IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA621/2023
CA103/2024
[2025] NZCA 30

BETWEEN	NEW ZEALAND POLICE Appellant
AND	TANA ORMSBY-TURNER Respondent

Hearing: 22 July 2024

Court: Hinton, Mander and Walker JJ

Counsel: I S Auld for Appellant
N P Bourke and S W O Campbell for Respondent

Judgment: 26 February 2025 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The High Court is to provide the New Zealand Police with the documents requested in their 4 July 2023 application.

C We make no order as to costs.

REASONS OF THE COURT

(Given by Hinton J)

[1] The New Zealand Police appeal against a refusal by the High Court to allow the Police access to documents.

[2] The request arose in the course of preparing for Tana Ormsby-Turner's sentencing, following his guilty pleas to charges of wounding with intent to cause grievous bodily harm and being an accessory after the fact to murder.[1]

[3] On 4 July 2023, the Police applied to the High Court pursuant to the Senior Courts (Access to Court Documents) Rules 2017 (the Rules) for access to three reports and two affidavits held on the court file. The Police said they required the documents for an ongoing investigation into and possible prosecution of Mr Ormsby-Turner and his parents, Mr Ormsby and Ms Turner, for perverting the course of justice by providing false information to the Court.

[4] On 12 July 2023, Cooke J sentenced Mr Ormsby-Turner to 12 months' home detention.[2]

[5] On 26 September 2023, Cooke J declined the application for access to documents pending the Crown's sentence appeal to this Court.[3] The sentence appeal was allowed on 6 November 2023.[4] This Court increased Mr Ormsby-Turner's sentence to two years and 10 months' imprisonment.[5]

[6] On 9 January 2024, the Police renewed their application for access to the documents. The Judge issued a minute dated 9 February 2024 once again declining the application.[6]

[7] The Police now appeal both decisions.

Background

[8] On 3 August 2022, Mr Ormsby-Turner (then aged 16), his older brother Turanganui-John Ormsby-Turner (TJ) and Hamiora Laupama, went to an address on South Road, New Plymouth, to pick up an associate of theirs who was also an affiliate

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1 Crimes Act 1961, ss 188(1), 71 and 176.
2 *R v Ormsby-Turner* [2023] NZHC 1817 at [53] [sentencing notes].
3 *R v Ormsby-Turner* [2023] NZHC 2678 [judgment under appeal].
4 *R v Ormsby-Turner* [2023] NZCA 601 [sentence appeal].
5 At [99].
6 *New Zealand Police v Ormsby-Turner* HC New Plymouth CRI-2022-043-937, 9 February 2024 [minute of Cooke J].

of the Mongrel Mob. They planned to pick up this associate and engage in a "taxing" operation, which is to say a form of extortion and/or retribution, where gang affiliates violently take property or money from a victim in payment of alleged debts.[7]

[9] One of the associate's relatives was Mr Rei Marshall, a 23 year old prospect of the Uru Taha gang. Mr Marshall arrived while Mr Ormsby-Turner, TJ, and Mr Laupama were there.

[10] Mr Laupama and Mr Marshall had a confrontation. TJ then moved in front of Mr Marshall and stabbed him once in the torso. At the same time, Mr Ormsby-Turner struck Mr Marshall multiple times on the head with a wooden hammer. Mr Ormsby-Turner's assault continued while Mr Marshall was on the ground. Mr Marshall was pronounced dead soon after he arrived at Taranaki Base Hospital later that evening. The medical evidence confirmed Mr Marshall died because of the stab wound to his chest, inflicted by TJ. In addition, Mr Ormsby-Turner had caused Mr Marshall to suffer two fractures to the head, blunt force trauma to the right of his neck and associated haemorrhages. Following Mr Marshall's death, the three Mongrel Mob affiliates took steps to hide evidence of the offending.

[11] TJ was sentenced to life imprisonment for murder with a minimum period of imprisonment of ten and a half years.[8] Mr Laupama was sentenced to five months' home detention for being an accessory after the fact to murder.[9] Mr Ormsby-Turner was sentenced to 12 months' home detention with a further 12 months of standard post-detention conditions for wounding with intent to cause grievous bodily harm and being an accessory after the fact to murder.[10] Mr Ormsby-Turner was 17 years old at the time of sentencing.

[12] Prior to sentencing, a number of reports on Mr Ormsby-Turner were filed with the High Court. These reports included a pre-sentence report from Probation Services dated 3 March 2023, a cultural report under the Sentencing Act 2002 (s 27 report) dated April 2023 and a privately commissioned report from a psychiatrist dated

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7 Sentencing notes, above n 2, at [7].
8 *R v Ormsby-Turner* [2023] NZHC 406.
9 *R v Laupama* [2022] NZHC 3312.
10 Sentencing notes, above n 2, at [53].

19 April 2023. The reports canvassed many aspects of Mr Ormsby-Turner's background, but each reported on his disassociation from the Mongrel Mob since his offending.

[13] Among other things, the reports recorded Mr Ormsby-Turner as saying he had "left behind" his anti-social peers, was "intent on leading a gang-free and more pro-social life" was happy with his decision to leave the Mongrel Mob and lucky to be able to leave "before [he] was eventually patched." Mr Ormsby-Turner's parents expressed similar sentiments to report writers. For example, his mother reportedly said that Mr Ormsby-Turner had complied with all bail conditions, stating "no breach, no nothing, just does his own…and it's without Mongrel Mob" and that the Mongrel Mob "don't know where [Mr Ormsby-Turner] is at the moment" but that she was "worried what will happen if they find out".

[14] Prior to sentencing, the Police started an investigation after they were advised that Mr Ormsby-Turner had become a patched member of the Mongrel Mob. As part of the investigation, they obtained recordings of Mr Ormsby-Turner speaking to TJ. The transcripts of those recordings suggested an ongoing association with the Mongrel Mob, that the two were "convicted murderers" and that Mr Ormsby-Turner had recently acquired a Mongrel Mob back tattoo. On 27 June 2023, the Police executed a search warrant at Mr Ormsby-Turner's bail address. Mr Ormsby-Turner was present at the address. During the course of the search, it was confirmed that he had a new, large Mongrel Mob tattoo across his back. He was also in possession of a number of Mongrel Mob patches in his wardrobe.

[15] At Mr Ormsby-Turner's sentencing the next month, the Crown submitted this information demonstrated that he had not been honest with the report writers, and this conduct potentially involved an attempt to pervert the course of justice.[11] The Judge accepted Mr Ormsby-Turner had not been honest with the report writers but did not accept that everything Mr Ormsby-Turner had said was untrue.[12] The Judge said he was not prepared to go against the general view of the report writers by concluding

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11 Potentially giving rise to a charge of misleading justice under ss 108–117 of the Crimes Act.
12 Sentencing notes, above n 2, at [39]–[40].

that there was no prospect of rehabilitation. He considered the least restrictive appropriate sentence remained one of home detention.[13]

The decisions under appeal

[16] Having been made aware of what the Police found at Mr Ormsby-Turner's bail address, on 4 July 2023 (still prior to sentencing) the Crown Solicitor for New Plymouth applied to the High Court on behalf of the Police for access to documents under the Rules. The access application sought the professional reports referred to at [10] above and affidavits from each of Mr Ormsby-Turner's parents which had been filed in support of a previous bail variation application.

[17] The application recorded that the documents would be used:

> For the purposes of the ongoing police investigation into the alleged offending of Tana Ormsby-Turner, Kerrin Ormsby-Turner and David Turner for attempting to pervert the course of justice in relation to providing false information to the Court via affidavits and reports in respect of an application for variation of EM bail, the jurisdictional hearing and sentencing of Tana Ormsby-Turner (current investigation).

[18] As noted, on 26 September 2023, the Judge declined the application.[14] He expressed the view that an application under the Rules was not necessarily required given the Crown Solicitor was already in possession of the documents.[15] He concluded the issue of releasing the documents fell to be determined under the High Court's inherent jurisdiction to control the information disclosed in criminal proceedings. The Judge drew an analogy with civil proceedings and said there was an implied undertaking that the Crown Solicitor would only use the information for the purposes of the criminal proceedings for which it was obtained, especially during the course of the proceedings. This prevented the Crown Solicitor from providing the documents. The Judge noted that this principle was "usually referred to in relation to civil proceedings" and cited two civil authorities.[16]

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13 At [43]–[44].
14 Judgment under appeal, above n 3.
15 At [16].
16 At [17].

[19] The Judge said that, as with all exercises of inherent jurisdiction, the focus was on protecting the Court's processes.[17] To allow the Police access to information commissioned by the defence, but which was also Court ordered as part of a sentencing exercise, had the potential to interfere with the judicial process.[18] The Judge cited a decision from the Court of Appeal of England and Wales, *R v Elleray*, which was concerned with the admissibility of statements defendants may have made to probation officers. The Court of Appeal held that such statements were admissible, but said:[19]

> … the fact that the admission was made in the course of an interview between an offender and a probation officer should [not] be ignored. It is clearly important that there should be frankness in the exchanges between a probation officer and an offender as this furthers the role of the probation officer in the sentencing exercise. If it were to be the practice that the prosecution regularly rely upon what is said by an offender to a probation officer as evidence for further prosecutions then clearly this would have an adverse effect upon this need for frankness. Indeed a situation could soon arise where probation officers would be hampered in performing their important duty to assist the court in determining the correct sentence for offenders. So in the case of an admission the prosecution should first carefully consider whether it is right to rely upon evidence provided by a conversation between a probation officer and an offender and only rely upon it if they decide it is in the public interests so to do. … In deciding whether to exclude the evidence it is perfectly appropriate for the court to have in mind the contrast between the position that exists where an offender is interviewed by the police and that which exists when the offender is interviewed by a probation officer. The court should bear in mind the need for frankness between the offender and the probation officer; the fact that there may not be a reliable record of what was said; that the offender has not been cautioned; and that the offender has not had the benefit of legal representation.

[20] After citing *R v Elleray*, the Judge continued:[20]

> [20] I consider that similar considerations, and a similar balancing exercise applies when the Court is considering the grant of leave to release or access the reports. This will involve considering all relevant circumstances, including the public interest in investigating the alleged offending, and accordingly the seriousness of that offending. The reasons for restricting access are perhaps more significant when the interviews are between a psychiatrist and the authors of cultural reports and the defendant. It is of importance that the interaction between such report writers and a defendant be full and frank. Any concern that what is said may be reviewed by police and subject to investigation may undermine this. For the police to investigate whether the statements made by the defendant in that setting were untrue, and

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17 At [18].

18 At [19].

19 *R v Elleray* [2003] EWCA Crim 553, (2003) 167 JP 325 at 329, as cited in judgment under appeal, above n 3, at [19].

20 Judgment under appeal, above n 3.

> involved an attempt to pervert the course of justice, has the capacity to cut across the judicial process and to be contrary to the interests of justice.
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> [21] A similar approach would apply if access to the information is sought under the Rules. When a substantive hearing is still to take place the approach in r 13(a) applies and it is less likely that access to Court documents will be permitted. There is greater prospect of allowing access to information after the proceeding has concluded under r 13(c). In any event the Court will be significantly influenced by the impact that access has on the integrity of the criminal process.

[21] The Judge then turned to consider the Police's application. He concluded that the subject matter of the investigation—which he recited as being Mr Ormsby-Turner's statements, their truth and the impact they may have had on his sentence—remained a live issue given the Crown's (at that stage) outstanding sentence appeal.[21] He did not consider it appropriate to grant access either under the High Court's inherent jurisdiction or under the Rules in order so the Police could conduct an inquiry into a matter still before the courts.

[22] The Judge indicated that, following determination of the Crown's sentence appeal, there would be less reason to restrict the use of the information held by the Crown Solicitor or to prevent access to the court file. However, the Judge also warned there should be "some care" taken in pursuing an investigation because he did not apprehend there to be "necessarily a strong public interest in a further investigation of an alleged attempt to pervert the course of justice."[22]

[23] As noted earlier, on 6 November 2023 this Court increased Mr Ormsby-Turner's sentence to two years and 10 months' imprisonment.[23] In doing so, the Court noted that Mr Ormsby-Turner's decision to become a patched member of the Mongrel Mob and his comments to the contrary to report writers cut against a finding of genuine remorse and also tended to suggest his rehabilitative prospects were not as promising as the Judge had concluded.[24]

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21 At [23].
22 At [24].
23 Sentence appeal, above n 4.
24 At [67] and [79].

[24] The Police then renewed their application for access to the documents received as part of the sentencing exercise. On 9 February 2024, the Cooke J issued a minute, again declining the application, on this occasion for the following reasons:[25]

> (a) Whether there was an attempt to pervert the course of justice is a heavily fact dependent question. It would require significant investigation, the interview of report writers, and ultimately an assessment of what the defendant's intentions were. It is not a straightforward matter.
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> (b) There can, nevertheless, be clear situations where the Court apprehends there has been [an] attempt to mislead it, including potentially in the sentencing exercise. In those situations the Court can itself refer the matter to police for investigation. That has not occurred in the present case. The apparent dishonesty of the defendant at sentencing was identified, but I did not regard it as something that warranted the matter being referred to the police.
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> (c) The defendant's dishonesty with the report writers is something that has itself been taken into account by the Court in determining the sentence. The Crown submitted that allowing discounts for rehabilitation prospects or remorse when an offender had attempted to mislead the Court brought the administration of justice into disrepute. The Court of Appeal took this into account in deciding not to give a discount for remorse or rehabilitation prospects. So the defendant's dishonesty has already been addressed by judicial decision.
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> (d) As has been submitted, any offending that could now be proved could not lead to any material change to the prison sentence that the defendant is currently serving. There is not a strong public interest in pursuing the investigation in those circumstances.

[25] The Judge concluded that, notwithstanding the disposition of the sentence appeal, it was appropriate to exercise some care in deciding whether to release the documents and he was "not persuaded" that this was "an appropriate case to pursue a further investigation into what happened".[26]

[26] The Police now appeal both the Judge's initial decision and his subsequent minute.

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25 Minute of Cooke J, above n 6, at [6]. Footnotes omitted.
26 At [7].

This appeal

[27] As this Court held in *Crimson Consulting v Berry*, an appeal from a decision made under the Rules is a general appeal conducted by way of rehearing in accordance with the principles set out in *Austin, Nichols v Stichting Lodestar.*[27]

Submissions for the Police

[28] For the Police, Mr Auld submitted that, in hindsight, an application under the Rules was not necessary, but rather a matter of courtesy, as the Crown Solicitor could have just provided the documents unless the Court made an order restricting access pursuant to either r 5 of the Rules or by an exercise of its inherent jurisdiction.

[29] Mr Auld further accepted that this application could be approached in terms of the Court's inherent jurisdiction, and that, as the Judge indicated, the two approaches would be similar.[28]

[30] The Police do not accept that there is an implied undertaking preventing the Crown Solicitor from providing information received in criminal proceedings to them. They say the Judge did not identify any rule of law establishing such an undertaking, and there are strong policy factors which weigh against imposing one. In many respects, the Crown and the Police are one and the same "party" to Crown prosecutions. It is contrary to common practice during such prosecutions to suggest there is an undertaking preventing the sharing of information.

[31] Mr Auld says that the Privacy Act 2020 provides sufficient safeguards to ensure the Crown Solicitor and the Police are not able to inappropriately use or disclose information received in proceedings. Generally, information may only be used for the purpose for which it was received. However, the exception to this principle is where the use is necessary to avoid "prejudice to the maintenance of the law by any public

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27 *Crimson Consulting Ltd v Berry* [2018] NZCA 460, [2019] NZAR 30 at [30], referring to *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

28 Judgment under appeal, above n 3, at [20].

sector agency, including prejudice to the prevention, detection, investigation, prosecution, and punishment of offences".[29]

[32] Mr Auld also submitted that the Judge erred in finding there was not a strong public interest in an investigation into apparent attempts to pervert the course of justice. The independence of the Police in fulfilling this role is an important part of New Zealand's constitutional arrangements. The Police must act independently in determining whether and how to investigate offending, with the courts only interfering in exceptional circumstances.[30] In Mr Auld's submission, the Judge's decision is somewhat equivalent to an injunction on an investigation into offending by Mr Ormsby-Turner or his parents. He says that approach is incorrect: it is for the prosecuting body—in this case the Police—to consider the public interest in weighing certain pieces of evidence, not the courts.

[33] In any event, in Mr Auld's submission, the Judge erred in assessing there to be low public interest in investigating the offending. There are reasonable grounds to believe the documents contain evidence of offending by Mr Ormsby-Turner and potentially by his parents. Allowing defendants to provide report writers with false information undermines the integrity of the criminal justice system and public confidence in the fairness of sentencing. While he acknowledges Mr Ormsby-Turner's sentence would not change if there were a successful prosecution for perverting the course of justice,[31] that does not vitiate the public interest in the investigation. There is a strong public interest in the level of deterrence and denunciation such a conviction would provide. Also, while there could be no increase in Mr Ormsby-Turner's sentence, his parents would be liable for the full range of sentences.

[34] Mr Auld also submitted that the Judge erred in finding that Mr Ormsby-Turner's dishonesty had already been addressed. While this Court

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29 Privacy Act 2020, s 22, pp 10 and 11.

30 Citing *R v Commissioner of Police, ex parte Blackburn* [1968] 1 All ER 763; *R v Chief Constable of Sussex* [1999] 2 AC 418; *R v Serious Fraud Office* [2008] UKHL 60, [2009] AC 756; *Gill v Attorney-General* [2010] NZCA 468, [2011] 1 NZLR 433; *Fox v Attorney-General* [2002] 3 NZLR 62 (CA); *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC); and *Osborne v WorkSafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.

31 Sentencing Act 2002, s 18 provides that a person under age 18 at the time of the offending cannot be sentenced to a term of imprisonment unless for a category 4 or (in certain circumstances) a category 3 offence. None of the charges considered by the Police are category 3 or 4 offences.

declined to give him a discount for remorse on the basis of the comments he had made, declining a discount in those circumstances does not amount to an additional penalty. Rather, in all of the circumstances, the Court weighed up Mr Ormsby-Turner's eligibility for such a discount and concluded he was not remorseful.

[35] Mr Auld accepted there is public interest in free and frank discussions between offenders and report writers. However, he submitted that any confidentiality is pierced once the conversations are recorded in reports, filed and read in court, and able to be referenced in sentencing notes. In any event, the public interest in confidentiality should yield to the public interest in enforcing the criminal law. To the extent enforcement causes a chilling effect, it will primarily have the effect of deterring false information, rather than deterring relevant and genuine disclosures.

Submissions for Mr Ormsby-Turner

[36] Mr Bourke, for Mr Ormsby-Turner, submitted that the Judge was correct to find that a Crown Solicitor is subject to an implied undertaking to use information received in the course of criminal proceedings only for those proceedings. Such an approach is consistent with the general principles in the Privacy Act and the analogous prohibition on the collateral use of discovered documents in civil proceedings.

[37] It was unnecessary to determine the appropriate framework for the application as the Judge was required to take into account relevant factors on either approach, which were materially those set out in the Rules.

[38] Mr Bourke said this Court should be sceptical as to whether an offence was made out on the basis of Mr Ormsby-Turner's conduct. Pre-sentence reports are inquisitorial in nature and their focus is on expert opinions given by people able to reject an offender's account. Similarly, he said, the Court is able to accept or reject any information provided in the reports, as both the High Court and the Court of Appeal did in this case. The inconsistency between Mr Ormsby-Turner's account to a report writer and his actions does not necessarily mean he had the necessary intent to pervert justice: it does not take an expert to conclude that a child can be torn between two emotions or intents.

[39] In Mr Bourke's submission, charging Mr Ormsby-Turner with perverting the course of justice would involve an element of overreach. On every occasion where a defendant gives evidence denying offending at a trial and they are subsequently convicted, there is the prospect that they will have committed perjury. Mr Bourke submitted that the Judge was correct to note that conduct such as Mr Ormsby-Turner's does not lead to perjury or perverting charges and that this is reinforced by s 24 of the Sentencing Act, which provides an inbuilt sentencing mechanism to determine disputed aggravating and mitigating factors.

[40] Even if a charge could fit Mr Ormsby-Turner's actions, Mr Bourke contended that there is no public interest in a further charge given his age and custodial status. This is something on which the Judge was entitled to take a view. The powers to dismiss a charge and stop a trial from proceeding are examples of where judges can interfere with prosecutorial discretion. According to Mr Bourke, it seems "obvious" that when a Judge's permission is required to release evidence, they should form an independent view of the public interest in the prosecution in accordance with the Solicitor General's Prosecution Guidelines.[32]

[41] Mr Bourke also submitted that this Court should be mindful of the potential chilling effect on expert report writers, should the appeal be allowed. If report writers know that their reports might found a prosecution, their willingness to participate could be compromised. He noted it was already a very difficult matter to obtain an independent report for sentencing purposes. Likewise, there could be a chilling effect on frank disclosures. There is a public interest in defendants being willing and able to speak freely to report writers.

[42] Finally, Mr Bourke submitted the Judge's decisions were consistent with the United Nations Convention on the Rights of the Child, which requires treatment of offenders to be "appropriate to their age and legal status".[33] He noted the Police had referenced neither this international consideration, nor the Oranga Tamariki Act 1989, in their submissions.

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32 Referring to Crown Law Office *Solicitor General's Prosecution Guidelines* (1 July 2013).

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

The Senior Courts (Access to Court Documents) Rules 2017

[43] As the Judge considered (and the parties now accept) that there is little difference between the Rules and exercise of the Court's inherent jurisdiction, we set out the relevant Rules below. They came into force on 1 September 2017 and detail a uniform process for accessing documents held on a court file.

[44] Rule 11 relevantly provides:

> …
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> (2) A person may ask to access any document by providing the Registrar of the relevant court registry with a letter, an email, or any other written form of request that—
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> (a) identifies the person and gives the person's address; and
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> (b) sets out sufficient particulars of the document to enable the Registrar to identify it; and
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> (c) gives reasons for asking to access the document, which must set out the purpose for which the access is sought; and
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> (d) sets out any conditions of the right of access that the person proposes as conditions that he or she would be prepared to meet were a Judge to impose those conditions (for example, conditions that prevent or restrict the person from disclosing the document or contents of the document, or conditions that enable the person to view but not copy the document).
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> …
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> (7) A Judge may—
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> (a) grant a request for access under this rule in whole or in part—
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> (i) without conditions; or
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> (ii) subject to any conditions that the Judge thinks appropriate; or
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> (b) refuse the request; or
>
> (c) refer the request to a Registrar for determination by that Registrar.
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> …

[45] As set out in r 12, in determining a request for access the Judge must consider the nature of the reasons for the request, and take into account the following matters to the extent they are relevant:[34]

> (a) the orderly and fair administration of justice:
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> (b) the right of a defendant in a criminal proceeding to a fair trial:
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> (c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:
>
> (d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:
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> (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):
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> (f) the freedom to seek, receive, and impart information:
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> (g) whether a document to which the request relates is subject to any restriction under rule 7:[35]
>
> (h) any other matter that the Judge thinks appropriate.

[46] Under r 13(c) when considering an application for access to documents after the conclusion of a substantive hearing, the Judge also must have regard to the fact that:[36]

> (i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but
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> (ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.

Analysis

[47] The parties have agreed the issues on appeal as follows:

> (a) Whether the Judge erred in finding the Crown Solicitor was under an implied undertaking not to provide documents received in the course of

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34 Senior Courts (Access to Documents) Rules 2017 (the Rules), r 12.
35 Rule 7 provides for restrictions on access to documents in proceedings under certain enactments.
36 Rule 13(c).

criminal proceedings to the Police for the purpose of investigating potential offending disclosed in the documents.

(b) Whether the Judge erred in exercising the Court's inherent jurisdiction to prevent the Crown Solicitor from providing relevant documents to the Police for the above purpose, on the basis that there was insufficient public interest in investigating the offending.

(c) Whether the Judge erred by failing to take into account that the Police sought access to the documents to investigate potential offending by Mr Ormsby-Turner's parents (Mr Ormsby and Ms Turner) as well as by Mr Ormsby-Turner.

Implied undertaking

[48] We do not consider an analogy can be drawn with the prohibition on the use of discovered documents for a collateral purpose, which is a long-standing principle in the civil context.[37] It has not been suggested previously that such an analogy can be drawn, nor do we consider it apt. In the criminal context, there is a high public interest in disclosure, both for the purpose of discovering crimes and in ensuring that already-occurred crimes are punished appropriately. There is also not the same need to avoid litigation being brought as a collateral attack on, for example, a business rival. The public interest in disclosure in criminal cases is reflected in the Privacy Act 2020, which contains an exception for information necessary for the "detection, investigation, prosecution, and punishment of offences".[38] We see no basis for extending the analogy.

[49] Such an analogy was the only basis for the Judge's finding of an implied undertaking and no other basis has been cited to us. There is no authority in support.

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[37] The history of this principle is usefully traced in *Hally Labels Ltd v Powell* [2013] NZHC 900 at [6]. Even in the civil context, where 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: *H v Attorney-General* [2024] 3 NZLR 319, [2024] NZHC 2317 at [33(b)].

[38] Privacy Act, s 22, p 11(1)(e)(i). That exception can also apply, in rare instances, in civil cases: *H v Attorney-General*, above n 38. The exception, however, is of general application in the criminal context.

[50] For these reasons, we find against there being an implied undertaking.

Exercise of inherent jurisdiction

[51] We address the second and third issues on appeal below.

[52] In refusing the application, the Judge relied heavily on his view that there was not necessarily a strong public interest in a further investigation of an alleged attempt to pervert the course of justice[39] and that there "is not a strong public interest in pursuing the investigation in those circumstances."[40] We respectfully disagree.

[53] The decision whether to prosecute offending is the role of the executive branch of government, not the courts.[41] Good reasons exist for observing constitutional boundaries and exercising judicial restraint in reviewing exercises of prosecutorial discretion.[42] In *Osborne v WorkSafe New Zealand*, this Court reviewed a decision not to continue with the prosecution of charges brought in relation to the fatal explosions at the Pike River Coal Mine.[43] In commenting on the courts' role in reviewing instances of prosecutorial discretion, Kós P observed there is a stronger case for restraint from interference on the part of the court where the decision is that the prosecution should proceed (as opposed to where the decision challenged is one not to proceed).[44] Kós P said:

> [36] … The risk of collateral interference with the criminal justice system is greater. The rights or wrongs of the prosecution, so far as the culpability of its subject are concerned, will be established by the conclusion of the criminal case. Mechanisms internal to the criminal jurisdiction are available, such as a stay of prosecution or discharge under s 147 of the Criminal Procedure Act. Collateral challenge serves little useful purpose. …

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39 Judgment under appeal, above n 3, at [24].

40 Minute of Cooke J, above n 6, at [6(d)].

41 *Fox v Attorney-General*, above n 31, at [28].

42 *Osborne v Worksafe New Zealand* [2017] 2 NZLR 513, [2017] NZCA 11 at [34].

43 While Osborne was overturned on other grounds in the Supreme Court, Kos P's statement is uncontroversial: *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [62], *R (on the appln of Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756 at [31]; *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [28]–[31]; *Matalulu v DPP (Fiji)* [2004] NZAR 193 (Fiji SC) at 215.

44 *Osborne v WorkSafe New Zealand*, above n 42.

[54] The same logic applies to the Police in their role investigating offending that may culminate in a prosecution. As noted by Lord Keith in *Hill v Chief Constable of West Yorkshire*:[45]

> [A] chief officer of police has a wide discretion as to the manner in which the duty [to prosecute offending] is discharged. It is for him[46] to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted.

[55] There is an inherent public interest in allowing the Police to have evidence in order to investigate and prosecute potential offending.[47] There is also considerable public interest in ensuring the courts have reliable information placed before them in order to uphold the integrity of the sentencing exercise.

[56] We disagree with Mr Bourke's submission that a prosecution against Mr Ormsby-Turner is essentially moot because he cannot be sentenced to any further term of imprisonment. That overlooks the other purposes of sentencing following a successful prosecution, including general deterrence and denunciation.[48] As the Police submitted, this process is distinct from the objectives achieved by merely declining to give Mr Ormsby-Turner a discount at sentencing.[49] The fact Mr Ormsby-Turner did not succeed in misleading the Court is also irrelevant, as success is not a pre-requisite of the potential charges.[50]

[57] Finally, to the extent any investigation into Mr Ormsby-Turner is moot, the Judge overlooked the fact the investigation was not just into Mr Ormsby-Turner's conduct, but also that of his parents. That, as the Police submitted, clearly material.

[58] Beyond that, in our view a Judge considering an application under the Rules should not take on a supervisory approach as to the overall merits of an investigation or the prosecution of a certain class of offending. That is a matter for the Police. In

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45 *Hill v Chief Constable of West Yorkshire* [1989] AC 53, [1988] 2 All ER 238 (HL) at 240.
46 We leave to one side his Lordship's assumption that any chief officer of police would be male.
47 A factor that can be considered under r 12(h) of the Rules.
48 Sentencing Act, s 7(1)(e) and (f).
49 We consider it unnecessary to consider the process for disputing factors in mitigation under s 24 of the Sentencing Act because that is an entirely different process to the separate investigation of criminal offending.
50 See Crimes Act, ss 113, 116 and 117.

this case as Mr Auld submitted, the Judge's view on the merits of the investigation effectively and in our view incorrectly, marked its end.

[59] There are factors which cut against granting access to the documents. Obviously, there is an interest in protecting Mr Ormsby-Turner's privacy, a consideration which is heightened because of his age.[51] However, we consider that the relatively confined scope of the application is sufficient to mitigate this concern. Unlike other potential applications under the Rules, or under the Court's inherent jurisdiction, there is a lower privacy interest in the information because granting access to these documents will not tell the Police what it does not already know. Furthermore, unlike in other potential applications, the privacy interests in this case must yield to the interest in the "detection, investigation, prosecution, and punishment of offences".[52]

[60] We also see some merit in the submission that any confidentiality is pierced when the statements are filed in court. From there, the information could be (and was) relied on in court through being referenced in Cooke J's sentencing notes and in the later decision of this Court on appeal. Those decisions in turn are generally available for publication. While not officially cautioned, Mr Ormsby-Turner and his parents knew that such information as they provided to report writers or by way of affidavit would in turn be provided to law enforcement (the Crown Solicitor) and placed before the courts. This case is not analogous to a case of religious or medical privilege, as submitted by Mr Bourke, where the legal consequences were not foreseeable at the time of any disclosure.

[61] Nor is it a case of an admission of offending to a report writer as in *R v Elleray*, the English decision relied on by the Judge (in which the evidence was, in any case, admitted). *Elleray* has been considered in *G(CA206/10) v R,* where this Court observed that a person undergoing an interview with a probation officer had already been convicted and was aware that the Court was intending to rely on whatever they said to the officer.[53] The same situation obtains here. Mr Ormsby-Turner was aware

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51 The Rules, r 12(d). See also considerations under the Oranga Tamariki Act 1989.
52 Privacy Act, s 22, p 11(1)(e)(i).
53 [2010] NZCA 283 at [88].

that what he said to report writers would be relied on by the Court. That was the whole point of the process.[54]

[62] We must also address the argument as to the potential chilling effect of granting access.[55] The risk that access to these documents will deter future disclosures to report writers has been overstated in our view. Unlike in a police interview, telling the truth or being frank about a defendant's personal circumstances for purposes of sentencing will not attract liability.[56] The disclosures that will be disincentivised will be voluntarily proffered and clearly material falsehoods. The voluntary nature of the disclosures made by Mr Ormsby-Turner during the interview process means we do not see any relevant distinction between the compulsory report from Probation Services and the voluntary s 27 and psychiatrist reports. We are not convinced that potential consequences for lying to the court are going to chill disclosures that are relevant and helpful to the sentencing exercise. We are not aware of previous sentencing cases raising concerns of the somewhat egregious nature at issue here, namely of an offender (and his parents) allegedly not only lying about his ceasing any gang affiliation, but the offender contemporaneously taking active steps to increase their involvement.

[63] The same logic applies to any chilling effect on report writers. Given the inquisitorial nature of expert reports, any liability for false information in the reports would rest with the person who provided it, namely the offender and their family, not the report writer who recorded the disclosures. In order for expert reports to add value to the sentencing exercise the court needs to have assurance of their accuracy within some reasonable bounds. Arguably the deterrent effect of a prosecution would aid in achieving this, rather than prevent it.

[64] Viewed in the round, it is appropriate to grant access to the requested documents. This decision should not be taken as determinative of the admissibility of

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54 See also *R v Secord* [1992] 3 NZLR 570 (CA), and *R v King* CA162/05,18 July 2005, in each of which this Court confirmed that where a person makes voluntary disclosures in presentence reports, any effect of its disclosure is of the person's own making.

55 The Rules, r 12(f).

56 This might not be the case where, as in *Elleray*, the disclosures amount to admissions of further offending. That is a situation quite different to that present here and we do not venture a conclusion on it.

any of the requested documents in any subsequent criminal proceedings, nor as to the merits of such a proceeding should it commence.

[65] Under r 7(a) of the Rules, which would apply by analogy, the Court can grant a request in whole or in part, with or without any conditions the Judge thinks appropriate. It was not suggested by either counsel that we should impose conditions in the event the appeal was allowed. We therefore proceed on the basis that no conditions are sought. In any event, the parties should be able to agree reasonable conditions.

Result

[66] The appeal is allowed.

[67] The High Court is to provide the New Zealand Police with the documents requested in their 4 July 2023 application.

[68] We make no order as to costs.

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