at 80-82 (**KEB 1/6/124-125**); Teo at 24-35 (**KEB 2/15/246-247**); and Boileau2 at 31, and 89-95 (**KEB 1/10/172, and 185-186**).
[172] Boileau at 93 (**KEB 1/6/127**).

2.81.8. ask Linode for a list of all people who had access to the Linode customer account(s) for the VPS service that operated the www.whaleoil.co.nz website;[173]

2.81.9. ask Linode for all of the logs for all access to the customer accounts relating to the VPS service for the relevant period;[174]

2.81.10. ask Linode for all of its customer service records in relation to these accounts, to see whether the attack related to a fraudulent customer inquiry to the customer service centre;[175]

2.81.11. obtain information from Mr Slater about the name registry and name hosting service he was using, and then obtain the relevant access logs to see whether Mr Slater's site had been compromised to misdirect traffic and read passwords;[176] and

2.81.12. conduct a proper forensic analysis of Mr Slater's computer, in that the analysis focused on automated malware instead of suspicious emails, suspicious chat messages or other communication, suspicious web browser history, and other typical indicia of hacker techniques.[177]

Application, issuance, and execution of the warrant

The application for the warrant

2.82. On 30 September 2014, DS Beal lodged an application for a search warrant. He asserted a reasonable belief that the following evidence in five categories would be found at Mr Hager's address.[178] In short, his stated grounds of belief were that Mr Hager had been meeting and

[173] Boileau at 84 (**KEB 1/6/125**); and Boileau2 at 94 (**KEB 1/10/186**).
[174] Boileau at 85 (**KEB 1/6/125**); and Boileau2 at 94 (**KEB 1/10/186**).
[175] Boileau at 86 (**KEB 1/6/125**); and Boileau2 at 94 (**KEB 1/10/186**).
[176] Boileau at 87-94 (**KEB 1/6/126-128**); and Boileau2 at 95 (**KEB 1/10/186**).
[177] Boileau at 95 (**KEB 1/6/128**); and Boileau2 at 14-30 (**KEB 1/10/169-172**).
[178] PD 8/1462-1463 (**KEB 4/29/1462-1463**).

communicating with the Source and had had a USB containing material from the Source.[179]

2.83. The application did not mention any of the open lines of inquiry set out in paragraphs 1.53 to 1.81 above.

2.84. DS Beal was aware of the issue of journalistic privilege.[180] The application did not mention journalistic privilege, or s 68 of the Evidence Act, or that Mr Hager was a journalist. The application did not contain any mention of the legal issues about the search of journalists' premises, including, in particular, the Court of Appeal's decision in *TVNZ v Attorney-General*.

2.85. DS Beal familiarised himself with the policies and procedures in relation to searches involving privileged material and media organisations.[181] The application did not draw the Judge's attention to those policies. It did not suggest that any conditions were appropriate.

Issuance

2.86. The application was submitted to Judge Ida Malosi in the Manukau District Court.[182] No information other than the warrant application was provided to the Judge.[183] The Judge recorded no separate reasons for her decision.[184] No conditions were attached.[185] Judge Malosi granted the warrant on 30 September 2014.[186]

2.87. The warrant granted the Police permission to enter and search Mr Hager's house for, and seize, the evidential material set out above in paragraph

[179] PD 8/1470-1471 (**KEB 4/29/1470-1471**).
[180] Beal at 23 (**KEB 2/11/196-197**).
[181] Beal at 24-26 (**KEB 2/11/197**).
[182] PD 1/33 (**KEB 4/29/33**).
[183] Memorandum of counsel for the third respondent, 11 December 2014, at 13-15.
[184] Ibid.
[185] PD 1/31-36 (**KEB 4/29/31-36**).
[186] PD 1/33 (**KEB 4/29/33**).

4.34.[187] The warrant authorised Police to force entry into Mr Hager's home if it was reasonable in the circumstances.[188] They were prepared to do so.[189]

2.88. Police sought and received legal advice about the effect of s 68 of the Evidence Act relating to journalistic privilege.[190] As a result, they determined that if Mr Hager claimed privilege, any relevant evidence would be seized and secured and leave the claim to be determined by the High Court.[191]

Execution of the warrant

2.89. Police expected significant public interest, and prepared a media strategy before executing the warrant.[192]

2.90. Police prepared an Operation Order for the search dated 1 October 2014. Among other things, it said:[193]

2.90.1. Mr Hager "is believed to be very surveillance aware".

2.90.2. "Should privilege be claimed regarding any online searching of emails at the scene and this material cannot be secured in the same manner an undertaking will be provided that the ECL member will not release or disclose this information to the investigators."

2.90.3. Mr Hager was "potentially expecting Police to conduct this search warrant."

2.90.4. "There is strong likelihood of Media interest should they become aware and potential Media attendance at the scene. Any Media communication to be handled by Ross Henderson PNHQ."

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[187] PD 1/31-32 (**KEB 4/29/31-32**).
[188] PD 1/32 (**KEB 4/29/32**).
[189] Beal at 39 (**KEB 2/11/199-200**); and PD 11/2109 (**KEB 4/29/2109**).
[190] PD 8/1516 (**KEB 4/29/1516**); and Beal 43-44 (**KEB 2/11/200-201**).
[191] Ibid.
[192] PD 8/1516 (**KEB 4/29/1516**); and PD 12/2167.
[193] PD 8/1518-23, paras 1.8, 3.5, 3.6, 4.2 (**KEB 4/29/1518-23**).

2.91. On 2 October 2014, Police executed the search warrant at Mr Hager's house.[194]

2.92. The warrant was executed by five Police officers and a staff member from the Police Electronic Crime Laboratory: DS Simon Beal, Det Joseph Teo, Det Neil Parsons, Det Annalise Ferguson, Det Jason Abbott, and Ian Donovan.[195]

2.93. Police arrived at about 7:45 am.[196] Mr Hager was in Auckland. His daughter [redacted] answered the door.[197] Ms [redacted] was not dressed.[198]

2.94. Ms [redacted] phoned Mr Hager and gave the phone to DS Beal to speak with him.[199] DS Beal explained the purpose of the search and read out some of the terms of the warrant.[200] Mr Hager told him there was nothing in the house that would help him identify his source for Dirty Politics, but expressed concern that the search would interfere with his rights and obligations in relation to other sensitive projects and confidential sources.[201]

2.95. In the meantime, the search had commenced.[202]

2.96. Mr Hager phoned back the Police again, talking initially to Det Teo, who then passed him back to DS Beal.[203] At this point, for the first time, DS Beal asked whether Mr Hager was claiming journalistic privilege.[204] Mr Hager said he was. DS Beal said he would ensure that everything seized was

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[194] Beal at 39-42 (**KEB 2/11/199-200**); Lynch at 56 (**KEB 2/12/215**); Teo at 35 (**KEB 2/15/247**); the affidavit of Ian Stephen Donovan affirmed at 30 April 2015 ("**Donovan**") at 17 (**KEB 2/13/222**); and the affidavit of Julia Moana [redacted] affirmed on 27 March 2015 ([redacted] at 3 (**KEB 1/10A/190B**); and PD 8/1549, 1571, 1574, and 1584 (**KEB 4/29/1549**); and Transcript PD 9/1602-1603.
[195] Beal 39 (**KEB 2/11/199-200**); and Donovan at 17 (**KEB 2/13/222**).
[196] [redacted] at 4; Donovan at 17 (**KEB 2/13/222**); Beal at 42 (**KEB 2/11/204**); and PD 8/1549, 1571, 1574, and 1584 (**KEB 4/29/1571, 1574, and 1584**).
[197] [redacted] at 4 (**KEB 1/10A/190B**).
[198] Beal at 45 (**KEB 2/11/201**); and [redacted] at 4 (**KEB 1/10A/190B**).
[199] [redacted] at 9 (**KEB 1/10A/190B**); and Transcript PD 9/1608.
[200] Hager at 105 (**KEB 1/1/27**); and Transcript PD9/1608-1610.
[201] Hager at 106 (**KEB 1/1/27**).
[202] Beal at 51 (**KEB 2/11/202**).
[203] Transcript PD 9/1612.
[204] Hager at 107 (**KEB 1/1/27**); Beal at 51 (**KEB 2/11/202**); and Transcript PD 9/1613.

sealed and not examined further without permission from a judge.[205] He said Mr Hager was being treated as a witness not a suspect.[206]

2.97. Later, Mr Hager also claimed legal professional privilege over some of his material.[207]

2.98. The search took more than ten hours.[208] Ms [redacted] was required to dress in front of a police officer.[209] The search was highly intrusive.[210] The Police searched such places as Ms [redacted] bedroom - including her underwear drawer,[211] her private letters,[212] and her private photo album.[213] The Police seized Ms [redacted] laptop, phones, and iPod.[214] She felt upset, violated, and stressed.[215]

2.99. Police covertly recorded the search.[216]

Actions alleged to amount to breaches of privilege

Email with a suspect

2.100. During the search, Det Abbott found a printed copy of an email exchange between Mr Hager and a person who had been publicly accused of being Mr Hager's source for *Dirty Politics*.[217] In fact, that person is not the Source for *Dirty Politics*.[218]

2.101. Det Abbott showed it to Det Teo.[219] Det Teo photographed this privileged document and emailed a copy to DC Rachelle Smith at 1:36 pm. He asked

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[205] Hager at 108 (**KEB 1/1/27**); [redacted] at 32 (**KEB 1/10A/190F**); and Transcript PD 9/1613-1614.
[206] Hager at 109 (**KEB 1/1/28**).
[207] Hager at 110 (**KEB 1/1/28**).
[208] [redacted] at 30 (**KEB 1/10A/190F**); and Lynch at 75 (**KEB 2/12/219**).
[209] Beal at 45 (**KEB 2/11/201**); [redacted] at 11-13 (**KEB 1/10A/190C**).
[210] [redacted] at 14 (**KEB 1/10A/190C**).
[211] [redacted] at 15 (**KEB 1/10A/190C**).
[212] [redacted] at 16 (**KEB 1/10A/190C**).
[213] Ibid.
[214] [redacted] at 18-25 (**KEB 1/10A/190D-190E**).
[215] [redacted] 17, 21, 26, and 30 (**KEB 1/10A/190D-190F**).
[216] See Transcript, PD 9/1602-1833.
[217] Hager at 126 (**KEB 1/1/31**).
[218] Ibid.
[219] Teo at 50 (**KEB 2/15/249**).

her "Can you do some enquiries please".[220] The documents disclosing these facts, and the subsequent actions of DC Smith, were not provided in discovery until June 2015, and only after a large number of complaints by the applicant as to the obviously incomplete nature of the discovery.

2.102. DC Smith conducted a range of internet inquiries in relation to the information in the email and sent five emails recording her results.[221] The emails record inquiries into the domain name used by the Source, the encryption method the emailer was using, an internet security conference mentioned in the email, and names revealed following a Google search of the email address. The way in which this material is presented suggests that this information was new to DC Smith and that she thought it was new to the investigation team.

2.103. At 10:25 pm, Det Teo forwarded at least two of DC Smith's emails to DS Beal.[222]

2.104. At the time of drafting these submissions, the Police have agreed to list for discovery documents relating to the steps taken by the investigation team after the search and in relation to the facts DC Smith uncovered from the privileged document. Police have not completed this exercise but Crown counsel have said that 175 such documents have so far been identified. Crown counsel assert that these documents do not amount to further breaches of the privilege, but say that documents that would show this are confidential and cannot be provided.

2.105. On 22 October 2014, Det Teo wrote a job sheet explaining what had happened to the piece of paper and put it on the investigation file.[223] The job sheet recorded the email address of the suspect including the name of a company with which he is or was associated and the name of his ISP. This

[220] PD 14/2303 (**KEB 4/29/2303**), attaching PD14/2351 (**KEB 4/29/2351**); see also PD 15/2469 for the connection between the photo and the email.
[221] PD 14/2306-2310 (**KEB 4/29/2306-2310**).
[222] PD 14/2347, 2348 (**KEB 4/29/2347, 2348**).
[223] PD 8/1500 (**KEB 4/29/1500 and 1500A**); Teo at 50 (**KEB 2/15/249**).

document was provided in discovery in January, but the key passages were redacted until 25 June 2015. For this reason an unredacted copy it not yet in evidence.

Email accounts and Ms [redacted] computer

2.106. During the search, Det Abbott found a piece of paper containing two email addresses and a password.[224]

2.107. One of the accounts was in Mr Hager's name.[225] Mr Hager had used it.[226]

2.108. The other account was used by one of Mr Hager's confidential informants, who had nothing to do with *Dirty Politics*, to send information to Mr Hager to use in a news story.[227] The informant's identity could be ascertained from the information stored there.[228] However, the accounts had both expired.[229]

2.109. Mr Donovan used Mr Hager's internet connection, without authority, to attempt to access both accounts. He found one to be disabled and the other inactive. He photographed the screens and made a record of his enquiries.[230]

2.110. Mr Donovan attempted to connect to the internet using Mr Hager's internet connection, but he had difficulty doing so.[231] At the time, he was in possession of the laptop belonging to Ms [redacted] for the purposes of cloning that computer. [232]

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[224] Beal at 55 (**KEB 2/11/203**); Hager at 115 (**KEB 1/1/29**); and PD 8/1586 (**KEB 4/29/1586**).
[225] PD 8/1586 (**KEB 4/29/1586**).
[226] Hager at 116 (**KEB 1/1/29**).
[227] Hager 116-117 (**KEB 1/1/29**).
[228] Hager at 118 (**KEB 1/1/29**).
[229] Hager at 118 (**KEB 1/1/29**); Donovan at 25 (**KEB 2/13/223**).
[230] PD 8/1586 (**KEB 4/29/1586**); and Donovan at 25, 30.2 (**KEB 2/13/223 and 228**).
[231] Donovan at 25 (**KEB 2/13/223-225**).
[232] Donovan at 23 (**KEB 2/13/223**).

2.111. In order to provide himself with information to assist to connect to Mr Hager's internet system, Mr Donovan explored the settings on Ms [redacted] laptop, found her internet settings, photographed them, and then attempted to use that information.[233]

2.112. Mr Donovan used this information to use Mr Hager's internet account to access the internet.[234] He had no reason to believe that he had Mr Hager's or Ms [redacted] permission to do so, and he did not in fact have such permission.[235]

TOR storage service

2.113. During the search, Det Abbott also found a piece of paper containing information about accessing a storage service on the internet that anonymises the user (TOR), including a special "onion" Uniform Resource Locator (URL) address.[236]

2.114. This paper was to help Mr Hager access information provided by another confidential informant for a news story.[237] Again, it had nothing to do with *Dirty Politics*.[238] Again, Mr Hager had promised confidentiality.[239] Again, had Police accessed this service it would have revealed the informant's identity as well as the information provided.[240]

2.115. Det Abbott showed the piece of paper to Ian Donovan. Mr Donovan photographed it, and emailed a copy to Bevan Lee at the National Computer Crime Centre.[241] Det Abbott took another photograph of the paper. He sent a copy of his photograph to Clifford Clark at the National Computer Crime Centre.[242]

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[233] Donovan at 25 (**KEB 2/13/223-225**).
[234] Ibid.
[235] Hager at 128 (**KEB 1/1/31**); and [redacted] at 34 (**KEB 1/10A/190G**).
[236] Donovan at 29 (**KEB 2/13/227-228**); Beal at 56 (**KEB 2/11/203**).
[237] Hager at 121 (**KEB 1/1/30**).
[238] Ibid.
[239] Hager at 120-123 (**KEB 1/1/30**).
[240] Hager at 123 (**KEB 1/1/30**).
[241] PD 11/1863-1864 (**KEB 4/29/1863-1864**).
[242] PD 11/2024-2025 (**KEB 4/29/2024-2025**).

2.116. Shortly afterward, Mr Clark replied by email that Police would need to establish a power to search it, and a warrant could be obtained quickly.[243]

2.117. At some point, Mr Clark also "confirmed there was nothing to explore"[244] and "advised no further action was required".[245]

2.118. Mr Hager was concerned to know whether this second statement from Mr Clark was based on steps taken to check the URL in breach of the privilege and after Mr Clark had himself identified that it would be unlawful to do so without a further warrant. His counsel asked for an assurance that no investigative steps had been taken in relation to, inter alia, that URL.[246] That assurance was given on 16 June 2015 and 18 June 2015.[247]

2.119. Still not satisfied, Mr Hager asked:[248]

> Just so that there is no room for confusion on this issue, Mr Hager asks that the Police, including both Clifford Clark and Rex Cottingham, assure him that no one attempted to check whether it was a live link and/or attempted to enter that address into a browser.

2.120. On 30 June 2015, Crown counsel confirmed:[249]

> We are told that NC3 staff did try [the URL] on the day of the warrant but found it not to be working and did nothing further.

SIM card and IMEI number

2.121. During the search, Det Ferguson found a mobile phone and, separately, a SIM card in Mr Hager's bedroom drawers.[250]

2.122. Det Teo took note of the IMEI number of the phone and the SIM card number.[251]

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[243] PD 14/2253 (**KEB 4/29/2253**).
[244] PD 14/2371.
[245] Donovan at 29 (**KEB 2/13/227-228**).
[246] PD 15/2460-2461; and PD 15/2422-2423.
[247] PD 15/2465; and PD 15/2424.
[248] Attachment to the applicant's memorandum of counsel of 26 June 2015.
[249] Email of Kim Laurenson of 30 June 2015.
[250] PD 7/1393 (**KEB 4/29/1393**).
[251] PD 8/1565-1566 (**KEB 4/29/1565-1566**).

2.123. The mobile phone had been used exclusively to contact a confidential informant in relation to a news story that had nothing to do with *Dirty Politics*.[252]

2.124. On 3 October 2014, Det Teo sent information requests to Vodafone New Zealand, Spark, and Two Degree Mobile Limited in relation to these records.[253]

2.125. No useful material was obtained because Vodafone does not keep records beyond six months and the SIM card was not associated with either network.[254]

The Exhibit list

2.126. Even after privilege was invoked, Police examined physical documents to assess their possible relevance as evidence. They regarded any documents "detailing either contacts or communications" as potential evidence.[255] Having looked at these documents, they entered a written description of each on a list of exhibits, frequently listing specific names or contact details on that list.[256]

2.127. Police seized 104 pages of such documents.[257] This list of exhibits was then filed on the investigation team's database, and not sealed. Some of those names or contact details related to Mr Hager's confidential sources.[258]

Photographs

2.128. During the search, Police took photographs. Concerned that these might contain some privileged information, Ms [redacted] and Mr Price (Mr Hager's lawyer) asked to see them.

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[252] Hager at 125 (**KEB 1/1/31**).
[253] Teo at 54 (**KEB 2/15/249-250**); Beal at 58 (**KEB 2/11/204**); PD 14/2405-2410 (**KEB 4/29/2405-2410**).
[254] Teo at 54 (**KEB 2/15/249-250**).
[255] Beal at 54 (**KEB 2/11/202-203**).
[256] PD 8/1562-1572 (**KEB 4/29/1562-1572**).
[257] Hager at 144-147 (**KEB 1/1/35-36**).
[258] Hager at 147 (**KEB 1/1/36**).

2.129. DS Beal explained that they were scene photographs and not going to be used in the investigation that way. However, he agreed to show Ms [redacted] and Mr Price the photographs, and to delete any that contained any privileged information. Ms [redacted] and Mr Price objected to some of the photographs and they were deleted. There was a clear understanding that they would be shown all the photographs.[259]

2.130. Ms [redacted] and Mr Price were not shown all the photographs.[260] In particular, they were not shown any of the photographs relating to the alleged breaches set out above.

Seized items

2.131. During the search, the Police seized two computers, one laptop, four mobile phones and a charger, a sim card, an ipod, a dictaphone, a camera, two memory cards, a hard drive, more than a hundred compact discs and more than a hundred pages of documents.[261] They also seized, or cloned, 16 USB storage devices, and cloned one smart phone.[262]

2.132. The items seized contained no information about Mr Hager's source for *Dirty Politics*.[263] However, they contained much confidential information including information capable of identifying a range of other confidential sources.[264] This included confidential copies of Edward Snowden documents and confidential sources relating to them;[265] confidential material provided by a vulnerable source relating to Mr Hager's investigation of tax havens;[266] intelligence documents from a confidential source;[267] information from confidential sources held as safe-keeping for

[259] [redacted] at 36-40 (**KEB 1/10A/190G-190H**); and Teo at 39 (**KEB 2/15/248**).
[260] [redacted] at 37 (**KEB 1/10A/190G-190H**); Beal at 57 (**KEB 2/11/203-204**); and Donovan at 30 (**KEB 2/13/228**).
[261] PD 2/236-250 (**KEB 4/29/236, 239, 242, 245, 248**).
[262] Ibid.
[263] Hager at 134 (**KEB 1/1/33**).
[264] Hager at 131-152 (**KEB 1/1/32-38**).
[265] Hager at 135-136 (**KEB 1/1/33**).
[266] Hager at 138 (**KEB 1/1/34**).
[267] Ibid.

another journalist;[268] a number of confidential interviews on the dictaphone;[269] sensitive information on a CD provided by a confidential source in 2003;[270] and papers containing the identities of six confidential sources relating to other projects.[271]

Chill effect

2.133. The search has been widely covered in the media.[272]

2.134. Some of Mr Hager's confidential sources have already contacted him, worried that the Police have seized material that might identify them.[273] He is concerned that the mere fact of the Police search will impact seriously on his ability to continue his work as an investigative journalist.[274]

2.135. Pulitzer Prize-winning journalist Seymour Hersh says that the search of Mr Hager's premises "will have an enormous detrimental effect on Mr Hager's ability to receive confidential information and on the ability of other New Zealand journalists to do likewise."[275]

2.136. Dr Gavin Ellis has given evidence that the Police search on Mr Hager's house will have a serious chilling effect: it will deter sources from trusting Mr Hager and other journalists because they will become aware that the Police can circumvent the journalists' promises.[276]

2.137. Investigative journalist David Fisher agrees. He says that since the Police search, he has already noticed sources becoming more concerned about exposure.[277] He says the possibility of a Police raid is a "nightmare

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[268] Ibid.
[269] Hager at 139 (**KEB 1/1/34**).
[270] Hager at 140 (**KEB 1/1/34-35**).
[271] Hager at 147 (**KEB 1/1/36**).
[272] Fisher at 34 (**KEB 1/3/69**).
[273] Hager at 97-98 (**KEB 1/1/25**).
[274] Hager at 162 (**KEB 1/1/40**).
[275] Hersh at 34 (**KEB 1/4/87**).
[276] The affidavit of Gavin Peter Ellis affirmed 31 March 2015 ("**Ellis**") at 11 and generally (**KEB 1/5/93**).
[277] Fisher at 42 and generally (**KEB 1/3/70**).

scenario" for his sources, and believes the result of this case will have a significant bearing on the decision-making of confidential informants.[278]

Other effects of the search

2.138. The search has also had a more direct impact on Mr Hager. It has deprived him of his main computers, which contained material not contained on a back-up hard drive. It has scrambled his paper files. It has considerably disrupted his work. [279]

[278] Fisher at 39 (**KEB 1/3/69-70**).
[279] Hager at 153, 154 (**KEB 1/1/38**).

III. SOURCE PROTECTION

Introduction

3.1. The duty – and right – of journalists to protect their confidential sources is at the heart of this application. Mr Hager relies on the fundamental principle that *when journalists promise confidentiality to a source in exchange for information of public importance, they should not be compelled to disclose the source's identity unless there is an overriding public interest.*

3.2. That principle is rooted in journalistic ethics, is expressly recognised by statute and by the common law, and is a fundamental aspect of the right to freedom of expression. It has been recognised in New Zealand and in every comparable jurisdiction internationally. These rules reflect a powerful practical rationale: they are necessary to protect the flow of important information to society.

3.3. The principle is not absolute. But any derogation requires the most careful consideration and the most compelling justification. In this case, while the Police were aware of this issue, there was no consideration of it whatsoever before the search was executed.

3.4. This section deals with:

3.4.1. the importance of the source protection principle

3.4.2. the legal rules that seek to provide that protection

3.4.3. the particular New Zealand rules in play in this case:

3.4.3.1. Sections 14 and 21 of the Bill of Rights Act 1990;

3.4.3.2. Section 68 of the Evidence Act 2006; and

3.4.3.3. *TVNZ v Attorney-General*.

The chilling effect

3.5. Democratic societies need source protection because without such rules the flow of important information to the public will be chilled. This was perhaps best recognised by the European Court of Human Rights in the seminal decision of *Goodwin v UK:*[280]

> Protection of journalistic sources is one of the basic conditions for press freedom… Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.

3.6. *Goodwin* has now been accepted as authoritative in the United Kingdom.[281] In the leading case, *Ashworth v MGN*, Lord Woolf recognised the same need for the principle of journalistic source protection:[282]

> Any disclosure of a journalist's sources does have a chilling effect on the freedom of the press. The court when considering making an order for disclosure in the context of the *Norwich Pharmacal* jurisdiction must have this well in mind. The position is analogous to the long recognised position of informers under the criminal law. In *D v NSPCC* [1978] AC 171 their Lordships applied the approach of the courts to police information to those who provided information to the NSPCC. Having referred, at p 218, to *Marks v Beyfus* (1890) 25 QBD 494, Lord Diplock explained the rationale of the rule as being plain, if the identity of

[280] (1996) BRHC 81, 27 March 1996, para 39 (ECHR); see also *Nagla v Latvia* (App. no. 73469, 16 October 2003), paras 95, 103 (ECHR) (**ABoA 2/21**); *Financial Times v UK* (App. no. 821/03, 15 December 2009) at para 59 (ECHR); *Voskuil v Netherlands* (2007) BHRC 306, para 65 (ECHR); *Tillack v Belgium* (App. no. 20477/05) 27 November 2007, para 53 (ECHR); *Roeman v Luxumburg* (App. no. 51772/99) 25 February 2003, para 46 (ECHR) (for a summary of relevant ECHR cases see **ABoA 2/28)**.

[281] *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033 (HL), at para 38 (**ABoA 2/19**).

[282] At para 61.

> informers were too readily liable to be disclosed in a court of law the sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. Ordering journalists to disclose their sources can have similar consequences. The fact is that information which should be placed in the public domain is frequently made available to the press by individuals who would lack the courage to provide the information if they thought there was a risk of their identity being disclosed. The fact that journalists' sources can be reasonably confident that their identity will not be disclosed makes a significant contribution to the ability of the press to perform their role in society of making information available to the public. It is for that reason that it is well established now that the courts will normally protect journalists' sources from identification.

3.7. In 1980, the New Zealand Court of Appeal expressly endorsed the same rationale in relation to the "newspaper rule" that stops pre-trial defamation applications from seeking the identity of sources:[283]

> The broader purpose is to encourage the flow of information to the public and thereby facilitate free trade in ideas. That flow is dependent on the reporting of matters of public interest to the news media. The rule promotes this end by holding out to news gatherers and contributors of information to the news media the assurance that, unless and until a matter goes to trial and in the setting of the trial itself, identification of the source of the news media's information will not ordinarily be compelled.

3.8. The same principle has also received recognition in the Canadian Supreme Court:[284]

> In *Lessard* and *New Brunswick*, the Court accepted that freedom to publish the news necessarily involves a freedom to gather the news. We should likewise recognize in this case the further step that an important element in the news gathering function (especially in the area of investigative journalism) is the ability of the media to make use of confidential sources. The appellants and their expert witnesses make a convincing case that unless the media can offer anonymity in situations where sources would

[283] *Broadcasting Corporation of New Zealand v Alex Harvey Industries* [1980] 1NZLR 163, 172 (CA), per Richardson J.
[284] *R v National Post* [2010] SCR 477, para 33, Binnie J for seven judges of the court (**ABoA 2/17**).

> otherwise dry up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.

3.9. In New Zealand, this principle has now been recognised by s 68 of the Evidence Act 2006. That section requires that the interests of disclosure of a source be balanced against, inter alia:[285]

> [T]he public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

New Zealand legal rules that embody source protection

3.10. The source protection principle is now woven into the fabric of New Zealand law. Its manifestations include:

3.10.1. the Press Council's Statement of Principles says "Publications have a strong obligation to protect against disclosure of the identity or confidential sources";[286]

3.10.2. the Broadcasting Standards Authority has accepted that the principles in *Goodwin* apply to its assessment of applications to order discovery of journalists' sources;[287]

3.10.3. the Broadcasting Standards Authority also treats breaches of journalists' promises of confidentiality as violations of the standards requiring fairness;[288]

3.10.4. the Journalist Code of Ethics of the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc (New Zealand's leading union for journalists, including freelance

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[285] The Evidence Act 2006, s 68(2)(b) (**ABoA 2/24**).
[286] Principle 8; also see Ellis at 18-19 (**KEB 1/5/95**).
[287] *Benson-Pope and Radio New Zealand Ltd* - ID2005-083, paras 30-35.
[288] See, for example, *Diocese of Dunedin v TV3*, 1999-125, pp 41, 44; *Criminal Bar Association v TVNZ*, 1997-128, p8.

journalists) states that "in all circumstances [journalists] shall respect all confidences received in the course of their profession";[289]

3.10.5. the "newspaper rule" prevents disclosure of journalists' sources at preliminary stages in defamation cases, and possibly other cases as well;[290]

3.10.6. in the High Court, if a defamation defendant pleads honest opinion or privilege then no interrogatories may be issued as to the defendant's sources of information unless they are necessary in the interests of justice;[291]

3.10.7. Television New Zealand and Radio New Zealand may decline to provide information about the identity of a confidential source in response to a Privacy Act 1996 request, if disclosure would be likely to prejudice the supply of similar information, or of information from the same source;[292]

3.10.8. although not only for reasons of source protection, other news media are wholly exempt from the disclosure requirements under the Privacy Act 1996;[293] and

3.10.9. the right to freedom of expression in the International Covenant on Political and Civil Rights encompasses "that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources".[294]

3.11. The following are additional manifestations recognised in the UK which, it is submitted, would also be applicable in New Zealand:

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[289] www.epmu.org.nz/journalist-code-of-ethics at (c).
[290] *Broadcasting Corporation of New Zealand v Alex Harvey Industries* [1980] 1 NZLR 163 (CA).
[291] High Court Rule 8.46.
[292] Privacy Act 1993, s29(1)(g) (**ABoA 2/25**).
[293] Section 2(1)(b)(xiii) (**ABoA 2/25**).
[294] Human Rights Committee, General Comment 34, Article 19 Freedoms of Opinion and Expression, 12 September 2011, CCPR/C/GC/34, para 45. Note that New Zealand has ratified the ICCPR, and that paragraph (b) of the long title of NZBORA states that it is an Act "to affirm New Zealand's commitment to the [ICCPR]."

3.11.1. the Court of Appeal of England and Wales has recognised that a judge has a common law discretion to permit a journalist witness not to disclose the identity of a source if the interests underlying the promise of confidentiality outweigh the interests of justice in the case;[295] and

3.11.2. the UK Supreme Court has held the Court's power to order a third party caught up in someone else's wrongdoing to disclose information about that person (the *Norwich Pharmacal* jurisdiction) should not be exercised without considering "the public interest in maintaining the confidentiality of journalistic sources, as recognised in s 10 of the Contempt of Court Act 1981 and art 10 of the convention".[296]

3.12. With respect to these last two examples, it is noted that article 10 of the European Convention of Human Rights protects freedom of expression in similar terms to s 14 of the New Zealand Bill of Rights Act 1990.

Legal rules of particular significance to this case

3.13. Four further New Zealand legal rules that reflect the source protection principle are central to this case. They are:

3.13.1. the right to freedom of expression in s 14 of the Bill of Rights;

3.13.2. the right to freedom from unreasonable search and seizure in s 21 of the Bill of Rights;

3.13.3. the privilege to protect journalists' sources in s 68 of the Evidence Act 2006, and

3.13.4. the rules relating to searches of journalists' premises set out by the Court of Appeal in *TVNZ v Attorney-General*.

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[295] *Attorney-General v Mulholland; Attorney-General v Fraser* [1963] 1 ALL ER 767 (CA), assumed to be applicable in New Zealand in John Burrows and Ursula Cheer *Media Law in New Zealand* (LexisNexis New Zealand, 6ed, 2010), 738.

[296] *Rugby Football Union v Consolidated Information Services* [2013] 1 All ER 928, para 17 (UKSC).

3.14. The applicant contends that each of these was breached.

The Bill of Rights

Rights at issue

3.15. The Bill of Rights provides protection for freedom of expression in s 14:

> Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.

The right is not absolute. But any limitations must be "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[297]

3.16. The Bill of Rights also provides protection in s 21 from unreasonable search and seizure. Section 21 has been described as having internal balancing, in that, on its own words, it only protects against an "unreasonable" infringement.[298]

3.17. Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other meaning.[299] However, the Bill of Rights cannot be used to overturn other statutes.[300]

The Bill of Rights applies to police and judiciary

3.18. The Bill of Rights applies to acts of the executive, including the Police.[301] The judiciary too are subject to the Bill of Rights.[302]

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[297] Section 5 (**ABoA 2/26**).
[298] There is academic disagreement, unlikely to need resolving in this case, about whether s 21 "unreasonable" should be read in terms of s 5, or whether there are two different reasonableness tests that both need to be applied: Rishworth et al *The New Zealand Bill of Rights* (Melbourne, OUP, 2003), 174 cf Butler and Butler *The New Zealand Bill of Rights: A Commentary* (Lexis Nexis, Wellington, 2005), 566.
[299] Section 6 (**ABoA 2/26**).
[300] Section 4 (**ABoA 2/26**).
[301] Section 3 (**ABoA 2/26**).
[302] Section 3 (**ABoA 2/26**).

The Bill of Rights applies to open-ended decision-making

3.19. The Supreme Court has held that apparently untrammelled powers must be interpreted and exercised consistently with the Bill of Rights.[303]

3.20. This means that whenever the Police are exercising public powers, they must do so consistently with the provisions of the Bill of Rights where possible.[304] The courts have repeatedly found, in particular, that this applies to Police and actions and decisions in relation to search warrants.[305] It also applies to court decisions to grant search warrants, which can be quashed if they contain unjustified restrictions on the guaranteed rights and freedoms.[306]

Section 21 is in issue

3.21. This case involves administrative and judicial decisions in relation to a search and seizures. Section 21 is therefore clearly in issue. The only question, addressed below, is whether the search and/or the seizures were unreasonable.

Section 14 is in issue

3.22. A few explanatory steps may be needed to understand why s 14 is also in issue in this case. First, the right to freedom of expression includes the right of the media to freedom of expression.[307]

3.23. Secondly, the media's right of free expression includes source protection. This is because the media's ability to receive and impart information is crucially dependent on receiving such information from sources. In many

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[303] *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 (NZSC), para 91 (SC) (Ministerial power to deport).
[304] See, for example, *Simpson v Attorney-General* [1994] 3 NZLR 667 (Baigent's case) (CA).
[305] See, for example, TVNZ v Police [1995] 2 NZLR 541, 549 (HC) per Fisher J (**ABoA 1/2**); *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA) (**ABoA 1/7**); Baigent's case.
[306] See, for example, *Calver v District Court at Palmerston* North [2005] DCR 114 (HC), paras 79-83, 86 (**ABoA 1/8**).
[307] *TVNZ v Attorney-General* [1995] 2 NZLR 641, 646 (CA) (**ABoA 1/1**).

cases, it can do so only by promising to keep their identities secret. Thus, the obligation and entitlement of journalists to make and keep promises to sources is widely recognised as an important aspect of the right to freedom of expression.[308]

3.24. The freedom of expression underpinning journalistic source protections has been repeatedly recognised by the European Court of Human Rights. It has also been accepted by the House of Lords. In *Ashworth*, Lord Woolf said, after quoting the passage from *Goodwin* cited above, that "the same approach can be applied equally to s 10 now that art 10 is part of our domestic law."[309] Article 10 is the guarantee of freedom of expression in the European Convention on Human Rights and Fundamental Freedoms; s 10 refers to the Contempt of Court Act 1981 and its protection of journalistic sources, which is to similar effect as New Zealand's s 68 of the Evidence Act, discussed below.

3.25. The same is true of the guarantee of freedom of expression in the Bill of Rights; that is (as it is put in *Goodwin*), that "protection of journalistic sources is one of the basic conditions for press freedom". This has been accepted by New Zealand courts. In New Zealand's leading case on source protection, *Police v Campbell*, Randerson J said that:[310]

> [T]he trend of authority both in New Zealand and in the United Kingdom is to attach substantial weight to freedom of expression in the broad sense *as well as in the narrow sense of encouraging the free flow of information and the protection of journalists' sources*. This is evident from the authorities already cited. *Their importance is underlined by the enactment of s. 14 of the New Zealand Bill of Rights Act guaranteeing freedom of expression*. (Emphasis added)

3.26. The Court of Appeal too has held that media freedom is "an important adjunct" of s 14 of the Bill of Rights, and provides "further reason for

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[308] *Goodwin*, above n 280 (**ABoA 2/16**) and the cases cited in that footnote. See also *R v National Post* [2010] 1 SCR 477 (SC) (**ABoA 2/17**) (holding that Charter speech values infuse the application of source privilege).
[309] *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033 (HL), at para 38 (**ABoA 2/19**).
[310] *Police v Campbell* [2010] 1 NZLR 483 (HC), para 92 (**ABoA 1/3**).

restraint and careful scrutiny" of search warrants on journalists' premises.[311]

3.27. In this case we are dealing with a journalist and a Police attempt to uncover the identity of one of his confidential informants. That this is the case is examined in more detail below in reference to the terms of s 68. However, despite a lack of clarity from the respondents' pleadings, it is not understood that this is seriously in dispute.

3.28. That issues of source protection are squarely in play in this case is also emphasised by the evidence before the Court of the likely extent of the chill effect because of this search.[312]

Is the infringement demonstrably justifiable?

3.29. The issue, then, is whether the various actions of the Police and the District Court were "reasonable limits" that can be "demonstrably justified in a free and democratic society". This is often referred to as "proportionality."

3.30. The Supreme Court has set out the requirements of proportionality in *R v Hansen*,[313] which in turn essentially applies the Canadian Supreme Court approach in *R v Oakes*:[314]

> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> (b) (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

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[311] *TVNZ v Attorney-General,* above n 307, 646 (**ABoA 1/1**).
[312] Ellis (**KEB 1/5**), Hersh (**KEB 1/4**), Fisher (**KEB 1/3**), and the second affidavit of David James Fisher affirmed on 18 June 2015 ("**Fisher2**") (**KEB 1/8**) generally; Hager at 97-98 and 162 (**KEB 1/1/25 and 40**); and Hager2 at 2-15 (**KEB 1/7/137-140**).
[313] [2007] 3 NZLR 1, at para 104 per Tipping J.
[314] [1986] 1 SCR 103.

> (iii) is the limit in due proportion to the importance of the objective?

3.31. *Butler and Butler* suggest that the appropriate framework for assessing proportionality is to ascertain: [315]

> (1) the significance of the values underlying the Bill of Rights in the particular case or context;
>
> (2) the importance in the public interest of the intrusion on the particular Bill of Rights right;
>
> (3) the effectiveness of the intrusion in protecting the interests put forward to justify those limits sought to be placed on the Bill of Rights right in the particular case; and
>
> (4) the proportionality of the intrusion.

3.32. In summary, proportionality demands that the court assess both sides of the balance: the significance of the right in the particular context (and correspondingly the harm done to the right by upholding the limitation); as against the significance of the limitation: its importance, its relevance, its likely effectiveness, whether it is properly tailored, and whether other less intrusive options are available.

Summary of proportionality argument

3.33. The above jurisprudence results in proportionality analyses in Court that are sometimes lengthy and can lack a sense of practical connection to the daily job of the administrative decision maker.[316] Indeed, the factors going to proportionality are unpacked at some length in a later section of these submissions. However, the applicant does not want to be taken as suggesting that the search in this case would only have been prevented by

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[315] *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis 2005), Ch 6 and p589: this is closely derived from the approach of Richardson J in *Noort v MOT* [1992] 3 NZLR 260, 283-4 (CA).

[316] See, for example, the lengthy and nuanced analysis of Tugendhat J in *Mersey Care NHS Trust v Ackroyd* [2006] EWHC 107 (QB) (**ABoA 2/20**), a source protection case. See the warnings of the New Zealand Court of Appeal (*R v Grayson and Taylor*, 409 (**ABoA 1/7**)) and High Court (*TVNZ v West* [2011] 3 NZLR 825, paras 97, 103-105 (**ABoA 1/5**)) that the Bill of Rights must be applied in a realistic way.

the Police or District Court engaging in such a careful or detailed analysis. It is his submission that if the Police had had even a cursory regard to the relevant case law in this area, there should have been no question of this search going ahead.

3.34. That conclusion applies whatever attitude this Court takes to another vexed question in the law of proportionality: whether the Court's proper role in cases like this is to determine whether or not the decision was substantively proportionate,[317] or merely to review the methodology followed by the decision-maker to ensure that the proper questions were asked.[318] The Police's consideration of proportionality here was cursory or non-existent. Whether their obligation was methodological (to conduct a reasonable assessment of the factors in play) or substantive (not to act disproportionately), the Police manifestly failed.

3.35. The applicant's case is that the value of the free expression interest in his case is very weighty given the significance of his journalism, and the attack on the right is a severe one because of the obvious damage it was likely to do to the flow of information from confidential sources.

3.36. In addition, the type of search that was proposed was highly invasive. The people whose privacy were being invaded were not even suspects of any offending. They were an investigative journalist and his daughter, and the search encompassed drawers in her bedroom – private space the Court of Appeal has held requires the greatest protection.[319]

3.37. On the other side of the balance, it is accepted that searching for evidence of a crime is a legitimate objective. The crime was a moderately serious

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[317] This is the position in the UK: see *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2007] 1 AC 100; and see *TVNZ v Freeman* HC Wellington, CIV 2011-485-840, Simon France J, 26 October 2011, at para 42 (**ABoA 1/6**).

[318] See the UK Court of Appeal in the *Denbigh High* case *The Queen on the application of SB v Headteacher and Governors of Denbigh High Schoo*l [2005] 1 WLR 3372 (overturned); and perhaps the judgment of Asher J in *TVNZ v West* at, for example, para 103 (**ABoA 1/5**).

[319] *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA) (**ABoA 1/7**).

one.[320] However, neither was it very serious offending. There was no suggestion of any ongoing harm. The chances of finding useful evidence were very slim. Many alternative avenues of investigation remained open to the Police.

3.38. For these reasons, the decision to apply for a warrant, its scope, the grant, and execution of the warrant, were all disproportionate and therefore a breach of the Bill of Rights.

Section 68

Introduction

3.39. Section 68 of the Evidence Act 2006 creates what Parliament has described as a "privilege" for journalists.[321]

3.40. In full, that section states:

> **Protection of journalists' sources**
>
> (1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.
>
> (2) A Judge of the High Court may order that subsection (1) is not to apply if satisfied by a party to a civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs—
>
> (a) any likely adverse effect of the disclosure on the informant or any other person; and
>
> (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

[320] It is not claimed that the crime was of a trivial or truly minor nature as envisaged by the Court of Appeal in *TVNZ v Attorney-General* [1995] 2 NZLR 641 (**ABoA 1/1**).
[321] SSA, s 136, "The following privileges are recognised… (i) the rights conferred on a journalist under s 68 of the Evidence Act 2006 to protect certain sources."

> (3) The Judge may make the order subject to any terms and conditions that the Judge thinks appropriate.
>
> (4) This section does not affect the power or authority of the House of Representatives.
>
> (5) In this section,—
>
> **informant** means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium
>
> **journalist** means a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium
>
> **news medium** means a medium for the dissemination to the public or a section of the public of news and observations on news
>
> **public interest in the disclosure of evidence** includes, in a criminal proceeding, the defendant's right to present an effective defence.

Section 68 applies to Mr Hager's source for Dirty Politics

3.41. It is submitted that this section plainly applies to Mr Hager and his source for *Dirty Politics*.

3.42. First, Mr Hager's works, his books and articles, are news media within the meaning in that section, in that they were mediums for the dissemination to the public of news and observations on news.[322]

3.43. Secondly, Mr Hager is a journalist within the meaning in that section. Mr Hager is a person who is given information in the course of his work by informants in the expectation that they may be published in a news medium – his books and articles.[323]

3.44. Thirdly, Mr Hager's source for *Dirty Politics* is an informant within the meaning in that section. The Source gave information to a journalist,

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[322] Hager at 4-54, 61, and 67-68 (**KEB 1/1/2-18**); Edwards generally (**KEB 1/5**); Hersh at 39-41 (**KEB 1/4/88-89**); and *Dirty Politics*. This is implicitly accepted by the respondents' pleadings ASoC/ASoD at 1, and ASoC/ASoD at 22-24.

[323] ASoC/ASoD at 1; and Hager at 4-54 (**KEB 1/1/1-15**).

Mr Hager.[324] This was done in the normal course of Mr Hager's work.[325] The Source understood that Mr Hager would use and may publish that information in a news medium, in particular including in *Dirty Politics*.[326]

3.45. It is noted that the Privacy Commissioner has ruled that *Dirty Politics* is protected under the news medium exception in s 2(1)(b)(xiii) of the Privacy Act 1996.[327]

3.46. In relation to s 68, in *Slater v Blomfield*, Asher J defined news as "providing new information to the public about recent events of interest to the public" if it is done "for the purpose of disseminating news".[328] He emphasised that it was not restricted to mainstream journalists, or any particular format, or something regulated by an ethics complaints body. It could include a blog. It could include something published less regularly than a substantial corporate news organisation.[329]

3.47. Lastly, Mr Hager promised not to disclose his source's identity.[330]

Section 68 applies to many other of Mr Hager's sources

3.48. Mr Hager has made use of many other confidential informants in his past work.[331] Mr Hager continues to make use of confidential informants for his current and future work.[332] These are people who were providing information on the understanding that it may be published in a news medium,[333] and to whom Mr Hager had made promises to keep their identities secret.[334]

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[324] ASoC/ASoD at 30; Hager at 60, 63, and 67-68 (**KEB 1/1/16-18**).
[325] Hager at 56-60 (**KEB 1/1/15-16**).
[326] Hager at 60, and 65 (**KEB 1/1/16 and 17**).
[327] Exhibit BDE-1 at 180-184.
[328] [2014] 3 NZLR 835, paras 52, 54 (**ABoA 1/4**).
[329] Paras 48, 50, 51, 65.
[330] Hager at 63 (**KEB 1/1/17**).
[331] Hager at 10, 17, 18, 22, 28, 37-38, 41-46, 50, 52, 72 and 86 (**KEB 1/1/4-6, 8, 10-14, 19, and 22**).
[332] Hager at 54, 116-118, 120-121, 125, 133, 136-140, and 147-150, and 152 (**KEB 1/1/15, and 29-38**).
[333] Hager at 12, 17, 20, 28, 37, 53, 54, 72, 117, 121, 125 (**KEB 1/1/4-6, 8, 10, 14, 15, 19, and 29-31**).
[334] Hager at 10, 17, 22, 20, 28, 38, 53, 72, 117, 121, 125 (**KEB 1/1/4-6, 8, 10, 14, 19, and 29-31**).

Section 68 applies automatically

3.49. It is to be noted that the protection in this section arises automatically. It does not need to be invoked. When the required promise of confidentiality is made in circumstances covered by s 68, the legal consequences follow immediately: the journalist cannot be compelled in civil or criminal proceedings to produce documents identifying the Source.

Section 68 requires determination by a High Court judge

3.50. It is also to be noted that this presumptive protection cannot be overcome without an application to the High Court. This reflects the significance that Parliament attached to issues of source confidentiality.

The relevance of s 68 before conducting the search

3.51. On its face, s 68 does not prevent the Police from seeking a search warrant in relation to any premises. Section 68 privilege, as with any other issue of privilege, might arise incidentally in relation to any search. In general, one might expect to deal with such issues if and when they arise. The scheme of Part 4 Subpart 5 of the SSA provides mechanisms to do just that.

3.52. The difference in this case is the extent to which s 68 was so squarely engaged from the outset. Indeed, it is submitted that the search in this case was clearly inimical to s 68. The search of a journalist's property for documents revealing a confidential source strikes at the very heart of s 68. Inevitably, any material obtained from the search would need to be tested against the requirements of s 68.

3.53. The Law Commission envisaged s 68 being taken into account in the issue of a search warrant in appropriate cases. In the Report that led to the enactment of the Search and Surveillance Act 2012, the Commission considered confidential journalistic sources in its chapter on Privileged and Confidential Material.[335] Its recommendations in that regard were

[335] Law Commission *Search and Surveillance Powers*, Report 97, June 2007, Ch 12, at paras 12.137-12.148.

accepted. The Commission emphasised that the reasons for protecting confidential journalistic sources applied just as powerfully in relation to searches:[336]

> …we propose that the Evidence Act 2006 protection for material identifying journalistic sources should be available when enforcement powers are exercised. The underlying policy grounds justifying the presumption against disclosure in court proceedings (freedom of expression, including freedom of the press), apply equally in our view to the exercise of enforcement powers.

3.54. The Commission recommended that confidential source material be protected from search at the point at which it is identified as being potentially privileged, either by the enforcement officer or the search subject. This would prevent any search until an opportunity has been given to the journalist to claim protection.[337]

3.55. The Commission noted that s 68 is qualified. It is a presumption that can be overcome on a showing of the public policy factors it sets out.

3.56. The Commission regarded it as clear that those factors would need to be considered by the warrant-issuing officer, who may conduct the s 68 balance him- or herself and authorise the seizure of privileged material on terms considered appropriate, or else grant a more general warrant and leave it to the journalist to claim the privilege, in which case the search would have to be conducted in such a way that the privilege would be preserved for later determination:[338]

> The qualified nature of the protection should therefore be reflected in the enforcement power regime. First, where an enforcement agency seeks to search premises for confidential material identifying sources, and the agency can make a sufficient case on public policy grounds to satisfy the issuing officer that the presumption against disclosure should be overturned, the issuing officer could authorise the search and seizure of material on

[336] At para 12.142. The Commission specifically referred to s 68.
[337] At paras 12.143-12.144.
[338] At paras 12.146-12.148.

> approving of the warrant, subject to any terms and conditions the issuing officer thinks appropriate.
>
> Secondly, where the presumption against disclosure is not overturned on the issue of a warrant, the enforcement agency should be entitled to challenge any claim for protection made by a journalist on or following exercise of a law enforcement power, on the specified public policy grounds.

3.57. This would seem to require that the issuing judge be alerted to any likely claim of s 68 privilege, and provided with enough information about the relevant factors to decide what course to adopt, and what conditions might be appropriate.

3.58. Significantly, the Commission said that the Search and Surveillance Act regime was not intended to "constitute the sole regulation of the exercise of enforcement powers involving journalistic material. Search of the media have been recognised by the court as a special category." It cited *TVNZ v Attorney-General*.

Particular importance of s 68 in relation to this search

3.59. The search of Mr Hager's house was uniquely destructive of his s 68 privilege in that:

3.59.1. it was aimed solely at material that fell within the privilege;

3.59.2. the search was not targeted at a known document or objects, but was a general search of all of Mr Hager's papers for things that might constitute evidence;

3.59.3. the search therefore required a general search of Mr Hager's documents that would necessarily include documents falling within the privilege in relation to other of Mr Hager's sources;

3.59.4. the very act of examining material for relevance would necessarily destroy the privilege;

3.59.5. no conditions were attached to the warrant to protect the s 68 interests;

3.59.6. Mr Hager had no opportunity to challenge the validity of the warrant before this harm was done; and

3.59.7. it was always likely that there would be widespread coverage of the search in the media, sending a powerful signal to potential future sources.

3.60. In relation to point 2, it is worth noting the dicta of Fisher J in the HC in *TVNZ v Police*. His Honour said that searches which might affect confidential sources should be closely confined to specific objects: [339]

> There is a critical distinction between [searches for] film, tapes and photographs of public events on the one hand and records of private interviews and personal journalistic working materials on the other. The difference is confidentiality…
>
> Confidential interviews and working materials are a different kettle of fish. That distinction can be achieved only by defining in the warrant itself a limited range of things which may be searched for and taken.

3.61. In relation to point 4, over a hundred documents were seized by Police during the search. These were documents with names and contact details on their face. All of these documents were examined. All were described in the list of exhibits – which included descriptions of some of the names and contact details, and was then placed on the investigation file. Three of the documents were photographed and emailed off-site.

3.62. The necessary consequences of this search meant that it was going to infringe the s 68 privilege to some degree. This meant there was a need for s 68 considerations to be undertaken at an early stage and certainly before the search was executed. This is saying no more than that the Police needed to consider the consequences of their actions and how they might infringe the rights of Mr Hager and others.

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[339] *TVNZ v Police* [1995] 2 NZLR 541, 555 and 556 (HC) (**ABoA 1/2**).

The Police's blinkered view

3.63. In this case the Police took legal advice on the relevance of s 68. From the discovered documents it appears that all such consideration of s 68 related only to the Source and not to any of Mr Hager's other sources. It is also appears from the documents that legal advice was taken in a very short time frame. The Police evidence is that they decided to search on 29 September 2014, they received legal advice shortly before 1 pm on 30 September 2014, and the warrant was sent to the Manukau District Court at 4 pm the same day.

3.64. As a result of that legal advice they prepared to deal with a possible s 68 claim after the search. However, they did nothing to consider ahead of the search whether s 68 meant that a search was not justified.

3.65. This was wrong. It is possibly the most significant error made by the respondents. It was based on a blinkered view of Part 4 Subpart 5 of the SSA, without any considerations of the interests that s 68 is there to protect or the inevitable consequences of this particular search.

3.66. It cannot be correct that, in such circumstances, the SSA allows this issue to be deferred until after the search and after some damage has already been done to the privilege. The SSA does not authorise breaches of privilege. Its very purpose is to protect privilege and ensure that privilege claims can be considered by the Courts.

3.67. Further, the SSA and the Evidence Act must be interpreted and applied consistently with the right to freedom of expression in the Bill of Rights. As discussed below, this encompasses protection of journalists' confidential sources.

3.68. Consideration of s 68 would have formed part of a Bill of Rights proportionality exercise. As discussed above, the interests that underpin s 68 are a subset of the rights protected by s 14. The balancing exercise set out in s 68(2) is therefore a necessary aspect of any s 14 analysis.

3.69. The same point was made by the House of Lords in *Ashcroft*. Their Lordships were comparing the requirements of art 10, freedom of expression, with s 10 of the Contempt of Court Act 1981 (UK) – a rough equivalent of the non-compellability protection in s 68. Their Lordships concluded that both required the same stringent scrutiny of "any request… which will result in the court interfering with freedom of expression including ordering the disclosure of journalists' sources".[340]

Section 68 application likely to be refused

3.70. The applicant does not believe that he needs to prove in this case that an application under s 68 to force him to disclose his source would have failed on the merits. However, there must be a very powerful likelihood that such an application would not have succeeded.

3.71. That can be readily demonstrated on the basis of the approach laid down in the leading case of *Police v Campbell*. In that case, Police applied to the High Court to require journalists at Campbell Live to disclose the identity of the person they interviewed who claimed to be one of the burglars of the Army medals stolen from the Army installation at Waiouru.

3.72. Randerson J held that s 68 contains a presumptive right to protect sources. The assessment is an evaluative judgment of fact and degree, and ultimately a discretion. There is no special standard of proof, but because of the right to freedom of expression, it should not be lightly departed from. The two limbs of s 68 needed to be weighed against each other.

3.73. Ultimately, he suggested that the balance was in favour of the Police in that case.

3.74. However, the outcome in *Campbell* is readily distinguishable from the present case:

3.74.1. there is a very strong public interest in the particular journalism at the heart of this case whereas *Campbell* concerned a rather self-

[340] At para 49 per Lord Woolf CJ.

serving medal thief who didn't have much of public interest to say except that he was sorry;

3.74.2. this case arises in the context of investigative journalism – not a mere interview with criminal; Mr Hager was really performing a watchdog function; Campbell Live was not;

3.74.3. in Mr Hager's case, there was a powerful public interest to be served by having a journalist put the unlawfully obtained material in context;

3.74.4. Mr Hager's source was motivated by public concern - Mr Hager had met with the Source to assure himself that the Source did not have a selfish ulterior motive;

3.74.5. Mr Hager's source was much more like other potential journalists' sources (compared with a medal thief) so other potential sources may well consider their circumstances analogous to Mr Hager's source, even if they have not hacked material but have, for example, removed it from work - as the judge said in *Campbell*, the usual case is a source disclosing wrongdoing by others not themselves;[341]

3.74.6. there was much less evidence that a search of Mr Hager's premises was likely to be fruitful, whereas in *Campbell*, the police investigation had uncovered lots of material pointing to the particular suspects;

3.74.7. what is more it was almost certain that the information sought in *Campbell* would yield very strong evidence against the culprits since the Police knew they had met with the journalists at the hotel, and Police knew that John Campbell had got the interviewee

[341] At para 112.

to reveal something only the robber would know - the raid on Mr Hager's house was much more speculative;

3.74.8. Mr Hager's source obtained information, not valuable medals - arguably a less serious crime by the Source of the information;

3.74.9. here, the s 68 issues arise through a search not a court application;

3.74.10. in this way Police adopted process that may have short-circuited journalist's ability to claim under s 68, and the message sent to other sources is that police can raid journalists' computer and files, not merely that Police can make application to court to require disclosure of a source;

3.74.11. Mr Hager relies on his reputation for protecting sources to do his work much more than John Campbell did - Mr Hager's work very frequently turns on obtaining confidential material and having sources trust him;

3.74.12. no doubt John Campbell uses significant confidential sources occasionally, but his entire work product does not turn on it; and

3.74.13. it is much, more likely that Mr Hager could reasonably believe he could promise to protect confidentiality and have that respected by the courts (cf promise to self-confessed medal thief).

3.75. In summary, s 68 applies very differently in this case than it did in *Campbell*. The crime is less serious, and the evidential foundation for the search much more flimsy. Other avenues were open to the Police.

3.76. On the other side of the equation, the information is of much greater value to the public. The chilling effect is likely to be more powerful, which may seriously affect the flow of information to the public as well as Mr Hager's ability to fulfil his role as an investigative journalist.

TVNZ v Attorney-General

Introduction

3.77. In *TVNZ v Attorney-General*,[342] the Court of Appeal considered the legality of the issue and execution of a search warrant at the premises of Television New Zealand.

3.78. In its decision, the Court set out some guidelines for the grant and execution of search warrants affecting the media. The applicant says that these created common law obligations which the Police failed to follow in this case. The dicta in that case also assists in identifying relevant factors for the ss 14 and 21 balancing that the Police and the Court needed to undertake.

3.79. The warrant covered footage shot during a protest. The Police sought it for the purposes of gathering evidence for charges of disorderly behaviour or assault, and identifying the perpetrators. The warrant did not raise source confidentiality issues.

3.80. Even so, the Court recognised that searches concerning the media called for special consideration. "When media freedom may be seen to be involved, there is further reason for restrain and careful scrutiny," it held. Media freedoms, it said, were "an important adjunct" of the right to freedom of expression in the Bill of Rights Act.[343]

3.81. One of the guidelines set out by the Court of Appeal directly relates to the chill effect on confidential sources:[344]

> Only in exceptional circumstances where it is truly essential in the interests of justice should a warrant be granted or executed if there is a substantial risk that it will result in the "drying up" of confidential sources of information for the media.

[342] [1995] 2 NZLR 641 (**ABoA 1/1**).
[343] At p 646.
[344] At p 648.

3.82. Another guideline was:[345]

> As far as practicable, a warrant should not be granted or executed so as to impair the public dissemination of news.

3.83. The applicant's argument here is, it is submitted, obvious and compelling. The Court of Appeal's guidance about confidential sources was entirely overlooked in a situation when it most needed to be heeded.

Likely chill effect

3.84. The search of Mr Hager's house was clearly likely to create a significant risk of sources drying up. It concerned the country's most famous investigative journalist. It was at his house. It came at a time when his best-selling book was the talk of the country. Police themselves were braced for media interest.[346] If any case is ever going to raise a significant prospect of sources drying up, it is this one.

3.85. Mr Hager says he is worried that his other sources, present and future, will feel they will not be able to trust him:[347]

> If the Police search is judged to be lawful and the Police are permitted to search my computers and other seized materials - a continuation of the fishing trip that began in my house - then everyone I ask to help me on sensitive projects from that date forward will wonder if the Police will arrive again and their confidentiality will be breached. I am certain this would impact seriously on my ability to do my work and to play my role effectively.

3.86. He says he has already received anxious communications from past and present confidential sources worried that the raid might have compromised their confidentiality. That includes one person who is providing Mr Hager with information about Police actions.

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[345] At p 647-8.
[346] Submissions above, para 2.29.
[347] Hager at 162 (**KEB 1/1/40**).

3.87. Investigative journalist David Fisher has had similar experiences. He says that since the Police search,[348]

> I have already noticed some change in the attitude of the confidential informants I have been dealing with. Since that time, I have noticed potential confidential informants are concerned about the possibility of having their identities exposed.

3.88. Mr Fisher says that he uses confidential sources daily; they are a very important part of his work; it can take time to build up trust with them; the promise of confidentiality is very important to them; and they are conscious of the jeopardy they are in, knowing they may be subject to civil, criminal or employment processes and risk their careers. He concludes that the high profile of Mr Hager's case and the fact that most government sources are well-informed and live in Wellington means that if Police are permitted to access to Mr Hager's information, this would have a very significant chilling effect on the ability of Mr Hager and other journalists, including himself, to receive information from potential future confidential informants.[349]

3.89. Pulitzer Prize-winning journalist Seymour Hersh also gives evidence about the chilling effect of the search on Mr Hager:[350]

> It seems obvious to me that this will have an enormous detrimental effect on Mr Hager's ability to receive confidential information and on the ability of other New Zealand journalists to do likewise.
>
> …the confidential informants I deal with are socially engaged, intelligent people. They could be expected to be aware of what happens in a case like this. Given the nature of Mr Hager's work, which is in a similar field to my own, I would expect the same to be true of the type of confidential informants he uses.
>
> In my view, the people who are considering whether or not to be confidential informants to the news media in the future will know and

[348] Fisher at 42 (**KEB 1/3/70**).
[349] Fisher at 12, 13, 20, 21, 25, 27, 28, 33, and 37-39 (**KEB 1/3/65-70**).
[350] Hersh at 34, 36, 37, and generally (**KEB 1/4/87-88**).

> consider the outcome of this case. If the outcome is that it is lawful for the New Zealand Police to act in this way, then that will inevitably deter many people from being confidential informants.

3.90. Academic and former editor Dr Gavin Ellis gives evidence that the very act of the Police searching Mr Hager's house, and the expectation that the Police will access his computers, documents and notebooks, will have three chilling effects: it will[351]

- act as a disincentive to potential sources because the journalist's solemn undertaking to maintain confidentiality is nullified by actions beyond the journalist's control;
- force journalists to adopt extraordinary time-consuming clandestine methods to protect sources' identities, or limit their dealings with 'whistle-blowers'; and
- compromise Mr Hager's ability to practice as an investigative journalist and his capacity to build vital trust with his informants by sending a signal that he is unable to protect the identity of confidential sources.

3.91. Dr Ellis notes that "any police search would run the danger of unmasking confidential sources other than the one they are looking for."[352] He cites US evidence that "invasion of the reporter's ability to protect sources has led to sources 'drying up' and important information in the public interest suppressed."[353] He outlines the increasingly intricate, time-consuming and expensive steps that journalists are being forced to take to contact sources secretly and concludes that this leads to a reduction in "democratically significant journalism".[354] He regards this case as a "sea-change" that may deter reporting on politically embarrassing subjects.[355]

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[351] Ellis at 11 (**KEB 1/5/93**).
[352] Ellis at 26 (**KEB 1/5/97-98**).
[353] Ellis at 31 (**KEB 1/5/99-100**).
[354] Ellis at 38 (**KEB 1/5/102-103**).
[355] Ellis at 39 (**KEB 1/5/103**).

3.92. The only Police evidence challenging this is paragraph 66 of DI Lynch's affidavit. Mr Hager and Mr Fisher explain why DI Lynch's statement is based on a mistaken understanding of something Mr Hager said and a misunderstanding of the nature of investigative journalism.[356] The applicant has also written to the Crown and notified it that he does not accept that this paragraph from DI Lynch is admissible evidence. At the time of drafting these submissions, the Crown has yet to respond.

3.93. It does not take an expert to realise that this was always likely to be the case. The Police could not avoid looking at documents to see whether they contained names or contact details, and must have known that many of those documents would relate to other confidential sources. They were likely to have to seize material, and that was likely to be widely reported. Their own evidence is that they knew Mr Hager might assert journalistic privilege,[357] and they knew there was likely to be widespread media interest.[358] The Police should have foreseen a serious chilling effect.

Impairing dissemination of news

3.94. There is also uncontested evidence that the Police search will impede the business of news gathering. That comes in two forms. One is that already discussed: the danger to the business of getting important confidential sources to continue to trust journalists.

3.95. The other is the effect on Mr Hager personally of the loss of his computers, papers, USB sticks, dictaphone, cameras and other materials. His evidence is that this has hampered his ability to pursue his current projects:[359]

> On a practical level, the search has considerably disrupted my work. The seizing of both my main computers, which contain research materials, address lists, email archives and other resources, has been a major

[356] Fisher2 at 5-30 (**KEB 1/8/149-155**); and Hager2 at 2-15 (**KEB 1/7/137-140**).
[357] Beal at 37 (**KEB 2/11/199**).
[358] Submissions above at para 2.29.
[359] Hager at 153, 154 (**KEB 1/1/38**).

> inconvenience. Only some of the material was contained on a backup hard drive that was still accessible to me.
>
> Also my paper files were scrambled during the search so that I often cannot locate materials. In addition, many weeks of work time have been lost while I replaced equipment, re-established computer files, and then took the actions needed to protect my sources through the current court action.

Failure to mention in warrant

3.96. However, in their application for the search warrant, the Police make no mention of the probable impact the raid would have on the confidential sources of Mr Hager and other journalists, or the likely effect on the dissemination of the news.

3.97. Nor does the application mention the case of *TVNZ v Attorney-General*, or the principles it lays out.

Failure to consider chilling effect in application process

3.98. None of the documents provided under discovery reveal that the likely chilling effect was ever considered. It does not feature in the Police Policy documents concerning searches of the media, even though nearly 20 years have passed since the Court of Appeal's decision in *TVNZ v Attorney-General*.

3.99. The Police's explanation of their reasons for the search provided in response to Mr Hager's Official Information Act request contains no consideration of this factor.[360]

3.100. Nor is there any mention of the likely impairment of Mr Hager's ability to continue to do his job.

[360] PD 14/2222 (**KEB 4/29/2222**).

Failure to manage chill problem

3.101. In turn, this means that the Police made no suggestions in their application as to what conditions might be imposed to address the chill effect. At a minimum these should have provided that no search could be conducted if Mr Hager was not present and specifically asked whether any of the document in the house were subject to privilege.[361] If Mr Hager's daughter had not been there or had not called him, or if he had been unable to be reached by phone, then he would have had no opportunity to claim privilege.

Forced entry power

3.102. Instead, the application and the warrant contained a power to force entry if that was reasonable in the circumstances. The Police planned to exercise this as a last resort.[362] This may have fatally undermined the confidentiality of all the documents in Mr Hager's house.

3.103. In the High Court decision appealed against in *TVNZ v Attorney-General*, Fisher J was critical of the fact that the warrant contained a standard provision allowing forced entry.[363]

Conclusion

3.104. The likely chilling effect of this search was obvious and severe. The Court of Appeal has held that searches should not be conducted when sources are likely to dry up. The Police did not even consider it, or refer to it in their application for the warrant. The judge was not asked to consider anything beyond the application.[364]

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[361] See discussion on possible appropriate conditions at paras 3.168 to 3.175.
[362] Beal at 39 (**KEB 2/11/199-200**); and PD 11/2109 (**KEB 4/29/2109**).
[363] *TVNZ v Police* [1995] 2 NZLR 54 (HC) (**ABoA 1/2**); the Court of Appeal held that standard conditions would usually be appropriate, but did not comment on Fisher J's point about forced entry.
[364] See above n 183.

3.105. It is submitted that this factor alone is enough to render unlawful the decision to apply for a warrant, the application itself, and the grant of the warrant.

Proportionality

Introduction

3.106. The central task here is a straightforward one: considering whether any rights will be harmed by the proposed action, assessing how gravely they will be harmed, and ensuring there is a commensurate justification for any harm. In legal terms, this can be seen as an application of the *Oakes* and *Noort* tests set out above.[365]

3.107. This is the sort of exercise Police are required to perform all the time: certainly in relation to every search. It is complicated in the present case by the presence of free expression implications. However, it is made easier by the guidance that Parliament has provided in s 68 about the importance of source protection and relevant factors to be considered, and by the guidance the Court of Appeal has provided in *TVNZ v Attorney-General* about searches that affect confidential sources.

3.108. The applicant contends that by any measure, this search was not proportionate.

[365] Alternatively, it can be seen as taking the Bill of Rights into account as a mandatory relevant consideration: *TVNZ v West* [2011] 3 NZLR 825, para 86 (with reference to the Broadcasting Standards Authority) (**ABoA 1/5**). However, Asher J also cited the UK Supreme Court decision in *R v Governors of Denbigh High School* [2007] 1 AC 100 at para 31, which held that the *substantive outcome* must be proportionate.

Proportionality argument at a glance

VALUE OF RIGHT		**VALUE OF RESTRICTION**	
Rights in play	Freedom of expression and right to be free of unreasonable search/privacy	**Interest in play**	Detecting crime
Importance of rights	High	**Seriousness of crime**	Moderate
Chances of adverse effect on rights	Almost certain	**Chances of successfully detecting crime**	Very low
Impact of derogation of right	Evidence of serious chill of flow of important information; significant interference with expectations of privacy	**Chances of avoiding or deterring future harm**	Low
Conduct of journalist	Highly responsible	**Was leaker maleficent?**	No
Purpose of the leak	Public interest	**Was leaker inaccurate?**	No
Effect on third parties	High	**Less restrictive alternatives all tried and failed?**	No
Was subject of search accused of crime?	No	**Less restrictive search methods unavailable?**	No
ULTIMATE SOCIALCOST OF RIGHTS IMPAIRED	Very high	**ULTIMATE SOCIAL VALUE OF RESTRICTION**	Low

The significance of the right to free speech in the context of this case

3.109. It is difficult to imagine speech that is more central to the guarantee of freedom of expression than the works of Nicky Hager.

3.110. There is a vast literature on the value of freedom of expression.[366] The Courts routinely accept that free speech is generally fundamental to democracy. They accept that some speech has more value than other speech, and that limiting such speech requires greater justification.[367] Speech is to be valued according to how much fulfils the rationales for the speech guarantee, and in particular, the workings of democracy, the search for truth, and the fostering of individual fulfilment and development.[368]

3.111. It cannot be doubted that Mr Hager's writings, including *Dirty Politics,* fall at the core of all these rationales. The subject matter of Mr Hager's investigations is serious political and social issues; he seeks to uncover important truths that would otherwise remain hidden; his research is meticulous; and his work has had great impact. His future work is likely to be just as important. This is speech that has the highest benefit to society.[369]

3.112. *Dirty Politics* is a prime example of it. It revealed clandestine political conduct that was unethical and perhaps criminal. One of its central allegations has been vindicated by an inquiry by the Inspector-General of Security and Intelligence. It dominated the public debate in the lead-up to the last election. Dr Bryce Edwards' affidavit sets out its enormous political significance and impact.[370]

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[366] See the summary in Claudia Geiringer and Steven Price, "Moving from Self-Justification to Demonstrable Justification — the Bill of Rights and the Broadcasting Standards Authority" published in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis NZ Limited 2008), 320-323 (**ABoA 2/29**).
[367] For example, *TVNZ v West*, at paras 99, 103, (**ABoA 1/5**) citing Baroness Hale in *Campbell v MGN Ltd* [2004] 2 AC 457; *Hosking v Runting* [2005] 1 NZLR 1 (CA), per Tipping J at para 235.
[368] *Hosking v Runting* at paras 229-237 (per Tipping J), at para 178 (Keith J).
[369] Hersh at 39, 40 (**KEB 1/4/88-89**).
[370] Edwards at 17 (**KEB 1/2/48**) and generally.

3.113. As a result, a particularly compelling justification is required before Mr Hager's speech can be restricted. As Tipping J put it in *Hosking v Runting*:[371]

> This is a manifestation of proportionality. The more value to society the information imparted or the type of expression in question may possess, the heavier will be the task of showing that the limitation is reasonable and justified.

The significance of s 21

3.114. The right not to be subject to unreasonable search is also severely impaired in this case. The privacy interests at stake were very high.

3.115. The search was at a domestic residence, was carried out early in the morning, and involved delving through the personal belongings and confidential papers and of Mr Hager has his daughter, including bedroom drawers, private correspondence, and private photograph albums. It took 10 hours and involved six Police staff.[372] In *R v Williams*, the Court of Appeal observed:[373]

> In terms of searches of property, residential property will have the highest expectation of privacy attached to it … The public areas will invoke a lesser expectation of privacy than the private areas of the house. Inaccessible areas such as drawers and cupboards (particularly ones where one would expect to find private correspondence or intimate clothing) would count as private areas.

3.116. The Police seized, and seek to search, Mr Hager's home computers and the personal laptop of his daughter, and a very large amount of other digitally stored material. In *Dotcom v Attorney-General*, the majority of the Supreme Court noted that:[374]

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[371] At para 235; see also *Mersey Care NHS Trust v Ackroyd* [2006] EWHC 107 (QB), paras 105-119, 193 (**ABoA 2/20**).

[372] [redacted] at 3, 15, 16, and 30 (**KEB 1/10A/190B-190C, and 190F**); Beal at 39 (**KEB 2/11/199-200**), Donovan at 17 (**KEB 2/13/222**).

[373] *R v Williams* [2007] 3 NZLR 207, at para 113 (**ABoA 1/9**).

[374] *Dotcom v Attorney-General* [2014] NZSC 199, at para [119] per McGrath, William Young, Glazebrook and Arnold JJ (**ABoA 1/10**).

> [S]earches of computers (including smart phones) raise special privacy concerns, because of the nature and extent of information that they hold, and which searchers must examine, if a search is to be effective. This may include information that users believe has been deleted from their files or information which they may be unaware was ever created. The potential for invasion of privacy in searches of computers is high, particularly with searches of computers located in private homes, because information of a personal nature may be stored on them even if they are also used for business purposes. These are interests of the kind that s 21 of the Bill of Rights Act was intended to protect from unreasonable intrusion.

3.117. In the same vein, a majority of the Supreme Court of Canada observed in 2010 that, "[i]t is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer".[375]

3.118. Not only did the search intrude into Mr Hager and his daughter's most private spaces, but it did so totally unnecessarily. The idea that documents revealing the identity of the source might, for example, have been in the bathroom, or hidden on his daughter's person, was not reasonable.

3.119. Without suggesting that this factor should be counted twice, it is also submitted that the fact that the search intruded into information in relation to confidential informants would also be relevant to a s 21 analysis. It is hard to think of a higher privacy interest, or something more clearly involving a reasonable expectation of privacy, than documents over which a person's occupation requires and expects them to maintain the utmost levels of secrecy.

3.120. The search also caused significant disruption to the applicant's ability to continue his work. This is exactly the sort of interruption that the Court of Appeal in *TVNZ v Attorney-General* cautioned against.

[375] *R v Morelli* [2010] 1 SCR 253, 263-264 (CSC), per McLachlin CJ and Binnie, Fish and Abella JJ.

3.121. The many breaches of privilege, as discussed above and below, are another factor suggesting that this was an unreasonable search in breach of s 21.

3.122. Lastly, it is submitted that the fact that the Police chose to covertly record the search was yet another example of unreasonable behaviour suggesting that this was an unreasonable search.

The conduct of the journalist

3.123. Where a journalist has a proven track record of undertaking responsible journalism in the public interest, revealing serious wrongdoing, and exercising care over which parts of the leaked information should be made public, it is not in the public interest that sources are discouraged from speaking to that journalist.[376]

3.124. Mr Hager's journalism is a model of responsibility. In his evidence, he explains the care he takes to protect sources,[377] satisfy himself that they are genuine,[378] and check facts, provide context, and weed out sensitive material that is not in the public interest.[379] Mr Fisher describes him as a "fine journalist".[380]

3.125. Where the journalist did not solicit the disclosure, or pay for the information, there will be less justification for ordering disclosure.[381] That is the case here.

3.126. There is another powerful consideration. The role of Mr Hager and other investigative journalists is not merely to act as a conduit for confidential sources. It is more to act as a curator. They assess their sources' bona fides; work out whether they are trustworthy, and whether they have ulterior motives. They assess the information. They check it. They work out what is important for the public to know. They conduct research. They provide

[376] *Ackroyd* at paras 174-182.
[377] Hager at 86-97 (**KEB 1/1/22-25**).
[378] Hager at 90-91 (**KEB 1/1/23**).
[379] Hager at 70-73; and 99-102 (**KEB 1/1/18-18, and 25-26**).
[380] Fisher at 79 (**KEB 1/3/78**).
[381] *Mersey Care NHS Trust v Ackroyd* [2006] EWHC 107 (QB), paras 141-157 (**ABoA 2/20**).

context. They discard material that is private and sensitive. This makes their role exceptionally valuable to the public.

3.127. Mr Fisher gives evidence that people who hack others' information are not going to stop doing it just because a journalist's house gets raided. What they will stop doing is sharing the information with journalists. They will simply dump it on Wikileaks or Twitter. Alternatively, they may disclose it to a journalist anonymously, severely hampering the journalist's ability to assess the source's motivation and the authenticity and context of the disclosed documents. That will rob society of the curating role of the journalist, which would be a sad loss.[382]

3.128. It is submitted that this inflates the value of the speech at issue here. Society bears a heavier price when Mr Hager's reporting is restricted.

The degree of intrusion into the right

3.129. The ECHR has recognised that a search warrant seeking the identity of a source is a very great inroad into the right to protect sources. It has repeatedly held that the grant of search warrants calls for particular care and scrutiny as they authorise access to all the journalists' papers, and effectively prevent any challenge to the access to the material:[383]

> [A] search conducted with a view to identifying a journalist's source is a more drastic measure than an order to divulge the source's identity…. Investigators who raid a journalist's workplace or home unannounced and are armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist.

3.130. The search of Mr Hager's house attacked the very foundation of his ability to produce his journalism. It was not restricted to specific items, such as film of a certain protest. It permitted the Police to rummage through all of his documents. It undermined his ability to make promises to his sources.

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[382] Fisher at 46-56 (**KEB 1/3/71-73**); see also Hersh at 38 (**KEB 1/4/88**).
[383] *Nagla v Latvia* (App. no. 73469/10), 16 October 2013, para 95 (ECHR) (**ABoA 2/21**).

It has affected, and is likely to continue to affect, sources' willingness to trust him with information that it is important for the public to know. That in turn affects the interest of the public in receiving this information.

3.131. What's more, it affects other journalists too. Their sources and potential sources, if they become aware of this search, are likely to have concerns that their identities may be discovered in another Police search – whether the search is for them or for someone else.[384]

3.132. The Courts have often recognised that where court-ordered disclosure would be likely to chill particular sources, or sources in general, the harm done to freedom of expression is particularly high.[385]

3.133. These effects are particularly likely to be pronounced because the search affects the country's highest profile investigative journalist, at a time when the eyes of the country were on him.

3.134. Thus the search is likely (and was always likely) to have a severe effect on journalists' ability to protect their sources and hence, the flow of important information to the public, and the Bill of Rights guarantee of freedom of expression.

3.135. This, it is submitted, underscores the need for an exceptionally powerful justification for the actions taken in this case.

The other side of the proportionality equation

3.136. It is submitted that the social benefits of the search, in terms of the search's ability to advance some important public aim, were very limited and were manifestly insufficient to outweigh the powerful harm to the applicant's rights as detailed above.

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[384] See discussion on chill effect above beginning at para 3.84.

[385] *Police v Campbell* at para 101 (HC) (**ABoA 1/3**); *Goodwin* at para 39 (ECHR) (**ABoA 2/16**); *TVNZ v Attorney General*, p 646 (CA) (**ABoA 1/1**); *Canadian Broadcasting Corporation v Lessard* [1991] 3 SCR 421, 452, (SCC) (**ABoA 2/18**) where McLachlin lists the six main ways in which a search of the media may impinge on the press, including the chill effect.

The purpose of the limiting measure

3.137. It is accepted that the discovery of a criminal wrongdoer is a legitimate objective, and the search was at least potentially relevant to this objective.[386]

3.138. However, unlawful access to a computer system is not the most serious offence in the criminal calendar. Former senior Police officer Wayne Stringer has given evidence that, in his experience, the files of many very serious offences are closed without conducting a search, even though there was a suspect and one possible line of inquiry would have been to apply for a search warrant.[387]

3.139. Moreover, there is another factor that sets this case apart from the usual run of search warrants. It is relevant to the importance of the objective of detecting crime. It is the fact that journalists' sources will almost always be behaving with some degree of unlawfulness. Leaking will almost invariably involve a breach of confidence.[388] It will often involve some sort of crime. The ECHR recognises this, holding: [389]

> The right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution.

3.140. In other words, the value of the social objective of detecting criminals is lower in cases like the present. There is less of a public interest in pursuing people who are responsible for bringing publicly significant information to

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[386] *Police v Campbell* at paras 97-98 (HC) (**ABoA 1/3**); in *Senior v Holdsworth* [1975] 2 WLR 897 (EWCA), Lord Denning MR said the test was whether it was "likely that the film will have a direct and important place in the determination of the issues before the court"; this was approved in *TVNZ v Attorney-General* [1995] 2 NZLR 641, 648 (CA) (**ABoA 1/1**).

[387] Stringer para 13 (**KEB 1/9/160**).

[388] Hersh at 25 (**KEB 1/4/85-86**); Fisher at 28 (**KEB 1/3/68**); Hager2 at 5 (**KEB 1/7/137-138**). The authors of *Borrie and Lowe* The *Law of Contempt* (Lexis Nexis Butterworths, 4ed 2010) say at para 15.16: "since source disclosure cases will normally involve a breach of confidence at the least, to use such unlawful conduct as a reason for refusing disclosure would be likely to lead to orders being routinely made where there has been an unlawful communication of confidential information, thus emasculating the protection of section 10, and in turn lowering the standard of necessity set by Strasburg" (**ABoA 2/27**).

[389] *Nagla v Latvia* (App. no. 73469/10), 16 October 2013, para 97 (ECHR) (**ABoA 2/21**).

light. As David Fisher points out in his evidence, the Police themselves are usually reluctant to prosecute someone who comes forward with valuable information, even if they obtained it in the course of committing a crime.[390]

Purpose of the leak

3.141. The applicant accepts that there will sometimes be significant value in detecting those responsible for leaks. As Justice Sedley has held, that is particularly likely to be the case where the leaker's purpose is maleficent, or where the evidence suggests that the leaker doctored the leaked materials:[391]

> What matters critically, at least in the present situation, is the source's evident purpose. It was on any view a maleficent one, calculated to do harm whether for profit or for spite…The public interest in protecting the source of such a leak is in my judgment not sufficient to withstand the countervailing public interest in letting Interbrew seek justice in the courts against the source.

3.142. The present case is very different. The Source was motivated by public interest considerations.[392]

The degree of harm to be averted or punished

3.143. The applicant accepts that the amount of damage done by the leak and the degree of harm that can be averted by identifying the leaker are relevant factors.[393]

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[390] Fisher2 at 28-29 (**KEB 1/8/154**).

[391] *Interbrew v. Financial Times et al.* [2002] EWCA Civ 274 at para 55. The Court of Appeal ordered source disclosure, but was found to be in breach of Article 10 right to freedom of expression by the ECHR because the evidence of the source's malicious motivation and doctoring of the document was not determinative and the evidence of the internal inquiries aimed at finding the leak was not fleshed out. See also *Mersey Care NHS Trust v Ackroyd* [2006] EWHC 107 (QB), para 193 (**ABoA 2/20**).

[392] Hager at 90-91 (**KEB 1/1/23**); Hager2 at 22-23 (**KEB 1/7/141-142**).

[393] *X v Morgan Grampian* [1991] 1 AC 1, 44, per Lord Bridge.

3.144. However, where an injunction has been obtained to prevent further distribution of leaked material, there is less reason to order source disclosure.[394]

3.145. On 5 September 2014 Mr Slater obtained an injunction against the publication of his material by "those persons who gained unauthorised access to the plaintiff's email or Facebook accounts and who took copies of any emails or messages".

3.146. Recall that on the same day, Whaledump/Rawshark announced on twitter that "By the time you read this, every device used in this operation will have been destroyed and disposed of along with all the decryption keys ... So long, Aotearoa!". There has been nothing further from him. There is no reason to suppose that he will release any more of Mr Slater's material.

3.147. The necessity for source disclosure may also be reduced if the victim of the leak has taken effective steps to protect themselves against repetition, for example, by increasing their security measures.[395]

3.148. Mr Slater has taken steps to improve his security since the hack.[396]

3.149. In short, there is little possibility of future harm. And as pointed out in *Borrie and Lowe: The Law of Contempt*:[397]

> Speculative suggestions that disclosure may prevent future rights violations or aid in the prevention of crime should not be considered enough.

The likelihood of finding useful evidence

3.150. There was never any likelihood that the Police would find useful evidence during this search. A range of factors should have made this obvious to Police:

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[394] *Goodwin v UK* (1996) BRHC 81, 27 March 1996, para 42 (ECHR) (**ABoA 2/16**).
[395] *Mersey Care NHS Trust v Ackroyd* [2006] EWHC 107 (QB), 189, 193 (**ABoA 2/20**).
[396] PD 12/2159; Boileau at 94 (**KEB 1/6/21-22**).
[397] (Lexis Nexis Butterworths, 4ed 2010) at para 15.15 (**ABoA 2/27**).

3.150.1. Mr Hager was a skilled and experienced journalist with a long record of protecting his confidential sources even when there were concerted attempts to discover them.

3.150.2. Mr Hager had publicly stated that he had returned the leaked material to his source. Mr Hager has a long track record of honesty.

3.150.3. Police themselves wrote that Mr Hager was "very surveillance aware" and might be expecting to be searched.[398]

3.150.4. Police knew that Mr Hager's source had shown himself to be very technically adept and good at hiding his trail online.[399]

3.150.5. There was little possibility of finding electronic fingerprints.

3.151. This point is explored further in the submissions dealing with the lack of reasonable grounds to believe evidence would be found at Mr Hager's house.[400]

Have all reasonable alternatives been exhausted?

3.152. Ordering a journalist to reveal a source cannot be justified unless all reasonable alternative means to obtain the information have been tried and been found to be unsuccessful.[401]

3.153. This reflects the principle that it cannot be proportionate or demonstrably justified to infringe someone's rights when the same objective may be able to be achieved with actions that do not infringe, or infringe less seriously.

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[398] PD 8/1518 (**KEB 4/29/1518**).
[399] Beal at 36, 41 (**KEB 2/11/199-200**).
[400] See paras 4.31 et seq.
[401] *Campbell* para 96 ("it will ordinarily be relevant to consider whether, in the circumstances of the case, other means are available to obtain the information sought"); *Lessard* above n385, at 445 (SCC); *John v Express Newspapers* [2000] 1 WLR 1931 (EWCA), Lord Woolf; *Financial Times v UK* (App. no. 821/03, 15 December 2009) at para 69 (ECHR) (Court should not have assumed without better evidence that the company's internal leak inquiry was sound, and that the leaked document was doctored).

3.154. In this case, it is clear that the Police had many other avenues open to attempt to discover the identity of Mr Hager's source, short of the extreme step of a raid on his house.[402] The evidence shows that the Police were in fact actively pursuing some of these avenues, and had not completed them by the time of the search. For example, Police had not even completed their forensic analysis of Mr Slater's computer. They had not completed their interview of Mr Slater's information technology consultant [redacted]. In particular, they had not even asked him for the identities of the people he said he and Mr Slater had turned to in order to solve difficult technical problems with his computer, people who may well have had the best opportunity to access the information.

3.155. There were other investigative avenues that were open, but had not even been attempted by the Police, even though they had thought of them. For example, on 30 September 2014, Det Rachelle Smith was assigned the task of contacting New Zealand ISPs to ask whether there were peaks in email data from the TOR network at the time of the hack. That may have been a promising inquiry. It need not have taken long. But it was not performed before the search.

3.156. More fundamentally, the Police had not even generated a list of the group of people close to Mr Slater with the technical skills to conduct the hack, as suggested by Rex Cottingham of the National Computer Crime Lab.[403]

3.157. They had not made an appeal to the public for information about the identity of Rawshark, as suggested by Ross Henderson.[404]

3.158. They had not interviewed other journalists identified by Police as having been contacted by Mr Hager's source.

3.159. Furthermore, in many cases where the Police had sought information, they were told that a production order would be required, or some other step

[402] See above from para 17
[403] PD 8/1491 (**KEB 4/29/1491**).
[404] PD 13/2184 (**KEB 4/29/2184**).

needed to be taken. They often did not take that step. For instance, they did not obtain production orders for material held by Trade Me, Air New Zealand, and Google; nor did they invoke the mutual legal assistance framework to seek information from Twitter relating to Whaledump.

3.160. Nor did Police take the obvious step of applying for production orders or remote access warrants for Mr Hager's telephone and email records. (Mr Hager does not concede that this would have been lawful or proportionate, but it cannot be doubted that it would have been less intrusive than a search of his home).

3.161. There were also other avenues of inquiry open to the Police that they should have thought of, but didn't. These steps have been identified as basic ones in evidence by Adam Boileau, a computer expert who has in the past been retained by the Police to teach them how to investigate such crimes. Again, these could have been conducted with no, or much less, impact on the applicant's right to protect his sources: see paragraph 1.8124 above.

3.162. Furthermore, Police have admitted that they continued to take steps in the investigation after the search, but have not disclosed any detail about them. Whatever those steps were, there is plainly an inference available that they could have been taken before the search. They are at the very least inconsistent with the evidence for the Police by DS Beal that:[405]

> I was aware that lines of enquiry to identify the hacker had either not provided material of evidential value or could not be completed for an extended period of time.

3.163. Similarly, they are inconsistent with the evidence by DI Lynch that:[406]

[405] Beal at 30 (**KEB 2/11/198**).
[406] Lynch at 32 (**KEB 2/12/211**).

> By 29 September 2014, some of our lines of inquiry had reached an end. Others were ongoing but were likely some months away from providing us with any information.

3.164. Police have not asserted that there was any urgency in relation to the search. There was then no pressing need to conduct it before these steps had been taken. The Police's evidence is merely that a search was the next logical step. Indeed, that had been the Police position since 1 September 2014, when they wrote in their Investigation Plan:

> Should there be no result from NC3/ECL examination of the Whaledump tweets or Slater's computer, a warrant at Hager's address is the next logical step in the investigation.

3.165. The fact that a long list of obvious and half-completed steps in the inquiry were still open means that the Police cannot plausibly argue that all reasonably available alternatives to a search had been exhausted. That being the case, it cannot be said that a search, and the limitation on Mr Hager's rights that it entailed, was reasonable and demonstrably justified.

Less invasive search

3.166. It is submitted that Police also failed to pursue less invasive alternatives in another way. They took no steps to try to manage the search warrant application and the search to protect Mr Hager's rights so far as they could be protected. There is no evidence that Police considered putting conditions on the search. They did not raise any with the judge.

3.167. There were plainly alternative ways that the warrant could have been structured that would have had less impact on the applicant's rights. (Again, the applicant does not accept that this would have made the warrant lawful, he merely points out that because less invasive alternatives were open, the more invasive path that was taken was disproportionate.)

3.168. One way this could have been achieved is by limiting the scope of the search. Fisher J has warned that searches of media premises should

ordinarily be for particular listed items, such as footage of a particular event that Police know has been created by the media. This has almost invariably been the practice. This is to guard against the possibility of confidential sources, even those who have nothing to do with the Police's interest, being jeopardised by an indiscriminate search.[407]

3.169. Instead, the warrant allows for the Police to examine every document and electronic device in Mr Hager's possession.

3.170. In addition, it allows Police to look for material pertaining to the "authoring" of *Dirty Politics*. This sweeps in a trove of documents that can have nothing to do with Rawshark. The unjustified width of the warrant is discussed in these submissions at paras 4.55 et seq.

3.171. A second alternative was the imposition of conditions to protect the privilege interests. In designing the provisions of the Search and Surveillance Bill dealing with journalists' privilege, the Law Commission said it did not intend the SSA to be the sole regulation of the exercise of enforcement powers against the media, and emphasised that additional conditions could be placed on search warrants.[408]

3.172. The applicant's contention is that this warrant could not have been lawfully issued in the circumstances of this case. He therefore does not concede that there are any conditions that would have made this warrant lawful. However, there are some conditions which could have made the breaches somewhat less egregious. There was therefore an obligation to impose such conditions if this warrant was to be issued at all.

3.173. One obvious condition would have been to require Police to ensure that Mr Hager was present before they searched. Instead, it allowed for a forced entry. Fisher J has suggested that this is entirely inappropriate in media

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[407] See above para 3.60.

[408] Law Commission *Search and Surveillance Powers*, Report 97, June 2007, Ch 12, at paras 12.146-12.148.

cases.[409] Police indicated that they would have exercised this right if necessary.[410]

3.174. A second condition would have been to ensure that Mr Hager had been given a chance to invoke privilege in advance of any examination of his material. [411]

3.175. A third condition would have been to ensure that, had Mr Hager asserted privilege, the seizure was conducted by an independent barrister who had an given appropriate undertaking not to disclose any information pending the resolution of privilege issues.

Other factors that show search was disproportionate

3.176. Two other factors demonstrate the disproportionality of the search.

3.177. First, there is the fact that Mr Hager was merely a witness, not a suspect. The burden on the Police to justify invasions of his rights in such cases must be higher.

3.178. Second, there were third party interests at stake. The Police do not need merely to justify the effects of the search on Mr Hager's rights and interests, they need to justify the effects on his other confidential sources, and beyond that, the effects on other investigative journalists and their sources, and still beyond that, the public's interest in receiving important information.

Conclusion

3.179. The decision to search cannot be proportionate. Mr Hager's speech is at the core of the expression protected by the Bill of Rights. Moreover, the intrusion into his right to be free of unreasonable search was severe. A moment's thought should have told Police that they could not conduct a

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[409] *TVNZ v Police* [1995] 2 NZLR 541, 557, 558 (HC) (**ABoA 1/2**).
[410] Beal at 39 (**KEB 2/11/199-200**).
[411] The Canadian Supreme Court has held that "adequate terms must be inserted in any warrant to protect the special position of the media, and to permit the media ample time and opportunity to point out why, on the facts, the warrant should be set aside." *R v National Post* [2010] 1 SCR 477 at para 84 (**ABoA 2/17**).

search, even if they were merely securing material to seize, without fatally undermining Mr Hager's confidential sources and sending an ominous signal to anyone who might want to trust important information to journalists. Police did not try to reduce these harms by attaching conditions to the warrant; indeed there is no evidence that they considered them at all.

3.180. There was no compelling reason to search. There was no urgency, and Police had many other possible lines of inquiry to pursue short of a raid on Mr Hager's house. In any event, they must have known they had little hope of finding useful evidence. Mr Hager has a long track record of protecting sources. He had returned the hacked material. The Police expected he may have been anticipating a search. The source was technically clever at hiding his tracks.

3.181. It is difficult to see why, among the many very serious offences they are called upon to investigate, Police chose this case to conduct a search of the house of a witness. There was no ongoing harm to the victim, who had improved his security, changed his ISP and obtained a court injunction against further publication by Rawshark. For his part, the evidence suggests Rawshark was not a hardened criminal: he had been motivated by public interest considerations, and had announced an end to his activities. There seemed little danger of repetition.

3.182. Accordingly the warrant, and the application for it, were not demonstrably justified and were unlawful.

IV. OTHER DEFICIENCIES IN THE WARRANT PROCESS

Failure to disclose relevant material/forthrightness

Introduction

4.1. Mr Hager challenges the legality of the warrant on the grounds that the warrant application failed to disclose relevant material.

4.2. The job of an applicant for a warrant is to provide all the information that may be relevant to the issuing officer's decision to issue the warrant.[412] The applicant officer must give the issuing officer the full picture.[413] It is important that the courts do not engage in "nit-picking exercises",[414] but certain minimum standards of candour are required.[415] The application should not materially mislead nor should it fail to disclose material facts.[416] It will always be a question of degree and judgment whether there has been an abuse of process and thus a miscarriage of justice.[417]

4.3. A number of material facts that were not disclosed in the application for the search warrant. Some of these omissions were central to the matters the issuing officer should have been considering. Some of these omissions had the potential to mislead the issuing officer. Separately or in combination these omissions amount to an abuse of process.

Section 68 considerations

4.4. The most glaring omission is any reference to s 68 considerations.

4.5. The applicant for the warrant knew that Mr Hager was a journalist, and that he might claim s 68 privilege. [418] The fact that Mr Hager was a

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[412] *R v Williams* [2007] 3 NZLR 261-262 (CA) at para 214 (**ABoA 1/9**) citing *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 (CA) at para 21 (**ABoA 1/11**), and *R v Butler* (Court of Appeal, CA 439/00, 10 April 2001) at para 31).
[413] Ibid citing *R v McColl* (1999) 17 CRNZ 136 (CA) (**ABoA 1/13**).
[414] *R v Kissling* [2009] 1 NZLR 641, 651 at para 36 (CA).
[415] *McColl* at para 34 citing *Solicitor-General v Schroder* (1996) 3 HRNZ 157, 161 (**ABoA 1/13**), and *R v Williams* (1990) 7 CRNZ 378, 383 (CA) (**ABoA 1/9**).
[416] Ibid.
[417] Ibid.
[418] Beal at 23 (**KEB 2/11/196-197**).

journalist is not mentioned in the search warrant application. Instead, he is described as a "political author".[419] There is no reference to s 68 in the application. The only reference to s 68 in the warrant is in a notice at the end which informs the person being served of all of the different kinds of privilege.[420]

4.6. DS Beal, who made the application for the warrant says that he "considered [he] had done what [he] needed to do by alerting the Judge to the fact that the information we were seeking related to the source of the material that formed the basis of Mr Hager's book".[421]

4.7. It is submitted that that was clearly inadequate. The likelihood of a claim of journalistic privilege was central to the issue of whether a warrant should have been issued. DS Beal was obliged to draw the issuing officer's attention to this issue. He should have alerted the issuing officer to the facts that Mr Hager is a journalist, the information that the Police sought was arguably covered by journalistic privilege, and the search was likely to require the Police to search through other documents that were covered by journalistic privilege. It is not good enough for DS Beal to have left these for the Judge to work out for herself based on her knowledge of current affairs.

4.8. The issuing officer could not have been expected to have ever dealt with an application of this kind before. It was therefore also incumbent on an applicant to draw the issuing officer's attention to the particular requirements that an application needed to meet in order to be issued in these circumstances. These would have included the requirements as set out by the courts in *TVNZ v Attorney-General*. These should have included the factors identified above that need to be considered before a warrant to search on a member of the news media is issued or executed.

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[419] PD 8/1461 (**KEB 4/29/1461**).
[420] PD 8/1476 (**KEB 4/29/1476**).
[421] Beal at 23 (**KEB 2/11/196-197**).

4.9. Having done that, DS Beal would have then needed to set out his basis for saying that this application met those requirements. As is addressed below, the application does not do this. If DS Beal expected the Judge to figure out for herself that there were s 68 issues in play, then, having failed to address the factors relevant to such an application, he ought to have also expected his application to have been rejected.

Suspect hiding his identity

4.10. The next most significant omissions is any reference to the measures that the suspect was known to have taken to mask his or her identity.

4.11. In the application, DS Beal states that he has reasonable grounds to believe that the search will find evidential material including "material comprising of communications with [the suspect]" and Mr Hager's emails.[422] DS Beal also asserts in relation to the unlawfully obtained material that he asserted would be in Mr Hager's possession that even if material has been returned to the Source, "there will be evidential material available to identify the hacker held by Mr Hager on electronic storage devices and/or paper form".[423] Of obvious material relevance to the issuing officer's consideration of whether DS Beal had reasonable grounds to believe that this material would contain evidence was the information that DS Beal had about the suspect's use of techniques to ensure he did not leave any forensic record of his or her identity.

4.12. The application states that, "[a] production order has been issued to Yahoo!, Google NZ and Twitter inc to establish any Internet protocol (IP) addresses linking back to [the suspect]".[424] All of those inquiries had proved fruitless because the suspect had used techniques to mask his or her identity.[425] However, this was not disclosed to the Judge.

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[422] PD 8/1462 (**KEB 4/29/1462**).
[423] PD 8/1471 (**KEB 4/29/1471**).
[424] PD 8/1470 (**KEB 4/29/1470**).
[425] Beal at 18-20 (**KEB 2/11/195-196**).

4.13. DS Beal states in his evidence that:[426]

> I was also aware from discussions with NC3 that a number of the enquiries they had made had shown that the alleged offender had shown technical ability had had (sic) used TOR and other methods to cloak their activity.

DS Beal was also aware that other journalists had been using TOR and Tails to communicate with the suspect.[427]

4.14. None of that information was disclosed in the application.

Investigation incomplete

4.15. The application is misleading as to the IP searches that had been conducted and omits important details about the avenues of investigation that still remained open to the Police.

4.16. As stated above, the application claimed that "[a] production order has been issued to Yahoo!, Google NZ and Twitter inc".[428] In fact, by the time of the warrant application the Police had received responses from Google, requiring a US court order,[429] and from Twitter, requiring a mutual assistance application.[430] However, the Police had not taken steps to seek a US court order or to make a mutual assistance application.

4.17. As identified above, one of the facts that an issuing officer needs to consider when determining an application to search a journalist for information related to a confidential informant is whether the Police had other means of obtaining the information.[431] The application did not directly address this issue. However, DS Beal does state in it that "[f]urther enquiries are underway to ascertain if these IP addresses is (sic) linked to the person responsible for illegally accessing SLATERS email and social media

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[426] Beal at 36 (**KEB 2/11/199**).
[427] Beal at 41 (**KEB 2/11/200**).
[428] PD 8/1470 (**KEB 4/29/1470**).
[429] Teo at 15 (**KEB 2/15/243-244**).
[430] PD 13/2138 (**KEB 4/29/2138**).
[431] See paras 3.152 to 3.165.

accounts".[432] As stated above, this suggests that alternative investigative avenues were yet to be fully explored. This should have militated against the granting of such a warrant.

4.18. DS Beal's position now is that "lines of enquiry to identify the hacker had either not provided material of evidential value or could not be completed for an extended period of time".[433] However, also as stated above, this does not accord with the documentary evidence provided by the Police, or with DS Beal's supplementary affidavit. As set out in paragraphs 1.53 to 1.81, that evidence shows that there were a raft of incomplete avenues of investigation at the time that DS Beal made his application.

4.19. Each of these incomplete investigations constituted an alternative avenue of investigation that could have revealed the identity of the suspect. Therefore, the existence of these avenues of investigation militated against the granting of the warrant and they should have been brought to the Judge's attention.

4.20. At the time of drafting these submissions, the Police are refusing to disclose the other steps that were taken after the search but which arguably could have been taken before the search. To the extent that such steps had been identified by that time, they too should have been set out in the application.

The fruitless investigations into Mr Hager

4.21. The application failed to set out the fruitless investigations that had already been conducted in relation to Mr Hager.

4.22. The application reveals that the Police had obtained Mr Hager's banking information.[434] DI Lynch says that the reason for this was:[435]

> to ascertain any travel movements that may have been able to be linked to the offender as well as assessing whether or not he was generating

[432] PD 8/1470 (**KEB 4/29/1470**).
[433] Beal at 30 (**KEB 2/11/198**).
[434] PD 8/1468-1469 (**KEB 4/29/1468-1469**).
[435] Lynch at 31 (**KEB 2/12/211**); and see also the clarification in Lynch2 at 19 (**KEB 2/19/263**).

> income from the proceeds of the book that could be considered for proceeds of crime action.

4.23. These reasons for that search were not disclosed to the Judge. Nor was the fact that the inquiry had proved fruitless disclosed. Nor was there any disclosure of the fruitless enquiries that had been made in relation to Mr Hager from: Trade Me, Air New Zealand, Jet Star, Spark, or Vodafone.

4.24. The fact of these fruitless investigations decreased the likelihood that evidence would be found during the search. For example, DS Beal suggests that Mr Hager may have been communicating with the suspect by cell phone.[436] It was therefore clearly relevant to tell the Judge about the fruitless efforts that the Police had gone to discover whether Mr Hager had a cell phone.

4.25. The fact of these searches would have also informed the Judge of the extent of the intrusion that had already occurred into Mr Hager's personal life. Given that Mr Hager was not accused of any crime, this was clearly a factor in determining whether this further search would have been unreasonable.

4.26. Arguably, it should also have been disclosed to the Judge that all of these inquiries had been made without a production order.

That Mr Hager was a suspect

4.27. The applicant omitted to mention that the Police had a collateral purpose for the search.

4.28. Mr Hager had himself been treated as a suspect up until the day on which the warrant was issued.[437] DI Lynch makes it clear that the only reason Mr Hager ceased to be a suspect was because of the Court of Appeal decision in *Dixon v R* [CA518/2013].[438] DI Lynch further points out that that

[436] PD 8/1471 (**KEB 4/29/1471**).
[437] PD 8/1516 (**KEB 4/29/1516**).
[438] Lynch at 29 (**KEB 2/12/210**).

case is under appeal and suggests that Mr Hager may yet be charged depending on the outcome of that appeal.[439]

4.29. It is not suggested that the primary purpose of the search was to gather evidence against Mr Hager. However, it is clear from the evidence that the Police had not given up hope that they might be able to charge Mr Hager in the future. Given that, the Police must have had in their minds that a search of Mr Hager's home might also provide them with evidence against Mr Hager for such a future charge.

4.30. It is submitted that this was a strong enough collateral purpose for this application that the DS Beal should have been open about it in the warrant application and open about the fact that the Police lacked the grounds to obtain a warrant for that purpose.[440]

Lack of reasonable grounds to believe

Introduction

4.31. In order to obtain the warrant, DS Beal was required to satisfy the Judge there were reasonable grounds to believe that the search would find evidential material.

4.32. "Reasonable grounds to believe" is the same standard that existed under the recently replaced s 198 of the Summary Proceedings Act 1957. Having "reasonable grounds to believe" is a higher standard to meet than "reasonable ground to suspect".[441] Belief means that there has to be an objective and credible basis for thinking that a search will turn up the item(s) named in the warrant.[442] A genuine belief based on general experience could be no more than suspicion.[443] Suspicion is not enough.[444]

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[439] Ibid.
[440] *Williams* at 38 (**ABoA 1/9**).
[441] *R v Williams* [2007] 3 NZLR 207, 261 (CA) per William Young and Glazebrook JJ (**ABoA 1/9**).
[442] Ibid citing *R v Laugalis* (1993) 10 CRNZ 350, 354-355 (**ABoA 1/15**).
[443] *R v Laugalis* (1993) 10 CRNZ 350, 355 (**ABoA 1/15**).
[444] Ibid citing *Hill v Attorney-General* (1990) 6 CRNZ 219, 222 (CA) per Richardson J.

4.33. The issue was summarised by the Court of Appeal in *R v HVT*:[445]

> … the courts must not lose sight of the fundamental principle that an application for a warrant under s 198 of the Summary Proceedings Act 1957 must be supported by evidence which affords the issuing officer with reasonable grounds to believe that evidence associated with the commission of an offence is at the stated location. Where the application provides such evidence with reasonable specificity, the material supplied is not misleading or selective and the power of search which is sought is not unduly wide, there will be little or no scope for a successful challenge.

The application

4.34. In his application, DS Beal asserted a reasonable belief that the following evidence would be found at Mr Hager's address: [446]

4.34.1. documents in either electronic and/or paper form relating to the authoring of the 'Dirty Politics' book released on Wednesday 13 August 2014;

4.34.2. documents in either electronic and/or paper form relating to the illegally accessed content obtained from Cameron Slater's email, Facebook and Twitter account;

4.34.3. communications with a person or persons who illegally accessed Cameron Slater's email, Facebook and Twitter content;

4.34.4. material held on the internet or other web based storage system relating to the e-mail account nicky@paradise.net.nz and/or any other such e-mail accounts identified as being accessed by Mr Hager; and

4.34.5. any documentation which will reveal the identity of Mr Hager's source whether held electronically and/or in paper form.

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[445] *R v HVT* [2008] NZCA 99 at para 9.

[446] PD 8/1462-1463 (**KEB 4/29/1462-1463**).

4.35. His stated grounds for that belief were: [447]

4.35.1. Mr Hager said in the media he had met with the Source personally, including a recent meeting;

4.35.2. Mr Hager said in the media that he was aware the material had been obtained illegally;

4.35.3. Mr Hager said in Dirty Politics that he had been in possession of a USB thumb drive containing the leaked material;

4.35.4. DS Beal accepted that Mr Hager said in the media that he had returned the thumb drive but DS Beal believed that Mr Hager was still in possession of material used to write the book "to show provenance should there be future litigation against him";

4.35.5. even if material has been returned to the Source, "there will be evidential material available to identify the hacker held by Mr Hager on electronic storage devices and/or paper form"; and

4.35.6. DS Beal accepted that Mr Hager did not reveal in the media the nature of his communications with his source, but believed "HAGER and the hacker have been communicating either by cellphone, landline and/or internet based application".

4.36. The applicant contends that the Police did not in fact have reasonable grounds to believe that the search would find evidential material. The Police lacked both reasonable grounds to believe that the material set out in paragraph 4.34 was evidence of the crime they were investigating and that it would be found in Mr Hager's home.

Not all categories of evidence are supported with reasons

4.37. The first point is that there is a disconnect between the reasons given and the claimed evidential material. The reasons relate to Mr Hager's

[447] PD 8/1470-1471 (**KEB 4/29/1470-1471**).

communications and to his being provided by the Source with the unlawfully obtained material. These only correspond with the categories 2 to 4 above.

4.38. No reason is given why the Police believed that documents relating to the authoring of the *Dirty Politics* would be evidence. Nor is it readily apparent why that would be the case. The end product had been published, and had been read by the Police.

4.39. This category is also extremely broad. It includes Mr Hager's contacts with his other confidential source for *Dirty Politics*. Mr Hager says there were about twenty such confidential sources.[448] It also includes his correspondence with his publisher, his editor, and his lawyers. There is no reason given to believe that any such communications will be evidence of the crime.

4.40. The type of evidential material set out in category 5 appears to be a catch all. It says little more than that DS Beal expected to find evidence in the form of evidence. To the extent that this is a reference to something not otherwise referred to in categories 2 to 4, no explanation has been provided as to why DS Beal had reasonable grounds to believe it were there.

4.41. Similarly, category 4 appears to be an unjustified extension of category 3. DS Beal has asserted reasons why he might find communications between Mr Hager and his source. He has given no explanation of why Mr Hager's communications with anyone else might constitute evidence.

4.42. Therefore the only categories of evidence for which reasonable grounds have even been asserted are category 2 and category 3.

Reasonable grounds in relation to the communications

4.43. The Police knew that the Source had shown a high degree of technical expertise.[449] In particular, he had used techniques in relation to other things

[448] Hager at 72 (**KEB 1/1/19**).
[449] Boileau at 103-117 (**KEB 1/6/130-133**).

he had done so as to leave no computer forensic trail of his identity.[450] They knew that the Source had been using these techniques to communicate with other journalists.[451] And they knew that all of the attempts to identify the Source from the forensic trails left in relation to all of his other online activities had been fruitless.[452]

4.44. As stated above, the Police failed to draw the Judge's attention to any of this which was a breach of their duty of candour. It also meant that they lacked reasonable grounds to believe that there would be evidential material at Mr Hager's house in relation to Mr Hager's communications with the source.[453]

4.45. Mr Boileau explains that the chance that a careful examination of Mr Hager's electronic equipment may reveal information that had been inadvertently left there and which would identify the Leaker was extremely small.[454] This view is based on information provided to Mr Boileau in Police Discovery and therefore was known to the Police. Mr Boileau also notes that there is reason to believe from the documents that the Police shared this view.[455]

4.46. No one involved in the investigation has responded to Mr Boileau's evidence on this point. There was a rebuttal filed by Brent Whale, a computer forensic consultant.[456] Mr Boileau explains fundamental errors in Mr Whale's evidence.[457] Mr Boileau also suggests that Mr Whale lacks the relevant expertise to be opining on these issues.[458]

4.47. In any case, Mr Whale's evidence does not go so far as to say that there were reasonable grounds to believe that forensic evidence would be

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[450] Boileau at 109-117 (**KEB 1/6/131-133**).
[451] Boileau at 109 and 112 (**KEB 1/6/131**); Beal 41 (**KEB 2/11/200**).
[452] See, for example, Beal at 14-20 (**KEB 2/11/194-196**); Boileau2 at 74-75 (**KEB 1/10/181**).
[453] Boileau at 121-126 (**KEB 1/6/134**).
[454] Boileau at 128-130 (**KEB 1/6/135**).
[455] Boileau at 126 (**KEB 1/6/134**).
[456] Whale at 33-37 (**KEB 2/16/255**).
[457] Boileau2 71-83 (**KEB 1/10/180-183**).
[458] Boileau2 81, and 84-86 (**KEB 1/10/183 and 184**).

obtained.[459] At its highest, Mr Whale's evidence says no more than that it was a possibility.[460]

4.48. It is accepted that it was a possibility. But a mere possibility was not enough.

Reasonable grounds in relation to "illegally accessed content"

4.49. It is not entirely clear what "documents …relating to the illegally accessed content" means. It would appear to include copies of the material provided to Mr Hager by his source, and documents discussing or analysing those documents.

4.50. No reasons is given as to why the latter would be evidence. It is therefore assumed that DS Beal was intending to refer to the former and to say that that would be evidence and would be at Mr Hager's house.

4.51. The first problem with this is one that DS Beal is open about in the body of the application. As he explains, Mr Hager had publically stated that he removed all of that material from his home. On that front, DS Beal essentially asserts that Mr Hager is not telling the truth. His reason is that Mr Hager might need the material to show provenance for future litigation.

4.52. This reasoning does not come close to the standards of an objective and credible basis. It is illogical – if Mr Hager needed the documents in the future he could have asked for them back. It is also disingenuous. By the time the application was made there had already been challenges to Mr Hager's credibility including by the Prime Minister.[461] In answer to those challenges, the Source had publically released the material.[462] DS Beal

[459] Boileau2 at 87 (**KEB 1/10/184**).
[460] Ibid.
[461] Boileau2 at 56 (**KEB 1/10/177**).
[462] Ibid.

knew this.[463] DS Beal also thought that Mr Hager was surveillance aware and would be expecting a search.[464]

4.53. By that time, the Police already had copies of that material. They had presumably analysed them already for evidence.[465] The Judge is not told this. Nor does the application clearly state why it is believed that these documents would contain evidence.

4.54. DI Lynch attempts a fuller explanation in his evidence. He states that:[466]

> …I was made aware that should Police be able to recover this flashdrive that there were forensic lines of enquiry that were available that had in the past allowed a source computer to be identified.
>
> I also understand that even when people are careful not to leave any electronic trail that can be followed by Police, it is easy to slip up….

4.55. DI Lynch does not say who made him aware of this or what their reasons for thinking this was. Nor has there been discovery of any documents which make this clear.

4.56. In any case, the reason given in DI Lynch's evidence is a perfect example of a belief based on general experience, and therefore no more than suspicion.

4.57. The claim that a forensic examination of Mr Hager's computer systems would reveal evidence also comes back to the same problems identified above in relation to examining any communications. Mr Boileau's evidence is that the chance of finding any evidence this was very small. In reply, Mr Whale's evidence, if it is accepted, still goes no higher than that evidence "could" be found, not that there were reasonable grounds to believe that it would be found.[467]

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[463] Ibid.
[464] PD 8/1520-1521 (**KEB 4/29/1520-1521**).
[465] Boileau at 120 (**KEB 1/6/133**).
[466] Lynch at 37-38 (**KEB 2/12/212**).
[467] Whale at 37 (**KEB 2/16/255**).

Too broad

Introduction

4.58. As the Court of Appeal explained in *Attorney-General v Dotcom*:[468]

> [24] The starting point is to recognise that issues relating to the validity of search warrants arise in the context of the exercise of statutory powers designed to achieve a balance between well-established rights of privacy, personal integrity, private property, the rule of law and law enforcement values….
>
> [26] The rights of the individual are protected from "unreasonable search or seizure" not only by the need for law enforcement agencies to comply with the requirements of the relevant statutory powers but also by the involvement of the Courts in considering issues relating to the validity of search warrants in challenges to the admissibility of evidence obtained under them and, on occasion, in judicial review proceedings.

4.59. In striking the balance referred to in this quote, the courts have naturally placed restrictions on the breadth of the scope of issued warrants. A warrant must not be "unduly wide" – see for example the quote from *R v HVT* above.[469] A warrant must be "as narrow as the circumstances allow".[470] And the law has "set its face against" general warrants, which are per se unlawful.[471]

4.60. The applicant contends that this warrant is unduly wide, if not actually a general warrant.

Not as narrow as the circumstances allowed

4.61. The warrant empowered the Police to search for the five categories of evidence as set out in the application and listed above at paragraph 4.34.

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[468] *Attorney-General v Dotcom* [2014] 2 NZLR 629 (CA) per White J for the Court.
[469] At para 4.33.
[470] *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 at para 41 (CA) (**ABoA 1/11**).
[471] *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 780 at para 38 (CA) (**ABoA 1/11**) recently cited with approval in *Attorney-General v Dotcom* [2014] NZSC 199 at 69 (SC) per McGrath, William Young, and Glazebrook and Arnold JJ (**ABoA 1/10**).

4.62. As set out above, no reasons were provided to justify the inclusion of category 1 (documents relating to the authoring of *Dirty Politics*). Nor were any reasons provided to justify the inclusions of categories 4 (all email accounts and web based storage systems) and 5 (anything that is evidence of the Source's identity) to the extent that they go beyond what was already provided for in categories 2 and 3.

4.63. Categories 1, 4, and 5 were not trivial additions. As discussed above, category 1 was extremely broad. Category 4 was broader still, encompassing all of Mr Hager's electronic communications and all of his cloud based storage. As is discussed below, category 5, understood in context, was broader still.

4.64. That the warrant authorised categories 1, 4, and 5, therefore means that it was unduly wide and not as narrow as the circumstances allowed.

Understanding the categories in context

4.65. It is also necessary to read these categories in context. The relevant context here is that the Police had no idea who the Source might be. Certainly, the Police had not provided the Judge with any information that would narrow it down.

4.66. This meant that anyone communicating with Mr Hager might have been the Source. The Police might have been able to eliminate some of the people Mr Hager communicated with as being the Source. However, to do that they first needed to identify those people by examining the communication that Mr Hager had with them - using the powers of the warrant.

4.67. That this was the case is borne out by the nature of the documents that the Police chose to seize. These were not only communications, but included scraps of paper from around Mr Hager's house on which he had written down phone messages and names and contacts of people he had met.[472] It included the names of an elderly couple he had met on a plane, a

[472] Hager at 145 (**KEB 1/1/36**).

Norwegian journalist, two old friends he met at a funeral and more than 40 other people equally irrelevant to the Police investigation.[473] They also included the identities of six of Mr Hager's confidential informants, again irrelevant to the Police investigation.[474]

4.68. With respect to electronic devices, the Police seized, for later examination, or cloned, essentially every computer system and digital storage device in the house.

4.69. The common law has set its face against general warrants for over 250 years. The famous ancient case establishing this principle is *Entick v Carrington*.[475] It is perhaps informative to recall the extent of the search that was held to be so offensive to the common law 250 years ago:

> **s**earched and examined all the rooms, etc. in his dwelling-house, and all the boxes, etc. so broke open, and read over, pryed into, and examined all the private papers, books, etc. of the plaintiff there found, whereby the secret affairs, etc. of the plaintiff became wrongfully discovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, etc. of the plaintiff there found, and other 100 charts, etc. etc. took and carried away, to the damage of the plaintiff 2000l.

Lack of conditions

4.70. The SSA provides for warrants being issued subject to conditions.[476] Under the old warrants regime, the High Court found in circumstances necessarily involving issues of privilege (a solicitor's office) conditions were a necessity.[477] Justice Fisher in the High Court in *TVNZ v Attorney-General*, suggested that there should be standard conditions imposed on all warrants to search the media.[478] The Court of Appeal declined to support

[473] Ibid.
[474] Hager at 147 (**KEB 1/1/36**).
[475] [1765] EWHC KB J98.
[476] SSA, s 103(3) (**ABoA 2/23**).
[477] *Calver v District Court at Palmerston* North [2005] DCR 114 (HC), at para 48 (**ABoA 1/8**).
[478] *TVNZ v Police* [1995] 2 NZLR 541, 557 (HC) (**ABoA 1/2**).

such a general rule, saying that "common sense and the spirit of New Zealand judgments is of course what should govern".[479]

4.71. Without conceding that it was possible for a warrant to be lawfully issued in the circumstances of this case, the applicant contends that any such issuance had to be on appropriate conditions designed to protect the countervailing interests, and in particular the s 68 privilege. An attempt at suggesting such conditions is made in paragraphs 3.171 to 3.175 above.

4.72. It was incumbent on the Police to raise these concerns and to suggest conditions. If they did not, then they ought to have been imposed by the Judge. Even if it is not otherwise unlawful, the warrant in this case is unlawful for an absence of any such conditions.

Breaches of privilege

Introduction

4.73. The applicant says that, having expressly promised not to, the Police examined the documents over which he had claimed privilege and took investigative steps based on what they contained. These were clear acts of bad faith.

4.74. Considering different but materially similar requirements as applied in this case, the Court of Appeal has said that:[480]

> Parliament has recognised that the merest glance at such material may infringe the privilege which the substantive law is at particular pains to protect.

4.75. On the other hand, there is also Court of Appeal authority for the proposition that a cursory examination of a privileged document done for

[479] *TVNZ v Attorney-General* [1995] 2 NZLR 6431, 647 (CA) (**ABoA 1/1**).
[480] *Chief Executive, MOF v United Fisheries* [2007] NZAR 45, 77 (CA) per Glazebrook and Ellen France JJ.

the purpose of determining relevance did not necessarily make the search unlawful of unreasonable.[481]

Obligations to protect privilege

4.76. DS Beal told Mr Hager that he would ensure that everything seized was sealed and not examined further without permission from a judge.[482]

4.77. DS Beal's promise was required by the Police policy in relation to claims of privilege.[483]

4.78. It was also required by Statute. Section 146 of the SSA provides that:

> **146 Interim steps pending resolution of privilege claim**
>
> If a person executing a search warrant or exercising another search power is unable, under section 142, 143, 144, or 145 to search a thing (whether as a result of the requirements of any of those provisions, or because of a claim of privilege made in respect of the thing, or for any other reason), the person—
>
> (a) may—
>
> (i) secure the thing; and
>
> (ii) if the thing is intangible (for example, computer data), secure the thing by making a forensic copy; and
>
> (iii) deliver the thing, or a copy of it, to the appropriate court, to enable the determination of a claim to privilege by a Judge of that court; and
>
> (b) must supply the lawyer or other person who may or does claim privilege with a copy of, or access to, the secured thing; and
>
> (c) must not search the thing secured, unless no claim of privilege is made, or a claim of privilege is withdrawn, or the search is in accordance with the directions of the court determining the claim of privilege.

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[481] *Southern Storm Fishing (2007) Ltd v Chief Executive, Ministry of Fisheries* [2015] NZAR 816, 825 (CA) per Ellen France P for the Court (**ABoA 1/13**).
[482] Hager at 108 (**KEB 1/1/27**); [redacted] at 32 (**KEB 1/10A/190F**); and Transcript PD 9/1613-1614.
[483] PD 3/440 (**KEB 4/29/440**).

Breaches

4.79. As set out in paragraphs 1.100-1.130, contrary to their undertakings, policy and legal requirements, the Police continued to search the contents of documents found in Mr Hager's house. As noted above and below, that the search began before Mr Hager was given an opportunity to claim privilege. However, a comparison of the transcript and the relevant notes shows that all of the specified breaches occurred after privilege had been claimed and the undertakings had been given.

4.80. The breaches went far beyond a cursory glance to determine relevance. The Police took active steps based on the information that they found in the documents. For example:

4.80.1. Det Teo photographed a privileged document, emailed the photograph to a colleague, DC Smith, and asked her to "do some enquiries please";[484]

4.80.2. DC Smith undertook internet enquiries and emailed back the results;[485]

4.80.3. some of those results were shared with DS Beal;[486]

4.80.4. Det Teo then noted down privileged information and put it on the investigation file;[487]

4.80.5. since then the Police have conducted extensive further enquiries into matters that were set out in the results of the enquiries conducted by DC Smith in her internet searches;[488]

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[484] PD 14/2303 (**KEB 4/29/2303**), attaching PD14/2351 (**KEB 4/29/2351**); see also PD 15/2469 for the connection between the photo and the email.
[485] PD 14/2306-2310 (**KEB 4/29/2306-2310**).
[486] PD 14/2347, 2348 (**KEB 4/29/2347, 2348**).
[487] Document provided to applicant on 25 June 2015 – unredacted copy of PD 8/1500 (**KEB 4/29/1500A**).
[488] As discussed above, this has been confirmed by Crown counsel. However, it is claimed that these enquiries are not based on the information in the privileged document.

4.80.6. on DS Beal's instructions, Mr Donovan tried to log into two email accounts found on a privileged document during the search;[489]

4.80.7. Mr Donovan and Det Abbott both photographed another privileged document and sent a copy to NC3;[490]

4.80.8. NC3 took steps to try to access the data at a URL contained in that document;[491]

4.80.9. Det Teo took note of a SIM card and phone IMEI number found at the search; [492]

4.80.10. information requests were later made based on that information and sent to Vodafone, Spark, and Two Degrees;[493]

4.80.11. numerous details were taken from privileged materials and were recorded, unsealed, on the investigation file;[494] and

4.80.12. Mr Donovan accessed the settings of a computer he was supposed to be cloning and used those setting to connect to the internet.[495]

4.81. That those steps were unfruitful is irrelevant. They were not allowed to take any such steps and they knew that that was the case. The specified breaches were acts of bad faith.

4.82. While it is accepted that it may sometimes be permissible for the Police to conduct a cursory examination of privileged material for relevance, it is submitted that that was not the case here. What the Police were looking for was a document that identified the Source. The claim of privilege would have covered such a document. What would have happened if the Police had found such a document? Having seen a document and learned the identity of the Source, could the Police be realistically expected to unlearn

[489] PD 14/2369; Donovan at 25, 30.2 (**KEB 2/13/223-225, 228**).
[490] PD 11/1863-1864 (**KEB 4/29/1863-1864**); and PD 11/2024-2025 (**KEB 4/29/2024-2025**).
[491] Email of Kim Laurenson of 20 June 2015.
[492] PD 8/1565 (**KEB 4/29/1565**).
[493] Teo at 54 (**KEB 2/15/249-250**); Beal at 58 (**KEB 2/11/204**); PD 14/2405-2410 (**KEB 4/29/2405-2410**).
[494] PD 8/1562 (**KEB 4/29/1562**).
[495] Donovan at 25 (**KEB 2/13/223-225**).

that information or to take no further steps in relation to it if the claim of privilege was held to be valid?

Lack of candour

4.83. As set out above, it was agreed between the Police and Mr Hager's counsel that photographs taken at the scene, and which were not being sealed with the seized material, could be examined by his counsel. Photographs that revealed privileged information were then deleted at counsel's request.

4.84. However, this arrangement was undermined by the Police. Several photographs were neither sealed nor shown to the applicant's counsel. Those photographs included close up photographs taken of privileged material, clearly for the purpose of providing the Police with a copy of that material. At least two such photographs were then emailed to other Police officers not at the scene.

4.85. Many documents evidencing the full extent of the breaches were not provided in discovery on 23 January 2015, despite falling within the scope of the Court's orders of 17 December 2014. Several key documents were withheld until after all evidence had been filed. They were only provided after many complaints from applicant's counsel as to the incompleteness of discovery and after the intercession of the Office of the Ombudsman.

4.86. The clearest example of this are the emails exchanged between Det Teo, DC Smith, and DS Beal, which were amongst some of the latest discovered documents. Those documents were discovered after Det Teo filed his supplementary affidavit. They show that both his original affidavit and his supplementary affidavit are misleading if not dishonest. They also undermine the evidence of other Police witnesses.

4.87. Some of the documents that were provided were redacted to cover up passages that exposed the breaches. This is now known because, in relation to some such passages, the Police have since provided these in unredacted form. While the Police have made no concession that the previous

redactions were unjustified, examination of the previously redacted passages shows that they did not have good grounds for their redactions.

4.88. The clearest example of this is the Job Sheet of Det Teo that was provided in unredacted form on 25 June 2015 and is not yet before the Court.

Misinformation

4.89. In his evidence, DI Lynch claims:[496]

> No steps have been taken based on information received from the warrant beyond attempting to secure (but not examine) phone data before it is deleted by the relevant telecommunications company.

4.90. The supplemental affidavit of Det Teo states that:[497]

> For clarity, I should have also said that during the search warrant I emailed a photograph of that document to Detective Constable Rachelle Smith. On 2 October 2014 Detective Constable Rachelle Smith and I deleted the email and no longer have direct access to a copy. As I indicated in my first affidavit, no steps in this investigation have been taken as a result of what Police saw on that piece of paper. Investigations in relation to the information already known to Police continue.

4.91. DS Beal's evidence is silent on the investigations done by DS Smith. DS Beal was the officer in charge. He had received emails setting out at least some of DS Smith's investigations. His silence demonstrates a concerning lack of candour.

4.92. However, DS Beal is not silent in relation to other the breaches. In relation to the onion URL, DS Beal says:

> I also became aware that Detective Abbott had found a piece of paper with what were thought to be details for an account with the Onion Router. A photograph was taken by Detective Abbott of those details and was sent to NC3 for technical assistance. I was aware that advice had been sought from NC3 on what could be done to lawfully secure any contents of that online repository/account but I was not aware at the time that a

[496] Lynch at 57 (**KEB 2/12/215**).
[497] The second affidavit of Joseph Eng-Hoe Teo sworn on 2 June 2015 ("**Teo2**") at 2 (**KEB 2/18/256**).

> photograph had been taken. I understand that no further investigation has been carried out using that information.

4.93. After previous denials, the Police, through Crown counsel, have now admitted that further investigations did take place. After telling the search team that nothing could be done without a further warrant, NC3 personnel attempted to access the data at the URL.

4.94. In relation to this breach, and some of the others, it was pure happenstance that deeply secret information of Mr Hager's totally unrelated to this investigation was not revealed.

4.95. The best one could say about this evidence is that it is highly misleading. At worst, it seems it is intended to misinform the Court.

Purported justifications

4.96. Elsewhere in his evidence, DS Beal attempts to explain the Police's breaches, essentially saying that the possibility that information that was still obtainable would be lost meant that there were exigent circumstances that justified the breaches.[498]

4.97. Even if this is true, it is submitted that this did not empower the Police to take it upon themselves to breach their undertakings, their policies and the law, and breach the applicant's privilege. If urgent action was needed then an urgent application to the Court should have been made for directions. There was no such application.

Conclusion on breaches of privilege

4.98. The breaches of privilege are an unlawful and unreasonable action over and above the illegality of the warrant. However, they are also deeply connected to the arguments above. They show, more clearly than any abstract reasoning, the jeopardy in which Mr Hager's privileged

[498] Beal at 58 (**KEB 2/11/204**).

information was placed – privileged information that had nothing whatsoever to do with the investigation.

4.99. The breaches also show the disrespect which the Police have shown to the legal bounds on their investigative powers. Together with the unlawful information requests, discussed below, they illustrate the impracticality of the Police case – that the Police should be free to examine and seize, albeit sealed, this material, assuming that issues of privilege can be determined later by the courts.

4.100. Lastly, they also illustrate the extraordinary breadth of this search. The fact that the Police have no idea who the Source is means that they are regarding any document relating to a communication between Mr Hager and another person as relevant. All of Mr Hager's contacts, including his private contacts, and all of his confidential informants are at risk of being caught up in the trawl net of this untargeted fishing expedition.

Other breaches of law

Section 145 of the SSA

4.101. The Police began their search of Mr Hager's house without giving him a reasonable opportunity to claim privilege in breach of s 145 of the SSA.

4.102. Section 145 of the SSA provides as follows:

> **145 Searches otherwise affecting privileged materials**
>
> (1) This section applies if—
>
> (a) a person executes a search warrant or exercises another search power; and
>
> (b) he or she has reasonable grounds to believe that any thing discovered in the search may be the subject of a privilege recognised by this subpart.
>
> (2) If this section applies, the person responsible for executing the search warrant or other person exercising the search power—

(a) must provide any person who he or she believes may be able to claim a privilege recognised by this subpart a reasonable opportunity to claim it; and

(b) may, if the person executing the search warrant or exercising the other search power is unable to identify or contact a person who may be able to claim a privilege, or that person's lawyer, within a reasonable period,—

(i) apply to a Judge of the appropriate court for a determination as to the status of the thing; and

(ii) do any thing necessary to enable that court to make that determination.

4.103. The evidence of DS Beal, the officer in charge of the investigation and the person who led the search of Mr Hager's house, is that:

4.103.1. the Police knew that Mr Hager may claim privilege;[499]

4.103.2. he did not seek to ascertain whether material in the house was subject to privilege until the second of two phone calls with Mr Hager;[500] and

4.103.3. by that time, the search had already commenced.[501]

4.104. In fact, DS Beal has made no efforts himself to contact Mr Hager or his lawyers. The phone calls with Mr Hager only came about because Mr Hager's daughter, Ms [redacted] took it upon herself to call Mr Hager and to pass the phone over to the Police.[502]

4.105. Indeed, the search team had prepared to break into the house if no one had been home.[503]

4.106. It is apparent from the Police evidence that they had formed the view that they did not need to take any action in relation to the s 68 issues unless, and

[499] Beal at 37 and 43-44 (**KEB 2/11/199-201**).
[500] Beal at 46 (**KEB 2/11/201**).
[501] Beal at 51 (**KEB 2/11/202**).
[502] [redacted] at 9-10 (**KEB 1/10A/190B-190C**); and Transcript PD9/1608-1614.
[503] Beal at 39 (**KEB 2/11/199-200**).

until, s 68 privilege had been claimed by Mr Hager. Given that they expected that s 68 would be an issue, this was not a correct conclusion.

4.107. Section 145 created specific obligations to take steps to identify the person who could claim the privilege and give that person a reasonable opportunity to do so. The Police failed to do this. Worse, the Police, by their own account, began the search before ascertaining whether or not the material being searched was privileged.

Section 103 of the SSA

4.108. The applicant avers that the application and the granted search powers were in breach of s 103(4)(k) of the SSA. That section provides:

> Every search warrant must contain, in reasonable detail, the following particulars: …
>
> if the warrant is intended to authorise a remote access search (for example, a search of a thing such as an Internet data storage facility that is not situated at a physical location) the access information that identifies the thing to be searched remotely

4.109. This application sought access to information "held on the internet of other web based storage system relating to the e-mail account nicky@paradise.net.nz and/or any other such email accounts identified as being accessed by Nicky Hager".[504]

4.110. The problem with this is everything after and including the words "and/or". The statutory requirement in s 103(4)(k) limits such search warrants to internet locations where the applicant is able to specify the access information. There is simply no authority to empower searches of "any other such email accounts".

4.111. Clifford Clark at the NC3 knew that this was an issue and alerted DS Beal and DI Lynch to it.[505]

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[504] PD 8/1473-1474 (**KEB 4/29/1473-1474**).
[505] PD 12/2174-2175 (**KEB 4/29/2174-2175**).

4.112. In the event, the Police went even further than the warrant allowed, and attempted to access an email address which they had not identified as being accessed by Mr Hager.

V. INFORMATION REQUEST

Introduction

5.1. As set out above in paragraphs 1.30-1.32, during September and October 2014 the Police made information requests to 16 bank contacts as well as Trade Me, Spark, Vodafone, Air New Zealand, and Jetstar. The information requests sought the disclosure of Mr Hager's private information. In response to some, the Police obtained Mr Hager's private information.

5.2. This was done without obtaining any production orders and in circumstances where production orders would not have been available. Mr Hager says that the information requests were unlawful and constituted unreasonable searches and seizures in breach of his rights under s 21.

Detail of the information requests

General bank request

5.3. On 24 September 2014, the Police sent information request sent to 16 bank contacts relied on an accusation of "suspected criminal offending, namely Fraud, Dishonest access of a computer system".[506] It claimed the information sought would "allow for a preliminary investigation to determine the scale of suspected offending (if any), thereby avoiding prejudice to the maintenance of the law through the detection of serious criminal offending, in respect of; HAGER/Nicky DOB: 04 384 5074 [sic] 73B Grafton Road, Roseneath, Wellington".[507] It asserted that it fell within the exception to the Privacy Act 1993 set out in Principle 11(e)(i) in s 6.

5.4. That request sought information about any accounts in his name, or for which he was a signatory, the date they were opened, current balances and account numbers, details of any signatories, details of all transactions on each account for the last 3 months, the dates, times and locations of the last

[506] PD 4/650-651 (**KEB 4/29/650-651**); PD 14/2356 (**KEB 4/29/2356**).
[507] Ibid.

week of transactions, and any past accounts, including the reasons they were closed.[508]

Westpac bank request

5.5. On 29 September 2014, the Police sent an information request to Westpac Bank. It relied on the same accusation of suspected Fraud and Dishonest Access of a Computer System. It claimed the information would "provide evidential material to identify suspects for the alledged [sic] offending, thereby avoiding prejudice to the maintenance of the law through the detection of serious criminal offending, in respect of; HAGER/Nicky DOB: 04 3845074 [sic] 73B Grafton Road, Roseneath, Wellington". It sought the details of all transactions for Mr Hager between December 2013 and May 2014.[509]

First Trade Me request

5.6. On 12 September 2014, Detective Sergeant Beal made an information request to Trade Me Limited.[510] The information request asserted that it fell within the exception to the Privacy Act 1993 set out in Principles 11(e)(i) and 11(e)(ii) in s 6 of that Act. The information request asserted that the information was required for a high profile investigation of access to a computer system for a dishonest purpose, contrary to s 249 Crimes Act 1961, and that the applicant had been identified as being in receipt of illegally obtained material, but did not otherwise explain the basis for asserting that Principles 11(e)(i) and 11(e)(ii) applied.

5.7. That information request sought the applicant's contact details, details of auctions involving the applicant since 2010, "relevant links to previous memberships, IP addresses, other members, etc", and details of any information held on the applicant including contact details, cookie details,

[508] Ibid.
[509] PD 14/2317 (**KEB 4/29/2317**); and PD 4/562-563 (**KEB 4/29/562-563**).
[510] PD 4/565 (**KEB 4/29/565**).

IP addresses, and trading/payment history on Trade Me or any associated companies.

Second Trade Me request

5.8. On 26 September 2014, Detective Joseph Teo made an information request to Trade Me Limited.[511] The information request asserted that it fell within the exception to the Privacy Act 1993 set out in Principle 11(e)(i) in s 6 of that Act.

5.9. That information request asserted that the second respondent was investigating a complaint of accessing a computer system for a dishonest purpose, but did not otherwise explain the basis for asserting that Principle 11(e)(i) applied. The information request sought the applicant's contact details, details of auctions involving the applicant since December 2013, the applicants current cell phone number, and "relevant links to previous memberships, IP addresses, other members, etc".

Spark request

5.10. On 24 September 2014, Detective Joseph Teo, with the approval of Detective Senior Sergeant Gary Lendrum, made an information request to Spark New Zealand Trading Limited.[512] The information request asserted that it fell within the exception to the Privacy Act 1993 set out in Principle 11(e)(i) in s 6 of that Act, but did not explain the basis of that assertion. The information request sought full subscriber/account holder details for the applicant's home landline number, and details of any cellular phone account held by the applicant.

Vodafone request

5.11. Also on 24 September 2014, Detective Joseph Teo, with the approval of Detective Senior Sergeant Gary Lendrum, made an information request to

[511] PD 4/564 (**KEB 4/29/564**).
[512] PD 4/558 (**KEB 4/29/558**).

Vodafone New Zealand Limited.[513] The information request asserted that it fell within the exception to the Privacy Act 1993 set out in Principle 11(e)(i) in s 6 of that Act, but did not explain the basis of that assertion. The information request sought to verify if an email account belonging to the applicant was held within the Vodafone/ex Telstraclear system, and, if so, account holder details, and whether the account was linked to a cell phone account held by Vodafone.

Air New Zealand request

5.12. On 29 September 2014, Detective Constable Rachelle Smith commenced a process of making an information request to Air New Zealand Limited.[514] The information request was made in unknown terms. The information request sought the details of all of the travel conducted by the applicant including information on any and all travelling companions.

Jetstar request

5.13. Similar enquiries to the information requests made to Air New Zealand were made of Jetstar.[515]

Responses

5.14. Police received a range of responses to these requests.[516] Private information was disclosed in response to some of those requests. In particular, two information requests resulted in the Police receiving the details of almost 10 months' worth of transactions from Mr Hager's three accounts.

5.15. On 25 September 2014, Police received detailed information about Mr Hager's bank account from Westpac Bank including some of Mr Hager's

[513] PD 4/561 (**KEB 4/29/561**).
[514] PD 7/1385 (**KEB 4/29/1385**).
[515] Ibid.
[516] PD 14/2337-2338, 2341-2342, 2345-2346, 2350, and 2353-2359 (**KEB 4/29/2355-2357**); PD 15/2446-2456, and 2459 (**KEB 4/29/2445**); PD 4/578 (**KEB 4/29/578**); and PD 7/1385-1386 (**KEB 4/29/1385-1386**).

bank statements.[517] On 30 September 2014, the Police received the requested further transaction information from Westpac on almost exactly the same basis as the 24 September 2014 request.[518]

Information requests were unlawful

5.16. The Privacy Act 1993 prohibited these third parties from disclosing Mr Hager's information except within limited exceptions.[519] As set out above, the Police asserted that their requests fell variously within the exceptions set out in Principles 11(e)(i) and 11(e)(ii) in s 6 of that Act. The principle and claimed exceptions state that:

> 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,… (e) that non-compliance is necessary—
>
> (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
>
> (ii) for the enforcement of a law imposing a pecuniary penalty.

5.17. Under the SSA, the Police can obtain a production order to force companies, such as those listed above, to produce copies of documents they hold.[520] In order to obtain such a production order the Police must have reasonable grounds:[521]

> (a) to suspect that an offence has been committed, or is being committed, or will be committed (being an offence in respect of which this Act or any enactment specified in column 2 of the Schedule authorises an enforcement officer to apply for a search warrant); and
>
> (b) to believe that the documents sought by the proposed order—

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[517] PD 5/712-719 (**KEB 4/29/713, 717, 719**) and 732-746 (**KEB 4/29/712A-712C**); PD 14/2355 (**KEB 4/29/2355**); and PD 8/1468-1469 (**KEB 4/29/1468-1469**).
[518] PD 14/2314-2317 (**KEB 4/29/2314 and 2317**); and PD 5/720-731 and 747-773 (**KEB 4/29/721, 723, 725, 729, 731, and 712D-712J**).
[519] Privacy Act 1993, s 6, Principle 11 (**ABoA 2/25**).
[520] Part 3, Subpart 2, ss 70-79 (**ABoA 2/23**).
[521] Section 72 (**ABoA 2/23**).

> (i) constitute evidential material in respect of the offence; and
>
> (ii) are in the possession or under the control of the person against whom the order is sought, or will come into his or her possession or under his or her control while the order is in force.

5.18. The Police did not obtain such production orders.[522]

5.19. The Police had reasonable grounds to believe that an offence had been committed by the Source. However, the Police did not have reasonable grounds to believe that the documents they were seeking in relation to Mr Hager would constitute evidential material in respect of that offence. The Police also lacked any reasonable grounds to believe that Mr Hager had committed any offence. And, in particular, the Police have discovered no documents to support any suggestion of fraud.

5.20. This is denied by the Police.[523] However, the Police have failed to assert any such reasonable grounds in their evidence. Nor have any reasonable grounds been disclosed by the documents provided by the Police in discovery.

5.21. Police have given a number of different reasons for seeking Mr Hager's bank information. In the application for the warrant it is claimed that these enquiries were used to establish Mr Hager's address.[524] In his first affidavit, DI Lynch says that this inquiry was:[525]

> to ascertain any travel movements that may have been able to be linked to the offender as well as assessing whether or not he was generating income from the proceeds of the book that could be considered for proceeds of crime action.

[522] ASoC/ASoD at 35P; Lynch at 30 (**KEB 2/12/211**); and Lynch2 at 18 (**KEB 2/19/263**).
[523] ASoC/ASoD at 35Q.
[524] PD 8/1468-1469 (**KEB 4/29/1468-1469**).
[525] Lynch at 31 (**KEB 2/12/211**).

5.22. In his second affidavit, DI Lynch clarified that:[526]

> It was a legitimate enquiry to pursue to see if in fact Mr Hager did pay for any of the illegally obtained information. The enquiry was however two-fold in that the book itself has generated substantial revenue. That revenue was obtained indirectly from a crime punishable by more than 5 years imprisonment. This could have given rise to potential action under the proceeds of crime regime.

5.23. These explanations give accounts of what the Police were looking for, but provide no reasonable grounds for the belief that the responses to the requests would in fact be evidence of a crime they were investigating. The suggestion that the bank records might disclose payments to the Source or otherwise disclose some other yet undetected offence was nothing more than speculation. There was also no need to search Mr Hager's bank records to find his home address – he was listed in the phone book.[527]

5.24. In relation to the other information requests, the only explanation is DI Lynch saying in his first affidavit that, "such enquires are basic steps in many investigations to pursue a variety of legitimate enquiries".[528]

5.25. For the same reason, it is submitted that the Police did not have reasonable grounds to believe that Principles 11(e)(i) or (ii) applied. Given that they had no reasonable grounds to believe that the information would be evidence of the crime they were investigating they did not have reasonable grounds to believe that the provision of that information was "necessary to avoid prejudice to the maintenance of the law".

5.26. This follows from a plain and ordinary meaning of the respective sections. It also makes sense from a policy perspective. Parliament would have intended that the power to obtain information and the power to provide it would generally coincide.

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[526] Lynch2 at 19 (**KEB 2/19/263**).
[527] https://whitepages.co.nz/w/100288949/.
[528] Lynch at 30 (**KEB 2/12/211**).

5.27. The Police therefore lacked any lawful authority for these information requests.

A breach of s 21

5.28. Further, the information requests constituted unreasonable searches and seizures in breaches of s 21 of the Bill of Rights.

5.29. An unwarranted request by the Police for a third party to disclose someone's private information can be a search.

5.30. In its 1994 decision in *R v H*,[529] the New Zealand Court of Appeal considered a case where the Police had sought and obtained private information from the accountant of a fishing company. The accountant had initially voluntarily provided information to the Police. This had not been sought by the Police and was therefore found not to constitute a search *by the Police*.[530] However, for the next 20 months the Police delayed obtaining a warrant and instead had the accountant continue to provide them with private information. This was held to be an unreasonable search and seizure in breach of s 21.[531]

5.31. The Police activities in *R v H* predated the Privacy Act 1993. However, this case clearly establishes that information requests can constitute searches and seizures. It also establishes that such requests outside of the proper process of obtaining a warrant are unlawful (and unreasonable). This argument is even stronger now that the Police simpler process of obtaining a production order under the SSA is available to the Police.

5.32. The Canadian Supreme Court decision in *R v Spencer* is highly informative.[532] In that case the Police had identified an IP address associated with serious criminal offending.[533] The Police then sought and

[529] *R v H* [1994] 2 NZLR 143 (CA) (**ABoA 1/12**).
[530] At 148.
[531] At 150.
[532] *R v Spencer* [2014] 2 SCR 21 (SCC) (**ABoA 2/22**).
[533] At para 8.

obtained the subscriber information from an ISP through an information request.[534] The Police did not seek a production order.[535] Instead, the Police had asserted that the request was made under s 7(3)(c.1)(ii) of the Personal Information Protection and Electronic Documents Act 2000.[536] That section provided that:

> [An] organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is…
>
> (c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that…
>
> (ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law…

5.33. In delivering a judgment for the court, Cromwell J found that this constituted a search as there was a reasonable expectation of privacy in relation to this information.[537] His Honour dismissed the argument that there was no expectation of privacy request because of s 7(3)(c.1)(ii). The requirement of "lawful authority" in that section was found to be co-extensive with the bounds of the Police's ability to obtain production orders.[538] The Police's reliance on s 7(3)(c.1)(ii) outside of the circumstances of a production order was said to be circular.[539]

5.34. Ultimately, the Canadian Supreme Court found that the information request in *R v Spencer* was a breach of the Charter. However, the evidence was not excluded after the Canadian equivalent of a s 30 balancing exercise.

5.35. It is submitted that similar reasoning can be adopted in this case.

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[534] At para 11.
[535] Ibid.
[536] Ibid.
[537] At para 66.
[538] At paras 68-73.
[539] At para 63.

5.36. It is noted that, due to the similarities in the constitutional frameworks including the wording of art 8 and s 21, Canadian jurisprudence has been highly influential in the development of the law around s 21 in New Zealand.[540] Specifically, New Zealand courts have adopted the reasonable expectation of privacy test for state action constituting a search.[541]

5.37. The first limb of the reasonable expectation of privacy test – that there was a privacy interest infringed – is more easily established in this case than in *Spencer*. The Police obtained almost 10 months of Mr Hager's bank transactions revealing a great deal of very personal information. Mr Hager says:[542]

> My strongest personal feelings were when I discovered that the Police had obtained all the bank account and credit card records from my bank. It is very unpleasant to know that people have trawled unsympathetically through each transaction describing the times, places and activities of my life.

5.38. While there are differences in the wording, Principle 11(e)(i) and (ii) present the same difficulty for the Police as did s 7(3)(c.1)(ii).

5.39. The New Zealand exception requires "reasonable grounds" to believe that the conditions apply. There is no suggestion that the third parties had any grounds other than what was being provided by the Police. The Police did not set out any grounds, they merely asserted, implicitly, that grounds existed. The third-parties relied on those assertions.

5.40. Since the Police did not have reasonable grounds then the provision of information from the third parties was not voluntary, nor was it authorised by law. The Police brought about that release of information through their conduct in misleading the third parties.

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[540] For example, *Hamed v R* [2012] 2 NZLR 305 (SC), but most leading s 21 cases provide examples of this proposition.
[541] *Hamed v R* [2012] 2 NZLR 305 (SC).
[542] Hager at 160 (**KEB 1/1/39-40)**.

5.41. For completeness, it is noted that Neazor J appears to reach a different conclusion on the legality of warrantless information requests in a 1995 decision.[543] However, the facts of that case are very different and His Honour makes no reference to, and appears unaware of, the decision in *R v H*.

5.42. The authors of *Butler and Butler* also express the view that voluntary, non-trespassory provisions of information from a third party should not come within the ambit of s 21.[544] Their reasoning is that there is no reasonable expectation of privacy given the exceptions in Principle 11. They exclude from "voluntary" cases where the Police hold out that they have the power to compel the provision of the information. With respect to the learned authors, for the reasons set out above, the circumstances in this case also fall within s 21.

5.43. Lastly, it is also noted that in another *R v Thompson*,[545] the Court of Appeal found that an information request made to a power company in that case was within Principle 11(e). That finding is not inconsistent with these submissions. It is not suggested here that information can never be supplied under Principle 11(e). That would be an obviously untenable submission. Whether it falls within that exception depends on the facts.

5.44. In that case, the Police had information to suggest that the house was being used to cultivate cannabis. The power company's own reference to the levels of power usage would have suggested that there were reasonable grounds to believe it was information that the Police could receive under Principle 11(e). But that case had not created a general rule that all Police requests for information are exempt, and there are no similarly supportive facts in this case on which the Police can rely to say that Principle 11(e) applies.

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[543] *R v Thompson* (1 December 1995, High Court at Palmerston North, T 26/95, Neazor J).
[544] *Butler and Butler*, above n315, at 18.11.5, pp 555-556.
[545] [2001] 1 NZLR 129 (CA); see also *R v R* [2015] NZHC 713 (HC).

5.45. In summary, the conditions set down by Parliament under which the Police can obtain information under a production order did not exist. The Police therefore sought the information without a production order. They lacked any authority to do this. They asserted that the conditions for a disclosure in breach of the Privacy Act 1993 existed. They did not. In reliance on the Police's assertions, the third parties provided private information.

5.46. This was state action in breach of a reasonable expectation of privacy. The Police lacked any lawful authority for this action. It was not reasonable. It therefore further breached Mr Hager's rights under s 21.

VI. OVERALL CONCLUSION

6.1. The error by the Police and the judge at the heart of this case was to treat this search the way they would any other. They thought it was the sort of "obvious and logical step" they would usually take in an investigation. But the circumstances of this search were not standard, in particular in the following five significant ways:

6.1.1. It was conducted in the home of a witness not a suspect. This is very rare, and requires careful justification.

6.1.2. More significantly, it was conducted in the premises of a working journalist. The Court of Appeal has held "where media freedom is seen to be involved, there is a further reason for restraint and careful scrutiny" in relation to the grant of a search warrant.[546]

6.1.3. More significantly still, it must have been obvious to the Police that this particular search would inevitably destroy the journalist's privilege in any material that was examined. Even the act of assessing a scrap of paper with a name on it for its evidential value would inevitably pierce the veil of confidentiality. Once seen, it could not be unseen. The act of examining was always going to breach privilege, whether or not privilege had been invoked. Sealing it up afterwards does not undo the harm.

6.1.4. Compounding the damage, the confidentiality, and privilege, would be vitiated for all the journalist's sources named or identified in material examined, not just the source Police were looking for. Creating certain jeopardy to the legal interests of third parties is not part of a standard search.

6.1.5. As Police in fact anticipated, this search was always likely to receive extensive media coverage, which also makes it different to most other searches. They must have known that this was likely to provide a powerful signal to any of Mr Hager's sources, present

[546] *TVNZ v Attorney-General* [1995] 2 NZLR 641, 646 (CA) (**ABoA 1/1**).

> or future, that entrusting him with their secrets was dangerous. It would also send a powerful signal to the present and potential future sources of other journalists that Police might raid their working spaces and undermine promises of confidentiality. The Court of Appeal has held that "only in exceptional circumstances where it is truly essential in the interests of justice should a warrant be granted or executed if there is a substantial risk that it will result in the "drying up" of confidential sources of information for the media."[547]

6.2. The Police did consider the statutory protection for journalists' confidential sources contained in s 68 of the Evidence Act. But they viewed it narrowly. They saw it merely as a potential impediment to the search. They were advised that if privilege was claimed, they should secure the material for later resolution of the privilege claim. And so they believed they didn't have to think any more about it.

6.3. That was to overlook the serious consequences of the exercise they were embarking on. It was to forget the great harm that the mere fact of the search was likely to do to Mr Hager, his family, his large number of confidential sources, and his ability to continue to effectively pursue his journalism. It also disregarded the harm to other journalists relying on confidential sources, to the wider public, who have a vital interest in the sort of probing, responsible journalism Mr Hager produces, and ultimately to the working of democracy which needs constant scrutiny against corruption, ineptitude and abuse of power.

6.4. This was to fail to grapple with the fundamental principle, deeply embedded in international law and the laws of New Zealand and other comparable countries, and located at the core of the right to free speech, that when journalists promise confidentiality to a source in exchange for information of public importance, they should not be compelled to disclose the source's identity unless there is an overriding public interest.

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[547] *TVNZ v Attorney-General* [1995] 2 NZLR 641, 648 (CA) (**ABoA 1/1**).

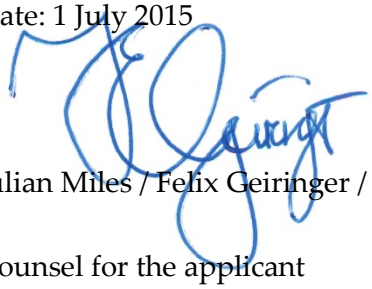
6.5. These factual oversights caused legal errors. Those errors can be cast in different ways. The Police breached the common law by conducting a search that was likely to cause confidential sources to dry up. They breached the Bill of Rights by damaging Mr Hager's rights to freedom of expression and to be free from unreasonable search without demonstrable justification. They breached their obligations to the Court by not providing all the information necessary for the judge to make a proper decision. They breached their administrative law obligations by failing to take into account mandatory relevant considerations, including the likely chill effect of their actions.

6.6. In turn, the Court by granting the warrant, made many of the same errors.

6.7. In executing the warrant, the Police then provided a vivid illustration of the reasons the law seeks to protect journalists against compelled disclosure in the first place. They commenced their search without asking Mr Hager if he wished to claim privilege. They examined and seized material containing any confidential sources, because they couldn't tell which might be the one they were looking for. Even after Mr Hager claimed privilege, they continued writing notes and taking photos of privileged material, and failed to seal those notes and photographs. They could not resist taking further investigatory steps on the basis of the leads they thought they uncovered, even though these plainly violated Mr Hager's privilege.

6.8. This is as clear and unambiguous a case of an illegal search as is ever likely to come before the courts. It is respectfully submitted that this Court should answer it with an equally clear and unambiguous condemnation.

Date: 1 July 2015



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