IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 7**

	Reference No. HRRT 023/2010
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**NICHOLAS PAUL ALFRED REEKIE**
	PLAINTIFF
AND	**ALLAN ROBERTS**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr RK Musuku, Member
Hon KL Shirley, Member

REPRESENTATION:
Mr Reekie in person supported by Ruth Wood as *McKenzie* friend
Mr P Dacre for Defendant

DATE OF HEARING: 11 and 12 October 2012

DATE OF DECISION: 14 March 2013

DECISION OF TRIBUNAL

Introduction

[1] Mr Reekie's case is that he addressed two information privacy requests to his former lawyer, Mr Roberts. He alleges that as neither request was responded to it follows that on each occasion there was an interference with his privacy as defined in s 66(2)(a)(i) of the Privacy Act 1993. He seeks (inter alia):

> **[1.1]** A declaration that the alleged decision to withhold documentation affected Mr Reekie's ability to seek "a fair appeal of convictions and/or the appeal process".

[1.2] Compensation of $5,000 for "the stress caused, the delay, effects of the delay on [Mr Reekie] and his desire to appeal convictions with the benefit of all documentation available to him".

[2] The allegations made by Mr Reekie are firmly denied by Mr Roberts.

[3] The primary issue in these proceedings is whether Mr Reekie has satisfied the Tribunal, on the balance of probabilities, that the two information privacy requests on which his case rests were in fact made.

The parties

[4] Mr Reekie is serving a sentence of preventive detention with a minimum term of 20 years, imposed on 15 July 2003 after trial, in respect of sexual offending against four complainants. See *R v Reekie* HC Auckland T021833, 15 July 2003. He appealed his convictions and sentence. He abandoned the former and confined his appeal to the latter. He sought only to have the minimum term imposed (originally 25 years) reduced. As to that he was successful. The minimum term was reduced to 20 years: *R v Reekie* CA339/03, 3 August 2004.

[5] Mr Roberts was the barrister who represented Mr Reekie at the 2003 trial. Prior to sentencing he was dismissed by Mr Reekie in acrimonious circumstances. In March 2007 Mr Roberts was appointed a District Court Judge. Since then he has sat in a North Island centre some distance from Auckland.

[6] Following sentence, new counsel, Mr Rob Harrison, was assigned and he represented Mr Reekie in respect of the conviction and sentence appeal to the Court of Appeal.

The file handover

[7] Mr Roberts gave evidence to the Tribunal that on Mr Harrison receiving instructions to represent Mr Reekie, Mr Harrison made an appointment with Mr Roberts to uplift the file. A signed authority from Mr Reekie had already been delivered to Mr Roberts. Mr Roberts has a clear recollection of handing over to Mr Harrison all of Mr Reekie's files. The only documents retained by Mr Roberts were six categories of handwritten instructions (they are itemised in the statement of reply) from Mr Reekie to Mr Roberts prepared for the purpose of the High Court trial along with a letter dated 23 May 2003 from Mr Roberts to Mr Reekie, and a copy of a letter from Mr Roberts to the (then) Auckland District Law Society (ADLS) concerning a complaint made by Mr Reekie against Mr Roberts.

[8] Mr Roberts says that at the file handover he advised Mr Harrison that he (Mr Roberts) was retaining the original handwritten instructions for any future discussions about the lawyer/client relationship he had had with Mr Reekie but was providing Mr Harrison with photocopies. Mr Roberts recollects Mr Harrison reading the original documents in Mr Roberts' office as Mr Roberts ran off the photocopies. He told Mr Harrison that as the photocopies were not of the best quality, he was welcome to return to Mr Roberts' office at any time to read the originals.

[9] Mr Roberts explained to the Tribunal that he retained the original handwritten instructions because the circumstances of his dismissal by Mr Reekie suggested the possibility that Mr Reekie might subsequently complain about Mr Roberts' conduct of the trial. Whether that complaint was made to the Court of Appeal on a conviction appeal or to the ADLS, he felt he would need the original documentation to explain the manner in

which he had presented Mr Reekie's defence. The statement of reply at para [15] puts the point in the following terms:

> The Defendant was not prepared to release the briefs, as he feared alteration or deliberate loss. He considered that it necessary to protect himself from the anticipated and unjustified vilification he foresaw.

[10] The statement of reply, apart from pleading that Mr Reekie's files were uplifted by Mr Harrison and that photocopies of the original documents retained by Mr Roberts were provided to Mr Harrison, explicitly states that the documents so retained by Mr Roberts would be made available to Mr Reekie in copied form. The same position was maintained by Mr Roberts throughout these proceedings and copies of the documents were included in the common bundle of documents. The originals were made available for inspection at the hearing by Mr Reekie and by the Tribunal.

[11] The account of the file handover as given by Mr Harrison is set out in a letter to the Secretary of the Tribunal dated 22 December 2010. This letter was received as evidence by consent without any need for formal production and without Mr Harrison being required for examination. See the (then) Chairperson's *Minute* dated 4 February 2011 at [2]. The letter materially states:

> Concerning the questions that have been put in paragraph 5, I can respond in the following way.
>
> a. "Did Alan Roberts tell Rob Harrison that he had handwritten briefs from Nicholas Reekie that were not in the files that he gave to him?"
>
> I cannot recall the exact conversations I had with Mr Roberts when I picked up the Reekie file from him.
>
> b. "Did Alan Roberts offer Rob Harrison a read of the handwritten briefs that he was intending to withhold from the files?"
>
> I do recall reading written instructions from Mr Reekie to Mr Roberts. In what form, whether original or photocopied, I cannot now say. I know that I read a great deal of material concerning Mr Reekie's instructions to Mr Roberts.
>
> c. "Did Alan Roberts offer Ron (sic) Harrison a photocopy of any handwritten briefs?"
>
> Again, I do remember reading handwritten instructions from Mr Reekie to Mr Roberts. I cannot remember now the format in which they were in. They were important when considering the appeal process because one of the issues that was considered in terms of an appeal against conviction was whether or not Counsel had followed the Appellant's instructions. There had been a number of discussions with Mr Reekie concerning those very issues leading up to the decision not to continue with the appeal against conviction.
>
> I believe, as a matter of course, I would have requested copies of any instructions written by the Appellant to his trial counsel if the originals were not available to me.
>
> All the material that I had concerning Mr Reekie's trial and appeal was handed to Ms Wood. From memory that was two or three boxes of material.
>
> The events you are now asking me to recall occurred some five or six years ago. I cannot accurately recall now discussions with Mr Roberts concerning the original documents or exactly what material I had and in what format it was in. I have not seen the file for five years.
>
> I have thought carefully about events and cannot be of more assistance.

[12] In this account Mr Harrison makes reference to the file being uplifted by Ms Wood. For her part, Ms Wood gave evidence that she took possession of the file in about August 2004 and that it was in a state of disorder. There was mention that Mr Harrison had shifted office. She could not be sure that all the documents had been handed to

her. In early 2007 Mr Reekie asked her to check whether the file had handwritten documents or photocopies of handwritten documents written by him [Mr Reekie]. Ms Wood completed her search by mid-April 2007. She found original handwritten documents from Mr Reekie addressed to Mr Harrison but no other photocopied handwritten documents were found. In about August 2007 she handed the file to Mr Peter Eastwood, Barrister, and uplifted the file from him in about February 2011.

Complaints made against Mr Roberts and Mr Harrison

[13] On 13 March 2006 Mr Reekie wrote to the ADLS which under the then Law Practitioners Act 1982 had jurisdiction to inquire into complaints made against law practitioners. That letter was not included in the evidence before the Tribunal but by letter dated 17 March 2006 the Professional Standards Department of the ADLS sent to Mr Reekie a booklet "Dissatisfied with your Lawyer" which explained the complaints process. Mr Reekie apparently then made a complaint against Mr Roberts in relation to his representation of Mr Reekie during the May 2003 trial. Produced in evidence was Mr Roberts' eight page response letter to the ADLS dated 20 March 2007. It contains a detailed and forceful rebuttal of the allegations made by Mr Reekie. The final paragraph concludes with a paragraph that assumes some importance to the issues before the Tribunal:

> I have answered this letter in detail to put an end to these issues. I invite you to deal with this complaint as you must. I will not enter into further correspondence and, as you are aware, I am to cease practice as a Barrister on or about 30 March 2007.

[14] As mentioned shortly thereafter Mr Roberts was sworn in as a District Court Judge.

[15] Mr Reekie also complained to the ADLS about Mr Harrison. In his letter dated 11 April 2007 to the ADLS Mr Harrison similarly firmly rejected the allegations made against him.

[16] In both his written brief of evidence (affirmed at the hearing) and in his oral evidence Mr Reekie continued to press a number of allegations of a serious nature against Mr Roberts. As mentioned, the allegations are firmly challenged by Mr Roberts. It was common ground, however, that the allegations made by Mr Reekie relating the conduct of the trial by Mr Roberts are not for the Tribunal to resolve. The evidence is notably incomplete and the issues are in any event well outside the jurisdiction of the Tribunal. We must nevertheless have regard to the unresolved allegations by way of background. Such allegations which do relate to the provision of access to personal information are ones in respect of which we must necessarily make findings. In this context we turn to the contention set out by Mr Reekie in para 66 of his second amended brief of evidence dated 16 July 2012 (pressed before us notwithstanding the evidence of Mr Roberts and of Mr Harrison) that:

> 66 It is my contention that Mr Roberts purposely withheld the documents I now seek from him at the time as together with his failings prior to trial and during the trial itself, these documents would help to prove how he sold me down the river. So it was not in his interests to release these documents at any stage, let alone admit he had them until he was forced to do so by my complaint to the Law Society against him. From what I have seen of the documents Mr Roberts has released as part of disclosure for this matter, he has not released all of the documents I know he received from me at the time.

Finding in relation to the file handover

[17] We have found nothing in the evidence before us to support this contention. Without hesitation we accept the evidence of Mr Roberts that the file was handed over to Mr Harrison in its entirety. His evidence is supported by the statement from Mr Harrison.

The handover included photocopies of the handwritten documents listed in the statement of reply. To put the matter beyond doubt, it is our finding that Mr Harrison was provided with photocopies of each of the documents itemised in the statement of reply and simultaneously given access to the original documents. These documents have never been withheld by Mr Roberts from Mr Reekie. Because Mr Roberts handed the documents to Mr Harrison on the specific instructions of Mr Reekie and as Mr Harrison was then the lawyer who had conduct of Mr Reekie's appeal to the Court of Appeal, delivery of the documents to Mr Harrision and the production to him for inspection of the originals of the handwritten documents was, in law, delivery to Mr Reekie and inspection by him. His complaint that Mr Roberts withheld and concealed documents from him is entirely without foundation.

[18] We turn now to the two information privacy requests which Mr Reekie claims to have addressed to Mr Roberts.

THE FIRST INFORMATION PRIVACY REQUEST – 8 AUGUST 2005

[19] Mr Reekie says that by letter dated 8 August 2005 he made an information privacy request to Mr Roberts.

[20] Mr Roberts gave evidence that no such request was received.

[21] Mr Reekie's case is that no response to his 8 August 2005 letter having been received, he made complaint to the Office of the Privacy Commissioner (OPC) by letter dated 23 September 2005. His letter, date stamped by the OPC as having been received on 30 September 2005 relevantly states:

> On the 8-8-05 I wrote to my trial lawyer Mr Alan Robert under the Official Information Act 1982 and also the Privacy Act 1993. I know my request comes under the Privacy Act. But I did it like that to cover myself both ways. The request relates to information about myself.
>
> On the 11 September 2002 and again on the 1 October 2002 warrants were signed by Judges to remand me into custody but I was not present. I asked my lawyer about this and he told me he was not present either on those days, which makes the warrants unlawful.
>
> Towards the end of my trial myself and Mr Roberts had a falling out and at sentencing he dismissed himself from my case. And we have not talked since.
>
> I am now taking a civil case for unlawful detention because of these warrants being unlawful, and I want him to state in writing what he has already told me for the purpose. Hence my request to him on the 8-8-05. My request to him was clear, polite and friendly. But I got no response.
>
> Then last week I got my friend of [indecipherable] to ring his office [indecipherable] of which he quite rudely stated to her that we had fallen out and he would not be doing anything for me, then hung up.
>
> I feel the fact we had a falling out should not interfere with his responsibilities to me as my trial lawyer and is acting in a professional manner to my request under both of those Acts.
>
> I rang the Ombudsman's office for advice on the matter and that is how I now come to be writing to your office with my complaint.
>
> Mr Alan Roberts details are as follows:
>
> Phone – 309-0526 – Mobile 021 950-050
> Fax: 307 6817
> Chambers: 9th Floor
> Canterbury Buildings
> 47 High Street
> Auckland

[22] By letter dated 10 October 2005 the Manager, Investigations, OPC wrote to Mr Reekie requesting a copy of the letter dated 8 August 2005:

> As I understand it, you have complained that by letter dated 8 August 2005 you requested from Mr Roberts a copy of the personal information that he holds about you. You allege, that to date, you have not received a response from Mr Roberts.
>
> Before we proceed any further with this complaint, I would be grateful if you would provide to me a copy of your letter to Mr Roberts dated 8 August 2005.

[23] By letter date stamped by the OPC as received on 21 October 2005, Mr Reekie replied. Two points of present relevance were made:

> **[23.1]** He did not have a copy of the letter dated 8 August 2005 which he claims to have sent to Mr Roberts.
>
> **[23.2]** On 14 September 2005 Ms Wood telephoned Mr Roberts:
>
> > Secondly, I did not get a response from him to my letter. So my partner rang him on the 14.9.2005 and he told her that he would be doing nothing for me. As we had had a falling out during my trial and then he hung up on her. So I take that as being the response to my request made [indecipherable] letter dated 8.8.2005 under both the Privacy Act and Information Act.

[24] As to the second point, Ms Wood told the Tribunal in her sworn evidence that she had forgotten about the telephone call she had made to Mr Roberts on 14 September 2005 until Mr Reekie reminded her. She now recalled it was a short call. She could not remember the gist of what was actually said. She did recall Mr Roberts saying that he and Mr Reekie had fallen out and that he did not want to have anything further to do with Mr Reekie.

[25] Mr Roberts told the Tribunal that Ms Wood did telephone him but he terminated the call as soon as she identified on whose behalf she was calling.

[26] Again we accept the evidence of Mr Roberts on this point and find there was no mention in the telephone call from Ms Wood of a request by Mr Reekie under the Privacy Act for personal information. The sworn evidence of Ms Wood is consistent with this finding.

[27] It follows that Mr Roberts, the OPC and in turn, the Tribunal, are entirely dependent on Mr Reekie's assertions as to the sending of and content of the letter dated 8 August 2005. Mr Reekie conceded in his evidence that insofar as his later letter dated 30 September 2005 to the OPC (the relevant extract is set out above) gives an account of what was in his request of 8 August 2005, that account is unclear. In the circumstances it will be seen that we are not prepared to accept Mr Reekie's unsupported assertions as to the sending and content of the letter.

[28] The point is potentially significant. Before an agency can be said to be in default of the obligation to provide access to personal information held by that agency, it is necessary that the requester establish the terms of the request and in particular, the nature of the information which was the subject of the request. This, no doubt, was the reason why the OPC, by letter dated 10 October 2005, asked Mr Reekie to provide a copy of the letter dated 8 August 2005.

[29] While it is apparent that there were subsequent exchanges of correspondence between the OPC, Mr Reekie and Mr Roberts, we have seen only some of the

correspondence passing between Mr Reekie and the OPC. None of the correspondence passing between the OPC and Mr Roberts has been produced. Nevertheless two points emerge with clarity. First, the OPC appeared to adopt the role of mediator, not fact finder. Second, the entire complaint process proceeded without the OPC or Mr Roberts seeing the letter dated 8 August 2005. The fact that Mr Reekie by subsequent letter dated 7 April 2006 advised the OPC that the information from Mr Roberts passed on by the OPC satisfied Mr Reekie's "request" and had brought the matter to "a successful close" does not assist the Tribunal in determining the assertion by Mr Reekie in these proceedings that Mr Roberts nevertheless interfered with his (Mr Reekie's) privacy by not responding to the letter of 8 August 2005.

Findings in relation to information privacy request dated 8 August 2005

[30] Mr Reekie has not been able to produce to the OPC or to the Tribunal a copy of the letter dated 8 August 2005 said to have been sent to Mr Roberts. Mr Reekie concedes that even from his own account of what was in the letter it is unclear what was requested of Mr Roberts. Mr Roberts says that he did not receive the letter and has no record of receiving it.

[31] We accept without reservation the entirety of Mr Roberts' evidence. As may be expected it was clear, direct, without embellishment, balanced and compelling. Concessions in favour of Mr Reekie were fairly made where this was appropriate. We have no reason at all to doubt Mr Roberts' evidence that he did not receive the 8 August 2005 information privacy request. Mr Reekie has been unable to challenge this evidence by producing a copy of the letter or by pointing to any other evidence. At its highest, his evidence is that he believes the letter was sent. But that is where his evidence begins and ends. The brief telephone exchange between Ms Wood and Mr Roberts contained no reference to the letter or to an information request. When contacted by the OPC Mr Roberts assisted as much as he could notwithstanding the absence of the claimed letter. His cooperation with the OPC is not evidence that the letter was sent or received.

[32] Before the Tribunal can grant any remedy it must first be satisfied, on the balance of probabilities, that any action of a defendant is an interference with the privacy of an individual:

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
>
> (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
> (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
> (c) damages in accordance with section 88:
> (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
> (e) such other relief as the Tribunal thinks fit.

[33] To succeed with his case Mr Reekie must satisfy the Tribunal, on the balance of probabilities, that the letter dated 8 August 2005 exists and that it was sent to Mr Roberts. This would involve (inter alia) establishing the address to which it was sent, that that address was Mr Roberts' correct address and that after it was received by Mr

Roberts, he failed to make a decision on the request, thereby interfering with his (Mr Reekie's) privacy in terms of s 66(2)(a)(i) and (3).

[34] For the reasons given we are not so satisfied that the letter exists, that it was sent by Mr Reekie to Mr Roberts' correct address and that it was received by Mr Roberts. Unless there is both a sending by the requester and a receipt by the agency, no information privacy request has been made and no obligation under s 40 arises for the agency to make a decision on the "request". Mr Reekie's evidence falls well short of the probability standard and the fact that the OPC and Mr Roberts engaged with him in the spirit of goodwill does not fill the substantial evidentiary void.

[35] We turn now to the subsequent "request" made approximately one year and eight months later.

THE SECOND INFORMATION PRIVACY REQUEST – 14 APRIL 2007

[36] As best we understand, the background to the second request for personal information is as follows. In addressing the first request of 8 August 2005 the OPC wrote to Mr Reekie on 25 November 2005 setting out the OPC's understanding of the complaint. In the absence of the letter 8 August 2005 the OPC articulated the complaint in the following terms:

> My understanding of your complaint is that by letter dated 8 August 2005 you requested from Mr Roberts a copy of the personal information that he holds about you. In particular, you sought information relating to warrants for your arrest dated 11 September and 1 October 2002. Your partner, Ruth Wood, contacted Mr Roberts on 14 September 2005 to follow up on your request for access.
>
> You allege, that to date, you have not received a response from Mr Roberts.
>
> You have asked the Privacy Commissioner to review Mr Roberts' decision to refuse you access to this information.
>
> Your complaint raises issues under principle 6. I enclose a copy of this principle for your information.
>
> Mr Roberts has been told of your complaint and asked to provide comments to the Commissioner within 20 working days ….

[37] By letter dated 14 December 2005 the OPC reported to Mr Reekie that Mr Roberts had responded. The OPC gave the following account:

> We have received a response from Mr Roberts. He advises that you uplifted all files he held in relation to your affairs following your sentencing in the High Court at Auckland. He advises he holds no documentation about you, either by way of file or diary entry that would assist in your enquiry.

[38] Reading this correspondence in context, the reported statement about holding "no documentation about you" refers to the information sought by Mr Reekie in relation to the two warrants of arrest issued in 2002. But as will be seen Mr Reekie reads this statement as an assertion by Mr Roberts that he holds no documentation whatsoever.

[39] Chronologically, the next step was the 25 February 2007 complaint by Mr Reekie to the ADLS about Mr Roberts' conduct as trial lawyer. It is to be recalled that Mr Roberts responded to that complaint by way of the eight page letter dated 20 March 2007. In this letter Mr Roberts made explicit reference to the handwritten instructions he received from Mr Reekie concerning the trial and at one point says:

> I still have the original copy of those handwritten instructions.

[40] Mr Reekie's case is that this admission to being in possession of documents is in conflict with the report by the OPC that:

> He advises he holds no documentation about you, either by way of file or diary entry that would assist in your enquiry.

Mr Reekie's take on this response is set out in paras 91 and 92 of his second amended brief of evidence dated 16 July 2012:

> 91 In Allan Roberts' response dated 20 March 2007 to my complaint he made a series of rude comments about me, as well as false statements and he also stated at several points in that letter that he does have a file on me from which he still has original hand written documents from me which he calls "Handwritten Instructions".
>
> 92 This omission to the Auckland District Law Society is in stark contrast to what Allan Roberts told me via the Office of the Privacy Commissioner in 2005.

[41] In these passages Mr Reekie takes the "no documentation" account provided by the OPC out of context.

[42] Nevertheless, having decided that he wanted access to the documentation referred to by Mr Roberts in his letter to the ADLS, Mr Reekie sent a letter to Mr Roberts. It is dated 14 April 2007 and addressed to Mr Roberts [by then a District Court Judge] at the PO Box address for his (former) practice. It was in the following terms:

> I have become aware that you have withheld documents from my appeal lawyer.
>
> Under the Privacy Act 1993, and the Official Information Act 1982, I request the following from you:
>
> 1. Copies of my briefs to you, as well as the covering letter that was sent with it.
> 2. Copies of all other letters you withheld.
> 3. A copy of, or list of all other documents you still have, or have withheld from me or my lawyer.
> 4. Your reasons in writing for withholding these documents in the first place from me, or my appeal lawyer.

[43] Before turning to the evidence of Mr Roberts we pause to make two observations:

> **[43.1]** The assertion by Mr Reekie that documents had been withheld from his appeal lawyer (Mr Harrison) is entirely mistaken and without foundation.
>
> **[43.2]** More importantly, at the time of making this new ie second information privacy request Mr Reekie already had a copy of Mr Roberts' letter to the ADLS dated 20 March 2007 and knew from that letter and from what Ms Wood told him of the earlier telephone discussion on 14 September 2005, that Mr Roberts wished to have nothing to do with Mr Reekie.

[44] Mr Roberts gave evidence that in April 2007, shortly after his appointment as a District Court Judge, he returned to Auckland from time to time on weekends to clear the PO Box he had used for his practice as he was still receiving correspondence relating to his practice. One weekend he found a letter from Mr Reekie addressed to him. Consistent with his statement to the ADLS that he would not enter into correspondence over Mr Reekie's complaints he (Mr Roberts) returned the letter to Mr Reekie by way of "return to sender" with the envelope unopened. The first Mr Roberts became aware that the letter contained a request under the Privacy Act was when the OPC contacted him in relation to the new complaint lodged by Mr Reekie. Mr Roberts said that the following account set out in the OPC letter to Mr Reekie accurately records what he told the OPC:

> After the solicitor/client relationship broke down with you, and following your further complaint to the Law Society, Mr Roberts made a decision not to communicate with you any further and he conveyed that position to both you and the Law Society. Subsequently in April 2007, Mr Roberts received a letter clearly from you as he recognised your distinctive handwriting on the envelope. In addition, you had recorded your name as sender on the back of the envelope.
>
> Mr Roberts did not open the envelope, and re-addressed it "Return to Sender" and put it back in the mail. Mr Roberts has indicated that he did not look at the contents and until our conversation, was not aware of the fact that the letter contained another privacy request.

[45] Mr Reekie accepts that about a week after he sent his request to Mr Roberts the letter was returned to him unopened.

[46] Without taking any further steps to communicate his request, Mr Reekie on 24 April 2007 made a formal complaint to the OPC and provided in support the returned letter and envelope.

[47] Mr Dacre submits that the return of the unopened letter put Mr Reekie on notice that Mr Roberts was not aware of the request and that Mr Reekie would need to do something more to make his request effective.

[48] This submission brings into focus the core issue in this case, namely "When is an information privacy request made"?

DETERMINING WHEN AN INFORMATION PRIVACY REQUEST IS MADE

[49] Information privacy Principle 6 establishes an entitlement to personal information. Alone among the information privacy principles that entitlement is enforceable in a court of law. See s 11(1) of the Privacy Act. The entitlement is to confirmation whether an agency holds personal information and to have access to that information. While s 33 defines the phrase "information privacy requests", there are no formal statutory requirements for making an information privacy request:

> **33 Application**
>
> This Part applies to the following requests (in this Act referred to as information privacy requests):
> (a) a request made pursuant to subclause (1)(a) of principle 6 to obtain confirmation of whether or not an agency holds personal information:
> (b) a request made pursuant to subclause (1)(b) of principle 6 to be given access to personal information:
> (c) a request made pursuant to subclause (1) of principle 7 for correction of personal information.

[50] In identifying when an information privacy request is "made" in the sense of triggering the provisions of the Privacy Act, it is necessary to examine the key provisions of the Act which address the responsibilities of the agency on receipt of the information privacy request.

[51] Part 4 of the Act sets out the grounds on which the agency may refuse to disclose information requested pursuant to Principle 6. While s 30 stipulates that the statutory grounds are closed in the sense that no reasons other than those expressly permitted justify a refusal to disclose requested information, the agency nevertheless has an implicit obligation to consider whether any of the Part 4 withholding grounds operate in the particular circumstances.

[52] Part 5 of the Act sets out the procedural provisions relating to access to and the correction of personal information. We do not intend addressing each provision in Part 5. We simply note the following stipulations:

> **[52.1]** An information privacy request may be made only by an individual who is a New Zealand citizen or a permanent resident of New Zealand or who is an individual "in" New Zealand (s 34).
>
> **[52.2]** The individual making an information privacy request can ask that the request be treated as urgent (s 37). Non-compliance with an urgency request can impact on the question whether the agency has interfered with the privacy of the individual as defined in s 66 (s 66(4)).
>
> **[52.3]** It is the duty of every agency to give reasonable assistance to an individual to make a request in a manner that accords with the requirements of the Act or to direct his or her request to the appropriate agency (s 38). The "requirements" of the Act are not explicitly articulated.
>
> **[52.4]** An agency may transfer a request in certain circumstances (s 39).
>
> **[52.5]** An agency is under a mandatory statutory duty, "as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that agency" to decide whether the request is to be granted and to give or post to the individual who made the request notice of the decision on the request (s 40). An agency which defaults in complying with this request is deemed by s 66(3) to have refused to make available the information to which the request relates and thereby to have interfered with the privacy of the individual. The remedies in s 85 can then be granted by the Tribunal (s 66(3)).
>
> **[52.6]** In certain circumstances the 20 working day period can be extended (s 41).
>
> **[52.7]** Redaction of documents is permitted (s 43).
>
> **[52.8]** Reasons for any refusal must be given (s 44).
>
> **[52.9]** Where an information privacy request is made pursuant to Principle 6(1)(b), an agency cannot give access to that information unless it is satisfied concerning the identity of the individual making the request and must ensure that any information intended for an individual is received only by that individual or where the request is made by an agent of the individual, only by that individual or his or her agent (s 45).

[53] Establishing that there has been an information privacy request is the key to the operation of Parts 4 and 5 of the Privacy Act in the sense that it is the existence of the request and its communication to the agency which triggers a series of statutory obligations. A defaulting agency is at risk of being found to have interfered with the privacy of the individual. Such finding exposes the agency to the remedies in s 85(1), namely:

> **[53.1]** A declaration that the action of the agency is an interference with the privacy of an individual.
>
> **[53.2]** An order restraining the agency from continuing or repeating the interference.

[53.3] Damages (the ceiling is $200,000).

[53.4] An order that the agency remedy the interference or redress any loss or damage suffered by the aggrieved individual as a result of the interference.

[54] Given the nature of the remedies which may be granted by the Tribunal, the standard of proof mandated by s 85(1) is for good reason the balance of probabilities.

[55] Taking into account the provisions referred to and the potential remedies it is our view on the present facts that for a valid information privacy request to be established there must be evidence (to the civil standard):

[55.1] That the person making the request is a person who, in terms of s 34 of the Act, is a person who may make an information privacy request or that the request is made by a properly authorised agent.

[55.2] That there is a request which exists in fact ie there is a request which is recorded in writing or, if the request is made orally, that the request has been spoken in terms which make it clear that access to personal information is requested.

[55.3] That the request was communicated in an effective manner to the agency holding the personal information. Where, as here, the request was made in writing this would involve establishing, inter alia:

[55.3.1] The terms of the request ie whether it was a request for:

[55.3.1.1] Confirmation of whether or not the agency holds personal information.

[55.3.1.2] Access to that information.

[55.3.1.3] Correction of information or attachment to the information of a statement of the correction sought but not made.

[55.3.2] That the request was sent.

[55.3.3] That the request was sent to the agency's correct address.

[55.3.4] That the manner of delivery can be shown to be such that in the ordinary course of events the request can be assumed to have been received by the agency but with the agency being able to show that the request was not in fact received. At a minimum it must be possible to identify the commencement date of the time period prescribed by s 40 of the Act.

[55.4] An action of the agency which is an interference with the privacy of the individual.

[56] The list is not intended to be an exhaustive prescription. It is simply a checklist which might help determine when an effective information privacy request has been made. The essence is that the existence of the request, the date of receipt by the agency (for the calculation of the time period) and the terms of the request must all be established. Without these essentials an agency will not be aware that a "request" has been "made", will not be able to identify when time began to run and will not be able to engage with its other responsibilities under Parts 4 and 5 of the Act. It is also to be

recalled that s 38 imposes a duty on an agency to give reasonable assistance to an individual to make a request in accordance with the requirements of the Act. To discharge this duty the agency must necessarily first be aware that the individual wishes to make an information privacy request or is making one which is not in accordance with the requirements of the Act or is making the request to the wrong agency. If such wish is not communicated, the agency cannot be expected to know that assistance is required.

[57] Whether a particular request for access to personal information triggers the Privacy Act is a question to be assessed objectively, taking into account all relevant facts. See *Sievwrights v Apostolakis* HC Wellington CIV-2005-485-527, 17 December 2007 (Ronald Young J, Dr A Trlin and G Kerr) at [22] and [25].

[58] Applying these principles we now assess whether, on the two occasions in question, Mr Reekie made effective information privacy requests.

Whether there was a first request

[59] As to the first "request" of 8 August 2005, we find (in summary) that it has not been established on the balance of probabilities that the letter exists and that it was sent to Mr Roberts at his then practice or private addresses. Neither Mr Roberts nor the Tribunal has seen the letter. Its terms are not known and no date of receipt has been established which would trigger the 20 working day time period stipulated by s 40(1) of the Act. In the circumstances we do not accept that it has been established on the balance of probabilities that an information privacy request was made. Indeed, while he carries no burden of proof, Mr Roberts has affirmatively established to the civil standard (and indeed has established beyond reasonable doubt) that the "request" was never received by him. In these circumstances we do not accept that an information privacy request was made. Insofar as Mr Reekie's case rests on the "request" of 8 August 2005, it must fail in its entirety.

Whether there was a second request

[60] As to the second request of 14 April 2007, the sending of the letter has been established but it is common ground that it was returned to Mr Reekie unopened. The question is whether an information privacy request can be said to have been made when the agency to which it is sent returns the letter, unopened, to the sender, is unaware of the contents of the envelope and is not on notice that personal information is required by an individual. We are mindful of the caution expressed in *O'Neill v Dispute Resolution Services Ltd* [2006] NZHRRT 15 (10 April 2006) at [30] that the Tribunal should not:

> … open the door to the possibility that agencies might be within their rights to ignore access requests because they would rather that the request had not been made, or because they might prefer that the request were made in some other way. That is a slippery slope which we are confident the Legislature did not intend to introduce into the Privacy Act.

[61] *O'Neill* was a case in which an agency put an automated block on emails coming from Mr O'Neill because of the flood of messages sent by him (the High Court later declared him to be a vexatious litigant). However, Mr O'Neill was not aware of the block and as it happened, the email containing the information privacy request got through and the Tribunal found that when this email arrived in the Inboxes of various employees of the agency, Mr O'Neill had successfully "made" an information privacy request to which s 40 of the Act applied. The Tribunal remarked, however, that its analysis would perhaps have been different if the fact of the block had been communicated. See para [29]:

> Perhaps the analysis would be different if the evidence had established that the fact of the block had been effectively communicated to Mr O'Neill, that the block itself was effective (so as to stop the email arriving in any DRSL Inboxes at all), and that Mr O'Neill had been notified in a timely and appropriate way that his email had been rejected.

[62] In the present case:

[62.1] Mr Reekie knew, prior to writing to Mr Roberts, that their relationship had broken down in the most fundamental way with Mr Reekie making serious allegations regarding Mr Roberts' conduct of the trial and Mr Roberts emphatically rebutting each and every of those allegations. Mr Reekie was also in possession of Mr Roberts' letter to the ADLS which ended with the statement that Mr Roberts would "not enter into further correspondence" and was to cease practice as a barrister on or about 30 March 2007. He was also aware that when Ms Wood had earlier spoken to Mr Roberts by telephone on 14 September 2005 Mr Roberts had said that he did not wish to have anything further to do with Mr Reekie.

[62.2] At the time the letter was sent on 14 April 2007 Mr Reekie and Mr Roberts had not communicated with each other since the sentencing date of 15 July 2003.

[62.3] Objectively viewed, it was understandable that Mr Roberts had decided not to communicate further with Mr Reekie. His return of the letter, unopened, was an act done entirely in good faith. There was nothing to put him on notice that the letter contained or could contain an information privacy request. The facts are entirely different to those in *O'Neill*. This is not a case where an access request has been ignored because the agency would rather that the request had not been made.

[62.4] Given the substantial effluxion of time since they had last spoken and knowing that Mr Roberts would not enter into correspondence with him, Mr Reekie had reasonable alternatives available to him once the unopened letter was returned to him and he was aware that the information privacy request had not been communicated in an effective manner. As explicitly acknowledged by s 45, an information privacy request can be made by an agent of the individual. That is, Mr Reekie could have authorised a third party (such as Ms Wood or a lawyer) to obtain the information. We are sure that had the information privacy request been conveyed to Mr Roberts through this alternative means permitted by the Act, the request would have been communicated in an effective manner and then complied with. In this regard the Privacy Commissioner cannot be an agent of the individual making an information privacy request because the Commissioner is charged by Part 8 of the Act with the investigation of complaints, not with the making of complaints and would have a conflict of interest. The statutory duty in s 13(1A) to act independently would be compromised.

[63] In these circumstances the return (unopened) of the information privacy request meant that Mr Reekie was on notice that the request had not been successfully "made" so as to trigger the obligations of Mr Roberts under the Privacy Act. As Mr Reekie took no further steps to communicate the request in an effective manner, no information privacy request has been established by the evidence.

SUMMARY CONCLUSIONS

[64] In summary our conclusions are:

> **[64.1]** We are not satisfied on the balance of probabilities that an information privacy request was made on 8 August 2005.
>
> **[64.2]** We are not satisfied on the balance of probabilities that an information privacy request was made on 14 April 2007. The request was not communicated to Mr Roberts in an effective manner and did not trigger any obligations under Parts 4 and 5 of the Act.

Formal orders

[65] For the foregoing reasons the decision of the Tribunal is that the claims made by Mr Reekie are dismissed.

Costs

[66] Any application by Mr Roberts for costs is to be filed and served, along with any submissions, by 5pm on Friday 29 March 2013.

[67] Should Mr Reekie wish to resist the application for costs his submissions are to be filed and served by 5pm on Friday 19 April 2013.

[68] The Tribunal will then determine the issue of costs on the basis of the papers that will by then have been filed and served without any further oral hearing.

[69] In case it should prove necessary we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Mr RK Musuku**	**Hon KL Shirley**
Chairperson	**Member**	**Member**