IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2022] NZHRRT 20**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 013/2018
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**NICHOLAS PAUL ALFRED REEKIE**
	PLAINTIFF
AND	**ATTORNEY-GENERAL (FOR DEPARTMENT OF CORRECTIONS)**
	DEFENDANT

AT AUCKLAND

BEFORE:
Ms SJ Eyre, Deputy Chairperson
Ms BL Klippel, Member
Mr IR Nemani, Member

REPRESENTATION:
Mr NPA Reekie in person
Ms K Hogan for defendant

DATE OF HEARING: **6 to 8 April 2021, 28 July 2021**

DATE OF DECISION: **14 June 2022**

DECISION OF TRIBUNAL[1]

[1] Mr Reekie is a prisoner currently held in the Auckland Prison. This claim is against the Department of Corrections (Corrections). In 2012 Mr Reekie served a period of his imprisonment at Springhill Corrections Facility (Springhill). While at Springhill Mr Reekie was subjected to strip searches and use of force on 12 March 2012. This caused significant stress and anxiety to Mr Reekie.

[1] [This decision is to be cited as *Reekie v Attorney-General* [2022] NZHRRT 20.]

[2] Following those events, Mr Reekie prepared an information privacy request seeking a number of documents relating to the 12 March 2012 events and requesting that video footage from that day be retained. Mr Reekie alleges Corrections interfered with his privacy by not responding in a timely manner and in accordance with the Privacy Act 1993 (the Privacy Act) to that information privacy request. Corrections denies it has interfered with Mr Reekie's privacy.

BACKGROUND

[3] On 28 February 2012 Mr Reekie was transferred, unwillingly, to Springhill and he remained there until 17 August 2012. Mr Reekie was then transferred back to Auckland Prison, where he is currently imprisoned.

[4] The 24 weeks at Springhill was a challenging period for Mr Reekie, as is apparent from the treatment he received and the high level of complaints he raised.

[5] On 12 March 2012, after a visit in a booth at Springhill, Mr Reekie was strip searched and restrained by Corrections officers. That evening Mr Reekie prepared an information privacy request. This treatment within two weeks of arriving at Springhill, was the catalyst for this claim.

[6] The information privacy request was dated 13 March 2012 and was made under the Privacy Act and the Official Information Act 1982. For the purposes of this claim, it is only the Privacy Act that can be considered. The information privacy request was handwritten on a Prisoner Complaint Form (PC.01) and it was assigned the number 232672 (the information privacy request). The information privacy request is set out in full below:

> I wish to make a request for information about the following:
>
> To Springhill Prison Manager
>
> Under the Privacy Act 1993 and the Official Information Act 1982 I request the following:
>
> (1) All camera footage from the visiting unit on 12th March 2012 from 2pm till 3pm be saved as evidence.
>
> (2) All camera footage from outdoor areas of viewing my being moved from the visiting unit to the A.R.U. on 12th March 2012 between 2pm and 3pm be saved as evidence.
>
> (3) All camera footage from the A.R.U. on 12th March 2012 between 2pm and 3.30pm be saved as evidence.
>
> (4) Copies of all use of force report, notification reports, incident reports and all other reports done on I.O.M.S. or otherwise around the use of force against me on 12th March 2012.
>
> (5) Copies of all communications about the use of force against me on 12th March 2012 including but not limited to:
>
> Emails faxes or otherwise, here at Springhill Prison, internally and externally with head office and prison inspectors etc.
>
> (6) Copies of all documentation around the use of the isolation cell on the grounds of concealment against me on 12 March 2012 including authorisation etc and reporting of the use of the dry cell etc.

[7] After receiving the PC.01 form, a Corrections Officer typed it into the Integrated Offender Management System (I.O.M.S). This is significant as the way in which Corrections manages PC.01 forms meant there were different versions of this form in evidence before the Tribunal, which was not ideal and which may have contributed to some confusion for Corrections in responding to the information privacy request.

[8] Mr Reekie's claim is only in relation to the documents sought at 4, 5 and 6 of the information privacy request as matters relating to the video footage have already been resolved. Mr Reekie claims he was not provided with a full response to points 4, 5 and 6 of the information privacy request until after the involvement of the Privacy Commissioner.

OTHER MATTERS ARISING FROM 12 MARCH 2012 EVENTS

[9] Mr Reekie took a number of actions following the events of 12 March 2012. While this decision is focused on the information privacy request, it is appropriate to also note that Mr Reekie complained to the Office of the Ombudsman. On 29 October 2012 the Ombudsman concluded that:

> **[9.1]** The Department of Corrections acted unlawfully, and as such, unreasonably and/or wrongly when it undertook the two strip searches of Mr Reekie on 12 March 2012; and
>
> **[9.2]** The Department acted unreasonably and/or wrongly, when it used force against Mr Reekie to effect the two strip searches.

[10] In December 2014, Mr Reekie filed a claim in the High Court against Corrections alleging multiple assaults and battery and multiple breaches of ss 9 and 21 New Zealand Bill of Rights Act 1990 that occurred on 12 March 2012. Mr Reekie and Corrections entered into a settlement of that claim on 3 July 2015 (the High Court Settlement).

[11] While not mentioned in its statement of reply, Corrections submitted in its opening submissions that Mr Reekie's action in bringing this claim before the Human Rights Review Tribunal may be in breach of the High Court Settlement.

[12] As part of the High Court Settlement, Mr Reekie undertook to:

> *… immediately discontinue the proceedings (No. CIV-404-000591) and agrees not to bring any subsequent civil proceedings in any New Zealand court against the Attorney-General, the Department of Corrections or any employee or former employee of the Department of Corrections or any other person arising from or in connection with the matters which are or have been the subject of these proceedings …*

[13] Accordingly, Mr Reekie is prevented from bringing proceedings in any New Zealand court about "matters which are or have been the subject of these proceedings". The subject of those proceedings is set out in the statement of claim dated 18 December 2014. There is no mention of the information privacy request in the statement of claim, nor is there any mention of the Privacy Act.

[14] Mr Reekie's claim in this Tribunal has arisen from the exercise of his rights under the Privacy Act to make an information privacy request to Corrections and then to complain about the response to the Privacy Commissioner. The claim in this Tribunal arises from the exercise of those statutory rights and is only on the very periphery of the incidents of 12 March 2012.

[15] Accordingly, the Tribunal finds that Mr Reekie's claim is not barred from being filed in this Tribunal as a result of the High Court settlement.

THE CLAIM

[16] On 13 March 2018 Mr Reekie filed this claim against Corrections. Mr Reekie alleges that Corrections did not respond to the information privacy request, until the Privacy Commissioner intervened. Mr Reekie says this delay is an interference with his privacy and seeks remedy.

[17] Corrections denies that it interfered with Mr Reekie's privacy and states that if there was any interference with his privacy, it did not cause Mr Reekie any harm. Corrections' initial response to the claim was set out in the statement of reply dated 31 May 2018 where it stated that it responded to the information privacy request on 16 December 2014, which it acknowledged was after the intervention of the Privacy Commissioner. Corrections also noted in both its statement of reply and the statement of evidence of Christopher Lightbown that the letter of 16 December 2014 recorded that the use of force reports had been provided to Mr Reekie on 13 March 2012.

[18] In the hearing, Corrections led new evidence from Mr Prakash which suggested that Mr Prakash had given Mr Reekie the response to his information privacy request sometime between 9 July 2012 and 17 August 2012. This was not referred to in the statement of reply or in Mr Prakash's written statement of evidence, but formed part of the Corrections' defence in closing submissions.

THE LEGAL FRAMEWORK

[19] The Privacy Act 1993 entitles an individual to make an information privacy request and prescribes the requirements for responding to an information privacy request.

[20] There are two key components to any response to an information privacy request:

> **[20.1]** First, a decision must be made about whether the request will be granted, in what manner and for what charge (if any). This decision must be made as soon as reasonably practicable and no later than 20 working days after the date on which the request was received (refer s 40 Privacy Act).
>
> **[20.2]** Secondly, the information requested must be provided without undue delay (s 66(4) Privacy Act).

[21] If a decision is not made within the timeframe specified in s 40 Privacy Act or the information is not provided without undue delay, then it is deemed to be an interference with privacy.

[22] If there has been an interference with privacy, then the Tribunal may provide a remedy for that interference with privacy.

[23] After Mr Reekie filed this claim, the Privacy Act 1993 was repealed and replaced by the Privacy Act 2020 on 1 December 2020. However, this claim was filed under the Privacy Act 1993. The transitional provisions in Privacy Act 2020 Schedule 1, Part 1, clause 9(1) provide that these proceedings must be continued and completed under the 2020 Act, but that does not alter the relevant legal rights and obligations in force at the

time that actions subject to this claim were taken. Accordingly, all references in this decision are to the Privacy Act 1993.

ISSUES

[24] The issues to be determined by this Tribunal are:

[24.1] Did Corrections determine whether to grant Mr Reekie's information privacy request within the timeframe required by the Privacy Act?

[24.2] Was the information in response to that request provided without undue delay?

[24.3] If Corrections did not make a determination to grant the request within the requisite time or it did not provide Mr Reekie the information without undue delay, was there an interference with Mr Reekie's privacy?

[24.4] If so, what is the appropriate remedy?

CORRECTIONS' DECISION ON MR REEKIE'S REQUEST

[25] Mr Reekie made his information privacy request on 13 March 2012. Accordingly, Corrections was required to decide whether to grant that request as soon as practicable, but no later than 12 April 2012 (allowing for Easter).

[26] Corrections provided no evidence that it decided on the information privacy request within that timeframe. The earliest date that Corrections has submitted it provided a full response to Mr Reekie's request is 12 July 2012. However, even if that evidence is accepted it is still three months after the date by which Corrections was required to respond.

[27] Accordingly, even based on the most generous view of Corrections' own evidence, a decision was not made within the statutory timeframe set out in s 40(1) of the Privacy Act. The Privacy Act allowed Corrections to extend the timeframe for its response, but Corrections did not avail itself of this option.

[28] Corrections did not decide on how it would respond to Mr Reekie's request as soon as reasonably practicable and within 20 working days of the request. This activates s 66(3) of the Privacy Act, which means that failure is deemed a refusal to make available the information to which the request relates. This is an interference with Mr Reekie's privacy.

WAS THE INFORMATION PROVIDED WITHOUT UNDUE DELAY?

[29] Corrections was required to provide Mr Reekie with the information he requested without undue delay.

[30] It is undisputed that on 16 December 2014, Mr Reekie was provided with the full response to his information privacy request made on 13 March 2012. This is 2½ years after the information was requested.

[31] This is an undue delay. A 2½ year wait for personal information, which you are entitled to receive under a straightforward statutory framework, is simply too long.

[32] Corrections submitted that because Mr Reekie made numerous information privacy requests and complaints, some leniency should be applied in assessing whether the delay was undue. With respect, while that could be arguable for a short delay in the provision of documents, it cannot be justified for 2½ years. The Head Office of Corrections repeatedly requested the staff at Springhill to provide Mr Reekie with a full response; that response was not provided until the Privacy Commissioner intervened.

[33] While Mr Reekie did make a number of information privacy requests over a relatively short timeframe, he was entitled to do so. It is expected that a government department would have an appropriate and robust process to deal with requests, even if made on a regular basis. The lack of a clear system, lack of training, and the way the PC.01 forms are recorded all contributed to the apparent confusion and inaction regarding Mr Reekie's information privacy requests. This does not however justify the extensive delay in providing a full and complete response to Mr Reekie's information privacy request.

[34] The Tribunal finds there was undue delay in the provision of documents to Mr Reekie in response to his information privacy request.

Was the information provided prior to December 2014?

[35] The Tribunal has had regard to submissions by Corrections that the information privacy request was responded to prior to 16 December 2014.

[36] Corrections submitted that part of the information, being the use of force reports, was provided on 13 March 2012. However, no reliable evidence was provided that this actually occurred, despite it being an oft-repeated assertion in communications from Corrections.

[37] There were two Corrections witnesses.

[38] Mr Lightbown acknowledged he had no personal knowledge of when the use of force reports were given to Mr Reekie. He relied on a letter written from Ms Julie Miller, Manager, Ministerial Services, to Mr Reekie dated 16 December 2014 which stated the reports had been given to Mr Reekie, without any reference to who apparently gave Mr Reekie the use of force reports.

[39] Mr Prakash was the only Corrections witness with first-hand knowledge of these events, but his statement contained no evidence of when the information privacy request was complied with.

[40] Under cross-examination Mr Prakash asserted that the statement in Ms Miller's letter that Mr Reekie was given the use of force report on 13 March 2012, was correct and that he had likely been the person who advised Ms Miller of this. However, it was also established in cross-examination, that in an email Mr Prakash sent to Ms Miller on 12 June 2012 he told her that "*documentation about the use of force and the dry cell on 12 March*" was "*no [sic] given*". Mr Prakash accepted that these two statements were inconsistent and could not both be correct.

[41] Corrections submitted that the email dated 12 June 2012 was unclear, given the phrase "no given". The Tribunal disagrees and considers it is clear that it means the documents were not given. The reply from Ms Miller tells Mr Prakash to give Mr Reekie copies of what exists and tell her when it is done. If Mr Prakash had already given them, it would be expected he would quickly reply and clarify this. However, Mr Prakash does

not reply until 10 months later on 8 April 2013, when he then tells Ms Miller he has provided Mr Reekie with the use of force documents. When this inconsistency was put to Mr Prakash in cross-examination, he could not explain it.

[42] The Tribunal has had regard to the submissions from Corrections that there was no reason for Mr Prakash to lie and that it is inherently unlikely that Mr Prakash would not comply with a Head Office direction. However, there is simply no credible evidence that the use of force documents were given to Mr Reekie on 13 March 2012. The Tribunal finds that it is more probable than not that Mr Reekie was not given the use of force documentation on 13 March 2012. Even if the documents were given, it was still not a complete response to Mr Reekie's information privacy request.

[43] Corrections also submitted that the complete response to the information privacy request was provided to Mr Reekie sometime between 9 July 2012 and 17 August 2012 when Mr Reekie left Springhill. However, this evidence was not in Mr Prakash's statement, nor was it in the statement of reply or recorded in any Corrections' documentation provided as evidence. The evidence was elicited after considerable signposting by counsel during re-examination; counsel was cautioned at the time that the questions appeared to be leading the witness. The complete lack of corroboration of this information and the unpersuasive manner in which the evidence was provided means that the Tribunal finds it unreliable evidence.

[44] There is no reliable and credible evidence that Mr Reekie was provided with a complete response to points 4, 5 and 6 of the information privacy request prior to December 2014. Accordingly, the Tribunal finds it is more probable than not that Mr Reekie's information privacy request was not complied with in 2012.

[45] Finally, it was also submitted by Corrections that Mr Reekie received the requested information as part of the discovery in the High Court proceedings. However, this is simply not the way in which a Privacy Act request should be responded to and the Tribunal does not accept this was a full response to the information privacy request made on 13 March 2012, even if all documents were provided.

INTERFERENCE WITH PRIVACY

[46] To obtain a remedy there must have been an interference with Mr Reekie's privacy.

[47] An interference with privacy is defined in s 66. The definition in subsection (2) is the most relevant for this proceeding, when read in conjunction with ss 66(3) and s 66(4). It reads:

> **66 Interference with privacy**
>
> (1) …
> (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.

(4) Undue delay in making information available in response to an information privacy request for that information shall be deemed, for the purposes of subsection (2)(a)(i), to be a refusal to make that information available.

[48] Section 66(2) imposes a two-stage test to establish if there has been an interference with privacy:

[48.1] First, s 66(2)(a) requires one of the decisions listed to have been made regarding the information privacy request; and

[48.2] Secondly, the Tribunal must be of the opinion that there is no proper basis for that decision.

[49] Corrections' failure to respond to the information privacy request within the time limit fixed by s 40(1) is deemed by s 66(3) to be a refusal to make information available. The subsequent failure by Corrections to provide the information without undue delay is also deemed a refusal to make information available, by virtue of s 66(4). Accordingly, the first part of the two-stage test is met.

[50] The next matter to consider is whether Corrections had any proper basis for its failure to respond within the time limit fixed by s 40(1) and for failing to provide the documents without undue delay. The reference in s 66(2)(b) to "proper basis" is a cross-reference to s 30 of the Act which states that no reason other than those permitted by ss 27 to 29 can justify a refusal to disclose information requested pursuant to IPP 6.

[51] Corrections have submitted that the delay may have arisen given the high number of complaints and information privacy requests made by Mr Reekie, however if Corrections considered there were administrative reasons for the delay it could have utilised s 41 to grant itself an extension. Corrections took no such action, accordingly this provides no proper basis for the failure to comply with the statutory timeframe and provide the documentation without undue delay.

[52] It was also submitted that the delay could be partially accounted for by the fact Mr Reekie put some of his information privacy requests on hold. However, the Privacy Act provides no basis for the pausing of the statutory timeframes and even if it did, a delay of 2½ years is undue.

[53] The second limb of the definition of an interference with privacy is met. The Tribunal finds Corrections has interfered with Mr Reekie's privacy.

REMEDY

[54] When the Tribunal determines on the balance of probabilities that there has been an interference with privacy it may grant one or more of the remedies set out in s 85 of the Privacy Act.

[55] Mr Reekie seeks:

> **[55.1]** A declaration that his rights were breached by Corrections, that there were adverse consequences and an interference with Mr Reekie's privacy;
>
> **[55.2]** $20,000 in damages for each of the following heads: exemplary damages, general damages, damages for marginalisation of person, rights and interests, damages for breach of legitimate expectation, damages for loss of opportunity, damages for humiliation, being a total of $140,000 damages;
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> **[55.3]** Interest on all sums awarded;
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> **[55.4]** Costs; and
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> **[55.5]** Such further or other relief as may be justified.

[56] The types of damages the Tribunal may order are set out in s 88 under three specific heads.

> **88 Damages**
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> (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:
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> (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.

Declaration

[57] The grant of a declaration is discretionary but declaratory relief is not normally denied in the Tribunal where there has been an interference with privacy. See *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLS 414 (Kós J, Ms SL Ineson and Ms PJ Davies) at [107] and [108].

[58] It is appropriate in this claim the Tribunal issue a formal declaration that Corrections has interfered with Mr Reekie's privacy. This declaration is accordingly made.

Damages

[59] Mr Reekie has sought damages under a number of heads. However, the Tribunal can only award damages for pecuniary loss and expenses incurred, loss of any benefit or damages for humiliation, loss of dignity and injury to feelings.

[60] Mr Reekie has not claimed damages for pecuniary losses but has claimed damages for loss of any benefit and damages for humiliation, loss of dignity and injury to feelings.

Damages for loss of any benefit

[61] To award damages under s 88(1)(b) the Tribunal must be satisfied the interference with privacy was a contributing or material cause of the loss of benefit.

[62] Where the loss of a benefit is the inability to use documents in a court proceeding, Churchman J noted in *Attorney-General v Dotcom* [2018] NZHC 2564 (1 October 2018) (*Dotcom*) that:

> It is necessary to consider the extent to which the information requested is likely to have actually affected the outcome of the litigation for which it was said by [the plaintiff] to be required.

[63] His Honour also noted it did not have to be inevitable that the information would influence the outcome, but there must be some evidential basis for assuming it was potentially relevant. While Mr Reekie did not seek to use the documents in a court proceeding, the same principles can be applied to using the documents in an Ombudsman complaint.

[64] Mr Reekie's claim for loss of a benefit is founded on the basis that the provision of the documents in a timely manner would have assisted him in his Ombudsman complaint. However, the Ombudsman reached a conclusion that the strip search and the use of force was unlawful, even without the documents. There is no reason to conclude that the unavailability of Mr Reekie's documents resulted in any loss of benefit in the Ombudsman process.

Damages for humiliation, loss of dignity and injury to feelings

[65] Mr Reekie's claim for damages for humiliation, loss of dignity and injury to feelings is not upheld. The Tribunal accepts that the events of 12 March 2012 were traumatic and humiliating to Mr Reekie. However the events of that day have already been considered by the Ombudsman and were the subject of the High Court settlement.

[66] This Tribunal is only concerned with any humiliation, loss of dignity or injury to feelings that arose from the delay in the provision of the documents in response to Mr Reekie's information privacy request. Mr Reekie was unable to provide any evidence, whether verbal or otherwise, of humiliation, loss of dignity and injury to feelings as a result of the delay in his documents being provided to him.

[67] Mr Reekie is not awarded any damages for this interference with his privacy. Accordingly, no interest can be awarded either.

Other Remedies

[68] Mr Reekie has sought any other orders that the Tribunal thinks fit but has provided no specific submissions regarding this. The Tribunal does not consider it is necessary to make any other orders in this claim. It appears from evidence of Mr Lightbown that new processes have been implemented, following this time period when Mr Reekie made multiple information privacy requests and it is expected the processes will have improved.

ORDER

[69] The Tribunal is satisfied on the balance of probabilities that an action of Corrections was an interference with the privacy of Mr Reekie.

[70] A declaration is made under s 85(1)(a) of the Privacy Act 1993 that Corrections interfered with Mr Reekie's privacy by failing to respond to his information privacy request in accordance with the Privacy Act 1993.

COSTS

[71] Mr Reekie has sought costs. As Mr Reekie was self-represented, the only recoverable costs are the disbursements incurred in preparing and presenting the case. An itemised list should be sent to Corrections for their comment. Unless the parties come to an arrangement on costs, the following timetable is to apply:

> **[71.1]** Mr Reekie is to file his submissions within 14 days after the date of this decision.
>
> **[71.2]** Any submissions for Corrections are to be filed within the 14 days which follow. Mr Reekie will then have the right of reply within seven days after that.
>
> **[71.3]** The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.
>
> **[71.4]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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Ms SJ Eyre	**Ms BL Klippel**	**Mr IR Nemani**
Deputy Chairperson	**Member**	**Member**