

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 7/92

Dated the 2nd day of March 1992

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

GISBORNE BOYS' HIGH SCHOOL
BOARD OF TRUSTEES

Broadcaster

RADIO 89FM of Gisborne

I.W. Gallaway Chairperson

J.R. Morris

R.A. Barraclough

L.M. Dawson

DECISION

Introduction

A news item broadcast by Radio 89FM in Gisborne on the morning of Monday 10 June 1991 reported the alleged activities of some pupils from Gisborne Boys' High School during an orientation visit to Waikato University. The item followed up a story published in a newspaper on Sunday 9 June. The news item broadcast by Radio 89FM included comment from the headmaster and a senior master at Gisborne Boys' High School.

The School's Board of Trustees complained directly to the Broadcasting Standards Authority, under s.4(1)(c) of the Broadcasting Act 1989, that the broadcaster failed to maintain standards consistent with the privacy of the individual. It said that the radio station had recorded the conversations and broadcast excerpts without the permission of either the headmaster or the senior master. The broadcast, it continued, failed to respect the privacy of the headmaster, the senior master and a number of pupils.

The Complaint

A story in the *Sunday News* newspaper of 9 June 1991 claimed that a group of pupils from Gisborne Boys' High School drank alcohol to excess and visited a strip club while on a familiarisation trip to Waikato University. On the same day, a reporter (Mr Bruce



Johnstone) from Radio 89FM in Gisborne (who is also the station's managing director) telephoned the headmaster (Mr Jack Gibbs) of the School to discuss the story with him. Mr Gibbs said that he was not aware of the newspaper story and declined to answer Mr Johnstone's questions, both about the trip generally and whether his son was one of the pupils on it. Mr Gibbs stated that he had been away and it was arranged that he might telephone Mr Johnstone after he was fully acquainted with the details of the newspaper article. Seemingly, he did not return the broadcaster's call.

As the newspaper account apparently also referred to Mr Brian Cairns (a senior master at the school), Mr Johnstone telephoned him. Mr Cairns told Mr Johnstone that he was a bit angry about the newspaper report and, although he had not necessarily been misquoted, he said that the story was exaggerated and probably stemmed from an interview with an unnamed parent of one of the boys.

The Authority accepts that Mr Gibbs and Mr Cairns knew, when they spoke to Mr Johnstone on the telephone, that they were talking to a reporter from Radio 89FM but that they were unaware that the telephone conversations were being taped by the broadcaster and that they did not give the broadcaster permission to broadcast excerpts from the taped conversations.

On the morning of 10 June 1991, Radio 89FM carried a report of the story from the *Sunday News*. The broadcast also included Mr Cairns' spoken remarks dealing with the points noted above and Mr Gibbs' response to a question about his son's participation to which he said:

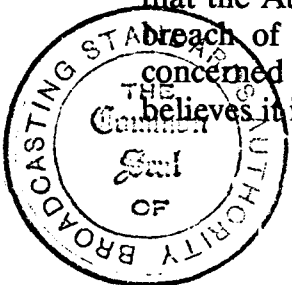
Can you let me have a look at the story and I'll make some comment when I feel able to.

The School's Board of Trustees complained directly to the Broadcasting Standards Authority under s.4(1)(c) of the Broadcasting Act 1989 that the broadcaster failed to maintain standards consistent with the privacy of the individual.

For the record, the Authority notes that the recording by radio staff of telephone conversations with members of the public is dealt with in the Radio Code of Broadcasting Practice. Standard 4.1 provides:

4.1 No telephone conversation with a member of the public is to be broadcast without that person's permission when statements by that member of the public are intended to be "on the record" for the purposes of news and current affairs or community comment; the person concerned should be warned if a conversation is to be recorded for possible broadcast.

Despite the fact that Radio 89FM's behaviour on this occasion appears to be in clear contravention of that standard, it must be put to one side for the following reason. Under s.8 of the Broadcasting Act, privacy complaints are the only type of complaints that the Authority can deal with directly. Other complaints, including those alleging a breach of a Code of Broadcasting Practice, must first be made to the broadcaster concerned (ss.6, 7 and 8 of the Broadcasting Act 1989.). As a result, the Authority believes it is unable to deal with a probable breach of the Radio Code. Accordingly, the



complaint is not assessed against standard 4.1 of the Code.

The Authority considered the concept of privacy at length in a decision following a complaint from a Mrs McAllister in 1989. The current complaint raises one of the issues examined on that occasion. However, rather than explore the preliminary points again, the Authority quotes extensively from Decision No: 5/90 issued in May 1990.

The Concept of Privacy

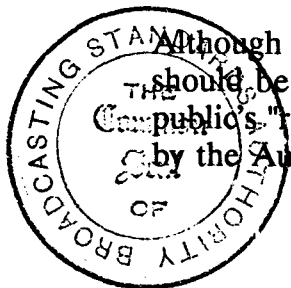
"The right to be left alone" is a common definition of privacy and it certainly accords with common sense. In Decision No: 5/90, the Authority recorded:

However, the Broadcasting Standards Authority believes that it is unable to rely solely upon everyday notions of privacy to determine complaints made under s.4(1)(c) of the Broadcasting Act 1989. This is because, pursuant to s.18 of the Act, decisions of the Authority are appealable to the High Court. Since legal notions of privacy can be expected to dominate the High Court's approach on appeal, the Authority is of the view that it must endeavour to take a similar approach when determining the extent of the protection afforded against broadcasters' actions by s.4(1)(c). Unfortunately, a precise legal view of the matter is not readily ascertained: the development of a clear legal concept of privacy is in its early stages in New Zealand, as it is in many other countries.

Despite the lack of authoritative statements as to the precise meaning of the protection afforded to individual privacy by a provision such as s.4(1)(c) of the Broadcasting Act 1989, there is no shortage of general information about privacy, written from a legal perspective. The Authority has been assisted in its comprehension of the limits of s.4(1)(c) by such materials as official Reports on privacy, legal text books, and by commentaries upon the International Covenant on Civil and Political Rights (Article 17 of which provides, amongst other things, for the right of every person to be protected against arbitrary or unlawful interferences with privacy). ...

The clearest principle to emerge from the sources, as well as from common sense, is that an individual's privacy cannot be protected by law to such an extent as to override the legitimate interests of other members of society. In the context of the present complaint - against a broadcaster - the complainant's interest in privacy is in competition with the public's "right to know" about events of interest to it. If both interests are to coexist, neither can be given its fullest meaning: if individual privacy is given its largest interpretation, the valued freedom of the media would be severely constrained; if the "public interest" in events is given its widest interpretation - to cover the public's curiosity about all matters reported to it - there would be no room left for individual privacy to be respected.

Although the Broadcasting Act 1989 gives no indication as to how the balance should be struck between the competing interests in individual privacy and the public's "right to know" about events of interest to it, the various models studied by the Authority provide assistance. The most developed ideas come from the



United States, with its tort (civil action) of invasion of privacy. Although American legal doctrine is not as common a source of inspiration for New Zealand law as the doctrines of Commonwealth countries, the Authority notes that, in the area of privacy, the New Zealand High Court recently called in aid United States' law. In Tucker v News Media Ownership Ltd [1986] 2 NZLR 716 at 733, McGechan J invoked American notions of privacy in support of the High Court's earlier decision (which had been upheld by the Court of Appeal) that a serious question to be tried was raised by the argument that a tort of invasion of privacy exists in this country.

The American tort of invasion of privacy has been said to comprise, in fact, four distinct torts. The invasions they protect are "tied together by the common name but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff 'to be left alone'". (Prosser and Keeton on Torts, Fifth Edition, Hornbook Series, Lawyer's Edition, p.581). From that text's discussion of the four American torts of privacy, it emerges that two may cast light upon the limits of the protection afforded to an individual's privacy by s.4(1)(c) of the Broadcasting Act 1989.

Decision No: 5/90 then discusses the concept of the public disclosure of private, and in some cases public, facts:

The first tort is described as protecting against the public disclosure of private facts but it is generally agreed that it will also protect against the public disclosure of *public* facts provided, in both cases, that the facts disclosed would be "highly offensive and objectionable to a reasonable person of ordinary sensibilities" (Prosser and Keeton pp856 - 859). Examples of private facts given by the authors include the details of a person's sexual relations or intimate private characteristics and conduct (p857). Public facts are described as facts "that occurred at a public place and in view of the general public, ... or ... [that] can be found in a public record" (p859). Logically, it will be more difficult to establish that the disclosure of public facts, rather than private facts, meets the "highly offensive" etc. test. The authors suggest that if a public fact is "of public concern" its disclosure will not meet that test. They then discuss the American law's liberal view of matters which are "of public concern", testifying to the difficulty an American plaintiff would have in succeeding in an action for invasion of privacy by the public disclosure of public facts (pp859 - 862).

Applying this provision to the current complaint, but without ruling on Mr Johnstone's claim that privacy could not be breached merely by asking a question, the Authority decided that the issue of the public disclosure of private facts was not raised in this case. Some incidents involved in the pupils' visit to Waikato University had been covered in the press and the question to Mr Gibbs about his son's participation could not be described as investigating a fact which was "highly offensive and objectionable to a reasonable person of ordinary sensibilities".

The second American tort of privacy which may be relevant to a determination of the limits of the protection afforded by s.4(1)(c) of the Broadcasting Act 1989



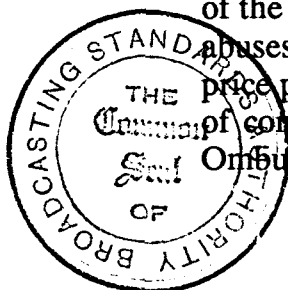
is referred to by Prosser and Keeton as unreasonable intrusion. It is described in these terms:

This is said to consist of intentional interference with another's interest in solitude or seclusion, either as to his person or to his private affairs or concerns. One form of invasion consists of intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters, or an illegal search of a shopping bag in a store. The principle has, however, been carried beyond such physical intrusion, and extended to eavesdropping upon private conversations by means of wiretapping and microphones; and there are decisions indicating that it is to be applied to peering into the windows of a home, as well as persistent and unwanted telephone calls. ...

It is clear, however, that there must be something in the nature of prying or intrusion. ... It is clear also that the intrusion must be something which would be offensive or objectionable to the reasonable person. ... It is clear also that the thing into which there is intrusion or prying must be, and be entitled to be, private. ... On the public street, or in any other public place, the plaintiff had no legal right to be left alone; and it is no invasion of his privacy to do no more than to follow him about and watch him there. Neither is it an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see. (Prosser and Keeton, pp.855-856)

Unlike the United States, New Zealand and countries with comparable legal systems - such as Australia and England - do not recognise any general legal right of a citizen to individual privacy. However, the question whether the law of those countries should recognise such a right, or whether it should, instead, protect individual privacy in specific circumstances by specific statutory provisions, has occupied a great deal of official time in recent years. In the course of examining those questions, the Australian Law Reform Commission Report No. 22 on Privacy (1983) includes a section canvassing the existing law's ability to protect individuals against intrusive conduct by journalists and reporters (ALRC 11 Volume 1, p.126). Having stated that journalists would be committing trespass if they entered private property and remained there after being requested to leave, the Report continues:

... the legal position is less clear where the offending activity occurs in a public place, for example, television coverage of funerals, an increasingly common feature of television news coverage following major accidents. It is argued that actions of this kind are often necessary and justified because of the interest of the general public in receiving news. ... It is said that the abuses of 'investigative journalism' are rare and must be tolerated as the price paid for a free media. Alternatively, it is said that adequate avenues of complaint exist [to the Australian Press Council, the Commonwealth Ombudsman, the Australian Broadcasting Tribunal or the Australian



Journalists' Association].

The Report then endorses the Law Commission's proposal, made in its 1979 Report Unfair Publication, for striking a balance "between privacy on the one hand, and freedom of the press, and the need of the public to be informed, on the other". That proposal was for the enactment of a statutory provision giving a cause of action to a person in respect of the publication of "sensitive private facts", ie those relating to health, private behaviour, love life or personal or family relationships in circumstances in which publication is likely to cause distress, annoyance or embarrassment, whether true or false. Importantly, several defences were proposed to be made available to that cause of action, including that the publication in question was relevant to a topic of "public interest", ie "a legitimate concern to the public but not merely published to arouse prurient or morbid curiosity". Also included as proposed defences were the consent of the affected person and the fact that the publication complained of was a matter of public record (Unfair Publication: Defamation and Privacy, ALRC 11, 1979, pp.236-240).

From the foregoing discussion, the Authority accepts that an individual does not have the inalienable right to be left alone - but neither does the media have the right to intrude unreasonably. In any particular situation, the question of whether a broadcaster's alleged intrusion is inconsistent with the privacy of an individual will involve an assessment of the specific facts.

Decision

Although the complaint was made by the School's Board of Trustees on behalf of Mr Gibbs (the headmaster), Mr Cairns (a senior master) and a number of other parties, the Authority is of the view that only the recording and broadcasting by the broadcaster of the telephone conversations with Mr Gibbs and Mr Cairns raise privacy issues which might contravene s.4(1)(c) of the Broadcasting Act 1989. That provision requires broadcasters to maintain standards which are consistent with the privacy of the individual. Accordingly, this decision is confined to the complaints made by the Board on behalf of Mr Gibbs and Mr Cairns as it was recordings of their conversations with Mr Johnstone which were broadcast.

The members of the Authority have listened to a tape of the full telephone conversation between Mr Bruce Johnstone, of Radio 89FM, and Mr Gibbs and have noted the extract which was broadcast. They have also listened to a tape of the telephone conversation between Radio 89FM and Mr Cairns which was broadcast on the morning of 10 June 1991. The broadcast apparently used the full tape of that conversation. They have also read the correspondence (summarised in the Appendix) which includes an article published in *The Eastland Sun* on the 15 June 1991 which summarises the story published in the *Sunday News* and deals with the headmaster's and senior master's reaction to the broadcaster's inquiries. Radio 89FM is a division of Eastland Newspapers Ltd which publishes *The Eastland Sun*.

The Authority has put to one side the issue of the broadcaster recording (as opposed to broadcasting) the conversations without the interviewees' knowledge. It is considered



that it is adequately covered by standard 4.1 of the Radio Code of Broadcasting Practice which, because of the procedure selected by the complainant, is not relevant to the complaint. Secondly, although the recording issue is related to the concept of privacy, in this instance the Authority is concerned with the application of the concept of privacy to what is broadcast. It considers that recording a conversation on the one hand and subsequently broadcasting it in full or part on the other, both without permission, are different matters with the former being outside the Authority's jurisdiction because of the procedures followed to lodge this complaint.

The Authority accepts that a single telephone call to most people, but especially to people who hold positions of authority and whose opinion on relevant matters can be expected to be sought, will rarely amount to an invasion of privacy within the terms of s.4(1)(c). Accordingly, it accepts that the telephone calls by Radio 89FM to the headmaster and a senior master of Gisborne Boys' High School on Sunday 9 June 1991 were legitimate.

On the issue of broadcasting the conversations without the headmaster's or senior master's knowledge and permission, the Authority's conclusion is specific to the facts of this complaint. It is required to decide whether, when balancing an individual's privacy with the public's right to know, the alleged invasion was objectionable to the reasonable person. The reporter's questions in this case concerned a matter which, because of a newspaper article, was already in the public domain. It was a story of legitimate interest to the broadcaster. Although the broadcaster's actions involved the broadcasting of the telephone calls about a matter which the School might have preferred was not publicised, the question remained whether the broadcasting of the telephone calls involved a degree of intrusion which, when balanced by the concept of the public interest, was offensive or objectionable to the reasonable person.

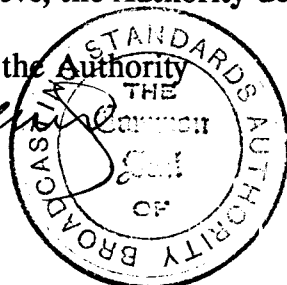
Having heard the broadcast extracts of the telephone conversations, the Authority concluded, first, that the content and manner of the conversation with Mr Cairns was such that its broadcast without his permission, while unethical, was unlikely to be considered so offensive or objectionable as to indicate a breach of s.4(1)(c) of the Broadcasting Act.

For the same reasons, the Authority also concluded that the broadcast of extracts from the conversation with Mr Gibbs did not amount to a breach of the statutory provision. Particular attention was paid to the question asked about Mr Gibbs' son for it raised a matter of personal, rather than purely professional, interest to Mr Gibbs. However, because Mr Gibbs did not answer the question but instead made a polite, non-committal response (which resulted in a recording of little news value), the Authority concluded that Radio 89FM's broadcast of that response without Mr Gibbs' consent was not in breach of the Broadcasting Act. Ironically, therefore, and despite Radio 89FM's use of an unethical broadcasting practice, Mr Gibbs' manner assisted it in maintaining standards consistent with his privacy.

For the reasons set forth above, the Authority declines to uphold the complaint.

Signed for and on behalf of the Authority

Iain Gallaway
Iain Gallaway
Chairperson
2 March 1992



Appendix

Gisborne Boys' High School's Board of Trustees' Complaint to the Broadcasting Standards Authority

The School's Board of Trustees complained directly to the Authority in a letter dated 28 June 1991 that a broadcast by Radio 89FM in Gisborne on 10 June 1991 failed to maintain standards consistent with the privacy of the individual - contrary to s.4(1)(c) of the Broadcasting Act 1989. Section 8(c) of the Act provides that complaints under s.4(1)(c), which allege a breach of an individual's privacy, may be made directly to the Authority.

The complainant stated that on Sunday 9 June, a reporter for the station, a Mr Johnstone, had telephoned both the headmaster and a senior master from the school. The letter continued:

Without their knowledge and without their permission he recorded the conversations, and without their permission excerpts were played on the morning of 10.6.91.

The complainant stated that the one question and the headmaster's answer, which were broadcast, dealt with the headmaster's son. Referring to the annoyance of some parents that, first, one boy, and secondly, some school prefects had been singled out in the broadcast, the complainant wrote:

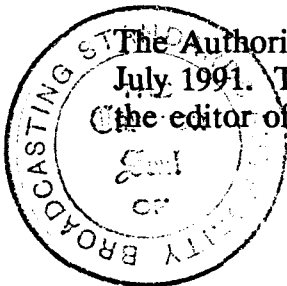
The news item was unfair, it was inaccurate, it was distorted and exaggerated, it was not impartial, and it failed to respect the privacy of the Headmaster, the Senior Master, the Headmaster's son, the school Prefects and the boys generally.

Radio 89FM Gisborne is associated with the newspaper, The Eastland Sun, and the incident in Hamilton which gave rise to the radio news item on 10 June, and the headmaster's and senior master's reaction, was discussed in an article in the paper on 15 June. The complainant, which supplied the Authority with the newspaper article, recorded:

Mr Johnstone in his newspaper gave a totally inaccurate account of the affair, but admits in this article that he had taped interviews without knowledge or permission, and used them without permission.

Radio 89FM's Response to the Broadcasting Standards Authority

The Authority sought the broadcaster's comments on the complaint in a letter dated 1 July 1991. The reply from Mr Bruce Johnstone, the station's managing director, and the editor of The Eastland Sun, is dated 24 September 1991.



Mr Johnstone agreed that he had taped the telephone conversation with Mr Gibbs after clearly identifying himself as a journalist seeking comment for a radio news item. He stated:

While Bruce Johnstone did not specifically say to Mr Gibbs that his words would be recorded and broadcast, the interview was clearly being conducted "on the record" by a person identified and well known to Mr Gibbs as a journalist asking for comment for the purposes of a radio news item on a subject already widely publicised by other media.

We submit that Mr Gibbs was in this way adequately "warned" in the context of section 4.1 of the code and further that a "no comment" response is not a "statement on the record" (referred to in the code) but rather an absence of the same.

The only recording of Mr Gibbs broadcast was his brief refusal to comment. We submit that this is clearly not a situation where privacy has been breached by the recording and broadcasting of an unguarded comment.

He suggested that the question, not the answer, was the essential basis of the complaint. Further, he said, while people in positions of authority had the right to refuse to answer questions, they did not have the right to suppress questions on the grounds of privacy. He continued:

We submit that the issue was handled in a completely fair manner in that Mr Gibbs was given every opportunity to comment and chose not to do so.

Mr Johnstone argued also that the broadcast neither breached the headmaster's privacy nor the privacy of any of the other people named. He concluded:

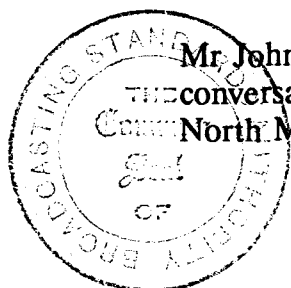
To uphold this complaint would be to create a serious precedent that would prevent reporters from broadcasting questions and refusal responses because people making "no comment" responses are unlikely to give their permission to the broadcasting of their refusal.

By broadcasting Mr Gibbs' refusal to comment we made it clear to listeners that we were prepared to ask Mr Gibbs the question we raised, that we gave him an opportunity to comment and that he had refused to do so.

Board of Trustees' Comment to the Authority

When asked to comment on 89FM's response, in a letter dated 2 October 1991, the headmaster of Gisborne Boys' High School (Mr J B Gibbs) wrote:

Mr Johnstone gave absolutely no indication at all that the telephone conversation was being taped. Having just arrived back from Palmerston North Mr Johnstone's call was the first indication of media attention. The



warning specifically required by Section 4.1 was not given. My permission was not asked for, nor given.

With regard to the statement that the station only broadcast Mr Gibbs' refusal to comment, the letter continued:

This statement is untrue. Please study the transcript of the item broadcast at 8.30 a.m. I am absolutely sure of my ground here in what was broadcast and I am aware it contains the most important substance of the complaint. I view Mr Johnstone's thinly veiled attempts to mislead the Tribunal as very serious indeed, because he has only admitted to the lesser part of what he broadcast. Such selectivity, or indeed dishonesty, will, I hope be viewed as seriously by the Tribunal.

He concluded by expressing his puzzlement at the tone of Mr Johnstone's letter and listed a number of standards in the Radio Code of Broadcasting Practice which he maintained were breached by the broadcast. He noted that the School's Board remained the complainant but had delegated to him the task of responding.

As the reply did not indicate clearly to the Authority whether the privacy complaint related only to Mr Gibbs, or to other staff and pupils, the Authority requested clarification from the complainant. The Authority was advised by telephone on 18 November that Mr Cairns' privacy complaint remained extant. As the broadcaster's response dated 24 September only dealt with Mr Gibbs' complaint, further information was sought from Radio 89FM.

Radio 89FM's Final Comment to the Authority

The broadcaster responded in a letter dated 10 December to the Authority's request of 18 November.

Mr Johnstone stated that the radio station had been confused by the correspondence, which he quoted, about who was making the complaint. He added that there was no evidence that Mr Cairns felt that his privacy had been breached. Nevertheless, in response to Mr Cairns' complaint, he made three points.

- 1) When telephoning Mr Cairns, Mr Johnstone had identified himself as a journalist seeking an on-the-record interview.
- 2) Mr Cairns responded to some questions and then indicated that he would go no further.

At no time did Mr Cairns say that his comments were either off-the-record or not for broadcast.



Board of Trustees' Final Comment to the Authority

When asked to comment on 89FM's response, in a letter dated 16 January 1992, the Board's secretary recorded that the Board, by formal resolution dated 17 June 1971, had complained, with the appropriate persons' permission, on behalf of the school, the headmaster, Mr Cairns, some parents, some boys, some prefects and the headmaster's son. It noted that Mr Gibbs' letter of 2 October 1991 to the Authority was written on behalf of the Board.

Referring specifically to Mr Cairns, the Board stated that he did not know that his comments were being recorded nor was his permission obtained to broadcast excerpts from the conversation.

Discussions concerning the applicability and scope of the Official Information Act have taken place between the Board and 89FM and the Board attached a copy of 89FM's request to it for information dated 10 December 1991. The Board asked the Authority to take into account the letter's final paragraphs which, it claimed, were attempts to influence the School's attitude to the complaint. The final paragraphs of the broadcaster's letter to the School read:

Our reasons for requesting this information is that this issue is expected to become of considerable public interest as a result of the privacy complaint being pressed by your board against our radio station to the Broadcasting Standards Authority.

All rulings made by the Broadcasting Standards Authority receive nationwide media coverage.

The announcement by the Authority of its ruling in *Gisborne Boys High School v. 89FM*, and any subsequent High Court appeal, is likely to create considerable public interest in the original news item.

