IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 21**

	Reference No. HRRT 021/2013
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**RICKEE TE WINI**
	PLAINTIFF
AND	**GRAEME ASKELUND**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr RK Musuku, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr R Te Wini in person
Mr G Askelund in person

DATE OF HEARING: **7 April 2015**

DATE OF DECISION: **15 June 2015**

DECISION OF TRIBUNAL

Introduction

[1] On 1 October 2003 Mr Askelund, an Auckland barrister, was appointed as lawyer to represent Mr Te Wini in proceedings brought by the Department of Child, Youth and Family Services (CYFS) under the Children, Young Persons, and Their Families Act 1989. The Department sought a declaration that Mr Te Wini was in need of care or protection, a psychological assessment and an interim support order. Mr Te Wini was then ten years of age (his date of birth is 15 March 1993) and living in the day to day care of his father, Mr Kevin McQuoid.

[2] At the time Mr McQuoid formed the view the social worker who made the application on behalf of CYFS perjured himself when swearing the supporting affidavit. Mr McQuoid

believes the evidence was assembled with the deliberate and calculated intention of manufacturing and perverting the proceedings. Mr McQuoid is also of the view Mr Askelund's report to the Family Court contained "incorrect statements and promulgated and advanced the perjured evidence of the CYFS [social worker] as though it were fact".

[3] Mr Askelund told the Tribunal that by early 2007 his ability to work constructively with Mr McQuoid had disintegrated completely and Mr Askelund accordingly stepped aside from the appointment to enable a new lawyer (Mr Alex Ashmore) to act for Mr Te Wini. The changeover took place in April 2007.

[4] Mr Te Wini is now 22 years of age. He and his father told the Tribunal they intend taking criminal and civil proceedings against the Ministry of Justice, CYFS and Mr Askelund in relation to the proceedings before the Family Court. With that object in mind they have endeavoured to gain access to Mr Askelund's file by using the Privacy Act 1993, particularly information privacy Principle 6 which confers on Mr Te Wini a right of access to the personal information held by Mr Askelund. Principle 6 provides:

> Principle 6
>
> *Access to personal information*
>
> (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—
>
> (a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
>
> (b) to have access to that information.
>
> (2) Where, in accordance with subclause (1)(b), an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
>
> (3) The application of this principle is subject to the provisions of Parts 4 and 5.

[5] By email dated 28 May 2009 Mr Te Wini sent to Mr Askelund an attachment in the form of a letter dated 5 May 2009 requesting a copy of Mr Askelund's file relating to Mr Te Wini.

[6] The effect of the 20 working day period prescribed by s 40(1) of the Privacy Act was that Mr Askelund was required to make a decision on that request (and to communicate the decision to Mr Te Wini) by 3 June 2009 (if time is calculated with a starting date of 6 May 2009) or by 26 June 2009 (if time is calculated with a starting date of 29 May 2009). In each case allowance has been made for Queen's Birthday which fell on 1 June 2009. Section 40(1) provides:

> **40 Decisions on requests**
>
> (1) Subject to this Act, the agency to which an information privacy request is made or transferred in accordance with this Act shall, 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,—
>
> (a) decide whether the request is to be granted and, if it is to be granted, in what manner and, subject to sections 35 and 36, for what charge (if any); and
>
> (b) give or post to the individual who made the request notice of the decision on the request.

[7] While Mr Askelund does not formally concede he failed to comply with s 40(1) he accepts he cannot provide evidence he did so comply. In the result the 20 working day period expired without a decision or other response from Mr Askelund. He said he has never practised in the area of privacy law and did not take legal advice. He told the Tribunal that looking back from the vantage point of 7 April 2015 it is likely Mr Te Wini's

file was lost or mislaid in the period after April 2007 and certainly before the access request in May 2009.

[8] From Mr Askelund's perspective it is most unfortunate he did not take timely legal advice in May or June 2009 and advise Mr Te Wini that the file could not be found. This is because one of the grounds on which an agency may refuse a request made pursuant to Principle 6 is that the information requested is not readily retrievable or the information requested does not exist or cannot be found. See s 29(2)(a) and (b):

> (2) An agency may refuse a request made pursuant to principle 6 if—
> (a) the information requested is not readily retrievable; or
> (b) the information requested does not exist or cannot be found; or
> (c) the information requested is not held by the agency and the person dealing with the request has no grounds for believing that the information is either—
> (i) held by another agency; or
> (ii) connected more closely with the functions or activities of another agency.

[9] It was in these circumstances the hearing before the Tribunal had as its focus the remedies (if any) which are to be granted. The witnesses who gave evidence were Mr Te Wini, his father Mr McQuoid and Mr Askelund. At the conclusion of the hearing both parties agreed closing submissions would be filed in writing to be considered by the Tribunal on the papers. Mr Te Wini's submissions on the evidence and on the law were due on 8 May 2015, Mr Askelund's submissions were due on 29 May 2015 and Mr Te Wini's submissions in reply were due on 12 June 2015. These dates were fixed to accommodate Mr Te Wini's university commitments (assignments were due on 20 and 29 April 2015). Neither party has filed submissions. Given the delays which have occurred in this case we do not intend postponing our decision any longer.

LIABILITY

[10] Before the Tribunal has jurisdiction to grant a remedy under s 85 of the Privacy Act it must be satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of the plaintiff. The expression "interference with the privacy of an individual" is defined in s 66 of the Act. The factually relevant limb of the definition is that in s 66(2) and (3):

> (2) Without limiting subsection (1), an action is an interference with the privacy of an individual if, in relation to an information privacy request made by the individual,—
> (a) the action consists of a decision made under Part 4 or Part 5 in relation to the request, including—
> (i) a refusal to make information available in response to the request; or
> (ii) a decision by which an agency decides, in accordance with section 42 or section 43, in what manner or, in accordance with section 40, for what charge the request is to be granted; or
> (iii) a decision by which an agency imposes conditions on the use, communication, or publication of information made available pursuant to the request; or
> (iv) a decision by which an agency gives a notice under section 32; or
> (v) a decision by which an agency extends any time limit under section 41; or
> (vi) a refusal to correct personal information; and
> (b) the Commissioner or, as the case may be, the Tribunal is of the opinion that there is no proper basis for that decision.
> (3) If, in relation to any information privacy request, any agency fails within the time limit fixed by section 40(1) (or, where that time limit has been extended under this Act, within that time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 40(1), that failure shall be deemed, for the purposes of subsection (2)(a)(i) of this section, to be a refusal to make available the information to which the request relates.

[11] The practical effect of Mr Askelund's acknowledgement he cannot establish he complied with s 40(1) is that his failure to comply is statutorily deemed for the purposes

of s 66(2)(a)(i) to be a refusal to make available the information to which the request related.

[12] As this failure came about through Mr Askelund's ignorance of his statutory obligations under the Privacy Act, we conclude for the purposes of s 66(2)(b) there was no proper basis for that failure. Accordingly we find there was an interference with the privacy of Mr Te Wini.

REMEDY

[13] Given this finding we have jurisdiction under s 85 to grant one or more of the remedies specified in that provision:

> **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.
> (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.
> (3) Where the Director of Human Rights Proceedings is the plaintiff, any costs awarded against him or her shall be paid by the Privacy Commissioner, and the Privacy Commissioner shall not be entitled to be indemnified by the aggrieved individual (if any).
> (4) It shall not be a defence to proceedings under section 82 or section 83 that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.

Section 85(4) – the conduct of the defendant

[14] Section 85(4) provides that while it is no defence that the interference was unintentional or without negligence, the Tribunal must nevertheless take the conduct of the defendant into account in deciding what, if any, remedy to grant.

[15] Mr Askelund was admitted to the Bar in 1980 and has been in private practice continuously since then, predominantly in the area of Family Law. He has been on the list of lawyers appointed to represent children since the early to mid 1980s. He estimates that since then he has received in excess of 1,000 Ministry of Justice appointments as lawyer for the child. He had never received an information request under the Privacy Act until Mr Te Wini's letter of 5 May 2009 and email of 29 May 2009. At the time he believed the request raised an important issue relating to the ownership of Mr Te Wini's file because he (Mr Askelund) had been instructed not by Mr Te Wini or any member of his family, but by the Ministry of Justice. He felt he had obligations not only to Mr Te Wini but also to the Ministry. He considered it likely the file was the property of the Family Court and contained information confidential to that court or which was legally privileged. He spoke to senior members of the legal profession but there was no consensus of opinion. Some considered Mr Te Wini had an absolute right to his

file, others considered the contents of the file to be privileged and the property of the court. Release of the file would be a breach of Mr Askelund's obligations as an officer of the court were he to release the file to Mr Te Wini. Mr Askelund accepts he did not research the Privacy Act but believes he did not act in a cavalier or irresponsible manner.

[16] On 29 June 2009 Mr Te Wini lodged a complaint with the Privacy Commissioner who on 22 July 2009 reported to Mr Te Wini that Mr Askelund had been spoken to and that he (Mr Askelund) had stated he would be referring the matter to the Family Court for a ruling whether the file could be released.

[17] By letter dated 24 July 2009 (well outside the 20 working day period prescribed by s 40(1) of the Privacy Act), Mr Askelund wrote to the Registrar of the Family Court at Waitakere outlining the circumstances and seeking comment from Mather DCJ. The relevant part of the letter stated:

> I have not previously encountered such a situation and I am unsure of my position both legally and procedurally. Whilst on the one hand Rickee [Te Wini] was my client and therefore entitled to be accorded the same legal status as any adult client, my role came about owing to a Judicial appointment and I suspect the Family Court will need to sanction and/or decline the release of my file.
>
> I would be most grateful if this letter could be referred to Judge Mather for judicial comment.

[18] By letter dated 4 August 2009 the Registrar responded, forwarding the text of a direction made by Judge Mather which was to the effect that Mr Te Wini's request for disclosure was declined:

> I acknowledge receipt of your correspondence dated 24 July 2009, which was referred to Chambers before Judge Mather and the following direction was made on 31 July 2009:
>
> > Mr Askelund is justified in his uncertainty. Given the background I am far from satisfied that this request is Rickee's independent of his father. Mr Askelund is court appointed and the Court's direction in this situation is appropriate. Rickee's request for disclosure is declined.

[19] On 6 August 2009 Mr Askelund sent to the Privacy Commissioner the text of this direction. However, in a ruling given on 25 November 2009 the Assistant Commissioner (Investigations) advised Mr Askelund the view expressed by Judge Mather was beside the point and there were no grounds under the Privacy Act justifying the withholding of the information requested by Mr Te Wini. It was accordingly concluded Mr Askelund had breached Principle 6 of the Act and interfered with Mr Te Wini's privacy. The Assistant Commissioner went on to state that before the case was referred to the Director of Human Rights Proceedings (who can bring a case before the Tribunal), Mr Askelund was invited to make submissions on any withholding ground in ss 27 to 29 of the Act which he (Mr Askelund) considered relevant. Mr Askelund did not respond to this invitation.

[20] He did, however, refer the matter back to the Family Court. By letter dated 2 December 2009 he wrote to the Registrar enclosing copies of the correspondence with the Privacy Commissioner and requested the matter be referred back to Judge Mather for further comment. On 15 December 2009 the Registrar reported Judge Mather had issued a further direction to the effect that he (Judge Mather) intended taking up the matter with the Principle Family Court Judge. In the meantime Judge Mather considered it would be premature and inappropriate for the Privacy Commissioner to refer the matter to the Director of Human Rights Proceedings:

> Correspondence filed and dated 2 December 2009 was dealt with in chambers and the following orders/directions were issued by His Honour Judge Mather:
>
> Minute to be copied to the Privacy Commissioner.
>
> > I have read recent correspondence between Mr Askelund and the Privacy Commissioner. There are some complexities to this case and the extent to which lawyers representing children are subject to the Privacy Act is unclear. I intend to take the matter up with the Principal Family Court Judge. It may be necessary to appoint counsel to assist the court. In the meantime I consider it would be premature and inappropriate for the Privacy Commissioner to pursue the matter as suggested in the letter of 25 November 2009.

[21] Subsequently Mr Askelund received via the Registrar a copy of a letter from Principal Family Court Judge, Judge PF Boshier to Judge Mather expressing the view that the court was not in a position to give directions on the point as the matter was outside the scope of the court's jurisdiction. The fact that the state paid the costs of the Lawyer for Child was a separate issue from who the client was and who owned the file. Judge Boshier stated:

> Having got to that stage, it is fairly and squarely a matter for Mr Askelund to engage with the Privacy Commissioner and decide what he is to do. I doubt that this has happened thus far for understandable reasons, namely his caution on ownership of the file and propriety in making any disclosure.

[22] Mr Askelund heard nothing further from the Privacy Commissioner or from Mr Te Wini throughout 2010 although he did receive a letter dated 9 April 2010 from the then Director of Human Rights Proceedings, Mr Robert Hesketh, advising that because Mr Hesketh knew Mr Askelund and had had a professional relationship with him, Mr Hesketh recused himself from deciding whether proceedings were to be brought against Mr Askelund. Mr Hesketh proposed instructing Mr Robert Stevens, an Auckland barrister to make that decision.

[23] Almost twelve months later Mr Askelund received a letter from Mr McQuoid dated 15 January 2011 requesting certain information about Mr Askelund's handling of the assignment. By email dated 20 January 2011 Mr Askelund replied to Mr McQuoid advising he had been unable to locate the file:

> I acknowledge your letter dated 15 January 2011 sent to me by email.
>
> I have been unable to locate my old file for your son Rickee despite a comprehensive search.
>
> However, even if my search was more productive I would be unable to release the information to you in your personal capacity. It is privileged material.
>
> I regret I cannot be of further assistance.

[24] The statement by Mr Askelund that as at January 2011 he had been unable to locate the file becomes relevant later in the narrative of events.

[25] Against this background Mr Askelund submits while he did not address the specific terms of the Privacy Act, he did act responsibly by referring to the Family Court what he believed to be a novel issue, not previously encountered by the Lawyer for Child. He considered himself bound by the direction given by Judge Mather on 31 July 2009 that the request for disclosure was declined. Even the letter from Judge Boshier acknowledges it had been understandable for Mr Askelund to have exercised caution on ownership and disclosure of the file.

[26] It is to be observed none of these circumstances amount to a defence. They are, however, relevant to mitigation and in turn, remedies. We turn now to the loss of the file.

Loss of the file

[27] Both in his evidence and in his submissions Mr Te Wini contended Mr Askelund had been disingenuous when explaining why he did not comply with the Principle 6 request. It is not intended to rehearse all the steps in the argument. Rather the focus will be on the question whether the file was lost. Briefly, when the first teleconference was convened by the Chairperson on 15 November 2013 Mr Askelund said he had retrieved Mr Te Wini's file from the archives and it was available for inspection. He offered to meet with Mr Te Wini and Mr McQuoid to ascertain what information was required. See the *Minute* dated 15 November 2013 at [7].

[28] On 4 February 2015, at what had been intended to be the substantive hearing, Mr Askelund, in the course of his adjournment application, told the Tribunal he had not been able to find Mr Te Wini's file for the period 2002 to 2007. He thought he may have handed it to Mr Ashmore at the changeover in April 2007. He had asked Mr Ashmore to check if he held Mr Askelund's file. See *Te Wini v Askelund (Removal of Second Plaintiff)* [2015] NZHRRT 2 (10 February 2015) at [12]. Mr Ashmore subsequently advised on 10 February 2015 he did not have Mr Askelund's file nor had he ever seen a copy of it.

[29] Mr Te Wini and Mr McQuoid allege Mr Askelund set out to deceive them and the Tribunal by first saying he had the file and then that it could not be found.

[30] Explaining the apparent discrepancy Mr Askelund gave evidence that over many hours he had conducted numerous searches for the file but without success. He provided the following background:

> **[30.1]** His closed file index book records a closed file No. 10/88 in the name of L4C McQuoid. L4C is an abbreviation of Lawyer for Child.
>
> **[30.2]** The reference to "10" is year 2010 and the reference to "88" is the numerical file number.
>
> **[30.3]** When Mr Askelund first searched his archived files he could not locate the 10/88 file packet. He therefore assumed it had either already been retrieved (and mislaid) or had not in fact been filed away.
>
> **[30.4]** In the lead up to the 15 November 2013 teleconference he had been anxious to leave no stone unturned in his pursuit of the file and conducted a further search of the archived files. This time he was able to locate packet 10/88. It was a plain brown manila envelope with the name L4C McQuoid and the filing number written in marker pen on the front of the envelope. The file had been incorrectly boxed, out of chronological order.
>
> **[30.5]** He did not open the packet at the time. He assumed it was Mr Te Wini's file. He had no reason to believe otherwise and was pleased to have located it.
>
> **[30.6]** On a date unknown but following the teleconference he opened the packet. To his dismay he found it contained an entirely unrelated file for parties with the same surname of McQuoid. Mr Askelund had been appointed by the Family Court to assist a Mr and Mrs McQuoid with regard to relationship property proceedings.

[31] Mr Askelund submits there was no attempt by him on 15 November 2013 to mislead the Tribunal or Mr Te Wini as to possession of the file. He honestly believed at that time

he had been able to locate Mr Te Wini's file for the period 2002 to 2007. Having subsequently learnt from Mr Ashmore that he (Mr Ashmore) did not hold Mr Askelund's file, Mr Askelund is of the opinion it is likely the file was lost or mislaid in the period after April 2007 and certainly before the information request in May 2009. He also points out that in his email dated 20 January 2011 to Mr McQuoid he (Mr Askelund) had explicitly stated he had been unable to locate Mr Te Wini's file despite a comprehensive search.

[32] Having seen and heard Mr Askelund give evidence we are satisfied he has given an honest and reliable account of his searches for the file and of the circumstances in which he at one point believed he had successfully found the file only to discover after the 15 November 2013 teleconference that that was not the case. Mr Askelund has not set out to mislead the Tribunal or Mr Te Wini. Furthermore Mr Askelund's request that Mr Ashmore check to see if he held Mr Askelund's file was nothing more than a precaution, not an assertion the file had been delivered to Mr Ashmore.

Conclusions on the conduct of the defendant

[33] Because Mr Te Wini and his father regard Mr Askelund with ill-disguised animosity and suspicion the perceived inconsistencies regarding loss of the file have assumed disproportionate significance. We find that objectively there is no basis for their suspicions.

[34] Mr Askelund was without doubt unwise not to take legal advice regarding his obligations under the Privacy Act. Had he taken this step and had it been the case that as at May 2009 the file was unable to be found, a refusal of the request based on s 29(2)(a) or (b) of the Act would have been the end of the matter.

[35] On the other hand Mr Askelund did not simply ignore the request. He genuinely believed there was an issue whether it was proper for him as Lawyer for the Child to give access to that file and consequently raised the matter with Judge Mather. This resulted in a Minute by Judge Mather to the effect that access was not to be given. That the direction was entirely misconceived is not the issue. The point is Mr Askelund acted responsibly in seeking guidance from the Family Court, ultimately receiving advise via the Principal Family Court Judge that while the court had no proprietorship in a file held by the Lawyer for Child, it had been understandable Mr Askelund had exercised caution.

[36] In short we find nothing in Mr Askelund's conduct which aggravates his failure to comply with the 20 working day requirement in s 40(1) and as mentioned, we find also his statements regarding the loss of the file give no support for the allegation he has deliberately tried to mislead the Tribunal or Mr Te Wini.

The conduct of the plaintiff – the question of delay

[37] The delays by Mr Te Wini and his father in pursuing their case against Mr Askelund are striking and of such a degree they impact on the Tribunal's discretion to grant a remedy. It is therefore necessary to examine the conduct of Mr Te Wini and his father from the time access to the information was requested up to the hearing before the Tribunal on 7 April 2015.

[38] In the narrative which follows we refer to the actions (and inaction) of both Mr Te Wini and Mr McQuoid because Mr McQuoid has acted for his son throughout the events in question and his authority to do so was expressly acknowledged by Mr Te Wini in his evidence to the Tribunal. For the circumstances in which Mr McQuoid was removed as a party to these proceedings see *Te Wini v Askelund (Removal of Second Plaintiff)* [2015] NZHRRT 2.

[39] In the interests of brevity only a summary of the delays by Mr Te Wini (and Mr McQuoid) follow:

[39.1] First, there is the inordinate delay in filing the present proceedings. The closure of the investigation by the Privacy Commissioner was notified to Mr Te Wini by letter dated 25 November 2009. A Certificate of Investigation was issued by the Privacy Commissioner on 25 March 2010, being the document which establishes jurisdiction under s 83 of the Act for proceedings to be brought before the Tribunal by "the aggrieved individual". The present proceedings were not filed until 14 August 2013, a delay of three years and five months.

[39.2] Second, although Mr Te Wini sought free legal representation by the Director of Human Rights Proceedings under s 82 of the Act, in the nine month period from 10 November 2010 to 4 August 2011 he and his father simply disengaged themselves from the process they themselves had set in motion. The letter from Mr Stevens (the barrister delegated to act after Mr Hesketh recused himself) dated 28 June 2011 vividly illustrates the needless waste of time which occurred:

> I wrote to you both on 10 November 2010. In a follow-up telephone call I made to Kevin a few weeks later, I was promised that a reply would be coming very soon. I did not receive the promised reply and I wrote to you again on 13 March 2011 saying that, if I heard nothing definite and detailed from you by 8 April, I would assume that you no longer wish to pursue this matter through the Director of Human Rights Proceedings.
>
> On 8 April I received a telephone call from Kevin, saying that you were then looking at pursuing the matter by means of a complaint to the Law Society and that he would send me some material about that in the following few days. I told him that I thought that the Law Society avenue of complaint seemed to me a better course to take, and said that I would hold the Director's file open for a further month. I have heard nothing further from you.
>
> It is simply not right to hold this file open indefinitely. If I have not heard from you by Friday 8 July, answering my letter of 10 November and confirming that you are willing and able to proceed with a claim in the Human Rights Review Tribunal without further delay, I will close the file and return it to the Director. I will have to advise Mr Askelund of that action.

[39.3] Third, over a period of 13 months Mr Te Wini and Mr McQuoid failed to comply with directions given by the Chairperson at the first teleconference held on 15 November 2013. Specifically:

[39.3.1] Mr McQuoid failed to file a memorandum setting out the reasons why he should remain as a party to these proceedings.

[39.3.2] Neither Mr Te Wini nor Mr McQuoid filed a memorandum setting out their reasons for contending the jurisdiction of the Tribunal was not confined to the Principle 6 request of 5 May 2009.

[39.4] Fourth, among the issues addressed at the first teleconference of 15 November 2013 was the fact that while the Privacy Commissioner had investigated only the alleged breach of Principle 6, the statement of claim as filed additionally alleged breach of Principles 1, 4, 7, 8, 10 and 11. As can be seen from the *Minute* of 15 November 2013 the Chairperson explained to Mr McQuoid the reasons why the Tribunal's jurisdiction was confined to Principle 6 alone. Four months later, on 5 March 2014, Mr Te Wini wrote to the Privacy Commissioner with a request that the complaints under Principles 1, 4, 7, 8, 10 and 11 be investigated. On 18 June 2014 the investigating officer wrote to Mr Te

Wini requesting further evidence and submissions. Mr Te Wini did not respond. The investigating officer emailed again on 24 July asking that a response be provided and advising that if nothing had been received by 1 August 2014 it would be presumed Mr Te Wini no longer wished to pursue his complaint. Because no further correspondence was received from Mr Te Wini the investigating officer wrote on 10 September 2014 advising that the file had been closed.

[39.5] As stated in the *Minute* issued by the Chairperson at the conclusion of the hearing on 7 April 2015, closing submissions were to be filed in writing. Mr Te Wini asked that in fixing the timetable the Tribunal take into account his university commitments, particularly the fact he had assignments due on 20 and 29 April 2015. In those circumstances he was allowed until 8 May 2015 to file his submissions. Mr Askelund's submissions in reply were due on 29 May 2015. Mr Te Wini has not in fact filed any closing submissions or sought an extension of time for doing so. Similarly, Mr Askelund has filed no submissions.

Conclusions on the conduct of the plaintiff

[40] The Tribunal cannot recall a case in which there have been such serious, repeated and compounding delays. For no compelling reason Mr Te Wini delayed three years and five months before filing these proceedings. He then allowed a further thirteen months to drift by without complying with simple directions given by the Chairperson at the first case management teleconference. At the same time, having approached both the Director of Human Rights Proceedings and the Privacy Commissioner for assistance, he disengaged from both processes and wilfully ignored correspondence from both agencies. He said he was busy with his studies. This hardly addresses the magnitude of the repeated delays in question. Other plaintiffs live as busy (or busier) lives as Mr Te Wini but if genuinely aggrieved they routinely press their cases expeditiously. For his part Mr McQuoid said he had had no faith in Mr Hesketh as he had experienced Mr Hesketh "manufacturing" an outcome to suit himself. Mr McQuoid further said that when he and his son went back to the Privacy Commissioner it was "overwhelming to wade through constant refusal and subjugation of us to the world [of the Privacy Commissioner]". Asked to explain his failure to provide the information requested by the Commissioner in 2014 he said it was "exhaustion". He had been emotionally exhausted and yet another obstacle was being put in his way. Mr McQuoid did not strike the Tribunal as a person who would be easily deterred or who would become exhausted. Rather he is an energised, forthright, outspoken individual who is at times also aggressive.

[41] Both Mr Te Wini and Mr McQuoid were as quick to deny responsibility for their inordinate delays as they were to attribute to Mr Askelund allegations of serious misconduct. We were unimpressed by Mr Te Wini and Mr McQuoid as witnesses and do not accept their explanations and excuses for the delays for which they are responsible.

[42] In these circumstances it is difficult to take seriously the claim that Mr Askelund's breach of the Privacy Act has been "incredibly stressful" and "ruinous" of Mr Te Wini's peace of mind. Having observed Mr Te Wini and his father at the hearing we have concluded these proceedings have little to do with failure to gain access to personal information held by Mr Askelund and everything to do with a grudge held against him, a grudge driven by an unshakeable belief Mr Askelund and the social worker colluded in bringing false care and protection proceedings regarding the then ten year old Mr Te Wini and that in the course of those proceedings gave perjured information to the Family

Court. Mr Te Wini and Mr McQuoid aim to "get" Mr Askelund. His failure to provide the file is simply one such opportunity. In this context it is relevant to record the point made by Mr Askelund when cross-examining Mr Te Wini that Mr Wini has been able to gain access to between 80% and 90% of the information that was held on Mr Askelund's file. That is, the bulk of the information has already become available to Mr Te Wini because:

> **[42.1]** Mr McQuoid, as Mr Te Wini's legal guardian and caregiver, was served with the court documentation. So was Mr Te Wini's mother.
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> **[42.2]** Both Mr Te Wini and Mr McQuoid have made various information requests to the Department of Child, Youth and Family as well as to the Family Court.
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> **[42.3]** Consequently Mr Te Wini either directly or indirectly is in receipt of the pleadings and any additional material filed by CYFS. He will also be in possession of any orders, Minutes or directions made throughout the case.
>
> **[42.4]** If Mr McQuoid ever filed any documentation in relation to the proceedings, that would also be available to Mr Te Wini directly from his father. The same applies in relation to his mother.
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> **[42.5]** Mr Te Wini is in receipt of Mr Askelund's reports via the disclosure process together with the memoranda and submissions filed as a consequence of information requests to CYFS.

[43] These factors are not a defence. But they are relevant to the claim for damages under s 88(1)(b) and (c). See by analogy *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [106].

[44] In this context our assessment is that no genuine humiliation, loss of dignity or injury to feelings (s 88(1)(c)) has been established by Mr Te Wini. The opportunistic nature of these proceedings is underlined by the fact that whereas the "particulars" dated 9 February 2015 sought $10,000 for loss of benefit and a further $10,000 for emotional harm, both amounts were increased at the hearing to $40,000. Mr Te Wini submitted the case is at "the severe end of the spectrum". In our view this is unrealistic, if not fanciful.

The remedy question

[45] As we have been satisfied on the balance of probabilities that an action of Mr Askelund (the deemed refusal to make information available) was an interference with the privacy of Mr Te Wini, the Tribunal has jurisdiction to grant one or more of the remedies listed in ss 85(1) and 88(1) of the Privacy Act. However, a plaintiff does not have a right to any specific remedy. The Tribunal has a discretion. This is plain from the permissive "may grant" and "may award" language in which the jurisdiction is conferred. Confirmation is found in *Geary v New Zealand Psychologists Board* at [106] to [108].

[46] As to the damages claimed under s 88(1)(b) for loss of benefit (defined by Mr Te Wini as use of the information in the contemplated proceedings against the social worker and Mr Askelund), the extraordinary (and compounding) delays coupled with Mr Te Wini's lack of diligence (if not interest) in pursuing this case illustrate the claimed lost benefit is somewhat artificial.

[47] As to the claim of $40,000 for humiliation, loss of dignity or injury to feelings, it is difficult to see how such emotional harm can be asserted in the face of:

[47.1] The inordinate delays which have characterised this case including the three year five month delay in bringing these proceedings and the failure over thirteen months to comply with directions given by the Chairperson.

[47.2] Mr Te Wini's acknowledged access to both the court and CYFS files

[47.3] His indifference to communications from the Director of Human Rights Proceedings and the Office of the Privacy Commissioner.

[47.4] His failure to file closing submissions when given leave to do so.

[48] We find that humiliation, loss of dignity or injury to feelings has not been established.

[49] Even if a lost benefit of some kind could be established and even if we are wrong in finding there has been no humiliation, loss of dignity or injury to feelings, we would in any event exercise our discretion to withhold an award of damages because of the delays referred to earlier.

[50] We turn now to the question of a declaration. As held in *Geary*, a declaration may be declined generally on the basis of disentitling conduct. In that case reference was made to factors such as whether the applicant has acted with clean hands or has acted "fairly and appropriately". We would add delay as a further relevant consideration. We have paused long to consider the question whether Mr Te Wini's overall conduct is sufficient to disentitle him from declaratory relief. In the end we have decided that because Principle 6, alone among the information privacy principles, confers a legal right (see s 11) the circumstances do not cross the line of disqualification for a declaration, although they certainly come very close to so doing. Accordingly a declaration of interference is made.

FORMAL ORDER

[51] For the foregoing reasons the decision of the Tribunal is that it is satisfied on the balance of probabilities that an action of Mr Askelund was an interference with the privacy of Mr Te Wini and a declaration is made under s 85(1)(a) of the Privacy Act 1993 that Mr Askelund interfered with the privacy of Mr Te Wini by refusing to make information available in response to his information request.

[52] No damages are to be awarded for loss of benefit or for humiliation, loss of dignity or injury to feelings.

COSTS

[53] Both parties have been self-represented and both parties have enjoyed a measure of success. In these circumstances costs are to lie where they fall and there is to be no order for costs.

.....	.....	.....
Mr RPG Haines QC	**Mr RK Musuku**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**