IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2021-485-624
[2021] NZHC 3319

UNDER	the Judicial Review Procedure Act 2016
AND	Part 30 of the High Court Rules 2016
BETWEEN	TE POU MATAKANA LIMITED First Applicant
	WHĀNAU TAHI LIMITED Second Applicant
AND	ATTORNEY-GENERAL Respondent
AND	PRIVACY COMMISSIONER Intervener

Hearing: 25 November 2021

Counsel: J B Orpin-Dowell, M R G van Alphen Fyfe and T J G Allan (by VMR) for the Applicants
S M Kinsler, V E Squires and L N Wilson (by VMR) for the Respondent
B Keith and A de Joux for the Intervener

Judgment: 6 December 2021

JUDGMENT OF GWYN J

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Introduction

[1] The applicants seek judicial review of a decision by the Ministry of Health (the Ministry) declining to provide them with the personal details, contact details, vaccination status and vaccination booking status of those Māori in Te Ika-a-Māui/North Island who have not yet received any dose of the COVID-19 vaccine or have received only one dose of the vaccine (the data).

[2] The applicants in this case are Te Pou Matakana Limited, trading as the Whānau Ora Commissioning Agency (WOCA), and Whānau Tahi Limited. WOCA is the commissioning agency contracted by Te Puni Kōkiri/Ministry of Māori Development to deliver Whānau Ora services for Te Ika-a-Māui/North Island. Whānau Tahi is Te Pou Matakana's information systems provider.

[3] This case is a sequel to an earlier case brought by the applicants against the Ministry and the underlying issues remain the same. In the earlier case, the Court set aside the Ministry's refusal to share the data with the applicants (the first decision), and directed the Ministry to urgently retake the decision, within three working days, with leave to apply if more time was required (the first judgment).[1] That time was extended by a day with the applicants' consent. On 5 November 2021 the Ministry made a new decision on the request. The Director-General of Health, Dr Ashley Bloomfield, accepted recommendations from Ministry officials, including to "decline the request for access to all Te Ika-a-Māui/North Island individual level Māori health information sought by the applicants" (the second decision).

[4] The applicants challenge the second decision as being wrong in fact and law. While in the earlier case the applicants asked the Court to set aside the Ministry's decision and direct the Ministry to reconsider, in this case they argue that there are exceptional circumstances that mean that, rather than remitting it back to the Director-General to make a fresh decision, the Court should direct the Ministry to urgently share the data with the applicants.

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1 *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 2942.

Context

[5] As set out in the first judgment,[2] as at that date, the COVID-19 immunisation programme had not achieved equitable coverage between Māori and other ethnic groups; the percentage of the eligible Māori population who had received COVID-19 vaccinations was at that point materially lower than the percentage of other eligible populations. The parties agreed that the underlying reasons for that inequity included that there are significant barriers to Māori accessing primary healthcare services, including cost, access to services, poor service delivery, cultural barriers, poor communication by health providers, and different approaches and models to wellbeing.[3] It was also accepted that one of the reasons why the Māori vaccination rate is lower than other groups of New Zealanders is a lack of trust by Māori in government institutions.[4]

[6] The second decision records that Māori vaccination rates are improving quickly, but also acknowledges that Māori vaccination rates continue to lag behind the general population, and Māori are disproportionately impacted by the current outbreak of the Delta variant in those locations where it is occurring.

[7] The evidence from the applicants was that, although more Māori are getting vaccinated, the differences between vaccination rates for Māori and non-Māori for those who are double vaccinated have been persistent and in fact increased in the month leading up to the second decision. The applicants' submission is that the actual vaccination coverage is significantly lower than reported by the Ministry, because the Ministry uses the Health Service Utilisation (HSU) population figures, which only include those who engaged with health services in 2020. That is known to undercount Māori, as well as young people. By reference to Stats NZ estimated resident population counts, Mr Andrew Sporle for the applicants estimates that the undercount

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2 At [26]-[29].
3 At [28].
4 At [29].

of Māori needing to be vaccinated is approximately 74,000.[5] Mr Sporle's evidence was that on the Ministry's published data from 9 November 2021, there was:[6]

(a) a 14.5 per cent difference between the first vaccination coverage for the Māori population (74.9 per cent) and NZ European/Other population (89.4 per cent); and

(b) a 22.3 per cent difference between second vaccination coverage for the Māori population (58.1 per cent) and NZ European/Other population (80.4 per cent).

[8] Mr Sporle's evidence was also that the differences in vaccination coverage vary by age band, with the greatest disparities in the younger age bands, particularly in the 12-19 and 20-34 age bands. Significantly, these bands make up 38.4 per cent of the total Māori population.

[9] The applicants say this age-based disparity among young people presents particular risks for Māori, as research shows these age bands are most at risk of transmitting COVID-19 because of their large social networks. That means a very real risk of rapid spread within Māori communities. Mr Sporle also notes that the younger age group requires more time to increase vaccine coverage as they have higher rates of vaccine hesitancy and are less likely to be engaged in healthcare than other age groups.[7] In addition, transmission among this group also puts at risk the 25 per cent of the Māori population who are under 12 years of age and cannot yet be vaccinated.

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5 Andrew Sporle is an expert in applied statistics research. In 2021 he received the Prime Minister's Science prize as part of a group award to the COVID-19 modelling team advising the government. Mr Sporle's statistical training is through epidemiology including advanced post-graduate courses in genetics and epidemiology.

6 The Ministry's submissions challenged Mr Sporle's evidence relating to the difference between the HSU population data and the Stats NZ official estimated resident Māori population, on the basis that it resulted in an overestimate of the number of Māori individuals requiring a first or second dose. I am satisfied that, taken as a whole, Mr Sporle's evidence provides an accurate picture of the equity gap.

7 Mr Sporle cites Kate C Prickett, Hanna Habibi and Polly Atatoa Carr "COVID-19 Vaccine Hesitancy and Acceptance in a Cohort of Diverse New Zealanders" (2021) 14 The Lancet Regional Health – Western Pacific 1.

[10] Māori make up only 17 per cent of New Zealand's population, but at the time the applicants filed their submissions Māori made up 48 per cent of active cases. In the period between the first judgment and the date of hearing of this application, there had been an additional 2,031 confirmed Māori cases of COVID-19 and an additional five deaths.

[11] Since the first judgment, ESR has carried out Māori-specific vaccination modelling. The lowest modelled level of Māori vaccination is 75 per cent double vaccinated. At the time the applicants filed their submissions for this hearing, only 63.5 per cent of the eligible Māori population was double vaccinated.

[12] The ESR modelling predicts that if the percentage of the eligible Māori population who are double vaccinated was raised from 75 per cent to 90 per cent that would result, over a one-year period, in:[8]

(a) a 40 per cent reduction in peak Māori cases (32,900 fewer people assuming no public health measures);

(b) a 17 per cent reduction in Māori total cases (108,000 fewer people assuming no public health measures);

(c) a 31 per cent reduction in Māori deaths (1,220 fewer people assuming no public health measures);

(d) a 47 per cent reduction in peak hospitalisation levels for Māori people (3,120 fewer people assuming no public health measures); and

(e) a 27 per cent reduction in hospitalisations for Māori (9,800 fewer people assuming no public health measures).

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[8] Mr Sporle explains the ESR modelling was completed in October 2021, and models the impact of different vaccination levels and strategies on hospitalisations and deaths for Māori over a one-year period. It was designed to inform vaccination strategies alone, so does not include the impact of public health measures such as masking and isolation levels.

[13] On 17 November 2021, the Prime Minister announced that the whole of New Zealand would move into the COVID-19 Protection Framework (the "traffic light" system); since the hearing the Prime Minister announced this would occur at 11.59 pm on 2 December 2021. The move to the traffic light system is no longer tied to a requirement that 90 per cent of the eligible population in each District Health Board (DHB) region be double vaccinated, as had been previously indicated. From 15 December 2021, border restrictions in Tāmaki Makaurau/Auckland, which has had the highest rates of COVID-19 in the latest Delta outbreak and as a result has been at a higher alert level than most of the country (with associated travel restrictions), will be eased, allowing travel outside of the city.

[14] In the applicants' submission, the inevitable result of those measures will be the accelerated spread of COVID-19 around New Zealand, increasing the risks for the unvaccinated. They point to the time lags in getting any data sharing agreement(s) in place and then receiving and utilising the data to get individuals vaccinated, including allowing for at least three weeks between the first and second doses. The applicants say that the window for Whānau Ora and other kaupapa Māori providers to engage with the unvaccinated before COVID-19 is circulating in their communities has almost closed.

The legal framework

[15] The applicants' request for the data falls to be considered by the Ministry under the Privacy Act 2020 (the Act) and, specifically, the Health Information Privacy Code 2020 (the Code).

[16] Rule 11 of the Code governs the applicants' request. It places limits on the disclosure of health information. Generally, information can be shared where it was a purpose of collection (r 11(1)(c)), or where the disclosure is authorised by the individual concerned (r 11(1)(b)). A number of exceptions are set out in r 11(2), which recognises that other interests may be engaged and may take precedence.

[17] Rule 11 provides:

Rule 11
Limits on disclosure of health information

(1) A health agency that holds health information must not disclose the information unless the agency believes, on reasonable grounds,—

(a) that the disclosure is to—

(i) the individual concerned; or

(ii) the individual's representative where the individual is dead or is unable to exercise their rights under these rules; or

(b) that the disclosure is authorised by—

(i) the individual concerned; or

(ii) the individual's representative where the individual is dead or is unable to give their authority under this rule; or

(c) that the disclosure of the information is one of the purposes in connection with which the information was obtained; or

(d) that the source of the information is a publicly available publication and that, in the circumstances of the case, it would not be unfair or unreasonable to disclose the information; or

(e) that the information is information in general terms concerning the presence, location, and condition and progress of the patient in a hospital, on the day on which the information is disclosed, and the disclosure is not contrary to the express request of the individual or their representative; or

(f) that the information to be disclosed concerns only the fact of death and the disclosure is by a health practitioner or by a person authorised by a health agency, to a person nominated by the individual concerned, or the individual's representative, partner, spouse, principal caregiver, next of kin, whānau, close relative, or other person whom it is reasonable in the circumstances to inform; or

(g) that the information to be disclosed concerns only the fact that an individual is to be, or has been, released from compulsory status under the Mental Health (Compulsory Assessment and Treatment) Act 1992 and the disclosure is to the individual's principal caregiver.

(2) Compliance with subrule (1)(b) is not necessary if the health agency believes on reasonable grounds, that it is either not desirable or not practicable to obtain authorisation from the individual concerned and—

…

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

(i) public health or public safety; or

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

…

(4) Disclosure under subrule (2) is permitted only to the extent necessary for the particular purpose.

[18] As I noted in the first judgment, the Act and the Code are not displaced by the exception in r 11(2)(d).[9] If the Ministry were to provide the applicants with the individual identifiable data sought, they would remain subject to the stringent requirements of the Code and other regulatory obligations – the applicants would be obliged to treat the data in confidence, to use it only for the purpose permitted, and to retain it securely and for no longer than required.

[19] As the first judgment also noted in relation to that point,[10] it is important to record at the outset that there is no concern about the applicants' ability to keep any data provided appropriately secure. The decision paper on which the first decision was based referred to "the very impressive technical capability demonstrated by WOCA and Whānau Tahi's current data-handling systems and personnel."

The second decision

[20] The second decision was made by the Director-General on 5 November 2021. It was based on a decision paper from Ms Joanne Gibbs, the National Director, COVID-19 Vaccination and Immunisation Programme (the decision paper).

[21] The second decision was to:

a. invite the Whānau Ora Commissioning Agency and Whānau Tahi Limited urgently to work in partnership with the Ministry, relevant iwi, and local service delivery providers to identify those rohe where vaccination outreach to Māori is most needed, and to identify the necessary and appropriate scope of data sharing in each case;

b. decline the request for access to all North Island individual level Māori health information sought by the applicants;

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9 *Te Pou Matakana Ltd v Attorney-General*, above n 1, at [38].

10 At [39].

c. continue Ministry engagement with iwi, Hauora providers and other Māori organisations to enable access to both meshblock level, and, where appropriate, individual level data to support vaccination of Māori across Aotearoa in support of the data sharing agreement with the Iwi Leaders Group.

[22] In the decision paper, the Ministry reconsidered the applicants' request in terms of r 11(2)(d). As set out in the first judgment,[11] r 11(2)(d) allows disclosure of health information, in the absence of authorisation from the individual whose information it is, where:

(a) It is not desirable or practicable to obtain authorisation from the individual.

(b) There is a serious threat to public health or public safety or the life or health of an individual.

(c) Disclosure of the information is "necessary" to prevent or lessen that threat.

[23] As in its first decision, in the second decision the Ministry accepted that (a) and (b) were satisfied. The decision paper focussed on whether (c) – the "necessity" test – was satisfied and, if so, whether the Director-General should exercise his discretion to disclose the data.

[24] An assessment of "necessity" under r 11(2)(d) required consideration of:[12]

(a) The anticipated effectiveness of disclosure and use of the requested information.

(b) The anticipated adverse consequences, in terms of the protection of life and health, or other material and relevant harm, of that same disclosure and use.

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11 At [42].
12 At [63].

(c) Whether there are other options to address the health risk that lessen the privacy intrusion and resulting harms, but are nonetheless effective to address the risk (including in light of the urgency of that risk), and so whether it is possible to await the outcome of lesser measures.

[25] In relation to (a), the anticipated effectiveness of the disclosure and use, the decision paper concluded that:

> Overall, we consider there is evidence to suggest WOCA's proposed use of the information, given its breadth, may be effective to address the risks associated with COVID-19 in relation to some areas, but the evidence is not so clear it would have an impact in all others.

[26] That conclusion appears to be based on identification of geographic areas where Whānau Ora providers were said to have more limited coverage but, nevertheless, "very positive progress" was being made in terms of vaccination. In addition, the decision paper noted that there were urban areas, particularly Tāmaki Makaurau and Kirikiriroa/Hamilton, where the current Delta outbreak is occurring, where Whānau Ora had better coverage and there was also a real need for targeted resource to support further progress. The decision paper also noted that the provision of mapping level data to Whānau Ora would go a long way to support providers to target their response.

[27] As to (b) above, the health-related disadvantages of the proposed disclosure were noted in the decision paper. They were principally concerned with the possible erosion of trust and confidence in the health system, and the Crown more generally, if individual level Māori personal information were to be shared. As in the first decision paper, the particular concern expressed by DHB Chairs was noted, as was the risk of bullying and vilification of the unvaccinated if they could be identified individually. The decision paper identified related concerns involving saturation and overload in terms of individuals receiving repeated contact from different providers. However, the decision paper noted "we would not recommend placing too much weight on these concerns in the current context", and it concluded "so at best we would see these risks as neutral factors". There is therefore no need for further analysis of that aspect in this judgment.

[28] As to (c), the Ministry concluded that a less privacy-intrusive alternative to sharing the data with the applicants was to share smaller sets of personal information with trusted locally-based organisations. The decision paper noted a potential "weakness" in Whānau Tahi's process, arising from a lack of iwi oversight in governance terms.

[29] Since the decision was made, the Ministry has embarked on a consultation process with local iwi, on a "rohe by rohe" basis. Since the hearing, the Ministry has advised that progress has been made as follows:

(a) data sharing agreements with Whānau Tahi are in place, and data is being shared, in relation to Waikato, Auckland, and Taranaki;

(b) decisions to share data have been made in relation to Tairāwhiti and the Wellington region and data sharing agreements were provided to the applicants on 26 November 2021;

(c) the Ministry has just reached its decision in respect of the MidCentral area and provided a data sharing agreement to the applicants for signing;

(d) the Ministry anticipated reaching its decision in respect of Wairarapa by 30 November 2021;

(e) urgent discussions are happening with iwi and hapū in respect of the Lakes area, Te Tai Tokerau, the Bay of Plenty, and the Hawkes Bay; and

(f) Whanganui iwi do not consider it necessary for data relating to their rohe to be shared with the applicants, due to access already being available to iwi and local providers. The Ministry is confirming what other support may be needed in Whanganui to increase vaccination rates, and indicated it would make a formal decision by the end of the week.

[30] Counsel for the applicants responded to that update, noting that as of that date the applicants were not aware of the Ministry's progress in relation to Wairarapa, Lakes area, Te Tai Tokerau, Bay of Plenty, and Hawke's Bay. They advised they had received no further communication from the Ministry regarding sharing of information relating to individuals who have received a first dose but not a second dose; in particular, they say the Ministry is proposing to share information only for Māori who received a first dose more than eight weeks ago, which is inconsistent with its public statement that Healthline (a non-Māori telehealth company) will follow up with all people whose first dose was more than three weeks ago. The applicants also confirmed their renewed application for the data relating to Whanganui.

Grounds of review

[31] The applicants first challenge the Ministry's assessment of whether disclosure would be effective to address the risk, on several grounds:

(a) error of law, on the basis the Ministry applied the wrong legal test by introducing an "imminence" threshold into r 11(2)(d);

(b) error of law, on the basis the Ministry applied the wrong legal test by setting the threshold for "necessity" too high;

(c) error of fact, in the Ministry's conclusion about Whānau Ora's coverage; and

(d) a related error of law, in the Ministry's focus on the ability of Whānau Ora providers to address the COVID-19 threat with existing information, rather than carrying out an evidence-based assessment of the anticipated effectiveness of disclosure and use of the data sought by the applicants.

[32] The applicants also challenge the Ministry's assessment of whether there are less privacy-intrusive options that are still effective to reduce the risk, on several grounds:

(a) error of law, in relation to an evidence-based assessment of alternatives;

(b) error of law, on the basis that iwi oversight in relation to the governance of Whānau Tahi is irrelevant; and

(c) error of law and fact, in that this Court already determined that the provision of mapping level data is not an equally effective alternative.

[33] The applicants also challenge the Ministry's decision to consult with iwi before disclosing the data, on the following grounds:

(a) the Ministry acted inconsistently, having provided similar data to another health service provider, Healthline, and to PHOs, without consulting with iwi or Māori.

(b) the Ministry breached the applicants' right to natural justice, by reaching its conclusions as a result of a flawed consultation process;

(c) error of law, on the basis that the Ministry's approach introduced an authorisation requirement to r 11(2)(d); and

(d) error of law, on the basis the Ministry adopted a process that does not have regard to the urgency of the situation.

[34] The final aspect of the second decision that the applicants challenge is the Ministry's exercise of its discretion under r 11(2)(d).

[35] The applicants seek substitutory relief – a mandatory order that the Ministry provide the data to the applicants within three days. Alternatively, they seek orders setting aside the second decision, and directing the Ministry to retake the decision within three days.

The Ministry's assessment of whether disclosure would be effective to address the risk

[36] Counsel for the applicants, Mr Orpin-Dowell and Ms Alphen Fyfe, submit that the Ministry made four errors in arriving at the conclusion that disclosure of the data was not necessary to prevent or lessen the serious threat to public health:

(a) It applied the wrong legal test by:

(i) introducing an "imminence" threshold into r 11(2)(d); and

(ii) setting the necessity threshold at the level of "indispensable or essential" (based partly on the Director-General's explanation that the necessary threshold was "not impossible to meet"), rather than the correct standard of "needed or required".

(b) It erred in law, by focussing on the capacity of Whānau Ora providers to prevent or lessen the threat posed to Māori by COVID-19, on the basis of their existing resources and information, rather than analysing the effectiveness of the disclosure of the data sought by the applicants.

(c) Related to that point, the applicants say the Ministry made a factual error when it concluded that Whānau Ora providers had limited coverage in two areas, Tairāwhiti and Wairarapa.

[37] For the Ministry, Mr Kinsler first addressed the meaning of "necessary", submitting that the applicants, in essence, urge a "is it helpful" threshold – which does not accord with the protections offered by the Code to health information, or the centrality given to the concepts of consent and autonomy. The Director-General's use of the phrase "not impossible" in relation to meeting the relevant threshold was not intended to import a new test. The Ministry rejects the applicants' proposition that the Ministry's evaluation introduced an "imminence" threshold into r 11(2)(d), saying the rohe by rohe consultation process has enabled the Ministry to assess the relevant data needs. The Ministry says by focusing on Auckland first, it has not misdirected itself through the reintroduction of an imminence threshold – this is more "semantic

quibbling" from the applicants as the spread of Delta was plainly a relevant consideration informing how to prioritise rohe.

[38] As to the anticipated effectiveness of disclosure of the data sought by the applicants, Mr Kinsler conceded that the Ministry's assessment of Whānau Ora's reach and coverage, and of the capabilities of other providers, was constrained by urgency and was largely "impressionistic". Mr Kinsler also submitted that providing the data to the applicants is not the only "tool in the toolkit".

Error of law: did the Ministry introduce an imminence threshold to r 11(2)(d)?

[39] The decision paper does not explicitly adopt an "imminence" threshold in the analysis of whether disclosure of the data was necessary. However, it does implicitly adopt such an approach when it says, in relation to "areas where the current Delta outbreak is occurring in parts of Auckland and Hamilton … there is real need for targeted resource to support further progress." The Ministry has focussed on sharing data for regions where there is already a Delta outbreak, and then assessing the threat level for other regions on an area by area basis.

[40] As the first judgment noted,[13] while previous iterations of r 11(2)(d) required the threat to be "serious and imminent", the words "and imminent" were removed in 2013. There is no dispute that the threshold for serious threat is met in the present case.

[41] The effect of the Ministry's approach is to incorrectly reintroduce an "imminence" test when that is no longer part of r 11(2)(d).

[42] Nor is such a gloss necessary in the context where the Ministry itself has acknowledged that it is critical to reach all eligible people in New Zealand, especially Māori, as soon as possible. The evidence for the applicants, from Mr Len Cook,[14] is that, in any event, the threat of COVID-19, and particularly of Delta, applies across New Zealand and cannot be confined to particular rohe. Mr Cook's evidence is that,

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13 At [45].

14 Mr Cook is a professional statistician who has previously been the Government Statistician of New Zealand and is a Companion of the New Zealand Royal Society.

even with vaccination, ESR one-year modelling of outcomes for the Māori population shows the majority of the total population are predicted to become community COVID-19 cases. He notes two scenarios:

(a) If 90 per cent of eligible Māori are vaccinated, it is projected that some 60 per cent of the total Māori population will become a community case.

(b) If 75 per cent of eligible Māori are vaccinated, it is projected that some 73 per cent of the total Māori population will become a community case.

[43] I conclude that the Ministry did apply the wrong test, by introducing an "imminence" threshold in making its assessment of whether disclosure of the data was necessary to lessen the threat posed by COVID-19.

Error of law: did the Ministry apply the wrong threshold for "necessary"?

[44] As to the meaning of "necessary", as set out in the first judgment, previous cases have held that necessary in this context means only "needed or required". Although it must be more than merely "desirable or expedient", it does not impose a threshold of "indispensable or essential".[15] That approach was endorsed by the Privacy Commissioner and I accept it is the correct approach.

[45] That paragraph of the decision paper particularly focused on "necessity" says:

> In terms of the necessity of sharing individual level data with WOCA, the specific examples noted above relating to Tairāwhiti and Wairarapa [where there are existing arrangements and approaches in communities, working together to deliver vaccinations] demonstrate that in some areas where WOCA provider coverage is more limited very positive progress is being made. In contrast, some urban areas – including areas where the current Delta outbreak is occurring in parts of Auckland and Hamilton – where WOCA providers have better coverage, there is real need for targeted resource to support further progress. It would be difficult to justify the "necessity" of providing WOCA individual data in the former examples whereas in the latter the case may be particularly strong.

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15 At [54].

[46] The Director-General's evidence does indicate that the test the Ministry applied was something more than that disclosure was "needed or required". First, there is the paragraph relied on by the applicants, where the Director-General said that "the test as to whether disclosing information is 'necessary' in the current context is "not impossible to meet".

[47] Second, the applicants submit that the Ministry's error in applying the necessity test also flows through to its response to the applicants' request for second dose data.

[48] The applicants seek data for those Māori who are unvaccinated and for those who have had only one dose of the vaccine. Ms Gibbs says in her evidence that the Ministry determined it was not necessary in terms of r 11(2)(d) to share the data of those Māori who have had one dose. As at 17 November 2021, the completion rate for Māori across New Zealand was 89.4 per cent.[16] The two data sharing agreements entered into between the Ministry and Whānau Tahi as at the date of the hearing, for Tāmaki Makaurau and Waikato, provide for the disclosure of data only for Māori who have not yet received a first dose of vaccine.

[49] The applicants say that, in this respect too, the Ministry is adopting an erroneous "indispensable or essential" approach to necessary.

[50] Mr Sporle's evidence, based on Ministry data as of 9 November 2021, is that there is a 22.3 per cent difference between second vaccination coverage for the Māori population (58.1 per cent) and NZ European/Other population (80.4 per cent). His evidence is that these differences are not only persistent, but have increased in absolute terms, since Ministry data of 12 September 2021. The gap is most pronounced in the 12-19 and 20-34 age bands. Mr Daymon Nin's evidence is that providing the data for those Māori who have had one dose, at the same time as the provision of the data for unvaccinated Māori, would allow the applicants to include them in their outreach campaigns, lowering costs and minimising inefficiencies.[17]

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16 The completion rate is the number of individuals who have received a second dose as a percentage of the number of individuals who received a first dose at least 21 days ago and are therefore eligible for their second dose.

17 Mr Nin is the Chief Product and Consulting Officer of Whānau Tahi.

[51] Mr Nin's evidence also attaches a news item from 24 November 2021, which is based on data from the Ministry of Health and records that a total of 75,585 people – 1.8 per cent of the eligible population – are still to receive their second dose of vaccine, more than six weeks after their first, based on data to 21 November. 37 per cent of those had their first vaccine more than 10 weeks ago. Most – 43 per cent – were first vaccinated seven or eight weeks ago, and the remaining 20 per cent were first vaccinated nine or 10 weeks ago. The article quotes the Ministry's Group Manager for COVID Vaccine Operations, Astrid Koornneef, as saying: "We are actively following up with all people whose first dose was more than three weeks ago, while also strengthening our focus on helping them get vaccinated."

[52] In an updating memorandum filed at the Court's request after the hearing, the Ministry advises that where agreement is reached with the applicants for the sharing of the data in relation to a particular region, it will include the data of individual Māori who have not yet received a second dose and have no future vaccine booking, where it has been eight weeks or more since their first dose.

[53] That decision is based on Ministry data which it says shows a high conversion rate of first dose to second dose, noting that many people are still following the Ministry's earlier public guidance of waiting approximately six weeks between first and second doses. As at the date of hearing, the Ministry's data showed that of those Māori who had received a first dose:

(a) 5.6 per cent received their first dose between three and six weeks ago (and have not received their second dose or made a future booking).

(b) 3.1 per cent received their first dose over six weeks ago (and have not received their second dose or made a future booking).

(c) 1.8 per cent received their first dose over eight weeks ago (and have not received their second dose or made a future booking).

[54] In response, the applicants say it is inconsistent with the Ministry's public statement from Ms Koornneef that the Ministry is following up, including through

Healthline, with all people whose first dose was more than three weeks ago. The applicants say that, in this respect too, the Ministry is adopting an erroneous "indispensable or essential" approach to necessary, in relation to Te Ika-a-Māui/North Island Māori. The consequence of not providing the data until after eight weeks is further delay and the lost opportunity for Whānau Ora providers to support whānau to be fully vaccinated before Auckland border restrictions are lifted on 15 December 2021.

[55] Overall, having regard to the decision paper, the Director-General's evidence, and to the iterative decisions about provision of data for those who have had only one dose, I conclude that the Ministry set the bar too high in assessing what was "necessary". While it did not pitch it at the "indispensable" or "essential" level, it is implicit that the Ministry saw the test as being something more than "needed". That is highlighted by the Ministry's apparently inconsistent response, as between the general population and the Māori population, in relation to second doses. The Ministry did apply the wrong test as to "necessity", in making its assessment of whether disclosure of the data was necessary to lessen the threat posed by COVID-19.

Error of fact: did the Ministry err in its conclusion about Whānau Ora's coverage?

[56] An important factor in the Ministry's decision to decline the applicants' request and subsequently adopt a regional approach was its conclusion that Whānau Ora's "reach and coverage is not spread evenly across the North Island". The Ministry identified two areas, Tairāwhiti and Wairarapa, which were cited as examples of regions where "there are existing arrangements and approaches in communities, working together to deliver vaccinations, using data at a granular level." Later, the decision paper notes that in "some areas where WOCA provider coverage is more limited very positive progress is being made".

[57] I find that the decision paper contains an error of fact in this regard. In relation to Wairarapa, the two providers identified by the Ministry – Te Whaiora and Te Hauora Runanga O Wairarapa – are both Whānau Ora providers. The uncontradicted evidence of the applicants is that Te Hauora does not in fact have access to individual level data.

[58] In relation to Tairāwhiti, I accept that it is not correct to say that Whānau Ora has limited coverage. Mr Nin's evidence explained that Whānau Ora providers' coverage cannot be assessed by looking only at Whānau Ora head offices. Those are located in populated areas where resources are most available and, ordinarily, most needed. But, as Mr Nin notes, from those locations, providers service their outlying communities through the establishment of satellite sites and mobile services. Whānau Ora offers more vaccination sites in this area than those offered by mainstream providers, when permanent sites and pop-up sites are identified.[18]

Error of law: would disclosure of the data be effective to address the risk?

[59] I also find that there was an associated error of law in the Ministry's focus on the ability of Whānau Ora providers to address the COVID-19 threat with existing information, rather than carrying out an evidence-based assessment of the anticipated effectiveness of disclosure and use of the additional data sought by the applicants.

[60] The Director-General says in his affidavit:

> And even largely without that level of data … since the Commissioning Agency's 27 August request, 217,119 Māori individuals from Te Ika-a-Māui have been fully vaccinated. It was not necessary for the Ministry to disclose the personal information of those people to the Commissioning Agency.

[61] Officials said they could not clearly attribute the vaccination strike rate in other contexts to the use of individual level data.

[62] The assessment of the anticipated effectiveness of disclosure and use of the data is not a relative assessment, when it is clear that the applicants' current position does not enable it to effectively address the serious threat posed by COVID-19. The Ministry asked itself the wrong question – what could be done without the data requested by the applicants or, to put it another way, whether the applicants can continue to make progress, in the sense of continuing to vaccinate more people – rather than assessing whether more could be done by the applicants with the data. That approach is evident from the focus in the decision paper on Whānau Ora's existing

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[18] At [75] below I discuss the way in which Whānau Ora providers operate.

resources, particularly the location of partner head offices, and the failure to consider the anticipated effectiveness of disclosure of individual level data.

[63] The Ministry's analysis focused on continued progress without the data sought by the applicants. The analysis ought to have focused on what more could be done with the data sought in relation to the residual group identified by the Honourable Te Ururoa Flavell, former Minister of Māori Development and Minister for Whānau Ora, who said in his evidence:

> Right now, over half of Māoridom is vaccinated. The cohort we must target however, are those who are hesitant, the reluctant, the hard to convince, the hard to find, the unwilling, or those that are unconvinced that being vaccinated is right. That cohort becomes harder and harder to convince as the days go on. It is time consuming and intense work. We have to korero kanohi ki te kanohi (discussions face to face), which is the only culturally appropriate way of engaging.

[64] Mr Flavell also says:

> But if we had data, we would be able to reach more whānau, quicker, and more easily. As a result of this work, our workforce is stretched and fatigued. I am extremely grateful for our kaimahi and the extraordinary work they are doing. We are doing what we must do for our whanau, but to meet the target of vaccinating everyone we need more efficient ways of working. We need data.

[65] Mr Cook's evidence goes to this point also: individual level data would allow providers to reach in excess of eight times the number of unvaccinated Māori with the same resources.

The Ministry's assessment of less privacy-intrusive options

[66] The applicants say that the Ministry's analysis of whether there were less privacy-intrusive options that would be equally effective to address the risk was wrong as a matter of law and/or fact:

(a) First, the Ministry failed to carry out an evidence-based assessment (as required by the first judgment) of whether its identified alternative is an equally effective measure for addressing the risk posed to Māori by COVID-19, in light of the urgency of the threat. The applicants say that alternative providers are not a substitute for the applicants. I note

at this point that the applicants emphasised throughout that this is not an either/or situation. WOCA does not see itself as being in opposition to, or in competition with, iwi providers; they view their role as complementary to that of other providers.

(b) Second, the applicants say that iwi oversight of Whānau Tahi in governance terms (which the decision paper said was a potential risk, as it is a private company operating in accordance with ordinary commercial incentives) is irrelevant to the privacy risks associated with sharing the data or whether other options identified by the Ministry are equally effective and lessen the privacy intrusion.

(c) Third, the applicants say that the first judgment already determined as a matter of fact that the provision of mapping level data to support a door-to-door approach was not an equally effective alternative.

[67] Mr Kinsler conceded that, in the time available, the Ministry's assessment of both the applicants' geographic reach and of the details of alternative providers, was not systematic or comprehensive. However, Mr Kinsler emphasised that although the Ministry's decision was to decline the data, it immediately pivoted to resolving remaining concerns. This is reflected in (a) and (c) of the decision paper.[19] The practical effect of that approach is that the Ministry's efforts, and its submissions, were primarily focused on the consultation process, which is discussed at [83] to [97] below.

Error of law: was the issue of iwi oversight of Whānau Tahi irrelevant?

[68] Under the heading "Are there other less privacy-intrusive options that are still effective to address the risks?", the decision paper first observed:

> Given the concerns expressed by iwi and others, a potential weakness of Whānau Tahi's process in this space arises from its lack of iwi oversight in governance terms. It is a private company operating in accordance with ordinary commercial incentives. Further consideration could be given to requiring through data sharing agreements some form of iwi oversight in relation to the use of any Māori health information provided for the duration it is held.

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19 See above at [21].

[69] The decision paper went on to say:

> A less privacy intrusive alternative to the applicants' broad request is to share smaller sets of personal information with trusted locally-based organisations, with an expectation they work together to reach the unvaccinated populations, as with the Tairāwhiti example. Sharing information with providers who work locally on the ground, with local relationships and who can engage face to face with individuals, is a model that can be built with consent and partnership of the relevant local iwi, hapū and whānau, and the evidence suggests it is more likely to build trust and confidence in the way information is used. Sharing datasets with local organisations, with an expectation that they work together and coordinate their effort, as with the Tairāwhiti example, also reduces the likelihood that an unvaccinated person is approached in ad ad-hoc way by multiple, different providers.

[70] The lack of iwi oversight in the governance of Whānau Tahi was addressed by Mr Tamihere's evidence. He notes that the Ministry has not previously been concerned with "iwi oversight" of Healthline, PHOs, or general practitioners, to whom individual Māori health data is also provided. Nor has it been expressed by the Ministry as a concern in relation to those Te Ika-a-Māui/North Island Māori who are part of WOCA's caseload and for whom the applicants have already received individual level data.

[71] Mr Tamihere also notes that the majority of partners and providers for whom Whānau Tahi acts, as data and information systems provider, are iwi owned or controlled.[20] Four of Whānau Tahi's five directors are Māori and it is 100 per cent owned by Te Whānau O Waipareira Trust, the Board of which are Māori. The Waitangi Tribunal has previously found that Te Whānau O Waipareira Trust exercises rangatiratanga.[21]

[72] The expressed concern about lack of iwi governance of Whānau Tahi is also implicitly linked to the concern of those consulted about data sovereignty – that is, that the data sought by the applicants included individuals' iwi affiliation. As I note at [128] below, that is not the case. For that reason, and for the reasons addressed by Mr Tamihere, I find that this question was irrelevant to the assessment the Ministry was required to make as to whether there were other less privacy-intrusive options

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20 See below at [75].

21 Waitangi Tribunal *Te Whānau O Waipareira Report* (WAI 414, 1998).

available to address the risk. The Ministry therefore erred by relying on this factor in making its assessment under r 11(2)(d).

Error of law: provision of mapping level data not an equally effective alternative

[73] The third alleged error can be shortly disposed of. As the applicants plead, the effectiveness of providing the applicants with only mapping-level data was directly addressed in the first judgment, where I concluded that the Ministry's alternative, door-to-door approach, based on mapping level data, was not an equally effective alternative for reaching unvaccinated Māori to the disclosure of individual data.[22] For the reasons set out there, it was not open to the Ministry to conclude that this was an equally effective alternative to the provision of the individual level data sought.

Error of law: evidence-based assessment of alternatives

[74] Significantly, the decision paper did not identify who the "trusted locally-based organisations" are; did not assess their technical capacity to meet the Ministry's privacy requirements for data storage, access and auditing, or appropriate systems to record any opt-outs and deceased individuals);[23] did not assess the resources, scope and reach of those organisations to reach unvaccinated Māori; nor did it consider how long it would take to identify, partner with and disseminate the information to those organisations. Those gaps in the analysis necessarily mean this alternative does not meet the acknowledged urgency of the risk.

[75] In contrast, the applicants' evidence highlights:

(a) the size of the Whānau Ora network – 96 local providers across Te Ika-a-Māui/North Island, currently providing 204 fixed and mobile vaccination sites;

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22 *Te Pou Matakana Ltd v Attorney-General,* above n 1, at [72].

23 The Ministry had identified these requirements as likely impediments to sharing data with iwi and Māori organisations in the decision paper for the first decision, and the Data Iwi Leaders Group acknowledged that without further investment in infrastructure, iwi were not in a position to keep data secure.

(b) that Whānau Ora providers currently provide services to approximately 190,000 clients across Te Ika-a-Māui/North Island (almost one third of the Te Ika-a-Māui/North Island Māori population);

(c) the close links between Whānau Ora providers and local iwi – of the 96 providers, 73 are iwi owned or affiliated (Mr Nin's evidence is that Whānau Ora providers are more often than not the delivery mechanism for iwi in relation to health and social services generally); and

(d) Whānau Tahi's technical capabilities (as to which, see [77]-[79] below).

[76] Nor would this alternative be less privacy-intrusive than providing the data to the applicants. The Ministry would be sharing the same volume of health information, but across multiple organisations, instead of being provided to one only (Whānau Tahi).

[77] The locally-based organisations referred to in the decision paper generally lack the technical capability to securely store health information, in contrast to Whānau Tahi. As Mr Nin explains in his evidence, Whānau Tahi stores everything in an encrypted database, accessible only through multi-factor authentication, with site-based access policies. This meets best practice requirements and provides a high level of protection. Mr Nin's uncontradicted evidence is that this level of protection of data is greater than that afforded by some DHBs.

[78] Mr Nin also notes that the Ministry is very familiar with Whānau Tahi's ability to securely store and manage data. There are a number of contracts between Whānau Tahi and the Ministry:

(a) Whānau Tahi operates the Ministry's e-prescription service nationally.

(b) Whānau Tahi operates the Socrates system, which is a health and disability tool for disability needs assessment coordinators. If a person needs services due to a disability, that data also will go through Whānau Tahi.

[79] In addition, in the past six months, Whānau Tahi has successfully bid for the contracts for mental health services for five DHBs: MidCentral, Waikato, Tairāwhiti, Taranaki and Bay of Plenty.

[80] Mr Nin's evidence, again uncontradicted, is that he does not know of any other Māori health provider that has the same technical ability as Whānau Tahi to securely store health information. His conclusion is that, if the Ministry wishes to share data with locally-based organisations, either it will have to share the data with organisations that lack the same security systems, posing a greater privacy risk; or the Ministry will only be able to share the data with a small sub-set of Māori providers, significantly reducing the number of unvaccinated Māori who can be reached in this way.

[81] I find that the Ministry did not have sufficient evidence to conclude that its proposed alternative was both less privacy intrusive and equally effective to address the risk to Te Ika-a-Māui/North Island Māori posed by COVID-19.

The Ministry's consultation process

[82] The applicants submit that the Ministry, in its approach to consultation:

(a) acted inconsistently, having provided similar data to Healthline and PHOs, without consulting with iwi or Māori;

(b) breached the applicants' right to natural justice, by reaching its conclusions as a result of a flawed consultation process;

(c) erroneously introduced an authorisation requirement into r 11(2)(d), by seeking to achieve consensus or consent from iwi about the disclosure of the data; and

(d) breached its duty to make a decision within a reasonable period of time by failing to act urgently, as a consequence of the Ministry's preferred approach to the consultation.

The consultation process

[83] The decision paper notes:

> … even if we had concluded North Island wide sharing of personal Māori health information with the applicants was 'necessary' in accordance with Rule 11(2)(d) of the Code, we would not, in the face of the credible and more Treaty/Te Tiriti-compliant alternatives, recommend exercising the discretion to release all North Island individual level Māori health information as sought by the applicants.

[84] And in his affidavit in this proceeding, the Director-General says:

> I also considered and weighed the view-points expressed by iwi leaders and other leaders within Māoridom (including Mr Tamihere). These perspectives were varied but emphasised the urgency of the situation, the need for good process and consultation, in particular with iwi in respect of whose rohe and whose whānau would be impacted by the proposed information sharing. Firm stances were adopted by iwi leaders about the need for this consultation which reflects some of my own conversations with iwi leaders since I made my decision.

[85] Consistent with that, as noted above,[24] the Ministry has invested considerable time and resources in consulting with both pan-Māori organisations and with iwi.

[86] As Ms Gibbs notes in her affidavit evidence, following the Court's first judgment, the Ministry took advice from technical officials within the Ministry as well as from Te Puni Kōkiri, Te Arawhiti (the Office for Māori Crown Relations) and the Crown Law Office.

[87] Te Arawhiti convened a number of hui, two of which took place before the second decision and informed the decision paper. The first hui took place on 3 November 2021; it included Ms Gibbs and other Ministry representatives, Ms Lil Anderson (Chief Executive of Te Arawhiti) and representatives of the National Iwi Chairs Forum (NICF) Pandemic Response Group.

[88] Attendees at that hui expressed strong opposition to Te Ika-a-Māui/North Island wide individual information being shared with the applicants without a mandate from iwi, although the attendees were supportive of the applicants' work generally. In

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[24] See above at [29].

particular, it was emphasised that WOCA itself was not a Te Tiriti based entity and it would be inappropriate for the Ministry to share the requested data, which is a taonga, without input from its Te Tiriti partner. It was noted that data sharing could be appropriate where WOCA providers that are Te Tiriti based (through their connection to iwi) have talked through the proposal with their iwi. Ms Gibbs says that multiple participants in the hui emphasised that iwi have rights and responsibilities in relation to the individual level data that is the subject of the applicants' request and that iwi themselves have a right to it in respect of their own people. Participants emphasised the data sovereignty that each iwi exercises over the information.

[89] The NICF made a statement following the hui, in which it emphasised:

(a) Its support for the findings of the first judgment that the Ministry's power to disclose the data under the Code must be exercised in accordance with Te Tiriti and that the Ministry's decision must be informed by the principles of partnership and options, as informed by tikanga.

(b) New Zealand is in a pandemic, and the health and wellbeing of Māori is the paramount concern.

(c) The Crown's Te Tiriti obligations extend to sharing individual level data with iwi, but the Crown must ensure equitable investment in appropriate infrastructure to enable iwi to safeguard and use that data.

(d) It is critical that the Ministry engage with iwi to understand their position on information about their people and within their rohe. It is the Ministry's responsibility to be adequately informed about the requirements of tikanga, and engage with the appropriate tikanga experts.

[90] Ms Gibbs says that the clear message the Ministry took from the first hui was that the interests of specific iwi in individual level data about people within their rohe needed to be reflected in the process around sharing that data, and that iwi wanted to

be consulted and to have input into whether, to whom, and the way in which individual data is shared.

[91] A second hui was convened with representatives from the New Zealand Māori Council, the New Zealand Māori Authority, the Federation of Māori Authorities, and Doctors Rawiri Jensen and Rawiri Taonui. Ms Gibbs notes that the views expressed at this hui were quite different, and generally more supportive of the immediate provision of individual level data to the applicants, than at the first hui. The Māori health experts attending expressed the view that in the particular circumstances it was appropriate for individual level data to be shared with Māori organisations with community mandate. Ms Gibbs says:

> Discussion during this hui was focused on the imperative of protecting Māori through the sharing of data in order to uphold the welfare of the collective, which should properly be seen as taking precedence over other interests in this scenario. It was emphasised by several participants that in the context of vaccination, effective protection of Māori health must come through empowerment of groups within the community. Consistent with this, there was a greater focus on the role and significance of hapū as against iwi during this hui. The view that came across was that individual level information was required for effective outreach.

[92] Ms Gibbs summarised the Ministry's conclusions from the two hui in the following terms:

> … there is reasonably wide support for the urgent sharing of data, including, where appropriate, individual data, to ensure the Crown upholds its responsibility to protect Māori health. However, there was also the view that the Crown would in effect breach its Te Tiriti obligations if it proceeded to share data without first assessing and accommodating the input of individual iwi within their own rohe.

[93] Subsequent to that hui Te Rūnanga o Ngāi Tahu wrote twice to Ms Anderson of Te Arawhiti. The first letter noted Ngāi Tahu's full and unequivocal support for Ngāi Tahu Whānui being vaccinated against COVID-19. It acknowledged that vaccination rates for Māori are lower than for non-Māori including, in part, because of a lack of trust by Māori in government institutions and, for that reason, it is imperative that proper processes and the appropriate principles are applied in deciding whether to disclose the data requested. The letter identified "key principles" as: the Crown's obligation to uphold Te Tiriti in the COVID-19 vaccination rollout; in relation to Ngāi Tahu Whānui, the Crown's Te Tiriti partnership is with Ngāi Tahu, therefore

in considering whether to provide information about Ngāi Tahu Whānui the Crown would need to engage with Ngāi Tahu about the decision; other entities, such as a Whānu Ora commissioning agency, are not a Te Tiriti partner in the Ngāi Tahu takiwā; disclosure of personal sensitive information about Ngāi Tahu Whānui to a party who is not a Te Tiriti partner without engaging with Ngāi Tahu would not be consistent with Te Tiriti.

[94] In a follow-up letter four days later, Ngāi Tahu emphasised that it was not against providing Ngāi Tahu Whānui health information to third parties in all situations, noting that third party health providers have an important part to play in keeping Ngāi Tahu Whānui and everyone in the community safe. It said "in relation to Ngāi Tahu Whānui we are asking the Crown to engage appropriately to ensure the Crown does not inadvertently cause harm in how the Crown manages this issue."

[95] Ms Gibbs explains in her evidence about the subsequent consultation, following the second decision:

> The approach sees access to individual data being determined in respect of an area, following consultation with local iwi, but the final decision on the sharing of data within a rohe does not rely on gaining iwi consent to WOCA's proposal. Instead, the consultation ensures the Ministry is properly apprised of the rights and interests which its decision will affect, before that decision is taken.

[96] Subsequently, as at the date of the hearing, 13 separate hui have been conducted with iwi, essentially on a DHB by DHB basis. Those hui were with:

(a) Te Tai Tokerau (Northland);

(b) Tāmaki Makaurau (Counties Manukau, Auckland, Waitemata);

(c) Waikato;

(d) Te Moana-a-Toi (Bay of Plenty);

(e) Rotorua, Taupō (Lakes);

(f) Tairāwhiti;

(g) Taranaki;

(h) Whanganui;

(i) Heretaunga (Hawke's Bay);

(j) Manawatū–Horowhenua, Tararua (Mid-Central);

(k) Wairarapa;

(l) Te Awa Kairangi (Hutt); and

(m) Te Whanganui-a-Tara and Kapiti (Capital and Coast).

[97] The Director-General records in his affidavit:

> Positive initiatives are resulting from the consultation with iwi that has already occurred, and we consider the benefits of engaging with iwi and Māori within their rohe is more likely to produce coordinated and effective efforts to lift Māori vaccination rates.

Error of law: did the Ministry introduce an authorisation requirement to r 11(2)(d)?

[98] Rule 11(2)(d) does not require consultation as a precondition to disclosure of personal health information. Indeed, to do so would undercut the key premise of the rule, particularly in a context, as here, where there is serious urgency.

[99] Rule 11(2)(d) provides that where the agency holding the health information in question believes on reasonable grounds that it is not desirable or practicable to obtain authorisation from the individual concerned, disclosure is permitted, in the absence of individual authorisation. Here, the Ministry had already concluded that it was impracticable to obtain the consent of the individuals concerned.

[100] Rule 11(2)(d) is also premised on disclosure being necessary to prevent or lessen a serious threat to public health or safety, or the life or health of an individual.

That factor too, particularly in the context of an emergency situation such as the COVID-19 pandemic, weighs against importing a consultation requirement into the rule. As Mr Keith, counsel for the Privacy Commissioner submitted, although r 11(2)(d) itself does not require disclosure, the requirements of necessity and efficacy within r 11(2)(d) are stringent, and if met may demonstrate that other obligations – for example, the right to the highest attainable standard of health – do require that disclosure occur. As Dr Magdalena Kędzior notes, the Council of Europe in a joint statement of 30 March 2020 on the right to data protection in the context of the COVID-19 pandemic recalled that "data protection can in no manner be an obstacle to saving lives and that the applicable principles always allow for a balancing of the interests at stake."[25]

[101] The Director-General concluded that in the circumstances, consultation was necessary to meet the Ministry's obligations under Te Tiriti. As counsel for the Ministry put it, not consulting was not an option for the Ministry, when it had been specifically requested (by the two pre-decision hui) to do so. However, the Ministry says it was not seeking consensus or consent of iwi to the disclosure of the data to the applicants, and thus no question of adding an "authorisation" requirement arises.

[102] This aspect of the claim gives rise to two issues: first, on the facts, was the Ministry in fact seeking authorisation from iwi and thus adding an additional and inconsistent requirement to r 11(2)(d)? Second, what did tikanga require?

Was the Ministry in fact seeking authorisation from iwi?

[103] Ms Gibbs says the Ministry was not seeking consensus, nor permission, but rather to inform the approach to the reconsideration that had been directed by the Court in the first judgment. Counsel for the Ministry emphasised the Crown's obligation under Te Tiriti to engage with Māori organisations and groups to ascertain the relevant interests among Māori on a particular issue and so inform itself. That engagement is essential. It points, for example, to the Waitangi Tribunal's *Napier Hospital and Health Services Report*.[26]

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25 Magdalena Kędzior "The right to data protection and the COVID-19 pandemic: the European approach" (2020) 21 Academy of European Law Forum 533 at 538.

26 Waitangi Tribunal *Napier Hospital and Health Services Report* (Wai 692, 2001).

[104] On the evidence, the Ministry did not explicitly seek consent or authorisation from iwi for disclosure of the data. But the process it followed – with the 5 November refusal of the request, combined with an invitation to discuss and the rohe by rohe hui – meant that in reality the Director-General's ultimate decision did hinge on reaching a level of comfort as a result of the consultation.

[105] By way of example, the representative for Te Ākitai stated that they did not want the applicants to have the data sought. Te Ākitai is a small Auckland iwi of 135 members. Eventually the Ministry decided that, because the data could not be filtered by iwi affiliation, the data for Auckland would be provided to the applicants with the inclusion of data for Te Ākitai; but in the meantime the agreement for disclosure of information for some 27,459 unvaccinated Auckland Māori, the vast majority of whose iwi had expressed their desire in strong terms to have the data released to the applicants, was not completed.

[106] Related to this point, Mr Flavell's evidence for the applicants notes that the Ministry has not adopted a consultation approach in making other decisions during the COVID-19 pandemic. He cites, by way of example, the "traffic light" system; adopting a 90 per cent target for all of the population (rather than specifically for Māori); road blocks (iwi, hapū or otherwise); and lifting or imposing restrictions. He is critical of the Ministry not engaging with Māori when making other significant recommendations or decisions in relation to Māori health.

What did tikanga require?

[107] As to the Crown's Te Tiriti and tikanga obligations, given the first judgment, it would be perverse for this Court to conclude that consultation with iwi about the disclosure to the applicants, in and of itself, was an error of law. Rather, the question is what did tikanga require in the particular circumstances. It is well accepted that tikanga Māori is part of New Zealand's common law.[27]

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[27] *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] and [164]; *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA); *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, [2021] 2 NZLR 142 at [103]; *Ngawaka v Ngāti Rehua-Ngātiwai ki Aotea Trust Board (No 2)* [2021] NZHC 291, [2021] 2 NZLR 1 at [2], [3] and [58].

[108] Although the first hui had recommended that the Ministry seek expert advice on tikanga, it appears this did not occur. Dr Carwyn Jones gave expert evidence for the applicants as to what tikanga required in this context.[28] Dr Jones' evidence was not responded to or challenged by the Ministry. Dr Jones concluded that iwi by iwi consultation may be appropriate, and indeed necessary to be consistent with tikanga and Te Tiriti in ordinary circumstances, "but these are not ordinary circumstances." Dr Jones notes that the issue that the Ministry appeared to be grappling with is a concern to avoid undermining tino rangatiratanga of iwi or hapū, and a related concern that not consulting iwi may give rise to a breach of Te Tiriti. He says, however, that the concern misunderstands tino rangatiratanga and the obligations under Te Tiriti:

> The primary objectives of tino rangatiratanga are to ensure that the community survives as a people, with both individuals and the collective thriving. The maintenance of whakapapa, whanaungatanga, and health and wellbeing of members of the community are central to those objectives, particularly in the context of a pandemic. It is not consistent with maintaining tino rangatiratanga to frustrate those primary objectives. If the health and wellbeing of tangata Māori is not maintained, tino rangatiratanga is not protected but undermined, and the ability to exercise tino rangatiratanga in relation to those tangata Māori is put at risk.

[109] Dr Jones notes that the highly prized taonga of health has particular primacy in the context of a pandemic. Where that taonga is at risk, not all tikanga principles, values or practices will be able to be perfectly fulfilled, and where certain aspects of tikanga conflict with the purpose of protecting health, there is little expectation that they will be pursued at the cost of the caring for the health and wellbeing of whakapapa. Dr Jones says:

> The control of data by individual iwi and hapū may have less priority as we work urgently towards the common goal of protecting the health of tangata Māori across the motu …

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[28] Dr Carwyn Jones is a Pūkenga Matua in the Ahunga Tikanga (Māori Laws and Philosophy) programme at Te Wānanga o Raukawa. Dr Jones' iwi are Ngāti Kahungunu and Te-Aitanga-a-Māhaki. Between 2006 and 2021, Dr Jones was a Lecturer, Senior Lecturer and then Associate Professor in the Faculty of Law at Te Herenga Waka/University of Wellington. Prior to that, Dr Jones' roles included at the Māori Land Court, Waitangi Tribunal and the Office of Treaty Settlements. Dr Jones' primary areas of research are the Treaty of Waitangi and the interaction between tikanga Māori and the New Zealand legal system. He gave expert evidence on tikanga Māori in that context.

[110] The evidence from Lady Tureiti Haromi Moxon for the applicants is to similar effect:[29]

> There is taonga in life and health. If there is taonga in data, then that taonga must give way to life and health. Providing the contact details of unvaccinated Māori provides the best chance of respecting the taonga of their life and health.

[111] While it is not for the Court to itself decide what tikanga applies, as Cooke J said in *Mercury NZ Ltd v Waitangi Tribunal*:[30]

> There will be situations, perhaps particularly when the relevant Māori participants agree upon the tikanga to be applied where a court or tribunal will be applying that tikanga to resolve the matters within its jurisdiction.

[112] I rely on and accept Dr Jones' uncontradicted evidence that tikanga did not require that the Ministry obtain iwi by iwi consent to the disclosure. That conclusion is consistent with the observation in the first judgment that rights to privacy and health are not incompatible.[31]

Conclusion

[113] I therefore find that the Ministry erroneously introduced an authorisation requirement to r 11(2)(d), as a consequence of its overly detailed consultation process.

Error of law: did the Ministry adopt a consultation process that does not have regard to the urgency of the situation?

[114] The applicants say that the effect of the Ministry's rohe by rohe approach to consultation is that there has been a considerable delay in the Ministry arriving at any decisions in relation to disclosure of the data. The applicants first entered into discussions with the Ministry in August 2021, and the applicants' request was refined by September 2021, but the only data disclosed as at the date of the hearing in November 2021 was for Waikato and Tāmaki Makaurau. That was agreed to by the Ministry on 15 November and 19 November respectively, and the data provided on 17 November and 20 November respectively. This is against the backdrop of the very

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29 Lady Moxon is the Chairperson of the Board of Trustees for the National Urban Māori Authroity (the principal shareholder of WOCA), and Managing Director of Te Kōhau Health (contracted as the lead Whānau Ora partner by WOCA).

30 *Mercury NZ Ltd v Waitangi Tribunal*, above n 27, at [103].

31 At [59].

serious and acknowledged risks of COVID-19, particularly for Māori, the rapid spread of the Delta variant through the country, and the announcement that New Zealand would move to the COVID-19 Protection Framework even without achievement of a 90 per cent vaccination rate, together with the announced opening of the Auckland border on 15 December 2021.

[115] The Ministry submits in response that it has achieved a great deal in the consultation, in a short space of time, particularly given the highly unusual pressures under which it has been working.

[116] The duty to make a decision within a reasonable time is a general principle of administrative law.[32] Failure to do so may be a breach of natural justice.[33] What is "reasonable" will depend on the particular circumstances of the case.

[117] In normal circumstances, the speed with which the Ministry has consulted iwi, while working under great pressure, would be readily acknowledged as reasonable, and indeed impressive.

[118] I also acknowledge that the Ministry was having to carry out the reconsideration process while working under the unique pressures of a pandemic, which had dominated its work for almost two years. The Ministry's intentions are not, from my perspective, in issue.

[119] But in the particular circumstances of this case – the acknowledged very serious risks of COVID-19, particularly for Māori, the rapid spread of the Delta variant, the loosening of travel restrictions – what is a "reasonable" time cannot be measured against usual government processes.

[120] Following the first judgment, the Ministry was required to make a decision, based on an evidence-based assessment. As the Privacy Commissioner submits, and I accept, a decision in this context, made under exigent circumstances, does not have

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32 Graham Taylor *Judicial Review a New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [15.80].

33 *Vea v Minister of Immigration* [2002] NZAR 171 (HC) at 182-183; *Unitec Institute of Technology v Attorney-General* [2006] 1 NZLR 65 (HC) at [125].

to be perfect or fully informed. It is not a counsel of perfection. Nor is it a precedent for all time. Again as the Privacy Commissioner notes, it is reasonable and consistent with the Code and the Act to do what could be done within a tight timeframe, given the evidence of the risks increasing over time.

[121] I acknowledge that the Ministry approached the reconsideration with a desire to get it right. From the Ministry's perspective, an important part of doing so was, as part of its Te Tiriti obligations, to ascertain the views of iwi and attempt to accommodate those views where possible. However, as the Waitangi Tribunal noted in the *Napier Hospital and Health Services Report*,[34] when summarising the main criteria applicable to the process of consultation with Māori, regard must be had to:

- the sufficiency of information already possessed or gathered by other means on Māori opinion and on the impact of the decision on affected Māori; and
- the existence of exceptional factors justifying proceeding without consultation in the interests of timely action and good government.

[122] While it might be said that the second decision was made with a reasonable time, in fact the decision was something of a place-holder; both the Ministry and the applicants have treated the subsequent process of consultation by the Ministry and engagement between the Ministry and the applicants, as part of the decision-making process. In the particular factual circumstances, and having regard to the expert evidence as to what tikanga requires, I conclude that the Ministry has not made a decision on the applicants' request for disclosure of the data within a reasonable period of time.

Breach of natural justice: is the Ministry's conclusion the result of a flawed consultation process?

[123] The applicants were not involved in, or consulted about, the first two hui that informed the decision paper. Mr Nin's evidence is that the 9 November 2021 online hui was the first time any of the decision-making Ministry personnel had made direct contact with WOCA or Whānau Tahi to discuss the Ministry' concerns, since the first judgment on 1 November 2021. Subsequently the applicants had some involvement

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34 Waitangi Tribunal, above n 26, at [3.96].

in the hui with iwi. The applicants say that the failure to adequately involve them in the consultation process was a breach of natural justice.

[124] The Ministry says that not inviting the applicants to the pre-decision hui was not intended to be a breach of the applicants' rights; rather the Ministry was interested in hearing a diversity of views. The purpose of the consultation was to gather information about the relevant Māori rights and interests protected by Te Tiriti. Ms Gibbs notes that many participants with whom the Ministry was engaging had expressed the desire that their view be kept confidential. She notes the Ministry was already aware of WOCA's views. Ms Gibbs also notes that, while the Ministry respects Mr Tamihere's right to express himself in strong terms, at times the way in which he chooses to do so can have a "chilling effect" on the participation of others.

[125] The applicants say that the consultation miscarried because several issues arose, which appeared to assume prominence in the Ministry's thinking, that were adverse to the applicants' request for the data, but that could have been addressed had they been present. That was the breach of natural justice. Those issues were:

(a) Māori data sovereignty;

(b) the relationship between Whānau Ora providers and iwi;

(c) WOCA's status as a "Treaty partner"; and

(d) protection of the data.

[126] The applicants say also that the fact that the same level of individual data as sought by the applicants is already released by the Ministry to Healthline and PHOs, without iwi consent, was important context in understanding the applicants' request, and could have been discussed if they had been present at the hui.[35]

[35] I deal separately with the issue of inconsistent treatment at [151] below.

Māori data sovereignty

[127] The decision paper refers to "iwi information" and "information at a collective level", and it appears that participants at the two pre-decision hui thought the Ministry was being asked by the applicants to share collective iwi information. On the notes of the hui put in evidence for the Ministry it does not appear that their understanding was addressed. For the Ministry, Mr Kinsler submitted that misconceptions occurring during the consultation about iwi affiliation data were not material, but that submission does not seem to be borne out on the facts of the consultation, and the Ministry's response in the decision paper.

[128] As Mr Tamihere's evidence identifies, there are two separate issues about data sovereignty. First, an individual's record of iwi or affiliation. Second, an individual's contact details and vaccination status. As to the first question, the key points the applicants make is that they were not seeking iwi affiliation, nor does the relevant health information held by the Ministry include information about the iwi affiliation of Māori. The practical result is that information about vaccination status cannot be filtered by iwi affiliation.

[129] Mr Tamihere's evidence also supports the applicants' second submission on this issue, that iwi do not have an exclusive interest in Māori health data that does not include iwi affiliations. He notes that WOCA provides services to every Māori regardless of their whakapapa. He does not accept that an individual's contact details and vaccination status engage data sovereignty questions but, in any event, he says it does not engage to defeat other considerably more important taonga – life and health.

[130] Mr Tamihere also observes that Māori data sovereignty is not an exclusive right, and it does not mean that any given iwi has the right to preclude the sharing of identity data concerned with vaccination status with appropriate iwi or Māori collective entities or Whānau Ora collectives. Less than five per cent of Māori whakapapa to only one iwi. The Ministry's position would mean that any iwi can veto a Ministry's decision and that, unless all iwi agree, the details of all unvaccinated Māori cannot be disclosed.

[131] Lady Moxon's evidence also addresses the data sovereignty question:

> … no iwi has the sole right to claim taonga over any person's data, let alone in a pandemic. No iwi can legitimately claim to have dominion over the contact details of Māori in a pandemic given that so many of us have multiple iwi to which we whakapapa. There are many Māori in Aotearoa who live outside of their iwi boundaries. Many of those living in urban areas do not know their whakapapa and are not registered with any iwi. In fact, the outreach support services by the Whānau Ora Collective organisations are in many cases the largest support system that many Māori have and not their iwi.

[132] Lady Moxon also refers to the Ministry's child immunisation service – Outreach Immunisation Service (OIS) – and notes that iwi have never previously objected to the Ministry disclosing the contact details of unvaccinated tamariki,[36] on the grounds that the information is taonga and requires consultation with iwi.

Whānau Ora relationship with iwi

[133] The decision paper reflects an apparent concern that locally-based organisations, working locally on the ground, with local relationships and the ability to engage kanohi ki te kanohi (face to face) with individuals, was preferable to providing the data to the applicants (at least in some areas).

[134] The applicants say this too was an issue that could have been answered if the applicants had been part of the consultation process. As Mr Tamihere's evidence in the first proceeding clarified, and Mr Nin reiterated in this proceeding, WOCA is an umbrella organisation that supports a large number of iwi-owned, governed and/or affiliated Whānau Ora providers, to deliver health services on behalf of iwi.

[135] Mr Nin's evidence refers to WOCA's experience in Te Tai Tokerau:

> The Whānau Ora group that travelled to assist in Te Tai Tokerau had a totally different approach to the PHOs and associated providers. PHOs set up their mobile units in one location and stay there, and did not have accompanying loudhailer vehicles and so on. For some providers we worked with, our approach has left an impression.

[136] Mr Flavell describes the networks and manaaki that Whānau Ora providers offer each other – between cities and towns, across collectives, and across regions:

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[36] In relation to diphtheria, tetanus, polio, whooping cough (pertussis), Pneumococcal Rotavirus, Haemophilus influenzae type B, measles, mumps, rubella or chicken pox (varicella).

> Our tautoko and manaaki to other providers is part and parcel of how we work. We shift resources, offer support, and get people to places where there are shortfalls, which is increasingly necessary when we are stretching our resources to harder to reach places.

[137] He gives an example of the Te Arawa Whānau Ora collective working across three DHB areas – the Lakes District (under the Lakes DHB), Murupara, Maketū and Te Puke (under Bay of Plenty DHB); and Mangakino (under Waikato DHB).

Te Tiriti partners

[138] In her evidence, Ms Gibbs refers to the view of unspecified iwi that sharing data with Whānau Ora would be sharing data with a group that does not have a "mandate based on Te Tiriti." The minutes of the first hui record the Data Iwi Leaders Group as saying "the Whānau Ora agency" is not a "Te Tiriti based agency". Similarly, the NICF Pandemic Response Group is reported as saying Whānau Ora agencies need to "get a mandate from each of the iwi" in order to access the data and that data should not "be shared to other groups that don't have a mandate for iwi information. Iwi are the Crown's Te Tiriti partner." The correspondence from Ngāi Tahu also identified a concern with the Ministry providing the data to WOCA, which is not a "Te Tiriti partner".

[139] Dr Jones addresses this issue, noting, first, that signatories of Te Tiriti were generally leaders of hapū (not iwi), but over time a particular hapū might have become known by a different name – he explains "it is not as simple as saying 'this hapū signed Te Tiriti, and therefore they are a Tiriti partner'".

[140] Dr Jones also says:

> It is also incorrect to imply that Te Tiriti obligations are owed to iwi, or hapū, alone. Te Tiriti obligations are owed to all Māori – including to Māori individuals (and their whānau) who are at risk of contracting COVID-19 because they are not yet vaccinated. The status of the 'partner' with whom the Crown is engaging to fulfil its obligations is not the sole criterion as to whether Te Tiriti obligations are at play, or whether the Crown has greater obligations to other entities (in this case, iwi or hapū). The real question … is whether the entity has the leadership, expertise, capacity, and capability to protect the health of tangata Māori – through which the Crown can discharge its obligations to those Māori.

[141] In his evidence Mr Flavell notes that there is no one list of "Treaty partners" and that what is really at issue is to whom the particular Treaty obligation is owed. Te Tiriti was generally signed by hapū leaders. But Treaty obligations, in general, are owed to all Māori. Organisations such as iwi rūnanga and trusts are often the conduit the Crown uses to meet its obligations, but they are not the only conduit. Mr Flavell also observes that the Waitangi Tribunal regularly hears claims and gives recommendations in favour of people or entities that did not sign Te Tiriti.

[142] Further, Mr Flavell says, two of the bodies consulted with by the Ministry – the New Zealand Māori Council and the Federation of Māori Authorities – are not iwi based; the former is a statutory construct, and the latter is based on Māori land trusts. Nevertheless, the Ministry saw them as sufficiently "Treaty based" to be consulted. Mr Flavell says Whānau Ora is in a similar position to both those organisations:

> It has a mandate to empower whānau, engender tino rangatiratanga within whānau, and work to support them in all respects. Given that position, Whānau Ora should not be in any less position than the New Zealand Māori Council or the Federation of Māori Authorities.

[143] The issue is addressed in the decision paper, which notes:

> … the Crown accepts that it contracts WOCA and its providers in part on the basis of their reach and relationships within the relevant areas, and we are aware that the Waitangi Tribunal in the *Waipareira* report has acknowledged that in certain circumstances urban non-kin based groups exercise rangatiratanga in relation to their groups, and in that sense can be considered Treaty partners.

[144] It appears therefore not to have been a live issue at the time the second decision was made and I do not consider it further.

Protection of the data

[145] Related to the data sovereignty issue, the applicants say that if they had been properly involved in the consultation process they could have reassured the participants about the security of the data, if it were to be provided to them.

[146] The uncontested evidence was that Whānau Tahi systems meet best practice requirements and provide a high level of protection.[37]

Conclusion

[147] The right to be heard is a fundamental requirement of natural justice. The rights of natural justice are affirmed by s 27 of the New Zealand Bill of Rights Act 1990. It is plain that the applicants' rights of natural justice were engaged in this case. The second decision, which was informed by the consultation process, has a significant impact on them.

[148] What is required to comply with the principles of natural justice depends on context. As the Court of Appeal said in *Graeme Martin Contracting Ltd v Disputes Tribunal*:[38]

> … what is necessary to facilitate the right to natural justice depends on the particular circumstances. The question is what is required to ensure fairness in the particular case. Context is always important, including the significance of the decision and the purpose of the statute under which the decision-making power is exercised.

[149] In his text on judicial review,[39] Graham Taylor cites the Australian case of *Kioa v Minister for Immigration and Ethnic Affairs* for its summation of the considerations affecting the implication of natural justice in non-adversarial situations:[40]

> A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise … in the ordinary case where no problem of confidentiality arises, an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made.

[150] I find that, cumulatively, the issues considered above did have a material impact on the outcome of the pre-decision hui, the second decision, and the Ministry's consultation process that followed. The Director-General has indicated that even if he had been satisfied that information sharing on the terms sought by the applicants was

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37 See above at [77].

38 *Graeme Martin Contracting Ltd v Disputes Tribunal* [2018] NZCA 328 at [37] (footnotes omitted).

39 Graham Taylor, above n 32, at [13.18].

40 *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550 (HCA) at 628-629.

necessary, he would have declined to exercise his discretion to grant the request, because of Te Tiriti concerns arising from the feedback from iwi leaders. If the applicants had been included in the consultation process (whether in the room, or subsequently, to clarify the above matters with the Ministry) those questions could have been responded to, and likely resolved. I find that the Ministry's failure to involve the applicants was a breach of their right to natural justice.

Inconsistent treatment (disclosure of individual data to other entities)

[151] I have already noted the applicants' position that the Ministry's provision of individual-level data to Healthline, PHOs and OIS, without iwi consultation or consent, was relevant contextual information that could have been made available to those being consulted.[41] The applicants also advance this as a separate ground of challenge.

[152] The applicants submit that the Ministry has taken the position that sharing individual data with Pākehā organisations such as Healthline without consultation with Māori is appropriate, but sharing that data with a kaupapa Māori organisation like the applicants imposes the Ministry's Te Tiriti obligations as an impediment to the provision of kaupapa Māori health services in the context of a pandemic. The applicants point out that Whānau Ora was established because of the recognition that standard ways of delivering health services were not working for Māori, and to provide services in a way that reflects the spirit and intent of Te Tiriti partnership.

[153] As I noted in the first judgment,[42] the Ministry agreed that the discretion must be exercised consistently and rationally – the Ministry must treat "like cases alike" – but said there can be a rational basis for differing treatment. In the context of the first hearing the Ministry said Healthline is not in an analogous position to the applicants: although it is a private, commercial company, it is the Ministry's direct agent, using the Ministry's data to achieve the Ministry's purposes. Disclosure of information to it is one of the purposes for which the information is obtained.

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41 See above at [126].

42 *Te Pou Matakana Ltd v Attorney-General*, above n 1, at [81].

[154] Here the issue of inconsistency is subtly different. The Ministry has emphasised its obligation to consult with iwi about sharing the data with the applicants, but appears not to consider that, if that is indeed the case, the obligation to consult with iwi must also extend to the sharing of the same individual level data with other (non-kaupapa Māori) entities. That approach is not a consistent and rational exercise of the Ministry's discretion.

[155] Another aspect of inconsistent treatment arises on the evidence. The applicants also say that Whānau Ora is now being asked by the Ministry in certain regions to provide support services to whānau, particularly Māori, who have contracted COVID-19 and who are self-isolating at home. In order to carry out that service, Whānau Ora must be given the contact details of those Māori, including unvaccinated Māori.

[156] By way of example Mr Flavell notes that Te Arawa Covid Hub has been asked to consider taking up the role for the Lakes DBH to look after those who will be self-isolating with COVID-19. As he notes, self-isolating at home is a major difficulty for Māori because Māori live in closer communities, often with large whānau, and in confined housing environments. It often comes with psychological harm; loneliness and lack of whānau contact can be very distressing for Māori. Supporting whānau in this context is hard work and requires long hours all days of the week.

> These agencies are asking us to assist when whānau have already fallen ill, and when they do not have the capacity to deal with it. It is convenient – and cheaper for them – to offload that task onto Whānau Ora at that point. They know we can do a better job of it than they can, because we have proven we are better at working with our people, and it is more likely to be our people who will become ill.
>
> The Ministry is thereby willing to give us the contact details of whānau who must self-isolate after they fall ill with COVID-19 (and may be dying) but the Ministry is not willing to provide us with the contact details of those whānau to prevent that from happening. They will not let us put our kaupapa Māori approach into practice, when it is most needed.

[157] Lady Moxon also refers to the Waikato DHB asking her organisation, Te Kōhao, to look after 10 households of whānau with COVID-19 who are self-isolating at home.

[158] Those requests of Whānau Ora providers also indicate an inconsistent approach by the Ministry to the need to consult with iwi about the provision of individual level data.

[159] I conclude that the Ministry did exercise its discretion inconsistently in requiring consultation with iwi before agreeing to disclose the data to the applicants, but not requiring such consultation in relation to the disclosure of individual level Māori health information to other entities, or in relation to the disclosure of individual level Māori health information for the purpose of enabling Whānau Ora providers to care for Māori with COVID-19 who are self-isolating at home.

The Ministry's discretion

[160] As I have already noted, r 11(2)(d) confers a power to disclose information, but even where the three requirements of r 11(2)(d) are satisfied, the decision-maker retains a discretion about disclosure.

[161] The Ministry says that even if it had concluded that it was "necessary" to grant the applicants' request, it would not have recommended exercising the discretion to do so, "in the face of the credible and more Te Tiriti-compliant alternatives."

[162] However, as discussed above, in fact the decision paper contained no evidence-based assessment as to whether sharing smaller sets of personal information with "trusted locally-based organisations" would be an equally effective measure.

[163] In light of those factors, the applicants say that the sole reason given by the Ministry against the exercise of the discretion cannot be a proper reason for exercising the discretion not to disclose the data sought to the applicants.

[164] The applicants submit that this is one of the rare cases in which a discretionary power is also coupled with a duty to exercise that power.[43] They say that, in the very particular legal and factual circumstances of this case, where the requirements of r 11(2)(d) of the Code are satisfied, the Ministry may only decline to exercise the

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[43] *Julius v Bishop of Oxford* (1880) 5 App Cas 214 (HL) at 222-223, 229-230 and 241; *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823 at [31].

power for a compelling reason that is consistent with the policy and object of the rule. The scope of the Ministry's discretion is so limited because:

(a) The preconditions for the disclosure of information under r 11(2)(d) are, in themselves, demanding.

(b) If the data is disclosed to the applicants, the data will continue to be protected because the applicants will be subject to the stringent requirements of the Code and other regulatory obligations. They will be required to use the data in confidence, to use it only for the purpose permitted, and to retain it securely and for no longer than required.[44]

(c) The purpose of r 11(2)(d) is to lessen or prevent a serious threat to public health, including in the context of the pandemic. The legislative history of the Code indicates Parliament's clear intention that the power should be available and used to save lives.

(d) The COVID-19 pandemic is a "once in a century public health crisis for Māori", for which there is readily available modelling data to show the impact for Māori in terms of the scale of deaths, hospitalisations and infections.

(e) Māori are at greater risk of adverse outcomes from COVID-19.

(f) The overarching principles for the vaccination programme are equity and Te Tiriti. This includes the Crown's duty of active protection.

(g) The vaccination programme has not achieved equitable outcomes for Māori.

(h) Disclosure of the data will help support the attainment by Māori of the fundamental right to the highest attainable standard of health, which the Crown has recognised through its ratification of the Constitution of the

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44 *Te Pou Matakana Ltd v Attorney-General*, above n 1, at [38].

World Health Organization and the International Covenant on Economic, Social and Cultural Rights.[45]

(i) Parliament has recognised in the New Zealand Public Health and Disability Act 2000 that Māori face historic health disparities, and that the provision of public health services should "reduce health disparities by improving the health outcomes of Māori".[46]

(j) The only health-related disadvantages identified by the Ministry are considered by the Ministry to be neutral factors.[47]

(k) There are no concerns about the applicants' ability to securely store, manage and delete the data.

[165] The respondent says in response that the applicants' approach would constrain the discretion to an untenable extent and would transform the rule into a right in requesters to seek disclosure of information.

[166] The discretion must be exercised within the scope of the legislation and consistent with its purposes. As the Supreme Court said in *Unison Networks Ltd v Commerce Commission*:

> A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act.

[167] Here, the premise of the Act and the Code is that disclosure is permissible to address serious risks. In the first judgment,[48] I referred to the Report of the Special Rapporteur on the right to privacy and it bears repeating:[49]

> While the priority is to save lives, fighting COVID-19 and respecting human rights, including the right to privacy, are not incompatible. In fact, the trust of citizens that their privacy … is being taken into account builds confidence and

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45 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976).

46 Section 3(1)(b).

47 See above at [27].

48 *Te Pou Matakana Ltd v Attorney-General*, above n 1, at [59].

49 Joseph Cannataci *Report of the Special Rapporteur on the right to privacy* UN Doc A/75/147 (27 July 2020) at [1]-[2] (footnotes omitted).

> willingness to proactively support State measures to prevent the spread of the virus.

[168] As the Privacy Commissioner helpfully framed it, the purpose of the Act, as reflected by s 3(a),[50] is concerned with both protection and use: it is a "how to", not a "do not do".

[169] As I have found, the Ministry applied a wrong interpretation and application of the tests in r 11(2)(d). That erroneous approach directly affected the exercise of the Director-General's discretion. The Director-General records in his affidavit that his concerns about the scope of the applicants' request and the perceived need to consult led to his decision not to disclose the data sought by the applicants.

[170] As the Privacy Commissioner's submissions emphasise, when the stringent r 11(2)(d) requirements of necessity and efficacy are met – as I have found they are – other obligations, such as the right to the highest attainable standard of health, may point to a requirement that disclosure occurs.

[171] I am satisfied that the statutory tests have been satisfied. My findings in relation to the s 11(2)(d) criteria implicitly address the basis for the exercise of the Director-General's discretion not to disclose. I conclude that the exercise of the discretion was not consistent with the object and policy of r 11(2)(d).

Relief

[172] This is an application for a judicial review; it is not an appeal. The High Court in judicial review does not second-guess the substantive merits of the decision under review; "judicial review, as the words imply, is not an appeal from the decision, but a review of the manner in which the decision was made."[51]

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50 Section 3(a) provides that the purpose of the Act is to promote and protect individual privacy by "providing a framework for protecting an individual's right to privacy of personal information, including the right of an individual to access their personal information, while recognising that other rights and interests may at times also need to be taken into account".

51 *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, [1982] 3 All ER 141 at 155 (HL).

[173] The Court's role in a case like this is to:[52]

> … ensure that when public officials exercise the powers conferred on them by Parliament, they act within them. Judicial review is the common means by which the courts hold such officials to account. It provides the public with assurance that public officials are acting within the law in exercising their powers, and are accountable if they depart from doing so.

[174] That distinction in the court's role between judicial review and appeal has an impact on what are appropriate remedies.[53] As a general rule, judicial review is not a procedure which allows the Court to substitute its own judgment for that of the decision-maker, although in exceptional circumstances the courts have been prepared to substitute their decision for the decision under review where there was only one lawful decision available.[54]

[175] Those exceptional cases rely primarily on the approach of the Court of Appeal in *Fiordland Venison Ltd v Minister of Agriculture and Fisheries*.[55] In that case, the Minister had declined to grant to a licence for a game packing house where a positive duty to issue a licence existed under the Game Regulations 1975 once the Minister was satisfied as to five matters specified in the regulations. The Court inferred that the decision to decline the application was made out of concern for the reduction in turnover or profit of other game packing businesses, which was not a relevant consideration. There had been a considerable delay since the application for a licence had been declined, and the Court of Appeal accepted that there was no evidence on which the Minister could reasonably or properly determine that he was not satisfied of the matters prescribed in the relevant regulation. The Court granted the appellant a declaration that, subject to certain upgrading of the packing house premises in accordance with plans and specifications that had been submitted, it was entitled to the licence it had been declined by the Minister.

[176] This case is not as clear-cut as *Fiordland Venison*. There, the decision-making did not involve the exercise of any discretion or evaluation beyond the presence or

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52 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 at [3] (footnotes omitted).

53 Taylor, above n 32, at [1.10].

54 See, for example, the dissent of Elias CJ in *Helu v Immigration and Protection Tribunal* [2015] NZSC 298, [2016] 1 NZLR 298 at [105].

55 *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 (CA).

absence of the stipulated matters. Here it is plain (and all parties agree) that even where the r 11(2)(d) factors are satisfied, the decision-maker retains a residual discretion.

[177] Relief in judicial proceedings is essentially discretionary but, as the authorities make clear, where the court finds reviewable error, the "starting point" is that the applicant is entitled to relief.[56] However, events have moved on since the second decision was made on 5 November 2021. As I have already noted the parties have treated the post-second decision consultation process and the ongoing engagement between the Ministry and the applicants as part of the decision-making process and I have treated them as reviewable and within the scope of this proceeding. Considerable progress has been made since the second decision (and since the hearing) in the sense that the Ministry has agreed to provide more of the data sought by the applicants (see [29] above).

[178] The alternative orders sought by the applicants, that the Court sets aside the second decision and directs the Ministry to make a final decision on the applicants' request for the data within three working days, has the potential to undermine what has been decided in the intervening period and to waste valuable time and resources (for both the Ministry and the applicants).

[179] As counsel for the applicants stressed, time is not now at large. The most important thing is to achieve resolution of the applicants' request as soon as possible. In those circumstances I direct the Ministry to take the following steps, within three working days and having regard to the findings in this judgment:

(a) Complete its consideration of and decision on provision of the data in those areas where it has not yet agreed to provide data to the applicants.

(b) Review its decision to provide data in relation to those Māori in Te Ika-a-Māui/North Island who have had only a first dose, in light of the Ministry's publicly announced position in relation to the general

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[56] *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]-[61]; *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112].

population who have had only one dose and the finding in this judgment at [55] above.

Costs

[180] While I have not granted relief in the specific terms sought by the applicants, I have upheld their judicial review claims in the respects set out above. I indicate an initial view that the applicants are entitled to costs in the normal course. If the parties are not able to agree costs, I invite them to submit memoranda setting out their respective positions. The parties may wish to deal with costs on a global basis, encompassing both this proceeding and the earlier proceeding (CIV-2021-485-553). Given the time pressures on both parties, I will not set a specific deadline for submissions.

Gwyn J