IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 36**

	Reference No. HRRT 012/2013
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**GORDON HENRY HOLMES**
	PLAINTIFF
AND	**HOUSING NEW ZEALAND CORPORATION**
	DEFENDANT

AT DUNEDIN

BEFORE:
Mr RPG Haines QC, Chairperson
Ms WV Gilchrist, Member
Ms ST Scott, Member

REPRESENTATION:
Mr GH Holmes in person
Ms CP Paterson for defendant

DATE OF HEARING: **12 and 13 November 2014**

DATE OF DECISION: **11 August 2015**

DECISION OF TRIBUNAL

Introduction

[1] Mr Holmes has been a tenant of Housing New Zealand Corporation (HNZ) since 12 June 2000. In March 2012 he made complaint to HNZ, the Police and Noise Control operated by the Dunedin City Council (DCC Noise Control) regarding the behaviour of another tenant of HNZ who lived in the same block of housing units. Believing his concerns had not been adequately addressed he wrote to the HNZ Regional Manager by letter dated 27 March 2012 making a request under the Privacy Act 1993 for recordings of his calls to the HNZ 0800 number in the period 15 April 2011 to 27 March 2012 together with all records regarding the 0800 calls and the action taken by HNZ regarding those calls.

[2] Mr Holmes says HNZ did not respond to his request, thereby breaching s 40 of the Act and that that breach constituted an interference with his privacy as defined in s 66(2).

[3] Housing New Zealand says it did not receive the letter with the result its obligations under the Privacy Act were never engaged.

[4] The short issue in these proceedings is whether Mr Holmes has established on the balance of probabilities his letter was both sent to and received by HNZ.

[5] Before addressing the evidence it is necessary to note briefly a procedural matter which arose subsequent to the hearing.

The question of the discontinuance

[6] At the conclusion of the hearing at Dunedin on 12 and 13 November 2014 the Tribunal reserved its decision. By letter dated 16 November 2014 (received on 20 November 2014) Mr Holmes asked the Tribunal "to cease and discontinue the decision immediately".

[7] By memorandum dated 28 November 2014 HNZ opposed the discontinuance, submitting it would be an abuse of process for the proceedings to be discontinued. HNZ said it was entitled to a decision on the merits. Application was made for the discontinuance to be set aside.

[8] By letter dated 8 December 2014 Mr Holmes acknowledged he was wrong to have requested a discontinuance and withdrew the request. He too sought a decision on the merits.

[9] Against this background the Tribunal determined it would not act on the discontinuance and that a decision on the merits would be given. See the *Minute* issued by the Chairperson on 15 December 2014.

[10] The only other procedural matter of note is that these proceedings were originally set down for hearing at Dunedin in the week commencing Monday 17 March 2014 but were not reached because another case involving Mr Holmes and HNZ unexpectedly ran for four days. That case (HRRT012/2012) was eventually determined in favour of Mr Holmes. See *Holmes v Housing New Zealand Corporation* [2014] NZHRRT 54 (3 November 2014).

THE EVIDENCE FOR MR HOLMES

[11] In evidence Mr Holmes said that on or about 15 March 2012 he made a complaint to HNZ regarding noise from his neighbour, the tenant of the adjoining unit. By letter dated 21 March 2012 HNZ told Mr Holmes that having investigated the complaint, HNZ did not intend taking further action as it had not been possible to establish Mr Holmes had called DCC Noise Control as claimed.

[12] This set Mr Holmes on a quest to establish he had called DCC Noise Control and that he had been advised to complain to HNZ because DCC Noise Control would not act on complaints where the two parties involved were tenants of the same landlord. When he rang the HNZ 0800 number he was told to ring DCC Noise Control. Mr Holmes wanted to obtain from HNZ the recordings of his calls to the HNZ call centre. He believed these recordings would show he had in fact made complaint about noise and had explained his complaint to DCC Noise Control had been to no avail.

[13] Mr Holmes wrote also to the Dunedin City Council in May 2012 requesting a transcript of his call to DCC Noise Control. That request was not actioned until 3 October 2012, the delay leading to another complaint by Mr Holmes to the Privacy Commissioner. Mr Holmes' separate proceedings before this Tribunal against the Dunedin City Council under the Privacy Act were heard at Dunedin on 14 November 2014 but by letter dated 16 November 2014 were discontinued by Mr Holmes prior to delivery of the Tribunal's decision. See the *Minute* dated 21 November 2014 issued by the Chairperson in HRRT010/2013.

[14] Returning to the complaint against HNZ, on or about Tuesday 27 March 2012 Mr Holmes prepared a two page handwritten letter addressed to the Regional Manager of HNZ, Dunedin and marked it for the personal attention of the Regional Manager. This was because Mr Holmes believed intermediate management had stopped listening to him. After setting out the background circumstances and after expressing his dissatisfaction with the alleged failures of HNZ, Mr Holmes made a request under the Privacy Act in the following terms:

> I require under the Privacy Act 1993. Please supply
>
> 4 All copies of recordings from myself to 0800 HNZC number or transcripts of such recordings from dates 15th April 2011 till 27 March 2012.
>
> 5 Please supply all recordings and computer records in regard to these 0800 calls and action taken, same above dates.
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> These are my two Privacy Act requests.

[15] On Thursday 29 March 2012 and again on Friday 30 March 2012 Mr Holmes went to the HNZ office situated at 426 Moray Place, Dunedin to deliver the letter by hand so it could be stamped with an acknowledgement of receipt. On both occasions he found the HNZ office closed. The lights were on but the door was firmly locked. Mr Holmes then (on Friday 30 March 2012) went to the Post Office. After purchasing an envelope and stamp he posted the letter to HNZ. It was addressed to the Regional Manager, HNZ and marked "Personal". The address written on the envelope was copied by Mr Holmes from HNZ letterhead, namely 426 Moray Place, PO Box 830, Dunedin 9058. Mr Holmes is certain he copied the address correctly and paid the correct postage.

[16] Not having a receipt for his letter, the following week (most likely on Thursday 5 April 2012) Mr Holmes called the HNZ 0800 number. On reaching the call centre he introduced himself as Gordon Holmes of 4B Ponton Street, Dunedin and explained that the previous week he had sent to HNZ a letter dated 27 March 2012 marked for the personal attention of the Regional Manager and wanted to know if the letter had been received. The male person he spoke to did not give his name but went off to check. On his return to the telephone he told Mr Holmes the letter had been received on Monday 2 April 2012. Mr Holmes re-iterated it was a letter addressed to the Regional Manager and marked "personal". The person at the call centre answered "yes".

[17] A month later, not having received a response from HNZ, Mr Holmes by letter dated 12 May 2012 lodged a complaint with the Privacy Commissioner.

THE EVIDENCE FOR HOUSING NEW ZEALAND

[18] Housing New Zealand accepts that on 15 March 2012 Mr Holmes telephoned HNZ to make a noise complaint against his neighbour and that on 21 March 2012 Mr Holmes' tenancy manager wrote to Mr Holmes advising no further action would be taken on the complaint as there was no evidence Mr Holmes had called DCC Noise Control.

[19] However, HNZ says it has no record of having received the information privacy request of 27 March 2012 and that is the reason why there was no response.

[20] The only witness called by HNZ was Mr K Tuhakaraina, Associate General Counsel and the designated Privacy Officer for HNZ. Mr Tuhakaraina said (inter alia):

> **[20.1]** In April 2012 local HNZ offices were closed for drop-in visits by customers as the Customer Service Centre 0800 number was intended to be the primary way customers first made contact with HNZ. Local offices did not reopen until July 2013.
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> **[20.2]** He was not personally familiar with the date on which the Dunedin office closed. It would have been on or about April 2012. Asked if the office could have been closed on the Thursday and Friday of the last week of March 2012, he replied he did not know.
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> **[20.3]** In March 2012 the Regional Manager was based in Christchurch part of the time and in Timaru part of the time. Mr Tuhakaraina would have expected any letter addressed for the personal attention of the Regional Manager would have been sent to Christchurch either by courier or as a PDF attachment to an email. It could be expected a copy of the letter would also be placed on the relevant file.
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> **[20.4]** Housing New Zealand did not become aware of the information privacy request until contacted by the Privacy Commissioner and Mr Tuhakaraina did not see the letter of 27 March 2012 until a copy was received from Mr Holmes during the course of these proceedings.

[21] The Tribunal also heard evidence from Mr Tuhakaraina about the operation of the Customer Services Centre, the audio recording of calls to the centre, how requests for audio recordings are dealt with at the current time, client activity reports and the investigation by the Privacy Commissioner. In view of the conclusions we have reached on the facts, it is not necessary for that evidence to be referred to or discussed and the same applies to the submissions based on that evidence.

FINDINGS OF FACT

[22] The simple issue in this case is whether Mr Holmes has proved, on the balance of probabilities, he posted the letter of 27 March 2012 to the correct address and that the letter was received by HNZ. Housing New Zealand says the letter was not received and no obligation under the Privacy Act was engaged.

[23] The only direct evidence heard by the Tribunal regarding the sending and receipt of the 27 March 2012 letter has come from Mr Holmes. Mr Tuhakaraina fairly conceded he could give only general evidence as to the processes followed by HNZ.

[24] We believe and accept the account given by Mr Holmes for the following reasons:

> **[24.1]** We have no reason to disbelieve Mr Holmes. He was an honest witness.
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> **[24.2]** By producing a copy of the letter dated 27 March 2013 he has established there was in fact a letter dated 27 March 2013.
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> **[24.3]** The letter is consistent with the factual matrix in that it is clearly a response to the HNZ letter of 21 March 2012 in which it was stated HNZ would take no

action on the noise complaint because it could not be established Mr Holmes called DCC Noise Control. Mr Holmes' request to HNZ (and to the Dunedin City Council) for transcripts of his calls was a direct reaction to the implicit claim no noise complaint had been made.

[24.4] The evidence of Mr Holmes that on successive days (Thursday 29 March 2012 and Friday 30 March 2012) he found the Moray Place office of HNZ closed is supported by the evidence of Mr Tuhakaraina that "on or about" April 2012 local HNZ offices were closed for drop-in visits. Mr Tuhakaraina could not challenge Mr Holmes' evidence that the Dunedin office closed a few days early and could not be accessed on the last Thursday and Friday of March 2012.

[24.5] Mr Holmes' account of his posting of the letter and subsequent call to the Call Centre is consistent with his almost obsessive preoccupation of ensuring all his dealings with officialdom are clearly documented, including the obtaining of a confirmation of receipt for all documents supplied by him.

[24.6] When cross-examined, no flaws or weaknesses in Mr Holmes evidence were uncovered.

[24.7] The "defence" based on the absence from the HNZ Client Activity record of the events spoken of by Mr Holmes is of no significance. The record is admittedly incomplete in material respects. Specifically it makes no mention of the significant letter from HNZ dated 21 March 2012.

[24.8] The location of the Regional Manager in Christchurch and Timaru (something then outside Mr Holmes' knowledge) created the possibility of the letter being sent out of Dunedin and becoming lost or misplaced within the HNZ system. The fact that the letter was handwritten and challenging to read could well have increased the risk of the significance of the document not being appreciated and the information privacy request not being actioned.

[25] Each of these factors provide support for Mr Holmes' account. Certainly there is no evidence to contradict it. His "failure" to mention to the Privacy Commissioner the telephone call to the Call Centre on 5 April 2012 is explicable on the basis there was no need to make reference to it. When he made his complaint to the Privacy Commissioner he was not then aware HNZ would claim the letter had not been received. It was not an issue which would have reasonably occurred to Mr Holmes.

[26] Our conclusion on the evidence is that Mr Holmes has established, to the civil standard, the letter dated 27 March 2012 was sent by post to HNZ on Friday 30 March 2012 and received by HNZ on Monday 2 April 2012.

THE LEGAL ISSUES

[27] Information Privacy Principle 6 establishes an entitlement to personal information:

> 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.

[28] As recently pointed out by the Tribunal in *Armfield v Naughton* [2014] NZHRRT 48 at [70] and in *Director of Human Rights Proceedings v Valli & Hughes* [2014] NZHRRT 58 at [31], an agency which receives a request under Information Privacy Principle 6 for access to personal information has three key obligations:

> **[28.1]** First, to make a **decision whether the request is to be granted**. This decision must be made "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. See s 40(1) of the Privacy Act 1993:
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> > **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.
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> Failure to make such decision is deemed to be a refusal to make available the information to which the request relates (s 66(3)). The governing test is "as soon as reasonably practicable". The 20 working day period is the upper limit to what can be said to be "as soon as reasonably practicable". See further *Koso v Chief Executive, Ministry of Business, Innovation and Employment* [2014] NZHRRT 39 at [1] to [6] and [62].
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> **[28.2]** Second, **to make the information available** without "undue delay". This obligation is contained in s 66(4) of the Act. Where undue delay occurs there is similarly a deemed refusal to make the information available (s 66(4)).
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> **[28.3]** Third, where the request is refused, **to give reasons for the refusal**.

[29] These obligations are only triggered if a valid information privacy request is made. It must be established not only that the request was sent, but also that the manner of delivery chosen was 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. See *Reekie v Roberts* [2013] NZHRRT 7 (14 March 2013) at [55]:

> **[55]** … 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):
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> > **[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.
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> > **[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.
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> > **[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.

Application of the law to the facts

[30] For the reasons given it has been established on the balance of probabilities the information privacy request of 27 March 2012 was both sent and received. It is not for Mr Holmes to establish what happened to the request once received by HNZ. If the letter was lost or mislaid within the HNZ system or in the course of transfer from Dunedin to Christchurch or Timaru, such is not the responsibility of Mr Holmes. The loss or misplacement of the request is not a "defence" to the information privacy request. See s 30 of the Act. In terms of the *Reekie v Roberts* test, on the rather slight and insubstantial evidence received from HNZ, we do not accept it has been demonstrated the request was not received.

[31] As it is common ground no decision on the request was made within the statutory 20 working day period there was an interference with the privacy of Mr Holmes as defined in s 66(2)(a)(i) by reason of s 66(3) and we are satisfied there was no proper basis for that deemed refusal.

REMEDIES

[32] Where 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 one or more of the remedies allowed by s 85 of the Act:

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.

[33] Section 88(1) relevantly provides that damages may be awarded in relation to three specific heads of damage:

88 Damages

(1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:

(a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:

(b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:

(c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

Damages for humiliation, loss of dignity and injury to feelings

[34] Mr Holmes seeks damages of $20,000 for humiliation, loss of dignity or injury to feelings, a figure he described in the statement of claim as "conservative" given the "actions, attitude, arrogance, lies and deceit" of HNZ and its officers.

[35] In our view the emotional harm asserted by Mr Holmes has been much exaggerated. In particular we do not accept Mr Holmes experienced humiliation or loss of dignity by not being provided with an in-time response to his request under Principle 6. He did experience a limited degree of injury to his feelings in the form of some frustration and anger.

[36] The award of any remedy under ss 85 and 88 of the Act must be an appropriate response to the circumstances. No award of damages should exceed what fits the case. See *Hammond v Credit Union Baywide* [2015] NZHRRT 6 at [170.8]. The award of damages is also at the discretion of the Tribunal. Damages are not accessed as of right.

[37] In our view the facts of this case are at the far low end of the bands discussed in *Hammond v Credit Union Baywide* at [176]. Taking a possibly over generous view of the facts we have decided to award damages of $400.

Declaration

[38] While the grant of a declaration is discretionary, declaratory relief should not ordinarily be denied. See *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, Ms SL Ineson and Ms PJ Davies) at [107] and [108].

[39] On the facts we see nothing to justify the withholding from Mr Holmes of a formal declaration that HNZ interfered with his privacy and such declaration is accordingly made.

FORMAL ORDERS

[40] For the foregoing reasons the decision of the Tribunal is that it is satisfied on the balance of probabilities that an action of Housing New Zealand Corporation was an interference with the privacy of Mr Holmes and:

> **[40.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that Housing New Zealand Corporation interfered with the privacy of Mr Holmes by refusing to make personal information available to him in response to his request of 27 March 2012 for access to that information.
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> **[40.2]** Damages of $400 are awarded against Housing New Zealand Corporation under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for injury to feelings.

COSTS

[41] As a lay litigant Mr Holmes is not entitled to costs, although he may recover disbursements as defined in High Court Rules, r 14.12. Essentially, he can recover the expense of photocopying documents for the purpose of these proceedings.

[42] The following procedure is to apply:

> **[42.1]** Mr Holmes is to file particulars of any disbursements claimed within 14 days after the date of this decision. The submissions for HNZC are to be filed within a further 14 days with a right of reply by Mr Holmes within 7 days after that.
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> **[42.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.
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> **[42.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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Mr RPG Haines QC	**Ms WV Gilchrist**	**Ms ST Scott**
Chairperson	**Member**	**Member**