

9 February 2017

Felix Geiringer  
Terrace Chambers  
No. 1 The Terrace  
P O Box 10-201  
**WELLINGTON 6143**

**Sent by email only to:** [felix.geiringer@terracechambers.co.nz](mailto:felix.geiringer@terracechambers.co.nz)

Dear Mr Geiringer

**Privacy Act Complaint: Nicky Hager and Westpac New Zealand (Our Ref: C/28047)**

1. I refer to previous correspondence concerning the Privacy Act complaint from Mr Nicky Hager about the actions of Westpac New Zealand.
2. On 23 November Ms Jamieson-Smyth wrote to both parties setting out her preliminary view on this complaint, and inviting comments on that view. Both parties have responded. I have now reviewed Ms Jamieson-Smyth's letter, and the parties responses. I have found no reason to depart from or alter Ms Jamieson-Smyth's draft findings on the complaint, which I now confirm and adopt as my determination of this matter. Accordingly, I find that Mr Hager's complaint that Westpac interfered with his privacy by disclosing his extensive banking records to the Police, has substance.

**Background**

3. The background to this matter has been set out in previous correspondence. I will not repeat it here. Suffice to say, Westpac made two disclosures of Mr Hager's financial information in response to requests from Police in the context of the investigation following Mr Hager's book "Dirty Politics".
4. Following negotiations between the parties, a complaint was made to my Office. On receipt of the complaint my investigator Ms Jamieson-Smyth used her best endeavours to secure a settlement between the parties. She was not successful. Accordingly, she formed a preliminary view on the complaint on 23 November 2016. Both parties have had further opportunity to comment on that view.

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5. For my purposes, the fact of the disclosures is not in dispute. All that remains to be determined is whether Westpac can rely on the exceptions at principles 11(d) and or 11(e)(i) of the Act, and to address the comments on Ms Jamieson-Smyth's preliminary view.

### **The Privacy Act**

6. Principle 11 prohibits the disclosure of personal information by a holder agency, to another agency, unless it believes, on reasonable grounds that the disclosure is provided for in law, either by virtue of the exceptions to the information privacy principles, or through some other authority which overrides the Privacy Act, such as pursuant to a production order.
7. I will restrict my comments here the specific points raised in response to Ms Jamieson-Smyth's preliminary view.
8. Mr Every-Palmer for the respondent argues that 11(d) requires that the disclosure was either authorised or that the agency formed a reasonably held belief that it was authorised. He says that 11(e)(i) also requires a reasonably held belief that the information is necessary to prevent a prejudice to the maintenance of the law.
9. Mr Every-Palmer says that at the time of the disclosure Westpac had reasonable grounds to form the belief was both authorised and/or necessary to avoid a prejudice to the maintenance of the law. In any event, that the preliminary view is in error and there has been no breach of principle 11 in this case.
10. At paragraph six of his submissions Mr Every-Palmer questions whether Ms Jamieson-Smyth has failed to adhere to the statutory scheme. He says Ms Jamieson-Smyth's focus appears to be on a hypothetical reasonable customer not part of principle 11.
11. With respect, I consider that following the statutory scheme is exactly what we have done. We have made a finding that Westpac did not have reasonable grounds to believe that Mr Hager had authorised that disclosure in these circumstances.
12. The effect of Westpac's submissions would appear to be that it believes that every customer has authorised the disclosure of all of their information from each of their accounts to Police for whatever reason Police give, without recourse to production orders or other authorities. I simply cannot accept that is a well-founded belief. As a general proposition it seems untenable that Westpac would genuinely hold this belief. I am sure it would come as a surprise to a great many of Westpac's customers that this were so.
13. Whether or not the wider Westpac customer base would be surprised by, or would accept this proposition is however a side issue. This case must turn on its facts, and

for the reasons set out in Ms Jamieson-Smyth's earlier letter, I cannot accept that Westpac formed a belief on reasonable grounds that Mr Hager so authorised such a disclosure. Likewise, for reasons that have been well traversed earlier I concur with Ms Jamieson-Smyth's finding that Westpac has not provided sufficient evidence to demonstrate the basis on which it believed that such an extensive disclosure of personal banking information was necessary to avoid a prejudice to the maintenance of the law.

## Conclusion

14. When my Office finds an interference with privacy, I have the discretion of referring a matter to the Director of Human Rights Proceedings who may take it as a case before the Human Rights Review Tribunal.
15. There are a number of issues we must take into account before making this decision. They include whether a significant issue of law is involved and the likely outcome in the Tribunal. Having reviewed this file, I do not consider that it warrants referral to the Director because:
  - a. Both parties are well represented by experienced counsel;
  - b. While we accept Mr Hager has suffered harm, it is not at the extreme end of the scale, and he has remedies available in other fora;
  - c. Westpac has changed its processes to avoid a repetition.
16. However Mr Hager is free to take the matter as a case before the Tribunal himself. If he decides to do so, he can visit the Tribunal's website<sup>1</sup> for more information including copies of the necessary application forms.
17. As part of initiating proceedings in the Tribunal he will have to show that I have conducted an investigation into this complaint. I enclose a Certificate of Investigation that he may give to the Tribunal for that purpose.
18. Thank you for bringing this matter to my attention. The file relating to this complaint is now closed.

Yours sincerely



John Edwards  
**Privacy Commissioner**

Encl: Certificate of Investigation

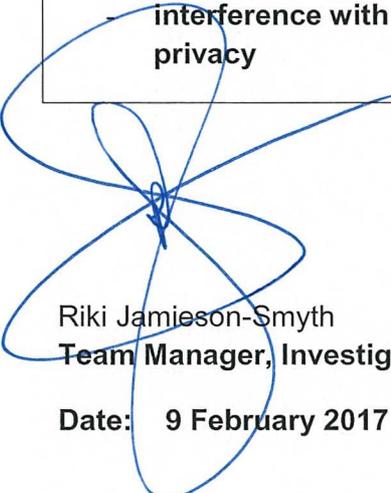
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<sup>1</sup> <https://www.justice.govt.nz/tribunals/human-rights/make-a-claim>



# Certificate of Investigation for Human Rights Review Tribunal

<b>Complainant</b>	Nicky Hager (Our Ref: C/28047)
<b>Respondent</b>	Westpac New Zealand ("Westpac")
<b>Matters investigated</b>	Whether Westpac had reasonable grounds to believe an exception to IPP11 applied when it made two disclosures of Mr Hager's personal banking information to New Zealand Police in September 2015.
<b>Principle(s) applied</b>	Information Privacy Principle 11
<b>Commissioner's opinion:</b>  - application of principle(s)  - adverse consequences  - interference with privacy	<p>In the circumstances, neither 11(d) nor 11(e)(i) was operating to allow Westpac to make the two disclosures to Police.</p> <p>Yes</p> <p>Yes</p>



Riki Jamieson-Smyth

Team Manager, Investigations and Dispute Resolution (Wellington)

Date: 9 February 2017