Evidence Amendment (Journalist' Privilege) Bills - Public Hearing 18 November 2010, Questions on Notice

Witness	Hansard page No.	Senator	Question
Australia's Right to Know	14	Brandis	Senator BRANDIS—Can I turn to a completely different topic. That is the difference between the coalition's bill and Mr Wilkie's and Senator Xenophon's bill about which you offer no expression of opinion, but can I simply make a point to you and invite your comment. By locating journalist privilege among a range of other confidential relationships, the effect of the coalition's bill would be to attract a wide body of legal principles concerning the protection of confidential relationships. This is kind of a lawyer's point, I suppose, but it seems to me that that would strengthen the protection of journalists because their privilege is located in a more substantial, more significantly developed and sophisticated body of legal principle. What do you think about that? Ms Chapman—I think we should probably take it on notice. They are quite different privileges, so potentially they may overlap, but I would suspect that they would also lead to— Senator BRANDIS—But there are some core legal principles that apply across the range of that body of legal doctrine that deals with the protection of confidential relationships. Ms Chapman—I think we need to take it on notice. Senator BRANDIS—Alright, thank you.

ARTK Response

The protection afforded to journalists by both the proposed section 126H of the Wilkie/Xenophon Bill and section 126D of the Brandis Bill will be identical - they both create a journalists' privilege that is industry specific.

ARTK accepts the definition of "journalist" under both Bills as "*a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium*".

ARTK supports both the Wilkie/Xenophon Bill and the Brandis Bill. ARTK does not believe that locating the journalist privilege among a range of other confidential relationships (with established jurisprudence) will strengthen the protection of journalists. The protection afforded to journalists under both Bills is sui generis and may not necessarily benefit from the application of legal principles concerning other confidential relationships.

It is fair to say that the Brandis Bill and its proposed extension of the professional confidential relationship privilege to other protected confidences may be of benefit to the journalist profession in circumstances where the criteria of journalists' privilege is not made out. Say for example, a doctor, nurse or social

worker who contributes confidential information to a news medium, law reform commission or other inquiry, but does not satisfy the definition of "journalist" and is not protected by the privilege. In these circumstances, a general confidential relationship privilege may also assist in the provision of information to the public, whilst retaining the relationship of confidence under which the information was imparted. The balancing test however will remain as per the current section 126B.

The Brandis Bill's professional confidential relationship privilege would also cover relationships where there is a legal, ethical or moral obligation not to disclose protected communications and records. For example: doctor/patient, psychotherapist/client, social worker/client. As Senator Brandis notes, there is jurisprudence surrounding the quality of confidence associated with these relationships, particularly in associated with the health industry. However it is not critical that the jurisprudence that has developed in respect of these relationships be applied to the privilege that is proposed for journalists.

We also noted in the hearings that one of the members of the Committee made an inquiry to the Press Council regarding whether any legal cases have been considered in New Zealand in relation to Section 68 of the Evidence Act 2006 (NZ). Section 68 is the provision in New Zealand legislation upon which the protection in the Bills was based. To our knowledge, there has only been one case related to section 68, namely, Police v Campbell and Ors HC WANG CIV 2009-483-000127, a copy of which is attached.

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IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

CIV 2009-483-000127

UNDER	Section 68 Evidence Act 2006
IN THE MATTER OF	THE NEW ZEALAND POLICE v K and W
BETWEEN	THE NEW ZEALAND POLICE Plaintiff
AND	JOHN JAMES CAMPBELL First Defendant
AND	INGRID MARIEKE LEARY Second Defendant
AND	CAROL ANN HIRSCHFELD Third Defendant
AND	HANNAH ROSE STORY Fourth Defendant
AND	ZOE JOAN DUFFY Fifth Defendant

Hearing: 30 June 2009 (at Auckland)

Counsel: L C Rowe for Plaintiff
J G Miles QC and DCE Smith for Defendants
J N Bioletti for K (granted leave to intervene)
M A Kennedy for W (granted leave to intervene)

Judgment: 7 August 2009

INTERIM RESERVED JUDGMENT OF RANDERSON J

This judgment was delivered by me on 7 August 2009
at 11 am, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

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Introduction

[1] On 2 December 2007 the Waiouru Army Museum was burgled. Some 96 medals were stolen including nine Victoria Crosses. The police say that a conservative estimate of the value of the medals is a sum in excess of $5.7 million.

[2] There was an immediate public outcry about the loss of the medals. Many regard them as an important part of New Zealand's heritage since they were bestowed for acts of valour by New Zealanders in successive world wars.

[3] The burglary and the taking of the medals was the focus of intense media attention both in New Zealand and overseas. Large sums of money by way of reward were offered for information leading to the conviction of the offenders and the recovery of the medals. Negotiations conducted through an Auckland barrister (Mr Christopher Comeskey) resulted in the recovery of the medals. Some were returned on 18 January 2009 and the remainder on 15 February 2008.

[4] On 21 February 2009 an interview was broadcast on TV3's "Campbell Live" news and current affairs programme. The presenter, the first defendant Mr John Campbell, interviewed a person described only by the fictitious name "Robert" who claimed to be one of the burglars of the Army Museum responsible for the taking of the medals. The image of the person interviewed was disguised so he could not be identified. It later transpired that the person interviewed was an actor playing the part of the person claiming to be the burglar. But it is not in dispute that the interview closely followed a transcript of an audio interview conducted earlier in the day by Mr Campbell with a man who claimed to be one of the burglars.

[5] Mr Campbell and others employed by TV3 who were connected with the interview were spoken to by the police with a view to obtaining evidence about the identity of the burglar. All those interviewed declined to disclose information about the identity of the person interviewed.

[6] After making further inquiries, the police charged two men (K and W) with the burglary. The case against them is entirely circumstantial. The police now apply by way of originating application for an order under s 68 Evidence Act 2006 compelling Mr Campbell and the other four defendants named in this proceeding to answer questions and produce documents at depositions with a view to ascertaining the identity of the person interviewed on 21 February 2008. The defendants resist the application on the ground that, as journalists, they are not compellable to give evidence disclosing the identity of an informant.

[7] The essential contest in this case is between two important aspects of the public interest. The first is the public interest in the investigation and prosecution of crime and the second is the public interest in the free flow of information and the protection of journalists' sources.

The Evidence

[8] The evidence before the Court comprises affidavits filed by the plaintiff and the defendants. The evidence on behalf of the New Zealand Police substantially comprises two affidavits by Detective Inspector C J Bensemann who is the officer-in-charge of the police investigation into the burglary. His affidavits describe the negotiations with Mr Comeskey in relation to the return of the medals, detail the nature of police inquiries to date (including interviews with the defendants in this proceeding), and outline the evidence the police have gathered so far in relation to the prosecution of K and W.

[9] According to Detective Inspector Bensenmann's evidence, [suppressed].

[10] [Suppressed].

[11] The police have issued a summons to Mr Comeskey for the purposes of the prosecution against K and W but Mr Comeskey has made it clear he is not willing to disclose the identity of his clients and is claiming legal professional privilege. No determination has been made about the admissibility of Mr Comeskey's evidence.

[12] Detective Inspector Bensemann details the results of police surveillance of [suppressed].

The TV3 Interview

[13] The police understand that the interview with the person claiming to be one of the burglars took place at the Duxton Hotel on the afternoon of 21 February 2008. Security footage taken at the Duxton Hotel on that day shows the defendants Mr Campbell, Ms Leary and Ms Hirschfeld entering and leaving the hotel that afternoon. All three are associated with TV3 in various capacities. [Suppressed].

Police interviews with Mr Campbell and Ms Leary

confirm that they were first contacted by a male who acted as an intermediary. Mr Campbell said he was contacted the following day by a different man who gave him an address to go to. Mr Campbell went to that address and the interview was recorded on an MP3 player. Mr Campbell did not disclose the address but Ms Hirschfeld told the police that it was the Duxton Hotel. Ms Duffy (another TV3 employee) confirmed to the police she booked the hotel for the interview.

[14] It is not in dispute that Mr Campbell and others associated with TV3 promised the person interviewed that they would not reveal his identity. Only Mr Campbell and Ms Leary were present during the interview which was recorded and later transcribed by Ms Leary. The police are in possession of the transcript of the audio interview but Ms Leary has stated that the digital record of the interview has been deleted from the recording device.

[15] A feature of the evidence is the steps taken by Mr Campbell to satisfy himself that the person interviewed was one of the persons responsible for the theft of the medals. Mr Campbell put the matter this way in his affidavit:

> Because of the history of an individual claiming responsibility for the burglary, apparently untruthfully, I was concerned to ensure that the person who I was interviewing was, in fact, who they claimed to be – ie, one of the persons responsible for the theft of the medals. I therefore asked this person to tell me something that only the perpetrator would know. Robert gave me some information, which I verified with a third party, and I was accordingly satisfied that Robert was a person responsible for the theft of the medals. It was crucial for me to be sure in my own mind that I was interviewing the real thief.

[16] Mr Campbell also spoke on talk-back radio about this aspect of the matter the day after the interview. In answer to the question "Did he steal them?" Mr Campbell is recorded as responding as follows:

> Yeah. Absolutely no, no doubt in my mind. And I did two things to check that. First of all I said to me [sic] you've got to tell me something that only the perpetrator would know which he did with great gusto and, in fact, his description of what he did was, you know, compelling but we weren't allowed to use that be it's a specific method that he said was particular to him and it would narrow the list of suspects.

[17] Mr Campbell went on to say on talk-back radio that he had telephoned Mr Comeskey who confirmed that the details given to him by the person interviewed were details that only the perpetrator would know.

[18] Ms Leary states in her affidavit that there was nothing distinctive about the person interviewed. She is not sure if she would recognise him again. Mr Campbell makes no such claim and says he did not obtain the name of the person. Mr Campbell told the police he knew the identity of one of the intermediaries and was confident he knew the identity of the other but was not willing to disclose who they were.

The Content of the Interview

[19] The interview begins with "Robert" agreeing with the proposition that he was one of the people involved in "pinching" the medals. He said he was surprised with the extent of the public reaction and realised that the medals had "enormous sentimental value". He told Mr Campbell that "we" decided that the medals would be returned without those responsible being detected. He was approached by a third person and he eventually met Mr Comeskey. Through him, the medals were returned. "Robert" expressed his regret to "everyone in New Zealand". He had been surprised at the media coverage and the extent to which other people had "tried to jump on board". He specifically denied that C had been involved.

[20] In the talk-back radio interview Mr Campbell gave the following day, Mr Campbell expressed the opinion that the man interviewed was a professional burglar who "was a little bit proud" of the "consummate crime" he had executed. He suspected he did not like C "raining on his parade". Mr Campbell went on to say he suspected that the person had stolen the medals in order to get a reward or some reimbursement.

Other Police Evidence Tending to Identify K and W as the Offenders

[21] [Suppressed].

[22] [Suppressed].

[23] [Suppressed].

[24] [Suppressed].

[25] [Suppressed].

[26] [Suppressed].

[27] [Suppressed].

Significance of the Disputed Evidence to the Police Case Against K and W

[28] Viewed overall, my assessment of the police case against K and W is that it is relatively weak. [Suppressed].
At least at this stage, the forensic evidence is weak.

[29] As to the link between K, Mr Comeskey and the return of the medals, an inference could be drawn that K was one of those responsible. But the inference could equally be drawn that K was an intermediary with no direct involvement with the burglary. Mr Comeskey's claim to legal professional privilege has yet to be determined but, on the face of things, it may be difficult to oblige Mr Comeskey to

disclose the identity of a client. Finally, it is notoriously difficult to have evidence of [suppressed] introduced in a case
like this. There is scant material before the Court to suggest that any such application is likely to be successful.

[30] In these circumstances, the identity of the person confessing to be one of those responsible when interviewed by Mr Campbell is a highly relevant and significant piece of evidence. Without it the police case against K and W could not be regarded as anything more than relatively weak.

[31] [Suppressed].

[32] Subsequent to the hearing, I sought clarification from counsel for the defendants as to whether privilege was claimed in relation to the identification of the Duxton Hotel as the place where Mr Campbell's interview took place on 21 February 2008. Counsel has confirmed that privilege is not claimed for those facts. Counsel advises that TV3 would provide a non-journalist witness to confirm those facts. A witness from TV3 would also provide a transcript of the audio interview and a transcript of the reconstructed video as televised.

[33] TV3's willingness to confirm these facts is important because, when combined with [suppressed], there is a sound factual
basis to enable a jury to infer that K was the person interviewed.

[34] There is a further potential weakness in the police case against K and W. [Suppressed]

The Reasons Advanced by the Defendants for Resisting the Request to Disclose the Identity of the Informant

[35] The defendants provided affidavits from Mr Campbell, others associated with TV3, as well as an independent and experienced media consultant Mr Gavin Ellis. Mr Campbell confirms in his affidavit that there was an extraordinary amount of public interest in the theft and return of the medals which he accepted represented heroic feats achieved by New Zealanders in the service of their country. In conducting the interview, he sought to provide the audience with a unique insight into the mind and motivations of someone claiming to have been involved in the theft and the return of the medals. He confirms he promised to protect the identity of the person interviewed. He described himself as being totally confident that he could honour the assurance given. He was aware that the law had changed and that journalists now had a recognised statutory immunity allowing them to protect a source. His understanding was that the immunity should operate in all but the most limited circumstances.

[36] Mr Campbell states in his affidavit that he believes very strongly in his responsibilities as a journalist. These include the honouring of promises made in the course of his work, which he regards as vital to his integrity as a journalist. The trust of those with whom he deals in the course of his work is essential and form the basis of his reputation and standing in the profession. Mr Campbell gives an example of a working relationship with a particular person who has acted as an informant on a

number of public issues. The relationship relies heavily on a guarantee that the informant's identity will not be disclosed. Without that assurance, Mr Campbell says the stories obtained from this and other sources would not be revealed. If he were compelled to disclose the identity of informants, he would not, in future, feel confident in giving an assurance of protection and the trust which informants place in him would be adversely affected. He suggested that the threshold for compulsion must be set at the highest possible level which he identified as occurring only where the protection of life was at stake.

[37] Mr Campbell also points to the practical difficulty that an assurance of protection is normally given prior to an interview at which time the information to be given is not known. Since the circumstances did not involve risk to life or property and the medals have been returned, Mr Campbell does not consider he ought to be compelled to disclose the identity of the person interviewed.

[38] Ms Leary and Ms Hirschfeld express similar views in their affidavits stating that the interview would not have been secured but for the promise to protect the identity of the person interviewed.

[39] Mr Ellis discusses a number of rules which he regards as fundamental if a request for confidentiality is made to a journalist. Any guarantee to protect the source of the information should be made prior to the interview, otherwise a journalist would not feel bound by a request for anonymity made after an interview. Where an undertaking is given, it is treated as binding. The agreement is not limited to the naming of the source but also includes the disclosure of information likely to lead to identification.

[40] Given what Mr Ellis describes as the solemn nature of such an agreement, a journalist must consider the matter carefully before acceding to the request for confidentiality. In particular, the journalist must be satisfied that the source is likely to have direct knowledge of the matter under discussion and does not have ulterior motives that might distort, obscure or mislead. Furthermore, the subject matter must be of sufficient public interest to justify a guarantee of confidentiality and must not be otherwise obtainable through attributed sources.

[41] Mr Ellis refers to the watchdog role provided by journalists as a check on the power of the state and of other organisations or individuals whose actions affect the community. He expresses the view that, at times, this role can be effectively discharged only by providing protection to individuals who have evidence of any such abuse of power but who would suffer consequences as a result of disclosure of their identity.

[42] While accepting that the present case is not one in which TV3 was performing any role as a watchdog, Mr Ellis expresses the view that the media also serve the public by contributing to a shared understanding of a wide range of values and issues of common interest. He deposes that there is wide acceptance of the "virtuous circle" within which the media can serve an important and useful function. Even if the information appears to fall outside the "virtuous circle" the promise of protection must nevertheless be honoured. Not to do so would undermine the principle of source protection; would adversely affect the ability of a journalist to discharge his or her civic role; would give rise to a chilling effect if informants doubted the journalist's willingness or ability to protect identity; the use of the expression "guarantee" would ring hollow if the public perceives that journalists can be forced to give up the identity of a source; and the breaking of an agreement would violate the level of trust engendered in the relationship between the journalist and the source.

[43] In Mr Ellis' view, there are only two circumstances in which a guarantee of anonymity may in good conscience be breached by a journalist. The first is where a person may suffer actual harm or a serious crime may be committed unless the journalist discloses the identity of the source to appropriate authorities. The second is where the journalist later becomes aware of ulterior motives which, if known at the outset, would have led to the journalist to decline to give any promise of anonymity.

[44] Mr Ellis concludes by saying a journalist must accept there may be consequences in maintaining silence. He sees this as a price that journalists must be prepared to pay in order to preserve the integrity of a "convention that is a vital tool in investigative reporting in the public interest".

[45] In response to the affidavit of Mr Ellis, the police obtained evidence from Mr Steven Price, a barrister specialising in media law and a lecturer in that subject at Victoria University. Mr Price is well qualified academically in both law and journalism and has some experience as a working journalist. His evidence analyses the nature and extent of the "chilling effect" described by Mr Ellis. He concludes that while it is very likely there will be some sort of chilling effect if disclosure of a journalist's source is directed, it is impossible to identify the existence of such an effect with any certainty, and if identified, to establish how great its impact may be.

[46] Mr Price bases his view on a substantial body of research which he describes in his evidence. He notes that the incidence of subpoenas being issued to journalists is extremely low in New Zealand. He attributes this in part to the reluctance by the media to reveal their sources and similar reluctance by the police to formally involve the media in criminal proceedings. He observes that, in considering whether to reveal information to the media, a potential source of information is likely to weigh up a number of factors. Any chilling effect might be strongest where the possibility of the identity of the source being revealed in court is present in the mind of the source. In the end, Mr Price expresses the opinion that sources are most likely to be chilled if there is a pattern of high profile court ordered disclosure and particular informants perceive that a court might compel disclosure in their case.

[47] While accepting there is no empirical evidence to support his view, Mr Price ventured the opinion that most of the ordinary business of off-the-record conversations will be substantially unaffected. The approach adopted by informants in deciding whether to reveal certain information is likely to be based on their perception of the similarities between their case and others where disclosure has been ordered.

[48] As to the grounds upon which a journalist might breach an undertaking as to confidentiality, Mr Price noted, based on overseas research, that most journalists agree they might breach such a promise in order to save lives; some would breach a confidence to prevent an innocent person being convicted; and some would voluntarily provide the authorities with confidential information to help secure a conviction for a significant crime.

[49] The views of Mr Ellis and Mr Price are valuable in illuminating the issues. The importance of protecting journalists' sources is clearly recognised but Mr Price's evidence highlights the difficulties inherent in making any empirical assessment of the extent of the chilling effect Mr Ellis fears. At best, the nature and extent of any such effect must be assessed as a matter of intuition taking into account the circumstances of the particular case; the frequency with which the court is willing to require disclosure; the level of any threshold established; and the circumstances in which the court will order disclosure. The lower the threshold established, the greater the frequency of court-ordered disclosure and the higher the level of publicity attracted to the making of such orders, the greater any chilling effect may be.

The Protection of Journalists' Sources

[50] Over the last 30 years, the law in New Zealand has seen a steady evolution in the development of protections available to journalists against being compelled to disclose confidential sources of information. Any protection at common law was limited, falling well short of any recognised privilege: *Attorney-General v Clough* [1963] 1 QB 773, 792; *Attorney-General v Mulholland* [1962] 2 QB 477, 489-490 and *British Steel Corp v Granada Television Ltd* [1981] AC 1096, 1169. If the Court considered that the ultimate interest of the community in justice being done outweighed the respect due to confidence in the profession, then the journalist was obliged to answer.

[51] A limited but well-established exception known as the newspaper rule was developed in terms of which, in defamation proceedings, a newspaper or other news medium could not be forced to disclose their source of information: *Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd* [1980] 1 NZLR 163(CA). The overriding justification for the newspaper rule was said to be the public interest in the dissemination of information. However, the rule did not extend beyond the interlocutory phases of discovery and interrogatories. A similar rule applied at the interlocutory stages of a breach of confidence action: *European Pacific Banking Corp v Television New Zealand Ltd* [1994] 3 NZLR 43, 48 (CA).

[52] Section 35 Evidence Amendment Act (No 2) 1980 conferred a statutory discretion on the Court to excuse any witness from answering any question or producing any document on the ground that, to do so, would be a breach by the witness of a confidence that the witness should not be compelled to breach. Any such confidence could arise from the special relationship existing between the witness and the source of the information or document. This section included, but was not confined to, journalists who may wish to protect the identity of their sources.

[53] By subs (2), the Court was required to consider whether the public interest in having the evidence disclosed to the Court was outweighed, in the particular case, by the public interest in the preservation of confidences between the relevant persons and the encouragement of free communication between them. The subsection required the Court to have regard to the likely significance of the evidence to the resolution of the issues in the proceeding; the nature of the confidence and of the special relationship; and the likely effect of the disclosure on the confidant or any other person. The Court of Appeal held in *R v Howse* [1983] NZLR 246, 251 that the legislature had conferred a discretion to weigh the competing public interest bearing on each particular case, having regard to broad criteria. Clearly, a balancing process was envisaged.

[54] The section has been applied in several New Zealand cases including: *R v Cara and Kelman* HC AK CRI 2004-004-6560 2 June 2004; *R v Patel* HC AK CRI 2004-004-14009 27 October 2005; and *R v Patel* HC AK CRI 2004-004-1409 3 November 2005. In *Cara and Kelman*, Potter J stated at [35]:

> ...The Court must weigh the competing public interest in freedom of expression, pursuant to which the Courts have long recognised that sources of information accessed by the media may require protection otherwise the flow of information on which freedom of speech relies may well be curtailed or may cease; and the interest of an accused person and of society generally in ensuring a fair trial for those charged under the law.

[55] Similarly, in the second of the *Patel* cases, Rodney Hansen J stated at [35]:

> The public interest in the media's ability to publish without hindrance and, for that purpose, to protect any obligation of confidence that exists, is of fundamental importance. It is not to be lightly overridden.

[56] In the United Kingdom, s 10 Contempt of Court Act 1981 confers a qualified protection in different terms from our former s 35. Section 10 of the United Kingdom legislation provides:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

[57] The differences between the previous position at common law and under s 10 are discussed by Lord Diplock in *Secretary of State for Defence & Anor v Guardian Newspapers Ltd* [1985] 1 AC 339 at 345-350 (HL). The protection conferred upon journalists in relation to disclosure of sources of information under this section is much wider than at common law. In particular, the protection exists in favour of the journalist unless the party seeking the information establishes to the satisfaction of the Court that disclosure is "necessary" for any of the three purposes identified in s 10. Establishing whether such disclosure is necessary is regarded as a question of fact.

[58] The approach to s 10 of the United Kingdom legislation was discussed again by the House of Lords in *X Limited v Morgan Grampian Ltd* [1991] 1 AC 1, and, in particular, by Lord Bridge. Lord Bridge emphasised at 44 that the task of the Court:

> ... will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached.

[59] Lord Bridge went on to identify a number of relevant factors. Significantly for the present case, Lord Bridge said at 44:

> One important factor will be the nature of the information obtained from the source. The greater the legitimate public interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained

> legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity.

[60] Later, English jurisprudence began to be influenced by the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome) 4 November 1950; TS 71 (1953); Cmd 8969 and, in particular, the right to freedom of expression conferred by article 10. In *Ashworth Hospital Authority v MGN Limited* [2002] 1 WLR 2033, the House of Lords adopted the following passage from the European Court of Human Rights decision in *Goodwin v United Kingdom* (1996) 22 EHRR 123 at [39]:

> "The court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

[61] In *Ashworth*, Lord Woolf CJ (with whom Lord Oliver and Lord Lowry agreed) said at [38] that:

> The same approach can be applied equally to section 10 now that article 10 is part of our domestic law.

[62] At [39], Lord Woolf endorsed the approach to s 10 adopted by Lord Bridge in *X Limited v Morgan-Grampian (Publishers) Ltd* (see [58] above).

[63] At [61], Lord Woolf adopted a further passage from the decision of the European Court in *Goodwin* at [40] of its judgment to the effect that the "necessity" for any restriction of freedom of expression must be "convincingly established" and

that "limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court". Lord Woolf added at [62]:

> Furthermore, I would also adopt Mr Browne's contention that any restriction on the otherwise unqualified right to freedom of expression must meet two further requirements. First, the exercise of the jurisdiction because of article 10(2) should meet a "pressing social need" and secondly the restriction should be proportionate to a legitimate aim which is being pursued.

[64] Finally, at [66], Lord Woolf said:

> The situation here is exceptional, as it was in *Financial Times Ltd v Interbrew SA* [2002] EWCA Civ 274 and as it has to be, if disclosure of sources is to be justified.

[65] On the facts, the House of Lords found that disclosure of the source of leaked medical records was proportionate and justified. The disclosure of the medical records in question was wrongful and increased the danger to the care of patients. It was necessary to identify and punish the source in order to deter the same or similar wrong-doing.

[66] The chilling effect of court orders requiring the disclosure of press sources has been discussed by Laws LJ at the Court of Appeal level in *Ashworth Hospital Authority v MGN Ltd* [2001] 1 All ER 991 at [101]:

> It is in my judgment of the first importance to recognise that the potential vice—the 'chilling effect'—of court orders requiring the disclosure of press sources is in no way lessened, and certainly not abrogated, simply because the case is one in which the information actually published is of no legitimate, objective public interest. Nor is it to the least degree lessened or abrogated by the fact (where it is so) that the source is a disloyal and greedy individual, prepared for money to betray his employer's confidences. The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source. The suggestion (which at one stage was canvassed in the course of argument) that it may be no bad thing to impose a 'chilling effect' in some circumstances is in my view a misreading of the principles which are engaged in cases of this kind. In my judgment, the true position is that it is always prima facie (I can do no better than the Latin) contrary to the public interest that press sources should be disclosed; and in any given case the debate which follows will be conducted upon the question whether there is an overriding public interest, amounting to a pressing social need, to which the need to keep press sources confidential should give way.

[67] This passage was approved by Lord Woolf in the House of Lords in *Ashworth* (above) at [66]. As a footnote, compliance with the order revealed only the name of a journalist who refused to name his source. Proceedings commenced against him ultimately failed to obtain an order requiring him to disclose the identity of his source: *Mersey Care NHS Trust v Ackroyd (No. 2)* [2006] EWHC 107; upheld on appeal: [2007] EWCA Civ 101.

[68] It is clear from the English cases and the decision in *Goodwin* that the courts in those jurisdictions have accepted that, without statutory protection, journalists' sources may be deterred from assisting the press to inform the public on matters of public interest. In turn, it has been accepted that the public watchdog role of the press might be undermined.

[69] Counsel referred to two recent articles relating to the protection of journalists' sources: Janice Brabyn "Protection Against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions" (2006) 69(6) MLR 895-934; and Ruth Costigan "Protection of Journalists' Sources" [2007] Public Law – Autumn 464. These articles are helpful to the extent that they discuss the relevant authorities in the United Kingdom and some other jurisdictions. The authors each emphasise the need for exceptional or truly compelling circumstances in order to override the protection of journalists' sources. Ms Brabyn advocates what she describes as "constitutional imperative/weighted balancing protection" for confidential news sources: 932. At 933-934 she concludes:

> As to other types of case, absent physical safety or truly compelling law enforcement/national security concerns, constitutional imperative source protection would normally prevail in criminal cases arising out of the disclosure or publication only. In criminal cases unconnected with the disclosure, no news gatherer should wish or be permitted to remain silent about information that has a real chance of preventing a person suffering physical harm or wrongful conviction. Sometimes, swearing that the defendant was not the news gatherer's source may be sufficient. Sometimes, and subject to taking all possible steps to ensure the news gatherer's and the source's safety, identification of a source may be strictly necessary. Most credible sources will understand this. Otherwise, the public interest in protecting news gatherer/confidential source relationships would still prevail.

[70] Ms Brabyn acknowledges however that news media have public interest responsibilities which she expresses in the following terms at 932:

> The point is all news gatherers who argue for special protection for news gatherer/confidential source relationships need to take their public interest responsibilities very seriously. They need to be vigilant to ensure that news gathering serves rather than threatens liberal democracy, that is, that the public benefits of publishing on confidentiality terms clearly outweigh the public and private costs of both the publication of the material and any subsequent disclosure or nondisclosure of sources. Such disinterested vigilance is both the justification for and the price of special protection for news gatherer/confidential source relationships.

[71] In her article, Ms Costigan urges the Courts to give fuller effect to what she calls the "primacy" of freedom of expression and laments the continuing influence of the common law balancing approach. She concludes at 486-487:

> The courts have responded to the requirements of the HRA. It has been established that the exceptions in s.10 CCA must correspond to the legitimate aims in Art.10(2), that the Strasbourg test of necessity must be applied, and that a disclosure order must be a last resort. But the continuing influence of the common law balancing approach, with insufficient recognition that since the HRA the exercise is one of judgment, means that these requirements are not in every respect implemented appropriately and to a sufficiently demanding standard. The jurisprudence conveys the sense that for the journalist to keep the protection of s.10, the source must have acted out of conscience, the story must be clearly in the public interest, and the journalist must be of good standing and have acted responsibly. If there is weakness at any one of these points, the courts are likely to come down on the claimant's side. Concrete harm to the claimant's legal interests wins out against intangible injury to freedom of expression. Yet the cost of incremental intrusion on the free flow of information is so high that compelling journalists to identify their sources should be truly exceptional. The relevant Recommendation of the Council of Europe Committee of Ministers identifies the following as potentially capable of overriding the public interest in the confidentiality of journalists' sources: the protection of human life, the prevention of major crime, and the defence of someone accused or convicted of a major crime. The contrast with domestic law, which continues to authorise disclosure orders simply for a private company to dismiss an employee, is stark. There is a pressing need for the courts to give full effect, whilst not adopting an absolutist position, to the primacy of freedom or expression, for as Laws L.J. has identified, "it is always *prima facie* ... contrary to the public interest that press sources should be disclosed".

The Public Interest in the Investigation and Prosecution of Crime

[72] No authority is needed for the proposition that there is a strong public interest in the investigation and prosecution of crime. The defendants rightly concede as much. In the particular context of s 10 Contempt of Court Act 1981 (UK) the House of Lords in *In re Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 was called upon to deal with the meaning of the expression "prevention of … crime" in s 10. Lord Griffiths (with whom the other Law Lords agreed) said at 705:

> The phrase the "prevention of … crime" carries, to my mind, very different overtones from "prevention of a crime" or even "prevention of crimes". There are frequent articles and programmes in the media on the prevention of crime. The subject on these occasions is discussed from many points of view including the social background in which crime breeds, detection, deterrence, retribution, punishment, rehabilitation and so forth. The prevention of crime in this broad sense is a matter of public and vital interest to any civilised society. Crime is endemic in society and will probably never be eradicated but its containment is essential. If crime gets the upper hand and becomes the rule rather than the exception, the collapse of society will swiftly follow. By identifying "prevention of … crime" as one of the four heads of public interest to which the journalist's privilege may occasionally have to yield, I am satisfied that Parliament was using the phrase in its wider and, I think, natural meaning, rather than in the restricted sense for which the appellant contends.

[73] By reference to s 10, the House of Lords found there was no reasonable excuse for a journalist to refuse to disclose the identity of his sources of information for the purposes of an inquiry under the Financial Services Act 1986 into apparent contraventions of the Companies Securities (Insider Dealing) Act 1985.

[74] The public interest in the investigation and prosecution of crime is not limited to particular crimes but extends to the public interest in the prevention of crime generally.

The Genesis of s 68 Evidence Act 2006

[75] Mr Rowe for the plaintiff provided a helpful summary of the background to the development of s 68. In 1994, the Law Commission issued a discussion paper

entitled *Evidence Law: Privilege (Preliminary Paper No 23)*. The Law Commission noted at para 338 that the enactment of the New Zealand Bill of Rights Act 1990 arguably gave scope to base journalistic privilege on the right to freedom of expression guaranteed by s 14. The Commission went on to say at para 339:

> The Commission takes the view that on balance there is a case for according privilege to journalists' confidential sources of information. Nevertheless, it has to be circumscribed with some care, and there appears to be no room for any "absolute" privilege which would prevent the courts from looking into individual cases to see whether the privilege is justified. The question is whether the existing common law principles afford a sufficient protection, or, if not, whether the matter requires specific legislation, or whether it is enough that confidentiality may be protected under the general discretionary powers afforded by statute.

[76] The Law Commission went on to propose that s 35 Evidence Amendment Act (No 2) 1980 be retained with some modifications. It was suggested that the free-flow of information (and by implication, the freedom of the press) should be declared to be a matter of public interest. At para 354 the Law Commission suggested that additional guidelines could include:

- A requirement that alternative avenues be exhausted before ordering a journalist to disclose a source.
- The court should take into account the nature of the proceeding.
- The court should also consider whether disclosure could be made in a way which limited publication of the identity of the source.

[77] In 1999, the Law Commission published its *Evidence Report* (Report 55 – Vol 1 – Reform of the Law). The Commission proposed a specific section (then s 66) to create a specific qualified privilege for journalists' confidential sources. The Commission stated at para 301 of the report that:

> The protection of journalists' confidential sources of information is justified by the need to promote the free-flow of information, a vital component of any democracy.

[78] The Commission went on to note at para 302 that an express qualified privilege which put the onus on the person seeking to have the source revealed, was preferable to a general discretion. It was said that:

This would give greater confidence to a source that his or her identity would not be revealed.

[79] The section then proposed was in substantially similar terms to the present s 68 as enacted. Apart from minor drafting changes, the only substantial change made to s 68 upon enactment was the addition of subs (5) containing certain definitions.

Section 68 Evidence Act

[80] Section 68 provides:

> **68 Protection of journalists' sources**
>
> (1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.
>
> (2) A Judge of the High Court may order that subsection (1) is not to apply if satisfied by a party to a civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs—
>
> (a) any likely adverse effect of the disclosure on the informant or any other person; and
>
> (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.
>
> (3) The Judge may make the order subject to any terms and conditions that the Judge thinks appropriate.
>
> (4) This section does not affect the power or authority of the House of Representatives.
>
> (5) In this section,—
>
> **informant** means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium
>
> **journalist** means a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium

> **news medium** means a medium for the dissemination to the public or a section of the public of news and observations on news
>
> **public interest in the disclosure of evidence** includes, in a criminal proceeding, the defendant's right to present an effective defence.

[81] Section 68 is found within subpart 8 of the Evidence Act entitled "Privilege and Confidentiality". This subpart commences with "Matters relating to interpretation and procedure" (ss 51 and 52) and is then further subdivided under the headings "Privilege" (ss 53 to 67) and "Confidentiality" (ss 68 to 70). Privilege is conferred in respect of communications with specified persons such as legal advisers, mediators, ministers of religion, medical practitioners and clinical psychologists. A person upon whom such a privilege is conferred has the right to refuse to disclose his or her communications with these specified persons: s 53. Certain privileges may be waived or disallowed under ss 65 and 67 respectively.

[82] In contrast, s 68 is expressed in the form of an exemption from the normal obligation of a witness to answer questions or to produce documents in a civil or criminal proceeding. Section 68 is focussed on the confidentiality of the communication as well as the status of journalist and informant as defined in subs (5). Section 69 applies more generally to confidential communications, irrespective of the occupation of the person to whom the communication may be made. Unlike s 68, it does not confer an exemption from compellability but gives a discretionary power to a Judge to direct that confidential information or communications not be disclosed.

[83] The Evidence Act 2006 appears to differentiate s 68 from the privileges conferred within ss 54 to 64. Section 68 takes the form of an exemption from compellability which, conceptually, may be distinguished from an entitlement to privilege: see the discussion in McNicol *Law of Privilege* (1992) at 10; J D Heydon (ed) *Cross on Evidence* (7th Australian Edition, 2004) at para 25005; and Mahoney et al *The Evidence Act 2006: Act & Analysis* (2007) at 68.02. The privileges conferred by the earlier provisions in subpart 8 belong to whoever is in communication with a person who falls into one of the designated categories (for example, the privilege under s 54 belongs to the client, not the legal adviser). In contrast, the exemption from compellability under s 68 is conferred upon the journalist. Section 68 is

therefore better interpreted as conferring a protection or immunity to journalists rather than a privilege. Indeed, such an interpretation is consistent with the heading of the section and the structure and language of the subpart.

[84] Except to the extent specifically enacted in s 68, journalists are competent and compellable witnesses in the same way as any other witness. The protection from compellability is limited and specific. It applies only where a journalist has promised an informant not to disclose his or her identity. The protection is limited to exemption from the obligation to answer questions or produce documents that would disclose the identity of the informant or enable that identity to be discovered. It does not extend, for example, to the content of any document or conversation between an informant and a journalist unless the content would enable the identity of the informant to be discovered. The limited protection conferred by the statute is not absolute. It is qualified by the power given to a High Court Judge to order under s 68(2) that the protection under s 68(1) is not to apply. While a journalist may not be compelled to disclose the identity of an informant by virtue of s 68(1), the journalist may choose to do so if he or she wishes.

[85] In this case it is common ground that:

- All of the defendants are "journalists" for the purposes of s 68.
- The person interviewed was an "informant" within the meaning of the section.
- Mr Campbell and others associated with TV3 promised the person interviewed that his identity would not be disclosed.

[86] The critical question for consideration is how the Court should approach an application under subs (2). Three points are straightforward:

- The starting point is that a journalist is not obliged to answer questions or produce documents that would disclose the identity of the informant or enable that identity to be discovered: s 68(1).
- The journalist's *prima facie* immunity may be displaced by an order under s 68(2).

- The onus is on the party seeking an order under s 68(2) to satisfy a High Court Judge that such an order should be made.

[87] Generally, the expression "is satisfied" does not import any particular standard of proof. In *R v White (David)* [1988] 1 NZLR 264 McMullin J, delivering the judgment of the Court of Appeal, stated at 268:

> ...the phrase "it is satisfied" does not carry with it the implication of proof beyond reasonable doubt and has not been construed to have this meaning in the many cases in which it has been considered. The Canadian case referred to is an exception. We would decline to follow it. The phrase "is satisfied" means simply "makes up its mind" and is indicative of a state where the Court on the evidence comes to a judicial decision. There is no need or justification for adding any adverbial qualification to "is satisfied": *Blyth v Blyth* [1966] AC 643. In that case the House of Lords rejected the view of the Court of Appeal that "it is satisfied" means "satisfaction beyond reasonable doubt". Lord Pearson said at p 676:
>
> > "The degree or quantum of proof required by the court before it comes to a conclusion may vary according to the gravity of the subject matter to which the conclusion relates, but in relation to each subject matter the specified conclusion is reached or not reached by the end of the trial: the court either is or is not satisfied upon each point."

[88] Mr Miles QC on behalf of the defendants submitted that the consideration of the matters under s 68(2) does not involve the exercise of discretion and should not be regarded as a simple balancing exercise. He relied on the right of journalists not to be obliged to disclose their sources now being clearly recognised in s 68(1). He also relied on the article by Ms Costigan (above) where the author (at 467-471) discusses a number of authorities in which it was said that the assessment of whether disclosure of a journalist's source is "necessary" under s 10 Contempt of Court Act 1981 (UK) is a question of fact and does not call for the exercise of discretion.

[89] I am not persuaded by these submissions. There are clear differences between the language of s 10 of the Contempt of Court Act 1981 (UK) and s 68 Evidence Act. First, the New Zealand legislation does not use the word "necessary", which is a pivotal factual inquiry in the judgment required under the United Kingdom provision. Secondly, the use of the word "outweighs" clearly requires the Court to undertake a balancing exercise. The Court must weigh the public interest in the disclosure of evidence of the identity of the informant against any likely adverse

effect of the disclosure on the informant or any other person and against the public interest in the communication of facts and opinion to the public by the news media as well as the related issue of the ability of the news media to access sources of facts. The court may only make an order under s 68(2) if it is satisfied that the public interest in the disclosure of evidence of the identity of the informant outweighs both the matters in s 68(2)(a) and (b).

[90] I accept however that the required balancing exercise is more in the nature of an evaluative judgment of fact and degree than the exercise of a discretion in the conventional sense: *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 at [17] (SC).

[91] Mr Miles submitted that if the journalist's protection conferred by s 68(1) is to be adequately protected, then it should not be overridden except in unusual or exceptional circumstances. To support that submission, he relied on the English and European authorities already discussed. I do not accept that submission. To do so would require a gloss to be applied to the words the legislature has chosen to use. If Parliament had intended that disclosure of the identity of an informant should only occur in truly exceptional or compelling circumstances, it could easily have said so. It could also, for example, have used the expression "substantially" outweighs in s 68(2). Parliament did not use any such expression.

[92] While the statute does not give any specific guidance as to the relative weight to be attached to the elements which must be assessed under s 68(2), the trend of authority both in New Zealand and in the United Kingdom is to attach substantial weight to freedom of expression in a broad sense as well as in the narrow sense of encouraging the free-flow of information and the protection of journalists' sources. This is evident from the authorities already mentioned. Their importance is underlined by the enactment of s 14 New Zealand Bill of Rights Act guaranteeing freedom of expression. It is also illustrated in previous authorities dealing with the grant of search warrants seeking materials from the premises of the media: *Television New Zealand Ltd v Attorney-General* [1995] 2 NZLR 641, 648 (CA).

[93] The Court should approach its task from the starting point that the journalist's protection is established by s 68(1) and that any order under s 68(2) is therefore a departure or exception from this initial position. The presumptive right to the protection should not be departed from lightly and only after a careful weighing of each of the statutory considerations.

[94] It was submitted that a high threshold should be set in order to protect the journalist's sources. Given the structure and language of s 68, I decline to set any such threshold. To adopt a threshold of serious threat to life or property, for example, would amount to an inappropriate fetter on the statutory task of weighing the factors identified by s 68(2). Guidelines of the type suggested in evidence may be adopted by journalists for their own purposes but they cannot be permitted to control or influence the approach mandated by the statute which will inevitably be fact-dependent. As Lord Bridge expressed it in *X Limited v Morgan Grampian Limited* (above) at 49:

> Any rule of professional conduct enjoining a journalist to protect his confidential sources must, impliedly if not expressly, be subject to whatever exception is necessary to enable the journalist to obey the orders of a court of competent jurisdiction.

[95] The public interest in the disclosure of the identity of a informant is not defined except in the limited sense described in s 68(5) mentioned below at [99]. But s 68 operates in the context of "proceedings before any court" (s 68(1)) and the relevant public interest is in disclosure in that setting: (s 68(2)). The relevant public interest in disclosure must therefore be taken to include the investigation or prosecution of crime, the importance of which is described in [72] to [74] above.

[96] In considering the weight to be attached to the public interest in the disclosure of the evidence of the identity of the informant in a case such as this, it will ordinarily be relevant to consider whether, in the circumstances of the case, other means are available to obtain the information sought. That is because the journalist's protection should not normally be overridden if the public interest in the disclosure of the identity of the informant can be satisfied by an alternative route. Where the prosecuting agency has sufficient evidence of the identity of the informant

from other sources, it is unlikely an order would be made: see *R v Cara and Kelman* (above).

[97] The Court will also assess the significance to the prosecution case of the information sought. Where the prosecution has sufficient evidence to secure a conviction without the disclosure of the identity of the informant, one would expect an order to be declined. On the other hand, the more crucial the identity of the informant is to the prosecution case, the greater the weight to be attached to the public interest in the disclosure of the evidence of identity. The evidence in question need not be essential or critical but it must at least be important and not merely desirable or "nice to have".

[98] In a case such as this, the Court would also take into account the importance of the charge. A prosecution for a minor offence is unlikely to carry the degree of public interest that would attach to the prosecution of a serious charge.

[99] In a criminal proceeding, the public interest in the disclosure of evidence includes the defendant's right to present an effective defence: s 68(5). This is presumably intended to require the Court to consider a defendant's fair trial rights when weighing the public interest in favour of an order. For example, in the *Patel* decisions (above) the Court required disclosure of materials to enable the credibility of an informer to be effectively challenged. Section 8(2) Evidence Act similarly requires the Court to consider the right to present an effective defence. So too, s 25(a) and (e) New Zealand Bill of Rights Act.

[100] On the other side of the ledger, the Court is obliged to consider under s 68(2)(a) any likely adverse effect of the disclosure on the informant or any other person. This could involve, for example, consideration of whether the informant or any other person is likely to suffer some form of harm if the identity of the informant is disclosed. It might also embrace an adverse effect on the journalist such as a risk of physical harm or damage to property.

[101] The Court must also consider under s 68(2)(b) the specific public interest identified in the communication of facts and opinion to the public by the media and

the public interest in the ability of the media to access sources of facts. Here, the Court would consider, amongst other things, whether the effect of an order would be likely to have the chilling effect referred to in the evidence. Such an effect could be specific to the informant in the particular case or more generally as tending to deter members of the public from communicating confidential material to the media. While any potential impact of this kind may be difficult to quantify, the courts and the legislature have specifically recognised the public interest in preserving the ability of the media to access sources of fact. A person who, for example, confidentially discloses evidence of corruption or wrong-doing in public or private institutions or the whereabouts of an abducted child is not to be discouraged by the risk of his or her identity being disclosed by order of the Court. The Court would also take into account the potential to undermine the ability of the media to access information if orders under s 68(2) were lightly or frequently made.

[102] Even if the Court is satisfied that the public interest in disclosure outweighs the matters identified in s 68(2)(a) and (b), it does not follow that an order under s 68(2) must be made. The Court "may" make such an order. If it does, the Court may make the order subject to any terms and conditions the Judge thinks appropriate: s 68(3). It should be noted that an order made under s 68(2) does not require disclosure. Its effect is to order that the privilege against disclosure in s 68(1) does not apply. The next step would be for the prosecutor to subpoena the journalist. As already mentioned, the admissibility of the journalist's evidence would still be open to challenge on the grounds of relevance, reliability, unfairness or otherwise.

[103] In summary, the steps to be followed by a Judge in considering an order under s 68(2) are to:

a) Determine whether s 68(1) is engaged and the protection applies.
b) Identify the issues to be determined in the proceeding for which the evidence is sought.
c) Weigh the public interest factors identified in s 68(2).
d) If, having regard to the issues identified, the Court is satisfied that the public interest in the disclosure of the evidence of the identity of the

informant outweighs the matters in both s 68(2)(a) and (b), the Court may make an order.

e) Consider whether, as a matter of discretion, an order should be made and, if so, on what terms and conditions.

The Present Case

[104] The first two steps just identified are established. It is accepted that the privilege under s 68(1) applies and the relevant issue at K and W's trial will be whether they are identified as the burglars. In my judgment, the public interest in the successful prosecution of the offenders is high. Burglary is a serious crime attracting a maximum term of imprisonment of 10 years. This was a particularly serious burglary involving the breaking and entering of public premises and the removal of extremely valuable property. The medals have a high monetary value but, more importantly, they reflect and symbolise the nation's pride in acts of valour by New Zealand soldiers. Bringing those responsible to justice is very much in the public interest. The fact that the medals were returned may reduce any penalty ultimately received by those responsible but does not diminish the strong public interest in prosecuting those involved as a deterrent to them and others who may be similarly minded.

[105] It is not in dispute that the crime attracted major and widespread public concern for the reasons already elaborated. It is common ground that both the burglary and the return of the medals were the subject of intense media scrutiny within New Zealand and overseas, highlighting the level of public concern over the incident. I accept that it is important to distinguish between mere public curiosity or sentiment and the broader public interest contemplated by s 68(2), but the extent of publicity in this case reflects the public's concern to prevent burglaries of this kind and to see the successful prosecution of the offenders. Such concerns are legitimate matters of public interest.

[106] As noted at [30], the identity of the person interviewed by Mr Campbell is a highly relevant and significant piece of evidence. Without that evidence, my assessment is that the police case against K and W is relatively weak, as already

noted. Mr Miles submitted that a confession to a crime (of whatever magnitude) could never be sufficiently exceptional to outweigh the public interest in maintaining a journalist's protection from disclosure of sources. I do not accept that submission. Obviously, an admission of a trivial crime would be unlikely to justify an order under s 68(2). But the crime alleged here is far from trivial. For the reasons already canvassed, it was in fact a major burglary likely to attract a very serious penalty.

[107] The evidential value of a confession is invariably regarded as very high in a criminal prosecution unless there is reason to believe it may be false or to have been improperly obtained. A confession may be challenged or explained on various grounds but, as an admission against interest, is rightly regarded as carrying great weight in any prosecution. If the confession made in the interview in question could be linked to one of the offenders, the strength of the prosecution case against both K and W would be transformed from its present relatively weak state to one which has good prospects of success.

[108] In the circumstances of this case, I am satisfied that the right of K and W to present an effective defence is not a relevant factor in terms of s 68(5). Counsel for K and W were granted leave to intervene in this proceeding. Neither suggested the disclosure was necessary to assist their defence of the case. Indeed, they supported the defendants in opposing the application for the order sought by the police.

[109] Addressing the matters in s 68(2)(a), the disclosure of the identity of the person interviewed will adversely affect K if he is identified as that person. The prosecution case against him will be strengthened. Similarly for W if he can be linked with K as being involved in the burglary. But the legislature cannot have intended that the strengthening of the Crown case against K and W that would result from the making of such an order is the kind of harm contemplated. If the disclosure of the identity of the person interviewed is permitted, K and W could well be prejudiced, but not illegitimately so. The presentation of admissible evidence which strengthens the prosecution case cannot amount to illegitimate prejudice. If an order under s 68(2) is made, it remains open to K and W to challenge the admissibility of the evidence on other grounds, for example, that it was improperly or unfairly obtained.

[110] There is no evidence of any risk of harm to any person. Any damage to the reputation or integrity of Mr Campbell as a journalist is not likely to be significant if his claim to privilege is set aside by court order.

[111] The most significant matters to be weighed in opposition to the police application are the public interest factors identified in s 68(2)(b). Here it is important to recognise the substantial weight ordinarily given to the role of the media in the dissemination of material to the public and to consider the potential for the chilling effect described in the evidence.

[112] A material consideration in the present case is that a confession to the news media by the perpetrator of a serious crime is a very unusual event. Counsel were unable to recall a similar case. The usual case in which the protection of a journalist's sources arises is where an informant discloses evidence of wrong-doing by others, not by themselves. A person who confesses to a serious crime knowing that the confession will be broadcast to the public takes a very serious risk even if promised confidentiality. Such a person could not reasonably have a high level of confidence that the Court would protect his identity. Nor could a journalist reasonably believe the identity of the source would inevitably be protected. For these reasons, it is reasonable to expect that the occasions on which a similar situation will arise are likely to be rare.

[113] The chilling effect which concerns the defendants is likely to be much less significant if the Courts, as in my view they must, take a cautious approach to setting aside the journalist's protection giving due weight to the presumptive right to protection as well as to the importance of protecting the identity of a journalist's sources and freedom of expression. There were few cases involving journalists under s 35 of the Evidence Amendment Act (No 2) 1980 and there is no reason to suppose this will change under s 68 of the 2006 Act.

[114] I accept Mr Price's evidence that the risk of journalists' sources drying up for fear their identity will be revealed will be diminished if the frequency with which the Court makes orders under s 68(2) is low. When this factor is combined with the unusual (if not unique) circumstances of the present case, I find that the making of an

order under s 68(2) is unlikely to have any material or enduring effect on the ability of the news media to access information or to inhibit the communication of facts and opinions to the public.

Conclusion

[115] I have reached the conclusion for the reasons discussed that the significance of the evidence enabling the identity of the informant to be discovered and the public interest in the prosecution of this serious offending, outweighs the factors identified in s 68(2)(a) and (b) by a significant margin. *Prima facie*, an order should be made under s 68(2) that the protection available under s 68(1) is not to apply.

[116] Before reaching any final conclusion, it would be helpful to have further submissions and to consider in more detail the evidence relating to identity which TV3 is willing to provide or which may not be protected by s 68(1) in any event. By that means, it may be possible to conclude there is sufficient evidence available to identify the informant without the need for an order under s 68(2).

[117] I have already noted the willingness of TV3 to make a witness available to confirm that the interview in question took place at the Duxton Hotel on 21 February 2008 and to produce the transcripts of both the audio interview and the reconstructed interview as televised that day. That evidence has the potential, when combined with [suppressed], to
provide a proper factual basis to enable a jury to draw an inference as to the identity of the person interviewed.

[118] Mr Rowe accepted that this evidence would be helpful, subject to a witness from TV3 being able to confirm the time of the audio interview [suppressed].
Mr Rowe also has concerns about the
admissibility of the evidence of the timing of the interview if the evidence is not given either by Mr Campbell or Ms Leary who were the only persons present when the interview was conducted. These issues need to be clarified.

[119] There is a further topic upon which evidence from a witness from TV3 could be helpful on the identity issue. [Suppressed].

Such evidence

may however give rise to admissibility issues. Strictly speaking, issues of admissibility of evidence (as distinct from the application or otherwise of s 68(1)) should be left to the trial Judge. But admissibility issues are relevant to the decision I am called upon to make.

[120] Another possibility counsel may care to consider is whether the evidence issues can be dealt with on a staged basis. For example, if agreement could be reached on the evidence discussed in [117] and [118] above, an order under s 68(2) might not be necessary at this stage. Leave to apply could be reserved to allow the issue to be revisited once the position becomes clearer after depositions.

[121] This decision is issued on an interim basis. The Registrar is requested to arrange a telephone conference before me as soon as convenient to discuss the manner in which this matter may best be concluded.

Suppression Orders

[122] This judgment is not to be published in news media or on the internet or other publicly accessible database until final disposition of the trial of K and W. Publication in a law report or law digest is permitted.

[123] The suppression orders made at the hearing on 30 June 2009 remain in effect with slight alterations. They are repeated here for convenience:

a) There is to be no publication of any evidence identifying the informant referred to in the application or particulars which may lead to the identity of the informant and no publication of any of the facts

that the Crown rely upon in support of the charges against the two accused, K and W.

b) There is to be no publication of the names of the two accused or any identifying particulars.

c) There is to be no publication of any previous convictions of either of the accused.

d) There is to be no publication of the agreement entered into in between the New Zealand Police and Mr Chris Comeskey in February 2008 to secure the return of the medals alleged to have been taken from the museum at Waiouru on 2 December 2007.

e) These orders may be reviewed upon application made to this Court and may also be varied by application made to the District Court at depositions or at any subsequent trial.

f) The Court file in relation to this proceeding is not to be searched without the leave of a Judge.

g) The application before the Court may be described only in the following terms, namely that it was an application by the New Zealand Police for an order under s 68 of the Evidence Act 2006 compelling the five defendants named in this proceeding (Mr Campbell, Ms Leary, Ms Hirschfeld, Ms Story and Ms Duffy) to produce relevant information in respect of the depositions hearing, and any subsequent trial, in relation to the alleged burglary of the Waiouru Army Museum on 2 December 2007.

Costs

[124] The issue of costs is reserved.

A P Randerson J
Chief High Court Judge

NOT TO BE PUBLISHED IN NEWS MEDIA OR ON INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

CIV 2009-483-000127

	UNDER	Section 68 Evidence Act 2006
	IN THE MATTER OF	THE NEW ZEALAND POLICE v K and W
	BETWEEN	THE NEW ZEALAND POLICE Plaintiff
	AND	JOHN JAMES CAMPBELL First Defendant
	AND	INGRID MARIEKE LEARY Second Defendant
	AND	CAROL ANN HIRSCHFELD Third Defendant
	AND	HANNAH ROSE STORY Fourth Defendant
	AND	ZOE JOAN DUFFY Fifth Defendant
Hearing:	31 August 2009 (Heard at Auckland)	
Appearances:	L C Rowe for Plaintiff M R Heron for Defendants J N Bioletti for K and on behalf of M A Kennedy for W (both granted leave to intervene)	
Judgment:	31 August 2009	

RESERVED FINAL JUDGMENT OF RANDERSON J

This judgment was delivered by me on 31 August 2009
at 4 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:	Crown Solicitors, PO Box 441, Wanganui 4540 Russell McVeath, PO Box 8, Auckland J Bioletti, PO Box 105546, Auckland 1143
Counsel:	J G Miles QC, PO Box 4338, Auckland 1140 M A Kennedy, PO Box 6955, Auckland 1141

[1] In my interim judgment delivered on 7 August 2009 I reached the conclusion that the significance of the evidence enabling the discovery of the identity of the informant and the public interest in the prosecution of the alleged offending outweighed the factors identified in s 68(2)(a) and (b) Evidence Act 2006 by a significant margin. I concluded that, *prima facie*, an order should be made under s 68(2) that the protection available under s 68(1) is not to apply.

[2] In the interim judgment, I sought further submissions before reaching a final conclusion about the scope of the evidence relating to identity which TV3 might be willing to provide or which might not be protected by s 68(1) in any event. I indicated that it might be possible, by that means, to conclude that there is sufficient evidence available to identify the informant without the need for an order under s 68(2).

[3] Since the interim judgment, I have received memoranda from counsel and have had a further telephone conference with counsel. Today, I heard counsel in court.

[4] The defendants have produced a "will-say" statement by the first defendant Mr John Campbell which has been tendered on a privileged and confidential basis. Mr Heron on behalf of the defendants has indicated that Mr Campbell would be willing to provide a depositions statement to the counsel along the lines of the will-say statement but remains unwilling to give any direct evidence identifying the person he interviewed or to take part in any formal identification procedure under s 45 Evidence Act.

[5] In general terms, Mr Campbell's will-say statement outlines the process he followed prior to the interview at the Duxton Hotel on 21 February 2008. His statement also describes the movements of TV3 personnel into and out of the hotel. He also refers to the steps he took to satisfy himself the person he interviewed was not an impostor. He will also confirm the accuracy of the transcripts made of the audio interview and the subsequent interview which went to air later the same day.

[6] As described in my interim judgment, the Crown already has evidence from surveillance footage at the Duxton Hotel on the afternoon the interview took place which is sufficient to identify the TV3 personnel (including Mr Campbell) and K entering and leaving the hotel and the precise times when they did so. I am satisfied that the will-say statement provided by Mr Campbell combined with the surveillance footage from the hotel does provide a sound basis to enable a jury to draw the inference that the person interviewed was K.

[7] As Mr Rowe for the Crown points out, to the extent that Mr Campbell's proposed evidence would enable the identity of the person interviewed to be discovered, Mr Campbell is not relying on the protection which might otherwise be available to him under s 68(1). But, as noted in my interim judgment, a journalist may choose to disclose material which would otherwise be protected if the journalist wishes to do so. In this case, Mr Campbell has drawn the line at disclosing any direct evidence of the informant's identity.

[8] Given the material now available to the Crown in the prosecution of those responsible for the burglary of the Waiouru Army Museum on 2 December 2007, I am satisfied that the balance under s 68(2) now falls against the making of an order under that subsection to the effect that the protection available under s 68(1) is not to apply.

[9] In formal terms, the application by the plaintiff for an order under s 68(2) is dismissed on the specific understanding that the first defendant Mr Campbell will provide a depositions statement to the police which follows the form of the will-say statement he has provided to the Court. An order is made in these terms.

[10] Leave is reserved to the plaintiff to apply to the Court if any further orders or directions are needed.

[11] The suppression orders made in [122] and [123] of the interim judgment of 7 August 2009 remain in force but with the following proviso to the order made in [123](g):

Provided that the outcome of the interim and final judgments may be stated along with the reasoning which has led to the Court's conclusion.

[12] I confirm the order made in Court today that no details be published of the will-say statement provided to the Court by Mr Campbell nor any comments by counsel or the Court upon that statement.

[13] As noted at [124] of the interim judgment, the issue of costs is reserved. If the parties are unable to reach agreement on this issue, memoranda should be submitted to the Court within 14 days of today's date.

A P Randerson J
Chief High Court Judge