ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-361
[2024] NZHC 2317

UNDER	the Declaratory Judgments Act 1908
IN THE MATTER OF	the proper interpretation of s 7 of the Privacy Act 1993
AND	the proper interpretation of s 24 of the Privacy Act 2020
BETWEEN	H First Plaintiff
AND	S Second Plaintiff
AND	ATTORNEY-GENERAL sued for and on behalf of the Ministry of Social Development First Defendant

Continued…

Hearing:	18 April 2024
Appearances:	S M Cooper and F D G Brailsford for the Plaintiffs K M Eckersley and S J Edwards for the First, Second, Third and Sixth Defendants Appearances excused for the Fourth and Fifth Defendants
Judgment:	19 August 2024
Reissued:	20 August 2024

JUDGMENT OF PALMER J

ATTORNEY-GENERAL
sued for and on behalf of Oranga Tamariki
Second Defendant

ATTORNEY-GENERAL
sued for and on behalf of the Ministry of Justice
Third Defendant

PRINCIPAL FAMILY COURT JUDGE
Fourth Defendant

PRINCIPAL YOUTH COURT JUDGE
Fifth Defendant

ATTORNEY-GENERAL
sued for and on behalf of the Crown Response to the Abuse in Care Inquiry Interagency Group
Sixth Defendant

Solicitors
Cooper Legal, Wellington
Crown Law Office | Te Tari Ture o te Karauna, Wellington

Summary

[1] The plaintiffs are survivors of abuse which they say they suffered while in state care.[1] They have filed or intend to file proceedings suing the Attorney-General, on behalf of the Ministry of Social Development (MSD). The plaintiffs have expressed an intention to resolve such claims through MSD's alternative dispute resolution process. To assist with this, the plaintiffs have requested access to their state care records from MSD, which has withheld or redacted parts of their records under the Privacy Act 1993 (the 1993 Act) and the Privacy Act 2020 (the 2020 Act) (together, the Privacy Acts). MSD says that reports and plans ordered by and furnished to courts need to be requested from the courts. The plaintiffs seek declarations that the Privacy Acts do not provide a basis for the relevant government agency to withhold from them their own personal information.

[2] The issue is whether the rights of claimants to access their personal information under the Privacy Acts are limited by specific provisions in welfare legislation and court rules. I conclude they are not. The texts of the Privacy Acts, interpreted in light of their purpose and context, recognise the rights of the plaintiffs to access their own personal information records as adults. The specific provisions of most of the welfare legislation, and the court rules, and provisions empowering the making of court rules, do not impose a prohibition or restriction, or regulate the manner in which information is to be made available, in relation to the personal information of the child or young person once they are adults, for the purposes of ss 7 or 24 of the Privacy Acts. To the extent some provisions in welfare legislation do have that effect, nothing in the application of IPP 6 or 11, in the context of those requests from adults, derogates from, limits or affects those provisions. Accordingly, the government agencies are bound by the Privacy Acts to respond to those persons' requests. Unless a court has ordered that specific personal information not be provided to the person concerned, or another exception in the Privacy Acts applies, the Agencies must provide the information to the person concerned.

[3] The Crown has changed its position in relation to this legal issue several times. And survivors of abuse in state care cannot reasonably be expected to have confidence

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1 The plaintiffs' names have been suppressed by the High Court, by consent.

in the Crown's word that it will abide by the decision of the Court without a formal order being made. Accordingly, I declare that the plaintiffs' rights as adults, to access their own personal information under the Privacy Acts, in documents that are held by the defendant agencies which were ordered to be created by courts, are not limited, under s 7 of the Privacy Act 1993 or s 24 of the Privacy Act 2020, by the provisions, considered in this judgment, of the Oranga Tamariki Act 1989, the Care of Children Act 2004, the Children and Young Persons Act 1974, the Child Welfare Act 1925, the Guardianship Act 1968, and the District Court (Access to Court Documents) Rules 2017 or Family Court Rules 2002.

What happened?

The parties

[4] The two plaintiffs, H and S, were in the care of the state, directly or indirectly, at various points in their lives. They say they suffered abuse in state care and are in the process of bringing claims in respect of that abuse. They have been attempting to access personal information held by MSD, Oranga Tamariki, and the Ministry of Justice (together, the Agencies) concerning the time they spent in state care. In a little more detail:

(a) H was a child and/or young person who was subject to orders and determinations of the Family and/or Youth Court at various periods between January 1997 and January 2017. On 12 December 2022, MSD accepted Cooper Legal's request, on behalf of H, for H's state care records. On 20 December 2022, MSD provided the records with redactions, describing what each document was and why it was being withheld or redacted.

(b) S was a child and/or young person who was subject to orders and determinations of the Family and Youth Courts for various periods between December 2002 and December 2022. On 25 May 2022, Cooper Legal, on behalf of S, requested her state care records from MSD and Oranga Tamariki, with urgency due to a pending limitation

period. By 20 June 2023, no response had been received. It is unclear whether the records have now been provided.

[5] Ms Cooper, for the plaintiffs, submits they are representative of a group of individuals who allege they suffered abuse in state care and who have sought or seek access to personal information about their time in state care under the Privacy Acts. Ms Cooper emphasises that these are real people who are bewildered about decisions over their care and that access to their records is extraordinarily important to helping them understand what happened to them.

[6] Regarding the defendants:

(a) Oranga Tamariki and MSD, on whose behalf the Attorney-General is sued as the first and second defendants, receive and process requests from claimants for personal information. All state care records were transferred to Oranga Tamariki following its establishment in 2017. MSD also has access to them to perform specific functions, including managing historic claims and processing requests for personal information. Oranga Tamariki and MSD oppose the application.

(b) The Ministry of Justice, on whose behalf the Attorney-General is sued as the third defendant, has liaised with the heads of relevant court benches, the fourth and fifth defendants, about whether there are alternative means of accessing the information. The Ministry of Justice opposes the application.

(c) The Principal Family Court Judge and Principal Youth Court Judge, the fourth and fifth defendants, have not filed submissions and abide the Court's decision on this application.

(d) The Crown Response to the Abuse in Care Inquiry Interagency Group (Crown Response Group), the sixth defendant, was set up to lead and coordinate the Crown's response to the report of the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-

based Institutes (the Royal Commission). The Crown Response Group's strategic governance is provided by a sponsoring group made up of chief executives of Oranga Tamariki, Whaikaha, MSD, the Ministry of Education, the Ministry of Health, and the Crown Law Office. The Group is housed within Oranga Tamariki and has published guidance about the release of information. It opposes the application.

The records

[7] It is not disputed that state care records assist with the particularisation of an individual's legal claim if proceedings are to be filed and that they are consequently sought prior to filing and before discovery. Cooper Legal requests the overwhelming majority of state care records, on behalf of their clients. The records which are at issue in these proceedings are reports ordered by and furnished to courts, pursuant to provisions in welfare legislation. Cooper Legal's evidence is that the reports often contain information relevant to their claims:

> 10 Client records provide information about a person's legal status and often substantiate or corroborate allegations made by a survivor. Client records often contain:
>
> 10.1 Evidence of significant social worker practice failures;
>
> 10.2 The names of staff working with survivors;
>
> 10.3 Complaints of abuse made at the time (or soon after) the abuse occurred;
>
> 10.4 Investigations into abuse allegations made at the time (or soon after) the abuse occurred;
>
> 10.5 Information about a survivor's family and any identified risk of neglect and/or abuse;
>
> 10.6 Evidence of when social workers received notifications of concern and/or became aware of the survivor was at risk of serious harm and/or neglect;
>
> 10.7 Information about survivors' placements, including duration and suitability;
>
> 10.8 Evidence of compliance with or failure to comply with legislative and internal policy requirements surrounding the admission of the client to Secure Units, the conduct of searches and confinement to Time Out places; and

10.9 Reasons for decisions made by social workers.

[8] The amended statement of claim in these proceedings states that MSD has withheld certain records furnished to courts including:

> 31.1 various reports, furnished to a court pursuant to ss 128, 135, 178, 186, 187, 308C, 314, 319A, 320, 333, 334 and 336 of the [Oranga Tamariki Act 1989] …;
>
> 31.2 various reports and/or advice, furnished to a court pursuant to ss 131A, 132 and 133 of the Care of Children Act 2004 ("the COCA");
>
> 31.3 social worker reports, furnished to a court pursuant to s 41 of the Children and Young Persons Act 1974 ("the CYPA");
>
> 31.4 reports of any proceeding subject to s 30(2) of the Child Welfare Act 1925 ("the CWA"); and,
>
> 31.5 reports of any proceeding subject to s 29 of the Guardianship Act 1968.

Responses to requests for information

[9] When Oranga Tamariki was established in 2017, all state care records were transferred to it. However, MSD has responsibility for claims of abuse and neglect prior to 2017 and so has direct access to Oranga Tamariki's file management system. MSD and Oranga Tamariki have similar processes for responding to requests for personal information:

(a) They locate the files and assign them to an assessor to assess the information in them for release under the Privacy Acts or Official Information Act 1982.

(b) If redactions are required, the requestor will be provided with the relevant provision and a summary of the information withheld. Redactions may be made to personal information about other people or legally privileged information.

(c) Where the file includes the documents at issue in this proceeding, their content will be marked as redacted under s 24(1)(b) of the 2020 Act

and/or s 7 of the 1993 Act, if the information is available. Information about each redacted documented will be provided.

(d) This reflects the "Shared Redaction Guidance" developed by the Crown Response Group, which was reviewed by the Ombudsman and Privacy Commissioner before publication in April 2023.

[10] As context, the Agencies' stance over what to release has changed over time, including in accordance with developments in the law:

(a) In 2011 and 2012, Cooper Legal complained to the Privacy Commissioner about redactions being made to records, as a test case. In September and November 2012, the Commissioner considered some personal information may have been improperly redacted under the 1993 Act and sought further comment from MSD before finalising the transfer of the information. The Commissioner also found that some information was appropriately withheld.

(b) From May 2014, MSD advised it would treat all of Cooper Legal's requests under the 1993 Act as requests for information where the exception under information privacy principle (IPP) 11(1)(e)(iv) in s 6 of the 1993 Act applies. That allows for disclosure of personal information, when it would usually be restricted, if it is necessary for the conduct of court or tribunal proceedings. Information would only be redacted or withheld if it was irrelevant third-party information or legally privileged.

(c) From April 2015, MSD advised that, once documents were filed in the courts, they were the property of the court and it was inappropriate to release them.

(d) In August 2018, MSD changed its position, withholding court documents subject to specific access provisions or restrictive court order.

(e) The plaintiffs say that, in July 2020, MSD again began withholding all the documents furnished to courts. The Attorney-General says MSD's position has been consistent since 2018. The parties agree that this disagreement is not something that needs to be resolved in this case.

(f) In 2021 and 2022 there were attempts to find alternative pragmatic solutions. That included engagement with the Ministry of Justice, who in turn engaged with the Principal Family Court Judge and Principal Youth Court Judge. There were discussions about whether a practice note might be issued to authorise release of the court documents or whether MSD could assess court documents and refer them to the court if they were particularly sensitive. A solution was unable to be reached. The Principal Youth Court Judge was concerned about a general direction in the event parts of a report are potentially detrimental to the person if released. The Judges did not consider they could properly delegate decisions about court documents. The parties disagree about the respective roles of the Agencies and the Judges in relation to these events, but they agree that is also not something that needs to be resolved in this case.

(g) In 2021, data collected by MSD on the number of court documents withheld over a two-week period enabled them to project the number of documents they currently withhold over a 12-month period: 2,002 documents per year in the Youth Court jurisdiction and 3,146 documents per year in the Family Court jurisdiction.

[11] As matters stand, the Agencies decline to release documents under s 7(2) of the 1993 Act and/or s 24 of the 2020 Act. Their reason is that the documents were furnished to the District Court or Family Court under specified legislation and, according to the High Court judgment in *Simes v Legal Services Commissioner*, it is for the relevant court to decide on its release under each court's rules for doing so.[2]

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2 *Simes v Legal Services Commissioner* [2017] NZHC 2331 at [80]–[82].

[12] As at 19 March 2024, Cooper Legal had filed approximately 2,600 requests for access to court files with Family and Youth courts in 14 different locations. Evidence of responses to some of the requests by judges or registrars of those courts has been provided. On 17 March 2024, in response to one of the requests, filed on behalf of 1,383 named clients, Judge T M Black, as the Executive Judge of the Family Court at Wellington, estimated the time required to review the files would take between two and a half and three years of one Judge working full time. He gave explicit permission to Cooper Legal to publish his minute to the High Court in these proceedings.

Royal Commission

[13] The interim December 2021 report of the Royal Commission, *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānui* stated:[3]

> The barriers to accessing records can affect survivors' ability to heal. Limited records can affect their ability to make claim for redress, but it can also bar survivors from understanding their own experiences and understanding the tūkino, or abuse, harm and trauma, they experienced.

[14] Among other recommendations, the Royal Commission recommended:[4]

> 85. Institutions, when responding to record requests, should:
>
> › help survivors obtain their records in as full a form as possible while still respecting the privacy of others
>
> › help survivors to understand their records
>
> › favour disclosure wherever possible
>
> › be consistent as much as possible in what they disclose, irrespective of whether in response to court discovery rules or survivor requests
>
> › give specific explanations of the privacy reasons they use to justify withholding information
>
> › have the necessary resources to respond in an appropriate and timely way.

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3 Abuse in Care Royal Commission of Inquiry *He Purapura Ora, he Māra Tipu: From Redress to Puretumu Torowhānu (Volume 1)* (December 2021) at 250.

4 At 344.

[15] In April 2023, the Crown Response Unit published a "Shared Redaction Guidance" document, which states:

> Court documents
>
> In some situations, a file might contain court documents that are covered by additional legislation (other than the Privacy Act and Official Information Act), and therefore may need to be withheld. Examples of this are psychologist or social worker reports that have been ordered by the Family Court, Youth Court, or the Criminal Court even if they contain the requester's personal information. To put this another way, the documents are controlled by the Court, so agencies do not have the right to release them to the requester.
>
> Where court documents exist that other agencies cannot release, requesters can contact the Courts directly on the 0800 2 AGREE number to request information from their court files. Where another agency holds court documents, considering them for release entails identifying whether they come under other legislation.

[16] The final report of the Royal Commission, *Whanaketia — Through pain and trauma, from darkness to light: Whakairihia ke te tihi o Maungāroro*, was released on 24 July 2024. That report expressed concern about the delay in implementing its previous recommendations on the subject of access to records.[5] The Royal Commission made a number of recommendations about data collection, record keeping, and information sharing. Most relevantly, the Royal Commission recommended:[6]

> **Tūtohi | Recommendation 84**
>
> The government should consider, in consultation with the Privacy Commissioner, whether existing information sharing provisions are sufficient to enable adequate sharing of information to prevent and respond to abuse and neglect in care, or whether additional tools are needed. This work should consider the recommendations of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse, "establishing a national information exchange scheme across sectors". The purpose of the review should be to ensure all bodies (whether State or non-State) providing care to children, young people or adults can access the information they need to prevent and respond to abuse and neglect. The review should consider, among other things, whether non-State bodies should be empowered to share

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5 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions "Part 8 — Puretumu Torowhānui, Holistic Redress: Tiritiria ki toi whenua" in *Whanaketia — Through pain and trauma, from darkness to light: Whakairihia ke te tihi o Maungāroro* (July 2024) at 30.

6 Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions "Preliminaries — He kapenga tuatahi" in *Whanaketia — Through pain and trauma, from darkness to light: Whakairihia ke te tihi o Maungāroro* (July 2024) at 132.

information more readily with both State and non-State bodies to prevent and respond to abuse and neglect.

The application

[17] The plaintiffs seek declarations under the Declaratory Judgments Act 1908 that the provisions of the Privacy Acts do not provide a basis to withhold an individual's personal information included in a report or advice furnished to a court, or included in a record of proceeding, under welfare legislation and that the relevant court rules do not regulate the manner in which personal information may be obtained or made available to the individual the information concerns. They also seek a declaration that their access rights have been breached as a result of the conduct of each of the defendants. The Attorney-General, on behalf of the Agencies, opposes the application.

Law relating to disclosure of personal information

[18] Before outlining the parties' submissions and analysing the issues, I provide a broad outline of the relevant law. This is traversed in much more detail in the analysis below. But a broad outline first enables the submissions to be better understood.

Privacy Acts

[19] The 1993 Act and the 2020 Act, which apply to requests for personal information made before and after 1 December 2020 respectively, govern access to personal information held by agencies in the public sector and the private sector. Both Acts are intended to be principles-based regulatory regimes and set out privacy principles originating in the OECD *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*.[7] They contain IPPs that protect an individual's right to access their personal information, while recognising other rights and interests may also need to be taken into account.

[20] The interpretation issues here centre on the meaning and effect of s 7 of the 1993 Act and s 24 of the 2020 Act. In summary, they provide that nothing in IPPs 6 or 11 derogates from, or limits or affects, a provision in any New Zealand enactment

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[7] Te Aka Matua o Te Ture | Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at [2.9]–[2.14], [2.35], [3.1]–[3.2] and [4.1]–[4.2]. See also OECD *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (1980).

that authorises or requires personal information to be made available, which prohibits or restricts the availability of personal information, or which regulates the manner in which personal information may be made available. Some provisions of the Privacy Acts themselves restrict access to personal information.

Welfare Acts

[21] The other interpretation issues here concern the effect, in terms of ss 7 and 24 of the Privacy Acts, of a number of provisions in welfare legislation that relate to the documents at issue. In summary, the documents at issue are:

(a) plans, advice, and reports prepared by the Chief Executive of Oranga Tamariki, social workers, medical professionals (including psychiatrists and psychologists), and/or persons who can report on ethnic, cultural, and community considerations under the Oranga Tamariki Act 1989 (OT Act);[8] and

(b) advice and reports prepared by the Chief Executive of Oranga Tamariki, social workers, medical professionals (including psychiatrists and psychologists), and/or persons who can report on a child's cultural background under the Care of Children Act 2004 (COCA).[9]

[22] There has also been discussion by the parties in this proceeding about:

(a) social worker reports prepared under the Children and Young Persons Act 1974 (CYP Act);[10]

(b) reports prepared by the head of the relevant agency or social worker under the Guardianship Act 1968;[11] and

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8 Oranga Tamariki Act 1989, ss 128, 135, 178, 186, 187, 296M, 308C, 314, 319A, 320, 333, 334, 335, and 336.
9 Care of Children Act 2004, ss 131A–133.
10 Children and Young Persons Act 1974, s 41.
11 Guardianship Act 1968, s 29.

(c) reports of proceedings under the Child Welfare Act 1925 (CW Act).[12]

Case law

[23] The only senior court case relating to access to the sorts of documents at issue here is *Simes v Legal Services Commissioner*.[13] The issue there was whether the Legal Services Commissioner could access documents held by an applicant for, or recipient of, legal aid, where the document was also held on Family Court files. The effects of the Privacy Acts were not at issue in the case. In summary, Collins J held that disclosure of reports, plans, or a video record, obtained under, relevantly, ss 132, 133, 178, 186, 187, and 191 of the OT Act and ss 132 and 133 of the COCA, cannot be disclosed by a legal aid party or their lawyer because it is the court, not a legal aid party or lawyer, that controls the release of this information.[14]

Submissions

[24] Ms Cooper and Mr Brailsford, for the plaintiffs, submit:

(a) It is only where restrictive provisions are inconsistent, and incapable of reconciliation, with the scheme of the Privacy Acts, that they override the Privacy Acts' provision of access. The CWA provision does not impose any restrictions inconsistent with the access rights in the Privacy Acts. The OT Act, COCA and CYP Act provisions are not ouster clauses. They do not impose restrictions but instead permit a court to impose restrictions, though it is arguable they do not apply to a person who is no longer a child or young person. Access to personal information is only restricted where a court has ordered it.

(b) The Privacy Acts and relevant court rules provide alternative and non-exclusive pathways for access to personal information and to court documents from government agencies and from courts respectively. That is consistent with the leading case of *Mahanga*, which has been

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12 Child Welfare Act 1925, s 30.
13 *Simes v Legal Services Commissioner*, above n 2.
14 At [98]–[99].

the basis for guidance by the Ombudsman in respect of the Official Information Act.[15] The Privacy Acts take precedence, as primary legislation. There is no reason to read the Privacy Acts as subject to these statutes.

(c) Even in s 134 of the COCA and s 42 of the CYP Act, where there are presumptions against providing a document, there is an obligation to explain to the child the purpose and content of the report unless it is contrary to the welfare and best interests of the child. These requirements cease once an individual turns 18 and is no longer considered a "child" under the relevant Act. There is no reason for the Family Court to decide whether a 40-year-old adult should have access to their own personal information. Such an approach is not survivor-focussed and is even more inappropriate when survivors are disproportionately Māori men. Ministry staff have been working with survivors for years and are probably more qualified than judges to assess their information.

(d) Where a court has the power to restrict access but has not done so, survivors of abuse in care should be provided with access to their own records by the agencies that hold them. It is objectionable and unreasonable that Oranga Tamariki provides access to MSD, which decides on redress, but not to the person the information concerns. If IPP 6 does not give the person concerned access to the information without decision by the courts, then IPP 11(1)(a) does not give MSD such access.

(e) The context of *Simes*, concerning access to documents by the Legal Services Commissioner and not the person concerned, was critical and very different from that here. The Commissioner, the requestor there, would not be entitled under any other statutory scheme to access the court documents in question and the Privacy Acts were not directly

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15 *R v Mahanga* [2001] 1 NZLR 641 (CA).

concerned. The fact a court is empowered to release a document does not mean it is the "property" of a court. The fact a court orders preparation of a report by an agency does not mean that agency is the court's agent.

(f) The greatest barrier to obtaining access under court rules is the ability of the courts to locate the court file and the second greatest barrier is the ability of the courts to provide meaningful access by processing the sheer numbers of applications. The consequent delays would unreasonably limit, without benefit, claimants' right under s 14 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) to receive information. The Attorney-General's position to the contrary is wholly impractical, harmful to survivors of abuse in state care, practically untenable, unworkable, unnecessary, absurd, and wrong in law.

[25] Ms Eckersley, for the Attorney-General, submits:

(a) The documents in question are commissioned by the Family or Youth Courts, on a confidential basis and subject to statutory restrictions. They are the "property" of the court,[16] though that should be understood as in common parlance rather than in law. They remain in the custody and/or control of the relevant court and the control ensues "for as long as the Family Court retains control of the report and its source data".[17]

(b) This is not a situation where two pieces of legislation say conflicting things about the same issue. The only question is whether the legislative provisions "impose a prohibition or restriction in relation to the availability of personal information" or "regulate the manner in which personal information may be obtained or made available", engaging ss 7 and 24 of the Privacy Acts. They clearly do.

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16 *Simes v Legal Services Commissioner*, above n 2, at [3] and [52]; and *S v Family Court at Manukau* [2021] NZHC 3002 at [21]. See also *V v G* [2001] NZFLR 1005 (FC) at [3].

17 *Henry v Family Court at Auckland* [2007] NZFLR 167 (HC) at [31]. See also *Haye v Psychologists Board* [1998] 1 NZLR 591 (HC) at 600–601.

(c) By the nature of the prescribed access and disclosure provisions, and how court documents are commissioned and obtained, access can only be granted by the court that commissioned the document. The provisions restrict and tightly control who can be given a copy of a report and, in some cases, the way they may be provided. The provisions vest in the court a discretion to consider the dissemination of a report, limiting the group of people to whom the report is given as of right.[18] That is supported by the status of the report writer as the court's expert and witness and is inconsistent with the form of access and disclosure provided for under a personal information request to the agencies. Only the court can waive the confidentiality that reposes in the court documents, which are then furnished to the entitled parties by a Registrar, not the agencies.

(d) The provisions impose a restriction without the need for an express order and plainly regulate the way personal information may be obtained. Their effect is that the privacy principles give way to all other enactments, including secondary legislation and to the express statutory provisions at issue here that govern access and disclosure. There are subtle differences in the orders available under the different restrictive sections which cut across the plaintiffs' argument that access is only restricted where there is an express order declaring so. For example, in s 134 of the COCA and s 42 of the CYP it is not the presence of an order that engages ss 7 and 24 of the Privacy Acts, but rather an absence of an order. And the presence or absence of an order will not be evident from the document itself, so the agencies cannot know for certain that no order exists unless they contact the court. This raises the same resourcing implications of a request to the court.

(e) *Simes* is the leading case on the interpretation of the provisions that control access and disclosure of court documents, on which the Privacy

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[18] Advice under s 131A of the COCA, an expedited version of s 132 reports, arguably ought to be captured by s 134. MSD and Oranga Tamariki presently take different approaches to this.

Commissioner has relied.[19] The documents commissioned by a court for a specific purpose are the "property" of the court and are in a different category to other documents on the court file.[20] Access can only be granted through the specific court. Resourcing and administrative burdens do not aid in resolving this issue of statutory interpretation.

Issue 1: Is the right of a person to access their own personal information from agencies under the Privacy Acts limited by welfare legislation?

[26] There is no dispute that the information at issue here is personal information held by the relevant agencies and that, accordingly, the Privacy Acts apply to requests to them by the persons concerned. The issue is whether the claimants' right to access their information from the agencies is limited by the operation of the access and disclosure provisions in the welfare legislation or only when access to the information has been specifically restricted by a court order. Addressing this issue requires interpretation of the Privacy Acts and the relevant provisions of the welfare legislation and court rules in determining access to documents.

[27] The meaning of statutory provisions must be ascertained from their text and in light of their purpose and context, as required by s 10 of the Legislation Act 2019. That section effectively affirmed the interpretative approach set out by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group*.[21]

The Privacy Acts

[28] The purpose of the 2020 Act, contained in s 3, includes protecting an individual's right to access their personal information, while recognising other rights and interests may also need to be taken into account. Section 3 provides:

> **3 Purpose of this Act**
>
> The purpose of this Act is to promote and protect individual privacy by—

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19 Case Note 297224 [2020] NZ PrivCmr 1 at 2.

20 *Simes v Legal Services Commissioner*, above n 2, at [3] and [52].

21 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

(a) providing a framework for protecting an individual's right to privacy of personal information, including the right of an individual to access their personal information, while recognising that other rights and interests may at times also need to be taken into account; and

(b) giving effect to internationally recognised privacy obligations and standards in relation to the privacy of personal information, including the OECD Guidelines and the International Covenant on Civil and Political Rights.

…

[29] The same sort of balancing is reflected in the 1993 Act. Protecting the right to privacy while recognising the need to take into account other rights and interests is similar to the balancing exercise between rights and justified limitations on rights in the Bill of Rights. The similarity is understandable given the common heritage of the Bill of Rights and the Privacy Acts in protecting human rights. The long title of the Bill of Rights explicitly affirms New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR). The Bill of Rights deliberately provides no general guarantee of privacy, which was not fully developed in New Zealand law when it was passed.[22] But the human right not to be subjected to arbitrary or unlawful interference with privacy is explicitly recognised by art 17 of the ICCPR. An equivalent provision, which is relevant to the context of these proceedings, is included in art 16 of the United Nations Convention on the Rights of the Child (UNCROC).[23] The right to privacy is now more fully recognised in New Zealand law, particularly in the Privacy Acts. Section 3(b) of the 2020 Act explicitly states that it gives effect to the ICCPR and OECD Guidelines.[24]

[30] The right to freedom of expression, recognised by s 14 of the Bill of Rights and art 19(2) of the ICCPR, is also relevant. In the Bill of Rights that right is defined to include "the freedom to seek, receive, and impart information and opinions of any kind in any form". That is also reflected in art 13 of the UNCROC.[25]

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22 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.144].

23 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC].

24 The long title of the 1993 Act describes the 1993 Act as "[a]n Act to promote and protect individual privacy in general accordance with the Recommendation of the [OECD] Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data".

25 UNCROC, above n 23.

[31] The way in which the Privacy Acts intend the balance to be struck between is indicated, generically and in principle, by the IPPs. In the 2020 Act, most relevantly:

> **22 Information privacy principles**
>
> The information privacy principles are as follows:
>
> …
>
> Information privacy principle 6
>
> *Access to personal information*
>
> (1) An individual is entitled to receive from an agency upon request,—
>
> (a) confirmation of whether the agency holds any personal information about them; and
>
> (b) access to their personal information.
>
> …
>
> (3) This IPP is subject to the provisions of Part 4.
>
> …
>
> Information privacy principle 11
>
> *Limits on disclosure of personal information*
>
> (1) An agency that holds personal information must not disclose the information to any other agency or to any person unless the agency believes, on reasonable grounds, –
>
> (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
>
> (b) that the disclosure is to the individual concerned; or
>
> (c) that the disclosure is authorised by the individual concerned; or
>
> (d) that the source of the information is a publicly available publication and that, in the circumstances of the case, it would not be unfair or unreasonable to disclose the information; or

(e) that the disclosure of the information is necessary—

(i) to avoid prejudice to the maintenance of the law by any public sector agency, including prejudice to the prevention, detection, investigation, prosecution, and punishment of offences; or

(ii) for the enforcement of a law that imposes a pecuniary penalty; or

(iii) for the protection of public revenue; or

(iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or

(f) that the disclosure of the information is necessary to prevent or lessen a serious threat to—

(i) public health or public safety; or

(ii) the life or health of the individual concerned or another individual; or

(g) that the disclosure of the information is necessary to enable an intelligence or security agency to perform any of its functions; or

(h) that the information—

(i) is to be used in a form in which the individual concerned is not identified; or

(ii) is to be used for statistical or research purposes and will not be published in a form that could reasonable by expected to identify the individual concerned; or

(i) that the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern.

…

[32] So, IPP 6 in the 2020 Act expresses an individual's right to access their personal information as an entitlement, upon request. The wording is slightly, but not materially, different in the 1993 Act. In tension with that right to access, IPP 11 in the 2020 Act requires an agency holding personal information not to disclose information. But it also provides exceptions where the agency believes, on reasonable grounds, any

of a number of circumstances exist. Most relevantly, those grounds include, in IPP 11(1)(b) and (c), that the disclosure is to, or authorised by, the individual concerned.[26] The fact personal information is requested by the person concerned is a powerful reason militating in favour of disclosure under the Privacy Acts. It reflects the right of the person concerned to access personal information relating to themselves. The Law Commission's 2010 Issues Paper on the 1993 Act observed that all four of the principles in the 1993 Act that contain exceptions, which constitute legitimate grounds for non-compliance with principles, allow non-compliance where this is authorised by the individual concerned.[27]

[33] In addition, there are other circumstances in IPP 11 which could also arguably apply to personal information at issue here, as exceptions to the Agencies' obligation not to disclose personal information:

(a) There is an exception to the obligation not to disclose personal information in IPP 11(1)(a) where disclosure is, or is directly related to, the purposes in connection with which the information was obtained. Here, as explained further below, the purposes of the welfare legislation under which the information was originally obtained had, at their heart, the interests of the child or young person at the time. So do the requests now, when the child or young person is pursuing their interests as an adult. Disclosure is, or is directly related to, the purposes in connection with which the information was obtained.

(b) There are exceptions to the obligation not to disclose personal information in IPP 11(1)(e), (f) and (g), which specify a range of public interest reasons why disclosure is "necessary". This reflects the similarly structured balancing exercise between the right to access official information and the grounds for withholding information under the Official Information Act. The exceptions include that the disclosure is "necessary" to avoid prejudice to the maintenance of the law by any

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[26] IPP 11(1)(b) and (c) in the 2020 Act correspond to IPP 11(c) and (d) in the 1993 Act. I reference IPP 11(1)(b) and (c) for consistency in this judgment.

[27] Te Aka Matua o Te Ture | Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC IP17, 2010) at [4.14].

public sector agency at IPP 11(1)(e)(i) and for the conduct of proceedings before any court or tribunal at IPP 11(1)(e)(iv). Where the information is necessary for a claimant's suit, subject to the potential availability of the same information with the same timeliness from the courts, disclosure may be considered necessary for both reasons.

[34] So, the Privacy Acts recognise claimants' right to request their personal information. The in-built obligation on agencies not to disclose information does not apply to the information at issue here because it is requested by, or on the authorisation of, the individual concerned as well as, arguably, for other reasons.

Legislative exceptions to disclosure in the Privacy Acts

[35] As the Law Commission observed in 2010, the balancing of privacy interests can be undertaken through the application of the Privacy Acts or, alternatively, by the lawmaker itself in the course of formulating legislative provisions.[28] Sections 7 and 24 of the Privacy Acts make clear that the IPPs do not derogate form, limit, or affect enactments which either require or restrict the availability of personal information. Section 7 provides:

> **7 Savings**
>
> (1) Nothing in principle 6 or principle 11 derogates from any provision that is contained in any enactment and that authorises or requires personal information to be made available.
>
> (2) Nothing in principle 6 or principle 11 derogates from any provision that is contained in any other Act of Parliament and that—
>
> (a) imposes a prohibition or restriction in relation to the availability of personal information; or
>
> (b) regulates the manner in which personal information may be obtained or made available.
>
> (3) Nothing in principle 6 or principle 11 derogates from any provision—
>
> (a) that is contained in any legislative instrument within the meaning of the Legislation Act 2012 made by Order in Council and in force—

[28] At [2.28].

(i) in so far as those principles apply to a department, a Minister, an organisation, or a public sector agency (as defined in paragraph (b) of the definition of that term in section 2(1)) that is established for the purposes of assisting or advising, or performing functions connected with, a department, a Minister, or an organisation, immediately before 1 July 1983; and

…

(iii) in so far as those principles apply to any other agency, immediately before 1 July 1993; and

(b) that—

(i) imposes a prohibition or restriction in relation to the availability of personal information; or

(ii) regulates the manner in which personal information may be obtained or made available.

(4) An action is not a breach of any of principles 1 to 5, 7 to 10, and 12 if that action is authorised or required by or under law.

…

[36] In 2010, in its Issues Paper on the 1993 Act, the Law Commission said:[29]

> The privacy principles set out a default position for the handling of personal information; however, other legislation may expressly or impliedly override the principles, either by imposing stricter requirements than those imposed by the principles, or authorising disclosure or practices that may otherwise breach the privacy principles. The subservience of the privacy principles to other statutory provisions is due to the operation of principles of statutory interpretation such as *generalia specialibus non derogant* (general provisions do not derogate from specific ones). In addition, section 7 of the Privacy Act is a ranking provision, confirming that the principles may be overridden by other laws, and making clear that the privacy principles are subservient to legislative provisions in force at the time that the Privacy Act was passed, as well as those that have been subsequently enacted.

[37] In its final report in 2011, the Law Commission considered that s 7 was unduly complex and recommended it be replaced.[30] It recommended that, in future, inconsistent regulations should not automatically prevail over the principles.[31] It identified the most difficult question to be whether another statutory provision

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29 At [11.2]. Footnotes omitted.
30 Te Aka Matua o Te Ture | Law Commission, above n 7, at [8.3]–[8.5].
30 At [8.6].
31 At [8.6].

impliedly overrides a privacy principle even though it does not do so expressly.[32] That is the issue here. The Law Commission stated:[33]

> It is not possible to lay down clear rules of interpretation for such a case. Each case has to be treated on its merits. We have considered whether there should be a statutory requirement that, in the case of an apparent inconsistency, the other provision should where possible be interpreted consistently with the privacy principles. Such a provision in the Privacy Act would be akin to section 6 of the [Bill of Rights]. But there was not much support for this in submissions, and the [Bill of Rights] experience is not such as to suggest that it would make the interpretive task easier. So we prefer to leave things as they are, with the question of implied statutory override being left to interpretation in each case. The purpose section which we recommend in chapter 2 would serve as an aid to interpretation.

[38] The Law Commission recommended that the Legislation Advisory Committee (LAC) should consider re-examining its guidelines on relationships between Acts.[34]

[39] As it ended up, s 24 of the 2020 Act provides:

> **24 Relationships between IPPs and other New Zealand law**
>
> (1) Nothing in IPP 6, 11, or 12 limits or affects—
>
> (a) a provision contained in any New Zealand enactment that authorises or requires personal information to be made available; or
>
> (b) a provision contained in any other New Zealand Act that—
>
> (i) imposes a prohibition or restriction in relation to the availability of personal information; or
>
> (ii) regulates the manner in which personal information may be obtained or made available.
>
> (2) An action taken by an agency does not breach IPPs 1 to 5, 7 to 10, or 13 if the action is authorised or required by or under New Zealand law.

[40] The guidelines of the Legislation Design and Advisory Committee (LDAC), the successor to the LAC, refer to s 24 and state:[35]

…

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32 At [8.9].
33 At [8.10].
34 At [R84].
35 Legislation Design and Advisory Committee *Legislation Guidelines* (2021) at [8.1].

> For information privacy principles 6, 11 and 12 there is then no need for legislation overriding the Act to contain an express override provision. However, any override of the Act requires careful consideration and the reasons should be clearly identified in relevant decision making documents.
>
> If that occurs, the policy should be developed so as to minimise the inconsistency. If there is any ambiguity regarding an inconsistency with the Privacy Act, the courts may prefer an interpretation of the legislation that involves the least impact on the privacy interests of individuals.
>
> …

[41] Section 7(2) of the 1993 Act states that nothing in IPPs 6 or 11 "derogates from any provision that is contained in any other Act of Parliament" that "imposes a prohibition or restriction in relation to the availability of personal information" or "regulates the manner in which personal information may be obtained or made available". Section 24 of the 2020 Act is to a materially similar effect: nothing in IPPs 6 or 11 "limits or affects" such a provision.

[42] The meaning of those provisions must, of course, be interpreted in light of the purpose and context of the Privacy Acts which emphasise a person's human right to access their own personal information. The principle of legality is also relevant. As Lord Hoffman explained in *R v Secretary of State for the Home Department, ex parte Simms*:[36]

> Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[43] Lord Browne-Wilkinson put it this way in *R v Secretary of State for the Home Department, ex parte Pierson*:[37]

> A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect … the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.

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36 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131.
37 *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL) at 575.

[44] The principle of legality applies in New Zealand law.[38] While s 6 of the Bill of Rights effectively gives legislative force to some aspects of the principle of legality, some fundamental values protected by common law presumptions are protected by the principle of legality, including the right to privacy.[39] As with other human rights, the right to privacy can only be overridden by legislative provisions which make clear that is what Parliament intended to do. As I held in *Four Midwives v Minister for COVID-19 Response*, the principle of legality is used to interpret the scope of statutory provisions so as to avoid rights-infringing applications of those provisions that do not represent justified limits on the right at issue.[40]

[45] It is relevant to note that the Privacy Acts themselves contain specific restrictions on the disclosure of personal information. Some of these restrictions could be relevant to requests for the information at issue here:

(a) Section 29(1)(a) of the 1993 Act empowers an agency to refuse to disclose information where disclosure would involve the unwarranted disclosure of the affairs of another individual. Section 49(1)(a)(iii) of the 2020 Act empowers an agency to refuse access to personal information requested if the disclosure would include disclosure of information about another person, who is the victim of an alleged offence and "would be caused significant distress, loss of dignity, or injury to feelings by the disclosure".

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38 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [27]; *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [76] and [161]; and *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [51]–[57]. And see *Four Midwives v Minister for Covid-19 Response* [2021] NZHC 3064, [2022] 2 NZLR 65 at [54]–[64].

39 *Fitzgerald v R,* above n 38, at fn 72 (per Winkelmann CJ) and at [218] (per O'Regan and Arnold JJ). See the recognition of privacy as a common law right in New Zealand: *D (SC 31/2019) v New Zealand Police*, above n 38, at [92]; *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [92]–[96] per Gault P and Blanchard J and [226] per Tipping J; and *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [224] and [228] per Thomas J.

40 *Four Midwives v Minister for COVID-19 Response,* above n 38, at [63]–[64]. The application by NZDSOS and NZTSOS for leave to appeal directly to the Supreme Court was declined in *NZDSOS Inc v Minister for COVID-19 Response* [2021] NZSC 163. The appeal to the Court of Appeal was deemed abandoned on 10 March 2022 and the Court of Appeal refused an application to revive the appeal: see *NZDOS Inc v Minister for COVID-19 Response* [2023] NZCA 67.

(b) Section 29(1)(c) of the 1993 Act and s 49(1)(b) of the 2020 Act empower an agency to refuse access to information relating to the requestor if it is likely to prejudice their physical or mental health.

(c) Section 29(1)(a) of the 1993 Act and s 53(b) of the 2020 Act empower an agency to refuse access to information that includes the unwarranted disclosure of the affairs of another person.

(d) Section 29(d)(i) of the 1993 Act and s 53(f) of the 2020 Act empower an agency to refuse access to information where disclosure would constitute contempt of court. Whether the disclosure of the information at issue here would constitute contempt of court depends on the extent of a court's powers and functions in relation to that information, which I examine further below.

[46] I understand it to be agreed between the parties that information falling into these categories could be appropriately redacted by an agency responding to a claimant's request for information under the Privacy Acts. The effect of the welfare legislation on disclosure, under ss 7 and 24, is more directly in issue.

Oranga Tamariki Act

[47] Section 4 of the OT Act sets out its purposes. It emphasises the promotion of the well-being of children and young persons (under the age of 18) including by:

(a) in s 4(1)(a), their participation in decision-making that affects them and advancing long-term positive outcomes for them;

(b) in s 4(1)(b), supporting and protecting them by responding to harm, abuse, neglect, ill-treatment or deprivation and to respond to offending; and

(c) in s 4(1)(j), assisting young persons who are or have been in care or custody under the Act to successfully transition to adulthood in the ways provided in the Act.

[48] The principles of the OT Act, outlined in s 4A, make the best interests of the child or young person "the first and paramount consideration" in all matters relating to the administration or application of the Act (other than pts 4 and 5) and identify four "primary considerations": their well-being and best interests; the public interest; the interests of any victim; and their accountability for their behaviour.

[49] Section 5 requires any court or person who exercises any power under the Act to be guided by principles including (and subject to s 4A):

> …
>
> (a) a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any proceeding, process, or decision affecting them, and their views should be taken into account:
>
> (b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—
>
> (i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—
>
> (A) treated with dignity and respect at all times:
>
> (B) protected from harm:
>
> (ii) the impact of harm on the child or young person and the steps to be taken to enable their recovery should be addressed:
>
> …
>
> (v) decisions should be made and implemented promptly and in a time frame appropriate to the age and development of the child or young person:
>
> …
>
> (vii) endeavours should be made to obtain, to the extent consistent with the age and development of the child or young person, the support of that child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:
>
> …

[50] The purposes and principles of the OT Act set out in ss 4, 4A, and 5 support those making decisions under the OT Act to assist the recovery of those who have been abused as children and young persons when they were subject to orders made under the OT Act.

[51] Sections 8 to 11 expand on the principles in s 5 regarding the participation of children and young persons in decision-making. They require information and explanations about processes, documents and decisions to be given to a child or young person. Relevantly:

(a) Section 8(1) requires parents, guardians, those having the care of a child or young person, and the child or young person themselves, to be informed as soon as practicable of any action or decision that significantly affects a child or young person, and of the reasons for it. Section 8(2) provides that it is not necessary to so inform the child or young person if they are incapable of understanding the action or decision or it is plainly not in their interests to be so informed. Section 8(3) requires the information to be given orally and where practicable in writing, and in a manner and language that the person understands.

(b) Section 10 requires, in proceedings before the Family Court or Youth Court in which a child or young person appears, their barrister or solicitor, and the court, to:

(i) explain in a manner and in language that can be understood by the child or young person the nature of the proceedings and, where they are not legally represented, the nature and the legal implications of the allegations;

(ii) satisfy themselves that the child or young person understands the proceedings; and

(iii) explain to the child or young person the nature and requirements, provisions for variation and rights of appeal relating to care or protection orders under s 83(1), other orders under s 84, and Youth Court orders under s 283, in a manner and in language that can be understood by that child or young person.

(c) Section 11 requires a judge, barrister, solicitor, person convening a family group conference, or person preparing or reviewing a plan or taking an action or making a decision, to:

(i) encourage and assist a child or young person to participate in identified court proceedings "to the degree appropriate for their age and level of maturity" unless, in their view, that participation is not appropriate;

(ii) give them reasonable assistance to understand the reasons for the proceedings or process, the options available to the decision-maker and how those options could affect them;

(iii) give them reasonable opportunities to freely express their views on matters affecting them;

(iv) assist them to express their views and be understood;

(v) take into account their views and set them out and, if those views were not followed, include the reasons as to why; and

(vi) explain to the child or young person the decisions, the reasons and how it will affect them, in a manner and in language appropriate for their age and level of understanding.

[52] These requirements reflect the requirement on New Zealand under art 12(2) of the UNCROC to provide children with the opportunity to be heard in any judicial or

administrative proceedings affecting them, in a manner consistent with the procedural rules of national law.[41] They also reflect art 13, as noted above at [30].

[53] Part 2 of the OT Act sets out orders the Family Court can make in respect of children, including care or protection orders, services orders, restraining orders, and custody orders.[42] Section 128 provides that the Family Court must obtain a plan for a child or young person before making a services order, support order, custody order, guardianship or special guardianship order. The court can order who prepares the plan; otherwise it is prepared by the applicant, under s 128(1). Sections 132, 133 and 136 provide for the distribution of these plans:

> **132 Access to plans**
>
> (1) Subject to section 133, a copy of every plan furnished to the court pursuant to section 128 shall be given by the Registrar of the court—
>
> (a) to every person entitled to appear and be heard on the application to which the plan relates and to any barrister or solicitor appearing for that person:
>
> (b) to any lay advocate, barrister or solicitor, or other person representing the child or young person to whom the application relates or a parent or guardian or other person usually having the care of the child or young person:
>
> (c) to the chief executive:
>
> (d) to any other person whom the court considers has a proper interest in receiving a copy of the plan.
>
> …
>
> **133 Court may order plan not to be disclosed**
>
> The court may order that the whole or any part of a plan given to any person pursuant to section 132(1) shall not be disclosed to any person specified in the order where it is satisfied that such disclosure would be, or would be likely to be, detrimental to the physical or mental health, or the emotional well-being, of any child or young person or other person to whom the plan relates.
>
> …

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41 UNCROC, above n 23.

42 Oranga Tamariki Act, ss 83, 86, 87 and 101.

136 Access to reports and revised plans

The provisions of sections 132 and 133 shall apply, with such modifications as may be necessary, with respect to every report, and every revised plan, furnished to the court pursuant to section 135.

[54] Part 3 of the OT Act provides for the Family Court's procedures in making the orders identified above in respect of any child or young person to whom the proceedings relate. These include: medical, psychiatric, and psychological reports; social worker reports; and cultural and community reports.[43] Sections 191 and 192 of the OT Act provide:

191 Access to reports

(1) Subject to section 192, a copy of every written report furnished to the court pursuant to section 178 or section 181 or section 186 or section 187 shall be given by the Registrar of the court—

(a) to every person entitled to appear and be heard on the proceedings to which the report relates, and to any barrister or solicitor appearing for that person:

(b) to each lay advocate, barrister or solicitor, or other person representing a child or young person to whom the proceedings relate or a parent or guardian or other person usually having the care of the child or young person:

(c) to the chief executive:

(d) to any other person whom the court considers has a proper interest in receiving a copy of the report.

…

192 Court may order report not to be disclosed

The court may order that the whole or any part of a report given to any person pursuant to section 191(1) shall not be disclosed to any person specified in the order where it is satisfied that such disclosure would be, or would be likely to be, detrimental to the physical or mental health, or the emotional well-being, of any child or young person or other person to whom the report relates.

[55] Parts 4 and 5 of the OT Act relate to youth justice and Youth Court procedure. The Youth Court may order reports and plans for its proceedings.[44] Section 339 of the Act regulates access to these reports:

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43 Sections 178, 186 and 187.

44 Sections 296M, 308C, 314, 319A, 320, 333, 334, 335 and 336.

339 Access to reports and plans under this Part

The provisions of sections 191 to 194 shall apply with such modifications as may be necessary with respect to—

(a) every report furnished to the court pursuant to section 296M or section 308C or section 314 or section 319A or section 320 or section 333 or section 334 or section 336; and

(b) every plan furnished to the court pursuant to section 296M or section 319A or section 335.

[56] Accordingly, there are two categories of provisions at issue here. First are the provisions which identify to whom the Registrar of a court must give copies of plans and reports. Second are the provisions which empower a judge to order that a plan or report not to be disclosed to the person concerned. I examine these categories of provisions in turn. I note at the outset that ss 7 and 24 of the Privacy Acts require IPPs to give way to contrary legislative provisions. The IPPs uphold human rights. So, in accordance with the principle of legality and as the LDAC expected, ss 7 and 24 should be read relatively narrowly, so as not to infringe the human right to privacy more than is proportionally necessary.

[57] First, ss 132, 136, 191 and 339 of the OT Act identify to whom a copy of plans and reports shall be given by the Registrar, which may include a parent, guardian, usual carer, or legal representative of the child or young person and "to any other person whom the court considers has a proper interest in receiving" a copy of the report or plan.[45] Sections 4, 5, 8, 10, and 11 of the OT Act affect the extent to which the child or young person themselves receive such information from their parent, guardian, usual carer or legal representative. The emphasis is on providing the child or young person with the information that enables them to participate meaningfully in processes affecting them, in an age-appropriate way. This reflects arts 12(1) and 13 of the UNCROC.[46]

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45 Sections 132 and 191. This is subject to the court's discretion to order that the whole or any part of a report shall not be disclosed to a person where that would be or would be likely to be detrimental to a child or young person or other related person's physical health, mental health or emotional well-being: ss 133 and 192. Whether those people specified in ss 132 and 191 are subject to this discretion is the subject of conflicting decisions in the District and Family Courts: see *Department of Social Welfare v RB* (1993) 10 FRNZ 214 (DC); and *H v H* (1997) 15 FRNZ 430 (FC).

46 UNCROC, above n 23.

[58] The reasons underlying those sections for information not to be given to the child or young person are related to their age and capability for understanding the information at the time. In 2016, Nessa Lynch explained why information about a young person might be denied to them in Youth Court proceedings when young:[47]

> Where any action or decision significantly affecting the young person is taken pursuant to the Act, the parent or caregiver and the young person must be informed of the action and the reasons for the action. The provision for the young person is tempered somewhat as the young person does not have to be informed where incapable of understanding or where the provision of the information is plainly not in the young person's interest. This provision is more likely to apply to younger children in the care and protection context. Clients of the Youth Court are aged at least 12, with the majority aged between 14 and 17 years. If the young person is to be held criminally responsible, it would be unlikely that he or she would be held to be incapable of understanding the information or that the provision of the information would not be in the best interests of the young person.

[59] In relation to the OT Act, even if documents are not provided to the child or young person directly, ss 10 and 11 require the lawyers and the court to explain to them the reasons for and nature of the proceedings, the options available to the decision-maker, the decisions and orders, and how it will affect them. The obligations in s 11 are subject to the paramountcy of the child or young person's interests in s 4A(1). Overall, the effect is that, if the documents are not provided to the child or young person for age-related reasons, the information in them that affects the child or young person should be provided in an age-appropriate manner.

[60] When the child or young person is an adult, the age-appropriate calibration in sections 8 to 11 is no longer applicable. Accordingly, given the purpose and context of the Privacy Acts and the OT Act as outlined above, it would be a strained and overly expansive interpretation of these provisions to conceive of them as imposing a prohibition or restriction in relation to the availability of the information to the child or young person once they are an adult, for the purposes of ss 7(2)(a) or 24(1)(b)(i) of the Privacy Acts. There may, of course, be other reasons not to disclose the information, such as those in ss 49 and 53 of the 2020 Act traversed above – including if it is likely to prejudice the physical or mental health of a requesting individual. But the provisions requiring Registrars to provide information are not themselves reasons

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[47] Nessa Lynch *Youth Justice in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) at 178–179 (footnotes omitted).

for the Agencies not to provide a former child or young person with their own personal information.

[61] Perhaps these provisions could be conceived to "regulate the manner in which the personal information is made available", for the purposes of ss 7(2)(b) or 24(1)(b)(ii) of the Privacy Acts, to a child or young person according to their age and level of understanding. But they do not regulate the manner of provision once the person is an adult, for the same reasons: the age-appropriate calibration is no longer relevant and the information must be provided. I do not consider that it matters that the welfare legislation requires that it is a Registrar who provides the information when the outcome is that the information is provided.

[62] Furthermore, even if these provisions were read as imposing a prohibition or restriction or regulating the manner of making information available to the child or young person concerned, nothing in IPP 6 or 11 derogates from or limits these provisions. This is because they relate to the right of the person concerned to request from the Agencies their personal information as an adult. IPP 6 and 11(1)(b) and (c) simply affirm the right of the person to access the information and make clear that a request by the person concerned is an exception to the Agencies' obligation not to disclose personal information. Neither of these aspects of the IPPs is at odds with a Registrar being required to distribute the plans and reports, including to the person concerned or their representative. Rather, they are consistent with those provisions.

[63] Second, ss 133, 136, 192 and 339 of the OT Act empower the Family and Youth Court to order that the whole or any part of a plan or report shall not be disclosed to a specified person when satisfied that would be detrimental to the physical or mental health or emotional well-being of the child or young person concerned, or another person to whom the report or plan relates. Read in light of the purpose and context of the Privacy Acts and the OT Act, and with a rights-regarding perspective, those provisions themselves do not impose a prohibition or restriction in relation to the availability of the information for the purposes of ss 7(2)(a) or 24(1)(b)(i) of the Privacy Acts. Rather, they empower the Court to impose a prohibition or restriction.

[64] I have already mentioned the constitutional reasons to read ss 7 and 24 relatively strictly. They have the effect of privileging contrary legislation over the information privacy principles. It would be constitutionally undesirable to read them so broadly as to empower an individual decision-maker to override information privacy principles by the exercise of their discretion.

[65] Breaching such a court order, if it is made, may constitute contempt of court. That is a different reason for declining disclosure under the Privacy Act than those discussed here, which I examine further below. But if a judge has not made such an order, I do not consider the power to make it means the information must be withheld from the person whose personal information it is.

[66] These provisions conferring a discretion to order non-disclosure might be said to regulate the manner in which personal information may be made available for the purposes of ss 7(2)(b) or 24(1)(b)(ii) of the Privacy Acts. But a power to restrict information from being provided does not naturally refer to "the manner" in which it is provided. And, as above, IPPs 6 and 11(1)(b) and (c) do not derogate from these provisions in providing for the right of the child or young person concerned to access their information as an adult, when the welfare legislation is interpreted purposively. Section 4(1)(j) of the OT Act provides that a purpose of the Act is "assisting young persons who are or have been in care or custody under the Act to successfully transition to adulthood in the ways provided in the Act". Accessing their own information can be considered to facilitate that purpose.

[67] Indeed, as further statutory context, pt 7 of the OT Act, dealing with children and young persons in care, has a subpt, that came into effect in 2019, with the heading "Moving to independence". Its purposes, at s 386AAB(c), include "to enable young persons to access the government and community support that they need to manage challenges and to grow and develop as adults". Section 386AAC sets out principles to be applied by any person performing functions or exercising powers under that subpt. They include the young person increasingly leading decisions about matters affecting them and being supported by adults to do this, as well as the young person being supported, to the extent reasonable and practicable, to address the impact of

harm. These purposes and principles also support those who have been in care accessing their own personal information about that experience, as adults.

[68] Furthermore, to hold that IPPs 6 and 11 do not apply even where there is no court order would have the surprising effect that, where there is a court order, termination of the order by the court would have no effect. It is not disputed between the parties that personal information may not be disclosed if a specific court order has been made.

Care of Children Act 2004 and Guardianship Act 1968

[69] Part 3 of the COCA contains procedural provisions, including in relation to guardianship and parenting orders:

(a) Under s 132, if an application is made for a guardianship or parenting order, the Chief Executive of Oranga Tamariki or a social worker must report on the application.

(b) Reports may also be ordered from other persons, such as psychologists pursuant to s 133.

(c) Section 134 provides, relevantly:

> **134 Distribution, etc, of reports under sections 132 and 133**
>
> (1) The Registrar of the court must copy a report under section 132 or section 133 (the **report**)—
>
> (a) to the lawyer acting for each party to the proceedings or, subject to subsection (3), if a party has no lawyer acting for that party, to that party; and
>
> (b) to a lawyer appointed to act for a child who is the subject of the proceedings.
>
> …
>
> (4) Before the report is copied to a lawyer under subsection (1)(b), a Family Court Judge or Family Court Associate must consider whether the report may be given or shown to the child for whom the lawyer is acting.

> (5) A lawyer referred to in subsection (1)(b) may give or show the report to the child for whom the lawyer is acting only if a Family Court Judge or Family Court Associate so orders, but in every case the lawyer must explain to the child the purpose and contents of the report, unless the lawyer considers that to do so would be contrary to the welfare and best interests of the child.

[70] The Guardianship Act was the predecessor to the relevant provisions in the COCA and may have applied to some claimants before 2004. Section 29 of the Guardianship Act, as originally enacted, regulated the distribution of a report from the chief executive or a social worker in relation to an application for guardianship, custody or access similarly to s 134 of the COCA — the court could order that the report given to counsel not be given or shown to the person for whom counsel is acting. The Guardianship Amendment Act 1980 effectively reversed that position in relation to children represented by a lawyer, an appointment which it empowered. Section 18 of the 1980 Amendment Act inserted s 30 which empowered the court to appoint counsel for the child unless the court was satisfied the appointment would serve no useful purpose. Section 16 amended section 29 of the Guardianship Act to provide that the report must be given to a lawyer for the child but would be given or shown to the child themselves only if the Court ordered that to be done. The Guardianship Amendment Act also inserted s 29A which empowered the court to request reports from other persons, subject to the same access provisions.

[71] So, unlike the OT Act, the COCA has, and the Guardianship Act had, a starting point that personal information will not be provided to a child for whom counsel is acting unless the court so orders. Accordingly, s 134 of the COCA do, and s 29 of the Guardianship Act did, impose restrictions on the making of information available to a child or young person for the purposes of ss 7 and 24 of the Privacy Acts. But, like the OT Act, s 7AA of the COCA requires:

> A lawyer appointed under section 7 to represent a child must, if it is reasonably practicable to do so having regard to the age and maturity of the child, explain the nature of the proceedings to the child in a manner that the child is most likely to understand.

[72] The required paramountcy of the welfare of the child in s 23 of the Guardianship Act, and the professional obligations of a lawyer for the child, should have had a similar effect under that regime. It is clear that the purpose of these

provisions rests on protecting the age-appropriate capacity of the child. That policy is not fulfilled by restricting release of the information to the person concerned when they are an adult.

[73] Interpreting these provisions purposively, and in accordance with the principle of legality, the operation of IPPs 6 and 11 in response to a request from the child or young person as an adult, for their own personal information, does not derogate from, limit or affect these provisions. That is because the operation of IPPs 6 and 11 in response to these sorts of requests, in this context, does not have the effect of providing the information to children or young persons but to adults. The protection of the age-appropriate capacity of the child is not derogated from, limited or affected, for the purposes of ss 7 and 24 of the Privacy Acts.

Children and Young Persons Act 1974 and Child Welfare Act 1925

[74] The plaintiffs also ask the Court to make declarations in respect of the CYP Act and its predecessor, the CW Act, which are now repealed but which may relate to the access of claimants to their personal information. In particular:

(a) Section 40 of the CYP Act required the Children and Young Persons court to satisfy itself that a child or young person understood the proceedings and to explain in simple language the nature of the proceedings and any allegations against the child or young person, including their legal implications.

(b) Section 42 of the CYP Act required a report of a social worker, into alleged offences committed by a child or young person and about the background of a child or young person under s 41 of the Act, to be shown to the parent, legal representative and, if the Court ordered, to the child or young person. If they were not represented and there was no such order, the Court was required to tell the child or young person, if they were of sufficient age and understanding, the substance of any part of the report bearing on their character or conduct. The child or young person or their parent could tender evidence in rebuttal.

[75] It is not clear to me whether the Crown opposes the legal point underlying this application. The statement of defence states that MSD and Oranga Tamariki provide copies of reports of proceedings subject to s 30(2) of the CW Act unless there is a specific indication that the report remains in the custody or control of the court. This section is not mentioned in the Crown's submissions. The plaintiffs' statement in reply simply asserts that these reports are not in the custody and control of the court. It is also not clear that the plaintiffs here are directly affected by these sections.

[76] These points are relevant to relief. But the application of the logic of the reasoning regarding the provisions considered above is reasonably clear. Section 42 of the CYP Act only required a report to be shown to the child or young person if the Court so ordered. But, if there was no such order, the substance of the information was required to be provided to them anyway, in an age-appropriate manner. Accordingly, the same reasoning as above applies. The section did not impose a prohibition or restriction, and did not regulate the manner in which personal information may be made available, in relation to the availability of the information to the child or young person once they are adult. Even if it did, IPPs 6 and 11 do not derogate from, or limit, s 42 in that regard.

[77] Section 30(2) of the CW Act stated it was not lawful for any person to publish a report of any proceedings taken before a Children's Court except with the "special consent of the presiding Magistrate or Justices". This section concerned publication of information and the publicness of hearings. As such, as the plaintiffs submit, it did not prohibit, restrict or regulate the manner of making available information to the child or young person, whether they were adult or not. The application of IPPs 6 and 11 would not derogate from, limit or affect s 30(2). A prohibition on the publication of sensitive personal information to the public, or whether a hearing is public, is not affected by the information being disclosed to the person concerned.

Issue 2: Is the right of a person to access their own personal information from agencies under the Privacy Acts limited by court rules?

[78] The above analysis focusses on the obligations of the Agencies under the Privacy Acts to disclose the personal information at issue that is held by them. The plaintiffs also seek declarations that the relevant court rules do not regulate the manner

in which personal information may be obtained or made available by the Agencies to the individual with whom the information is concerned. Ms Cooper submits that there are effectively two parallel disclosure regimes for personal information that is held by government agencies and by the courts that ordered the information be created. The Crown's position is effectively that the decision is that of the courts, not the Agencies. I have concluded that the Privacy Act requires the Agencies to disclose the information. Do the role and rules of the courts make a difference to that?

[79] I do not accept the Crown's submission that the nature of the prescribed access and disclosure provisions, and how court documents are commissioned and obtained, requires that access can only be granted by the court that commissioned the document or that the document is the "property" of the court – a submission Ms Eckersley wisely drew back from. Rather, the question of disclosure is answered by the application of the law and, in particular, the provisions of the Privacy Acts and their intersection with the court rules.

[80] I also do not consider that *Simes* makes a difference to the analysis of this issue. Collins J considered what documents could be provided to the Legal Services Commissioner by an applicant or recipient of legal aid, or their lawyer, where the document was held on Family Court files as well as by the party or their lawyer, in the context of proceedings concerning children that were still live.[48] But:

(a) The Privacy Acts were not relevant to the situation there. The Commissioner did not have the right to access the information against which the limitations of other legislative provisions had to be balanced. That makes all the difference to assessing the legal ability of the person concerned to request their own personal information.

(b) In addition, the considerations discussed by Collins J regarding the best interests of the child do not apply in the same way when the person concerned is an adult. The reasons Collins J identified for why courts should control the distribution of reports, which centred on the risk of

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48 *Simes v Legal Services Commissioner*, above n 2.

> physical or psychological harm to the person concerned,[49] has to be taken into account by the agency in making a decision under the Privacy Acts. There is a clear reason for courts seized of proceedings involving children to maintain control of the distribution of documents regarding those children. But long afterwards, when the children are adults, that reason in itself does not constitute a limit on their right to access their own personal information held by the Agencies.

[81] The Privacy Acts govern access to information from both public and private sector agencies. Agencies are defined in s 8(a) of the 2020 Act to include a court, "except in relation to its judicial function". Section 2(1)(b)(vii) of the 1993 Act similarly only excludes a court in relation to its judicial functions. So the Privacy Acts do not govern requests to courts for the disclosure of documents held by courts as part of their judicial functions. That includes the documents sought here. There was no argument to the contrary. Instead, such requests to the courts are governed by court rules which are examined below. The issue examined here is whether the courts' role, and rules, in relation to information in documents they have ordered be created, affect the obligations of the agencies who hold those documents to disclose them under the Privacy Acts when requested.

Exceptions under the Privacy Acts

[82] The role of courts in ordering plans, reports and other documents to be created under the welfare legislation, and the court rules under which courts consider disclosure of those documents, do not affect the application of IPPs 6 and 11(1)(b) or (c) to requests for information in those documents that are held by agencies, where the information is requested by the person concerned.

[83] As explained above, ss 7 and 24 of the Privacy Acts preserve provisions of legislation which IPPs 6 or 11 derogate from, limit or affect if they impose a prohibition or restriction in relation to the availability of personal information or regulate the manner in which personal information may be obtained or made available.

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[49] At [52].

[84] Sections 29(1)(i) of the 1993 Act and s 53(f) of the 2020 Act empower an agency to refuse access to personal information where disclosure would constitute contempt of court. The Contempt of Court Act 2019 reformed and refined the law of contempt of court, codifying six particular common law contempts.[50] The Act does not limit or affect the inherent jurisdiction of this Court to punish any person for contempt of court in other circumstances.[51] Section 16 of the Act empowers a court to enforce its orders where other methods of enforcement are inappropriate or have failed. It applies to orders made in clear and unambiguous terms which are clearly binding on a person who had knowledge of the terms of the order and who, without reasonable excuse, knowingly failed to comply with the order. That would ordinarily be likely to apply to a deliberate breach of a judge's specific direction not to disclose information. But it is difficult to see how disclosure by an agency, in accordance with a Privacy Act, to the person concerned, of their own personal information it lawfully holds, which has not been the subject of an express court order to the contrary, would constitute contempt of court. IPPs 6 and 11 do not derogate from, affect, or limit, ss 29(1)(i) or 53(f) of the Privacy Acts in those circumstances.

Exceptions in relation to court rules

[85] Section 236 of the District Court Act 2016 provides, relevantly:[52]

> **236 Access to court information, judicial information, or Ministry of Justice information**
>
> (1) Any person may have access to court information of the District Court to the extent provided by, and in accordance with, rules of court.
>
> (2) Access to judicial information is not subject to any enactment that applies to the provision of, or access to, any other information.
>
> (3) Any person may have access to any Ministry of Justice information to the extent provided by, and in accordance with, the Official Information Act 1982, the Privacy Act 2020, the Public Records Act 2005, or any other enactment providing for or regulating access to the information.
>
> …

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50 Contempt of Court Act 2019, s 3(3)(a) and pt 2.

51 Section 3(b).

52 The judgment was recalled and re-issued on 20 August 2024 to address this legislative provision of plain relevance, by inserting paragraphs [85]–[87].

(4) In this section, **court information**, **judicial information**, and **Ministry of Justice information** mean the information described as such in Schedule 1.

[86] The documents under discussion here fit within the category of "Court file" under the description of "court information" in sch 1 of the District Court Act:

…

2	Court file	A collection of documents in the custody and control of the court that relate to criminal or civil proceedings (including family proceedings) for example, applications, submissions, and supporting affidavits, but excluding notes made by or for a judicial officer for his or her personal use

…

[87] Accordingly, under s 236(1), any person may have access to the documents as court information "to the extent provided by, and in accordance with, rules of court". Access to "court information" is not subject to the same restriction as access to "judicial information", which is explicitly stated not to be subject to any enactment that applies to the provision of, or access to, any other information. A person's right to access their own personal information under the Privacy Acts, from the Agencies, depends on the interactions between those Acts and the court rules, in terms of ss 7 and 24 of the Privacy Acts.

[88] Sections 7 and 24 of the Privacy Acts also preserve provisions of secondary legislation which IPPs 6 or 11 derogate from, limit or affect, in different ways:

(a) Section 7(3) of the 1993 Act provides that nothing in IPP 6 or 11 derogates from any provision in any legislative instrument made by Order in Council within the meaning of the Legislation Act 2012. That applies to the Family Court Rules 1980 (FC Rules), the Oranga Tamariki Rules 1989 (OT Rules), and the District Court (Access to Court Documents) Rules 2017 (DC Rules).

(b) Section 24(1)(a) of the 2020 Act provides that nothing in IPP 6 and 11 limits or affects a provision "in any New Zealand enactment that

> authorises or requires personal information to be made available". Under s 13 of the Legislation Act 2019, "enactment" includes "any secondary legislation", which includes court rules.[53] But s 24(1)(a) only relates to provisions that authorise or require personal information to be made available, which is not what is at issue here. Section 24(1)(b) preserves a provision "in any other New Zealand Act" from being limited or affected by IPP 6 and 11. That does not include the court rules themselves. But it could include the empowering provisions under which those rules are made.

[89] It seems clear that this difference reflects the Law Commission's 2011 recommendation, discussed above at [37], that inconsistent regulations should not automatically prevail over IPPs, consistent with constitutional orthodoxy.

[90] The parties did not make submissions on the difference between ss 7 and 24 in terms of how they relate to court rules. Indeed, their submissions on court rules related primarily to the stand-alone implications of *Simes* rather than to the application of these sections in relation to court rules. On the basis of the clear meaning of the text of ss 7 and 24, I proceed on the basis that there is an interpretive issue regarding the effect of s 7 of the 1993 Act in relation to court rules but that the interpretive issue regarding the effect of s 24 of the 2020 Act relates only to the empowering provisions. I need to traverse these issues explicitly in order properly to consider the declarations sought. But these issues are similar to those relating to the welfare legislation, examined above.

[91] The FC Rules and the DC Rules govern access to information from the Family and Youth Courts.[54]

(a) The DC Rules are made under, relevantly:

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53 Family Court Act 1980, s 16A(5)(a); and Oranga Tamariki Act 1989, s 448(3).

54 In relation to the Youth Court, the Oranga Tamariki Rules 1989 provide that "if any case arises for which no form of procedure is prescribed by the Act or these rules, the District Courts Rules shall apply, so far as they are applicable and with any necessary modifications, and the general practice of District Courts shall apply": r 5(2).

(i) Section 228 of the District Court Act 2016 which empowers the Governor-General, by Order in Council, to make rules regulating the practice and procedure of the court in the exercise of its jurisdiction under that or any other Act. That includes, at s 228(4)(k), rules "providing for custody of District Court records". Under s 228(5) the rules are defined to be secondary legislation.

(ii) Section 386(1) of the Criminal Procedure Act 2011 which empowers rules to be made, including under s 386(2)(m), prescribing "requirements relating to the custody of documents, exhibits, and other things connected with proceedings to which this Act applies".

(b) The FC Rules are made under s 16A of the Family Court Act 1980 which empowers the Governor-General, by Order in Council, to "make rules regulating the practice and procedure of the Family Court in proceedings that the Family Court has jurisdiction to hear and determine". That includes, under s 16A(2)(h), rules providing for "the keeping, searching, and transfer of records". Under s 16A(5) the rules are defined to be secondary legislation.

[92] Relevantly, in the DC Rules and FC Rules:

(a) Rule 3 of the DC Rules provides that they apply to "documents while they are in the custody or control of the court". The definitions of "court file" and "document" in r 426 of the FC Rules have the same effect.

(b) Rule 5 of the DC Rules provide that the rules do not affect the court's inherent power to control its own proceedings and recognises that the court may direct that documents may be accessed only with the

permission of a Judge. The same point is accepted in the case law regarding the FC Rules.[55]

(c) In the DC Rules:

(i) Rule 7(1)(b) of the DC Rules provides that a person may not access documents, a court file or any judgment or order in proceedings under the COCA unless the Judge is satisfied that there is a good reason for permitting access or they are a party.

(ii) Rule 9(1) of the DC Rules, which overrides r 7, provides that parties have the general right to search and inspect the court file or any document relating to the proceeding without paying a fee, subject, in r 9(5), to a judge's directions to the contrary.

(d) In the FC Rules:

(i) Rule 427 entitles a party or their lawyer, or a lawyer appointed to represent a child or young person in the proceedings, among others, to access a document or court file in the first access period: up until six years from the date a sealed judgment or order is made or from the dates of the judge's reasons for making the order.

(ii) Rule 428 entitles a party to have access to an order, and a party and any other person to apply to the court for permission to access any other document or the court file in the second access period: after the six year period under r 427 and before a document is transferred to Archives New Zealand.

(e) Rule 427 of the FC Rules provides that a party to proceedings is entitled to have access to a document or court file unless that would contravene any order or direction of the court.

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[55] See, for example, *Hirstich v Family Court at Manukau* [2014] NZCA 305, [2015] NZFLR 317.

[93] A child may or may not be a party to the various proceedings contemplated under the relevant Acts. Section 1(a) of the Family Court Act, and s 7 of the COCA, imply that a child may be a party to, or the subject of, proceedings. Sections 156 and 157 of the OT Act contemplate that a child or young person is distinct from a party. Section 30 of the Guardianship Act contemplated that a child could be a party while the CW Act appears not to have, at various points in its history. The CYP Act is not particularly clear on the issue.

[94] So, the empowering provisions, s 228 of the District Court Act and s 16A of the Family Court Act, empower rules of those courts to be made as secondary legislation. The DC Rules and FC Rules provide that "parties" may access documents. Children affected by the proceedings at issue do not always have the status of "parties". The rules and those courts' inherent powers also empower courts to direct that documents may be accessed only with the permission of a judge.

[95] The intersection between ss 7 and 24 of the Privacy Acts and the court rules which empower judges to order documents not be disclosed, is similar to that between those sections and the sections of the welfare legislation which empower judges to order documents not be disclosed. Indeed, in the circumstances at issue here, the judges are empowered by the court rules to exercise discretions for the purposes of the same welfare legislation.

[96] Read in light of the purposes and contexts of the 1993 Act and the welfare legislation, and without an unduly expansive perspective, the court rules themselves do not impose a prohibition or restriction in relation to the availability of the information for the purposes of s 7(2)(a). They envisage that the usual procedure of the Youth Court and Family Court is that those courts may impose a prohibition or restriction. The constitutional reasons to read s 7 relatively strictly continue to apply. The rules do not empower an individual decision-maker, even a judge, to override the right to privacy of an individual who has been subject to state care, and is now an adult, to access their own personal information.

[97] The empowering provisions, and the rules, could be said to regulate the manner in which personal information may be made available for the purposes of ss 7(3)

or 24(1)(b)(ii) of the Privacy Acts. But, as with the equivalent provisions in the OT Act, the application of IPPs 6 and 11 in providing for the right of the child or young person concerned to access their own information as an adult, does not derogate from, limit, or affect the empowering provisions or the rules unless the court has made a specific non-disclosure order. To hold that IPPs 6 and 11 do not apply even where there is no court order would mean that, where there is a court order, termination of it by the court would have no effect. The point is reinforced by the fact that the person concerned making the request is no longer a child or young person. Accordingly, their interests are no longer the subject of the specialist expertise of the Family or Youth Court and the purposes of the welfare legislation do not apply to them in the same way as when they were children or young people.

Concluding observations

[98] I conclude that the text of the Privacy Acts, interpreted in light of their purpose and context, recognises the rights of the plaintiffs to access their own personal information records as adults. The specific provisions of most of the welfare legislation, and the court rules, and provisions empowering the making of court rules, do not impose a prohibition or restriction, or regulate the manner in which information is to be made available, in relation to the personal information of the child or young person once they are adults, for the purposes of ss 7 or 24 of the Privacy Acts. To the extent some provisions in welfare legislation do have that effect, nothing in the application of IPP 6 or 11 to the context of those requests from adults derogates from, limits or affects those provisions. Accordingly, the Agencies are bound by the Privacy Acts to respond to those persons' requests. Unless a court has ordered that specific personal information not be provided to the person concerned, or another exception in the Privacy Acts applies, the agency must provide the information to the person concerned.

[99] It is crucial to the interpretation of the restrictive provisions that it is the child or young person themselves, as an adult, who is requesting the personal information – or that someone is requesting it on their behalf. The above reasoning does not necessarily apply to requests from others.

[100] I note the practical difficulties the plaintiffs say would ensue from courts having to consider all of the requests from claimants. I also note the Crown's submission that similar practical difficulties will arise from the Agencies having to consider requests, if they need to check with the courts as to whether specific orders have been made. But, in the end, the administrative implications inform but do not determine the point of law at issue.

[101] In light of the conclusions I have reached, I do not need to decide the issue of whether the Agencies are lawfully able or unable to provide the same personal information to other agencies, as the plaintiffs say they have been doing. I did not receive detailed submissions from the parties about that matter.

[102] It follows from my reasoning that I accept the plaintiffs' submission that, at least for those whose own personal information is concerned, there are effectively two parallel disclosure regimes for personal information that is held by government agencies and by the courts that ordered the information be created. The fact that a court has powers to order personal information not to be disclosed, under welfare legislation and/or court rules, does not, in itself, obviate the legal responsibilities of the Agencies to respond to requests from the persons concerned for their own personal information, exercising their right to privacy under the Privacy Acts. Those responses must, of course, take into account the various potential grounds under the Privacy Act for non-disclosure that apply in an individual case, such as where it would include unwarranted disclosure of information about another person or disclosure is likely to prejudice the physical or mental health of the requestor, or where a court has specifically ordered that information is not to be provided to them.

Relief

Declarations sought

[103] The plaintiffs seek declarations under the Declaratory Judgments Act 1908 (DJA) that:

(a) In relation to a personal information access request made and/or transferred to an agency, ss 7 and 24 of the Privacy Acts did not, and/or

do not, provide a basis to withhold an individual's personal information included in:

(i) a report and/or advice furnished to a court pursuant to the OT Act, the COCA, CYP Act, or Guardianship Act; and

(ii) a record of a proceeding under the CW Act;

from the individual concerned and/or their representative.

(b) The DC Rules and FC Rules do not regulate the manner in which personal information may be obtained or made available to an individual concerned and/or their representative by an agency, in response to a personal information access request made and/or transferred to that agency.

(c) Their access rights have been breached as a result of the conduct of each of the defendants.

Relevant law of declarations

[104] Section 10 of the DJA provides that the jurisdiction to grant such declarations is discretionary and the Court may "on any grounds which it deems sufficient, refuse to give or make any such judgment or order". Courts have declined to exercise the discretion where there are questions of fact to be determined, a declaration relates to purely abstract or hypothetical questions or would not achieve some practical consequences to the parties or the public, or there would be sufficient vindication in the absence of an order, or the decision-maker will abide the Court's decision without need for a formal order.[56]

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[56] *Mandic v Cornwall Park Trust Board* [2011] NZSC 22, [2012] 2 NZLR 194 at [5]; *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864 at [289]; and *Department of Internal Affairs v Whitehouse Tavern Trust Board* [2015] NZCA 398, [2015] NZAR 1708 at [80].

Submissions on relief

[105] Ms Cooper and Mr Brailsford submit declaratory relief should presumptively follow findings in favour of a party. There is no reason to refuse relief. It is not reasonable to expect claimants who have been abused in state care to trust that the Crown, which has changed its position several times in relation to this issue, will comply in good faith without a court declaration. A clear and authoritative articulation of the proper meaning of the legislation at issue, and the effect of the Rules, is inherently useful and promotes and enables their proper application and prevents the Crown changing its position again. It would also provide certainty for future requests and assist the Office of the Privacy Commissioner's consideration of Agencies' previous practices. Where the Crown can constrain what information it gives, it does. History does not reflect kindly on the Crown in these claims.

[106] Ms Eckersley submits that, should the plaintiffs' interpretation be accepted, formal declarations should nevertheless by declined. The declarations sought do not properly capture the issue the Court has been asked to consider relating to whether the provisions engage ss 7 and 24 of the Privacy Acts. The declarations sought against the Ministry of Justice and the Crown Response Unit are inappropriate as the allegations against those parties are subject to factual disputes the Court has not been asked to resolve. The declarations sought about the DC Rules and FC Rules do not make sense in the context of the proceedings and the position taken by the parties. Similarly, the alternative declarations are not the subject of a dispute regarding ss 7 and 24 of the Privacy Acts. Declarations are also unnecessary as the Crown will abide the decision of the Court without the need for a formal order to be made, though the Crown understands why the applicants would not have confidence in that.

Should declarations issue?

[107] The plaintiffs have succeeded in their primary legal argument. They have sought only declarations as relief. There are no questions of fact to determine. The issues are very real to the plaintiffs, not abstract or hypothetical. I consider they are entitled to declaratory relief. The Crown has changed its position in relation to this legal issue several times. And survivors of abuse in state care cannot reasonably be

expected to have confidence in the Crown's word that it will abide by the decision of the Court without a formal order being made,

[108] However, I do not make the declarations sought by the plaintiffs. I do not consider a declaration stating that the plaintiffs' rights have been breached is required, given the uncertainty in, and complexity of, the law on the points at issue and the lack of clarity and argument about exactly what responses were made to whom and when. Rather, I make a simpler declaration that reflects the reasoning of the judgment. That reasoning includes the effect of the CYP Act, the CW Act and the Guardianship Act so, for the sake of clarity, I extend the declarations to those Acts as well.

Result

[109] I declare that the plaintiffs' rights as adults, to access their own personal information under the Privacy Acts, in documents that are held by the defendant agencies which were ordered to be created by courts, are not limited, under s 7 of the Privacy Act 1993 or s 24 of the Privacy Act 2020, by the provisions, considered in this judgment, of the Oranga Tamariki Act 1989, the Care of Children Act 2004, the Children and Young Persons Act 1974, the Child Welfare Act 1925, the Guardianship Act 1968, and the District Court (Access to Court Documents) Rules 2017 or Family Court Rules 2002.

[110] On a preliminary basis, I would be inclined to award costs against the Crown in favour of the plaintiffs on a 2B basis, and reasonable disbursements. If agreement cannot be reached on costs: the Crown may file and serve brief submissions of up to 10 pages within 20 working days of the date of this judgment; the plaintiffs may file and serve brief submissions of up to 10 pages within 10 working days of those submissions; and the Crown may file up to five pages of submissions in reply within five working days of that.

Palmer J