

Reference No. HRRT 036/2016

UNDER THE PRIVACY ACT 1993

BETWEEN RAM NAIDU

PLAINTIFF

AND ROYAL AUSTRALASIAN COLLEGE OF SURGEONS

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson
Ms K Anderson, Member
Hon KL Shirley, Member

REPRESENTATION:

Mr AR Bell for plaintiff
Mr AJ Knowsley for defendant

DATE OF HEARING: 16 and 17 April 2018

DATE OF LAST SUBMISSIONS: 25 May 2018 (plaintiff)
1 June 2018 (defendant)
7 June 2018 (plaintiff)

DATE OF DECISION: 14 June 2018

DECISION OF TRIBUNAL¹

INTRODUCTION

[1] On 10 August 2015 Dr Naidu addressed a request to the Royal Australasian College of Surgeons (RACS) for access to the personal information which RACS then held about

¹ [This decision is to be cited as: *Naidu v Royal Australasian College of Surgeons* [2018] NZHRRT 23]

him. Under the Privacy Act 1993 (PA), s 40 RACS had 20 working days within which to notify Dr Naidu of its decision on the request.

[2] The last day for giving the required notice under s 40 was 7 September 2015.

[3] The decision on the request was notified to Dr Naidu 11 days late on 22 September 2015 when by email of that date RACS provided a copy of Dr Naidu's file. A limited number of documents were withheld under s 29.

[4] Non-compliance with the 20 working day period prescribed by PA, s 40(1) triggered s 66(2)(a)(i) and (3) with the result RACS was statutorily deemed to have refused to make available the information to which the request related. As there was no proper basis for late compliance with the Act it follows there was in terms of s 66(2) an interference with the privacy of Dr Naidu.

[5] These essential facts are not in dispute. The central issue in this case is the nature of the remedies (if any) to be granted to Dr Naidu for the interference with his privacy. As to monetary compensation, the primary difficulty he faces is establishing a causative link between the 11 day delay and the damages sought under PA, s 88(1)(b) for loss of benefit and s 88(1)(c) for humiliation, loss of dignity and injury to feelings. As to the request for an order to perform, the primary issue is whether Dr Naidu is entitled to the formula or mechanism by which the referee scores were arrived at.

[6] Brief reference to the background facts is necessary.

BACKGROUND

[7] Dr Naidu is a doctor of medicine. Most of his adult life has been focused on the achievement of one goal, namely becoming an orthopaedic surgeon. He has obtained a Bachelor of Medicine and Surgery (Singapore), is a member of the Royal College of Surgeons, Edinburgh and has obtained a Master of Medicine, Orthopaedic Surgery. Before coming to New Zealand he was an orthopaedic registrar in Singapore for some 1.5 years and was offered a training position in orthopaedic surgery in that country. He chose, however, to come to New Zealand as he considered the training programme in this country to be superior. He and his wife migrated to New Zealand in January 2009 to pursue his dream. This necessitated taking a step back in his career and he started as an orthopaedic house officer at Waikato Hospital, Hamilton. His wife gave up her own career in a field unrelated to medicine. Later in 2009 Dr Naidu was promoted to registrar in the orthopaedic department at Waikato Hospital.

[8] To qualify as an orthopaedic surgeon, registrars must complete a programme known as the Surgical Education Training in Orthopaedic Surgery (SET). In New Zealand the SET programme is administered by the New Zealand Orthopaedic Association (NZOA) and delivered by its Education Committee on behalf of RACS. The programme covers training in all aspects of orthopaedic surgery and research and requires completion of rotations through accredited hospital training posts throughout New Zealand. The minimum period of training is five years from SET 1 to SET 5. Entry is highly competitive. In 2014 only nine applicants were selected to commence the SET programme.

[9] Dr Naidu applied for admission to the SET programme in 2011, 2012, 2014 and 2015. The information privacy request to which these present proceedings relate was in respect of the 2015 application.

[10] In 2015 some 28 candidates applied for selection and 26 were invited to interview. Dr Naidu and one other candidate (who ranked higher than Dr Naidu) were the two not offered an interview. Dr Naidu had been shortlisted and interviewed in 2011 and 2012 but not in 2014. It transpired that of the 26 candidates interviewed in 2015, only 9 were offered places in the training programme. It can be seen this mirrored the number of candidates selected in 2014.

[11] On 25 May 2015 Dr Naidu was advised by letter that his application had been unsuccessful based on his referee scores. A table of those scores was not disclosed to him until 8 April 2016, some 11 months later. This table was described as “the referee score information summary”:

Referee 1	17.60
Referee 2	64
Referee 3	64.8
Referee 4	40.8
Referee 5	15.2
Referee 6	44
Referee 7*	15.2
Total of referee and CV scores	26.90

* Omitted from total score as it was the lowest score.

[12] Based on the documentation made available to him on 22 September 2015 and on the referee score summary provided on 8 April 2016 Dr Naidu believes (inter alia):

[12.1] The scoring of his CV was incorrect. In this regard it is accepted by RACS Dr Naidu was entitled to an additional half point but this did not raise Dr Naidu’s overall score to the level required to be invited to interview.

[12.2] The referee scores were inconsistent with the verbal feedback he had received and were well below his previously achieved scores in 2011 and 2012.

[12.3] When, following his complaint to the Privacy Commissioner, RACS released the 8 April 2016 table summarising the referee scores, little meaningful information was in fact provided as the scores were without context. In particular, no information was provided regarding what the scores had been marked out of or whether they had been weighted. Because the scoring mechanism or methodology was not disclosed Dr Naidu could not interpret or decipher what the scores were and whether they had been correctly calculated. Dr Naidu told the Tribunal that when he received

the table he was shocked at how low some of the scores were. To him this raised issues as to how rigorous the assessment process had been.

[12.4] Dr Naidu was also concerned that he did not have a full set of references. There should have been seven but one of the references was late and Dr Naidu was not told of this fact nor was he advised whether the late reference had been counted when the referee scores were tallied.

[13] The specific submission was that the formula or mechanism by which the referee scores were arrived at should have been provided as part of the RACS response to the request for access to his personal information. Dr Naidu does not seek the evaluative material itself, recognising it is protected from disclosure by PA, s 29(1)(b).

[14] Dr Naidu had a right of appeal to the RACS Appeals Committee within three months from 25 August 2015. However, following a request by him RACS by email dated 24 August 2015 extended that period “to a date being one month from the date on which the documents requested under the Privacy Act 1993 are emailed to you”.

[15] As previously mentioned, the documents held by RACS (other than those withheld under PA, s 29) were released to Dr Naidu on 22 September 2015.

[16] On 15 October 2015 Dr Naidu filed his RACS appeal and on 27 October 2015 also filed a complaint with the Privacy Commissioner, a complaint which was not finalised until 4 May 2016.

[17] In response to a request by Dr Naidu, RACS by email dated 16 December 2015 extended the deadline for the taking of steps in the appeal process “until after the privacy request issues have been finalised”. After the Privacy Commissioner on 4 May 2016 published his final view on Dr Naidu’s complaint, RACS by letter dated 18 May 2016 notified Dr Naidu that if he wished to have a formal appeal hearing he was to contact RACS. In the same letter he was advised that should he wish to provide updated grounds of appeal, he was free to do so. Alternatively, should he decide not to proceed with the appeal, a refund of the NZ\$10,000 appeal fee (paid on lodgement of the appeal) would be arranged.

Consequences caused by interference with privacy

[18] Dr Naidu says the deemed refusal and the 11 day out of time response to his information privacy request caused the following:

[18.1] Prejudice in the conduct of the appeal. As the referee scores were provided without context and as he did not know what the scoring mechanism was he could not decipher the scores or assess whether they had been correctly calculated. Without this information he could not make informed arguments in support of his appeal or discharge his onus of establishing the grounds of appeal.

[18.2] A radical (and unwanted) change to his career path. Having committed almost seven years of his life to gaining entry to the SET programme he has now

been required, without any explanation, to elect another field of specialisation. This has caused him a huge amount of personal distress.

[18.3] Loss of confidence. The whole process has significantly shattered his confidence and made him question his ability as a doctor.

[18.4] Devastation. The humiliation and distress at being passed over in 2015 for no good reason has been devastating. All he seeks is an explanation as to “why I was not good enough”.

[19] In cross-examination Dr Naidu was asked to explain what loss of dignity he had suffered. In his answer Dr Naidu said the scores awarded in 2015 did not match his 17.5 years’ experience and in addition the scores achieved by him in 2011 and 2012 were both higher than his 2015 score. He wondered whether this meant he was getting worse as a doctor. The low scores shocked him. After seven years in New Zealand he had been at the cusp of qualification but had now found that he had been passed over for no good reason. He found this humiliating.

[20] Asked what injury to feelings he had experienced, Dr Naidu referred to the shattering of his confidence and self-belief. He wanted to know why he had done so badly. He felt RACS had failed to respect its own internal rules and procedures for the processing of applications under the SET programme.

Remedies sought

[21] The remedies originally sought in the statement of claim were:

[21.1] A declaration of interference with privacy.

[21.2] A declaration that RACS would not repeat the behaviour which caused the interference.

[21.3] An order that RACS provide the requested information, including the scoring mechanism for the referee reports.

[21.4] Damages:

[21.4.1] Loss of benefit being loss of the chance of “ever being able to become an orthopaedic surgeon”. Dr Naidu was instructing an actuary to determine the monetary value of this loss of benefit.

[21.4.2] Damages for humiliation, loss of dignity and injury to feelings.

[22] However, just one week prior to the hearing Dr Naidu by memorandum dated 10 April 2018 abandoned the request for damages for loss of future career benefits. He reformulated his claim in the following terms:

[22.1] A declaration of interference.

[22.2] An order that RACS disclose its file including:

[22.2.1] Confirmation of the final referee score.

[22.2.2] Confirmation of how the absence of a referee report impacted the score.

[22.2.3] Confirmation of what efforts were made by NZOA to obtain the missing referee report.

[22.3] Damages of \$9,473.00 for pecuniary loss in the form of legal expenses arising from pursuing the request and lodging the complaint with the Privacy Commissioner.

[22.4] Pecuniary loss in the sum of \$10,000 being the loss of the filing fee for the appeal.

[22.5] Damages of \$10,000 for the loss of the benefit of certainty associated with obtaining the missing information relating to the referee scoring.

[22.6] Damages of \$60,000 for humiliation, loss of dignity and injury to feelings.

[23] The claim for the \$10,000 filing fee was abandoned at the conclusion of the Tribunal hearing on 17 April 2018 when Dr Naidu advised he had decided not to proceed with the appeal and Mr Knowsley confirmed that RACS would accordingly refund the \$10,000.

[24] The claim for reimbursement of the \$9,473 in legal expenses was likewise abandoned at the conclusion of the hearing. The cross-examination of Dr Naidu had highlighted that the only evidence of the claimed expense was a list of invoices for the period 29 July 2015 to 28 February 2017 in the amount of \$11,891.65. The invoices themselves were not in evidence. Dr Naidu had been unable to identify which legal fees covered by these invoices related to the 11 day delay as opposed to legal expenses for other matters. The Tribunal consequently invited Mr Bell to give further thought to strengthening this part of the claim but in the closing stages of the hearing Mr Bell advised that Dr Naidu withdrew the claim to avoid the further delay which would flow from an application to admit further evidence after both parties had closed their cases and had presented their closing submissions.

[25] For its part, RACS did not oppose the making of a declaration of interference with privacy but submitted that as RACS has provided all the personal information it is required to provide, there was no need for a declaration that RACS not repeat the behaviour which caused the interference. The breach was bespoke to the situation and had resulted from a timing delay. It was not an intentional or persistent refusal to supply the personal information. RACS also opposed the claim for a loss of benefit and the claim for humiliation, loss of dignity and injury to feelings.

FINDINGS

[26] Because RACS was 11 days late in complying with the information privacy request made by Dr Naidu on 10 August 2015 the failure to comply with PA, s 40 has been deemed to be a refusal to make available the information to which the request related. It is to that

refusal that any claimed causation must attach when the question of remedies is considered.

[27] In explanation RACS told the Tribunal the deadline was missed because it concentrated on assembling and vetting the requested information with a view to it being released without undue delay in terms of PA, s 66(4). In so doing it overlooked the prior 20 working day notification period in s 40. This is a common error. See *Koso v Chief Executive, Ministry of Business, Innovation, and Employment* [2014] NZHRRT 39, (2014) 9 HRNZ 786 at [80]. A decision on the request must be given within 20 working days after the day on which the request is received by the agency. There is no requirement that the requested information be provided within the same 20 day period. It is only after the decision on the request has been made that the information itself must be provided “without undue delay”. Where the requested information is readily available and can be provided within the 20 working day period, failure to take this step may well amount to undue delay. But in most cases the two time periods are most likely to run consecutively, not concurrently.

[28] Common though the RACS error may be, such error is not a proper basis for non-compliance with the 20 working day period. In the present case, because both limbs of s 66(2)(a) and (b) are satisfied the Tribunal must find there has been an interference with Dr Naidu’s privacy. So much was properly conceded by RACS.

[29] This finding gives the Tribunal jurisdiction under PA, s 85 to award one or more of the remedies listed in that section after taking the conduct of the defendant into account:

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.

REMEDIES

Remedies sought by Dr Naidu

[30] By the conclusion of the Tribunal hearing the remedies sought by Dr Naidu were:

[30.1] A declaration of interference with his privacy (PA, s 85(1)(a)).

[30.2] An order to perform directing RACS to disclose the personal information requested by Dr Naidu (PA, s 85(1)(d)), being:

[30.2.1] Confirmation of the final referee score.

[30.2.2] Confirmation of how the absence of a referee report impacted the score.

[30.2.3] Confirmation of what efforts were made by NZOA to obtain the missing referee report.

[30.3] Damages for loss of benefit (PA, s 88(1)(b)).

[30.4] Damages for humiliation, loss of dignity and injury to feelings (PA, s 88(1)(c)).

Section 85(4) – the conduct of the defendant

[31] Section 85(4) provides that it shall not be a defence to proceedings that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal must take the conduct of the defendant into account in deciding what, if any, remedy to grant.

[32] In the present case there is no particular conduct by RACS which has any significant bearing on the issue of remedies except the fact that the statutory time limit was breached by only 11 days. The real issue is whether that delay was causative of any of the forms of harm asserted by Dr Naidu.

A declaration of interference

[33] 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] and *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66 at [164].

[34] On the facts, there is no disentitling conduct on the part of Dr Naidu and as properly conceded by RACS, he is entitled to a declaration that there has been an interference with his privacy.

An order to perform

[35] In this respect the essence of Dr Naidu's case is that he was entitled to the formula or mechanism by which the referee scores were reached because without a "key" to the figures provided in the table of 8 April 2016 he cannot decipher the personal information purportedly contained within it.

[36] We are of the view this submission is correct. While the scoring mechanism or formula is not personal information, its provision is a condition precedent to being able to access the personal information which is in the table. Without an access key it cannot be said access to the personal information has been given in terms of Principle 6. The access for which that principle makes provision is meaningful access.

[37] It is highly relevant that PA, s 42(1)(c) and (d) state, in effect, that personal information must be provided in a form which can be comprehended. The requirement of a transcript in the case of shorthand writing or code could not be more explicit:

42 Documents

- (1) Where the information in respect of which an information privacy request is made by any individual is comprised in a document, that information may be made available in 1 or more of the following ways:

...

(c) in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, by making arrangements for the individual to hear or view those sounds or visual images; or

(d) in the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, by providing the individual with a written transcript of the words recorded or contained in the document; or

...

[38] We see nothing in *CBN v McKenzie Associates* [2004] NZHRRT 48, (2004) 8 HRNZ 314 at [36] to the contrary as it does not address the point now under consideration.

[39] It is of further significance that this interpretation of the Privacy Act is supported by the relevant international instruments. As declared in the Long Title of the Act, its purpose is “to promote and protect individual privacy” in general accordance with the Recommendation of the Council of the Organisation for Economic Co-Operation and Development Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data:

An Act to promote and protect individual privacy in general accordance with the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, and, in particular,—

- (a) to establish certain principles with respect to—
- (i) the collection, use, and disclosure, by public and private sector agencies, of information relating to individuals; and
 - (ii) access by each individual to information relating to that individual and held by public and private sector agencies; and
- (b) to provide for the appointment of a Privacy Commissioner to investigate complaints about interferences with individual privacy; and
- (c) to provide for matters incidental thereto

[40] Given the explicit reference in the Long Title to the OECD Recommendation, it is inevitable that reference be made also to the OECD *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (OECD Guidelines) annexed to the OECD Recommendation. See *Armfield v Naughton* [2014] NZHRRT 48, (2014) 9 HRNZ 808 at [40] and *Holmes v Housing New Zealand Corporation* [2014] NZHRRT 54 at [73] to [74]. Those recommendations provide (see cl 13(b)(iv)) that an individual should have the right to have data communicated to him or her “in a form that is readily intelligible” to him or her. In our view this is an inherent aspect of the “meaningful access” standard.

[41] We believe such interpretation is also consistent with the transparency provisions of the European Union General Data Protection Regulation (GDPR) which came into force on 25 May 2018. This regulation and the Privacy Act share the same object (the protection of individual privacy) and are in many respects similar. In the context of the exercise of

rights by the data subject, Article 12(1) provides that the agency has a duty to provide information and to communicate “in a concise, transparent, intelligible and easily accessible form, using clear and plain language”. This duty attaches (inter alia) to requests made under Article 15 for access to personal information. Article 15(1)(h) further provides that where personal data is used in automated decision-making, including profiling, “meaningful information about the logic involved” must be provided.

[42] It is acknowledged New Zealand is not a member of the European Union and is not bound by the GDPR. Nevertheless, New Zealand is presently designated under the GDPR as a country providing an “adequate level of data protection” thus facilitating the transfer of personal information between New Zealand and the EU without additional safeguards. This means, for example, that businesses in New Zealand do not require specific authorisation where personal customer data is processed in New Zealand in respect of a commercial transaction between that business and a natural person in the EU. See Article 45. To maintain this designation New Zealand must be able to show that the level of data protection in New Zealand is “essentially equivalent” to the level of protection afforded within the European Union. See further the earlier decision of the Court of Justice of the European Union in Case C-362/14 *Maximillian Schrems v Data Protection Commissioner*, 6 October 2015 at [71], [73], [74] and [96] in relation to the now superseded data protection Directive 95/46. It is therefore only appropriate that wherever reasonably possible consistency be achieved between privacy legislation in New Zealand and the GDPR.

[43] This is not a novel proposition. It has long been recognised that the broader international legal context in which New Zealand operates is relevant to the interpretation of New Zealand domestic statutes. See for example *New Zealand Airline Pilots’ Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289 per Keith J:

We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand’s international obligations ... That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text ... In that type of case national legislation is naturally being considered in the broader international legal context in which it increasingly operates ... The application of the presumption depends on both the international text and the related national statute.

[44] It is not expected the interpretative approach we have taken will change when the Privacy Bill is enacted. This Bill, introduced into Parliament on 20 March 2018 and read for a first time on 11 April 2018, provides that when enacted, the (new) Privacy Act will have as its explicit purpose the promotion and protection of individual privacy by, inter alia, giving effect to internationally recognised privacy obligations and standards in relation to the privacy of personal information. The express reference to internationally recognised standards underlines the need for the interpretative approach taken by the Tribunal in the present case and in the other decisions earlier noted. Clause 3 of the Privacy Bill presently provides:

3 Purpose of this Act

The purpose of this Act is to promote and protect individual privacy by—

- (a) providing a framework for protecting an individual's right to privacy of personal information, while recognising that other rights and interests may at times also need to be taken into account; and
- (b) to give effect to internationally recognised privacy obligations and standards in relation to the privacy of personal information, including the OECD Guidelines and the International Covenant on Civil and Political Rights.

[45] Our conclusion from the foregoing is that the meaningful access for which Principle 6 provides is to be informed by the *OECD Guidelines* standard of “readily intelligible” to the requester as well as by the GDPR standard of communication “in a concise, transparent, intelligible and easily accessible form, using clear and plain language”. In simple terms, Principle 6 requires that meaningful access be given to the requested personal information. The information must be provided in a manner that is transparent, intelligible and easily accessible.

[46] Returning to the facts of the present case, there has been an admitted deemed refusal to provide access to Dr Naidu's personal information. Some information was provided on 22 September 2015 (11 days late) but the referee score information summary was not provided until much later on 8 April 2016. Dr Naidu has still not been provided with the formula or mechanism by which the referee scores were reached. RACS in this respect remains in default of its obligation to give Dr Naidu meaningful access to his personal information, that is in a manner that is transparent, intelligible and easily accessible.

[47] The right of access to personal information (and to request correction) is a most important privacy protection safeguard, a point reflected in PA, s 11. In the case of personal information held by a public sector agency, that right is a legal right enforceable in a court of law. It follows a plaintiff should not ordinarily be denied an order that a defaulting agency provide the personal information which has been requested under Principle 6.

[48] We accordingly order that RACS give Dr Naidu access to any personal information which has not been provided to date. In relation to the referee score information summary, Dr Naidu is to be provided with such information as is necessary to make access to his personal information (here the scoring and assessment of his SET application) meaningful. The information must be provided in a manner that is transparent, intelligible and easily accessible.

DAMAGES

Causation

[49] Before damages can be awarded for an interference with the privacy of an individual there must be a causal connection between that interference and one of the forms of loss or harm listed in PA, s 88(1)(a), (b) or (c). This causation requirement applies to both s 66(1) and s 66(2) cases. The plaintiff must show the defendant's act or omission

was a contributing cause to the loss or harm in the sense that it constituted a material cause. See *Taylor v Orcon Ltd* [2015] NZHRRT 15, (2015) 10 HRNZ 458 at [59]-[61]:

[59] While it has been accepted causation may in appropriate circumstances be assumed or inferred (see *Winter v Jans* HC Hamilton CIV-2003-419-8154, 6 April 2004 at [33]), it would appear no clear causation standard has yet been established in relation to s 66(1).

[60] As pointed out by Gaudron J in *Chappel v Hart* (1998) 195 CLR 232, 238 (HCA), questions of causation are not answered in a legal vacuum. Rather, they are answered in the legal framework in which they arise. In the present context that framework includes the purpose of the Privacy Act which is to “promote and protect individual privacy” and second, the fact that s 66(1) does not require proof that harm has actually occurred, merely that it may occur. Given the difficulties involved in making a forecast about the course of future events and the factors (and interplay of factors) which might bring about or affect that course, the causation standard cannot be set at a level unattainable otherwise than in the most exceptional of cases. Even where harm has occurred it is seldom the outcome of a single cause. Often two or more factors cause the harm and sometimes the amount of their respective contributions cannot be quantified. It would be contrary to the purpose of the Privacy Act were such circumstance to fall outside the s 66(1) definition of interference with privacy. The more so given multiple causes present no difficulty in tort law. See Stephen Todd “Causation and Remoteness of Damage” in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [20.2.02]:

Provided we can say that the totality of two or more sources caused an injury, it does not matter that the amount of their respective contributions cannot be quantified. The plaintiff need prove only that a particular source is more than minimal and is a cause in fact.

[61] Given these factors a plaintiff claiming an interference with privacy must show the defendant’s act or omission was a contributing cause in the sense that it constituted a material cause. The concept of materiality denotes that the act or omission must have had (or may have) a real influence on the occurrence (or possible occurrence) of the particular form of harm. The act or omission must make (or may make) more than a de minimis or trivial contribution to the occurrence (or possible occurrence) of the loss. It is not necessary for the cause to be the sole cause, main cause, direct cause, indirect cause or “but for” cause. No form of words will ultimately provide an automatic answer to what is essentially a broad judgment.

[50] In *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [33] and [34] it was accepted that causation may in appropriate circumstances be assumed or inferred from the nature of the breach.

Damages for loss of benefit

[51] Section 88(1)(b) of the Act confers jurisdiction on the Tribunal to award damages against a defendant for:

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.

[52] The benefit can be of a monetary kind but is not required to be so and in a series of cases the High Court has given an expansive reading to “benefit”.

[53] The relevant case law was recently reviewed by the Tribunal in *Dotcom v Crown Law Office* [2018] NZHRRT 7 at [223] to [238] and it is not intended to repeat that review here. What is important to note is that as noted in *Dotcom* at [238], assessment of the appropriate level of damages to be awarded under PA, s 88(1)(b) for loss of any benefit must be based on an objective assessment of the nature of the benefit which the aggrieved individual might reasonably have been expected to have obtained but for the interference, the seriousness of the interference and the surrounding circumstances.

[54] For Dr Naidu it was said he might reasonably have expected the following benefits:

[54.1] Ascertaining the likelihood of a successful appeal.

[54.2] Ascertaining whether he should pursue an appeal.

[54.3] Peace of mind and certainty and being able to move on towards a different career path earlier if an appeal was considered not worthwhile.

[54.4] Ascertaining and gaining certainty in respect of the areas of medical practice where he fell short.

[54.5] Being informed concerning discrepancies in the process. Reference was made to the issue whether there were six referee reports instead of the mandated seven.

[55] The difficulty faced by Dr Naidu is that there must be a causal connection between the deemed interference with his privacy and the benefit said to have been lost. On the facts he must establish a causal connection with the deemed refusal. He must also deal with the fact that only 11 days elapsed before he was provided with most of the information sought and he was entitled to a degree of discovery of other documents by virtue of the appeal process.

[56] Because RACS extended the time for appealing Dr Naidu had most of the requested information well before the lodging of his appeal on 15 October 2015. The notice of appeal identified the complaints which were aired also before the Tribunal and which included (inter alia) the confusion over whether a seventh referee report had been made available to the board processing the applications, the failure to correctly allocate points and the failures in the scoring of Dr Naidu's application. It was also asserted that the decision was not one a rational decision-maker could have arrived at in good faith. Relevant also is the fact that after the Privacy Commissioner published his final view, Dr Naidu was on 18 May 2016 notified he could update the grounds of his appeal.

[57] In these circumstances we do not accept that the deemed refusal followed 11 days later by most of the requested information had any material bearing on formulating the grounds of appeal or on ascertaining the likelihood of a successful appeal and whether an appeal should be pursued. Neither these "benefits" nor the balance of benefits listed at [54] are benefits which might reasonably have been expected to have been obtained but for the interference with privacy.

Damages for humiliation, loss of dignity and injury to feelings

[58] As mentioned earlier in this decision at [19] and [20], Dr Naidu explained his humiliation, loss of dignity and injury to feelings in the following terms:

[58.1] Because the scores awarded in 2015 did not match his 17.5 years' experience or the scores achieved by him in 2011 and 2012, he wondered whether he was getting worse as a doctor. The low scores shocked him. After seven years

in New Zealand he had been at the cusp of qualification but had now found that he had been passed over for no good reason. He found this humiliating.

[58.2] He referred also to the shattering of his confidence and self-belief as well as his devastation. His chosen career path had evaporated.

[59] These are genuine and understandable reactions. But they are forms of harm unrelated to the interference with privacy in the form of the deemed refusal to provide the requested information. The emotions experienced by Dr Naidu were caused by his realisation that his chosen career would not materialise and that he would not become an orthopaedic surgeon. The whole point of his moving to New Zealand for specialist training and the sacrifice of his wife's own career seemed to have been a terrible mistake. But these emotions and forms of harm were not causally connected in any way to the deemed refusal and the 11 day delay.

[60] It needs to be added also that Dr Naidu's reaction to seeing the information on the file and in particular his realisation that the one referee report disclosed to him did not accord with his own estimation of his abilities and qualifications, combined with his frustration at being unable to analyse the score summary provided by RACS are also not causally linked to the deemed refusal to make the information available. The remedies provided by the Privacy Act relate to the interference with privacy, not to the individual's reaction to the information that is provided.

[61] In conclusion we find no causal connection has been established between the deemed interference with Dr Naidu's privacy and the humiliation, loss of dignity and injury to feeling described in his evidence.

FORMAL ORDERS

[62] For the foregoing reasons the decision of the Tribunal is that it has been satisfied on the balance of probabilities that an action of the Royal Australasian College of Surgeons was an interference with the privacy of Dr Naidu and a declaration is made under s 85(1)(a) of the Privacy Act 1993 that there was an interference with the privacy of Dr Naidu by refusing to provide access to the personal information requested by him under Principle 6.

[63] An order is also made under s 85(1)(d) and (e) of the Privacy Act 1993 that the Royal Australasian College of Surgeons must comply with the information privacy request made by Dr Naidu on 10 August 2015. In particular Dr Naidu is to be given access to any personal information which has not been provided to date. In relation to the referee score information summary, Dr Naidu is to be provided with such information as is necessary to make access to his personal information (the scoring and assessment of his SET application) meaningful. The information must be provided in a manner that is transparent, intelligible and easily accessible.

COSTS

[64] Costs are reserved. Unless the parties come to an arrangement on costs the following timetable is to apply:

[64.1] Dr Naidu is to file his submissions within 14 days after the date of this decision. The submissions for RACS are to be filed within the 14 days which follow. Dr Naidu is to have a right of reply within 7 days after that.

[64.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

[64.3] 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
Chairperson

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Ms K Anderson
Member

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Hon KL Shirley
Member