EXCLUSIVE: We're in court for the Pitcairn appeals

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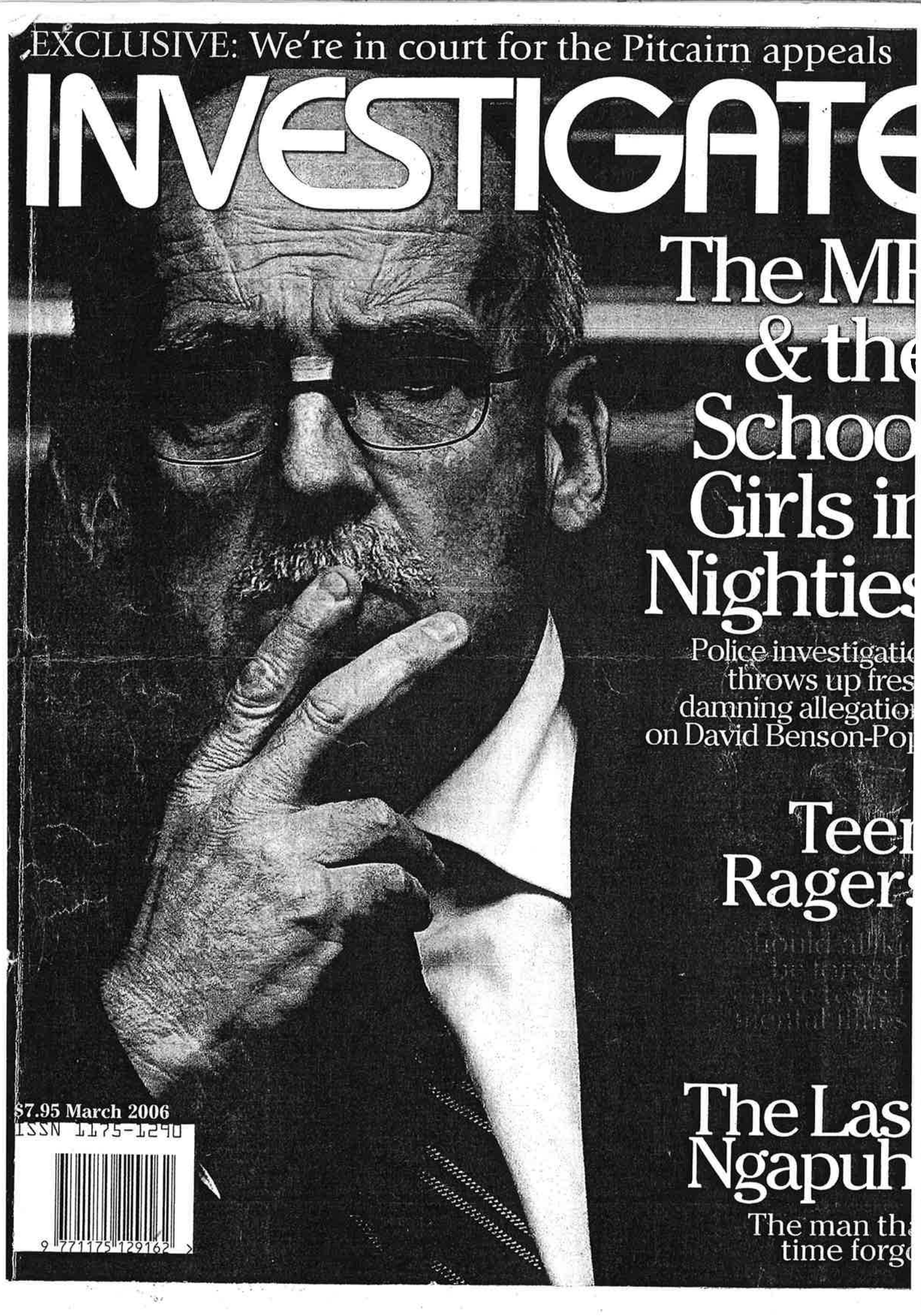

## The MP & the Schoo Girls in Nighties

Police investigatio throws up fres damning allegation on David Benson-Po

## Teen Rager

## The Las Ngapuh

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# Minister of Sleazy Developments

## ANOTHER BLOW TO DAVID BENSON-POPE'S CREDIBILITY

**He's already been sprung for shoving a tennis ball in a student's mouth and bashing another in the face with his fist, and he's been trying for two months to prevent Investigate from accessing more police documents. But now IAN WISHART can report Labour cabinet minister David Benson-Pope stands accused of making teenage schoolgirls strip to underwear and nighties at a school camp, and that's not all**

You'd think we'd already heard all there was to know about the David Benson-Pope case: the tennis balls, the bleeding nose, or the Vast Right Wing Conspiracy he claimed was setting him up on the basis of false allegations. But no, buried deep in more than 1,000 pages of documents released to the news media in December are previously unpublished allegations that the former school teacher used to make scantily-clad 14-year old girls parade for him at school camp, that he was "sleazy" towards the girls in his care and that he harassed a female teacher and vandalized her students' best work as part of a personal vendetta.

Although Benson-Pope is no longer an associate Education Minister, as Social Development and Employment Minister he retains extensive responsibilities for youth issues.

While *Investigate* has been probing the police file, the embattled cabinet minister has been fighting tooth and nail to prevent more still-confidential police documents being released to the magazine. It raises an obvious question: does David Benson-Pope have something more to hide over the police decision not to prosecute him for assault despite a prima facie criminal case?

On 1 December last year, police announced that a long-awaited release of their investigation file into the Benson-Pope case had been delayed after direct submissions from the minister's lawyer, John Haigh QC.

As a result of that delay, *Investigate* immediately lodged an Official Information Act request with police seeking copies of the behind the scenes submissions from the cabinet minister and details of any other correspondence between police and the minister.

When the Benson-Pope file was released, those items of correspondence were mostly not included. The first inkling of a reason why came in a brief three paragraph letter to *Investigate* from Police National Headquarters on December 19:

"I have carefully considered your request, but following submissions from Hon. David Benson-Pope I have decided to refuse it in terms of sections 9(2)(g)(i) and 9(2)(a) of the Official Information Act 1982."

Section 9(2)(a) of the Act allows for suppression to protect the privacy of individuals, and s9(2)(g)(i) is more complex. What police were arguing under *that* section is that because Benson-Pope is a Minister of the Crown, he's entitled to special privileges: according to police, Benson-Pope's submissions to the police – on whether he should be charged or whether *Investigate* could access the documents – could not be released under the Official Information Act because they come under the category of "free and frank expressions of opinions" between a Minister of the Crown and officials of a government department.

Before turning to that precise constitutional showdown

between *Investigate* and the police, however, it's worth briefly recounting what the criminal investigation of David Benson-Pope actually discovered.

There were three main areas police were investigating:

**1.** Did Benson-Pope, while he was a school teacher at Dunedin's Bayfield High in 1982, shove a tennis ball in the mouth of a student and then tape his hands to a desk so he couldn't remove the ball?

**2.** Did Benson-Pope attend a school camp that year where he punched a student in the face, causing a bleeding nose?

**3.** Did Benson-Pope force male and female students to go outside in their underwear and stand in the freezing cold at a school camp for up to an hour as a disciplinary technique?

So what really happened? Initially David Benson-Pope denied categorically that it happened, but he subtly changed his tune to the 'Winebox defence': "I cannot recall".

The police file however, tells a very different story about the MP's teaching style.

According to one woman interviewed by police about events when she was a 14 year old in Benson-Pope's class, the Labour MP was a "sleazy" teacher.

"Quite sleazy, some of the comments he made used to grate me. The girls, including me, felt that he was always staring at our legs beneath desks...With the girls he was always sleazy if he could be, he seemed to thrive on it."

lies. Ironically, however, one of the themes running through police file has been bullying by Benson-Pope, that he trea bright students well and the less-academically able badly, or he simply enjoyed picking on the helpless.

One student told police that when Benson-Pope delivered c ings in the corridor outside the classroom, he did so with ap ent relish:

"Mr Benson-Pope would whistle the cane in the air before ing a run up of about 10 feet. I'm estimating the distance but could actually hear him running up. It was pretty psychol cally damning, standing there bent over listening to the run I'm pretty sure it was a run-up for each of the three canes on occasion. As a result I suffered severe bruising but no bleed Obviously very painful to sit for the next few days."

A second boy remembers refusing to jump the vault at P the third form because he didn't feel confident. He told police punishment from Benson-Pope was the cane. He was one of boys given the cane for non-compliance at PE that day.

"I had to wait outside the school hall while Tony [the o offender] was dealt with first. I could hear screaming and ing – I still remember it well today because [Tony] was su tiny boy."

A former teacher confirms the incident. "It's a lasting imp sion because it's the only caning I've witnessed. I remember T ran a lap of the assembly hall yelling in pain after the caning

"Quite sleazy, some of the comments he made used to grate me. The girls, including me, felt that he was always staring at our legs beneath desks...Wi the girls he was always sleazy if he could be, he seemed to thrive on it"

David Benson-Pope, according to another police witness, used to address female students in his class as "fluffy-bunnies".

A former female art teacher at Bayfield High School also has negative memories of David Benson-Pope as a teaching colleague.

"I feel that David Benson-Pope harassed me over a couple of years. He had a position of responsibility and was the president of the PPTA. Basically, if you didn't agree with his way of doing things and way of thinking – he made it known.

"Because my kids went to a private school he assumed I was a National party supporter. Because I wouldn't agree with his proposed strike action he made my life difficult in the staffroom by yelling at me."

The teacher also accuses David Benson-Pope of stealing material from her class, and vandalizing students' work as part of his alleged vendetta against her:

"He would also come and take materials from my art room – that I had budgeted hard to get – and tell me that because he had a position of responsibility and I didn't there was nothing I could do to stop him.

"Eventually the last straw was a time when he interfered with displays of my best students' work. Some of the pieces were lost as a result. I walked out of the school threatening human rights action. Eventually there was mediation and Benson-Pope apologized."

Last year, when the allegations of the MP's brutality first surfaced, he initially claimed his accusers were liars, and school bul-

"When it was my turn," continues the former student w refused to jump the vault, "I was brought into the hall, I was over and caned once over my trousers by Benson-Pope. I plea not to be caned again but was struck once more with the ca

"I remember Benson-Pope laughing while he caned me – that's what got me the most. When I got home I realized I blood on my bum."

There is no question he was an unorthodox tea Many former students and teachers spoken t police felt that although his discipline style w hang-over from the 'Mr Gormsby' era, his te ing approach was "new age" or "ahead of its ti Significantly so that even those attacked by Benson-Pope respect many of his classroom achievements.

But it was out of the classroom, according to police witne that even more borderline behaviour took place.

Benson-Pope had a huge interest in outdoor education, organized many of the school camps each year and other door excursions.

"There was some funny discipline at the camps," one tea says in her witness statement, "including kids having to behind a car in the nighttime."

In 1982, Benson-Pope took fourth-formers to a camp a Catlins reserve south of Dunedin, where a large number of

"It is of particular public importance to see that a Minister of the Crown cannot bring undue private influence to bear on a police investigation that he is the subject of, and indeed the Minister's plea to police for information to be withheld under this section is itself of public interest, as it may be seen to be of itself an exercise of such influence. An ordinary member of the public gets no protection from this section in such circumstances.

"Accordingly, *Investigate* seeks to widen its OIA request to include the content of communications between Police and Mr Benson-Pope on the *Investigate* OIA request.

"It is the magazine's submission that the public interest properly requires full disclosure of the documentation or information originally sought, so as to clear the Minister of any suggestion of improper influence being brought to bear. Again, the fact that he pleads s9(2)(g)(i) indicates that his communications to police must have been, by definition, exceptionally free and frank, and the public have a right to know how much so.

"Turning now to s9(2)(a), again the issue here is not mere tittle-tattle of no public interest. The Minister already has a reduced right to privacy by virtue of holding high public office, and the OIA was not intended to protect the privacy of Ministers of the Crown on matters of public interest. Rather, this section was to provide protection in the first instance to ancillary people, members of the public, who might be harmed by the release of OIA material out of proportion to their involvement in the circumstances at issue.

"The Minister's reduced right to privacy is further reduced by the circumstances of the specific criminal case, and the fact that Police found a prima facie case against the Minister existed. This is an extremely rare and constitutionally important circumstance, against which Mr Benson-Pope's wish not to have the content of his communications with police must fail.

"I would draw attention to the Court of Appeal's comments in TVNZ, The Queen v David Bain, CA255/95, where the justices wrote: 'The substantial public interest in the murder and the trial is however relevant in another way. The material presented to this Court demonstrates significant media interest in and speculation about the suppressed evidence. The suppression might itself "promote distrust and discontent". That speculation is not in the interests of the administration of justice and is itself a reason supporting the revoking of the prohibition order'.

*Investigate* magazine seeks an urgent review of the police refusal to disclose the information requested, given the proximity to Christmas, the fact that the material has already been collated and reviewed by Police (subject to the addition of the latest communications) and our impending magazine deadlines."

When we got a reply from Chief Ombudsman John Belgrave, we were not expecting the answer we received. At the centre all, says Belgrave, is section 9(2)(g)(i) of the Official Informa Act, which reads:

9(2) ...this section applies if, and only if, the withholdir the information is necessary to –

(g) Maintain the effective conduct of public affairs throug

(i) The free and frank expression of opinions by or betv or to Ministers of the Crown or members of an organizatio officers and employees of any Department or organization in course of their duty;"

"In general terms," argues Belgrave, "the purpose of this tion is to avoid prejudice to the generation and expression of and frank opinions which are necessary for good governmer

"The ability of Ministers, officials and others to express t opinions on relevant issues in a free and frank manner is essential ingredient of the climate necessary for the effective c duct of public affairs."

To back up his analysis, Belgrave cites the 1982 Da Committee report that led to the creation of the Off Information Act:

"To run the country effectively the government of the needs nevertheless to be able to take advice and to deliberate it, in private, and without fear of premature disclosure. If attempt to open processes of Government inhibits the offe of blunt advice *or effective consultation and arguments* [Belgra emphasis], the net result will be that the quality of the decisi will suffer."

In other words, Benson-Pope's submissions to police and v versa and protected speech necessary for the maintenance public affairs.

"The information at issue," says Belgrave, "reflects opini put forward on behalf of Mr Benson-Pope by his lawyer, a responses by the legal advisor for the police. For the purp of my investigation it has been submitted that such exchan should occur without any inhibition from concern about disc sure under the Official Information Act.

"It has been further submitted that an expectation of co dentiality existed on the part of Mr Benson-Pope's lawyer.

"By way of basic approach, I consider that the lawyer for a p son in the position of Mr Benson-Pope should be free to expr views and opinions without concern that such communi tions will be released into the public domain under the Offic Information Act. The prospect of public disclosure in my vi would be likely to inhibit representations that may (and shou properly be made on behalf of the client.

"There is, however, no absolute rule and it is necessary for actual information and issue to be considered."

Chief Ombudsman Belgrave did consider the docume *Investigate* is seeking, and says he's satisfied that the opinions

**"Mr Benson-Pope's position as a Minister of the Crown means that there is considerably more proper public interest in the processes leading to a polic decision not to charge Mr Benson-Pope, than perhaps would apply to an ordinary criminal offender"**

both lawyer John Haigh QC and the police legal advisor "were expressed freely and frankly".

He refuses to release those communications because of the "expectation" of confidentiality. However, even that isn't the end of the matter – Belgrave is required by law to consider whether the withholding of the information "is outweighed by other considerations which render it desirable, in the public interest, to make that information available."

To that end, Belgrave says he looked again at the content of Benson-Pope's submissions on why he should not be prosecuted, and why *Investigate* shouldn't be allowed the documents, and determined that although the information might be "interesting" it was not of public interest to release it.

Naturally, *Investigate* fought back.

"It is a standing maxim of New Zealand law that "There is no confidence in iniquity" [*Gartside v Outram, 1857, 26LJ Ch 113*; per Wood VC, restated many times including *European Pacific Banking Corp v TVNZ, I Wishart and Ors, 1994*]. Iniquity as determined by the Privy Council does not even mean a test as high as illegality. Mere immorality is sufficient to trigger it," we told Belgrave.

"In a similar case to the one in question, a police officer supplied information in confidence to a reporter which revealed corruption by members of the police force. Despite statutory obligations on secrecy, the courts discharged an interim injunction to allow publication in the public interest. Full publication that is, not merely reporting the matter to "proper authorities". *Cork v McVicar, The Times LR, 31 Oct. 1984.*"

In another British case, the issue of a public figure claiming confidence also came under fire:

"It is in the public interest that P's article is displayed on the website. P's past behaviour described in the article is closely linked to his present political platform and the public should be aware of such an inconsistency in someone who is eligible. It is thus a "pressing need" and not merely information that is "interesting to the public" (*Lion Laboratories v Evans [1985] QB 526, 537*).

"Additionally, David Benson-Pope has an overwhelming conflict of interest in hiding behind the protections of s9(2)(g)(i). He is, in *Investigate's* opinion, using his Ministerial position to influence the police and intimidate them. The activities in question do not relate to his time as a Minister. Neither he nor the Police can claim immunity from scrutiny on that basis. To do otherwise would be for the Chief Ombudsman to confirm that the Labour Cabinet are indeed above the law of the land, even for alleged criminal offences predating their political office, let alone criminal offences committed in office."

The magazine then mounted an attack on the idea that letters from lawyers to police in this case should not be divulged.

"You cite in your letter that Benson-Pope's responses to police regarding the case should somehow enjoy some kind of privilege

similar to a lawyer-client privilege, even though no privileged relationship exists between the accused and Police. Indeed, the legal maxim applicable is "anything you may say can be taken down and used in evidence against you in a court of law..."

"I am unable to find any statutory ground for such a privilege inside the Act itself, nor does the section that Benson-Pope relies upon include it. Accordingly, if it is not one of the statutory defences available in the Act the Ombudsman has a duty to rule in favour of the release of the information."

The key argument appears to rest on whether Benson-Pope's legal submissions fall within the tight definition of the section 9 defence.

Firstly, the section applies "if, and only if". In other words, it is a last resort section. And it can only apply if it is necessary to "maintain the effective conduct of public affairs". Not just any conduct of public affairs – there is a suggestion inherent in the section that disclosure might result in some kind of breakdown of public affairs were the protection not in place.

Remember, the affairs in question were not public administrative matters, but personal affairs of an allegedly criminal nature that happened in a public place. For the Ombudsman to let Benson-Pope off the hook on Ministerial grounds would be like suggesting the Ombudsman should be immune from parking tickets because they hinder his ability to carry out his job without interruption.

But continuing with our breakdown of the section, it only applies to "free and frank expressions of opinion" to or from Ministers or officials that are "necessary to...maintain the effective conduct of public affairs".

In other words, not all free and frank expressions of opinion to or from Ministers or officials are covered, only those vitally necessary to maintain the effective conduct of public affairs.

"Is David Benson-Pope's desire to avoid more political embarrassment really a matter of national security and the maintenance of the rule of law? Because that is the implication from your letter, with respect," we suggested to Belgrave.

And even if the Ombudsman is correct (and we think he isn't) that the submissions are covered by that section, there's still the question of whether public interest should take precedence over Benson-Pope's right to privacy. The Benson-Pope case is a criminal justice issue, where justice should be seen to be done. There is some suggestion that police were pressured in regard to releasing the original documents under the OIA, and that too is a matter of enormous legitimate public interest.

The Ombudsman drew a distinction between what might be interesting to the public, and what is genuinely of public interest. He didn't feel the Benson-Pope documents were genuinely in the public interest.

Public interest is a legitimate defence in two scenarios – bre of confidence (alluded to above) and the right to privacy. As w already explained that any claim to confidence fails on the i uity test, or would if it was put to the court. By this, we mean although the MP's legal submissions are unlikely of themselve be iniquitous, they are central to the overarching prima facie ci inal case, and as such an important part of the picture.

The Ombudsman has already confirmed the submissions v extremely "free and frank", which again is relevant to determ ing whether they were so frank as to possibly intimidate pc out of prosecuting.

Then there's the novel defence raised for the first time by Ombudsman himself, which is that an expectation of priv existed to such an extent that it overrides the Official Informa Act's presumption that information should be released.

The dominant recent case on privacy in New Zealan *Hosking & Hosking v Simon Runting & Anor [2004] NZCA (25 March 2004).*

Lord Goff, in *Attorney-General v Guardian Newspapers (No. 2) [1990] 1 AC 109*, has been cited in the *Hosking* cas NZ as follows:

"His Lordship went on to discuss three limiting principles the principle of confidentiality only applies to information tc extent that it is confidential; (b) no duty of confidence atta to useless information or trivia; and (c) the public interest in tecting confidences may be outweighed by the public intere disclosure, particularly in the case of disclosure of iniquity".

Elsewhere in *Hosking*, the point is made by the Cour Appeal:

"The test for the "privacy" of information, i.e. information warrants protection (that its disclosure would be highly of sive to a reasonable person of ordinary sensibilities), take Campbell from the judgment of Gleeson CJ in the High C of Australia in *Australian Broadcasting Corporation v L Game Meats (2001),* comes directly from the American pri jurisprudence."

In other words, the test as to whether the information b withheld is 'private' needs to be more deeply considered in light of existing case law definitions. Is the Benson-Pope in mation likely to be "highly offensive to a reasonable person"? actual test in US law is:

"SS 652D Publicity Given to Private Life

"One who gives publicity to a matter concerning the pr life of another is subject to liability to the other for invasion c privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public."

Not only would the suppressed Benson-Pope data have t "highly offensive" to remain private, it would also have to l no legitimate concern to the public. Yet if there were trul

**"Public interest is a legitimate defence in two scenarios – breach of confidence and the right to privacy. As we've already explained that any clai to confidence fails on the iniquity test, or would if it was put to the court"**

legitimate concern, he would never have been investigated in the first place.

And further through *Hosking*:

"The Court in *Aubry [Les Editions Vice-Versa Inc v Aubry and Canadian Broadcasting Corporation (1998) 157 DLR (4th) 577]* recognised, however, that expectations of privacy may be less in certain circumstances. This will often be the case if a plaintiff is engaged in a public activity where the public interest in receiving the information should take priority."

The *Hosking* judges considered this aspect further in quoting some US jurisprudence on the issue:

"But privacy is not the only cherished American value. We also cherish information and candour, and freedom of speech. We expect to be free to discover and discuss the secrets of our neighbours, celebrities and public officials ... The law protects these expectations too – and when they collide with expectations of privacy, privacy almost always loses."

In *Bradley v Wingnut Films*, a New Zealand case involving filmmaker Peter Jackson cited in *Hosking*, the American definition of whether the information should be private was used:

"The Judge also felt the plaintiff would have difficulty establishing that the matter would be highly offensive and objectionable to a reasonable person of ordinary sensibilities."

*necessity for dissemination of information albeit involving inform tion about private lives where matters of high public (especially po ical) importance are involved."*

Not only is there no inherent right to privacy, but political f ures have even less protection, a point the judges develop at pa graph 120 of the *Hosking* ruling:

"The present case raises an important issue in relation to p vate facts. Should public figures have lower expectations of p vacy in relation to their private lives, and how does this imp on the families of public persons? Prosser identified three r sons why, in the United States context, *public figures are held have lost, at least to some extent, their right of privacy: (1) by se ing publicity they have consented to it; (2) their personalities a affairs are already public facts not private ones; and (3) there i legitimate public interest in the publication of details about pub figures.* That third factor is an important consideration to whi we will return."

David Benson-Pope holds high political office as an elect MP and Cabinet Minister. He is accused of a crime potentia carrying a prison sentence. There can be no higher legitim public interest in a democracy than scrutiny of elected pub officials by the news media.

The Hosking judges continued, ruling, "that voluntary pub figures (those who engage in public activities, assume a pron nent role in institutions or activities having general econom

**"Freedom of expression is the first and last trench in the protection of liberty. All of the rights affirmed by NZ Bill of Rights Act are protected by that particular right. Just as truth is the first casualty of war, so suppression of truth is the first objective of the despot – Court of Appeal"**

As we told the Ombudsman, his provisional view that an issue of privacy exists should be reconsidered in view of warnings from the Court of Appeal on precisely this matter in *Hosking*:

"In his judgment Randerson J listed several reasons for his conclusion that the courts should not recognise a separate privacy tort. The same reasons were at the forefront of the arguments in this Court. The first of these is that the deliberate approach taken by the legislature to date on privacy issues suggests caution towards "creating new law in this field". Emphasising this, the respondents contend that the deliberate exclusion from the Bill of Rights Act indicates a clear decision not to introduce any broad privacy protection in our law."

*Investigate* believes it is unconstitutional for the Ombudsman to make a decision on privacy not grounded in statute – the OIA – or common law. Indeed, as the upholder of the Official Information Act, it would be ironic indeed for the Ombudsman to be creating new privacy laws where no legal basis for them exists.

The judges in *Hosking*, in the magazine's view, deliver a killer blow to Benson-Pope or his lawyer's arguments regarding privacy, when they say this:

"The question is how the law should reconcile the competing values. Few would seriously question the desirability of protecting from publication some information on aspects of private lives, and particularly those of children. *Few would question the*

cultural, social or similar public interest, or submit themsel or their work for public judgment) have no right of privacy relation to public appearances or activities. But as Lord Wo CJ said in A v B (supra at 554): 'Where an individual is a pub figure he is entitled to have his privacy respected in the approp ate circumstances. A public figure is entitled to a private life. T individual, however, should recognise that because of his pub position he must expect and accept that his actions will be mc closely scrutinised by the media.

" 'The right to privacy is not automatically lost when a pers is a public figure, but *his or her reasonable expectation of privacy relation to many areas of life will be correspondingly reduced as pu lic status increases.* Involuntary public figures may also experien a lessening of expectations of privacy, but not ordinarily to t extent of those who willingly put themselves in the spotlight'.'

In fact, so tough is the privacy test for politicians internatio ally that New Zealand courts note even their families are f game for public scrutiny, especially if criminality is alleged:

"In the United States the families of people who court pu lic attention will also have lower expectations of privacy becau the legitimate public interest in the public figure is not necess ily limited to the individual himself. In *Kapellas v Kofman 1 C 3d 20 (1969)* a newspaper editorial was published urging electc not to vote for a certain candidate for the city council. The ar

cle referred to the fact that three of the candidate's six children had committed various offences and misdemeanours. She sued for, inter alia, an invasion of her children's privacy but the claim failed, with the Court observing (at para [17]): '*... when the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere* ... The children's loss of privacy is one of the costs of the retention of a free marketplace of ideas'."

On the issue of what is legitimate, the *Hosking* bench wrote:

"Legitimate public concern -

"There should be available in cases of interference with privacy a defence enabling publication to be justified by a legitimate public concern in the information. In *P v D*, absence of legitimate public interest was treated as an element of the tort itself. But it is more conceptually sound for this to constitute a defence, particularly given the parallels with breach of confidence claims, where public interest is an established defence. Moreover, it would be for the defendant to provide the evidence of the concern, which is the appropriate burden of proof if the plaintiff has shown that there has been an interference with his or her privacy of the kind we have described.

"Furthermore, the scope of privacy protection should not exceed such limits on the freedom of expression as is justified in a free and democratic society. A defence of legitimate public concern will ensure this. The significant value to be accorded freedom of expression requires that the tort of privacy must necessarily be tightly confined. In *Douglas v Hello!* Brooke LJ formulated the matter in the following way (at para [49]): '*[A]lthough the right to freedom of expression is not in every case the ace of trumps, it is a powerful card to which the courts of this country must always pay appropriate respect*'."

The *Hosking* Bench returned to the definition of public interest used by the Ombudsman to provisionally reject *Investigate*, and concluded that the balance should fall to the media's advantage unless there was a compelling reason not to:

"The importance of the value of the freedom of expression therefore will be related to the extent of legitimate public concern in the information publicised.

"The word "concern" is deliberately used, so as to distinguish between matters of general interest or curiosity to the public, and matters which are of legitimate public concern. We accept in this respect the observation of Eichelbaum CJ in *TV3 Network Services Ltd v Broadcasting Standards Authority (at 733)* that there is a difference between material that is "merely interesting" to the public and material "properly within the public interest, in the sense of being of legitimate concern to the public".

"A matter of general interest or curiosity would not, in our view, be enough to outweigh the substantial breach of privacy harm the tort presupposes. *The level of legitimate public concern would have to be such as outweighs the level of harm likely to be caused.* For example, if the publication was going to cause a major risk of serious physical injury or death (as in the Venables case), a very considerable level of legitimate public concern would be necessary to establish the defence.

"The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure."

Applying any of these tests, Benson-Pope's plea to privacy in regard to his communications with police must fail.

Justice Keith, in a separate judgement in the *Hosking* case, went further, calling the media's right to freedom of expression "central" to our democratic system:

"The importance of freedom of expression -

"The right to freedom of expression is recognised in our law (notably by Parliament in s14 of the Bill of Rights), as in the law of many other parts of the world, as being of the highest importance in a modern democracy. The purposes and values underlying it are also widely accepted. They include individual liberty and self-fulfillment, the value of the marketplace of ideas and the protection and advancement of democratic self-government.

"*The right of privacy should not interfere with publication of matters of public record, or obvious significant public interest,*" Justice Keith writes [our emphasis].

At paragraph 267 of the *Hosking* judgements, Anderson J also warns strongly against the idea that public figures should enjoy special privacy protection:

> "Freedom of expression is the first and last trench in the protection of liberty. All of the rights affirmed by NZ Bill of Rights Act are protected by that particular right. Just as truth is the first casualty of war, so suppression of truth is the first objective of the despot.

"In my view, the development of modern communications media, including for example the world wide web, has given historically unprecedented exposure of and accountability for injustices, undemocratic practices and the despoliation of human rights. A new limitation on freedom of expression requires, in my respectful view, greater justification than that a reasonable person would be wounded in their feelings by the publication of true information of a personal nature which does not have the quality of legally recognised confidentiality."

Apart from the overwhelming public interest in finding out why police chose in the end not to prosecute (and Benson-Pope's frank submissions are relevant to that quest), *Investigate* believes his plea for confidentiality fails at one final hurdle.

The Ombudsman has referred to Benson-Pope's lawyer John Haigh QC expecting all discussions to be confidential, and that this expectation of confidentiality is crucial for the maintenance of public affairs.

However, if that is indeed the case, why did the police release dozens of pages of interim submissions from John Haigh QC and even Benson-Pope himself in the original document release? Surely releasing those documents must compromise the "expectation" of confidentiality for others dealing with police in future?

In *Investigate's* view, Labour MP David Benson-Pope's actions up to the date of this issue going to press indicate he still has something to hide, and the magazine will pursue this until the question is resolved. INVESTIGATE