

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 138/93

Dated the 29th day of October 1993

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

GENE LECKEY

of Auckland

Broadcaster

TELEVISION NEW ZEALAND
LIMITED

I.W. Gallaway Chairperson

J.R. Morris

R.A. Barraclough

L.M. Dawson

DECISION

Introduction

A recording of a discussion about an application for permanent residence between a Malaysian applicant and immigration consultant Mr Gene Leckey was broadcast on TV1's *Holmes* programme between 6.30 - 7.00pm on Monday 19 March 1990. The item showed that the conversation was recorded surreptitiously by TVNZ, with the applicant's covert assistance and without Mr Leckey's knowledge.

Mr Leckey complained directly to the Broadcasting Standards Authority under s.8(1)(c) of the Broadcasting Act 1989 that the broadcast of a recording of the conversation which had been taped without his knowledge invaded his privacy in contravention of the broadcasting standards.

Maintaining that the New Zealand standards, like similar requirements elsewhere, accepted that electronic eavesdropping to obtain information in the public interest was permissible when there was no other way to obtain the information, TVNZ declined to uphold the complaint.



Decision

The members of the Authority have viewed a tape of the item complained about and have read the lengthy correspondence (summarised in the Appendix). As is its practice, the Authority has determined the complaint without a formal hearing.

The Programme

An item on the *Holmes* programme in March 1990 broadcast the conversation between an applicant for permanent residence in New Zealand and immigration consultant Mr Gene Leckey. During the broadcast, TVNZ advised that the recording had been made surreptitiously - without Mr Leckey's knowledge - and some of the tactics suggested by Mr Leckey to the applicant to meet the official immigration requirements displayed at least a cavalier disregard for the legal requirements. For example, Mr Leckey was heard advising the applicant that someone in New Zealand had to be prepared to confirm to the Immigration Service when telephoned that the applicant had at least five years' experience as an ethnic cook regardless of the truthfulness of the comment and regardless of the qualification of the person making it.

The item also included an interview with Mr Leckey in which he was not informed of the covert recording but during which he denied that he would use such procedures as described on the tape.

There is very little dispute between the complainant and the broadcaster about most of the factual issues involved. The Authority was later advised that Mr Leckey had approached the *Holmes* programme early in 1990, before the broadcast, because of his concern about the official operation of the immigration requirements and that he had agreed to an interview to discuss the possibility of requiring immigration consultants to be registered. The secret recording was made after that interview in which he denied that he used questionable procedures.

The Criminal Charges

The "plant" used by TVNZ was a Malaysian who was or had been a police officer in Malaysia and who, after the broadcast, co-operated with the New Zealand Police. Mr Leckey was arrested on 28 March 1990, nine days after the broadcast, and charged with a number of offences involving dishonesty arising from his business.

Because of the possibility that its records might be required in the trial, TVNZ was initially reluctant to respond to the Authority's request for a comment on the complaint. It was prepared to do so, however, when the Authority obtained legal advice that the information-gathering process would not be regarded as contempt of court. Mr Leckey's counsel, while fully participating in the information-gathering process, later urged the Authority not to publish its decision until the criminal proceedings had been completed because of the possibility of prejudice to his client.

In view of the applicable law of contempt, the Authority gathered the relevant information, which it completed in November 1990, and then decided to defer further



action until the criminal matters were finally resolved. From the media reports, the criminal proceedings raised a number of procedural issues which meant considerable delay and the matters were not resolved until July 1993. At that time, the account in The Dominion recorded under the heading "Immigration man cleared of fraud" (7 July 1993).

Former immigration consultant Gene Anthony Thomas Leckey has been cleared of forgery and fraud charges for the third time.

Judge Bruce Buckton ruled yesterday in the Auckland District Court that one count each of forgery and fraud were not proven.

Leckey, 54, company director of Westmere, was charged in 1990 with offences relating to his immigration business but all the charges were dismissed.

These latest two counts were among 10 dismissed in September but later re-laid.

The Presumption of Innocence

In September 1993, Mr Leckey confirmed to the Authority that he had been cleared of all charges and that he wanted the privacy complaint revived. In response, TVNZ suggested that the Authority should obtain from Mr Leckey's lawyer an account of the legal steps which had occurred between 1990 - 1993.

As well as recording that Mr Leckey has indicated that he is now handling the privacy complaint on his own, the Authority believes that its approach to the complaint should be governed by an important matter of principle encapsulated in the phrase that a person is innocent until proven guilty. This principle underlies a number of the provisions in the New Zealand Bill of Rights Act 1990.

Following this principle means that the Authority has no cause to examine the court proceedings.

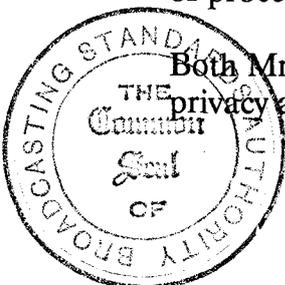
The Privacy Complaint

The issue for the Authority is whether the broadcast on the *Holmes* programme on 19 March 1990 contravened the requirement in s.4(1)(c) of the Broadcasting Act 1989 which requires broadcasters to maintain standards which are consistent with:

- (c) The privacy of the individual.

The Authority also puts to one side TVNZ's broadcast on 28 March 1990 reporting Mr Leckey's arrest. The circumstances surrounding and the contents of that broadcast provided the basis for the complainant's solicitor's subsequent claim about TVNZ's abuse of process. Those concerns did not raise broadcasting standards matters.

Both Mr Leckey's solicitor and TVNZ made submissions based on the discussion about privacy advanced by the Authority in Decision No: 5/90. They also referred to practices



in other countries, especially the rules laid down by the BBC in its News and Current Affairs Index. The complainant raised the point that TVNZ did not provide the Authority with a copy of its internal manual to verify that its rules complied with the BBC standards, or what level of authority was required to authorise the use of eavesdropping equipment, and whether that had occurred in the present circumstances. However, as the Authority was required to rule whether the broadcast breached s.4(1)(c) - not to rule on TVNZ's internal processes - it has not pursued that aspect of the complaint.

Privacy Principles

The Authority's thinking about privacy as it applies to s.4(1)(c) of the Act has progressed since Decision No: 5/90 as it has had to deal with more complaints which have raised the issue. The Authority would note that a complaint based principally on the alleged invasion of an individual's privacy is not frequently raised. Although mentioned as one aspect of a complaint - sometimes with minimal justification - privacy has been the major concern in only about 3% of decisions issued by the Authority (9 out of 320). However, because the Authority until recently has seemingly been the only organisation required by statute to enforce the concept of privacy, it has been necessary for it to develop a number of principles to apply when a complaint is made that a broadcast has invaded an individual's privacy.

After issuing a number of decisions, the Authority issued an Advisory Opinion in June 1992 to all broadcasters outlining the five relevant privacy principles it intended to apply. The Authority would add that these principles have been sufficient, so far, to deal with all complaints alleging a breach of privacy received since then. The introduction to the Advisory Opinion provides:

By way of introduction to this Advisory Opinion, the Authority wants to stress that, although it records five relevant privacy principles:

- These principles are not necessarily the only privacy principles that the Authority will apply;
- The principles may well require elaboration and refinement when applied to a complaint;
- The specific facts of each complaint are especially important when privacy is an issue.

The following five "relevant Privacy Principles" were enunciated:

Although the right to be left alone is a common sense definition of privacy, as the Authority's decisions may be appealed to the High Court it is necessary for the Authority to follow what it considers to be appropriate legal precedents. Because of the paucity of reported cases and the lack of a clear legal definition of privacy in New Zealand, the Authority has relied upon precedents from the United States in developing the following five principles which have been applied to privacy



complaints so far by the Authority when determining them under the Broadcasting Act 1989.

- i) The protection of privacy includes legal protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.
- ii) The protection of privacy also protects against the public disclosure of some kinds of public facts. The "public" facts contemplated concern events (such as criminal behaviour) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to the reasonable person.
- iii) There is a separate ground for a complaint, in addition to a complaint for the public disclosure of private and public facts, in factual situations involving the intentional interference (in the nature of prying) with an individual's interest in solitude or seclusion. The intrusion must be offensive to the ordinary person but an individual's interest in solitude or seclusion does not provide the basis for a privacy action for an individual to complain about being observed or followed or photographed in a public place.
- iv) Discussing the matter in the "public interest", defined as a legitimate concern to the public, is a defence to an individual's claim for privacy.
- v) An individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for breach of privacy.

Principles Applied to this Decision

The accepted facts have been recorded above and disclosed that the item broadcast a conversation which one person, unaware that the other had arranged for the recording, believed was a private discussion about a business matter.

Principles i) and ii) refer to the disclosure of "highly offensive" facts, while principle iii) is concerned with the "intentional interference" in an individual's interest in seclusion. A breach occurs when the intrusion is "offensive to the ordinary person".

The Authority had little hesitation in deciding that the electronic eavesdropping on a private business conversation on this occasion would have been offensive to the ordinary person under principle iii). Moreover, the exceptions in the standard about observing, following or photographing in a public place did not apply.

Although the 19 March broadcast was unquestionably a breach of principle iii) on this occasion, the Authority then considered principle iv). It provides that a broadcast in the



"public interest" is a defence to a complaint based on privacy. It was a defence raised by TVNZ based on the practices of television networks elsewhere - especially the BBC. Referring further to the overseas material, TVNZ stressed that Mr Leckey's privacy had not been invaded as there was no other way to obtain the information about an anti-social activity of important public interest. It said that on this occasion, the public interest defence was applicable as the behaviour disclosed by the use of electronic eavesdropping was a legitimate concern to the public.

Both TVNZ and the programme itself referred to the proposed changes to the immigration requirements which would increase the powers bestowed on immigration consultants, such as Mr Leckey, and the Authority accepted that the matter was an issue of important public interest. Information about the questionable practices of immigration consultants generally was included in the item through comments from an Immigration Department spokesperson. However, as the broadcast interview with Mr Leckey disclosed, he was not prepared to admit that he used questionable practices. Although the "plant" would have been able to give evidence of such practices, the use of electronic eavesdropping was indispensable to the report on the practices of the consultants named in the item and, moreover, seemingly the only way to obtain Mr Leckey's incontrovertible admission of the specific matters.

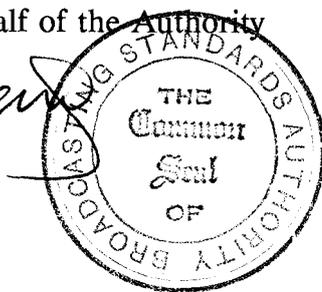
The Authority then focussed on the other aspect of TVNZ's argument that the use of technique was in the public interest because it disclosed an activity, event or behaviour which was criminal or widely recognised as being anti-social. As noted above, in view of the District Court decisions the Authority accepted that the behaviour disclosed by the surreptitious recording was not criminal. Nevertheless, in view of the continuing widespread interest in immigration, the Authority readily accepted that the behaviour disclosed would definitely be widely regarded as anti-social.

Consequently, the Authority concluded, the defence encapsulated in privacy principle iv) justified the broadcast of an item which breached privacy principle iii).

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



29 October 1993

Appendix

Mr Leckey's Complaint to the Broadcasting Standards Authority

In a letter dated 21 March 1990, the solicitor for Mr Gene Leckey of Auckland complained directly to the Broadcasting Standards Authority under s.8(1)(c) of the Broadcasting Act 1989 about an item broadcast on TV1's *Holmes* programme between 6.30 - 7.00pm on Monday 19 March. The complaint, the letter continued, alleged that broadcast had invaded Mr Leckey's privacy.

Observing that Mr Leckey was an immigration consultant, the solicitor wrote that the programme included extracts of a conversation between Mr Leckey and a man purporting to be an applicant for permanent residence in New Zealand. The letter continued:

According to the script, the person who purported to be an applicant was acting the part on instructions from Television New Zealand Limited while carrying concealed recording equipment. The actor recorded the conversation surreptitiously and excerpts from this conversation were broadcast.

The solicitor maintained that surreptitiously recording and broadcasting the conversation was a breach of privacy and the situation was exacerbated in that the conversation had been set up by subterfuge.

An order for \$5,000 against the broadcaster was suggested as the penalty.

TVNZ's Response to the Formal Complaint

Mr Leckey was arrested on 28 March 1990 on a number of charges arising from his business as an immigration consultant and TVNZ was reluctant to comment to the Authority on this complaint until those matters had been resolved, especially as some of the material which was broadcast could be relevant to the court proceeding. However, it did so after being advised that the Authority had received legal advice that it would not be acting in contempt of the court proceedings by assembling the relevant information. TVNZ finally responded to the Authority's request for comment in a letter dated 14 August 1990.

The broadcast was described in the following way:

The specific incident which led to this complaint involved a conversation between the complainant and a Television New Zealand "plant" being recorded without his knowledge or permission. Concealed microphone equipment was used - and a camera filmed the vehicle in which the conversation was taking place from a discreet distance.

TVNZ justified the use of the technique on the grounds that the matter was clearly in



the public interest and that there was no other way of obtaining the information. The public interest aspect was evidenced by the fact that Mr Leckey was now facing charges involving fraud and forgery as well as breaches of the Immigration Act.

The use of concealed equipment, TVNZ continued, followed its in-house guidelines which echoed the BBC provision which stated that electronic eavesdropping:

"may only be used for important stories in which the activity, event, or behaviour to be recorded is widely recognised to be illegal or anti-social. The material obtained must be indispensable to the story, and unobtainable by more open means."

TVNZ also referred to the guidelines on such eavesdropping among other television networks and concluded:

Although all the networks to be cited agree that such a technique can only be justified when all else fails, they all acknowledge there will be occasions when its use becomes necessary, and desirable, in the pursuit of information which is in the public interest.

The identity of the "plant", TVNZ stated, was another issue which arose from the broadcast. The person was a Malaysian police officer who had been helping the New Zealand Police. Accordingly TVNZ added that it did not wish to discuss that aspect further until the criminal charges against Mr Leckey had been resolved.

It continued:

It is not without relevance to comment that dealing with this matter before the results of the criminal proceedings are known, denies the company of potential support submissions justifying its covert action on the proven grounds that serious offences were committed and the matter was indeed of public concern and importance.

Referring to Decision No: 5/90 which, at the time, recorded the Authority's policy on privacy complaints, TVNZ endorsed the principle there enunciated that an individual's privacy could not be protected to such an extent that it overrode the legitimate interests of other members of society.

TVNZ argued:

The company would fully agree with this principle and state that in the case in question it is particularly relevant. It would argue that we are not dealing here with an ordinary individual's privacy, as in the case of an unexceptional member of the public. We are dealing in fact with a business principle. The legitimate interests of society in this case are paramount, especially in view of the fact that practices having a bearing on an influx of new, possibly unsuitably qualified immigrants, are at issue. It would appear to be clearly in the category deserving of the parting of the privacy curtain to allow for a public



insight which is in the interests of the community, as implied in the Authority's comment. There is an implicit "right to know".

It concluded by disputing the complainant's allegation that a breach of privacy had occurred, pointing to the fact that the technique used would have also been acceptable "in the homeland of the freedom of the press - Britain".

The Complainant's Comment to the Authority

When asked whether he wished to respond to TVNZ's reply, Mr Leckey's solicitor commented in letters to the Authority dated 11 October and 25 October 1990.

In the first letter, the solicitor alleged that the broadcast, because of the evidence of a close collaboration between TVNZ and the police, was not only a breach of privacy but an abuse of process. In support of this contention, he pointed to TVNZ's presence at Mr Leckey's home when his house was searched and he was arrested. He also referred to TVNZ's "plant" who had worked both for TVNZ and the New Zealand police. He concluded on the point:

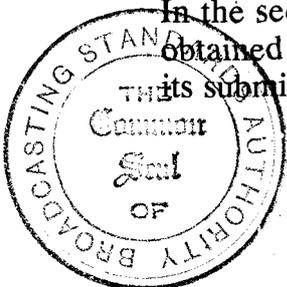
The totality of the evidence puts together a case for TVNZ to answer that it was party to an arrangement with the police, the outcome of which was that TVNZ obtained what it thought was a good story and the police, as a result of TVNZ's actions, obtained a climate of publicity in which a prosecution was more likely to succeed. If this was not the intention of the parties, at least TVNZ ought to have been aware that this would be the outcome, whether intended or not. At the very least, it allowed itself to be used to subvert the legal process.

Referring to the privacy issue, the solicitor argued that "freedom of speech" was a lofty principle but no more than a term of convenience. He referred to the limitations on the principle, including the provision in the Broadcasting Act, and maintained:

It is submitted therefore that, in matters of privacy of the individual, the Act requires as a matter of law an editorial judgment which properly weighs all the other constraints and interests which compete against the interest of publication. All the circumstances bearing on a decision to use concealed recording equipment to obtain material for broadcast must be taken into account. This was not done in the case of the broadcast complained of.

Mr Leckey's solicitor also requested that action on the privacy complaint be deferred until the criminal proceedings were disposed of.

In the second letter dated 25 October, Mr Leckey's solicitor reported that he had obtained a copy of the "BBC Current Affairs Index" from which TVNZ had quoted in its submission.



He applied the following facts to the matters considered relevant in Decision No: 5/90. TVNZ, not Mr Leckey, had put his business in issue. Eavesdropping on private conversations was offensive and strong reasons were needed to be advanced in each case to justify the practice. As this matter involved a discussion between an adviser and a client, it was obviously a private conversation. Accordingly, he asked whether the test of "the effect of the broadcast on a reasonable person of ordinary sensibilities" was sufficient in these circumstances. He also referred to the controls on electronic eavesdropping in the Crimes Act and, while it was not the Authority's role to determine whether an offence against the Crimes Act had been committed, he argued that the following was the first requirement:

It is therefore necessary to establish, as a preliminary fact, the exact circumstances of Mr Singh's involvement, who employed him, whether and, if so, how he was paid and by whom. If he was not employed, was he offered any other inducement to fulfil his role?

TVNZ'S Response to Mr Leckey's Solicitor's Comments

In a letter dated 9 November 1990, TVNZ "strongly denied" that the broadcast amounted to an abuse of process because of the alleged close collaboration with the police.

It reported that in response to police enquiries following the broadcast on 19 March, the "plant" had agreed to discuss the matters with them. A film crew had learned of the search of Mr Leckey's home on 28 March and had been present but that "was not as a result of any prior arrangement". It added that TVNZ had not been aware on 19 March of any police investigation. It added:

It is not unusual, of course, for any branch of the news media, while carrying out research, to learn of facts which could possibly lead, in due course, to a criminal charge being laid. In such circumstances there is no reason for the news media to cease their investigations and not to publish. It is certainly not an abuse of process as the solicitors allege. The administration of the immigration of people into New Zealand is a subject of very strong public interest. As already mentioned, the complainant in fact raised various queries with TVNZ earlier in the year. He certainly considered the matter to be of public interest.

With regard to the letter of 25 October expanding on the issue of privacy, TVNZ argued that Mr Leckey had put his business in issue for approaching the *Holmes* programme. Agreement was expressed with most of the factual summary outlined but TVNZ concluded, as it was acknowledged that a Crimes Act offence was not the issue:

We see no reason therefore why we should discuss Mr Singh's involvement.



The Complainant's Response to Television New Zealand Limited's Comments

In a lengthy letter dated 23 November 1990, Mr Leckey's solicitor responded to TVNZ's above letter in some detail. It began by asking the Authority to defer publication of its determination of the complaint until the criminal proceedings had been resolved because, as raised issues of credibility were raised in both proceedings, cross-examination was necessary to deal with some points in dispute.

Addressing the issues raised by TVNZ, the letter acknowledged that Mr Leckey originally contacted the *Holmes* programme to put his views about some immigration matters. It continued:

However, it was a large step from such an approach by Mr Leckey, to the setting up of a false interview to be recorded secretly. TVNZ has not explained why it took that large step.

As for TVNZ's contention that its process "echoed" the BBC provisions, the solicitor noted the high level of authorisation required at the BBC and the absence of any comment of who in TVNZ had approved the use of technique on this occasion. It was suggested that TVNZ's internal procedures could have been breached. Moreover, TVNZ had not supplied its manual to verify its stance that its processes reflected those of the BBC.

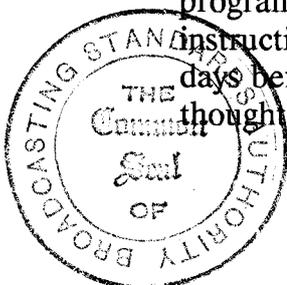
The letter then raised some questions about how a film crew "learned" of the possibility of a search of Mr Leckey's home and summed up:

An irresistible inference follows that the news crew's presence resulted from a tip-off either from the police or from the New Zealand Immigration Service. Either explanation supports a high degree of co-operation between TVNZ and one or other agency. In those circumstances, TVNZ had a duty of care to ensure that its view of Mr Leckey was not unduly coloured by this co-operative relationship with a law enforcement agency with whom it shared an interest in the story.

It continued by discussing other aspects raised by the abuse of process allegations and questioned the balance of the item on 28 March which reported the arrest and the reaction from the Labour Party's president. These points, the solicitor wrote, pointed to a "mind-set" on the part of TVNZ's journalists - a "mind-set" which adopted a presumption of guilt. There were matters, the solicitor maintained, which could only be tested by cross-examination.

The following background was provided to the 19 March broadcast:

We are instructed that at no stage before the broadcast of the *Holmes* programme did TVNZ tell Mr Leckey of the secret recording. Our instructions are that reporter Cameron Bennett interviewed Mr Leckey a few days before 19 March, on the pretext of wanting to ask Mr Leckey whether he thought immigration consultants should be registered. The interview contained



no questions on that subject. We are instructed that Mr Bennett made no mention of the secret recording and the first time Mr Leckey became aware of it was when he saw the broadcast.

And it argued that a breach of privacy had occurred:

Following Decision No: 5/90, whether there was an invasion of privacy is to be judged as at the date of broadcast, rather than at the time when the interview was conducted. This puts an onus on a broadcaster to consider not just the content of the broadcast but its potential impact as at the date of broadcast, having regard to all the circumstances of which the broadcaster is, or ought to be aware at that time. If there is any doubt as to the propriety of putting the programme to air at that time, it is submitted that there is a heavy onus on the broadcaster either to put that doubt to rest or to postpone the broadcast. The words in section 4(1), "programmes and their presentation ..." [our emphasis] necessarily include consideration of the effect of the timing of the presentation.

Further Correspondence

After its meeting on 14 December 1990, the Authority advised the parties that it decided to defer consideration of the complaint for six months to allow progress towards the disposition of the criminal charges faced by Mr Leckey. That deferral was periodically extended until the criminal matters were finally completed in July 1993 when Mr Leckey was cleared of all charges.

On 6 September 1993, Mr Leckey confirmed that the criminal proceedings were completed and stated that he now wished that his complaint alleging a breach of privacy in a broadcast on 19 March 1990 be revived and determined.

TVNZ's Response to the Authority

When advised of Mr Leckey's request, in a letter dated 14 September 1993 TVNZ suggested, first, that the request should be made formally by Mr Leckey's lawyer, and secondly, that it should be accompanied by a summary of the recent court decisions involving Mr Leckey.

Although not wishing to "unnecessarily prolong the delay", TVNZ argued:

Without further communication from Mr Leckey's lawyer our files (and yours) are left with a considerable void in respect of the developments in this story since its broadcast over three years ago. We find the absence of updated information from the complainant or his lawyer leaves us in the position of being unable to comment with any certainty on the complaint as it stands now, and we presume the Authority will find itself similarly inconvenienced.

In a later letter dated 29 September 1993, TVNZ urged the Authority to take note of its 9 November 1990 letter which argued that the use of the technique was justified in the public interest because there was no other way of obtaining the information.

