(1) ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR IDENTIFYING PARTICULARS OF THE VICTIM AND THREE OTHER PERSONS

(2) ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR IDENTIFYING PARTICULARS OF THE JURORS LISTED ON THE INDICTMENT IN *R V HARRIS* HC WHANGAREI T5/83

(3) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 15**

	Reference No. HRRT 015/2012
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**ROBERTO CONCHIE HARRIS**
	PLAINTIFF
AND	**DEPARTMENT OF CORRECTIONS**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Mr BK Neeson, Member

REPRESENTATION:
Mr RC Harris in person
Ms M Reddy for Defendant
Ms D Swan and Ms K Evans for Privacy Commissioner

DATE OF HEARING: 3, 4 and 5 April 2013

DATE OF DECISION: 24 April 2013

DECISION OF TRIBUNAL ON THE MERITS

Introduction

[1] Mr Harris alleges that on a date unknown at a café in Albany near Auckland Prison, the Department of Corrections (Corrections) lost documents from his file and thereby disclosed personal information in breach of information privacy Principle 11. The issue in this case is whether the evidence establishes that such breach occurred.

Non-publication orders

[2] At the commencement of the hearing on 3 April 2013 Ms Reddy for Corrections sought non-publication orders in relation to four specific individuals. One of them is the victim (the victim) of sexual offending by Mr Harris, the other is the victim's grandmother (the grandmother). Publication of her (the grandmother's) name will lead to the identification of the victim. The third person obtained a non violence/non molestation order against Mr Harris and was on Mr Harris' Victim Notification Register. She has previously complained to the New Zealand Parole Board of harassment by Mr Harris. The fourth person is a relative of Mr Harris and it is claimed by Mr Harris that she has been the recipient of threats to her safety by reason of her being related to Mr Harris.

[3] It was submitted by Corrections that it is not in the interests of justice that the identities of the four individuals be revealed because the public interest in maintaining an open justice system can be satisfied without the identities of these individuals being revealed. Indeed there is no public interest in the disclosure of their identities. Furthermore, unwarranted disclosure of their identities and affairs might cause harm to each of the individuals, they being vulnerable to re-victimisation and may suffer stress, embarrassment and anxiety. Finally, Corrections believe that Mr Harris has contacts in the criminal fraternity who may use the personal information adversely against the individuals should their names be published in the media.

[4] Mr Harris did not oppose the making of the non-publication orders sought by Corrections.

[5] The submissions by Corrections were accepted by the Tribunal. The concession by Mr Harris was proper. It was on these circumstances that the Tribunal at the commencement of the hearing on 3 April 2013 made an interim order under s 107(3)(b) of the Human Rights Act 1993 (incorporated into the Privacy Act 1993 via s 89 of that Act) prohibiting publication of the names of the four individuals concerned and of any details which might identify them. The Tribunal further ordered that there be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

[6] Having now heard all the evidence we are satisfied that the interim orders should be made permanent. The terms of our final non-publication orders are set out at the conclusion of this decision.

[7] We turn now to a separate but related matter. Ms Reddy drew attention to the fact that at the request of Mr Harris, the bundle of documents at pp 001 and 002 contains copies of the backing sheet to the indictment in *R v Harris* (High Court Whangarei T5/83) in which Mr Harris was charged with two counts of murder. Following a jury trial he was on 25 November 1983 found guilty on both counts. At some later point in time Mr Harris was mistakenly provided with a copy of the indictment on which the names of all 12 jurors are recorded.

[8] Mr Harris agrees he should never have been provided with this information and has produced the document simply to show how accidental disclosure of confidential information can occur.

[9] In these circumstances, with the consent of Mr Harris, at the commencement of the hearing we made a final order under s 107(3)(b) of the Human Rights Act and s 89 of the Privacy Act that the names and any details which might lead to the identification of the jurors not be published. This was expressed to be a final order. The terms of that final order are similarly set out at the conclusion of this decision. This order is complementary to the protection afforded by s 32B of the Juries Act 1981 and by Part 2 of the Juries (Jury Service and Protection of Particulars of List Information) Amendment Act 2012.

Mr Harris – a brief history

[10] As mentioned, Mr Harris was on 25 November 1983 found guilty by a jury on two counts of murder and was sentenced to life imprisonment. He has twice been released on parole and twice been recalled to prison.

[11] The first release on parole was on 14 December 1992. Then on 20 October 1994 Thorp J ordered an immediate recall following (inter alia) numerous complaints of assault and the making of demands for money. See the bundle of documents pp 005 to 008 as well as Exhibit A.

[12] The second release on parole was on 4 September 2006. However, Mr Harris was arrested on 15 March 2007 following an allegation that on the day of his release on parole he indecently assaulted a young girl then aged approximately 14 years (the victim). The victim had been brought up by her grandmother who was described by Mr Harris as an old family friend. A Parole Board decision given on 22 March 2004 described the grandmother as Mr Harris' "partner" who had hoped that upon Mr Harris being released on parole it would be possible to build up a relationship with him "on the outside". Both the grandmother and the victim had visited Mr Harris in prison.

[13] Mr Harris pleaded not guilty to the charge of indecent assault. He told the Tribunal that the grandmother had orchestrated a false complaint by the victim as revenge after discovering on the day of Mr Harris' release that he intended living with someone else, not the grandmother.

[14] The first jury trial ended in disagreement but at the re-trial Mr Harris was on 18 November 2008 found guilty and sentenced to imprisonment for two years and three months.

[15] We will return later to the significance of the accusation, trials and conviction.

The privacy breach acknowledged by Corrections

[16] In the background to this case is an unauthorised disclosure by Corrections of information relating to Mr Harris and to which Corrections admits. That admitted breach of information privacy Principle 11 is not part of the present complaint brought before the Tribunal by Mr Harris but is best briefly acknowledged as it assumes significance later in the narrative.

[17] In the statement of reply Corrections admit that on 18 June 2008 a Department of Corrections High Risk High Profile Memorandum and list with information on it relating to 266 offenders with high and complex re-integrative needs (the memorandum) was found on the corner of Swanson and Federal Streets in central Auckland outside the Auckland District Court. The memorandum referred to offenders who had been recently released into the community or whose New Zealand Parole Board hearings were pending. The memorandum had been legitimately taken to an interagency meeting being held in another location to discuss the offenders' risk management and release proposals.

Corrections accept that the memorandum should have been secured in a briefcase or satchel.

[18] The memorandum was passed to the *New Zealand Herald* but was never made "public" as such. Once the loss was discovered, Corrections immediately took a number of steps to obtain the return of the original and of any copies and to contain any harmful effects from its loss. The originals and five copies of the memorandum were returned to the control of Corrections as a result of a search warrant executed by the Police at the offices of the *New Zealand Herald* on 22 June 2008. In addition, appropriate follow-up action was taken with those media organisations that may have had access to copies of the document, including obtaining undertakings as to confidentiality.

[19] The Office of the Privacy Commissioner was notified and the Chief Executive of Corrections met with the Privacy Commissioner and the Assistant Commissioner (Investigations) on 23 June 2008. The Commissioner's investigation later concluded that Corrections had taken adequate steps to ensure that the mislaid information was returned to it and there was no harm of the kind required to find there had been an interference with the privacy of the prisoners concerned.

[20] The relevant staff member employed by Corrections was disciplined and Corrections took steps to ensure that loss of a similar kind did not occur. In June 2008 it reviewed its policy relating to the retention, safe keeping and security of hard copy, computer and High Risk High Profile reports.

[21] By letter dated 1 July 2008 the then Chief Executive of the Department of Corrections wrote to Mr Harris giving formal notification of the loss of the documents, of the steps taken to recover them and of the further steps being taken to prevent further unauthorised access to or use of the information. Mr Harris was also provided with a copy of the information referring to him and which had been lost and then recovered.

[22] This 2008 privacy breach is not directly part of Mr Harris' present case and on more than one occasion during the hearing he stressed that he accepted that Corrections had acted properly upon discovering the loss of the documents. He does rely, however, on the fact of the loss as evidence that documents are lost or misplaced by Corrections.

[23] With these preliminary matters having been disposed of we turn now to the case presented by Mr Harris. We do not intend providing an exhaustive account of the evidence he gave over two and a half days. A general overview only is intended.

THE CASE FOR MR HARRIS

[24] Mr Harris alleges that some time between November 2007 and November 2008, at a time when he was held at Auckland Prison, he received through the mail an anonymous letter from outside the prison telling him that documents from his prison file had been found by members of the public at an address described as a café in Albany. The undated letter also contained threats against the grandmother and the victim of the indecent assault committed by Mr Harris on 4 September 2006. The text of the letter follows. Where necessary the names of the grandmother and victim have been redacted:

> To Mr R.C. Harris
>
> This is some of the info found at an Albany cafe by myself an some friends. We don't have anything good to say to you after reading all the shit about you an other people in the prison material. Some fucked up prison or probation people have left the files in Albany. Many friends of ours have read it all, some photo copied most of it and were going to send it to the media. Some still have personal letters and info from the files, who's the horny and hot bitch [name

redacted]? and the narks [name of grandmother] an [name of victim]? What are many people in these files having anything to do with a murderer, drug dealer an all else? We had a fucken laugh reading the charge sheets for the offences you did in prison. Some friends of ours have friends in some gangs and they were pissed reading about [name of grandmother] an [name of victim] being narks. Some are sure they know them, they live on the North Shore. We will keep all the peoples names in the files and their personal info an hope you all have some nightmares.

Name Withheld.

[25] Mr Harris says that enclosed with this letter were approximately 100 documents he believes were found at the café. He contends that these documents could only have come from his prison file and that the unauthorised disclosure of this personal information about him breached Principle 11.

[26] Mr Harris did not at that time notify Corrections or any prison officer of the alleged discovery of the documents at a café as he believed that the documents would then be confiscated from him and he would lose both them and the letter itself ie the only evidence he had of the alleged privacy breach. He claims that he did, however, write to the Privacy Commissioner on three separate occasions complaining of the breach before finally getting through by way of a fourth letter dated 6 April 2010. Our credibility finding in relation to this claim follows later in the decision.

[27] In 2009 or possibly as late as April 2010 Mr Harris sent the 100 or so documents to his then lawyer, Mr Chris Tennet, a Wellington barrister who was acting for him in relation to the admitted loss by Corrections of the documents outside the Auckland District Court. In the meantime some of the documents were lost either when Mr Harris was transferred from one prison to another or when his cell flooded after a heater burst.

[28] Approximately two years after the receipt of the anonymous letter enclosing the 100 or so documents, Mr Harris received two further anonymous letters from outside the prison. He was then at Waikeria Prison. The date of receipt was either 6 or 7 April 2010. As will be seen from the text of the letters which follow, it is asserted in both letters that they have been written by individuals who came by information in the documents allegedly found in the Albany café.

[29] The first of the 2010 letters is addressed to the grandmother and the victim. Threats of serious harm are made to both women. Their names have once again been redacted:

[name of grandmother] an [name of victim]

We know from documents found in Albany you fuckin sleazy bitches are fuckin pig shit police nark's. You's will get what's coming to you bitches. We have let all our mate's know in most gang's what you fucker's are. We know where you's live an been watching you's an who's you's knock around with. You'll never know when it's coming, you'll be bashed an raped, acid thrown in your faces to leave you monsters, your fuckin house will be burnt to the ground, your car will blow up when you go to start it. Bitches we are watching you's [illegible] this fuckin Roberto Harris murderer. You's know it's all in the prison papers we have.

F.T.P. Fuck You's F.T.W.

[30] The second letter is addressed to Mr Harris' sister and makes threats against her as well:

To [name of sister]

This is to let you know we have some prison files and personal details on you's. Friends of our's found this info in a cafe in Albany and your fucking brother is on all of it. So you's better

> watch out some heavy fucking shit will come your way. We have all your personal details and heaps of other information. Some dumb fucker of a prison officer or probation officer left all this shit in public.

[31] On almost exactly the same day, by letter dated 6 April 2010 Mr Harris sent a detailed 12 page handwritten letter to the Privacy Commissioner complaining about the discovery of his personal information at the Albany café. We return to the content of this letter shortly. It is sufficient to note that neither of the two new anonymous letters are referred to in this communication to the Privacy Commissioner, nor were copies enclosed.

[32] As to the two new anonymous letters, Mr Harris said that he was concerned for the safety of the grandmother, the victim and of his sister and wanted to warn them of the threats made against them. He accordingly took the following steps:

> **[32.1]** On or about 8 April 2010 he gave to Principal Corrections Officer E Harihari a general description of what had happened and a "rough description" of the documents received from outside the prison. When PCO Harihari asked to see the documents, Mr Harris refused to let the officer see the documents.
>
> **[32.2]** On 12 April 2010 Mr Harris attempted to post from the prison an envelope addressed to a Mr Munroe, a relative. Inside the envelope were two further pre-addressed and stamped envelopes, the one addressed to the grandmother and the other to his (Mr Harris') sister. The envelopes contained the relevant threatening letter. Mr Monroe was asked to post these two letters. Prison officers opened all three envelopes and quickly realised that the contents of the envelopes addressed to the grandmother and sister were of a threatening kind. They copied both letters, mistakenly returning the "originals" to Mr Harris who then posted them to Mr Tennet with the result that when prison officers searched Mr Harris' cell on 13 April 2010 to recover the letters, they could not be found.
>
> **[32.3]** By letter dated 15 April 2010 Mr Harris wrote to the prison manager requesting the return of the copies which had been taken of the two threatening letters. In the course of complaining about the interception of these letters Mr Harris mentioned in passing that approximately 100 documents from his prison file had been found in an Albany café, that his solicitor now had possession of the documents and that Mr Harris had written to the Privacy Commissioner.
>
> **[32.4]** On 15 April 2010 a fellow prisoner (Brent Gilbert) wrote a letter to Mr Tennet stating that he (Mr Gilbert) had witnessed the receipt by Mr Harris of the two anonymous letters addressed to the grandmother and sister respectively.

[33] Mr Harris concedes that his letter dated 15 April 2010 to the prison manager and the oral communication he had had with PCO Harihari on 8 April 2010 was the first notification by him to Corrections that documents from his prison file had allegedly turned up outside Auckland Prison at a café in Albany.

[34] The Office of the Privacy Commissioner (OPC) wrote to Mr Harris on 23 April 2010 requesting further information and in particular any evidence to show that the loss of documents had in fact occurred. In August 2010 the OPC received from Mr Tennet copies of the three anonymous letters. At the conclusion of the investigation the Assistant Commissioner (Investigations) decided that there was no credible basis to the complaint made by Mr Harris. See the letter dated 22 December 2010 from the Assistant Commissioner to the Chief Executive of Corrections. In this same letter the author noted that Mr Harris had asked the OPC to send the threatening letter addressed to the grandmother (and victim) to "warn them" about the threats contained in the letter.

The Assistant Commissioner records that the OPC would not comply with the request. By letter dated 21 January 2011 the OPC wrote to Mr Tennet following a request by Mr Harris that the OPC return to Mr Tennet all documentation he had sent to the OPC as part of his complaint under the Privacy Act. The letter lists the documents being returned. They are itemised as follows:

> - Letter from Mr Harris to our Office dated 6 April 2010
> - Letter from Mr Harris to our Office dated 15 April 2010
> - Letter from Mr Harris to our Office dated 4 May 2010
> - Letter from Mr Harris to our Office dated 27 May 2010; and
> - Copies of letters that Mr Harris says were sent to him in prison and which we received from you on 12 August 2010.
>
> This is all the documentation that we have received directly Mr Harris or on his instruction during our investigation of his complaint.

[35] There is no evidence that the Privacy Commissioner received the three letters which, in his letter dated 6 April 2010, Mr Harris claims to have written to the Privacy Commissioner complaining about the alleged loss of documents.

[36] As part of his case Mr Harris has referred to other instances in which personal information has allegedly been lost by Corrections or in which documentation relating to other prisoners had come into Mr Harris' possession. In particular, following a request by Mr Harris under the Privacy Act for his medical files, he had received not only the requested documents, but also a report on a female prisoner whom he has never met. In addition, when putting out his trash one day he found in the rubbish bin a report by a registered clinical psychologist on another prisoner at Rimutaka Prison. Evidence of this kind was, during the hearing, referred to as similar fact evidence. The submission for Mr Harris was that because other documents have been allegedly mislaid by Corrections, it is more credible that certain of his documents were lost by Corrections at a café in Albany. These further alleged breaches have not been the subject of an investigation by the Privacy Commissioner and for that reason the Tribunal has no jurisdiction to investigate them as privacy breaches. However, the evidence was admitted provisionally to allow Mr Harris the maximum freedom to establish their relevance during the course of the hearing. See for example the *Minute* of the Chairperson issued on 15 February 2013 at [3]. Our ruling on this similar fact evidence follows later.

[37] Mr Harris also points to a series of email exchanges in the bundle of documents recording that in the process of his numerous transfers from prison to prison, Corrections appears to have mislaid one or more of the imprisonment warrants. However, even assuming such warrants have been mislaid, it does not provide any real support for the claim that 100 or so documents were lost at an Albany café.

THE CASE FOR THE DEPARTMENT OF CORRECTIONS

[38] The defence advanced by Corrections is simple and straightforward. It is submitted that Mr Harris has not established on the balance of probabilities that a breach of Principle 11 has taken place. It follows that there has been no interference with his privacy and that he has not established any loss, adverse effect or significant harm in terms of s 66(1)(b) of the Privacy Act.

[39] Only one witness was called by Corrections, being Mr PD Miller, Manager Ministerial Services, Wellington. It is not necessary to recite his evidence at length. For present purposes we note only the following significant points:

[39.1] During the pre-trial discovery process and during the course of the hearing Mr Harris has produced documents many of which appear to be photocopies. It was Mr Miller's evidence that because these documents are photocopies, it is not possible to verify their provenance. He notes, however, that Mr Harris has made several requests under the Privacy Act for access to personal information and has been provided with copies of documents from his file. Such requests are dealt with locally by the particular prison manager. Only difficult cases are referred to Head Office. There is inconsistency from prison to prison and officer to officer as to how Privacy Act requests are complied with. Documents released under the Privacy Act are not invariably watermarked "Released Under The Privacy Act". Furthermore, it is possible that documents which ought to have been withheld under ss 27 to 29 of the Act were mistakenly released to Mr Harris. Overall, there are several alternative explanations as to how the alleged Albany copies came into the possession of Mr Harris.

[39.2] As to those documents which are originals (Mr Miller said there were six), all could have been received by Mr Harris by means other than via a café in Albany.

[40] A brief description of the documents follows:

[40.1] Document 1 is a signed faxed warrant issued by Thorp J for the return of Mr Harris to prison after the recall in 1994. The *Minute* issued by Thorp J on 20 October 1994 states:

> Mr Harris to be given a copy of this minute with the order.

[40.2] The evidence of Mr Miller, in effect, is that given the terms of this direction it is not surprising that Mr Harris is in possession of an original document even though, due to the passage of time, it has not been possible to find a copy of the original on the Corrections file. As to this Mr Harris said that he cannot recall receiving the warrant. However, the submission for Corrections is that it must have been given to him as he has possession of it.

[40.3] Document 2 is a letter dated 14 September 1999 from a firm of Auckland solicitors, Jackson Russell, to Corrections advising that they were acting for a client who had been granted a non-violence order under the Domestic Protection Act 1982 against Mr Harris. Corrections were asked to bring a copy of the non-violence order to the attention of Mr Harris. The bundle of documents contains two versions of the Jackson Russell letter. They are identical except that the original held by Mr Harris is endorsed by him on 20 September 1999 as acknowledging receipt of a copy of the non-violence order. In these circumstances, Corrections contend, possession of the document by Mr Harris is entirely what is to be expected, given that it was handed to him by Corrections at the request of Jackson Russell. Indeed Mr Harris confirmed in cross-examination that he signed for a copy of the documents sent by Jackson Russell for service on him.

[40.4] Document 3 is a Visitor Approval Form. Mr Harris says that he provided the form to the visitor who is associated with the Salvation Army. The form was provided in blank except that Mr Harris had written on it that the nature of the relationship was "Friend". The balance of the document was filled in by the visitor. Mr Harris contends that the form was then delivered directly to Corrections. Mr Miller is unable to comment on that allegation but Ms Reddy points out that the form does not contain anything which suggests that it reached

the prison file and from there was "lost". The point is that if the visitor returned the document to Mr Harris instead of to Corrections, it was unsurprising that Mr Harris had possession of the original. Mere possession of the original does not establish a loss at a café in Albany.

[40.5] Document 4 is a Request for Interview Form. In cross-examination Mr Harris conceded that the version held by him has been partly completed in type by a prison officer recording the reasons for Mr Harris' request for the interview, the action taken and so on. Mr Harris has signed and dated the document in three places. Ms Reddy submits that this establishes that at some stage Mr Harris had possession of the document. There is a similar, but not identical version of this document in the bundle taken from the current Corrections file. Mr Miller's evidence is that documents like these are often handed to prisoners and Mr Harris agreed. Mr Miller's evidence is also that it would not be unusual for the complaining prisoner to have a copy or copies of the document. Again, Mr Harris agreed. Once more possession of the document does not of itself establish it came into Mr Harris' possession via a café in Albany.

[40.6] Document 5 is the letter from the Chief Executive of Corrections dated 1 July 2008 to Mr Harris giving notice of the incident in which documents were lost outside the Auckland District Court. As the letter is addressed to Mr Harris it is Mr Miller's evidence that it is unsurprising that Mr Harris has possession of the original.

[40.7] Document 6 is a Record of Hearing in relation to a disciplinary charge brought against Mr Harris and to which he pleaded not guilty. The charge was ultimately withdrawn. Mr Harris conceded that he would have been given the documents. Once again, possession of the document does not establish it was lost in Albany.

[41] Mr Miller also gave evidence that it is permitted that a prisoner personally carry out a physical inspection of the prisoner's file, albeit in the presence of a Corrections officer. In this way it was possible that Mr Harris could have had direct access to original documents from his prison file and extracted them himself without consent. Mr Harris vigorously challenged this evidence. In particular he said that he had never had such access to his file. As there is no evidence that Mr Harris did have direct access to his file, we leave the point out of our assessment of the case. As will be seen there are more significant matters which we have taken into account in arriving at our decision.

DISCUSSION

[42] Before the Tribunal can grant a remedy under the Privacy Act it must be satisfied on the balance of probabilities that any action of Corrections was an interference with the privacy of Mr Harris. See s 85(1) of the Privacy Act.

[43] In the context of a claim under Principle 11 the sequential steps to be followed are those identified in *L v L* HC Auckland AP 95-SW01, 31 May 2002, Harrison J at [20]:

[43.1] Has there been a disclosure of personal information. The plaintiff carries the burden of proving this threshold element on the balance of probabilities.

[43.2] If the Tribunal is satisfied that personal information has been disclosed, the burden shifts to the defendant to establish to the same standard that that disclosure fell within one of the exceptions provided by Principle 11.

> **[43.3]** Third, if the Tribunal is satisfied that the personal information was disclosed and that the defendant has not discharged his or her burden of proving one of the exceptions in Principle 11, the Tribunal must then determine whether the disclosure constituted an interference with the individual's privacy as defined in s 66 of the Privacy Act. That is, has the plaintiff established one of the forms of actual or potential harm contemplated by s 66(1)(b). The burden of proof reverts to the plaintiff at this stage.
>
> **[43.4]** Fourth, if the Tribunal is satisfied to this stage, then its final task is to determine whether, in its discretion, it should grant any of the statutory remedies identified in s 85 of the Act.

See also *Steele v Department of Work and Income* [2002] NZHRRT 12, *Ram v Kmart New Zealand* [2003] NZHRRT 27 and *Williams v Department of Corrections* [2004] NZHRRT 4.

[44] It is not a defence that the interference was unintentional or without negligence on the part of the defendant. See s 85(4) and *L v L* at [13] and [99].

[45] The challenge faced by Mr Harris is formidable. He is a prisoner endeavouring to establish that documents were lost by Corrections at a café outside the prison precincts. Mr Harris was not present when the alleged incident occurred and no identifiable person has stepped forward to say that the documents were in truth found at the yet to be identified café. All Mr Harris has are the three anonymous letters and such of the 100 or so documents said to have been enclosed with the first of the three letters as are still in his possession. He also relies on the similar fact evidence mentioned earlier.

[46] It is inevitable that in these circumstances the credibility of Mr Harris himself assumes central importance as does the authenticity of the three letters in question.

[47] We have given anxious consideration to these issues in light of the evidentiary challenges faced by Mr Harris compounded by the not inconsiderable difficulties faced by any litigant in person, particularly one challenging the very agency responsible for his detention.

[48] Our conclusion, however, is that the central facts on which the claim rests have not been established to the required probability standard. Indeed, we are of the view that the letters are not genuine documents. The claimed loss of the documents at the café is a fiction. The claim was a mechanism to facilitate the sending of a threatening letter to the grandmother and the victim or to get damages from Corrections, or both. There was no loss of documents at the café and the three anonymous letters are not genuine documents. The claim fails at the first *L v L* step. The reasons for our conclusions (which are to be read cumulatively) follow.

Motivation

[49] We address first the question of motivation.

[50] It is to be recalled that Mr Harris was first released on parole on 14 December 1992. Only two years later he was recalled on 20 October 1994. This must have been disappointing for Mr Harris, to say the least as the recall made more difficult his release on parole in the future. Indeed he was not released again until 4 September 2006, some twelve years later.

[51] Mr Harris was only at large on his second release on parole for about six months before his arrest in March 2007 for the offence committed on the very day of his release ie on 4 September 2006.

[52] Thereafter, from March 2007 he was preoccupied with his defence to the indecent assault charge. There was an initial trial in October 2007 followed by a second trial in October 2008 leading to a conviction and sentence of two years and three months imprisonment.

[53] Quite apart from having to serve this sentence, Mr Harris faced the even greater difficulty of securing a third release on parole. In 2007 he was some 60 years of age. As he himself said in his evidence to the Tribunal, he is now 65 years of age and has lost six years with his family and children. While he received a sentence of 27 months imprisonment, his time in prison has now stretched to an additional six years. He said it has been very hard to accept his fate. We have no doubt that this is true.

[54] It was also clear from the two and a half days Mr Harris spent giving evidence to the Tribunal that he has strong hostile feelings in relation to the grandmother. He portrayed her as a woman who felt scorned when she discovered on his release date that Mr Harris was going to live with another person (whom Mr Harris described to the Tribunal as his partner). He said she was embittered and to extract retribution incited the victim to make a false complaint that she had been sexually assaulted by Mr Harris. Clearly the jury at the second trial did not believe the claims made by Mr Harris. He nevertheless continues to be very angry.

General implausibility

[55] Second, it is to be noted that the alleged discovery of the "lost" documents from the prison file occurred between the recall of Mr Harris to prison in March 2007 and his conviction in November 2008. The other significant event in 2008 was the loss on 18 June 2008 by Corrections of documents outside the Auckland District Court. Mr Harris was one of about 20 to 30 prisoners who sought legal aid with a view to bringing a class action against Corrections but the contemplated proceedings did not eventuate once the Legal Service Agency declined legal aid in January 2009.

[56] After a long period of inactivity a number of "events" are said to have occurred in April 2010. First, the arrival of the further two anonymous letters, one of which renewed the threats against the grandmother and victim. Mr Harris was careful to ensure that this "event" was witnessed by another prisoner (Brent Gilbert who wrote a statement addressed to Mr Tennet). Mr Gilbert took the time to note that the intended recipients of the two letters (indeed Mr Harris himself) could be in "grave danger" of harm. Given that Mr Gilbert's letter is addressed to the lawyer acting for Mr Harris, the terms of this document are somewhat contrived. Second, there was the simultaneous first recorded complaint to the Privacy Commissioner (concerning the alleged loss of the documents) in the form of the letter dated 6 April 2010. Third, there was the first notice to Corrections by Mr Harris of his complaint that documents from his file had been lost in Albany.

[57] This flurry of activity is to be contrasted with Mr Harris' silence on receiving the first letter in the period November 2007 to November 2008. He made no complaint to Corrections in this two year period. Nor did he mention the letter to his lawyer even though it is his evidence that he received the letter and the 100 or so documents during his second trial. Nor did he tell the Police, with whom he would have had contact during the course of the trial. When asked about this apparent failure Mr Harris responded by giving contradictory evidence. He claimed that he thinks he did report the first letter to

the Police, but cannot be sure. If he did complain he did not get a response. Given the vigorous assertion of innocence by Mr Harris and his claim that the grandmother had set him up, we believe it unlikely that he would not have drawn the letter to the attention of the Police or that the Police would have taken no action had they in fact been told of the threats in the letter to the two main prosecution witnesses. It also seems odd that Mr Harris would lodge a complaint with the Police but not with Corrections. It is also to be observed that prior to the hearing before the Tribunal, Mr Harris had never before asserted that he notified the Police of the first letter.

[58] Pressed on this point Mr Harris said that he told his sister of the first letter and he thinks he asked her to tell the grandmother and the victim of the threats. While the first letter contained threats against the grandmother and the victim, he (Mr Harris) was not "overly perturbed". It was only when he received the later two letters that he became really concerned as the threats were more in-depth and vivid. Contradicting his other testimony, he said that neither before, during nor after the second trial did he tell the Police of the letter. It was only after the two new letters arrived on 6 or 7 April 2010 that he decided, out of concern for their safety, that he should warn the grandmother and the victim of the threats to their safety. Asked why it took him two years to himself write to the grandmother to warn her of the threats, he said he did not know.

[59] Our conclusion is that the claimed circumstances in which the first letter allegedly arrived in the post in the period November 2007 to November 2008 are not true. Nor is the letter a genuine document.

[60] Rather both it and the "later" two letters were brought into existence to deliver threats to the grandmother and victim. The letter to Mr Harris' sister (which is of much milder content) is part of the smokescreen designed to create the impression that Mr Harris and his sister were as much at risk of serious harm as the grandmother and victim.

[61] The persistence with which Mr Harris has pursued his efforts in communicating the threats to the grandmother and victim is seen not only in the attempt to send them through the prison mail to a third person for onward delivery, but also in the subsequent letter dated 15 April 2010 from Mr Harris to the grandmother reporting that Mr Harris was in receipt of a letter threatening harm to the grandmother and the victim and that Mr Harris had asked his solicitor to send the grandmother a copy of that threatening letter. When this letter to the grandmother was intercepted by Corrections, Mr Harris then asked the Office of the Privacy Commissioner to send the threatening letter to the grandmother.

The failure to complain to Corrections

[62] The third point is that for a period of two years Mr Harris did not notify Corrections of the loss of the documents in Albany. He says that he was afraid that if he took this step the evidence in his possession would be confiscated. But he had the option of telling his lawyer, Mr Tennet and giving to him (Mr Tennet) the documents for safe keeping, a step he belatedly took some time between 2008 and 2009, possibly as late as April 2010. Given the circumstances of the two trials, he had ample opportunity to communicate with his lawyer and to deliver the documents into safe keeping. He did not do this until approximately 12 months after the documents were received. Even having done so, he still lodged no complaint with Corrections.

[63] He does, however, claim that the letter which enclosed the 100 or so documents was given by him either to his sister or to a cousin for safe keeping. He cannot recall when he got the letter back.

[64] Even were this true (which we doubt), it makes even less explicable the failure by Mr Harris to lodge a complaint with Corrections at a time when either the first letter or the enclosed documents or both were in safe keeping outside the prison walls and beyond the reach of Corrections. Any search of Mr Harris' cell would be fruitless.

[65] Mr Harris says that his first complaint to Corrections was when he spoke to PCO Harihari on or about 8 April 2010, which was one or two days after the two new threatening letters had been received. It is to be recalled that this communication by Mr Harris to PCO Harihari was less than fulsome. His evidence is that he gave to PCO Harihari a general description of what had happened and a "rough description" of the documents received from outside the prison. When PCO Harihari asked to see the documents in question, Mr Harris refused. Asked the reason for his refusal Mr Harris told the Tribunal that it was PCO Harihari's job to check the file. When it was pointed out to Mr Harris that unless PCO Harihari knew what documents Mr Harris had received from the anonymous person outside the prison, PCO Harihari would not know what to look for when he checked the file. Mr Harris stubbornly insisted that he had no duty to give a description of the documents in question. It was for the officer to check and to find out for himself. During this passage of his evidence, as in others, Mr Harris was noticeably aggressive and hostile. Nor was his response a rational one.

[66] Even when Mr Harris wrote to the prison manager on 15 April 2010 the purpose of his letter was to complain about the interception of the two anonymous letters and to complain about the subsequent search of his cell. The claimed finding of the 100 or so documents at a café was mentioned but only as incidental to the two other complaints.

[67] The absence of a clear and specific complaint to Corrections over a period of two years when there was ample opportunity to make complaint without risk to the documents in question is a real concern in the context of our credibility assessment. We turn now to the fourth point.

The failure to complain to the Privacy Commissioner

[68] Mr Harris says that from the time he received the first anonymous letter in the period November 2007 to November 2008 he wrote three times to the Privacy Commissioner complaining about the alleged breach of his privacy. He does not, however, have copies of those letters or a record of the dates of posting. The Office of the Privacy Commissioner did not receive those letters. Mr Harris says he believes the letters were either intercepted by the prison authorities or went missing in the postal system. He asked his sister to check with New Zealand Post whether the letters had turned up in their system but he did not ask her or Mr Tennet to approach the OPC directly to enquire what had happened to the three letters. One would have thought that the latter enquiry would have been simpler and more straightforward than the claimed instruction to make enquiry with New Zealand Post. Nor did Mr Harris claim that he had made enquiry with the prison whether letters addressed by him to the Privacy Commissioner had been intercepted.

[69] What Mr Harris has produced is a letter to the Privacy Commissioner dated 6 April 2010. It is some twelve pages in length and has a number of notable features:

[69.1] The opening paragraph states:

> This is my fourth attempt to reach you through correspondence over the past two years. The reasons are beyond me as I've always clearly indicated on the back of the envelope the senders name and address. This is also accompanied by the usual official prison stamped name an address.

[69.2] Mr Harris states that he has received via an anonymous member of the public documents from his prison file. He then lists six documents or categories of documents so received.

[69.3] He states that all the documents were (then) with his solicitor.

[69.4] He assumed the OPC could recommend an out of court settlement with Corrections for compensation.

[69.5] There is a two page description of how his "rights, benefits, privileges and interests have been adversely affected" and of how the breaches had caused "significant loss of dignity and humiliation, severe injury to my feelings".

[69.6] The hope is expressed that the OPC can secure a settlement even though it did not have the power of the Human Rights Review Tribunal to award compensation.

[69.7] Mr Harris recalled reading the High Court decision in *Winter v Jans*.

[69.8] Mr Harris believed $25,000 would be appropriate for breach of legally privileged information and $25,000 for a "serious" breach of his privacy.

[70] Mr Harris said that he obtained much of the content of this letter by studying the legal correspondence generated by the intended class action in respect of the loss of documents by Corrections outside the Auckland District Court. Mr Harris produced to the Tribunal some of that correspondence.

[71] It is clear that both the vocabulary and content of the letter to the Privacy Commissioner is well beyond Mr Harris' normal range and we do not criticise him for drawing inspiration from legal documents in his possession. Our concern is the overall contrived nature of the letter. It does not read as a genuine fourth attempt to complain to the Privacy Commissioner. We refer in particular to:

[71.1] The self-serving claim that the letter represented a fourth attempt to lodge a complaint with the Privacy Commissioner.

[71.2] The overt claim for a substantial sum of damages.

[72] In addition, had there indeed been three earlier attempts to communicate with the Privacy Commissioner, it is strange that Mr Harris did not ask his sister to approach the OPC directly instead of making what could confidently be predicted to be a fruitless enquiry with New Zealand Post. Nor did Mr Harris complain to Corrections about interception of the alleged letters to the OPC. We note that Mr Miller gave evidence that letters addressed to the OPC are not opened by Corrections when outgoing mail is vetted. Nor did Mr Harris enlist the assistance of Mr Tennet who was said to be holding the very letters the subject of the complaint.

[73] In these circumstances we are not persuaded that there were three earlier letters addressed to the Privacy Commissioner. Nor are we persuaded that the letter of 6 April 2010 is a letter which records events which have in truth taken place. It is but a construct to further Mr Harris' purposes. We now come to the fifth point.

Reasons to suspect authenticity of the three anonymous letters

[74] While it must be acknowledged that the Tribunal has received no evidence from a document examiner and while it must be equally acknowledged that the Tribunal has no expertise in document examination, there are good reasons for the Tribunal holding

concerns regarding the authenticity of the three anonymous letters which Mr Harris claims to have received from outside the prison.

[75] There are two writing characteristics in the anonymous letters which are to be found also in letters admittedly written by Mr Harris within days of the alleged arrival of the two anonymous letters on 6 or 7 April 2010. The first characteristic is the dropped "d" in "and" and the second is the deployment of "yous" with an apostrophe as in "you's".

[76] The dropped "d" can be seen in the first anonymous letter. The word "and" is written without the letter "d" six times:

> by myself an some friends.
>
> about you an other people
>
> [name of grandmother] an [name of victim]?
>
> with a murderer, drug dealer an all else?
>
> [name of grandmother] an [name of victim]
>
> an hope you all have some nightmares

[77] It is also to be seen in the later anonymous letter received by Mr Harris on 6 or 7 April 2010 is addressed to:

> [name of grandmother] an [name of victim]

There is a threat that they will be "bashed an raped".

[78] The dropped "d" is also found in letters which Mr Harris admits to have written at about the same time. First there is his letter dated 15 April 2010 addressed to the Prison Manager at Waikeria. On the first page Mr Harris twice uses the phrase:

> [name of grandmother] an [name of victim]

[79] Second, in a letter also dated 15 April 2010 but addressed to "Marilyn" Mr Harris uses the phrase three times:

> [name of grandmother] an [name of victim]

He also deploys the phrase "raid an search".

[80] We turn now to the use of the apostrophe in "you's". The anonymous letter addressed to the grandmother and victim and said to have been received by Mr Harris on 6 or 7 April 2010 repeatedly deploys the word "yous" which is a common enough grammatical error. On its own it is without any real significance in the present context. What is unusual is that the author of this letter consistently uses the apostrophe "s" as in "you's". The word in this form is used six times. The second letter (ie the one addressed to Mr Harris' sister) uses the word twice.

[81] Comparing these letters with the one from Mr Harris to the grandmother dated 15 April 2010, it can be seen that "you's" is used by Mr Harris four times in the latter letter.

[82] There are demonstrable similarities of spelling and writing style in the three anonymous letters compared with contemporaneous documents written by Mr Harris. While the similarities do not necessarily establish that Mr Harris was the author or draftsperson of the three anonymous letters, they are disconcerting, to say the least.

We are highly suspicious of these three documents. Mr Harris denies being the author of the documents and says he had nothing to do with their being brought into existence. But in our view this assertion of innocence is not one to which we are willing to attach significant weight.

[83] Our concerns are increased by the fact that the evidence before us includes two examples of admittedly false or fraudulent documentation. In the one Mr Harris denies involvement. In the other he admits involvement. We address these documents next as the sixth point.

The two false documents

[84] When Mr Harris' case was considered by the New Zealand Parole Board in September 1997 he claimed that a trust fund had been set up for the two murder victims. Submitted to the Parole Board was a letter dated 2 March 1998 purportedly from Lorraine Smith, a solicitor practising in Auckland. The text read:

> Chairman of the Parole Board
>
> This is to verify on Mr Harris' behalf that a trust fund for the victims is in existence.
>
> It was further announced by myself on national television at the time.
>
> I trust this will assist the parole board in your request.

[85] Concerned that the document showed signs of having been manufactured, the Secretary to the Parole Board wrote to Ms Smith on 21 July 1998 requesting her confirmation that she was the author of the letter.

[86] By letter dated 24 July 1998 Ms Smith advised that she was not the author of the letter:

> I have read your letter and the enclosed letter purporting to have been sent from my office. I did not write it and I am concerned about its existence.

[87] Before the Tribunal Mr Harris said that while it had been part of his case before the Parole Board that a trust fund had been established, the letter dated 2 March 1998 purporting to be from Lorraine Smith had been "done as a joke by a late cousin of mine" and had been sent to the Parole Board "as a mistake". It had nothing to do with Mr Harris.

[88] The second document is a prison Canteen Form in the name of William Parker in the Nikau Unit and is dated 21 November 2009. The copy in the bundle of documents is not the best but it would appear that nothing has in fact been ordered on the form but the "order" is shown as having been approved by an "approving officer". Mr Harris said that he filled in the "Parker William – Nikau" information but another prisoner signed as "William Parker". The document had been brought into existence as a joke to show the inefficiency of the prison system. It should have been thrown away but had not been.

[89] Our concern is not only that the evidence before us shows that two false documents have been associated with Mr Harris. It is also that in each case his explanation for the documents is the same namely, they were created "as a joke". There is also the fact that Mr Harris concedes that part of his (then) case before the Parole Board was the existence of a trust fund. His claim that the letter was sent to the Parole Board by mistake is difficult to accept.

[90] Our suspicions as to the authenticity of the three anonymous letters which are at the core of Mr Harris' case are in our view justifiably reinforced by the false Lorraine Smith letter and by the fact that Mr Harris, on his own admission, has been a party to the creation of a false Canteen Form.

[91] We turn now to the seventh point which is the issue of demeanour.

Demeanour

[92] Because Mr Harris was self-represented and because there was no single, coherent brief of evidence, the Chairperson assisted Mr Harris to unfold his evidence during his evidence in chief. For much of that time Mr Harris presented as a well spoken, capable and intelligent man. He put his case coherently and cogently. He was unfailingly polite. These characteristics, however, were displayed primarily to the members of the Tribunal.

[93] Once cross-examination by Ms Reddy commenced there was a discernible change in Mr Harris' demeanour. He was visibly annoyed on being pressed on crucial aspects of his case, often evaded the questions put to him, was argumentative and unreasoning, as when he described his discussion with PCO Harihari and his expectation that PCO Harihari should check the file without seeing the documents which Mr Harris said were missing from the file. It was also noticeable that while Mr Harris claimed that the grandmother and victim were family friends and that he wanted to protect them, whenever the grandmother was mentioned Mr Harris could not disguise his anger and hostility. There was a clear disconnect between that hostility and his claimed concern for the welfare of the grandmother and the victim. We address now the eighth point.

Origin of documents not established

[94] As earlier mentioned, it is the case for Mr Harris that enclosed with the first anonymous letter were 100 or so documents. Some of those documents were originals and some were photocopies. Over a period of time some in both categories were lost or destroyed. Those still in his possession (or in the possession of Ms S Earl, Barrister of Wellington) were made available to Corrections during the pre-hearing discovery process. Commenting on these documents Mr Miller made two points:

> **[94.1]** It is not possible to verify the provenance of the photocopied documents.
>
> **[94.2]** There is an alternative explanation as to how the original documents came into the possession of Mr Harris.

[95] It is not intended to repeat the evidence given by Mr Miller on these two points as it is detailed earlier in this decision. In the light of that evidence we do not accept that Mr Harris has established to the required civil standard that the documents now held by him were lost from a prison file outside Auckland Prison. We turn now to the ninth and final point.

The similar fact evidence

[96] Mr Harris relies on other instances in which he says personal information has been lost or mislaid by Corrections. We have for convenience referred to this evidence as "similar fact" evidence though on one view it could loosely be described also as "propensity evidence". Such evidence, as defined in s 40(1) of the Evidence Act 2006, is admissible in a civil proceeding. Whether the evidence is viewed as similar fact evidence or as propensity evidence the key issues we must take into account are relevance and balancing. See *O'Brien v Chief Constable of South Wales Police* [2005]

UKHL 26, [2005] 2 AC 534 at [6] and [53] – [56]. That is, whether the evidence is logically probative of the alleged loss of documents at an Albany café and whether there are compelling factors in favour of excluding the evidence.

[97] In our view the evidence is not logically relevant in determining the origin of the Albany documents. So little is known of the "similar" evidence and the circumstances in which the "similar" documents were allegedly lost that no inference of any useful weight can be drawn.

[98] In addition, it is substantially unfair to require of Corrections that in defending an allegation of loss of documents at an Albany café it must also defend the loss of any other misplaced document which Mr Harris may have come across in the prison environment.

[99] For these broad reasons we have excluded from consideration the similar fact or propensity evidence.

CONCLUSION

[100] For the reasons given we are unable to place any reliance on the evidence given by Mr Harris. Furthermore, we do not accept that the three unsolicited letters are genuine documents. Such of the claimed 100 or so documents as are photocopies could have come from Corrections via requests under the Privacy Act or Official Information Act 1982 or given to Mr Harris by prison officers in the course of his long period of detention. Such of the documents which are originals (indicating, according to Mr Harris, that they must have come from his prison file) are either established to have come into his possession through proper channels within Corrections (such as the warrant signed by Thorp J and the documents served at the request of Jackson Russell) or as possibly having come into his possession via a route other than a café in Albany.

[101] Added to this we have concluded that the claimed circumstances in which the three anonymous letters arrived in the possession of Mr Harris are highly suspicious, as are the writing characteristics which appear not only in the documents themselves, but also in letters which Mr Harris admits to have written himself.

[102] His explanation for his failure to complain to Corrections is at best, weak and the claim that he wrote three times to the Privacy Commissioner is without support and undermined by the contrived terms of the only complaint letter received by the OPC.

[103] Mr Harris is very angry about his prosecution and imprisonment for a crime he says he did not commit. That anger is directed at the grandmother and victim. His claimed concern for their welfare is feigned. His attempt to communicate the threats to them was not borne out of concern for their safety. Rather it was a means of retaliation or revenge.

[104] Our conclusion is that the alleged loss of documents from the Corrections file at a café in Albany is not proved. Indeed, we are of the view that no such loss ever occurred. Mr Harris' case is without foundation in fact.

[105] In view of this conclusion there is no need for us to consider the Prisoners' and Victims' Claims Act 2005. The provisions of this Act are relevant only in the context of remedies, that is once the Tribunal has been satisfied on the balance of probabilities that any action of a defendant was an interference with the privacy of the plaintiff. As we are not satisfied that Corrections interfered with the privacy of Mr Harris, application of the Act is academic.

Formal order

[106] For the foregoing reasons the decision of the Tribunal is that no interference with the privacy of Mr Harris has been established. The proceedings are dismissed.

Costs

[107] At the conclusion of the hearing on 5 April 2013 both Mr Harris and Ms Reddy stated that no costs would be sought by them irrespective of the outcome. Costs are therefore to lie where they fall.

Final non-publication orders

[108] The following non-publication orders are made under s 107(3)(b) of the Human Rights Act 1993 and s 89 of the Privacy Act 1993:

> **[108.1]** An order prohibiting publication of the names, addresses or identifying particulars of the four individuals referred to at para [2] of this decision and of any details which might lead to their identification.
>
> **[108.2]** An order prohibiting publication of the names, addresses or identifying particulars of the jurors listed on the backing sheet to the indictment in *R v Harris* (High Court Whangarei T5/83) and of any details which might lead to their identification.
>
> **[108.3]** There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

.....	.....	.....
Mr RPG Haines QC	**Mr GJ Cook JP**	**Mr BK Neeson**
Chairperson	**Member**	**Member**