IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2012] NZHRRT 12**

	Reference No. HRRT 027/2011
IN THE MATTER OF	**A CLAIM UNDER THE PRIVACY ACT 1993**
BETWEEN	**RAZDAN RAFIQ**
	PLAINTIFF
AND	**COMMISSIONER OF INLAND REVENUE**
	DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson
Dr S Hickey, Member
Dr A Trlin, Member

REPRESENTATION:
Mr Rafiq in person (no appearance)
Mr E Child and Mr T Hallett-Hook for Defendant

DATE OF HEARING: **11 April 2012**

DATE OF DECISION: **23 May 2012**

DECISION OF TRIBUNAL

Introduction

[1] By letter dated 25 February 2011 Mr Rafiq requested access to the personal information held about him by Inland Revenue. Initially that request was not replied to. Only after a complaint was made to the Privacy Commissioner did Inland Revenue respond on 16 May 2011, some 28 days beyond the statutory period allowed by s 40(1) of the Privacy Act 1993. Nearly all of the personal information held by Inland Revenue was provided at that time. Some information was withheld. Particularly, computer

printouts were redacted to remove screen codes, user IDs and the names of individual staff members. Inland Revenue also refused to disclose three internal reports. The primary issues in these proceedings are whether the withheld information should be released to Mr Rafiq and whether a remedy is to be granted for the admitted breach of the s 40 time period.

Non-appearance of Mr Rafiq at the hearing

[2] Mr Rafiq did not appear at the hearing of these proceedings in Wellington on 11 April 2012. A brief background is necessary. A more detailed account is to be found in the *Minutes* dated 18 October 2011, 8 November 2011, 23 December 2011, 2 March 2012 and 3 April 2012.

[3] These proceedings were originally set down for hearing at Auckland. At the time of setting down Mr Rafiq had only one other proceeding before the Tribunal, namely *Rafiq v Commissioner of Police* (HRRT 032/2011). The circumstances in which the venue was changed to Wellington included the following:

> **[3.1]** Mr Rafiq refused to participate in pre-hearing teleconferences, insisting that all communications "be done by post only". See the statement of claim dated 30 August 2011. This made dialogue difficult.
>
> **[3.2]** When by *Minute* issued on 18 October 2011 a direction was made that these proceedings be heard at Auckland on 10 February 2012, Mr Rafiq was directed to file his briefs of evidence by 18 November 2011. By letter dated 10 November 2011 he advised he would not be filing any evidence.
>
> **[3.3]** When the Commissioner sought a change of venue to Wellington Mr Rafiq replied on 14 November 2011 that he wanted the hearing to be in Auckland and added, inter alia, that:
>
> > (iii) There shall be no evidence provided by the way of affidavit;
> >
> > ...
> >
> > (vi) There shall be no paper submissions of any nature in respect to the dealing of this case;
> >
> > (vii) The Plaintiff does not have to provide any evidence as the onus is on the Defendant to provide evidence to support its ground for the failure to disclose information as requested and withholding of critical information;
> >
> > (viii) The above is a full and final decision of the Plaintiff and there shall be no further procrastination in having the case moving forward;
> >
> > ...
>
> **[3.4]** In his submissions Mr Rafiq gave no meaningful information as to his personal circumstances and the same observation can be made in relation to his statement of claim.
>
> **[3.5]** By then Mr Rafiq had also filed multiple proceedings under the Privacy Act against a number of additional defendants loosely categorised as the Department of Labour, the Civil Aviation Authority and the Department of Internal Affairs. This meant that there were then eight separate proceedings against government departments or agencies based in Wellington. The earlier decision that these proceedings in HRRT 027/2011 be heard in Auckland required revisiting given

the substantial expense which the taxpayer now faced in relation to the travel costs and accommodation for the lawyers and witnesses involved in defending the multiple proceedings.

[3.6] In these changed circumstances the Chairperson concluded, in terms of Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002, that all eight proceedings would be more fairly, efficiently, simply and speedily heard in Wellington. The Auckland fixture was accordingly adjourned to Wellington. See the *Minute* of 23 December 2011.

[3.7] The change of venue from Auckland to Wellington was again addressed in the Chairperson's *Minute* of 2 March 2012 after Mr Rafiq sought a change of venue back to Auckland. For convenience paras [9] and [10] follow:

> **[9]** In balancing the interests of Mr Rafiq against those of the Commissioner and of the other government agencies the following considerations have been taken into account.
>
> > **[9.1]** In almost every case the cause of action (ie alleged breach of the Privacy Act) occurred in Wellington or was inextricably connected to an administrative decision-making process based in Wellington.
> >
> > **[9.2]** The lawyers representing the Commissioner and the other government agencies are based in Wellington as are most, if not all of the witnesses who will be called by them to give evidence.
> >
> > **[9.3]** The transport and accommodation costs which will be incurred by the taxpayer as a result of a hearing in Auckland will be substantial.
> >
> > **[9.4]** The only real connection between the eight proceedings and Auckland is the fact that Mr Rafiq lives in that city.
> >
> > **[9.5]** While Mr Rafiq claims to be now a welfare beneficiary he has given no meaningful information as to his current personal or financial circumstances.
> >
> > **[9.6]** The impression given by Mr Rafiq is that he believes that having instituted the several proceedings, it is now for each defendant to satisfy him (Mr Rafiq) that they are innocent of each and every alleged impropriety (of which there are many) and that Mr Rafiq is to be the sole judge of their "innocence". The additional cost and inconvenience (to the defendants) of a hearing in Auckland appears to be part of a strategy to "punish" the various departments for their alleged transgressions against Mr Rafiq.
>
> **[10]** The conclusion I draw from these considerations is that the interests of justice, fairness and efficiency, decisively favour a hearing in Wellington (Regulation 16(1) of the Human Rights Review Tribunal Regulations 2002 (SR2002/19)). The application for a change of venue to Auckland is declined.

[3.8] By memorandum dated 30 January 2012 Mr Rafiq required some twelve to thirteen witnesses to be summonsed to the hearing. The witnesses included the former Chair of this Tribunal together with a Registry official of the Tribunal, the Commissioner of Inland Revenue and two officials from his Wellington office along with eight officers from the Office of the Privacy Commissioner. In relation to each witness Mr Rafiq asserted that an arrest warrant would be issued for non-appearance. The application was dismissed in the *Minute* of 2 March 2012. For present purposes the point is that most of the intended witnesses were Wellington-based, thus reinforcing the Wellington-centric nature of these proceedings.

[4] Overall, the pre-trial history shows that Mr Rafiq decided from the outset to participate in these proceedings on his own terms and without regard to his obligation to

participate in them meaningfully and in good faith. The transfer of proceedings to Wellington became inevitable once it was established that his eight sets of proceedings would require the defendants to call seven witnesses (all Wellington-based) and that up to three Wellington lawyers would be representing those defendants. The general litigation rule would in any event require that the hearing take place at the venue closest to where the defendant resides and it was in Wellington that the relevant decisions were made. No or no material part of the cause of action arose in Auckland.

[5] The *Minute* of 2 March 2012 having re-affirmed Wellington as the proper venue, Mr Rafiq on 28 March 2012 filed what he called a "full and final statement in respect to this proceeding" saying that it constituted "the facts that I need to put across to the Tribunal". The language of the statement is in part abusive and offensive but confirms that Mr Rafiq would not attend the hearing:

> The Plaintiff will not appear in the proceeding as I do not intend to confront the Europeans and abuse them and due to financial constraints.

[6] At the commencement of the three day hearing at which all eight of his matters would be heard Mr Rafiq was contacted by the Registrar on his (Mr Rafiq's) cellphone. Responding to the inquiry by the Registrar, Mr Rafiq confirmed that he had not travelled to Wellington, would not be attending any of the hearings and would be relying on his "paper submissions". The hearing accordingly proceeded in the absence of Mr Rafiq as permitted by Regulation 19(3) of the Human Rights Review Tribunal Regulations 2002. The Commissioner's only witness, Mr Andrew Rodger, Manager, Relationship Management Group, gave oral evidence in accordance with his brief of evidence and answered supplementary questions from Mr Child and from the Tribunal.

Background circumstances

[7] In his opening submissions counsel for the Commissioner correctly observed that Mr Rafiq has a grievance with Inland Revenue and over a period of time has sent correspondence that has become increasingly offensive and abusive. Reference to that correspondence is necessary for an understanding of the decisions made by Inland Revenue, particularly the decision to withhold certain information from Mr Rafiq.

[8] The narrative of events which follows has been taken from the evidence given by Mr Rodger who is also the privacy officer for Inland Revenue.

[9] On 27 April 2009 Mr Rafiq made an information privacy request. That request was complied with promptly by Inland Revenue on 20 May 2009. A small amount of information was withheld, namely computer screen codes and user IDs from computer printouts along with internal reports. There does not appear to have been any challenge by Mr Rafiq to the withholding decision.

[10] Thereafter, from approximately mid-2010, correspondence from Mr Rafiq became increasingly shrill, abusive and racist. It is not intended to chart each letter. A summary only will suffice:

> **[10.1]** In a letter dated 11 May 2010 concerning a third person Mr Rafiq complained of "very poor, disgraceful, unprofessional, low caste and low standard of service" in respect of his dealings with Inland Revenue. He "dismissed" a named officer and the "Complaint Department". In relation to a named person he said:

> [She is] dismissed by me from any involvement in relation to many of the matters that I shall put forward to IRD. Any letters or correspondence that shall bear her name and sent to us will be returned back to IRD in the form of service complaint. She is a woman wasting our Tax money and should be suspended.

[10.2] In a letter to the Commissioner dated 14 June 2010 he referred to "lazy European staffs going home early or not answering any phone in an attempt to go home early" and listed four categories of persons or teams with the following preambular statement:

> Please note that the expulsion of the following racist European staffs or 'white snakes' remains effective forever.

[10.3] A letter dated 19 July 2010 stated:

> Due to the ongoing poor services of your department and perhaps, will never get improved, I hereby, expel all the European staffs of the Call Centre from any involvement in relation to my matters.
>
> If you act smart and attempt to have the above dismissed staffs still process my matters, I will then dismiss all the racist European staffs of all the Branches and you, the Commissioner from any involvement in respect to my matters. If such actions are carried out the Revenue Minister will be notified.
>
> The department is to make a note of the above proposed adverse decision against the White snakes!

[10.4] In a letter dated 30 July 2010 Mr Rafiq wrote that he was "expelling all European staffs of the IRD Manukau Branch from any involvement in relation to my matters". The letter also contained the following statements:

> If I get further upset I shall dismiss non European staffs if they listen to White people or act like Europeans in terms of language, names or addressing style.
>
> There is no right of appeal against my decision in relation to expulsion of 'White snakes' of IRD.
>
> … We do not pay tax to the government to feed the White snakes (Europeans) of Immigration New Zealand and Department of Labour.

[10.5] In a letter dated 10 August 2010 reference was made to punishing Europeans and to Mr Rafiq's hatred for Europeans:

> Re: Notice of Adverse Decision – EXPULSION OF YOU AND ALL STAFFS INCLUDING EUROPEAN SNAKES OF IRD AND SUSPENSION OF PAYMENTS FOREVER
>
> …
>
> … I reiterated my sister that these White Bullshit Europeans will face my punishment that will turn them to red.
>
> I had informed my families here in NZ that I am going to punish each and every European in a legally and professional manner.
>
> I am going to start from your department first.
>
> …

> As my hatred against Europeans has grown, I will continue discriminate Europeans in many areas of life …

[11] It was in this context that the information privacy request at issue in these proceedings was made by Mr Rafiq.

The 25 February 2011 information privacy request

[12] On 28 February 2011 the National Office of Inland Revenue, Wellington, received an envelope addressed as follows:

> To: Racist Europeans (Traitors)
> Inland Revenue
> National Office
> 7-27 Waterloo Quay
> PO Box 2198
> Wellington 6140
>
> "Europeans are Maori country invaders"

[13] Inside the envelope there was a letter from Mr Rafiq dated 25 February 2011 in the following terms:

> Dear Sir
>
> RE: Personal Information
> BY: Ray Razdan Rafiq
>
> I am writing to request you white European snakes for all my personal information.
>
> The request is filed under the Privacy Act 1993. If you Europeans refuse to disclose I am going to dismiss all student loans, you racist white European animals from England.
>
> I hate Europeans and all of you should go back to England.
>
> From now onwards I don't want to see any white European dirty ass handling my matters.

[14] The "student loans" reference in the second paragraph relates to Mr Rafiq's student loan account. At the time the loan balance was substantial and the assertion appears to be that should Inland Revenue withhold information from Mr Rafiq he would consider the balance reduced to zero.

[15] The evidence given by Mr Rodger is that while the letter itself was certainly noted, the fact that it was a request for personal information was unfortunately overlooked and not responded to within the 20 working day timeframe prescribed by s 40(1) of the Act. Mr Rafiq complained to the Privacy Commissioner. She wrote to Inland Revenue on 19 April 2011. After being alerted to the existence of the information privacy request Mr Rodger wrote to Mr Rafiq on 16 May 2011. He apologised for the oversight and attached copies of the personal information about Mr Rafiq received, sent or noted after 20 May 2009 (the date his previous information request had been fulfilled). The information released in 2011 was mainly made up of correspondence to and from Mr Rafiq, student loan statements and computer print-outs of file notes of letters and telephone conversations with him. However, some information was withheld.

The withholding of information by Inland Revenue

[16] Among the documents disclosed to Mr Rafiq were print-outs from Inland Revenue's computer system known as OLACS. Mr Rodger described the system as one used to record electronic file notes of correspondence and interactions with clients (such as

phone calls). It also records actions taken on a person's account. The deletions made from these print-outs were explained by him in the following terms:

> 24.1 Computer screen codes were deleted. These included several unique numbers that are assigned to each record, for administrative purposes. They also included some acronyms or abbreviations used by Inland Revenue. The codes were deleted in order to protect the integrity of the tax system. Disclosure of them could create risks for the security of the computer system, as it could make the system vulnerable to unauthorised access, or could enable people to discover other tax-secret information that is normally known only to Inland Revenue staff.
>
> 24.2 User IDs were deleted. A user ID is a unique identifier that is assigned to each staff member. It shows (to those who can decipher it) who was responsible for making a particular entry in the computer system. The user IDs were deleted in order to protect the integrity of the tax system. Disclosure of them could increase risks to the security of the computer system, for similar reasons as in respect of the computer screen codes.
>
> 24.3 Names of staff members were deleted. In a very small number of records, individual staff members were mentioned by name. The identity of individual staff members identified in the computer print-outs that had no significant involvement in Mr Rafiq's tax affairs were deleted to protect their privacy. As noted in my letter, those officials had had only peripheral involvement in Mr Rafiq's tax affairs, such as in relation to security or administrative support duties associated with the handling of correspondence.

[17] Addressing the three withheld internal reports Mr Rodger said:

> 26 In addition, three documents were withheld from Mr Rafiq in their entirety. Those documents are not communications with Mr Rafiq but instead are internal reports. They are dated 28 May 2010, 8 August 2010, and 7 March 2011. They are wholly internal documents, written by Inland Revenue staff about Mr Rafiq. They were withheld on the basis that their disclosure would be contrary to the secrecy provisions of the Tax Administration Act 1994 ("TAA").

The response by Mr Rafiq

[18] Mr Rafiq was not pleased by the withholding of information. His letter to Mr Rodger dated 7 June 2011 was couched in astonishing language:

> 7 June 2011
>
> Fucked Face, European snake and bastard, asshole, Andy
> Fucked Rodger Snake
> Snake face Privacy Officer
> Office of the Commissioner
> 55 Featherston Street
> National Office
> P O Box 2198
> WELLINGTON 6140
>
> RE: Personal Information
> BY: Ray Razdan Rafiq
>
> I want list of identities of individual staff members named in the computer printouts in my record you fucked faced European bastard, snake and son of a whore, slut.
>
> I want all the internal reports that you European fucked bastards, are withholding.
>
> Your mother must have fucked so many European bastards before giving birth to European snake face bastard, traitor like you.
>
> Your mother must have put poisonous snakes into her vagina in order to give a birth to a snake European bastard like you.

> Your mother should have thrown you in the rubbish and toilet pit shit when you were born you bastard European.
>
> You have 21 days from the date of this letter to release me the above information before I start expelling European sluts from matter and other whom I act for you snake whore bastard.
>
> Student loans will be expelled as well.
>
> I hate European people like you.
>
> You fucked and snake bastard and go and fuck your family and sell your family on the road and commitment suicide.

A handwritten endorsement at the foot of the letter read: "Go and fuck your Commissioner R. Russell you bastard."

[19] Further letters written in obscene language followed and are dated 1 July 2011, 31 August 2011 and 2 September 2011 respectively. It is not necessary that we make reference to them.

[20] We address first the question whether Inland Revenue properly withheld the information in question.

The withholding grounds

[21] In his submissions dated 11 April 2011 Mr Child submitted that all the withheld information described by Mr Rodger had been properly withheld. In particular:

> **[21.1]** In relation to the screen codes, user ID numbers and names of staff members on the computer printouts:
>
> > **[21.1.1]** Section 81 of the Tax Administration Act 1994 applies and, by virtue of s 7(2) of the Privacy Act, the Commissioner was entitled or required to withhold the information on that basis; or alternatively
> >
> > **[21.1.2]** To the extent that the information identified staff members, those identities may be withheld under s 29(1)(a) of the Privacy Act; or
> >
> > **[21.1.3]** The request for the information is frivolous, vexatious, or the information requested is trivial, under s 29(1)(j) of the Privacy Act.
>
> **[21.2]** In relation to the three internal reports, s 81 of the Tax Administration Act applies to this information as well and, by virtue of s 7(2) of the Privacy Act, the Commissioner was entitled or required to withhold it on that basis.

Procedure for determining whether information properly withheld

[22] Following the practice established in *Dijkstra v Police* [2006] NZHRRT 16; (2006) 8 HRNZ 339, *Reid v New Zealand Fire Service Commission* [2008] NZHRRT 8 and *NG v Commissioner of Police* [2010] NZHRRT 16 the opening submissions of Mr Child were received in open hearing. Thereafter the evidence of Mr Rodger as set out in his brief of evidence dated 14 December 2011 (including the bundle of annexures to that brief of evidence) was read and received in open hearing. However, once the hearing reached the point where it was necessary for the Tribunal to see the withheld information the hearing was closed to all except for Mr Rodger (the witness) and Mr Child and Mr Hallett-Hook (counsel for the Commissioner). In the closed part of the hearing the Tribunal received a closed bundle of documents, being the information withheld from Mr

Rafiq. During the closed hearing Mr Child expanded on his opening submissions with the advantage of now being able to address freely the closed documents specifically. Once this process concluded the hearing returned to "open" format.

Withholding – discussion

[23] While Principle 6 of the information privacy principles enunciates that an individual is entitled to have access to personal information held by an agency, this legal right (see s 11(1) of the Privacy Act) is subject not only to the provisions of Parts 4 and 5 of the Act but also to s 7 of the Act. In the present context reference need only be made to s 7(2):

> (2) Nothing in principle 6 or principle 11 derogates from any provision that is contained in any other Act of Parliament and that—
>
> (a) imposes a prohibition or restriction in relation to the availability of personal information; or
>
> (b) regulates the manner in which personal information may be obtained or made available.

[24] The primary submission by the Commissioner is that s 81 of the Tax Administration Act imposes exactly such a prohibition or restriction in relation to the availability of personal information with the consequence that the terms of s 81 prevail over Principle 6.

[25] Section 81 imposes on every officer of Inland Revenue a mandatory and non-derogable duty to maintain and to aid in maintaining the secrecy of all matters relating to the Inland Revenue Acts except as otherwise provided in s 81 itself. It is not intended to reproduce the entire text of s 81 as it stood prior to 29 August 2011. Only the key provisions are necessary:

> **Part 4**
> **Secrecy**
>
> **81 Officers to maintain secrecy**
> (1) Every officer of the department –
> (a) shall maintain and aid in maintaining the secrecy of all matters relating to –
> (i) the Inland Revenue Acts ….
> …
> which come to the officer's knowledge, and shall not, either while the officer is or after the officer ceases to be an officer of the department, communicate any such matters to any person except for the purpose of carrying into effect the Acts referred to in subparagraphs (i) …
> (2) …
>
> (3) Without limiting the generality of subsection (1), no officer of the department shall be required to produce in any court or tribunal any book or document or to divulge or communicate to any court or tribunal any matter or thing coming under the officer's notice in the performance of the officer's duties as an officer of the department, except when it is necessary to do so for the purpose of –
> (a) carrying into effect –
> (i) the Inland Revenue Acts
> …
>
> (4) Nothing in subsection (1) or subsection (3) shall be deemed to prohibit the Commissioner from –
> (a) …
> (l) permitting a copy of, or details of and from, any book, document, or information (including details of taxes and duties paid and payable), in the possession of, or obtained by, or on behalf of, the Commissioner for the purposes of any of the Inland Revenue Acts, including all Acts (whether or not repealed) at any time administered by or in the department, or for the purpose of any other function lawfully conferred on the Commissioner, to be given to the person from whom, or

> on behalf of whom, or in relation to whom such book, document, or information is held or was obtained, or to the legal personal representative of that person or to the agent of that person or of that legal personal representative authorised in writing or in such other manner as the Commissioner prescribes in that behalf:
> Provided that no information shall be given under this paragraph unless the Commissioner –
>
> (i) Is satisfied that such information is readily available in the department; and
>
> (ii) Considers it reasonable and practicable to give that information.
>
> ...

[26] The effect of s 81(1) was summarised in *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] NZSC 24, [2008] 2 NZLR 709 at [53]:

> [53] Section 81(1) lays down a rule that restricts use by officials of taxpayers' information held by the Inland Revenue Department, when discharging the Commissioner's functions of care and management of taxes. The obligation of secrecy under s 81(1) attaches to that material as a class. It is secret whether it has come into the department through voluntary disclosure in a taxpayer's return of income, in response to a requirement that it be furnished under s 17, or because it has been located by the department in some other way during the course of investigations to verify the correctness of any taxpayer's return. The obligation of secrecy is reinforced by a penal provision which makes contravention of the s 81 secrecy obligation an offence.

[27] In the present context there are only three relevant exceptions to the s 81(1) secrecy obligation:

> **[27.1]** Where communication of the "matter" is "for the purpose of carrying into the effect the [Inland Revenue Acts]". See s 81(1)(a).
>
> **[27.2]** Where the production of any book or document or the divulging or communicating of any matter is "necessary" for the purpose of carrying into effect the Inland Revenue Acts. See s 81(3).
>
> **[27.3]** Where, in terms of s 81(4)(l), the Commissioner considers it reasonable and practicable to give information to the person from whom the information was obtained or in relation to whom the information is held (and such information is readily available in the department). See s 81(4)(l).

[28] All of the information withheld from Mr Rafiq is subject to s 81. Unless one or more of the exceptions can be shown to have application to the facts of Mr Rafiq's case, s 81(1) applies with full rigor. That is, the Commissioner is statutorily prohibited from releasing the withheld information and this prohibition prevails over Principle 6 of the information privacy principles.

[29] The first two exceptions have no application on the facts because they only apply where the disclosure is for the purpose of carrying into effect the Inland Revenue Acts. The Privacy Act is not one of those Acts.

[30] As to the third exception it is to be noted that the withheld information was not obtained from Mr Rafiq but it will be assumed for the purpose of this decision that Mr Rafiq is a person "in relation to whom … information is held". That, however, is not sufficient on its own. The secrecy rule can only be waived if the Commissioner (inter alia) also "considers it reasonable and practicable to give that information". Here the Commissioner has determined that it is not reasonable and practicable to give the information for the reasons set out earlier at paras [16] and [17] above.

[31] It has not been necessary to hear argument on the jurisdiction (if any) of this Tribunal to review the Commissioner's assessment whether it is reasonable and practicable to give the taxpayer the withheld information. There are two reasons:

> **[31.1]** As observed by the Supreme Court in *BNZ Investments Ltd v Commissioner of Inland Revenue* at [70] the Commissioner's judgment is entitled to respect; and
>
> **[31.2]** Even were the Tribunal free to make its own assessment, it would on the facts come to precisely the same conclusion as the Commissioner. In short we are satisfied by a wide and substantial margin that all categories of the withheld information have been properly withheld for the reasons advanced by the Commissioner in these proceedings.

[32] We have therefore concluded that s 81 of the Tax Administration Act applies to all the withheld information and the Commissioner was entitled or required to withhold that information.

[33] In relation to the redaction of the names of individual staff members we are of the further view that that information was in any event properly withheld under s 29(1)(a) of the Privacy Act (disclosure of the information would involve the unwarranted disclosure of the affairs of another individual) as well as under s 29(1)(j) (the request is vexatious). It can be seen from the vituperative terms in which Mr Rafiq wrote to Mr Rodger on 7 June 2011 that the Commissioner is fully justified in withholding the identity of his officers. They are to be protected from vicious and hateful attacks.

Conclusion on the withholding of information

[34] We conclude, by the widest of margins, that the decision to withhold the information in question from Mr Rafiq was correct and the challenge by Mr Rafiq must be dismissed in that regard.

[35] The remaining issue is whether the failure by Inland Revenue to comply with the 20 working day time limit for responding to the personal information request should result in the grant of a remedy by this Tribunal.

Whether remedy to be granted for failure to comply with the 20 day time limit

[36] On the admitted facts Inland Revenue failed to respond to the information privacy request within the 20 working day period stipulated by s 40(1) of the Privacy Act. This has not, however, been the complaint in Mr Rafiq's proceedings. His statement of claim is focussed exclusively on gaining access to the withheld information. Be that as it may it is better that the point be addressed given that Mr Rafiq is a litigant in person and may not have intended to waive the point.

[37] The circumstances in which an agency "interferes" with the privacy of an individual are defined in s 66 of the Act. That provision states (inter alia) that where an agency fails to comply with the time period prescribed by s 40(1) for a decision on the information privacy request, that failure is "deemed" for the purposes of s 66(2)(a)(i) to be a refusal to make available the information to which the request relates. Provided this Tribunal is also of the opinion that there was no proper basis for that decision the deemed refusal meets the definition of "an interference with the privacy of [the] individual".

[38] The evidence of Mr Rodger was that the request by Mr Rafiq dated 25 February 2011 for access to information was overlooked. It is therefore inevitable that the Tribunal must find that there was no proper basis for the deemed refusal to make the information available.

[39] Turning now to the question of remedies we see no evidentiary basis for a restraining order, damages, specific performance or other relief. The only remedy in s 85 of the Privacy Act which can realistically be considered on the facts is a declaration that Inland Revenue has interfered with Mr Rafiq's privacy. The issue is whether such declaration should be made. In deciding against Mr Rafiq we have taken into account the following:

> **[39.1]** The oversight by Inland Revenue was inadvertent, promptly remedied and accompanied by an apology.
>
> **[39.2]** In these proceedings Mr Rafiq has focussed on gaining access to the withheld information, not on the delay.
>
> **[39.3]** Mr Rafiq has been uncooperative throughout the course of these proceedings, has failed to comply with timetable directions and has been calculated in the abuse and offence directed at virtually all actors in these proceedings. We address this aspect of the case in greater detail next.

Whether declaration of interference with privacy should be made

[40] *Geary v New Zealand Psychologists Board* [2012] NZHC 384 was a case in which a breach of Principle 6 was established but this Tribunal declined to make a declaration in favour of Mr Geary because of an apparent strategy adopted by him to produce key documents at the last minute on the morning of the hearing. The High Court reversed the Tribunal on this point. In so doing the High Court at [107] agreed with the Tribunal that the granting of a declaration under s 85(1)(a) of the Privacy Act is discretionary in nature:

> We accept that the granting of a declaration under s 85(1)(a) of the Privacy Act 1993 is discretionary in nature. The same is the case with declarations under the Declaratory Judgments Act 1908, although that consideration is there made explicit. A declaration may be declined generally on the basis of disentitling conduct. Whether the applicant has acted with clean hands, or has acted "fairly and appropriately" are relevant questions.

[41] But on the facts the High Court came to a different conclusion because it was of the view that while Mr Geary's conduct before the Tribunal had been tactical, improper and deserving of criticism his conduct had not been serious enough for declaratory relief to be denied. At [108] the Court stated:

> But we do not consider that a low "fairness" standard should be applied to deny declaratory relief where a clear breach of statutory obligation by a statutory authority has been found. Only then where an equally clear, but exceptionally egregious, breach of the standards to be expected of a litigant exists should declaratory relief be denied. What Mr Geary did at the hearing did not in our view reach that very high threshold for exception. Accordingly we do not see his behaviour as sufficiently disentitling conduct to deny expression of the finding the Tribunal made at [107] of its decision as a formal declaration.

[42] The decision in *Geary* is accordingly authority for the proposition that while the grant of a declaration under s 85(1)(a) is discretionary in nature, declaratory relief should be denied only where (inter alia) there is a clear and exceptionally egregious breach of the standards to be expected of a litigant.

[43] Applying this test to the present case we return again to the offensive terms in which both the personal information request of 25 February 2011 and the reply to Mr Rodger dated 7 June 2011 were couched.

[44] We also take into account Mr Rafiq's unwarranted attacks on the Case Manager who, in the Tribunal's Unit, Ministry of Justice, has had responsibility for administering all eight of Mr Rafiq's proceedings. These attacks were addressed in the *Minute* dated 23 December 2011, the relevant paragraphs of which follow:

> **[14]** As can be seen from the extract taken from Mr Rafiq's statement dated 14 November 2011 he asserts that the Case Manager "... is to step down ... due to extremely poor customer service". No evidence or submissions are offered in support of the allegation.
>
> **[15]** This calculated attack on the Case Manager is part of a pattern of conduct which Mr Rafiq has exhibited in past matters he has brought before the Tribunal. He must understand that behaviour of this kind will not be tolerated and that if he continues to make unfounded allegations against case managers, witnesses, counsel and the Tribunal all his proceedings will be at risk of being dismissed under s 115 of the Human Rights Act 1993 on the grounds that they are vexatious or not brought in good faith.
>
> **[16]** In this regard it is noted that Mr Rafiq, by email dated 20 December 2011 to the Case Manager, has copied a letter he (Mr Rafiq) addressed to an officer of the Privacy Commissioner which is in the following terms:
>
> > Re your Immediate Expulsion from my matters
> >
> > It has come to my attention from Inland Revenue evidence that you are a woman [name deleted]. I hate woman for the following reasons;
> >
> > - women only want to claim properties from their partners during the divorce;
> > - women are good for nothing
> > - women only want to have sick leave and low work productivity
> > - women are never to be trusted by men
> > - women only cheat money ways
> > - women can take me to a steep hill and push me and therefore, should never be trusted..
> >
> > Accordingly, I am expelling you as a woman from my matters.
> >
> > A service complaint against you will be filed to the Minister for fabricating and false pretence as a man to act on my matters. Women do not have the right to employment and higher income than men.
> >
> > I do not know how much you have claimed from your poor partner.
> >
> > Yours faithfully
> >
> > Razdan Rafiq
>
> **[17]** As mentioned, Mr Rafiq is on clear notice that in the light of his history of dealings with the Tribunal and further given the aggressive and often offensive tone of his correspondence all his proceedings are at risk of being dismissed unless his behaviour improves substantially. Everyone with whom he comes into contact is entitled to be treated with dignity and respect.

[45] In a subsequent memorandum dated 30 January 2012 Mr Rafiq demanded that the same Case Manager be required to appear at the hearing "for questioning", adding the threat that "arrest warrant will be issued for non appearance". At the same time Mr Rafiq demanded the attendance of the past Chairperson of the Tribunal, the Commissioner of Inland Revenue (together with other Inland Revenue witnesses), and virtually the entire staff of the Office of the Privacy Commissioner based in Wellington and Auckland. Those demands were addressed in the *Minute* dated 2 March 2012:

> **[11]** The memorandum dated 30 January 2012 asserts that Mr Rafiq requires some twelve to thirteen witnesses to be summonsed to the hearing. The witnesses include:
>
> > **[11.1]** The former Chair of this Tribunal together with a registry official of the Tribunal.
> >
> > **[11.2]** The Commissioner of Inland Revenue and two officials from his Wellington office, including Mr Rodger who will be giving evidence in any event for the Commissioner.
> >
> > **[11.3]** Eight officers from the Office of the Privacy Commissioner.
>
> No rational reasons are given as to why summonses should issue.
>
> **[12]** In relation to each witness Mr Rafiq asserts that "arrest warrant will be issued for non appearance". He appears to be of the impression that the issue of a witness summons is a matter of right, not discretion and that there is no duty to establish proper grounds for a summons to be issued. The very categories of the witnesses demonstrate that the demand for the summonses is frivolous, vexatious or not made in good faith. In the result, treating the communication from Mr Rafiq as a request for the issue of witness summonses under s 109 of the Human Rights Act 1993, the application is declined because no proper grounds have been made out in support of the application.

[46] Also in January Mr Rafiq sent to Mr Child, counsel for the Commissioner, a letter dated 7 January 2012 containing sexual material, outlandish stories about his relationships with women and making lewd remarks about Mr Child's secretary:

> I am in receipt of your statement regarding acting for Police. Prior to opening I have noticed that one of your staffs have handwritten my full name in such a beautiful manner on the envelope. I believe she must be a female staff. If this is the case I want permission to come over to kiss her beautiful hand for writing my full name in such a beautiful manner.
>
> I am seller of various auction websites and 99% of my buyers are women. Women buy from me becoz they really like me especially European ladies. I am extremely weak with ladies and when they ask for discounts I cannot deny them. I have noted that the Chairperson had asked me to come to Wellington for the hearings but I cannot afford it becoz I invest all funds into making love to women and giving them money for shopping to buy their beautiful handbags/high heel shoes and make ups like lancome etc. I went to see my female Doctor and she said that I have a very rare disease (can't stop making love to women). My female Doctor states that there is no cure for it and I have to live with this disease forever.
>
> Even though I hold multiple qualifications in Business Management/Administration I even cannot obtain a paid employment becoz the employers proclaim that if they employ me then all their female staffs will get pregnant …
>
> The above mentioned are the reasons why I cannot travel to Wellington for the hearings …

[47] Knowing that Mr Rodger would give evidence in these proceedings (he had been served with Mr Rodger's witness statement), Mr Rafiq wrote to the Minister of Revenue on 19 February 2012 making unsubstantiated accusations of bribery and corruption against Mr Rodger:

> I am writing to express my concern in respect to Andrew Rodger of Inland Revenue who is employed in the capacity of Manager, Relations Management Group. He is involved in bribery and corruption and is an artist in false information and documentation works He has a known history of interfering in other individuals personal affairs and false statements. Andrew Rodger states that he knows me and he has been requesting bribery over the numerous phone calls into my mobile.

[48] In his statement dated 26 March 2012 filed in support of his case Mr Rafiq alleged that Mr Child had been "deceitful in his various memorandums". He also made highly offensive comments about officers employed in the Office of the Privacy Commissioner:

> I really really really really hate women a lot and I never ever trust women as the Chairperson is aware. My blood starts to boil to boiling temperature whenever I see European women. More

> widespread abuse of European women and discrimination will be advanced by me and face to face intensive swears will be put forward to European women ladies. I will start with their monthly periods first. Next time no European women will ever think of filing charges against me. I need to send a clear message to all European women ladies the consequences for filing charges against me. I adjudge that European ladies like me a lot but I was wrong! Indian, Chinese and Black African Middle East women they love me so no abuse to them! I loved European women ladies a lot and now they have broken my heart and need to be punished. More service complaints will be tendered against private companies and more claims will be filed in the Disputes Tribunal against private companies who have European ladies as their Bosses. I want to view all the private companies getting bankrupt if they employ women at workplaces and as their Executives!

This "statement" also asserts that "Abuse will continue against Europeans".

[49] The repeated, calculated and wholly unjustified attacks which Mr Rafiq has made on virtually all persons who have had dealings with him are serious. We find that his behaviour is properly described as an "exceptionally egregious" breach of the standards to be expected of a litigant and for that reason declaratory relief is to be denied. In arriving at this finding we have confined ourselves to what has been said by Mr Rafiq in the course of making his information privacy request and in the course of pursuing these proceedings. We are aware that over the same period of time he has written to the Commissioner of Inland Revenue further letters which are even more obscene than the ones quoted in this decision. We here refer to his letters to the Commissioner dated 1 July 2011, 1 August 2011, 31 August 2011 and 2 September 2011. As these letters are not strictly related to the current proceedings they have not been taken into account.

Finding regarding remedies

[50] Mr Rafiq has to a serious degree breached the standards to be expected of a litigant. Notwithstanding the failure by Inland Revenue to comply with the s 40(1) time limit the Tribunal has determined that a declaration that Inland Revenue has interfered with Mr Rafiq's privacy is to be withheld.

Decision

[51] For the foregoing reasons the decision of the Tribunal is that:

[51.1] All of the information which Inland Revenue has refused to disclose in response to Mr Rafiq's Principle 6 request has been properly and justifiably refused.

[51.2] Mr Rafiq has clearly and egregiously breached the standards to be expected of a litigant and he is therefore to be denied a declaration that Inland Revenue interfered with his privacy by failing to comply with the information privacy request within the statutory 20 working day period.

[51.3] Mr Rafiq's claim is dismissed.

[51.4] Costs are reserved.

Costs

[52] Any application for costs will be dealt with according to the following timetable:

[52.1] Any application is to be filed and served, along with any submissions or other materials put forward in support of the application, within 28 days after this decision is issued to the parties.

[52.2] Any notice of opposition to the making of an award of costs is to be filed and served, along with any submissions or other materials put forward in opposition to the application, within a further 28 days.

[52.3] The Tribunal will then determine the issue of costs on the basis of the papers that will by then have been filed and served and without any further oral hearing.

[52.4] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Dr S Hickey**	**Dr A Trlin**
Chairperson	**Member**	**Member**