IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2012] NZHRRT 15**

	Reference No. HRRT 040/2010
IN THE MATTER OF	**A CLAIM UNDER THE PRIVACY ACT 1993**
BETWEEN	**FRIEDRICH JOACHIM FEHLING**
	PLAINTIFF
AND	**SOUTH WESTLAND AREA SCHOOL**
	DEFENDANT

AT HOKITIKA

BEFORE:
Mr RPG Haines QC, Chairperson
Ms J Grant MNZM, Member
Ms S Scott, Member

REPRESENTATION:
Mr Fehling in person
Ms AM Sloane, Principal of SWAS for Defendant

DATE OF HEARING: 7 May 2012

DATE OF DECISION: 6 July 2012

DECISION

Introduction

[1] On 5 January 2009 Mr Fehling was lawfully on that part of the school grounds which had been leased by South Westland Area School (SWAS) to one of its senior teachers. Without the knowledge or consent of that teacher and without prior discussion or warning, Mr Fehling was served with a notice under s 4 of the Trespass Act 1980 requiring him to stay off the entire school grounds, including the leased grounds. The notice was signed by the School Caretaker and served by the Police. No reasons were given. Immediately upon service of the notice Mr Fehling was arrested, apparently on an outstanding warrant in relation to some other matter. It being the holiday period, there were no judicial facilities on the West Coast and Mr Fehling was accordingly taken

to Christchurch. On his first appearance there before a District Court Judge he was released at large without bail. The charge was dropped. From the time of his arrest to the time of his release Mr Fehling mounted a hunger and water strike, a period of three and a half days.

[2] When Mr Fehling asked the School for the reasons for the issue of the trespass notice, the School declined to provide them. On seeking the intervention of the Ombudsman Mr Fehling was told that the reason was that complaints had been made to the Caretaker that he (Mr Fehling) had been using the pool, showers and toilets at the School. Mr Fehling strongly denies these allegations. By way of a request for personal information under the Privacy Act 1993, Mr Fehling sought the names of the individuals who had made the complaints. The School declined to provide that information, relying on s 27(1)(d) (disclosure of the information would likely endanger the safety of any individual) and s 29(1)(a) (disclosure of the information would involve the unwarranted disclosure of the affairs of another). The issue in these proceedings is whether the information has been properly withheld.

Representation

[3] During the course of these proceedings the School has been represented by Mr MM Bell of Corcoran French, Solicitors of Christchurch. While Mr Bell prepared the briefs of evidence and the legal submissions for the School, he did not appear at the hearing. This was to reduce the legal costs incurred by the School. Mr Bell also prepared the legal submissions dated 8 June 2012 responding to the Chairperson's *Minute* issued on 5 June 2012.

[4] At the hearing Mr Fehling appeared on his own behalf. The School was represented by Ms AM Sloane, the current Principal. Seated beside her at the Bar table was the School Caretaker, Ms JA Adamson. Also seated at the Bar table was the current Chairperson of the school's Board of Trustees.

Preliminary issues

[5] Before the merits of the case can be addressed two preliminary issues must be dealt with:

> **[5.1]** Whether the Tribunal should state a case to the High Court under s 122 of the Human Rights Act 1993; and
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> **[5.2]** Whether the determination of these proceedings should in any event be postponed pending the resolution of an intended appeal by Mr Fehling to the Supreme Court.

[6] The background to both applications follows.

[7] The service of the trespass notice on Mr Fehling along with his eviction and arrest have led to a keen feeling of injustice on his part. He passionately and genuinely wishes to have matters put right. While some of his efforts have been constructively focused (for example securing reasons via a complaint under the Ombudsman Act 1975 and challenging the withholding of information under the Privacy Act 1993) other challenges to "the system" have been less successful. Every lack of success has, in turn, added to Mr Fehling's feeling of injustice and a belief that "the system" is either not functioning correctly or is protecting itself. One outcome has been the filing in these proceedings of a statement of claim which, rather than directing itself at the absence of evidence to justify the withholding grounds relied on by the School, unwisely broadens the attack to

include (inter alia) a challenge to the way in which the Privacy Commissioner investigated the case. Mr Fehling has also called in aid the New Zealand Bill of Rights Act 1990 which he feels has been given insufficient (if any) attention by those charged with dealing with his various tribunal and court challenges.

[8] In *Fehling v South Westland Area School* [2011] NZHRRT 14 (12 May 2011) this Tribunal, differently constituted, ruled that the Tribunal could not review the manner in which the Privacy Commissioner carried out her statutory responsibilities in relation to Mr Fehling's complaint (that the School has improperly withheld personal information it holds about him) and does not have general jurisdiction to apply the NZBORA as a cause of action as suggested by Mr Fehling. The Tribunal reached the conclusion that:

> The Commissioner has investigated the School's refusal to give the plaintiff the names of three individuals who made complaints about him to the School. The Tribunal has power to consider those matters. The Tribunal would also have jurisdiction to consider what the consequences for the plaintiff have been, and what remedy should be awarded, should it be satisfied that the School's refusal to disclose the names of the three people concerned gave rise to an interference with his privacy.
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> That is, however, the limit of the Tribunal's power to deal with the plaintiff's matters. In all other respects the plaintiff's claims are dismissed.

[9] Dissatisfied with this ruling, on or about 30 May 2011 Mr Fehling filed an appeal in the High Court, Greymouth Registry. As best we understand from the description given by Mr Fehling, the Registrar refused to accept the papers on the grounds that they did not comply with the High Court Rules. In addition, when Mr Fehling requested waiver of the filing fee, his request was refused. He sees this second "injustice" as compounding the first. Relying on s 14 of the Supreme Court Act 2003 Mr Fehling has now filed papers in the Supreme Court seeking leave to appeal directly to that Court against these decisions. Once more he has encountered difficulty; the Registrar of the Supreme Court having drawn attention to the fact that that Court has no jurisdiction to deal with any of the matters Mr Fehling wishes to raise in his intended appeal.

[10] Against this background Mr Fehling, at the commencement of the hearing on 7 May 2012, made a request that the Tribunal (as presently constituted) state a case to the High Court under s 122 of the Human Rights Act on the question of law determined by the Tribunal in its decision dated 12 May 2011. Mr Fehling's point is that because the court proceedings would thereby be initiated by the Tribunal itself, the proceedings would be both received and accepted by the High Court, overcoming the rejection of his own papers at the filing counter. In the alternative the Tribunal was asked to adjourn the substantive hearing of these proceedings until the Supreme Court has ruled on Mr Fehling's application for special leave to appeal to that Court.

[11] On 7 May 2012, after hearing argument, we determined that both applications would be declined. Our reasons were briefly stated and are outlined below.

Reasons for declining to state a case

[12] Section 122(1) of the Human Rights Act provides:

> **122 Stating case for High Court**
>
> (1) The Tribunal may, at any time, before or during the hearing or before delivering its decision, on the application of any party to the proceedings or of its own motion, state a case for the opinion of the High Court on any question of law arising in any proceedings before the Tribunal.

[13] In addition to seeking a case stated on the point determined in the Tribunal's preliminary ruling of 12 May 2011, Mr Fehling also sought the inclusion of the following question in the case stated. The phrasing is Mr Fehling's:

> Does the fundamental principle per ss 6 and 7 of the Evidence Act 2006 (facts by application of logical rules, relevant evidence is admissible) require to include proofs of unlawful acts under other laws than the Privacy Act as inherent proof of breaches of plaintiff's privacy under s 66, if these breaches need to be weighed according to s 14(a), and has the HRRT the jurisdiction to include these unlawful acts as evidence for privacy breaches that should have been investigated by the Privacy Commissioner?

[14] Under s 122(1) the Tribunal may state a case of its own motion or on the request of one or other of the parties. In both cases the power is discretionary. Our reasons for exercising this discretion against Mr Fehling were as follows:

> **[14.1]** As stated by the Tribunal in its decision given on 12 May 2011, there can be little doubt that the Tribunal does not have jurisdiction to engage in the wider enquiry sought by Mr Fehling.
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> **[14.2]** Nevertheless, his complaints relating to the lawfulness of the notice issued under the Trespass Act 1980 and his point concerning the Residential Tenancies Act 1986 are all part of that narrative of facts as seen by him and the Tribunal would allow this narrative to be given.
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> **[14.3]** But the legal issue before the Tribunal remained whether, in terms of s 85(1) of the Privacy Act, the Tribunal was satisfied on the balance of probabilities that any action of the School amounted to an interference (as defined in s 66 of the Act) with the privacy of Mr Fehling.
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> **[14.4]** Should either party to the current proceedings be dissatisfied with either the whole or any part of the Tribunal's decision they had a right of appeal to the High Court under s 123 of the Human Rights Act.
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> **[14.5]** Regarding the evidentiary issues raised by Mr Fehling, while the Evidence Act 2006 applies to the Tribunal (see s 106(4) of the Human Rights Act), the Tribunal possesses much broader powers to receive as evidence any statement, document, information, or matter that may, in its opinion, assist it to deal effectively with the matter before it, whether or not it would be admissible in a Court of law. See s 106(1)(d). In addition, the Tribunal is required to act according to the substantial merits of the case, without regard to technicalities. See s 105(1). It was therefore far more productive for the Tribunal to proceed with the hearing and to receive the evidence rather than causing unnecessary delay by referring to the High Court the largely theoretical issues posed by Mr Fehling's further "question of law".
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> **[14.6]** Above all, the Tribunal has a responsibility to grapple with and to determine all the legal issues which arise in the course of proceedings before it. Those responsibilities can not be transferred to the High Court without compelling justification: *Stoves v Commissioner of Police* [2008] NZHRRT 30 (10 December 2008) at [10] and [11].

The adjournment application

[15] The application that the proceedings before the Tribunal be adjourned until determination of the special leave application filed in the Supreme Court was declined

on the simple ground that the Supreme Court has not accepted that Mr Fehling has lodged valid proceedings. An adjournment would serve no useful purpose. It was in the clear interests of the parties that the Tribunal hear the evidence and make a determination on the merits. Should either party thereafter wish to pursue proceedings in the superior courts, those courts would then be assisted by the factual determinations made by the Tribunal.

[16] On the giving of both rulings by the Tribunal Mr Fehling agreed to give evidence but asked that it be noted that his agreement was "under duress".

The evidence of Mr Fehling

[17] The narrative which follows has been taken from the evidence given by Mr Fehling at the hearing supplemented, where necessary, by the documents filed in support of his claim as well as by the exhibits produced at the hearing.

[18] Mr Fehling, born in Germany, is an electric engineer by training but has chosen to live a simple life in Nature. He has a particular attachment to Hari Hari where he has lived for approximately twenty years. He speaks English fluently, though with a marked accent. He is also at times intensely intellectual. These are not intended as adverse comments. They are mentioned only because they might aid an understanding of why Mr Fehling is regarded as an "outsider" by some in Hari Hari.

[19] When Mr Fehling first arrived in Hari Hari he lived in a tent and kept horses. He said the horses died from 1080 poisoning. Since approximately 2005 he has lived in a van painted in camouflage so that it blends more easily with the environment, consistent with Mr Fehling's beliefs as an environmentalist. He described his environment is "everything", that is not just the "green" environment but also the human environment which includes philosophy, rights, the Bill of Rights and the respect of rights by both government and citizens.

[20] From an early point following his arrival in Hari Hari Mr Fehling has known Mr Jim Costello, a senior teacher at the School. At the relevant time he (Mr Costello) lived on the School grounds with his wife in a house provided by the School. Mr Fehling and Mr Costello have become long term friends, Mr Fehling visiting Mr Costello and his wife often. Over the years Mr Fehling has been given permission by Mr Costello to stay on the grounds of the house. Since about 2005 Mr Fehling has travelled about and lived in a van which while in Mr Costello's ownership, was apparently purchased by Mr Fehling.

[21] It is common knowledge in Hari Hari that Mr Fehling is a friend of Mr Costello and that, from time to time, Mr Fehling stays on the Costello property in his van.

[22] It would seem that not all in Hari Hari have been as appreciative or welcoming of Mr Fehling as Mr Costello. The Tribunal was told of various incidents in which Mr Fehling says he was subjected to harassment by reason only of the fact that he is seen as "different". These incidents include the night-time smashing of the windows of his van; minor assaults and an occasion when his campsite was invaded by a motor vehicle doing "doughnuts" and other loss of traction manoeuvres to frighten him. Mr Fehling talked about encountering general hostility in the community which he explained in the following terms:

> I come from a different culture and background, have a different sense of freedom and there are a few people who cannot accept this.

[23] We turn now to the incident which has given rise to these proceedings. It requires a description of the Costello home and property in relation to the School itself. We will refer to the house and the adjacent land occupied by Mr Costello and his wife as the "Costello property".

[24] Two sides of the Costello property are surrounded by roads. On the third side there is a carpark leading to the School. The fourth side adjoins the School swimming pool but is separated from it by a two metre high fence made of corrugated iron. The pool itself is enclosed meaning that it is further separated from the Costello grounds. The door to the pool is on the enclosure wall furthest from the Costello property. The changing rooms comprising showers and toilets are not in the swimming pool enclosure as such. They are situated separately, a short distance from the pool. Anyone at the pool wishing to use the changing rooms would not have to walk past the Costello property. It would, however, be possible for a person on the Costello property to see persons entering and leaving the changing rooms.

[25] In the two years immediately prior to January 2009 Mr Fehling had been living in Reefton but in December 2008 he returned to Hari Hari. On his return, and with the permission of Mr Costello, Mr Fehling parked his van on the Costello property adjacent to the two metre high corrugated steel fence. It is not possible from this position to see into the pool given the two metre high fence and the fact that the pool itself is enclosed.

[26] In the first week of January 2009 Mr and Mrs Costello were absent from the property on holiday.

[27] On the evening of 4 January 2009, when Mr Fehling was alone in his van, a woman and her two adult sons entered the Costello property. All three persons were known to Mr Fehling from previous incidents. He says that they arrived with the apparent intention of provoking a reaction from him, most likely a violent reaction. However, Mr Fehling did not retaliate. He described himself as against violence and as a person who resolves disputes with brains not brawn. He said that he was a conscientious objector when living in the Federal Republic of Germany and has proved on several occasions that he is not violent. He asked the three persons to leave but they refused to do so. They demanded to know if he had permission to be on the Costello property. When the three uninvited persons eventually realised that they would not be able to provoke Mr Fehling they left, but their parting comment was to the effect that something else would be happening.

[28] The next day, 5 January 2009, two police officers arrived on the Costello property and served Mr Fehling with a trespass notice in the following terms:

> To: Fritz Fehling
>
> Of: No fixed abode
>
> Dear Mr Fehling
>
> NOTICE UNDER SECTION 4(1)(2) & (4) TRESPASS ACT 1980
>
> In accordance with the above Act and Section you are hereby warned to stay off the place known as: Hari Hari Area School + James Costello's house
>
> and occupied by Jenny Adamson + staff + James Costello.
>
> You are advised that in accordance with the provisions of the Trespass Act 1980 it is an offence punishable by a fine not exceeding $1,000 or imprisonment not exceeding 3 months to enter onto the above mentioned place within the space of two years after you have received this warning.

Yours faithfully

"J Adamson"

Date: 5/1/09

Served by: Paul Gurney QID PGW193

Place: Hari Hari Date: 5/1/09

[29] Mr Fehling says that moments after being served with the Notice he was arrested. He was given no opportunity to leave. Later he was shown an arrest warrant. As no District Court was sitting on the West Coast he was taken to Christchurch. After being held in custody for three and a half days (during which he refused food and water) he was released at large without bail. The charge on which he had been arrested was not pursued.

[30] Mr Fehling returned to Hari Hari and found that his van had been towed off the Costello property and left in the adjacent carpark.

[31] He says that during the two year period in which the trespass notice remained in effect he continued to visit Mr and Mrs Costello frequently at their invitation, Mr Costello giving him express written permission to be on the Costello property. He did not, however, return to any other part of the School grounds.

[32] Deeply upset by what had happened Mr Fehling tried to ascertain the reasons for the issue of the trespass notice. After several months and following a complaint to the Ombudsman, the School finally disclosed that he was alleged to have used the toilets and showers adjacent to the swimming pool and two pool attendants had felt threatened by his presence on the Costello property. When Mr Fehling requested the names of the complainants the Privacy Commissioner upheld the decision of the School to withhold the information under s 29(1)(a) of the Privacy Act (disclosure of the information would involve the unwarranted disclosure of the affairs of another individual).

[33] Mr Fehling denies that he used the toilets and showers in the school changing rooms. He says that the Costello house has two toilets, one of which he has access to even when the house is locked. Mr Fehling uses the hot pools at Hari Hari and has never been in the School pool.

[34] At the heart of Mr Fehling's grievance is that the School, without notice and without a hearing, evicted him from his lawful presence on the Costello property. Furthermore, no reasons were given for this action. He feels that employing the Police to serve the notice made him feel humiliated and powerless, much like "a servant being evicted". The circumstances of his eviction soon became well known in the small Hari Hari community and the stigma of being banned from the School premises for two years reinforced the hostility and suspicion with which he was regarded by some in that community. The unsavoury connotation that users of the pool, particularly young children using the showers and toilets, were unsafe because of his presence has been particularly humiliating and injurious to Mr Fehling's feelings. The fact that the Police had been involved in serving the trespass notice added to the negative speculation and general opprobrium.

[35] Mr Fehling seeks $1,500 "costs" and damages of $3,500 for loss of dignity, humiliation and injury to feelings. He also makes mention of the resulting consequences which included a two year period in which he was unable to use those facilities of the School which are available to the local public, including the Library and the School's

photocopying facilities. He submits that without knowledge of the information on which the trespass notice was issued he has been unable to redress the situation.

[36] He says that he must be permitted to know what is alleged against him and by whom the allegations are made so that he can respond and defend himself. No official of the School or member of the School Board having contacted him to discuss the allegations or to ascertain his status on the Costello property, he has been left to deal with the stigma of his forced eviction and compulsory exclusion from what in some respects is a community facility. He feels it necessary to do something about what he described as "slander" either by way of issuing legal proceedings for defamation or alternatively, to publish the true facts so that people in the Hari Hari community are made aware of what has happened.

The evidence of Ms Sloane, Principal of SWAS

[37] We do not intend setting out in full the brief of evidence (affirmed at the hearing) of Ms Sloane, Principal of the School. She explained by way of background that complaints had been received by the School from a volunteer and members of the community about Mr Fehling's alleged presence in and around SWAS property, its toilets and swimming pool. Her brief continued:

> 3 SWAS has an excellent school community whereby the facilities of the school are used during the summer breaks and weekends by "paid up keyholders". Parents with two or more students will often let one child go off to the toilet whilst still supervising others in the pool itself.
>
> 4 The plaintiff was at the relevant time living in his van on the SWAS property (a Teacher's residence owned by the School). Mr Fehling's van was situated right behind the School's swimming pool.
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> 5 [Mr] Fehling was reported as being seen around and using the School toilet/shower facilities next to the swimming pool. He had not obtained permission from the School to use these facilities.
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> 6 Unfortunately Mr Fehling has an alleged history of threatening behaviour and verbal harassment of people in the community. I am aware that local people feel intimidated by him.
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> 7 … The School was concerned that should it release the names of the complainants, they would potentially be visited by Mr Fehling, and perhaps subjected to harassment …
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> 8 All the complainants were trying to do was to ensure that young people and volunteers were safe using the School swimming pool and toilets during the summer holidays. If this were not the case an otherwise excellent community facility would not be utilised. No locals would be prepared to air concerns if their names were going to be disclosed in situations such as this. The School therefore considers it is imperative that the complainants details remain private.

[38] On one reading of these paragraphs it might be thought that Mr Fehling's presence near the pool, changing rooms and toilets was of a genuinely concerning nature, Mr Fehling comprising a threat to children and their keyholder parents. This reading is reinforced by the last paragraph.

[39] Yet the oral evidence given by Ms Sloane in answer to questions from the Tribunal requires a very different reading of her brief. She said that Mr Fehling had often called at the School office, sometimes as often as two or three times a fortnight, sometimes to ask what day it was, sometimes to ask for Mr Costello and sometimes to request access to the photocopying facilities. There had been no animosity in Ms Sloan's dealings with Mr Fehling and she had never had any difficulties with him. Asked about the alleged "history of threatening behaviour and verbal harassment" referred to in paragraph 6 of

her brief, Ms Sloane fairly conceded that she had never experienced any such threatening behaviour or verbal harassment apart from one occasion. That occasion was during the course of Mr Fehling making submissions to the Tribunal at Hokitika on 7 May 2012. This came as a surprise to all three members of the Tribunal as none had detected such behaviour. We return to this point later.

[40] Asked what incidents had been reported to her and which presumably formed the foundation for her paragraph 6, Ms Sloane said that she could recall one only, being when Mrs Costello had recently reported that Mr Fehling had become angry during a discussion of the use of 1080 poisoning and that "he had had a go" at Mrs Costello meaning there had been a frank exchange of views. There was no suggestion of violence.

[41] Asked the basis on which she believed that local people felt intimidated by Mr Fehling Ms Sloane said that students felt uncomfortable with him coming onto the School grounds because he would, on occasion, wear a dressing gown. In response to questions from the Tribunal she stressed that he would always have other clothes on and there was never any suggestion that, apart from wearing a dressing gown in public, he acted inappropriately. Ms Sloane mentioned ill-feeling arising from the fact that for some substantial period of time Mr Fehling had lived in the roof of a local church and someone had received a fright on discovering him there.

[42] Asked further about what she had observed of the behaviour of Mr Fehling, Ms Sloane said that she had never seen Mr Fehling using the swimming pool, changing rooms, toilets or showers. She said that the concern was not so much in relation to adults, but in relation to children. Pressed by the Tribunal to explain this point Ms Sloane said that her concerns arose from the way Mr Fehling looks (he has long hair and a beard) and dresses. She emphasised that she has never had cause to be concerned about his behaviour at the School either in relation to the schoolchildren or to the staff.

The evidence of Ms Adamson, School Caretaker

[43] In her brief of evidence (affirmed at the hearing) Ms Adamson, employed as the Caretaker at the School, said that during the Christmas/New Year break of 2008/2009 she went to spend the holidays with a daughter and family at Rangitata Island. She left a relative (who had also been in the employ of SWAS) looking after the swimming pool for the School. Her brief continues:

> 5 The relief Caretaker rang me during my holiday in a distressed state. She advised that Friedrick Fehling was now living in his van next to the swimming pool and she felt unable to go and do the necessary water checks on her own and had to be accompanied by her husband.
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> 6 The next day I checked my answerphone and found I had several messages from concerned residents and paid up keyholders for the school facilities. They were all along the lines that Mr Fehling had been using the SWAS toilet/shower facilities and was in residence in his van next to the swimming pool. I considered this to be a health and safety risk and accordingly cut my holiday short and came back to Hari Hari.
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> 7 As I usually work alone at the school during the school holidays I felt it appropriate and necessary to seek assistance from the Police and the SWAS Board of Trustees Chairman.
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> 8 It was decided in discussions with the Police and the Board Chairman to serve a Trespass Notice on the Plaintiff stopping him from going onto the school property. This was to protect my safety but also to enable the paid up keyholders to use the pool and facilities.

9 Some years previous to this incident, my family (including two daughters) was verbally threatened by Friedrick Fehling. I am aware that ours is not the only family in the Hari Hari region to be threatened by the Plaintiff. One incident involved Police intervention.

10 I confirm I did not feel safe at the school if Friedrick Fehling was allowed on the grounds and to use the facilities.

[44] This evidence repeatedly stresses the fears held by Ms Adamson for her safety and the need for her (and others) to be protected from Mr Fehling. These fears were further communicated to the Tribunal when, invited to the witness table, Ms Adamson made a request (which was granted) for a support person (Ms Sloane) to sit next to her during the giving of her evidence. The current Chairperson of the Board of Trustees, who throughout the hearing had sat next to Ms Adamson and Ms Sloane at the Bar table separating Ms Adamson from Mr Fehling, also remained present throughout Ms Adamson's evidence.

[45] In answer to questions from the Tribunal about paragraph 6 of her brief, Ms Adamson said that while she could not recall the exact number of messages on her answerphone, there were two or three. She did not save them or write them down as she did not think it important.

[46] Asked to identify the health risk referred to in paragraph 6 of her brief, she said that it was mainly the "anguish" of young people and their parents. She qualified this further by saying it was anguish by the parents for their children. Asked if any parents had been asked to give evidence for the School Ms Adamson said that none had volunteered to come forward but on the other hand, people had not been aware of these proceedings until Mr Fehling had in January or February 2012 put up a notice (in the form of the "chronological summary" which is part of Mr Fehling's intended appeal to the High Court) on the notice board at the Tearooms. However, Ms Adamson knew the names of the persons concerned but had not approached any of them to see if they were willing to give evidence about their fears relating to Mr Fehling.

[47] Asked the nature of the concerns held Ms Adamson said that they centred on the fact that Mr Fehling was living in his van by the swimming pool. Normally he parked his van on the adjacent road but on this occasion he had parked "right by the pool". When the Tribunal pointed out that there was a two metre corrugated iron fence as well as the wall of the pool enclosure separating Mr Fehling from the pool, Ms Adamson replied that Mr Fehling nevertheless intimidated people.

[48] Asked about her concerns relating to safety, Ms Adamson said that she was mainly worried about the students (aged between fourteen or fifteen) at the School. Some were in the School grounds unsupervised. The Tribunal enquired whether Ms Adamson's real fear was that Mr Fehling was a sexual predator or a person who otherwise behaved inappropriately towards children, young persons or their parents. To this she answered in the negative. Rather it was "his anger". She described him as "not a rational person – you cannot have a conversation with him". However, she knew of no arguments he had had with children. Nor had she personally seen him using the changing room toilets and showers.

[49] Asked whether, in effect, she was transferring the experience of her own family to the School community at large, Ms Adamson said that she was personally afraid of Mr Fehling and concerned that children using the pool very often went to the changing rooms on their own. She made a significant concession:

I don't think he is a danger, but he is scary.

[50] Asked about the personal incidents referred to in paragraph 9 of her brief Ms Adamson said that she has lived in Hari Hari for approximately thirty years. In that time the following incidents had occurred:

> **[50.1]** Some seventeen to eighteen years ago, at a time when her young daughters (then aged ten and twelve years respectively) had horses grazing on the side of the road, Mr Fehling had approached the family home to say that the horses were not being looked after properly.
>
> **[50.2]** About two weeks later, when Ms Adamson was at work and her two daughters were home alone, a male person had knocked on the front door. The daughters observed that a van similar to that driven by Mr Fehling was parked on the road. When she opened the door the eldest daughter had greeted the visitor with a .22 rifle. A neighbour became alarmed and called the Police. The male visitor was not in fact Mr Fehling. Mr Fehling had nothing to do with the incident and had not been present. The van was not his. Asked how this incident involving the rifle and the Police could be relevant to her fear of Mr Fehling, Ms Adamson replied that it was "very relevant".
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> **[50.3]** Mr Fehling had visited the family property on several occasions to see her late husband who had made and sold arrowheads. Mr Fehling would make purchases from time to time. On one occasion Mr Fehling had been asked to leave.
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> **[50.4]** On another occasion, about twelve years ago, Mr Fehling had been riding a horse on the lawn of the Hari Hari Motor Inn. Ms Adamson's second husband had become involved in a heated argument with Mr Fehling.

[51] Ms Adamson was aware of the friendship between Mr Fehling and Mr Costello. Two to three hours before the trespass notice was served attempts had been made to contact Mr Costello. It had been possible to reach only his brother. The brother had confirmed that Mr Costello owned the van which Ms Adamson knew was used by Mr Fehling. Ms Adamson had made no inquiry of Mr Fehling as to his status on the Costello property.

[52] When Ms Adamson spoke to the Police they told her that they would come down to the School to serve an outstanding arrest warrant but would prefer to use a notice under the Trespass Act. This was after Ms Adamson had told them of her fears both for herself and for the children at the School. She said it was the Police who had suggested service of the trespass notice. She spoke to the Chairperson of the Board and he asked her to sign the Notice on his behalf. Asked why the trespass notice described her as the Occupier of Mr Costello's home, Ms Adamson replied that the form had been filled in by the Police and only signed by her.

[53] Asked to give further details about the "distressed state" of the relief Caretaker referred to in paragraph 5 of her brief, Ms Adamson said that this person had told her (Ms Adamson) that she (the relieving Caretaker) could not carry out the water checks in the pool on her own because to get access to the pool she had to drive into the carpark and she "felt uncomfortable knowing that Mr Fehling was nearby". Without being asked, Ms Adamson disclosed that the relief Caretaker was in fact her eldest daughter.

[54] Asked whether any actions of Mr Fehling had been reported to her (Ms Adamson) at this time either by her daughter or anyone else, which had caused her to believe there was a "health and safety risk", Ms Adamson replied that there were none – "it was the

incidents I described before". Ms Adamson was therefore clear that the fears which in January 2009 she personally held for her safety and that of her two daughters were based on the incidents which had taken place some seventeen to eighteen years previously and most "recently", twelve years earlier.

[55] Asked why, prior to signing the trespass notice, she had not spoken to Mr Fehling to ascertain the lawfulness of his presence on the Costello property, Ms Adamson said that she had assumed that the Police had done this. She herself was not present when the Notice had been served although she had been elsewhere on the School property. She conceded that when she spoke to the Police she had not checked that they would put her "health and safety" concerns to Mr Fehling to get his side of the story.

[56] Asked about the threats referred to in paragraph 9 of her brief, Ms Adamson said that she could not recall any threat but went on to say that it was Mr Fehling's "attitude" which was found to be threatening.

[57] Finally, Ms Adamson said that the daughter who was acting as the relief Caretaker in January 2009 was her eldest daughter and was then twenty-eight years of age. Ms Adamson described her as "the most stable and strong person I know".

Credibility assessment and findings of fact

[58] We found Mr Fehling to be a credible and compelling witness who was at pains to present his case in a clear, accurate and succinct manner. He was forthright and direct when responding to questions. We are of the view he has conscientiously provided a true account of the events in question.

[59] Mr Fehling is an intelligent and articulate individual who cares passionately about his deeply held convictions. It would appear that some mistake his passion and intensity for "anger" or intimidation. For example, Ms Sloane said in her evidence that she had felt that in the course of presenting his case to the Tribunal, Mr Fehling had exhibited threatening behaviour or verbal harassment. None of the Panel members share that view. No such behaviour was detected. It is possible that his idiosyncratic vocabulary may at times require decoding. This requires understanding and patience on the part of the listener, qualities which he may not encounter often in his daily activities.

[60] It does not follow from the acceptance of Mr Fehling as a wholly credible witness that therefore Ms Sloane and Ms Adamson were not also credible witnesses. We are of the view that both have faithfully reported events as seen from their respective perspectives. The difficulty, however, is that in her brief of evidence Ms Sloane largely reported the untested but nevertheless prejudicial views of others. When in her evidence she attested to matters within her own knowledge, the evidence of Ms Sloane was largely in favour of Mr Fehling or at least neutral.

[61] As to Ms Adamson, we accept she is sincere in her belief that she does not feel safe in the presence of Mr Fehling. But we are equally of the view that on the evidence we have heard, this belief is not based on rational grounds. It was telling that her belief is based on events which occurred between twelve and seventeen years ago. Equally telling of her acute over-sensitivity to Mr Fehling is her insistence on the relevance of the incident in which her eldest daughter presented a rifle at a person who was not Mr Fehling. Her irrational fear of Mr Fehling has seemingly been inherited by her eldest daughter. She (the daughter) apparently can not walk past a property on which Mr Fehling's van is parked because of the "events" which are said to have occurred twelve to seventeen years ago. While their irrational fear of Mr Fehling is real to Ms Adamson

and her eldest daughter, those fears cannot properly play a part in assessing whether the School has established proper grounds for withholding personal information from Mr Fehling. Those grounds must necessarily be founded on objective and rational facts.

[62] An unfortunate aspect of the case is that although not expressly articulated, the evidence for the School conveyed the flavour of a man who, without authority, had taken up summer residence beside the School swimming pool, had been seen using the toilet and shower facilities, was a man with an alleged history of threatening behaviour and verbal harassment of people in the community and a trespass notice had been required to remove his unwanted presence. The inference was that children on the School premises and those using the School swimming pool and toilets were unsafe as long as he was present. Yet when these connotations were put to Ms Sloane she was very clear in accepting that in all her years as Principal (she took up her position in 2001) she had never had difficulties with Mr Fehling, had never experienced any threatening behaviour or verbal harassment and at most could say only that some students felt uncomfortable with him being on the School grounds because on one or more occasions he had been seen wearing a dressing gown on top his clothes. She had never known him to have acted inappropriately towards children at the School or towards the teachers. When the connotations were explored with Ms Adamson it was clear that none of the incidents on which Ms Adamson relies for her "fear" of Mr Fehling involve any suggestion of deviant behaviour. It is most unfortunate that in spite of the complete absence of any evidence to suggest inappropriate behaviour on the part of Mr Fehling that unsavoury inferences have nonetheless from time to time been capable of being drawn from the evidence called by the School.

[63] We will proceed on the basis that the inferences were entirely unintended but Mr Fehling is entitled to a clear and emphatic finding by the Tribunal that there is no evidence that he acted unlawfully or improperly at any time while on Mr Costello's property or on any of the occasions on which he has been on the School grounds generally. We accept his evidence that he has never used the swimming pool and had not used the changing room showers or toilets as alleged. When the trespass notice was served on 5 January 2009 he had full permission to be on the Costello property. By being "run out of town" by means of the trespass notice he has been made the victim of a substantial injustice. His request for the names of the people who allegedly made complaints about him must be seen in this light. It is difficult to see what else he could realistically do to challenge the entirely misconceived basis on which the School acted in evicting him from the Costello property.

[64] We consider now the two grounds on which the School has relied when withholding information from Mr Fehling. The first is section 27(1)(d) (disclosure of the information would likely endanger the safety of any individual) and the second is s 29(1)(a) (disclosure of the information would involve the unwarranted disclosure of the affairs of another). It is the School which must establish, to the balance of probability standard, that one or other of these grounds applies. It is not for Mr Fehling to establish that they do not apply. See s 87 of the Act.

Section 27(1)(d) – disclosure likely to endanger the safety of any individual

[65] Privacy Principle 6 provides that:

> Principle 6
> *Access to personal information*
> (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—

(a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
(b) to have access to that information.

(2) Where, in accordance with subclause (1)(b), an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.

(3) The application of this principle is subject to the provisions of Parts 4 and 5.

[66] Principle 6 is subject to Part 4 of the Act which prescribes the limited circumstances in which an agency may refuse access to personal information. Part 4 includes s 27 which relevantly provides:

> 27 Security, defence, international relations, etc
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if the disclosure of the information would be likely—
>
> (a) ...
>
> (b) ...
>
> (c) …
>
> (d) to endanger the safety of any individual.

[67] As can be seen, s 27(1) permits an agency to refuse to disclose information if disclosure is "likely" to have any of the consequences which follow. The standard of proof is not the balance of probabilities ie "more likely than not". In this context "likely" means a distinct or significant possibility. To avail itself of one of the grounds in s 27, an agency must show there is a real and substantial risk to the interest being protected: *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391, 404 and 411 and *Nicholl v Chief Executive of the Department of Work and Income* [2003] 3 NZLR 426 (Rodney Hansen J) at 430. In *Commissioner of Police v Ombudsman* Cooke P, in relation to earlier but similar provisions in the Official Information Act 1982, stated that:

> To cast on the Department or organisation an onus of showing that on the balance of probabilities a protected interest would be prejudiced would not accord with protecting official information to the extent consistent with the public interest, which is one of the purposes stated in the long title of the Act. At first sight it might seem otherwise, but what has just been said becomes obvious in my view when one considers the range of protected interests in s 6, including as they do, for instance, the security or defence of New Zealand, the New Zealand economy and the safety of persons. **To require a threat to be established as more likely to eventuate than not would be unreal. It must be enough if there is a serious or real and substantial risk to a protected interest, a risk that might well eventuate** …
>
> **Whether such a risk exists must be largely a matter of judgment** … [Emphasis added]

[68] This passage has been applied by the Tribunal on a number of occasions. See for example *Te Koeti v Otago District Health Board* [2009] NZHRRT 24, *Kaiser v Ministry of Agriculture and Forestry* [2009] NZHRRT 10.

[69] In his written submissions for the School Mr Bell stated that the School "was concerned for the health and safety of those complainants and the pool cleaner that if their names were disclosed to Mr Fehling they would be harassed and threatened".

[70] The difficulty with this submission is that it is not supported by the evidence given at the hearing. Neither Ms Sloane nor Ms Adamson related any incident of past harassment or threats, nor was there evidence of harassment or threats following Mr Fehling's eviction from the School grounds even though he knew that Ms Adamson had signed the trespass notice. In the period from 5 January 2009 to 7 May 2012 he has had ample opportunity to harass or to threaten Ms Adamson. But at no point in her evidence did Ms Adamson refer to any such adverse behaviour by Mr Fehling. Indeed,

Ms Adamson could cite no "incident" involving Mr Fehling more recent than twelve years ago. Her account of those incidents indicates a hypersensitive, if not irrational fear of Mr Fehling. Furthermore, the identity of the relief Caretaker as Ms Adamson's eldest daughter was disclosed by Ms Adamson herself when giving evidence to the Tribunal. She had not been asked either by the Tribunal or by Mr Fehling to make such disclosure. It was volunteered and what emerged was that the eldest daughter simply did not like having to pass by a property on which Mr Fehling was known to be. No encounter, threat or other unpleasant incident of any kind was reported by Ms Adamson's daughter. Had there been such incident we are sure it would have been mentioned.

[71] While the standard of proof under s 27(1) is lower than the balance of probabilities we conclude without hesitation that in the present case there is a complete absence of evidence to establish that disclosure of the information would be "likely" to endanger the safety of any individual. It follows that the School was not entitled to refuse disclosure under this provision.

[72] We turn now to the second withholding ground relied on by the School, namely s 29(1)(a).

Section 29(1)(a) Privacy Act – unwarranted disclosure of the affairs of another

[73] It has been accepted that the identity of an informant is "personal information" within the meaning of s 2 of the Act. See *Director of Human Rights Proceedings v Commissioner of Police* [2007] NZHRRT 22 (6 November 2007) at [33]. The issue is whether the School may refuse to disclose the identity of an informant on the grounds that disclosure of the information would involve the unwarranted disclosure of the affairs of another individual.

[74] The withholding of the identity of an informant is more commonly considered in the context of s 27(1)(c) of the Act (disclosure would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial). But in principle there is no reason why the withholding of the identity of an informant cannot, as here, fall for consideration in the context of s 29(1)(a) as well. We begin our discussion with a reference to the Evidence Act 2006 which applies to the Tribunal by virtue of s 106(4) of the Human Rights Act 1993.

[75] The Evidence Act 2006, s 64 grants only "a relatively confined privilege" to informers. See Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (2nd ed, Brookers, Wellington, 2010) at EV64.01. This provision is of no assistance in the context of the present case as the School is not an "enforcement agency":

> **64 Informers**
>
> (1) An informer has a privilege in respect of information that would disclose, or is likely to disclose, the informer's identity.
>
> (2) A person is an informer for the purposes of this section if the person—
>
> > (a) has supplied, gratuitously or for reward, information to an enforcement agency, or to a representative of an enforcement agency, concerning the possible or actual commission of an offence in circumstances in which the person has a reasonable expectation that his or her identity will not be disclosed; and
> >
> > (b) is not called as a witness by the prosecution to give evidence relating to that information.

(3) An informer may be a member of the Police working undercover.

[76] The position at common law is that identification of an informer is not required except where the informer's identity might help show that a person is innocent. See the summary in *R v Kissling* [2008] NZCA 559, [2009] 1 NZLR 641 at [22]:

> [22] Except in very limited circumstances, the identification in open court of informers has never been required. On this it is sufficient to refer to *R v Hardy* (1794) 24 State Tr 199 at pp 809 and 816 and *Attorney-General v Briant* (1846) 15 M & W 169 at p 185. The rule against non-disclosure applies not only to what is said in open court but also to discovery processes (compare *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at p 218). As noted in *D*, the only exception is where the disclosure of the informer's identity might help to show that the defendant was innocent.

At [24] the Court accepted that in practice "differing levels of confidentiality" may be warranted.

[77] The common law principles were applied in the context of the withholding provisions of the Privacy Act in *Nicholl v Chief Executive of the Department of Work and Income* [2003] 3 NZLR 426 at [16]:

> [16] There is therefore a substantial body of decisions dating from 1982 which have recognised that in a proper case, s 27(1)(c) may be relied on to deny access to the name of an informant. The decisions are firmly grounded in the words of the statute and in the pragmatic concerns which, since *R v Hardy* (1794) 24 St Tr 199, have conferred public interest immunity on police informants. For more than two centuries it has been accepted that the public interest favours preserving the anonymity of police informers by keeping open avenues of information which will assist in the detection and investigation of crime.

[78] The fact that the principle does not apply where disclosure of the identity of the informer may help establish the innocence of a person was recognised also in *Stoves v Commissioner of Police* (2009) 19 PRNZ 334 at [46]:

> [46] At common law, the one exception to the rule protecting the immunity of police informers was if disclosure would help establish the innocence of an accused person: *R v Hughes* [1986] 2 NZLR 129; (1986) 2 CRNZ 18 (CA). See also s 67 of the Evidence Act 2006.

[79] Against this background we turn to s 29(1)(a) of the Privacy Act which provides:

> 29 Other reasons for refusal of requests
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
>
> > (a) the disclosure of the information would involve the unwarranted disclosure of the affairs of another individual or of a deceased individual

[80] This withholding provision has two limbs. First, that the disclosure of the information would disclose the affairs of another person and second, that such disclosure would be unwarranted.

[81] As to "the affairs of another individual" this Tribunal has accepted that the name or identity of an informant falls within the meaning of "affairs" as it is used in s 29(1)(a). See *Director of Human Rights Proceedings v Commissioner of Police* at [33]. In the present case the real question is whether disclosure of the information is "unwarranted" in the circumstances.

[82] The term "unwarranted" requires the Principle 6 right of access held by the requester to be weighed against the competing privacy interest recognised in subs (1)(a). As to how the balance is to be struck and a determination made whether disclosure of the information would involve the "unwarranted disclosure" of the affairs of

another individual will depend on the circumstances. See *Director of Human Rights Proceedings v Commissioner of Police* at [63]. In that decision the Tribunal at [64] made reference to some of the considerations which can be relevant when weighing the competing interests:

> [64] In her submissions Ms Evans suggested an helpful list of relevant considerations to inform the assessment, including:
>
> > [a] Whether the informant was willing to have his or her identity become known to anyone else at the outset. In a case where the only issue is whether or not access to the information by the subject of the information would amount to an unwarranted disclosure of the affairs of the informant, but the informant has never objected to the disclosure, then there would probably have to be some unusual feature to the evidence to justify a finding that s.29(1)(a) is engaged;
> > [b] On the other hand, the fact that an informant may have expected or even stipulated for anonymity at the time of giving information will be a factor in the assessment, but it is not necessarily conclusive;
> > [c] The nature of the information;
> > [d] The characteristics of the informant, and his/her or its situation, and in particular the relationship (if any) that he/she or it has with the requester;
> > [e] Whether disclosure of the identity of the informant is necessary in order to ensure that the requester has a full and fair opportunity to respond to allegations that have been made against him or her;
> > [f] The size of the community in which the parties concerned live (in the sense that the revelation may have a disproportionate effect in a smaller community);
> > [g] What kind of harm might be suffered by the informant should the requester become aware of his or her identity.

[83] We intend addressing only those factors of greatest relevance to the facts.

[84] It is clear from the evidence that the School stands in a very different position to the Police and other public sector agencies whose law enforcement functions rely to a significant degree on information from the public to assist the discharge of those functions. It is equally clear that the information given by way of the messages left on Ms Adamson's answerphone were not left with a stipulation or expectation of anonymity. Furthermore none of the "informants" have been spoken to to see if they would be willing to give evidence and if not, whether there are good reasons for withholding their identity. Certainly the three individuals who accosted Mr Fehling the previous evening could not be concerned about the disclosure of their identity as it was known to Mr Fehling when they warned him that "something else would be happening".

[85] Two factors stand out. First, disclosure of the identity of the informants was necessary for Mr Fehling to defend himself against the allegations that he was unlawfully on the School grounds using the swimming pool, showers and toilets, allegations which led to the service of a trespass notice, his eviction and a two year exclusion from the grounds and the public facilities offered by the School to the local community. Second, there is a complete absence of credible evidence that the informants would suffer in any way should their identity be disclosed. The fact that the author of Mr Fehling's eviction and two year exclusion (Ms Adamson) has reported no adverse consequences is significant, as is the fact that Ms Adamson herself volunteered at the hearing that one of the informants was her own daughter.

[86] We are satisfied by a clear and decisive margin that the School has not established that disclosure of the identity of the persons who made complaints about Mr Fehling would amount to an unwarranted disclosure of their affairs. It follows that the School has not established proper grounds for refusing to disclose the information requested by Mr Fehling.

[87] In his submissions of 8 June 2012 Mr Bell submitted that s 27(1)(c) (disclosure would be likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial) could also be relied on by the School. But apart from the difficulty that this ground has not previously been relied on by the School, it does not provide even the Police with carte blanche to withhold any and all personal information about an individual. On the facts, the short point is that the School is not an agency with law enforcement responsibilities and in any event the information cannot be withheld where disclosure of the identity of the informant may help establish the innocence of an accused person. Here Mr Fehling was accused of trespassing and it is to be noted that breach of a trespass notice is itself a criminal offence.

Summary of findings on the withholding grounds relied on by SWAS

[88] The School has failed to establish that it had proper grounds under s 27(1)(c) and (d) and s 29(1)(a) of the Act to refuse to disclose the personal information requested by Mr Fehling pursuant to Principle 6.

Whether there has been an interference with privacy

[89] The circumstances in which an action by an agency is "an interference with the privacy of an individual" are defined in s 66 of the Act:

> **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
> (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.
> (2) Without limiting subsection (1), an action is an interference with the privacy of an individual if, in relation to an information privacy request made by the individual,—
> (a) the action consists of a decision made under Part 4 or Part 5 in relation to the request, including—
> (i) a refusal to make information available in response to the request; or
> (ii) a decision by which an agency decides, in accordance with section 42 or section 43, in what manner or, in accordance with section 40, for what charge the request is to be granted; or
> (iii) a decision by which an agency imposes conditions on the use, communication, or publication of information made available pursuant to the request; or
> (iv) a decision by which an agency gives a notice under section 32; or
> (v) a decision by which an agency extends any time limit under section 41; or
> (vi) a refusal to correct personal information; and
> (b) the Commissioner or, as the case may be, the Tribunal is of the opinion that there is no proper basis for that decision.

(3) If, in relation to any information privacy request, any agency fails within the time limit fixed by section 40(1) (or, where that time limit has been extended under this Act, within that time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 40(1), that failure shall be deemed, for the purposes of subsection (2)(a)(i) of this section, to be a refusal to make available the information to which the request relates.
(4) Undue delay in making information available in response to an information privacy request for that information shall be deemed, for the purposes of subsection (2)(a)(i), to be a refusal to make that information available.

[90] Given that we have found that nothing in s 27(1)(c) and (d) nor in s 29(1)(a) provides a proper basis for the withholding of the requested personal information it follows that there has been an interference with Mr Fehling's privacy in terms of s 66(2)(a)(i) and (b). We also find that there has been an interference with Mr Fehling's privacy as defined in s 66(1) in that an information privacy principle (Principle 6) has been breached and that action has meant that Mr Fehling has been unable to effectively challenge the trespass notice and the consequential two year exclusion from the School grounds. This has resulted in significant humiliation, significant loss of dignity and significant injury to his feelings.

[91] In short, we are satisfied on the balance of probabilities that whether viewed as an interference with privacy as defined in s 66(1) or as an interference with privacy defined in s 66(2), the School has interfered with Mr Fehling's privacy. It follows that the Tribunal may grant one or more of the remedies stipulated in s 85 of the Act.

Remedy

[92] Section 85(1) and (4) of the Act relevantly provide:

85 Powers of Human Rights Review Tribunal

(1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:

(a) a declaration that the action of the defendant is an interference with the privacy of an individual:

(b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:

(c) damages in accordance with section 88:

(d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:

(e) such other relief as the Tribunal thinks fit.

...

(4) It shall not be a defence to proceedings under section 82 or section 83 that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.

[93] On the facts we are satisfied that Mr Fehling is entitled to a declaration of interference pursuant to s 85(1)(a) and to damages pursuant to ss 85(1)(c) and 88.

Declaration of interference with privacy

[94] In *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [107] and [108] it was held that while the grant of a declaration under s 85(1)(a) is discretionary, the grant of such declaratory relief should not ordinarily be denied and there is a "very high threshold for exception". On the facts we see nothing that could possibly justify the withholding from Mr Fehling of a formal declaration that the action of the School in withholding the identity of the informers was an interference with his privacy.

Damages

[95] The jurisdiction of the Tribunal to order damages is set out in s 88 of the Act. Only subs (1) is relevant to the facts:

> **88 Damages**
>
> (1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:
>
> > (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:
> >
> > (b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:
> >
> > (c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

[96] As earlier mentioned, Mr Fehling seeks $1,500 "costs" relating to "law research and efforts relating to the appeal to the Tribunal" together with $3,500 for humiliation, loss of dignity and injury to feelings. His more recent memorandum dated 15 June 2012 seeks "$1,500 effort costs in addition to previously asked $500 for HRRT appeal effort and $500 jurisdiction argumentation, plus $500 for extreme effort for defended hearing, incl this very 5-page remedy & human rights argumentation". At the same time he seeks to increase the "previously very low $3,500" to $5,500.

[97] We do not see that the amount claimed for "law research and efforts relating to the appeal to the Tribunal" or "effort costs" as embraced by s 88(1)(a) or (b). These claims by Mr Fehling are more conventionally described as costs in the proceedings themselves and we address that later.

[98] For Mr Fehling to be awarded damages under s 88(1)(a) he must establish that he has suffered a pecuniary loss as a result of, or reasonably incurred expenses for the purpose of "the transaction or activity out of which the interference arose". Treating the "transaction or activity" as the issue and service of the trespass notice, Mr Fehling has led no evidence as to the pecuniary loss suffered as a result of the service of the trespass notice. Nor has he established any expenses reasonably incurred for the purpose of such service. His arrest and transfer to Christchurch coupled with the lengthy return journey to Hari Hari arose not out of service of the trespass notice, but out of his arrest on the outstanding warrant. While he was temporarily unable to stay on the Costello property he was presumably able to park his van elsewhere in the Hari Hari district as usual and suffered no pecuniary loss as such.

[99] In terms of the "loss of any benefit" he may reasonably have expected to obtain but for the interference (s 88(1)(b)), Mr Fehling did not establish in his evidence the loss of any benefit by his eviction from the Costello property other than the benefit of being able to live temporarily at a place of his choosing. While the provision does not require the loss of benefit to be of a monetary kind we find it difficult to quantify in monetary terms the loss of the "benefit".

[100] As in *Lochead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5 (27 March 2012) we are of the view that the more appropriate provision under which damages should be awarded is s 88(1)(c). This provision permits an award of damages for an interference with the privacy of an individual where it has been established that there has been "humiliation, loss of dignity and injury to feelings" of the aggrieved individual. On the facts we find that all three statutory criteria have been established by Mr Fehling to the balance of probability standard. Mr Fehling was lawfully on the Costello property. He was ejected by the Police following an allegation that he was a health and safety risk by virtue of the fact that he had allegedly been using the School pool and the adjacent shower and toilet facilities without permission. The withholding by the School of the identity of the "informers" disabled him from challenging the trespass notice in a timely and effective manner.

[101] As we have previously noted, the circumstances of his eviction soon became well known in the small Hari Hari community. The stigma of being banned from the School premises for two years reinforced the hostility and suspicion with which he was regarded by some in that community. The unsavoury connotation that users of the pool, particularly young children using the showers and toilets, were unsafe because of his presence has been particularly humiliating and injurious to Mr Fehling's feelings and there has been a loss of dignity. The fact that the Police were involved in serving the trespass notice has added to the negative speculation and general opprobrium.

[102] In the *Lochead-MacMillan* decision at [41] and [46] reference is made to other cases in which the information sought was for the purpose of potential legal challenges or proceedings, namely *Proceedings Commissioner v Health Waikato Ltd* (2000) 6 HRNZ 274 and *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004. In the latter case Mr and Mrs Jans were awarded $7,000 for "injury to feelings" in circumstances in which the withheld information was required for the purpose of investigating whether legal proceedings could be brought against the party withholding the requested personal information.

[103] As in *Lochead-MacMillan*, we have determined in this case that $10,000 is the appropriate figure to reflect the particular facts of the present case. In arriving at this figure we take into account that s 85(4) of the Act provides that while it is not a defence to proceedings under ss 82 and 83 that the interference was unintentional or without negligence on the part of the defendant, the Tribunal must take the conduct of the defendant into account in deciding what, if any, remedy to grant. We are of the view that the interference with Mr Fehling's privacy was negligent in that there never were any proper grounds for withholding from him the identity of the two to three individuals who had made complaints about him. The two withholding grounds pleaded by the School were deployed without proper justification and had the effect of depriving Mr Fehling of the opportunity to establish in a timely way his innocence in relation to the serious allegations made against him by the informants. The amount awarded is higher than that sought by Mr Fehling but it is important that awards by the Tribunal have consistency. In addition, it is by no means clear that when quantifying his claim Mr Fehling intended to seek a figure lower than that to which he was entitled.

[104] Mr Bell's submissions dated 8 June 2012 allege delay by Mr Fehling in making his request for personal information. This point was not, however, taken either before or at the hearing and Mr Fehling has not had an opportunity to respond.

Summary of findings regarding remedies

[105] In summary Mr Fehling is entitled to a declaration under s 85(1)(a) that there has been an interference with his privacy and to damages under s 85(1)(c) for humiliation, loss of dignity and injury to feelings.

Formal orders

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

> **[106.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that South Westland Area School interfered with the privacy of Mr Fehling by refusing to disclose the personal information requested by Mr Fehling. The School did not have proper grounds to withhold the information.
>
> **[106.2]** Damages of $10,000 are awarded to Mr Fehling against South Westland Area School under ss 85(1)(c) and 88(1)(c) of the Act for humiliation, loss of dignity and injury to feelings.

Costs

[107] The general rule is that a successful self-represented litigant is entitled to recover disbursements but not costs. We have not been provided with an itemised schedule supported by receipts. Mr Fehling has sought $1,500 for "law research and efforts relating to the appeal to the Tribunal" and other "effort costs". Such claim is not properly categorised as a disbursement. Rather it is a claim for the cost of preparation and as mentioned, is not a claim which Mr Fehling is entitled to make. In any event, given that the total amount sought in the statement of claim is $5,000 (belatedly amended to $8,500) and we have awarded $10,000 it might be thought that Mr Fehling has no wish to press a claim for disbursements.

.....	.....	.....
Mr RPG Haines QC	**Ms J Grant MNZM**	**Ms S Scott**
Chairperson	**Member**	**Member**