

Reference No. HRRT 005/2011 & 023/2011

IN THE MATTER OF A CLAIM UNDER THE PRIVACY ACT 1993

BETWEEN GORDON HENRY HOLMES

PLAINTIFF

AND MINISTRY OF SOCIAL DEVELOPMENT

DEFENDANT

AT DUNEDIN

BEFORE:

Mr RPG Haines QC, Chairperson

Ms W Gilchrist, Member

Ms S Scott, Member

REPRESENTATION:

Mr Holmes in person

Ms A Russell and Mr R Moran for Defendant

DATE OF HEARING: 1 and 2 December 2011

DATE OF DECISION: 30 August 2012

DECISION OF TRIBUNAL

Introduction

[1] Mr Holmes is a beneficiary. By letters dated 22 August 2010 and 4 October 2010 he presented to the Dunedin Central Office of Work and Income (a service of the Ministry of Social Development) two separate requests for personal information. The broad issue in these proceedings is whether the decisions on those requests were made within the prescribed statutory time limit and if not, the nature of the remedy to be granted.

[2] In the interests of clarity the two requests will be addressed separately. While the proceedings were consolidated, this was only to allow evidence filed in one of the proceedings to be treated as having been filed also in the other. The objective was to

achieve a single hearing on a single body of evidence. Each of the proceedings, however, retained their distinct identity. The requests will be addressed in chronological order. There is, of course, a degree of overlap as far as the background facts are concerned.

[3] It will be noted that in this decision the Tribunal makes no order under s 107 of the Human Rights Act 1993 relating to the non-publication of evidence or to the identity of any person involved in these proceedings. The interim order made at the commencement of the hearing on 1 December 2011 is accordingly at an end. That interim order was made to protect the confidentiality of a decision of the Social Security Appeal Authority received in evidence. We have not found it necessary to refer to that decision with the result that it does not require protection in these proceedings additional to that which it enjoys under the Social Security Act 1964.

[4] In this decision we have taken into account the post-hearing submissions filed by both parties.

FIRST REQUEST FOR ACCESS TO PERSONAL INFORMATION – THE LETTER DATED 22 AUGUST 2010

Advances and repayments

[5] Mr Holmes is in receipt of an Unemployment Benefit and has been since September 1999. The relationship between him and WINZ has been an unhappy one. The purpose of the hearing before this Tribunal was not to determine the reasons for this state of affairs or to attribute responsibility. However, for an understanding of the narrative which follows it is necessary to say that on such evidence as we have heard, WINZ find Mr Holmes something of an enigma. He, in turn, sees his relationship with WINZ as characterised by a lack of empathy and understanding. The end result, whether rightly or wrongly, is that Mr Holmes is suspicious of WINZ.

[6] Our assessment of Mr Holmes is that he is in some respects an eccentric. He is nevertheless an honest and upright individual who has a strong sense of what is right and what is wrong. His impoverished circumstances mean that he has no telephone or access to email. All his communications are written. Owing to poor eyesight he finds it necessary to read and write by using a large magnifying glass which he must hold very close to the page. This makes reading and writing a slow and challenging (if not exhausting) exercise, particularly where lengthy or complicated documents are involved. In written communications his frustration, if not suspicion, of WINZ is manifested in an oft-repeated phrase alleging “lies and deceit”.

[7] We do not intend rehearsing much of the evidence we have heard about the difficult relationship between Mr Holmes and WINZ. We are conscious that our jurisdiction is confined to the Privacy Act. It does not include the Official Information Act 1982. We are not the Social Security Appeal Authority, nor is it our role to mediate on the differences between the parties.

[8] We turn now to the relevant facts.

[9] On the first of April each year benefit rates are adjusted. This is known as the Annual General Adjustment. On 1 April 2009 the rate for the Unemployment Benefit received by Mr Holmes was set at \$190.39 net per week. On 1 April 2010 this rate was increased to \$194.12 net, an increase of \$3.73. In both years, prior to payment of the net sum into Mr Holmes’ bank account, deductions of \$100 and \$15.35 were made for

Housing Corporation rent and child support respectively. The balance due to Mr Holmes under the 1 April 2009 rate was \$75.04 whereas the balance due under the 1 April 2010 rate was \$78.77. To a person of very limited means such as Mr Holmes the weekly difference (\$3.73) is significant.

[10] Deductions for rent and child support are not the only deductions which can be taken from a benefit. Where the beneficiary receives an advance payment for any purpose, repayments are made by way of deduction against the weekly benefit payment. That is, if the advance is made on a refundable as opposed to a non-refundable basis.

[11] In Mr Holmes' case, on or about 13 October 2009, he approached WINZ seeking assistance to pay for an eye test needed for the renewal of his driver's licence. His application was supported by a quotation from an optometrist showing a consultation fee of \$70. The Ministry approved a recoverable advance of benefit of \$70 to be repaid at the rate of \$3 per week. Mr Holmes was unsuccessful in his endeavours to have the grant made non-refundable.

[12] By letter dated 13 October 2009 the Ministry wrote to Mr Holmes confirming approval of the payment of \$70 and giving notice that the repayments (by way of deduction from his Unemployment Benefit) would be \$3 a week:

Your repayments for this advance will be \$3.00 a week. This starts 22/10/09, and will continue until the full amount is paid.

To the ordinary reader, the repayment terms are clearly stated.

[13] It would be a mistake, however, to assume that such letter can always be taken to mean what it says and that the deduction will be made at a flat rate. The Tribunal was told by Ms Dixon, Branch Manager of Dunedin Metro Work and Income at Dunedin Community Link that where more than one deduction is made, as the debt in relation to one advance is retired, the money thereby released is then applied to accelerate such other repayment as may still be continuing.

[14] Throughout this process the only information letter the beneficiary receives about the deductions is the letter provided by WINZ at the beginning of the process when the grant of the advance is confirmed and the weekly deduction rate stipulated along with the terminating date. The beneficiary is not informed when the debt is repaid in full. When more than one advance is being repaid the beneficiary is not told that any released funds can be (and are) applied to accelerate the repayment of other advances. Her clear evidence was that the beneficiary would receive no notice and no explanation of the way in which the Ministry manages the deductions.

[15] On the documentation produced in the course of these proceedings the automatic deductions against Mr Holmes' unemployment benefit (known as a "Debt Offset") varied. On 1 April 2010 the debt offset was \$3. On 8 April 2010, 15 April 2010 and 6 May 2010 it was \$4. On 13 May 2010 it was \$2.30. In the following week (20 May 2010) there was no debt offset.

[16] It is not our role to explore or resolve how this state of affairs came about. The relevant point is that the fluctuating deductions meant that the amounts left over each week varied. All Mr Holmes was aware of was that the net amount paid into his bank account was not consistent. No explanation accompanied these variations and Mr Holmes was understandably left wondering why the amounts received into his account were different and why he appeared not to have received the 2010 Annual General Adjustment.

The request by Mr Holmes for personal information

[17] As mentioned, given the uplift in the unemployment benefit rates at 1 April 2010 by \$3.73, Mr Holmes expected his bank account to show a commensurate increase in the weekly deposits. But it was not until the payment made on 19 May 2010 that the uplift appeared in the form of a deposit of \$78.77 being the net amount left after deduction of \$100 rent and \$15.35 child support.

[18] By letter dated 22 August 2010 Mr Holmes wrote to WINZ about various matters, not all of which are relevant in these proceedings. The letter comprised five separate and numbered paragraphs addressing three separate and discrete matters. His concerns in relation to the apparent failure to pay him the 2010 Annual General Adjustment were addressed in paragraphs 2 and 3 of the letter:

2. I ask you to review the decision to deny me my increase April 1st 2010. Until I started making enquiries in regard to this matter (this is in line with the threats and intimidation made against me and my children "our contacts in WINZ" will take care of me). This is of course out of time due to other matters and your contacts, threats, which I have to consider carefully.
3. Please supply all letters of correspondence in relation to this denial to myself or any third party or other party in relation to No. 2 of this letter under Privacy Act 1993, and Official Information Act 1982 in regard to letters between other parties and yourself. Please supply reasons of decision to deny, under Ombudsmans Act 1975, as advised.

[19] It was the evidence of Ms Dixon that she thought that in these paragraphs Mr Holmes was seeking information about a "denial" of a benefit known as Temporary Additional Support (TAS). This was because in the same month Mr Holmes and Ms Dixon had been in correspondence in relation to a request by Mr Holmes that WINZ review a decision to decline him extra assistance by way of Temporary Additional Support. In the result, when Ms Dixon replied to Mr Holmes' letter dated 22 August 2010 she did not address Mr Holmes' complaint that he had apparently been denied the 1 April 2010 increase. Specifically she did not address or respond to his request for personal information in relation to the apparent denial of the 1 April 2010 increase. The letter from Ms Dixon to Mr Holmes is dated 27 August 2010 and relevantly states:

I have received your letter dated 22 August and respond to your queries:

Your letter of 27 July claimed that you were denied extra help, namely TAS, on 13 October 2009.

You did not apply for TAS or provide information to enable a grant to be considered. Mr Rakiraki has since requested that you apply for this Temporary Additional Support. To date, no application has been received.

[20] It is to be noted that Ms Dixon wrote to Mr Holmes within two working days of receipt, well inside the statutory time limit but the letter did not address the request that had been made for access to personal information.

[21] Mr Holmes complained to the Privacy Commissioner. The matter was not resolved and the statement of claim in this matter (HRRT 005/11) was filed on 28 March 2011. After several *Minutes* had been issued for the purpose of readying the case for trial, by notice dated 14 October 2011 the Secretary advised that these proceedings would be heard at Dunedin in the period 30 November 2011 to 2 December 2011.

[22] One month earlier, by letter dated 8 September 2011, Ms Dixon wrote to Mr Holmes about his two requests of 22 August 2010 and 4 October 2010 "in an effort to move forward and work with you to resolve your outstanding privacy complaints". In relation to the 22 August 2010 request the letter relevantly stated:

As you know, in interpreting this request, I assumed it must relate to your ongoing concerns in relation to Temporary Additional Support ("TAS"). I came to this conclusion as the Annual General Adjustment, which occurs on 1 April every year, is an automated process, and I did not have any record of you making enquiries about it. The increase you were entitled to as a result of the Annual General Adjustment in 2010 was not denied to you, but rather was applied automatically on 1 April 2010.

As there was no denial in relation to the Annual General Adjustment and knowing that you had ongoing concerns about TAS this is how I interpreted your request.

You have since indicated that this request did not relate to TAS. I understand that Crown Law have written to you asking for your interpretation of this request and have not received a response.

I have checked your 2010 Annual General Adjustment and may have found the cause of the confusion surrounding this request.

As you will know, your benefit is paid on Thursdays and it is paid in arrears. This means that on 1 April 2010 you received payment for the period 22 March 2010 to 28 March 2010. Your next payment, on 8 April 2010 was for the period 29 March 2010 to 4 April 2010; this payment included dates in both March and April, so it was a combination of the old rate and the new adjusted rate. Your first full payment at the adjusted rate occurred on 15 April 2010 for the period 5 April 2010 to 11 April 2010.

I enclose documentation relating to these payments for your records.

I recognise that this staged increase resulting in you not receiving your first full payment until mid-April could have caused some confusion. Work and Income receives many queries from clients in early April each year in relation to the Annual General Adjustment. I apologise if you have not previously received a clear explanation.

As you may be aware, section 29(2)(b) of the Privacy Act 1993 allows us to deny a request if the information requested does not exist. I am sure you can now appreciate that no denial of your 1 April 2010 increase was made and so we do not hold any information on this issue.

If my re-interpretation of your 22 August 2010 request is still not accurate, please let me know as soon as possible; Work and Income cannot resolve your complaint and supply you with the information you require without understanding what you want.

[23] It will be seen that while Ms Dixon helpfully explains the flow on effect of the time lag inherent when payment is made in arrears, the response is a broad and general one, addressing what appears to be a recurring concern by beneficiaries each year in relation to the Annual General Adjustment. The explanation does not address the critical issue raised by Mr Holmes, namely that he did not see the increased benefit until 19 May 2010, one month after the date given by Ms Dixon (15 April 2010) for the first full payment at the adjusted rate.

[24] As best we can see, the explanation lies in the interplay between the net amount of the benefit and the deductions made before the balance is deposited in the bank account of the beneficiary. While the beneficiary may be aware of fixed deductions such as rent and child support, he or she may not necessarily be aware of the amount of the Debt Offset deducted in any particular week. Only the Ministry has access to this information and it is not information which is provided to the beneficiary. As mentioned, he or she is given only an initial letter stating the amount to be repaid along with the rate of repayment. But even that rate may not necessarily be accurate for any length of time. Here the letter dated 13 October 2009 told Mr Holmes that the repayments would be at a rate of \$3 a week but the printouts headed SWIFTT – Production (Exhibit A) show a "recovery rate" of \$1 per week in relation to "An invoice date of 9 November 2009, which presumably relates to the advance payment approved on 13 October 2009. In the result the letter from Ms Dixon to Mr Holmes dated 8 September 2011 does not help in understanding why the second to last page of Exhibit A shows a recovery rate of \$1

whereas the debt offset was in fact \$4 a week. In her evidence she fairly accepted that Mr Holmes was not at any time notified of this increase. She said that he could apply to have the rate of deductions reviewed within a period of three months, a period which can be enlarged if good reason is shown. She frankly acknowledged that to exercise this review right Mr Holmes would first have to be made aware of what was happening with regard to the deductions but he was not told by WINZ in any particular week what debits and Debt Offsets were being made.

The statutory obligations resting on WINZ as an “agency”

[25] The submissions by Mr Holmes and by WINZ must be measured against the terms of the Privacy Act.

[26] The letter from Mr Holmes dated 22 August 2010 was a request for access to personal information in terms of Principle 6 of the information privacy principles. The right to access to personal information is couched in the following terms:

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.

[27] As this is a case in which the personal information was held by a public sector agency, the entitlements conferred on Mr Holmes by sub clause (1) of Principle 6 are legal rights, and are enforceable accordingly in a court of law. See s 11 of the Privacy Act 1993. The entitlements are clearly significant.

[28] The fundamental right of an individual to access personal information held by a public sector agency is reinforced and underlined also by s 30 which provides that subject to limited exceptions which are not relevant in the present context, no reason other than one or more of the withholding grounds set out in ss 27 to 29 of the Act justifies a refusal to disclose any information requested pursuant to Principle 6:

30 Refusal not permitted for any other reason

Subject to sections 7, 31, and 32, no reasons other than 1 or more of the reasons set out in sections 27 to 29 justifies a refusal to disclose any information requested pursuant to principle 6.

[29] The agency to which an information privacy request is made under Principle 6 is not conceived of as a passive receptor. Rather, consistent with (in the case of a public sector agency) the fact that the requester has an enforceable legal right to the information held by that agency, the agency is under a positive duty to give “reasonable assistance” to the individual to make a request in a manner that is in accordance with the requirements of the Act. See s 38 of the Act:

38 Assistance

It is the duty of every agency to give reasonable assistance to an individual, who—

- (a) wishes to make an information privacy request; or
- (b) in making such a request, has not made the request in accordance with the requirements of this Act; or
- (c) has not made his or her request to the appropriate agency,—

to make a request in a manner that is in accordance with the requirements of this Act or to direct his or her request to the appropriate agency.

[30] As observed by GDS Taylor and PA Roth in *Access to Information* (LexisNexis, Wellington, 2011) at 3.10.10:

Where the recipient of the request [is] unable to identify the information at issue, the appropriate course is to give reasonable assistance to the requester to identify the information sought. Sometimes provision of reasons (though there is no obligation to give reasons) will assist in understanding what is sought.

And at 3.10.15:

The key concept is the duty to assist. An agency should not “throw up its hands in despair” but ask the requester questions that may enable the information to be found within the agency or within another agency.

[31] The agency to which an information privacy request is made under Principle 6 is required “as soon as reasonably practicable” and in any case “not later than 20 working days” after the day on which the request is received, to decide whether the request is to be granted and to give notice of the decision on the request. See s 40(1) of the Act:

40 Decisions on requests

(1) Subject to this Act, the agency to which an information privacy request is made or transferred in accordance with this Act shall, as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that agency,—

(a) decide whether the request is to be granted and, if it is to be granted, in what manner and, subject to sections 35 and 36, for what charge (if any); and

(b) give or post to the individual who made the request notice of the decision on the request.

[32] There is a closed list of reasons for which an agency can refuse a request for information. Specially, an agency may refuse a request under Principle 6 if (inter alia) the information requested does not exist or cannot be found. See s 29(2)(b):

29 Other reasons for refusal of requests

(1) ...

(2) An agency may refuse a request made pursuant to principle 6 if—

(a) ...; or

(b) the information requested does not exist or cannot be found; or

(c) ...

[33] Where an information privacy request is refused the agency must (inter alia) give reasons for the refusal and notify the individual of his or her right to lodge a complaint

with the Privacy Commissioner and to seek an investigation and review of the refusal. See s 44:

44 Reason for refusal to be given

Where an information privacy request made by an individual is refused, the agency shall,—

(a) subject to section 32, give to the individual—

(i) the reason for its refusal; and

(ii) if the individual so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by section 27 or section 28 or section 29 and (in the case of the interests protected by section 28) there is no countervailing public interest; and

(b) give to the individual information concerning the individual's right, by way of complaint under section 67 to the Commissioner, to seek an investigation and review of the refusal.

[34] The circumstances in which an agency “interferes” with the privacy of an individual are defined in s 66 of the Act. It is sufficient to note that where an agency fails to comply with the time periods prescribed by s 40(1) 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 and therefore an interference with the privacy of the individual. Undue delay in making information available is also deemed for the same purposes to be a refusal to make that information available. See s 66(3).

[35] The deeming provision is of particular significance to the present case given that the facts establish that the “as soon as reasonably practicable and in any case not later than 20 working days after the day on which the request” standard was unquestionably breached. Ms Dixon simply misread the request. Her letter dated 27 August 2010 did not address the request let alone make a s 40 decision. This is not something for which Mr Holmes can be made responsible. Some attempt was later made by Ms Dixon in her letter of 8 September 2011 to provide the information but even at this late stage (a month or so before the Tribunal hearing) the information requested by Mr Holmes was still not provided.

Whether WINZ complied with Privacy Act – the case for Mr Holmes

[36] The breaches by WINZ asserted by Mr Holmes in relation to the 22 August 2010 request can be summarised as follows:

[36.1] Failure to comply with the statutory time limits for making and notifying the decision on the request (s 40).

The effect of s 66(3) is that the failure to comply with the time limit is deemed to be an interference with the privacy of the individual. The adverse consequences in s 66(1)(b) are not relevant in such circumstances and do not have to be established: *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [83].

[36.2] Insofar as WINZ asserts that the letter from Mr Holmes was unclear, WINZ failed to make inquiry of Mr Holmes (prior to his complaint to the Privacy Commissioner and the filing of the proceedings before this Tribunal) and thereby failed in its statutory duty to “give reasonable assistance” to him to make a request in a manner that was in accordance with the requirements of the Privacy Act.

[36.3] Insofar as WINZ asserts that the information sought does not exist, WINZ failed to comply with s 40 of the Act (by failing to make a decision whether the request was to be granted) and with s 44 which requires the agency to give reasons for its refusal along with information concerning the individual's right, by way of complaint under s 67 to the Commissioner, to seek an investigation and review of the refusal.

[36.4] The personal information did exist and Mr Holmes should have been given access to it.

[37] We now address the competing contentions advanced by WINZ.

Whether WINZ complied with Privacy Act – the case for WINZ

[38] In general terms the case for WINZ is:

[38.1] The letter from Mr Holmes dated 22 August 2010 is unclear.

[38.2] Mr Holmes had in fact received the 2010 Annual General Adjustment from 1 April 2010 “but ... failed to make any allowance for either of the debts being recovered”.

[38.3] The rate at which Mr Holmes' debts were being recovered was not within the scope of his 22 August 2010 request for “letters of correspondence in relation to [the decision to deny me my increase April 1st 2010].

[38.4] The information sought does not exist. Therefore the Ministry had a proper basis under s 29(2)(b) of the Privacy Act for refusing the request and has not interfered with Mr Holmes' privacy.

[38.5] Should its interpretation of the 22 August 2010 request be wrong, it is conceded that it failed to respond to the request within 20 working days.

Discussion – whether request unclear

[39] Addressing the first point made by WINZ (request not clear), neither the terms of the letter from Mr Holmes dated 22 August 2010 nor the context support the assertion that the terms of the request were not clear. The first of the two paragraphs refers explicitly to the 1 April 2010 uplift. The first day of April in any year is clearly an event of some significance to WINZ given that the Annual General Adjustment involves not only the enormous exercise of reprogramming the payments schedule but also the need to deal with what Ms Dixon described as the “many queries from clients in early April each year”. Both the terms of the letter (“... the decision to deny me my increase April 1st 2010”) and the context allow of no ambiguity or doubt as to what Mr Holmes was addressing. Indeed, when asked by the Tribunal whether she agreed that on its face, the letter from Mr Holmes dated 22 August 2010 was clear, Ms Dixon agreed. She further agreed that it had not occurred to her to go back to Mr Holmes to clarify such doubt or ambiguity as may have been in her mind.

[40] It follows from this factual finding that the request by Mr Holmes for access to personal information was not met with a decision under s 40 within the statutory period prescribed by that section and there was accordingly a deemed refusal to make available the information to which the request related.

Discussion – the degree of precision expected of Mr Holmes

[41] We turn next to the submission that Mr Holmes in fact received the increase in net payments from 1 April 2010 but failed to make any allowance for the debts then being recovered. The short answer is that Mr Holmes did not have the information which would allow him to know that he was receiving the correct payments. His letter of 22 August 2010 must be seen as a request for that information. The evidence given by Ms Dixon was clear and unambiguous. Once an advance is made to a beneficiary he or she is not provided with any further information beyond the initial letter of approval stipulating the amount of the advance and the amount of the weekly repayment. In the result beneficiaries would not know, in the words of Mr Holmes, how a \$1 Debt Offset becomes \$4. Mr Holmes did not know anything at all as to how the Ministry arranged or calculated the repayments in any particular week. All he could see was the final amount deposited into his bank account. If the information was not provided to him by the Ministry, he could hardly be expected to know what was going on. His request for personal information was in these circumstances entirely understandable, if not predictable. Similarly, he could hardly be expected to frame his request for personal information in terms which identified to WINZ that which was causing the difficulty so that WINZ could more readily locate the requested information. The whole point is that Mr Holmes did not know what was going on and wanted to find out. It is not appropriate for WINZ to say that he ought to have known and that his request should have been made more clear. If the request was not clear to WINZ it had a duty to seek clarification and to provide meaningful assistance under s 38 of the Act. It did not do so. We address this point next.

Discussion – the reading and interpretation of requests for access to personal information

[42] We turn now to the third submission (the request by Mr Holmes was for “letters of correspondence”, not for information about how his benefit payments were being calculated) as well as the fourth (the information did not exist). The point made by WINZ is that as he did not ask for anything other than “correspondence” and because there was no such correspondence, the Ministry were entitled to refuse the request under s 29(2)(b) (an agency may refuse a request made pursuant to Principle 6 if the information requested does not exist or cannot be found). We note in passing that even if correct, this submission does not overcome the delay of almost twelve months by WINZ in making a decision on Mr Holmes’ request. But it is necessary to address the submission on its merits. It is a submission which raises the question whether requests for personal information are to receive a broad and purposive interpretation or are to be read in a narrow and legalistic manner. The issue is particularly acute when, as is often the case, the individual seeking access to personal information is self represented and untutored in the precise framing of requests under the Privacy Act.

[43] The Long Title to the Privacy Act states that it is an Act to “promote” individual privacy in general and in particular, to establish certain principles with respect to access by each individual to information relating to that individual and held by public and private sector agencies.

[44] That the right to personal information in Principle 6 is an enforceable legal right (where the personal information is held by a public sector agency), that the agency is under a mandatory statutory duty to give “reasonable assistance” to an individual wishing to make an information privacy request and that only a closed number of reasons can be deployed to refuse a request, strongly favour an interpretation of the Act which avoids narrow, legalistic dissections of the terms in which a request for personal information is framed.

[45] Sight must not be lost of the fact that the focus of the information privacy principles is on the individual about whom the personal information is held. The clear statutory intent is to confer on that individual a right of access to his or her personal information directly, on his or her own application. There is nothing to indicate that lawyers or other professionals are to be the approved conduit for the submission of access requests. The clear legislative expectation is that agencies will be approached directly by the individual him or herself.

[46] This is a critical point in the case of a public sector agency such as WINZ which is the government agency through which individuals can access benefits and other forms of financial assistance. By definition, most “clients” will be in poor financial circumstances. A significant number will be lacking in higher education. Most will need assistance navigating policy relating to welfare payments. They will also likely be under stress. This is recognised by WINZ itself in its performance standards. We refer here to a brochure produced in evidence and entitled *Our Services and Standards – A guide to the services we offer and what you can expect from us*. It has a heading “What you can expect from us”. It states (inter alia):

We will:

- ...
- let you know about our services and how we can help
- give you information that is correct and easy to understand
- give you the assistance you are entitled to
- explain your rights and obligations
- ...
- listen carefully so we understand what you are telling us
- be understanding and caring about your needs
- ...

[47] In two places the brochure emphasises that WINZ sees its role not as one in which it simply responds to requests for assistance, but as one in which it is proactive in ascertaining the financial assistance to which individuals are entitled:

We are here to help people get the financial assistance they’re entitled to ...

We’ll do our best to support you in any way we can ...

Further on, under the heading “You have the right to” it is stated:

- be given correct information and entitlements

[48] The submission that the letter from Mr Holmes is to receive a literal and narrow interpretation sits uneasily with the provisions of the Privacy Act and with the service standards set by WINZ itself.

[49] In our view a request for access to personal information must be read both purposefully and contextually notwithstanding that the individual may not use the language of the statute, may not use lawyer’s language or the phrasing and accuracy of a tutored writer of the English language. If there is doubt as to what is being sought, the agency has a duty to seek clarification. The Act explicitly states that there is a duty to provide reasonable assistance. See s 38. If this process takes time the Act permits an extension of the statutory time limits provided notice of the required extension is given within the 20 working days after the day on which the request is received. See s 41.

[50] In the present case it was plain that the letter from Mr Holmes dated 22 August 2010 was saying that it was his belief that he had not received the 2010 Annual General

Adjustment and that he was requesting information that would allow him to understand why this “denial” had occurred. In short, he was asking for the personal information that WINZ were using when determining his weekly payments. There can be no doubt that the debts owed by Mr Holmes and the amounts which were being deducted from his Unemployment Benefit were “personal information” within the meaning of s 2 of the Act. The facts do not call for an extended discussion of the subject and there is no cause to enter into what was described in *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [47] as the “continuing debate” about the scope of the definition of “personal information”. As noted in *Gruppen v Director of Human Rights Proceedings* [2012] NZHC 580 (21 March 2012) at [32], to meet the definition of personal information in the Act all that is required is that the information be “about” an identifiable individual. This requires a factual enquiry. On the present facts money owing to and owed by Mr Holmes is without question “about” Mr Holmes and therefore personal information.

[51] When Mr Holmes requested “all letters of correspondence in relation to this denial” he was looking at the system from the outside. He did not know anything about the internal accounting system employed by WINZ. All he had in relation to the advance of \$70 was the letter dated 13 October 2009. It was understandable he would assume that if there was to be any change or variation to the stipulated terms of the advance, he would be sent a letter notifying him of the change. In trying to find an explanation for the “non-appearance” of the 2010 Annual General Adjustment in his bank account he understandably assumed that WINZ would have sent him something by way of explanation. It was entirely logical for him, in seeking information about how his benefit payments were being calculated, to seek “correspondence”. WINZ, on the other hand, has intimate knowledge of its own internal systems. It would have taken little effort or imagination to check the accounting records now produced as Exhibit A, to identify that the Debt Offsets were varying substantially in the April-May 2010 period and to then provide Mr Holmes with the personal information being used to determine his weekly payments. Even if, notwithstanding our finding that the terms of the 22 August 2010 letter are clear, WINZ were in doubt as to how to interpret paragraphs 2 and 3 of the letter, inquiry should have been made of Mr Holmes. Nothing less was required by the duty in s 38 to give reasonable assistance.

Discussion – whether the information requested did not exist

[52] It follows that we do not accept the submission for WINZ that even though they did not make a decision on the request within the statutory period, they had good reason to refuse the request on the grounds that the information requested did not exist. On the contrary, the information plainly did exist. It has been provided by Ms Dixon in her letter of 8 September 2011 and in Exhibit A. But in any event, it is no defence to say that although a decision on the request was not given within the “as soon as reasonably practicable, and in any case not later than 20 working days” time period, had a decision been given in that time there would have been good reason to refuse the request. The statutory deeming clause in s 66(3) permits no other interpretation.

[53] In the result, in terms of s 66(2) Mr Holmes has established a refusal to make available the information to which his request related. He must also establish, however, that, in terms of s 66(2)(b) there was no proper basis for that decision. As to this we find first that there was no proper basis for the almost twelve month delay in providing the information. None of the withholding grounds had application. Specifically we find that, for the reasons given, s 29(2)(b) of the Act did not apply and WINZ had no basis to refuse the request on the asserted ground that the information requested did not exist.

Legal consequences of non-compliance

[54] The breaches of ss 38 (assistance) and 44 (reasons to be given for refusal and duty to advise right to complain to Privacy Commissioner) do not in themselves amount to an “interference with the privacy of an individual” as defined in s 66 with the result that the Tribunal does not have jurisdiction to grant any of the s 85 remedies for non-compliance with these provisions. This does not mean that the established failure to comply with these provisions is irrelevant in the overall context of determining the seriousness of any interference with privacy which might otherwise be established.

[55] Breach of the time limit is in a different category. The legal consequence of the failure by WINZ to comply with the s 40(1) time limits is that there was a deemed refusal to make the information available. That refusal, in turn, is defined by s 66(2)(a)(i) as “an interference with the privacy of an individual”. We have found that there was no proper basis for that deemed refusal. These proceedings having been brought under s 83 of the Act the remedies described in s 85 of the Act can accordingly be sought if the interference is established on the balance of probabilities. The remedies relevantly described are in ss 85 and 88.

Remedies

[56] As to the s 40 time limit, the evidence clearly satisfies the balance of probability standard that the statutory time limits were not observed in relation to the request of 22 August 2010 and that an interference with the privacy of Mr Holmes has been established.

[57] In his statement of claim Mr Holmes seeks the following remedies:

[57.1] An order that the requested information be provided.

[57.2] An order restraining WINZ from continuing or repeating the interference with privacy.

[57.3] A declaration that there has been an interference with privacy.

[57.4] Damages in the sum of \$5,000 for “stress, humiliation, suffering, hardship, injury to feelings, loss of identity and attack on my integrity”.

[58] We address first the question of a declaration. In *Geary v New Zealand Psychologists Board* 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 Holmes of a formal declaration that the action of WINZ in failing to respond to the personal information request of 22 August 2010 within the time allowed by s 40 of the Act was an interference with the privacy of Mr Holmes.

[59] As to an order that the requested information be provided, we understand that the information was provided during the course of the evidence before the Tribunal. For that reason the order sought is not necessary.

[60] As to the request for an order restraining WINZ from continuing or repeating the interference, there is no doubt that Mr Holmes is suspicious of WINZ. Partly this is due to the way in which the requests for personal information the subject of these conjoined

proceedings have been dealt with by WINZ. But we mention the further examples raised by Mr Holmes during the course of the hearing:

[60.1] On 27 April 2010 Mr Rakiraki wrote to Mr Holmes acknowledging that a Review of Decision requested by Mr Holmes on 5 July 2007 had been misfiled and consequently overlooked. The oversight meant that the review was unactioned for seventeen months.

[60.2] On or about 12 September 2011 Mr Holmes was required to apply for a renewal of his unemployment benefit. The form presented to him contained a declaration to the effect that he acknowledged having read the Privacy Act statement governing the use of the personal information provided by him in the form. On looking for the statement Mr Holmes was unable to find the statement. When he pointed out to the WINZ officer that the statement was missing and for that reason Mr Holmes was unable to sign the form, he was told that if the form was not signed his benefit would be terminated. When we asked Ms Dixon about this incident she said that it was not until Mr Holmes drew attention to the absence of the Privacy Act statement that WINZ became aware of the omission notwithstanding that the form had been in use since December 2010.

[61] Ms Dixon was in attendance throughout the hearing (and also during the hearing of the preceding matter of *Holmes v Commissioner of Police* [2012] NZHRRT 17 on 30 November 2011 and the morning of 1 December 2011). In addition we understand that a representative from the legal section of the Ministry in Wellington attended most of the WINZ proceedings. It is to be hoped that having now had occasion to see Mr Holmes and to hear his complaints in person it can be seen that his eccentricities notwithstanding, he is unquestionably sincere. He also has solid grounds for his complaints to this Tribunal. It is appreciated that WINZ have the difficult, if not unenviable task of dealing with a number of people whose personal lives are under stress. Nevertheless, the services and standards prescribed by WINZ for itself require staff to be understanding and caring about the needs of those they serve. We would hope that through Ms Dixon staff at the various WINZ offices in Dunedin will have their attention drawn to the findings of this Tribunal and that this will result in a discernable improvement in the relationship between WINZ and Mr Holmes. In these circumstances we decline to make the restraining order sought by Mr Holmes.

[62] Nevertheless, while we decline to make a restraining order, we have real concerns about the degree to which the Dunedin branches of WINZ are complying with their obligations under Principle 6 to provide access to personal information on request and it will be seen that later in this decision we find there was a further breach in relation to the separate information privacy request dated 4 October 2010. Having regard to s 85(4) of the Act we find that the failures in the present case have been sustained and systemic. They underline the need for WINZ to undertake a thorough review of its processes for ensuring full compliance not only with the letter of the Privacy Act but also with its objects and purposes. We make an order pursuant to s 85(1)(d) and (e) that WINZ undertake such review under the direction and guidance of the Privacy Commissioner.

[63] As to damages, the breaches by WINZ of the Privacy Act have been, as mentioned, sustained and systemic. The request dated 4 October 2010 was clear but no decision was made on it for twelve months, causing considerable anxiety and depriving Mr Holmes of the ability to seek a review of the rate of deduction. If WINZ were in doubt as to the content of the request, clarification should have been sought and reasonable assistance provided to Mr Holmes under s 38. Instead an impoverished beneficiary who

has difficulty reading and writing has had to complain first to the Privacy Commissioner and then to this Tribunal to obtain redress. Having seen and heard him in person we have no doubt that there has been substantial humiliation, loss of dignity and injury to his feelings.

[64] This is another case in which the withholding of documents was not only unjustified, but left the individual without the means of knowing whether, had the information been provided, it would have been possible to have used the information to obtain a benefit, such as a review of the rate of his deductions. See *Proceedings Commissioner v Health Waikato Ltd* (2000) 6 HRNZ 274, *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 and *Lochead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5 (27 March 2012). There is a substantial imbalance of power between an agency such as WINZ and its “clients”. Principle 6 is an important mechanism for redressing, in part, that imbalance and promoting accountability by ensuring that individuals can access their personal information. By being aware of what is held by the agency, by being able to ensure that it is accurate and by being able to request that it be corrected they are more effectively able to challenge decisions made about them. The obligations of an agency to provide access to personal information are purposefully written in mandatory terms. Breaches of a material nature cannot be lightly dismissed.

[65] That having been said, however, we are of the view that to make a separate award under s 88(1)(b) for loss of a benefit would involve too much speculation as well as a potential overlap with s 88(1)(c). We believe that the facts call for a single award and that that award be for humiliation, loss of dignity and injury to feelings. We award \$10,000 under s 88(1)(c).

SECOND REQUEST FOR ACCESS TO PERSONAL INFORMATION – THE LETTER DATED 4 OCTOBER 2010

[66] It is to be recalled that Mr Holmes suffers from poor eyesight and can read and write only with the assistance of a large magnifying glass. It is to be further recalled that by letter dated 13 October 2009 he was told that he would be advanced \$70 to undergo an eye test which he needed for the purpose of renewing his drivers licence. The advance was refundable ie had to be refunded out of his benefit. Mr Holmes applied to have the advance made non-recoverable. That application led the officer to explore with Mr Holmes whether he would be eligible for other assistance and in particular eligible for a benefit known as Temporary Additional Support (TAS). The officer and Mr Holmes have sharply different accounts of what happened on 13 October 2009. It is to be remembered that it is not the role of the Tribunal to make findings of credibility and fact in relation to these accounts. It is only necessary for them to be recited by way of background to the later request made by Mr Holmes under Principle 6 for access to personal information relating to the TAS benefit.

[67] According to the file note made by the officer on 13 October 2009 she met with Mr Holmes that day at the WINZ reception slightly later than the appointed time and apologised for this. She had been detained assisting another client. Her account is that when it was suggested to Mr Holmes that he apply for the TAS benefit he became “extremely angry” and ended the interview. The file note relevantly reads:

Client wanted to know why his advance wasn't non recoverable as his friend was, explained advance category.

Client is entitled to \$20.13 tas was extremely angry when I suggested he apply for this, even though he needs glasses and this would be recoverable he would not notice the offsets if he tas,

Client stated the Ministry is giving information about him to IRD, ended interview and told client to have a nice day.

[68] The account given by Mr Holmes is that when he was given the forms to fill in he pointed out that he did not have his magnifying glass with him and could not read them. At that point the officer took the forms back which meant that Mr Holmes could not take them away to complete them at home:

I was kept waiting for 10 minutes and when I mentioned this, was told it was only 9 in a very sarcastic tone. She stated its all recoverable no-one gets free tests or glasses. I stated that's not true. She then spoke to a male who came over and stated the same. I repeated, that is not true. She then accused me of calling her a liar. I again stated what she said isn't true. She failed to ask why! She then questioned me over my rent, told me to get a job then I could pay for it myself. Again in a very sarcastic and condescending manner.

She told me to fill out rest of form for extra benefit. When I told her I couldn't as I didn't have my mag glass with me, she stated that's your problem then, the forms were not given to me to take away when I asked for them to do this, she said you had your chance and took them away. I was never told how much would be deducted or when, by this person.

I was belittled and humiliated by her but am not surprised in view of continuing treatment against myself by WINZ and other agencies in collusion with WINZ.

[69] By letter dated 27 July 2010 Mr Holmes wrote to WINZ requesting a review of what he described as "the decision to intentionally deny the extra help of benefit, namely TAS on 13/10/09". On 9 August 2010 Mr Rakiraki of the South Dunedin Service Centre replied to the effect that no application for Temporary Additional Support had been made on 13 October 2009 and Mr Holmes was invited to test his eligibility to such Support by completing and returning an enclosed application. Mr Holmes did not return the form.

[70] The decision that there was to be an "advance of benefit" of \$70 to pay for an eye test rather than a non-recoverable Special Needs Grant was confirmed by a Benefits Review Committee. Mr Holmes then appealed unsuccessfully to the Social Security Appeal Authority. The outcome of that appeal, however, is not relevant to the present proceedings under the Privacy Act.

[71] What is relevant is that on 4 October 2010 Mr Holmes wrote to the Branch Manager, Dunedin Central WINZ. This letter clearly and unambiguously made a request under the Privacy Act for documents relating to the TAS benefit between 13 October 2009 and 9 August 2010. The letter read:

2 Please supply under Privacy Act 1993

All paperwork supplied to myself in regard to TAS benefit denial 13/10/09 and S Rakiraki letter full of lies 9/8/10 some ten months later. Specifically, letters to reconsider, apply, reapply other benefits etc. [Emphasis in original]

[72] On the limited narrative of facts set out above it is clear that from the WINZ perspective no application for TAS has been made by Mr Holmes. His perspective, however, is that he was denied the opportunity to make the application and, by inference, the application had been declined.

[73] Applying the 20 working day period stipulated by s 40 of the Privacy Act, WINZ ought to have made a decision on or before 1 November 2010 whether the request was to be granted. Unfortunately Ms Dixon did not write until 13 December 2010. We do not intend setting out the full text of her letter as only one paragraph relates to the request made by Mr Holmes for access to personal information. Ms Dixon stated:

...

Your letter of 4 October requested:

1. ...
2. All paperwork relating to Temporary Additional Support, letters, requests to apply etc. This request was answered in the letter of 27 August 2010. There is no other information on your files.
3.

[74] Given that the request by Mr Holmes was dated 4 October 2010 it should not have been answered by cross-referencing to an earlier letter dated 27 August 2010. However, if reference is to be made to Ms Dixon's letter of 27 August 2010, it relevantly states:

Your letter of 27 July claimed that you were denied extra help, namely TAS, on 13 October 2009.

You did not apply for TAS or provide information to enable a grant to be considered. Mr Rakiraki has since requested that you apply for this Temporary Additional Support. To date, no application has been received.

[75] This letter of 27 August 2010 does not meaningfully address Mr Holmes' personal information request and the amended statement of reply at para 7 accepts that WINZ did not enclose any personal information regarding TAS with its 27 August 2010 letter.

[76] The amended statement of reply goes on to admit that it was not until 8 September 2011 that a copy of all information held by WINZ on Mr Holmes' file and referring, whether directly or implicitly, to TAS between and including 13 October 2009 and 9 August 2010 was provided. In her brief of evidence Ms Dixon describes these documents in the following terms:

- 22.1 12K Report dated 7 July 2010, and its exhibits, which included:
 - 22.1.1 Application form for special needs grant/advance on benefit/recoverable assistance payment dated 13 October 2009;
 - 22.1.2 TAS Assessment dated 13 October 2009;
 - 22.1.3 UCVII Note dated 13 October 2009;
 - 22.1.4 Mr Holmes' letter to Work and Income dated 5 January 2010;
 - 22.1.5 Mr Holmes' letter to Social Security Appeal Authority dated 14 June 2010;
 - 22.1.6 Report of the Benefit Review Committee;
- 22.2 Mr Holmes' letter to Lisa Davis dated 4 April 2010;
- 22.3 Mr Holmes' letter to Work and Income dated 27 July 2010;
- 22.4 Additional 12K Report dated 5 August 2010;
- 22.5 Mr Holmes' letter to Work and Income dated 8 August 2010;
- 22.6 Letter from Simon Rakiraki dated 9 August 2010;
- 22.7 TAS application form enclosed with letter from Simon Rakiraki dated 9 August 2010;
- 22.8 UCVII Note dated 9 August 2010.

[77] In her letter of 8 September 2011 to Mr Holmes Ms Dixon apologised for the delay in responding to the personal information request. She described how the earthquake in Canterbury on 4 September 2010 had placed extra demands on WINZ staff in Christchurch and around the country. Some Dunedin based staff relocated to Christchurch to help with the increased workload and it took several months for them to

normalise. It was December 2010 before Ms Dixon was in a position to respond to the request from Mr Holmes. In relation to the documents enclosed with her letter she pointed out that Mr Holmes had received all of the information earlier, either in relation to his Social Security Appeal Authority hearing, by post in relation to the letter from Mr Rakiraki or in photocopy form in relation to his letters to Work and Income. She acknowledged, however, that the fact that Mr Holmes had received these documents on a prior occasion did not negate the obligations of WINZ under the Privacy Act to supply him with the information when he requested it on 4 October 2010. She added:

The reason I point out that you have received this information before is to assure you that we have not deliberately withheld anything from you that you did not already have; we simply misunderstood your request.

[78] Ms Dixon repeated her apology for what she described as the series of events that had led to the delay in releasing the information and said:

I accept that Work and Income had an obligation to provide you with our decision regarding your request for TAS information within twenty working days of your 4 October 2010 request. I also accept that according to the Privacy Act 1993, our failure to provide you with the information that falls within the scope of your request until today without a good reason to refuse access amounts to an interference with your privacy.

...

We will inform the Human Rights Review Tribunal of this development and agree to a declaration that Work and Income interfered with your privacy in relation to your request for TAS information on 4 October 2010

The case for WINZ

[79] In general terms the case for WINZ is:

[79.1] It agrees that it did not notify Mr Holmes of its decision within twenty working days. However, based on its interpretation of the evidence given by Mr Holmes at the Tribunal hearing in Dunedin, it submits the information requested does not exist and therefore the Ministry had a proper basis for refusing this request and has not interfered with Mr Holmes' privacy.

[79.2] The Canterbury earthquake of 4 September 2010 placed extra demands on WINZ staff in Christchurch and around the country. It was several months before the situation at Dunedin normalised and the Ministry was able to consider the request by Mr Holmes. In any event the fact that no information exists in relation to his 4 October 2010 request could not have impacted on the outcome of his appeal to the Social Security Appeal Authority.

[79.3] WINZ acknowledges that a more appropriate course of action would have been to extend the time limit for responding to the request under s 41 of the Act.

[79.4] The primary submission made for WINZ in closing was in the following terms:

63 In September 2011 the Ministry interpreted Mr Holmes 4 October request as being for "all paperwork" sent to Mr Holmes between and including 13 October 2009 and 9 August 2010 regarding TAS. Mr Holmes' evidence to the Tribunal was that this interpretation was wrong, as he was seeking only a further copy of letters sent to him asking him to apply, reapply or reconsider applying for TAS between, but not including, 13 October 2009 and 9 August 2010.

64 If the Tribunal finds that Mr Holmes' request was properly interpreted by the Ministry as a request for a further copy of "all paperwork", the Ministry admits that

it was both outside the statutory timeframe for responding to Mr Holmes' request and that there was an undue delay in providing the three documents that fell within the scope of the request. The Ministry is therefore deemed to have refused to make the information available. The Ministry accepts that it did not have a proper basis for refusing to make the TAS information available, and does not oppose a declaration that it interfered with Mr Holmes' privacy in respect of his 4 October request in relation to TAS. However, no damages should be awarded.

Discussion

[80] Addressing the last point first, we are of the view that the WINZ September 2011 interpretation of the request made by Mr Holmes is the correct interpretation and flows naturally from the terms in which the request was made. The fact that Mr Holmes at the hearing may have been understood by WINZ as intending something of a more restricted nature is beside the point. The written request must be interpreted according to the terms in which it has been framed. In any event, we are not at all persuaded that in his evidence Mr Holmes intended to be understood as advancing a reading of the kind contended for in the post-hearing submissions for WINZ. The submissions by Mr Holmes in reply certainly challenge the notion that he intended at the hearing to narrow the scope of his request.

[81] As to the submission that the information requested does not exist and therefore the Ministry had a proper basis for refusing the request, this submission depends on a reading of the evidence which we find unsupportable and do not agree with. The request for "all paperwork supplied to myself in regard to TAS benefit denial" is clear and unambiguous, as recognised by the terms of Ms Dixon's letter and apology dated 8 September 2011. The very fact that eight documents were supplied to Mr Holmes at that time (in addition to the six exhibits to the 12K Report) demonstrates that personal information of the kind within the request made by Mr Holmes was held by WINZ and ought to have been disclosed within the twenty working day period ie by 1 November 2010. The provision of the information almost ten months later on 8 September 2011 on the eve of the hearing coupled with an apology was better than nothing. But there is no basis for the submission that the information requested did not exist and therefore the Ministry had a proper basis for refusing the request. The amended statement of reply at para 19 properly concedes the point in the following terms:

The defendant agrees that it notified the plaintiff of its decision regarding the plaintiff's 4 October 2010 request for information in relation to TAS more than 20 working days after the request was received, and accepts that it did not have a proper basis for refusing to make the TAS information available. The defendant has apologised to the plaintiff and does not oppose a declaration that it interfered with the plaintiff's privacy in respect of the plaintiff's 4 October 2010 Privacy Act request in relation to TAS.

[82] As to the Canterbury earthquake of 4 September 2010 and the extra demands placed on WINZ staff, we note the submission by WINZ that it ought to have unilaterally extended the time limit for responding. However, we observe that the circumstances in which s 41 can be deployed are strictly enumerated and events such as the Canterbury earthquake are not included. When such events do occur it is more likely that the failure to make the information available is better measured by the "undue delay" criterion in s 66(4), provided the decision on the request is made in time. Applying that criterion our view is that there has been undue delay. Not only was the request misread, it was responded to by way of reference to a letter written before the request was even submitted. The provision of the information and the tendering of an apology occurred twelve months after the statutory period had expired.

Whether WINZ complied with Privacy Act – Summary

[83] Our findings are that:

[83.1] WINZ failed to comply with the statutory time limits for making and notifying the decision on the request (s 40).

[83.2] Insofar as WINZ asserts that the information sought does not exist, this assertion rests on an interpretation of the evidence given by Mr Holmes at the hearing. The Tribunal does not share that interpretation and in any event the terms of the letter must be taken as they stand. Read in that light it is quite clear (as WINZ acknowledges in the amended statement of reply and in the letter from Ms Dixon dated 8 September 2011) that there was information which should have been made available but was not. As to any suggestion that the provision of documents on 8 September 2011 was more “generous” than might strictly have been required by the Act, we observe only that one would hope, given the purpose of the Privacy Act and the service standards self-prescribed by WINZ, that there will always be a “generous” approach by WINZ to requests for access to personal information.

Remedies

[84] For the reasons given the evidence clearly establishes to the balance of probability standard that the statutory time limits were not observed in relation to the request of 4 October 2010 and that there was no proper basis for the deemed refusal to make available the information to which the request related (s 66(2) and (3)).

[85] On the facts Mr Holmes is entitled to a formal declaration that the action of WINZ in failing to respond to the personal information request of 4 October 2010 within the time allowed by s 40 of the Act was an interference with his privacy.

[86] We now address the question of damages. We agree with the submissions for WINZ that Mr Holmes has provided no evidence that he suffered pecuniary loss or loss of benefit as a direct result of the actions of WINZ. Nor does the Tribunal have jurisdiction to order that a TAS be paid to Mr Holmes.

[87] As to whether the delay in providing the information impacted on the ability of Mr Holmes to properly conduct his case before the Social Security Appeal Authority we have reservations given the amount of speculation involved. But the issue is not what would have happened at the appeal hearing but rather whether being deprived of the requested information caused Mr Holmes uncertainty and anxiety along with the loss of the opportunity to decide for himself whether to deploy the information. We are satisfied an affirmative answer must be given. However, we bear in mind the caution expressed by the High Court in *Winter v Jans* that there can be some overlap between what is awarded in this kind of case under s 88(1)(b) and under s 88(1)(c). Our conclusion is that this is a case similar to that in *Lochead-MacMillan v AMI Insurance Limited* in that the compensation belongs more appropriately in s 88(1)(c) (humiliation, loss of dignity and injury to feelings). It was very clear from the evidence that the withholding of the information and the loss of opportunity for Mr Holmes to assess for himself whether there was information of use to his appeal compounded his feeling of being ignored, of being powerless in his dealings with officialdom and of being treated as if he did not matter. An award of damages under s 88(1)(c) is in these circumstances entirely appropriate.

[88] As to quantum, we do not intend repeating what has been said when determining quantum for the 22 August 2010 request. In relation to the 4 October 2010 request we have specific regard to the fact that through Ms Dixon, WINZ has apologised for the admitted interference with privacy. It remains the fact, however, that that apology was not tendered until twelve months after the event, and only after these proceedings had been instituted. This change of mind took place at a close distance to the substantive hearing before the Tribunal. In all the circumstances we have determined that an award of \$7,000 is to be made under s 88(1)(c) of the Act on account of the humiliation, loss of dignity and injury to feelings suffered by Mr Holmes. This award is slightly higher than that made in *Shahroodi v Director of Civil Aviation* [2011] NZHRRT 6 (9 March 2011) but the nearly twelve month delay by WINZ in relation to the 4 October 2010 request compounded the 12 month delay in complying with the 22 August 2010 request. The failures were not isolated. They were sustained and systemic. While each took its separate toll on Mr Holmes their impact was also cumulative. That cumulative effect must be reflected in the making of an award for the failure to respond to the 4 October 2010 request as that failure undoubtedly enhanced the feelings of impotence, insignificance, humiliation, loss of dignity and injury to feelings.

Formal orders in relation to the information privacy request dated 22 August 2010

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

[89.1] A declaration is made under s 85(1)(a) of the Privacy Act 1993 that Work and Income (a service of the Ministry of Social Development) interfered with the privacy of Mr Holmes by failing to respond to his personal information request dated 22 August 2010 within the time allowed by s 40 of the Act.

[89.2] Damages of \$10,000 are awarded against the Ministry under ss 85(1)(c) and 88(1)(c) of the Act for humiliation, loss of dignity and injury to feelings.

[89.3] An order is made under s 85(1) of the Act that the Ministry undertake a thorough review of its processes for ensuring full compliance not only with the letter of the Privacy Act but also with its objects and purposes. The review is to be undertaken under the direction and guidance of the Privacy Commissioner.

Formal orders in relation to the information privacy request dated 4 October 2010

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

[90.1] A declaration is made under s 85(1)(a) of the Privacy Act 1993 that Work and Income (a service of the Ministry of Social Development) interfered with the privacy of Mr Holmes by failing to respond to his personal information request dated 4 October 2010 within the time allowed by s 40 of the Act.

[90.2] Damages of \$7,000 are awarded against the Ministry under ss 85(1)(c) and 88(1)(c) of the Act for humiliation, loss of dignity and injury to feelings.

[91] There is no need for a separate order under s 85(1) of the Act requiring the Ministry to undertake a thorough review of its processes for ensuring full compliance with its obligations under the Privacy Act. Such order has already been made in para [89.3] above. The relief granted in that paragraph is intended to apply to both information privacy requests.

Costs

[92] As a litigant in person Mr Holmes is not entitled to costs. He is, however, entitled to reasonable disbursements. Ordinarily the Tribunal would expect the submission of a reasonably itemised schedule supported, if possible, by receipts or some other record of expenditure. However, given Mr Holmes' poor eyesight and reading difficulties we are of the view that it would be unreasonable to expect him to have kept such a record. In addition we are conscious that these long outstanding matters should be brought to an early close. In the circumstances we have decided to award a lump sum of \$300 for stationery, postage, copying and related expenses.

.....
Mr RPG Haines QC
Chairperson

.....
Ms W Gilchrist
Member

.....
Ms S Scott
Member