IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 31**

	Reference No. HRRT 016/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**FRIEDRICH JOACHIM FEHLING**
	PLAINTIFF
AND	**MINISTRY OF HEALTH**
	DEFENDANT

AT HOKITIKA

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

REPRESENTATION:
Mr FJ Fehling in person
Ms R Garden for defendant

DATE OF HEARING:	**20 March 2017**
DATE OF LAST SUBMISSIONS:	**12 April 2017 (Mr Fehling)** **12 May 2017 (Mr Fehling)** **29 May 2017 (Ministry of Health)** **2 June 2017 (Mr Fehling)**
DATE OF DECISION:	**24 August 2017**

DECISION OF TRIBUNAL[1]

INTRODUCTION

[1] Mr Fehling is suspicious of government and its agencies. In the present case he claims the Ministry of Health has breached his "privacy rights" by collecting information about him for the purpose of the National Health Index (NHI). His concern is that once

[1] [This decision is to be cited as *Fehling v Ministry of Health* [2017] NZHRRT 31]

an individual has been allocated a NHI number, that number and the name of the individual can be used by the Ministry to access clinical personal health information about that individual held by District Health Board (DHBs), Primary Health Organisations (PHOs) and health and disability service providers.

[2] Mr Fehling's case has not been assisted by the unconventional manner in which it has been presented. Although directed on 17 August 2016 to file a written statement of evidence by 30 September 2016, he failed to do so. In a letter to the Tribunal dated 31 August 2016 he asserted that a statement of evidence "made no sense" as all documentary evidence had already been filed. While it is correct Mr Fehling has filed some documentary evidence, it has come in by informal means and as will be seen, some of it was filed not in relation to the case against the Ministry of Health, but in answer to a strike-out application filed by the West Coast District Health Board (WCDHB) which, until the Tribunal's decision in *Fehling v Ministry of Health (Strike-Out of Second Defendant)* [2016] NZHRRT 29 (17 August 2016) was the second defendant. There is no statement or affidavit by Mr Fehling setting out the facts as asserted by him against the Ministry (and on which he could be cross-examined) together with the supporting documentation. By contrast the Ministry filed two affidavits (by Mr PB Knipe and by Ms CC Lyons) and Mr Fehling did not require either of these witnesses to attend the hearing for cross-examination. In the result there was no evidence to challenge the sworn evidence given by the Ministry.

[3] In addition Mr Fehling twice gave notice to the Tribunal that he would not attend an in person hearing by the Tribunal convened at Hokitika as it would be "time wasting, expensive and unnecessary". Nevertheless Mr Fehling did in fact attend the hearing held at Hokitika on 20 March 2017 "to prevent the Tribunal disadvantaging me for not appearing and ignoring vital documents".

[4] Nor has an understanding of Mr Fehling's case been facilitated by his characteristic rhetorical flourishes exemplified by the following paragraph taken from his post-hearing submissions dated 12 May 2017:

> This extreme systemic health-data collection/use/privacy breach and unwillingness to respect person's privacy is just one example of the total fascistic control that the British monarch and its freemason fascism (the princes are freemasons and thus fascists by definition) is silently installing in order to perpetuate rule by its rich aristocrats and maintain their unrestricted socially and environmentally damaging excesses, glitter and power.

[5] Equally his submissions are at times too abstract to be of meaningful assistance. We here refer by way of example to the "Improved Statement of Claim with Chronological Summary, Questions of Law, Argumentation for Health-Data Privacy" dated 1 September 2016. It contains in part template paragraphs which have been used by Mr Fehling in other, entirely unrelated proceedings under the Local Electoral Act 2001. See *Fehling v Attorney-General* [2016] NZHC 2911. In that case Dunningham J at [28] described Mr Fehling's pleadings as comprising "a sequence of lengthy and convoluted questions and lengthy and convoluted submissions". Provided as an example is a paragraph with the heading "Paramount Constitution Questions of Law". That same paragraph appears in Mr Fehling's "Improved Statement of Claim" in the present proceedings. It would be fair to say that Mr Fehling's various submissions to the Tribunal are for similar reasons difficult to follow.

[6] Furthermore, Mr Fehling's submissions to the Tribunal incorrectly assumed the Tribunal has jurisdiction over the broad policy issues which underpin the creation and maintenance of the NHI, including whether it should comprise numbers only or also include the name of the individual. For this reason it must be stressed the Tribunal is

confined by ss 66 and 85 of the Privacy Act 1993 to determining only whether Mr Fehling has established there has been an interference with his privacy.

[7] In this decision we explain our reasons for finding there has been no such interference.

PROCEDURAL MATTERS

[8] Two matters of procedure must be noted.

[9] First, although the WCDHB was originally named as the second defendant in these proceedings, the WCDHB was on 17 August 2016 dismissed as a party, the Tribunal finding it had no jurisdiction to hear that part of Mr Fehling's claim which related to the Board. The Tribunal's reasons for so finding are set out in *Fehling v Ministry of Health (Strike-Out of Second Defendant)* [2016] NZHRRT 29.

[10] Second, at the conclusion of the hearing on 20 March 2017 the Ministry sought and was granted leave to file evidence on a point advanced by Mr Fehling at the hearing which had not been previously pleaded. See the *Minute* issued by the Chairperson on 20 March 2017.

[11] The further affidavit of Mr PB Knipe sworn on 3 April 2017 was subsequently filed as were submissions by Mr Fehling dated 12 April 2017, 12 May 2017 and 3 June 2017 respectively as well as submissions for the Ministry dated 29 May 2017. All of the new evidence and submissions have been taken into account in the preparation of this decision.

[12] In view of the expansive submissions made by Mr Fehling it is necessary, before proceeding further, to identify the proper subject of these proceedings.

THE SUBJECT OF THESE PROCEEDINGS

[13] The assertion in Part 3 of the original statement of claim filed by Mr Fehling on 7 March 2016 (and which was not in this respect altered by the amended statement of claim) is that the Ministry contravened the following provisions of the Privacy Act 1993:

Principles	1 (a,b)
	2 (1), (2(a(i))) [indecipherable]
	4 (a,b)
Sections	66 (1(a(i)), (b (ii,iii))
	96 J-M.

[14] However, for reasons about to be explained, the Tribunal's inquiry is not in relation to the pleaded information privacy principles, but to their analogues in the Health Information Privacy Code 1994 (HIPC). Those analogues are

information privacy principle	1	rule	1
	2		2
	4		4

[15] While the rules in the HIPC are specifically focused on "health information" as opposed to "personal information" (which is the subject of the information privacy principles), in the context of the present case the difference is not material.

[16] In his statement of claim Mr Fehling asserts:

1. PHO enrolement form signed and filed on 16/12/14, with data-matching limit, together with sufficient ID provided through WINZ computer print-outs a day earlier (enclosed).

2. On 17/2/15 I received an invitation for a free Health Screen, proving that above enrolement was originally accepted.

3. On 8/6/15 (enclosed) I was informed that the enrolement was terminated on 7/1/15 due to the data-matching limit above, and that I cannot receive subsidised treatment; A visit on 7/5/15 showed that I was not enroled – I had not been informed previously, but had requested official info from MoH whether it had NHI number and personal details on 1/4/15 … MoH admitted to have both (enclosed).

4. An "assurance" by DHBs/PHOs Ms Tymons followed that computer data are safe; But she was evasive about the data access by MoH, which was finally and fully admitted by the Privacy Commissioner on 18/11/15.

5. A complaint to the Privacy Commissioner followed on 28/6/15 (enclosed); This explicit complaint is the basis for this claim. Privacy Commissioner's evasive cover-up conjecture followed, as typical for the fascistic govt's official serfs fearing for their jobs, because the govt's judiciary had invalidated rights-providing laws like Bill of Rights, Privacy Act and Human Rights Act, with their help …

6. A summary of the consequences per s 66(1)(b) to the Privacy Commissioner 28/10/15 (enclosed) is the remedy basis for this claim, re-inforced by a letter 24/11/15 (enclosed).

[17] Attached to the statement of claim was an enrolment form signed by Mr Fehling on 16 December 2014 recording his enrolment in the South Westland Area Practice, a part of the West Coast PHO.

[18] As to para 3, Mr Fehling is mistaken in asserting his enrolment was terminated because of "the data-matching limit". What the letter dated 8 June 2015 from the WCDHB said was that Mr Fehling's name was removed from their Practice Register on 7 January 2015 because Mr Fehling had failed to produce proof of identity and of eligibility.

[19] Subsequently, by letter dated 15 June 2016 Mr Fehling filed with the Tribunal two further enrolment forms regarding the WCDHB. They were signed by Mr Fehling on 28 January 2005 and 8 February 2008 respectively. These documents were submitted as part of his response to the strike-out application filed by the WCDHB.

[20] The important points are that neither of these two enrolment forms are the subject of the claims made in the statement of claim and further, that the issue for determination is whether HIPC rr 1, 2 and 4 have been breached. The statement of claim does not put HIPC r 3 in issue. For this reason neither the Ministry's evidence nor the Ministry's submissions addressed r 3 and it would not be proper for the Tribunal to make any determination in relation to it.

THE HEALTH INFORMATION PRIVACY CODE 1994

[21] Although the statement of claim filed by Mr Fehling on 7 March 2016 complains of a breach of information privacy principles 1, 2 and 4, for the reasons now to be explained this decision will address HIPC rr 1, 2 and 4.

[22] Section 46 of the Privacy Act empowers the Privacy Commissioner to issue special codes of practice governing particular areas of information privacy concern. We reproduce here only s 46(1), (2) and (3):

> **46 Codes of practice**

(1) The Commissioner may from time to time issue a code of practice.
(2) A code of practice may—
  (a) modify the application of any 1 or more of the information privacy principles by—
    (i) prescribing standards that are more stringent or less stringent than the standards that are prescribed by any such principle:
    (ii) exempting any action from any such principle, either unconditionally or subject to such conditions as are prescribed in the code:
  (aa) apply any 1 or more of the information privacy principles (but not all of those principles) without modification:
  (b) prescribe how any 1 or more of the information privacy principles are to be applied, or are to be complied with.
(3) A code of practice may apply in relation to any 1 or more of the following:
  (a) any specified information or class or classes of information:
  (b) any specified agency or class or classes of agencies:
  (c) any specified activity or class or classes of activities:
  (d) any specified industry, profession, or calling or class or classes of industries, professions, or callings.

[23] Such codes replace the information privacy principles in s 6 of the Privacy Act, imposing more specific privacy principles tailored to particular areas of activity. These specific principles are deemed to have the same force as the information privacy principles in s 6. See s 53:

53 Effect of code

Where a code of practice issued under section 46 is in force,—
(a) the doing of any action that would otherwise be a breach of an information privacy principle shall, for the purposes of Part 8, be deemed not to be a breach of that principle if the action is done in compliance with the code:
(b) failure to comply with the code, even though that failure is not otherwise a breach of any information privacy principle, shall, for the purposes of Part 8, be deemed to be a breach of an information privacy principle.

[24] The HIPC was the first code of practice of this kind. Its twelve health information privacy rules replace the general information privacy principles with respect to "health information". Their purpose is to protect the privacy of health information about identifiable individuals as far as possible without frustrating other legitimate aims. They cover the following subjects:

- Rule 1 - Purpose of collection of health information.
- Rule 2 - Source of health information.
- Rule 3 - Collection of health information from individual.
- Rule 4 - Manner of collection of health information.
- Rule 5 - Storage and security of health information
- Rule 6 - Access to personal health information.
- Rule 7 - Correction of health information.
- Rule 8 - Accuracy of health information to be checked before use.
- Rule 9 - Retention of health information.
- Rule 10 - Limits on use of health information.

- Rule 11 - Limits on disclosure of health information.
- Rule 12 - Unique Identifiers.

[25] As the present case is about HIPC rr 1, 2 and 4, their text follows.

Rule 1
Purpose of Collection of Health Information

Health information must not be collected by any health agency unless:
(a) the information is collected for a lawful purpose connected with a function or activity of the health agency; and
(b) the collection of the information is necessary for that purpose.

Rule 2
Source of Health Information

(1) Where a health agency collects health information, the health agency must collect the information directly from the individual concerned.
(2) It is not necessary for a health agency to comply with subrule (1) if the agency believes on reasonable grounds:
  (a) that the individual concerned authorises collection of the information from someone else having been made aware of the matters set out in sub rule 3(1);
  (b) that the individual is unable to give his or her authority and the health agency having made the individual's representative aware of the matters set out in subrule 3(1) collects the information from the representative or the representative authorises collection from someone else;
  (c) that compliance would:
    (i) prejudice the interests of the individual concerned;
    (ii) prejudice the purposes of collection; or
    (iii) prejudice the safety of any individual;
  (d) that compliance is not reasonably practicable in the circumstances of the particular case;
  (e) that the collection is for the purpose of assembling a family or genetic history of an individual and is collected directly from that individual;
  (f) that the information is publicly available information;
  (g) that the information:
    (i) will not be used in a form in which the individual concerned is identified;
    (ii) will be used for statistical purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
    (iii) will be used for research purposes (for which approval by an ethics committee, if required, has been given) and will not be published in a form that could reasonably be expected to identify the individual concerned;
  (h) that non-compliance is necessary:
    (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences;
    (ii) for the protection of the public revenue; or
    (iii) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
  (i) that the collection is in accordance with an authority granted under section 54 of the Act.

Rule 4
Manner of Collection of Health Information

Health information must not be collected by a health agency:
(a) by unlawful means; or
(b) by means that, in the circumstances of the case:
  (i) are unfair; or
  (ii) intrude to an unreasonable extent upon the personal affairs of the individual concerned.

The HIPC and establishing an interference with privacy

[26] Liability under Part 8 of the Privacy Act depends on an individual satisfying the Tribunal, on the balance of probabilities, that any action of the defendant is an interference with the privacy of the individual. See s 85(1) of the Act.

[27] The term "an interference with the privacy of an individual" is defined in s 66. That definition is in two separate and independent parts. It is only that part which is contained

in s 66(1) which is relevant to the present case. The requirements in subs 1(a) and 1(b) are cumulative:

> **66 Interference with privacy**
>
> (1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—
> (a) in relation to that individual,—
> (i) the action breaches an information privacy principle; or
> (ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or
> (iia) the action breaches an information privacy principle or a code of practice as modified by an Order in Council made under section 96J; or
> (iib) the provisions of an information sharing agreement approved by an Order in Council made under section 96J have not been complied with; or
> (iii) the provisions of Part 10 (which relates to information matching) have not been complied with; and
> (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—
> (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or
> (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
> (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

[28] Reduced to essentials, for Mr Fehling to establish an interference with his privacy, he must satisfy the Tribunal on the balance of probabilities that:

> **[28.1]** The Ministry of Health failed to comply with an obligation contained in HIPC rr 1, 2 or 4; **and**
>
> **[28.2]** The action:
>
> > **[28.2.1]** has caused, or may cause, loss, detriment, damage, or injury to Mr Fehling; or
> >
> > **[28.2.2]** has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of Mr Fehling; or
> >
> > **[28.2.3]** has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of Mr Fehling.

THE NATIONAL HEALTH INDEX

[29] Because so much of this case is about the National Health Index it is necessary that the detailed description of the NHI given by Mr PB Knipe, Chief Legal Advisor and Privacy Officer for the Ministry be reproduced in this decision. As Mr Knipe was not required for cross-examination, his evidence is unchallenged.

[30] In his affidavit sworn on 11 November 2016 Mr Knipe stated:

> ***What is the NHI?***
>
> 4. The National Health Index (**NHI**) is a database of unique identifiers, known as NHI numbers, which are used to help identify people in the health system.
>
> 5. A register, or index, used to identify people in the health system has been in place for more than 30 years. The first national register was the National Master Patient Index, which

began in 1977. This was replaced with the NHI in 1993. It is estimated the NHI now covers approximately 95-98 percent of the population.

6. The NHI is fundamental in helping health and disability services link information with the correct person. This is increasingly important because information about an individual patient is often held in more than one place (for example by a pharmacy or laboratory, or in admission/discharge/transfer records). The NHI helps health and disability support services correctly link those health records to the right person.

What is the Ministry's role with the NHI?

7. The Ministry has a maintenance and stewardship role over the NHI.

8. This includes the Ministry actively looking for conflicts or mismatches in information contained within the NHI, for example where a person appears to have more than one NHI number.

9. Conflicts can arise as a result of people providing incorrect information or information being entered incorrectly. The Ministry Identity Data Management team (**IDM**), DHBs and some GPs all have the ability to update the NHI (but only those staff who have the correct permissions to make updates). GPs are unable however to update the date of birth and gender fields in the NHI.

10. The Ministry uses software to go through and clean up the database, correcting conflicts in information and making sure NHI numbers match the correct people.

11. Audits of the NHI are also run. The IDM team uses these to monitor updates made to NHI records for accuracy and ensure the use of the NHI adheres to the Health Information Privacy Code 1994 (**Code**). For instance, any unusual or unlawful looking behaviour on the NHI will be picked up by these audits.

Benefits of the NHI

12. There are a number of benefits to maintaining a national identification system.

13. Being able to correctly identify a person assists health providers in making the right clinical decisions. By linking people to their health records, the NHI assists services to better understand each person's needs. It reduces the risk of a health provider making a decision based on wrong or incomplete information.

14. It also helps maintain the privacy of individual's health information. People are more likely to receive the right prescriptions, tests results and patient related correspondence.

15. More generally, the NHI helps with planning, coordination and provision of health and disability supports services across New Zealand. For example, it is used by DHBs' community health services to co-ordinate and manage visits, and by screening programmes to co-ordinate and manage the programmes. It is also used to identify information in the National Immunisation Register (**NIR**), which exists to increase New Zealand's immunisation coverage through timely access to immunisation histories.

16. Relatedly, NHI numbers are used to identify information held in the Medical Warnings System (**MSW**) database. The MWS alerts providers of known risk factors of a particular person. Access to the MSW features is dependent upon a valid NHI number for the relevant person being provided.

What is an NHI number?

17. A person's NHI number is a string of 7, randomly assigned characters (the first 3 are letters and the last 4 are numbers), contained within the NHI database that is linked to a basic set of personal, identifying information about that particular person.

18. The personal information held with a person's NHI number is their name (and any alternative names), address, date of birth, gender, residency status, ethnicity and date of death (if relevant).

19. An NHI number is not a medical record; it simply facilitates the identification of a particular person (along with their personal information).

20. NHI numbers currently exist indefinitely; there is no provision to destroy them.

How is an NHI number created?

21. Health providers can assign an NHI number under rule 12(1) of the Code.

22. Generally, NHI numbers are generated when a person receives health care. Only certain agencies are approved to assign an NHI number. This is set out in Schedule 2 of the Code, and includes agencies such as the Ministry, DHBs, hospitals and health practitioners.

23. For most people today, this will happen at birth if they are born in a hospital or under the care of another health provider. Registrations are usually via the Ministry of Health call centre. The call centre is used for example where:

    23.1 Midwives notify the call centre to have a new NHI number issued for a baby they have delivered; and

    23.2 GPs ask the call centre for a new NHI number to be issued for patients who are new to New Zealand and have never previously had an NHI number.

24. The IDM team and some GPs also have the ability create NHI numbers.

25. Health providers are required to tell a person if they are collecting information for the NHI and any person has to agree to provide the relevant information. If someone did not want to have an NHI number created it would be a matter for the particular health provider whether they nevertheless provided treatment.

What access do health providers have to the NHI?

26. The health providers listed in Schedule 2 of the Code are allowed to access the information in the NHI. NHI numbers will also be held by health providers, as part of an individual's medical record.

27. Most health providers have a means to access NHI information. This is primarily through either a provider's IT system having inbuilt access to the NHI (whereby NHI information is automatically returned within the application when the patient record is brought up) or providers accessing the NHI through a web browser. Under the second method, health providers access the NHI through the Health Identity User Interface.

28. Both methods allow healthcare providers to connect to the NHI database and search for and view patient identity information. For most providers, viewing the NHI is a read-only process. They can search for NHI numbers and see the information, but they are not able to change anything. As I explained above, information can only be updated or changed by DHBs, GPs and the Ministry of Health.

29. Usually any updating will be done through a DHB or GP practice, because that's the main point of contact most people will have with the health system. Updating occurs when a patient presents for a health service and identity information has changed.

30. In order to be able to update information on the NHI the Ministry must first assign permissions to a provider. By accepting the permissions a provider acknowledges (on behalf of all employees and agents of the organisation) that any access and use of any information obtained using the services is subject to the Privacy Act 1993 (**Act**) and the Code. As explained above, the Ministry monitors and audits the actions of health providers' use of the NHI.

Use of information on NHI

31. Provided it is in accordance with the Code and the Act, the information on the NHI can be used for other purposes. This will generally be for research or funding related matters.

32. Research using NHI numbers is done for a variety of reasons including to produce statistical publications; meet international reporting requirements; assist with developing policy; facilitate research; support the planning of health and disability support services and assist with monitoring the performance of health and disability support services.

33. NHI numbers are also used to help monitor funding of primary health organisations (**PHOs**). Funding of PHOs is calculated according to the number, age and gender of enrolled patients. PHOs are required to submit a full register of enrolled patients to the Ministry four times a year to receive funding. The Ministry uses the NHI database to ensure the data in the registers is accurate.

How the information on the NHI is kept secure

34. The NHI database is not a public database. Access is only allowed by authorised users, and when it is permitted by the Code and the Act. The only people who can access it are a select number of people at the Ministry of Health (who are required to sign confidentiality agreements) and health providers. Within those who have access, only the Ministry, DHBs and GPs have read-write access which means they have the ability to update the information held

35. Every NHI transaction is logged. This includes the following being recorded:

    35.1 the details of the person who accessed the NHI;

    35.2 when they accessed the NHI;

    35.3 what they did on the NHI; and

    35.4 which NHI number they looked at.

36. As explained above, an audit programme operated by the Ministry monitors whether access was justified and whether it was used for a legitimate purpose. DHBs and other health providers can also run audits around who is accessing health information on the NHI through their systems.

37. Further, all NHI messages are protected by a 128 byte encryption as they travel over a virtual private network called the health intranet. The encryption turns the NHI number into a coded form so it is not identifiable and protects privacy of individuals but allows data from different places to be linked. The computer system is kept in a secure government data centre and it is duplicated on another data centre in another building. Both systems have disaster recovery plans in place to ensure the NHI is always secure.

Can a person see their NHI?

38. A person can make a Privacy Act request to the Ministry or to a health provider with access to the NHI for their personal information. The Ministry would then provide the information in accordance with the Act. A person can ask that their identifying details be amended if they are out of date or incorrect but a person's NHI will not be deleted even if they ask for this.

[31] In his second affidavit sworn on 3 April 2017 Mr Knipe deposed that the Ministry does not hold a "secret" data matching system nor would such a system be lawful. He emphasised the NHI database contains NHI numbers and a basic set of identifying, personal information but is not a database containing an individual's clinical notes. Those notes are held by health professionals including DHBs and general practitioners. The Ministry does not have direct access to health professionals' patient management systems or clinical notes. An exception to this is the Ministry's receipt and storage of clinical notes on certain mental health patients but this process is governed by the Mental Health (Compulsory Assessment and Treatment) Act 1992.

[32] Mr Knipe added that the Ministry is responsible for national collections of certain health and disability information but these national collections do not contain clinical notes.

Mr Fehling and the NHI

[33] The evidence given by Ms CC Lyons, Lead Analyst in the Identity Data Management team within the Ministry was that Mr Fehling's NHI number was allocated

on 28 January 2005 by the WCDHB. The identifying particulars held with his NHI number are his name, address, date of birth, gender, New Zealand residency status and ethnicity. During the time that Mr Fehling's information has been held on the NHI his address has been updated.

THE PHO ENROLMENT FORMS COMPLETED BY MR FEHLING

[34] Mr Fehling asserts he has never consented to his personal or health information being held by the Ministry of Health. He points to three of the forms he has completed when enrolling with the WCDHB, the West Coast Primary Health Organisation and with the South Westland Area Practice (which is part of the West Coast PHO). We do not intend addressing the enrolment form dated 1 June 2016 also posted to the Tribunal by Mr Fehling as it post-dates the filing of these proceedings on 7 March 2016.

[35] In this context it is to be remembered that r 12(3) of the HIPC permits the assignment of a NHI number by a DHB, hospital and by a PHO, such agencies being listed in Schedule 2 of the HIPC.

The registration form signed by Mr Fehling on 28 January 2005

[36] By letter dated 12 April 2016 addressed to Greymouth Hospital Mr Fehling requested a copy of the registration form he completed at the hospital on 28 January 2005. After receiving the document from the hospital Mr Fehling sent that form (and another dated 8 February 2008) to the Tribunal under cover of a letter dated 15 June 2016 in the context of Mr Fehling's opposition to the strike-out application which had been filed by the WCDHB.

[37] The document signed by Mr Fehling on 28 January 2005 has the heading "Coast Health Care – Registration Form". In addition to being signed by Mr Fehling on 28 January 2005 it was witnessed on the same date by a Forensic Nurse. Whether the single sheet of paper now submitted by Mr Fehling represents the entire document and set of forms provided to Mr Fehling on 28 January 2005 is not known as Mr Fehling filed no statement of evidence and did not give evidence at the hearing at Hokitika on 20 March 2017. Be that as it may the document contained a Privacy Statement which read, in part:

> All personal information recorded on this form will be managed in accordance with the requirements of the Privacy Act/Health Information Privacy Code.

[38] It is beneath this statement that the signatures of Mr Fehling and the forensic nurse appear.

[39] It is to be recalled that the evidence of Ms Lyons is that Mr Fehling's NHI number was allocated by the WCDHB on 28 January 2005 itself.

[40] Some two months and two weeks after signing the form Mr Fehling on 6 April 2005 added an endorsement at the foot of the form in the following terms:

> 6/4/05: I hereby postum limit the validity of my signature above, because it is impossible to judge as a lay person whether I have been given all information, nor are the hospital staff professional lawyers to know all.

[41] The meaning and legal effect of this endorsement is far from clear but what is not in doubt is that it does not directly embargo the passing to the Ministry of Mr Fehling's NHI

number along with his name, address, date of birth, New Zealand residency status and ethnicity. But above all the endorsement was made more than two months after the NHI number had been allocated by the WCDHB and passed to the Ministry along with Mr Fehling's name, address, date of birth, gender, New Zealand residency status and ethnicity.

The registration form signed by Mr Fehling on 8 February 2008

[42] On 8 February 2008 Mr Fehling signed a further WCDHB registration form. The only relevant point is that above Mr Fehling's signature (and that of the registered nurse who witnessed his signature) is a Privacy Statement which contained the following statement:

> I wish to have information relating to my condition withheld from all enquiries Yes No

[43] To this question Mr Fehling answered "Yes" and in addition amended the statement by the insertion of the word "official". It accordingly read:

> I wish to have information relating to my condition withheld from all **official** enquiries Yes

[44] Again, the relevance and effect of this endorsement is hard to discern, particularly in the absence of evidence by Mr Fehling as to the circumstances in which the document was signed. In submissions to the Tribunal he claims the document shows he did not consent to his NHI number being passed to the Ministry together with his personal information as to his name, date of birth and the like.

[45] This submission is difficult to accept as this is not what the endorsement says or implies. In any event, the NHI number was that allocated in January 2005 and the evidence of Ms Lyons is that the only amendment since then was an updating of Mr Fehling's address.

The enrolment form signed by Mr Fehling on 16 December 2014

[46] On 16 December 2014 Mr Fehling signed an enrolment form regarding the South Westland Area Practice, which, as mentioned, is part of the West Coast PHO. The Health Information Privacy Statement provided:

> **I understand the following:**
> …
> **Patient Enrolment Information**
> The information I have provided on the Practice Enrolment Form will be:
> - held by the practice
> - used by the Ministry of Health to give me a National Health Index (NHI) number, or update any changes
> - sent to the PHO and Ministry of Health to obtain subsidised funding on my behalf
> - used to determine eligibility to receive publicly-funded services. Information may be compared with other government agencies but only when permitted under the Privacy Act.

[47] The enrolment form contained the following statement:

> I have read and I agree with the Health Information Privacy Statement.

[48] Mr Fehling crossed out the first four words in this line and added an endorsement so that the line, as amended, stated:

> I agree with the Health Information Privacy Statement, and have read it, with following limitation: The MoH must not receive personal details **and** an identified NHI number as this would result in criminal fascistic-corrupt government [illegible] overriding all privacy matters by "guarding" the liquor cabinet … The DHB can issue such a number NHI. [Emphasis in original]

[49] In a letter dated 10 May 2015 addressed to the PHO Mr Fehling explained his actions in the following terms:

> I had filled in a re-enrolment form on 16/12/14 with the added disagreement that the Ministry of Health (MoH) must not received both the NHI number **and** my personal details, as this would result in the unlawful removal of my privacy rights per Privacy Act – Health details deal with an individual's vulnerability, and need to be guarded with checks and balances above eg the hidden unworkable govt spy practise (see Dotcom) rubber stamped by a fascistic-corrupt govt-appointed judge. [Emphasis in original]

[50] The hurdle Mr Fehling cannot overcome is that his NHI number had been allocated some nine years earlier and there is nothing in the HIPC which allows the allocation of a NHI number to be re-negotiated each time an individual fills in an enrolment form at a hospital, PHO or doctor's surgery. Provided the health information is collected in a manner which complies with HIPC rr 1 to 4, its storage, retention and use are thereafter governed by HIPC rr 5 to 12. The HIPC confers on an individual an entitlement to request access to his or her health information and to request correction of that information. There is no entitlement to request removal of a NHI number.

[51] The unchallenged evidence of Mr Knipe was that NHI numbers currently exist indefinitely and there is no provision to destroy them. A person can ask that their identifying details be amended if they are out of date or incorrect but a person's NHI number will not be deleted even if requested. This is consistent with the fundamental purpose of the NHI, which is to help health and disability services link health information with the correct person. In addition there are the benefits to maintaining a national identification system, a point also made by Mr Knipe in his affidavit at paras 13 to 16. As those paragraphs are reproduced earlier in this decision it is not intended to repeat them here.

[52] It is now possible to address, in turn, HIPC rr 1, 2 and 4, being the rules relied on by Mr Fehling in his statement of claim.

HIPC RULE 1 – THE PURPOSE OF COLLECTION

[53] HIPC r 1 provides:

> **Rule 1**
> **Purpose of Collection of Health Information**
>
> Health information must not be collected by any health agency unless:
> (a) the information is collected for a lawful purpose connected with a function or activity of the health agency; and
> (b) the collection of the information is necessary for that purpose.

[54] The Ministry of Health is a "health agency" for the purpose of the HIPC because, in terms of r 4(2)(p) it is an agency specified in Schedule 1 of the HIPC.

[55] To overcome the prima facie prohibition in r 1 on the collection of health information the Ministry must show:

> **[55.1]** The information was collected for a lawful purpose connected with a function or activity of the Ministry; and

[55.2] The collection of the information was necessary for that purpose.

[56] Addressing the first issue, it is stipulated by the Health Act 1956, s 3A that among the Ministry's functions is the function of improving, promoting and protecting public health:

> **3A Function of Ministry in relation to public health**
>
> Without limiting any other enactment or rule of law, and without limiting any other functions of the Ministry or of any other person or body, the Ministry shall have the function of improving, promoting, and protecting public health.

[57] By virtue of s 2(1) of the Health Act, the term "public health" has the same meaning as in s 6(1) of the New Zealand Public Health and Disability Act 2000 (NZPHDA). The latter Act provides:

> ***public health*** means the health of all of—
> (a) the people of New Zealand; or
> (b) a community or section of such people

[58] The definition is in the broadest of terms. Louise Delany in "Overview of Public Health Law in New Zealand" in Skegg and Paterson *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) 773 at [25.1.1] to [25.1.2] makes four relevant points:

> **[58.1]** Public health encompasses the health of the general population, along with associated policies and services. It focuses on strengthening influences which promote good health and which prevent or minimise factors that cause ill-health. It is the science and art of preventing disease, prolonging life and promoting physical health and efficiency through organised community efforts.
>
> **[58.2]** Public health focuses on populations, rather than individual health.
>
> **[58.3]** Public health law differs from medical law in aims, content and principles. While medical law relates to the diagnosis, treatment and care of people who are ill – generally involving a relationship between health practitioners and patients – public health law is oriented towards populations as a whole, and groups within populations. It is not about individual health care issues or the legal consequences of clinical negligence. It is about the powers and duties of the state that relate to population health (as represented by medical officers of health, local government employees and other statutory officers), rather than the responsibilities of health practitioners in relation to their patients.
>
> **[58.4]** Some areas of public health law and medical law overlap, for example in the law on health information. Public health law often impacts on particular people as well as on general populations, and public health strategies such as immunisation or screening are implemented at the individual level.

[59] In our view there can be no doubt that the Ministry's maintenance and stewardship role over the NHI falls squarely within the Ministry's function of improving, promoting and protecting public health as defined in the NZPHDA. It could also be said the benefits of maintaining a national identification system are self-evident. However, at the risk of repetition, it is to be recalled Mr Knipe's first affidavit at paras 12 to 16 mentions at least four. Summarised they are:

[59.1] Reducing the risk of a health provider making a decision based on wrong or incomplete information.

[59.2] Maintaining the privacy of an individual's health information.

[59.3] Assisting with the planning, coordination and provision of health and disability support services across New Zealand including screening programmes and immunisation.

[59.4] Identifying information held in the Medical Warnings System so that health care providers are alerted to the known risk factors of a particular person.

[60] As to the second issue it is, we believe, inevitable that on the evidence given by Mr Knipe we also find that the collection of the information is necessary for the purpose of establishing and maintaining the NHI. In this context "necessary for that purpose" must mean "reasonably necessary" for that purpose. Each of the items of information held in the NHI (the number, name, address, date of birth, gender, New Zealand residency status and ethnicity) are necessary for the purposes served by the database.

HIPC RULE 2 – THE SOURCE OF HEALTH INFORMATION

[61] Rule 2 of the HIPC provides that when a health agency collects health information it must collect the information directly from the individual concerned. There are, however, exceptions to this rule. Sub-rule (2) allows sub-r (1) to be departed from:

> if the agency believes on reasonable grounds:
> …
> (d) that compliance is not reasonably practicable in the circumstances of the particular case.

[62] As this is an exception, the onus of proving the exception is on the Ministry. See s 87 of the Privacy Act.

[63] In the context of the present case the purpose of this exception is clear. It was to avoid the cost of unnecessary duplication of effort by health agencies and to avoid the inconvenience (and cost) to individuals of having to give the same information twice (or more) to health agencies.

[64] Little explanation is required as to why it is not practicable for the Ministry itself to collect all information held on the NHI directly from the individual concerned. Particular factors include:

[64.1] The index has been in place for more than 30 years and now covers approximately 95 to 98 percent of the population. Even a requirement that every change of name or address must be collected by the Ministry directly from the individual would impose an enormous administrative burden.

[64.2] For good reason NHI numbers are generated when a person receives health care. This largely explains why the agencies approved by Schedule 2 of the HIPC to assign a NHI number include DHBs, hospitals, PHOs and health practitioners. The Ministry does not provide health care and there is no reason for most people to have contact with the Ministry.

HIPC RULE 4 – MANNER OF COLLECTION OF HEALTH INFORMATION

[65] Rule 4 of the HIPC provides:

> **Rule 4**
> **Manner of Collection of Health Information**
> Health information must not be collected by a health agency:
> (a) by unlawful means; or
> (b) by means that, in the circumstances of the case:
> (i) are unfair; or
> (ii) intrude to an unreasonable extent upon the personal affairs of the individual concerned.

[66] The evidence of Ms Lyons was that Mr Fehling's NHI number was allocated on 28 January 2005 by the WCDHB, apparently being the date of his admission to Greymouth Hospital. The particulars held with his NHI number are his name, address, date of birth, gender, New Zealand residency status and ethnicity.

[67] Mr Fehling has produced no evidence that this information was collected by unlawful means or by means which were unfair or which intruded to an unreasonable extent upon his personal affairs.

[68] At the hearing on 20 March 2017 Mr Fehling relied on the fact that on 6 May 2005, some two months and two weeks after he signed the registration form, he added a "postum". As previously observed, at the time this endorsement was made:

> **[68.1]** The NHI number had already been allocated by the WCDHB and communicated to the Ministry together with Mr Fehling's name, address, date of birth, gender, New Zealand residency status and ethnicity; and
>
> **[68.2]** While the meaning and effect of the 6 April 2005 endorsement is less than clear, the endorsement does not purport to withdraw authority for the WCDHB to send the NHI number to the Ministry along with Mr Fehling's name, address, date of birth, gender, New Zealand residency status and ethnicity.

[69] In any event, there is nothing in the HIPC which allows the allocation of a NHI number to be re-negotiated. The evidence given by Mr Knipe was that while a person can request a correction of the personal information held on the register, once issued a NHI number cannot be deleted.

[70] As submitted by the Ministry, the NHI number and personal information was collected indirectly by it by virtue of its role as the custodian of the NHI database. There is no evidence the information was collected by unlawful means or by means which were unfair or which intruded to an unreasonable extent on Mr Fehling's personal affairs.

CONCLUSION

[71] We find the Ministry did not breach HIPC rr 1, 2 and 4. It follows that in terms of s 66(1) of the Privacy Act Mr Fehling has failed to establish an action by the Ministry which was an interference with his privacy.

[72] By way of emphasis we find also there is no evidence to support the contention by Mr Fehling that through the NHI number the Ministry has access to clinical information and that "secret" data-matching is both possible and likely.

[73] No interference with Mr Fehling's privacy having been established, the proceedings are dismissed.

Costs

[74] As costs are sought by the Ministry the following timetable is to apply:

> **[74.1]** The Ministry is to file its submissions within 14 days after the date of this decision. The submissions for Mr Fehling are to be filed within the 14 days which follow. The Ministry is to have a right of reply within 7 days after that.
>
> **[74.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.
>
> **[74.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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