IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2012] NZHRRT 24**

	Reference No. HRRT 033/2011
IN THE MATTER OF	**A CLAIM UNDER THE PRIVACY ACT 1993**
BETWEEN	**DIRECTOR OF HUMAN RIGHTS PROCEEDINGS**
	PLAINTIFF
AND	**DAVID HAMILTON**
	DEFENDANT

AT ASHBURTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms W Gilchrist, Member
Hon K Shirley, Member

COUNSEL:
Ms KT Dalziel for Director of Human Rights Proceedings
Mr D Hamilton in person

DATE OF HEARING: 16 and 17 August 2012

DATE OF DECISION: 1 November 2012

DECISION OF TRIBUNAL

Introduction

[1] Mr Hamilton is an accountant who has practised in Ashburton for a number of years. In the period from August 2008 to the present two of his clients (a husband and wife trading in partnership) sought access to the personal information held about them by Mr Hamilton. He concedes that with the exception of a "token gesture" which saw him release "peripheral" documents in December 2011, the requested access has not yet been given by him. The primary issue in these proceedings is whether Mr Hamilton has a proper basis for not complying with the request and if not, the nature of the remedies to be granted.

Preliminary matter

[2] Regulation 15(1) of the Human Rights Review Tribunal Regulations 2002 (SR2002/19) provides that a defendant who intends to defend the proceedings must file a statement of reply within 30 days after the day on which the statement of claim is served. A defendant who is out of time may file a statement of reply only with the leave of the Tribunal.

[3] These proceedings were filed on 17 October 2011. A statement of reply followed on 8 December 2011. Prima facie it was filed out of time. However, by email dated 22 November 2011 Mr Hamilton sought an extension of time on various grounds including the possible service of the statement of claim at an incorrect address and his absence from Ashburton for a period of two weeks. On the same date the Director responded that he would not take issue with the lateness provided the statement of reply was filed and served on or before 5pm on Tuesday 6 December 2011. Mr Hamilton was two days late in meeting this extended deadline but the Director does not take issue.

[4] At the commencement of the hearing on 16 August 2012 the Director through Ms Dalziel maintained his non-objection to the extension sought by Mr Hamilton on 22 November 2011.

[5] The Tribunal accordingly ordered that the application for extension of time be granted.

The parties

[6] These proceedings have been brought by the Director of Human Rights Proceedings pursuant to s 82(2) of the Privacy Act 1993 and as in *Director of Human Rights Proceedings v INS Restorations Limited* [2012] NZHRRT 18 the facts illustrate the application of the Privacy Act in a commercial setting.

[7] The complainant is Ms Patricia Powell who at the relevant time was married to Mr John Moodie. They had a business partnership together comprising a deer and sheep farm in Mt Somers and a spray-painting business in Ashburton called R & J Repairs.

[8] In 2004 Ms Powell and Mr Moodie separated and while their relationship later resumed for a time, she continued to live in Methven where she had found full time employment. In March 2007 the couple's nineteen year old son was killed in a motor vehicle accident. In October 2007 the couple separated permanently.

[9] Mr Hamilton, then a chartered accountant, acted for Ms Powell and her husband for some number of years. On 14 December 2007 he appeared before the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants on various charges. At that time his Certificate of Public Practice was cancelled in the expectation that he would enter into arrangements with another practitioner who would initially supervise and then acquire his (Mr Hamilton's) practice. Those arrangements were ultimately not consummated and came to an end in March 2010 following which Mr Hamilton resumed his practice. Mr Hamilton ceased to be a chartered accountant from 14 December 2007.

[10] On 15 December 2011 Mr Hamilton re-appeared before the Disciplinary Tribunal on six charges to which he pleaded guilty. The Tribunal ordered that his name be removed from the Institute's register of members, required the refunding of $4,746.98 to one of the complainants and ordered Mr Hamilton to pay $12,000 costs and expenses. An undertaking given by Mr Hamilton in the course of these disciplinary proceedings will be referred to later.

The evidence for the plaintiff

[11] The Director called only one witness, being the complainant, Ms Powell. She explained that while the complaint to the Privacy Commissioner had been in her name, it had been made on behalf of her former husband as well.

[12] The panelbeating business was started by Mr Moodie and his friend, Ross Stackhouse, in approximately 1987. The business was taken over by Ms Powell and her husband in the early 1990s and they moved on to their farm in 1994 or 1995. Mr Hamilton has been their accountant from the outset.

[13] It would appear that preparation of the annual accounts for the partnership, as well as the filing of tax and GST returns, has been problematical for a number of years. Delays have been endemic. For example, a letter from Mr Hamilton dated 23 April 2008 addressed to Argyle Welsh Finnigan, a firm of solicitors in Ashburton acting for Ms Powell and Mr Moodie, makes reference to "little progress [being] made in recent months on the accounting work" and goes on to state that "the best we can offer in terms of 'reasonable drafts' were:

- 2002/03 Accounts and balance sheets for the farm and panelbeating business
- 2003/04 Drafts

The letter went on to state:

> We have been working towards draft Balance Sheets for 2004/05, so that the 2005 Returns of Income can be filed – also the analysis of the 2005/06 year's Bank Statements for processing.

[14] A subsequent letter from Mr Hamilton dated 30 October 2009 addressed to Argyle Welsh Finnigan asserted that priority was being given to finalising the balance sheets "from 2001/02 onwards, probably involving amended Returns of Income". There is also reference to the analysis and processing of bank statements "for the more recent years with the objective of filing the outstanding Returns of Income".

[15] Among the exhibits is a letter from Inland Revenue dated 7 April 2010 addressed to Ms Powell and Mr Moodie. The subject line is "Final notice for outstanding returns":

> We've no record of receiving the following returns. Unless the returns are filed by 5 May 2010, we'll begin prosecution proceedings without further notice.
>
> | **Tax Type** | **Period Outstanding** |
> |---|---|
> | Goods and services tax | 31 January 2010 |
> | Income tax | 31 March 2005 |
> | Income tax | 31 March 2006 |
> | Income tax | 31 March 2007 |
> | Income tax | 31 March 2008 |
> | Income tax | 31 March 2009 |
>
> …
>
> Prosecution cases are heard in the District Court. Once proceedings have been lodged at Court they won't be withdrawn.

[16] There are conflicting perspectives as to how this parlous state of affairs came about. Mr Hamilton says that it was largely due to Mr Moodie not providing the necessary documents and information notwithstanding repeated requests, though he (Mr Hamilton) concedes some responsibility by acknowledging that he had heavy work commitments and other priorities which meant that the affairs of the partnership did not receive the attention they deserved.

[17] The evidence given by Ms Powell was that after the final separation in October 2007 she wanted the partnership wound up as soon as possible so that she could get on with her life and be confident that she would not end up in debt for matters she knew nothing about. It therefore became important that the partnership books be brought up to date. She said that in 2008 she contacted Mr Hamilton several times to ascertain progress being made with updating the books but with no success. In her brief of evidence (affirmed at the hearing) she gave the following description:

> 14. I contacted Mr Hamilton several times to see where things were at with the books. Each time he came up with excuses but no clear answers laying blame on John [Moodie] – things like "the information is sitting here on my table", "I need to find out the answer to some questions", yet he wasn't communicating this with John or making it clear to me what was needed.
>
> 15. I discovered after a meeting with John and his solicitor that, although provisional tax had been paid, Mr Hamilton had not filed tax returns for the partnership for some time, perhaps since around 2004. This really concerned me. I didn't know that previous tax returns had not been properly filed and when I asked Mr Hamilton about them he fobbed me off with "that's not a problem". I would pass on letters that I received from IRD and ask what they were about and he would say, "That not a problem, I just have to give them a call".

[18] Faced with this procrastination Ms Powell and Mr Moodie decided to get another accountant to do the books. It was not just a matter of complying with their tax obligations. Ms Powell had also made a relationship property claim under the Property (Relationships) Act 1976 which separately necessitated a determination of the extent and value of the relationship property. They agreed to appoint Mr Brendon Adam of Brophy Knight. On 19 August 2008 their lawyer (Greg Martin) sent a facsimile to Mr Hamilton to request that he send the partnership records to Mr Adam. The fax relevantly stated:

> …
>
> Mr and Mrs Moodie have agreed that, in order to facilitate a valuation of both the farm and repair business that three years of accounts should be prepared by an independent Accountant.
>
> To this end the parties have agreed to appoint Brendon Adam of Brophy Knight to undertake the preparation of these accounts.
>
> We write to inform you of our client's decision and to request copies of all information held by yourself relevant to the period in question for the above trading entities.
>
> Specifically, Brendon has requested the following (if you indeed have this on file):
>
> 1. Business bank statements for the whole period (3 years worth).
> 2. Computer cash book, if one has been kept. If there is no cash book then cheque & deposit books for the whole period.
> 3. GST returns for the whole period.
> 4. Wage book & PAYE details.
> 5. Lists of accounts payable & accounts receivable at the end of each financial year.
> 6. List of stock on hand & cost values at the end of each financial year. For the farm, numbers of livestock & quantity of hay/produce.
> 7. Details of any other income.
>
> I would be grateful if you could let me know should you require any further authority in order for this information to be uplifted to Brendon Adam.

[19] It is common ground that the requested information was never provided by Mr Hamilton. He told the Tribunal that the request for the documents came approximately nine months after his first appearance before the Disciplinary Tribunal. He was facing increased pressure from a backlog of work and from commitments to the Inland Revenue Department. He prioritised his work by giving attention first to those clients who were up to date and only thereafter did he deal with clients in arrears. Ms Powell

and Mr Moodie fell into the latter category. In addition, throughout 2008 he was trying to catch up on fees as he was facing considerable financial pressure. His recollection is that his response to the letter of 19 August 2008 "was only a couple of phone calls". He concedes that it was not an immediate response. In addition Mr Hamilton said that in his view the correct procedure would have been for Mr Adam to approach him directly for the documents and until he had such approach he was not ethically bound to comply with the request from Argyle Welsh Finnigan. However, in cross-examination he conceded that he never went back to Argyle Welsh Finnigan to give notice that he (Mr Hamilton) required a direct approach from Mr Adam, notwithstanding that the last sentence in the letter from Argyle Welsh Finnigan specifically asked Mr Hamilton to let the author of the letter (Mr Martin) know if any further authority was required before the information could be uplifted by Mr Adam.

The 23 September 2009 request for access to personal information

[20] One year on, no progress having been made in extracting the requested documents from Mr Hamilton, Mr Martin of Argyle Welsh Finnigan wrote to Mr Hamilton on 23 September 2009 making specific request on behalf of Ms Powell and Mr Moodie for access to all personal information held by Mr Hamilton about them:

> **Trish and John Moodie – Urgent access request made under Principle 7 of the Privacy Act 1993**
>
> We are instructed to make an urgent application for access to all the personal information that you hold on Trish and John Moodie.
>
> This request is urgent on the basis that the Inland Revenue Department has repeatedly contacted by Trish and John with regard to outstanding tax returns for themselves.
>
> You are required to provide access to the information you hold within 20 working days of this letter.
>
> We look forward to hearing from you in due course.

[21] During the hearing Mr Hamilton observed that the letter erroneously refers to Principle 7 instead of Principle 6. The error, however, is immaterial because Mr Hamilton concedes that he was not then aware of his obligations under the Privacy Act and cannot claim to have been misled by the oversight. In any event the text of the letter is plain and unambiguous in requesting access to all the personal information held in relation to the clients and in stipulating that the information was required within 20 working days. The typographical error is of no consequence.

[22] It is common ground that access to the personal information was not given by Mr Hamilton.

[23] On 30 October 2009 Mr Hamilton presented Ms Powell and Mr Moodie with an account for $25,518.76 for fees owing in respect of work done in the period from February 1998 to March 2003. There was a separate account for $18,506.25 for preparing accounts for the panelbeating business in the period April 1997 to March 2003. A third account for $11,531.25 purported to be for preparation fees for the farm account in the period April 1997 to March 2003.

[24] On 8 December 2009 the solicitors for Ms Powell and Mr Moodie wrote to Mr Hamilton drawing attention to the fact that it was estimated that seven years of accounts remained unfiled. Their clients declined to pay the $25,518.76 but offered $3,000 in full and final settlement of all work undertaken by Mr Hamilton and a further $2,500 per year of consolidated accounts finalised and filed with the Inland Revenue Department. This

package was said to equate to a payment of $20,500 on completion of filing of all accounts up to the winding up of their partnership. By letter dated 14 December 2009 Mr Hamilton rejected the offer.

[25] By letter dated 7 April 2010 Argyle Welsh Finnigan wrote once more to Mr Hamilton requesting the release of all documentation held on behalf of Ms Powell and Mr Moodie:

> Re John and Patricia Moodie
>
> We are instructed to request that you release all documentation held for and on behalf of John and Trish including business records relating to the farming partnership and R & J Repairs.
>
> I would be grateful if you would give me a ring and let me know a time when it will be convenient for someone to come round and pick up these documents.
>
> Trish and John would like to do this as soon as possible therefore I will be very grateful if you would get back to me as soon as you are able.

[26] It is common ground that the documentation was not released. On 13 April 2010 Argyle Welsh Finnigan reported that Mr Hamilton had declined to release the documents.

[27] On 24 May 2010 Ms Powell made a complaint to the Privacy Commissioner. Asked to respond to the complaint Mr Hamilton advised the Privacy Commissioner that he confirmed he held "substantial amounts of their financial information"; that there were a "number of years' Returns of Income presently overdue"; that while there had been some discussion and correspondence on the question of appropriate arrangements to complete the outstanding accountancy work, progress had stalled "over the question of our remuneration".

The 12 July 2010 request for access to personal information

[28] By letter dated 12 July 2010 Argyle Welsh Finnigan wrote once more to Mr Hamilton requesting the release of the personal information as soon as reasonably practicable:

> Re JA & PD Moodie
>
> Thank you for your letter dated 8 July. We are instructed to respond on behalf of both John and Trish. John and Trish note that you have declined to make a proposal as to how the situation with regard to their outstanding IRD returns can be addressed with urgency.
>
> John and Trish see no prospect of you completing this work and therefore we are instructed to request that all of John and Trish's personal information held by you be released to us as soon as practically possible. John and Trish confirm that they are happy to pay your reasonable photocopying costs. Should all the documentation requested not be either delivered to us or be available for collection by Monday the 19th of July, we are instructed to request again the assistance of the Privacy Commissioner.

[29] It is common ground that nothing was released by Mr Hamilton. His reply to Argyle Welsh Finnigan dated 13 July 2010 avoids addressing the explicit request for access to the personal information.

[30] On 17 August 2010 Mr Hamilton received a fax from the lawyers acting for Ms Powell, being Everist Gilchrist Lawyers, in the following terms:

> Moodie documents
>
> Please urgently provide a quote for the photocopying of the Moodie's personal documents. We wish to uplift these documents by the end of the week. This matter has become **urgent**.

> The Moodies are incurring tax penalties which they will seek to recover from you.
>
> We expect the quote by the end of today.

[31] Once again it is common ground that the requested documents were not released.

The effect on Ms Powell of the failure to provide access to her personal information

[32] Ms Powell said that she found the whole situation very stressful. Upon her relationship with Mr Moodie coming to an end she wanted all the partnership affairs sorted out as soon as possible as she felt that she could not move on with her life until, as she said, "the books are sorted".

[33] In addition she felt terrified when she learnt about the unfiled tax returns and the prospect of her being found to owe Inland Revenue a large sum of money. She has worried constantly over the possibility of substantial penalties being imposed. Of necessity she has had to keep in touch with Inland Revenue. Each contact has been a reminder of her fears and anxieties.

[34] Upon the death of her son she had wanted to go back to the United Kingdom to see her family as her mother and father were too frail to make the journey to New Zealand for her son's funeral. She did not, however, leave New Zealand because of her concerns centred on the unfiled tax returns and the inability to achieve a separation in which all partnership liabilities for tax were resolved. The protracted and ongoing difficulties she was experiencing in this regard meant that following the death of her father she did not return to the UK to visit her mother as she (Ms Powell) was afraid that she would be stopped at the border because of the unfiled tax returns. When in 2009 her mother died unexpectedly and Ms Powell did return to the UK for the funeral, she was so concerned about being stopped at the border that she telephoned Inland Revenue to explain what was happening with regard to Mr Hamilton and with regard to the complaint to the Privacy Commissioner.

[35] Ms Powell believes that Mr Hamilton has caused her a lot of extra stress at a difficult time. In addition, she explained:

> It has been almost five years since my marriage ended. Having the partnership books unresolved is a constant reminder to me of the separation and the circumstances in which the marriage ended. It has also interfered with my plans for the future.

The evidence for Mr Hamilton

[36] Mr Hamilton gave evidence on his own behalf. Apart from producing a number of documents he did not call any other evidence.

[37] He described how the inquiries which preceded his appearance before the Disciplinary Tribunal on 14 December 2007 and on 15 December 2011 had absorbed an inordinate amount of time causing an increasing backlog of work in his practice. At the same time he was facing a substantial decline in turnover. These factors affected the attention he gave to the Privacy Act request and the response he gave not only to that request but also to the related requests that he release the documents to Mr Adam of Brophy Knight.

[38] He acknowledges that the request dated 19 August 2008 for the release of business records to Brophy Knight was never complied with. He claimed that he was waiting for a direct approach from Mr Adam himself in accordance with Mr Hamilton's

understanding of the proper way in which a handover was to take place. He nevertheless conceded that he did not communicate this either to Argyle Welsh Finnigan or to Mr Adam himself notwithstanding the invitation from Argyle Welsh Finnigan that should he (Mr Hamilton) require any further authority he was to contact Mr Martin of that firm.

[39] Mr Hamilton told the Tribunal that he did not claim that because he believed he was owed money by Ms Powell and Mr Moodie he was therefore entitled to withhold documents or personal information.

[40] In relation to the Privacy Act request dated 23 September 2009 Mr Hamilton said that he met with Mr Martin of Argyle Welsh Finnigan and with Mr Moodie on 27 October 2009 and came away from that meeting believing that the Privacy Act request of 23 September 2009 had been superseded by the discussions at the meeting. However, Mr Hamilton's handwritten note of that meeting makes no reference to the Privacy Act request being discussed. Rather it records that it was agreed in principle that it was better for Mr Hamilton to complete the outstanding work rather than any other accountant. The note records that Mr Hamilton would require immediate payment on account for work done in relation to previous years.

[41] Mr Hamilton concedes that at the meeting on 27 October 2009 no reference was made to the Privacy Act request but asserts that it was implicitly overtaken by events once it was agreed with Mr Moodie and Mr Martin that Mr Hamilton was to continue to prepare the accounts. At the hearing it was put to Mr Hamilton that the request dated 23 September 2009 was for access to personal information, not a request that the file be handed over. Mr Hamilton did not appear to understand the difference but told the Tribunal that all his clients had open access to their records and only needed to call at his office to inspect any specific record or document nominated by them. When it was pointed out to Mr Hamilton that this did not in any way amount to compliance with Principle 6 of the Privacy Act he said that he was familiar neither with the Act nor with Principle 6 and conceded that at none of his meetings with Mr Martin or with Mr Moodie had the request for access to personal information been withdrawn. He also accepted that as at 2009 and 2010 he knew nothing about his responsibilities under the Privacy Act. In his submissions he described the Act as a "technical provision".

[42] In relation to the request dated 7 April 2010 requiring the release of all information held for or on behalf of Ms Powell and Mr Moodie, Mr Hamilton said that at the time he was "absolutely stuffed", having just spent the previous two months cleaning out his office, arranging the sale of the premises and shifting his practice to an upstairs level of the same building. All client records had been "tossed into boxes" and the lawyers were frustrating any attempts he made to get ahead with the accounts. In relation to the letter dated 13 April 2010 from Mr Martin to Mr Moodie reporting that Mr Hamilton had declined to release the documents, Mr Hamilton said that this assertion was false.

[43] Mr Hamilton also referred to a meeting held on 7 July 2010 attended by himself, Ms Powell, Mr Moodie, Mr Martin and Mr Everist. His handwritten note contains the following entry:

> Their priorities:
>
> 1. Privacy Act
>   - Were the records readily available
>   - Would I release them if required.

[44] Asked whether he ever responded to the enquiry whether he would release the records if required, Mr Hamilton said that he gave no response at the meeting and while he wrote a letter to Argyle Welsh Finnigan the following day, he accepted that that letter made no reference to the question he has recorded as being put to him at the meeting. Mr Hamilton believes that he never responded to the question.

[45] In relation to the letter from Argyle Welsh Finnigan dated 12 July 2010 requesting the release of all personal information, Mr Hamilton said that there was no release.

[46] Asked why he had not complied with the later request from Everist Gilchrist Lawyers dated 17 August 2010 Mr Hamilton said that even though he had been asked to provide a quote for the photocopying cost he felt that it was a "big mission" to locate the documents let alone adding up the photocopying cost. He added that "it was a ridiculous request as far as I am concerned".

[47] Mr Hamilton said that the only documentation released by him was the delivery he made to Argyle Welsh Finnigan on 2 December 2011. The circumstances were that in anticipation of the disciplinary hearing on 15 December 2011 he had given an undertaking to the New Zealand Institute of Chartered Accountants that he would deliver up all records he held in relation to Mr Moodie and Ms Powell and their partnership. In return one or more of the charges would be dropped. He said that there were "great volumes of paper" involved and the documents were not held tidily or in any order. The items he delivered were "a token gesture". He selected for delivery documents which were easily identifiable and in a form as originally delivered by the clients. He described these documents as "peripheral" in that they were the client's own documents as opposed to bank statements and the like. He accepted that the undertaking was to provide all the information and records and that as at 16 August 2012 (the first day of the hearing before the Human Rights Review Tribunal) he had not complied with the undertaking of December 2011 other than making the single "token gesture" referred to.

[48] Asked in cross-examination whether he still held information relating to the partnership of Ms Powell and Mr Moodie, Mr Hamilton said that he held "heaps" and was able to provide a detailed description of the categories of accounting records and the working papers he referred to.

[49] Asked whether, if required by the Tribunal, he would hand over all the personal information relating to Ms Powell and Mr Moodie, Mr Hamilton said that it would take him an indeterminate amount of time to comply with the order. He would be "most reluctant to spend two weeks doing this". Asked whether, if he received a court order directing the production of the documents he would give a different answer, Mr Hamilton said that he had already given an undertaking to the New Zealand Institute of Chartered Accountants to provide the personal information. He challenged, however, whether the accounting records were personal information. He said that "If we are talking about information I have produced and not been paid for" he did not consider this to be personal information about his former clients. The distinct impression conveyed by Mr Hamilton was that he was unlikely to comply with any order requiring him to give Ms Powell access to her personal information.

[50] Mr Hamilton conceded, when asked, that given his long association with Ms Powell and her husband, he was aware that in 2004 the couple were experiencing marital difficulties, that in March 2007 they had suffered the tragic death of their son and that in October 2007 the couple had separated permanently. He was also aware that finalisation of the accounts for the partnership had been requested because the

relationship had come to an end and because Ms Powell had made a claim under the Property (Relationships) Act 1976.

Credibility assessment

[51] We found Ms Powell to be a sincere and honest witness. In the period from 2008 to 2011 she was under enormous stress. This was because of the break up of her marriage, the death of her son, the seemingly futile attempts to resolve her relationship property claim and the demands being made by the Inland Revenue Department (which included threats to prosecute her). Mr Hamilton knew of each of these factors. She spoke of being unable to move on with her life, of being terrified when she learnt of the unfiled returns and described the trauma of not being able to travel to the United Kingdom to see her parents after the death of her son and of not being able to see her mother before she passed away. As she put it:

> I feel that Mr Hamilton has really caused me a lot of extra stress at a very difficult time.

[52] Mr Hamilton, on the other hand, impressed as a person in denial and a blame shifter. He is resistant to any view different to his own. By way of a selective and self-referenced reading of events he interprets opportunistically what people say and write in order to best suit his own purposes. For example, he will read a letter not according to its terms but according to what he believes it ought to say or contain. He is untroubled by promising to do things and then not acting as promised, whether in the context of a promise to prepare accounts or in the context of giving a solemn undertaking in the face of disciplinary proceedings. He is a muddler and incompetent in the management of his professional affairs.

[53] Where there is a conflict of evidence we prefer the evidence of Ms Powell.

Whether the access request related to "personal information"

[54] Principle 6 confers an entitlement to access "personal information" ie information about an identifiable individual. The definition in s 2(1) relevantly provides:

> … **personal information** means information about an identifiable individual …

The term "individual" is defined in s 2(1) as meaning a natural person, other than a deceased natural person. The definition accordingly excludes a company.

[55] There is at present no definitive judicial interpretation of the term "personal information" and different obiter opinions have been expressed. See in particular *Harder v Proceedings Commissioner* [2000] 3 NZLR 80 (CA) at [23] (Elias CJ, Thomas and Tipping JJ), [49] (Gault J) and [57] (Henry J). Nevertheless there is a consensus that in the vast majority of cases the issue whether information is "personal information" will be resolved by a fact-based analysis. Context is all important: *Sievwrights v Apostolakis* HC Wellington CIV2005-485-527, 17 December 2007 (Ronald Young J, Dr A Trlin and G Kerr) at [10] and [15] and *Grupen v Director of Human Rights Proceedings* [2012] NZHC 580, 29 March 2012 (Peters J, BK Neeson and RK Musuku) at [32] and [33].

[56] The fact that the information relates to more than one person does not mean that the information loses its character of being "personal information" about both persons. Nor is it necessary for the individual concerned to be identified in the information without the use of any extrinsic information or knowledge. The definition in s 2 of personal information requires only that the information be about an identifiable individual not that the individual be identified in the information: *Sievwrights v Apostolakis* at [16] and [17] and *Grupen v Director of Human Rights Proceedings* at [33] and [35].

[57] In *Sievwrights v Apostolakis* at [12] it was expressly acknowledged that information relating to a person's personal finances is "self-evidently" personal information.

[58] In the present case Ms Powell and Mr Moodie were in partnership and the Principle 6 request dated 23 September, made on their joint behalf, read in context with the earlier letter dated 19 August 2008, clearly requested access to the accounting records and information held by Mr Hamilton. The access request of 23 September 2009 required urgency on the basis that the Inland Revenue Department had repeatedly contacted Ms Powell and Mr Moodie with regard to outstanding tax returns. The subsequent access request dated 12 July 2010 again presses the request in the context of the need to address with urgency "outstanding IRD returns" and continues:

> John and Trish see no prospect of you completing this work and therefore we are instructed to request that all of John and Trish's personal information held by you be released to us as soon as practically possible.

[59] On the facts there can be no doubt that the access requests under Principle 6 related to personal information and that it was information about an identifiable individual, in this case Ms Powell.

Whether access given to personal information

[60] It is clear from the evidence, including the admissions made by Mr Hamilton, that the requests for access to personal information made on 23 September 2009 and 12 July 2010 were never complied with. Nor did Mr Hamilton deliver up any of the documents for which he was repeatedly pressed in the additional demands of 19 August 2008, 7 April 2010 and 17 August 2010. On his own admission the only time he has provided anything was on 2 December 2011 when he delivered "peripheral" documents as "a token gesture" in purported compliance with an undertaking he had given to secure the reduction of the number of charges he was due to face before the Disciplinary Tribunal on 15 December 2011.

Whether request for access to personal information withdrawn

[61] Mr Hamilton contended that at the 27 October 2009 meeting attended by him, Mr Moodie and Mr Martin of Argyle Welsh Finnigan, the Privacy Act request was implicitly overtaken by the agreement that Mr Hamilton was to continue to prepare the accounts. This is an untenable contention. Any agreement that Mr Hamilton prepare the accounts did not in any way affect, qualify or abridge the request which had been made by Ms Powell and Mr Moodie for access to all their personal information held by Mr Hamilton. Further, Mr Hamilton conceded that he was familiar neither with the Act nor with Principle 6 and at none of his meetings with Mr Martin or with Mr Moodie was the request for access to personal information withdrawn. He therefore had no basis to contend that the Privacy Act request was withdrawn. Indeed his own handwritten note of the meeting does not suggest that any reference was made to the Privacy Act request and he expressly conceded at the hearing that no reference was made at the meeting to the request.

[62] Neither request under Principle 6 having been withdrawn (expressly or impliedly) it follows that on the admitted facts Mr Hamilton is in breach of the Act. We now address his statutory responsibilities in greater detail.

The statutory obligations resting on Mr Hamilton

[63] The letters dated 23 September 2009 and 12 July 2010 contained requests for access to personal information under 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.

[64] The term "agency" is defined in s 2 of the Act as meaning:

> … any person or body of persons, whether corporate or unincorporate, and whether in the public sector or in the private sector ….

The definition does exclude certain persons, agencies and institutions. None of the exclusions have application on the facts. It is clear that Mr Hamilton is an "agency" within the meaning of s 2(1).

[65] The fundamental right of an individual to access personal information held by an agency is reinforced and underlined 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.

[66] 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.

[67] 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. The Tribunal must also be of the opinion that there is no proper basis for that decision.

[68] The deeming provision has direct application to the present case as 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. It is equally clear that there was no proper basis for the deemed failure. Mr Hamilton was not aware of his obligations under the Privacy Act, did not care to take advice and made no attempt to inform himself as to his obligations. In his arrogant indifference to the plight of Ms Powell and Mr Moodie he chose to ignore their requests for access to personal information. Indeed over a period of years he managed to stonewall every attempt to extract even so much as a single document from him. He has made only one "token gesture" delivery of "peripheral" documents and that was to serve his own purposes on the eve of the December 2011 disciplinary proceedings.

Legal consequences of non-compliance

[69] The legal consequence of the failure by Mr Hamilton to comply with the s 40(1) time limits is that there was a deemed refusal to make the information available. We have found that there was no proper basis for that deemed refusal. That refusal, in turn, is defined by s 66(2)(a)(i) as "an interference with the privacy of an individual". Section 84 of the Act provides that these proceedings having been brought by the Director of Human Rights Proceedings under s 82 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.

[70] It will be clear from the preceding narrative that we are well satisfied on the balance of probabilities that Mr Hamilton has interfered with the privacy of Ms Powell.

Remedies

[71] In his statement of claim the Director seeks the following remedies:

> **[71.1]** A declaration that the action of Mr Hamilton in refusing Ms Powell's request for personal information constitutes an interference by Mr Hamilton with the privacy of Ms Powell.
>
> **[71.2]** An order directing Mr Hamilton to make available to Ms Powell the personal information sought.
>
> **[71.3]** Damages.
>
> **[71.4]** Costs.

[72] This being a s 66(2) and (3) case it is not necessary for the Director to establish the adverse consequences set out in s 66(1)(b). See *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 (Paterson J, PJ Davies & L Whiu) at [83].

[73] It is to be borne in mind that s 85(4) provides that while it is not a defence to proceedings under s 82 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. On the facts there is no arguable case that the interference was unintentional or without negligence. As will be seen we also take into account Mr Hamilton's conduct.

A declaration

[74] We address first the question of a declaration. In *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, SL Ineson and PJ Davies) 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 the Director of a formal declaration that the action of Mr Hamilton in failing to respond to the personal information requests of 23 September 2009 and 12 July 2010 within the time allowed by s 40 of the Act was an interference with the privacy of Ms Powell.

An order requiring that the requested information be made available

[75] As to an order directing Mr Hamilton to provide the requested personal information we are amply satisfied that the making of such order (whether regarded as being made under s 85(1)(b) or (d)) is both justified and necessary. The access request of 23 September 2009 was made three years ago. To no effect. So too in the case of the request made on 12 July 2010. Disciplinary proceedings heard on 15 December 2011 resulted only in the delivery up of "peripheral" information as a "token gesture" notwithstanding Mr Hamilton's undertaking to deliver up all of the information and records he held in relation to Ms Powell and Mr Moodie (and necessarily, their partnership). Without this undertaking he would have faced (on his own admission) an additional charge of unjustified retention of records.

[76] Mr Hamilton freely acknowledges that he is in breach of this undertaking, saying that he has not had the time to discharge it. The Tribunal notes that it is now well over eight months since the disciplinary hearing and even the prospect of a hearing before this Tribunal was insufficient to motivate Mr Hamilton into action. He admitted in cross-examination by Ms Dalziel that he continues to hold all the accounting records for Ms Powell and Mr Moodie (and their partnership) as well as "heaps" of other information, all of it located in his office. Asked whether, if required, the documents and information could be provided within (say) two to three weeks of being so ordered he said he could not say.

[77] From these responses and from his other evidence the impression gained by the Tribunal is that Mr Hamilton still believes (notwithstanding his denial) he can retain the personal information until he is paid. He also believes that the accounting information and records are not personal information. On both accounts he is mistaken as to the law.

[78] In these circumstances the Tribunal has determined that an order is to be made requiring Mr Hamilton to make available to Ms Powell all of the personal information to which she has sought access in the requests dated 23 September 2009 and 12 July 2010. Mr Hamilton is to comply with this order within twenty working days after the date of this decision. If Mr Hamilton is in doubt whether any information in his possession is personal information about Ms Powell that information is to be made available for inspection by the Director in any event with leave reserved to both parties to come back to the Tribunal for a ruling if differences cannot be resolved. Leave is also reserved for the parties to seek such amendment or modification of this order as the circumstances may require.

[79] We address next the question of damages.

Damages

[80] The Tribunal is empowered by s 85(1)(c) to grant a remedy in the form of damages in accordance with s 88. Section 88 relevantly provides:

> **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.
>
> (1A) ...
> (2) Damages recovered by the Director of Human Rights Proceedings under this section shall be paid to the aggrieved individual on whose behalf the proceedings were brought or, if that individual is a minor who is not married or in a civil union or lacks the capacity to manage his or her own financial affairs, in the discretion of the Director of Human Rights Proceedings to Public Trust.
> (3) ....

[81] The Director does not seek damages in relation to s 88(1)(a) (pecuniary loss). The Director does, however, seek damages for "loss of any benefit" under s 88(1)(b) and for humiliation, loss of dignity, and injury to the feelings of the aggrieved individual" under s 88(1)(c).

[82] The effect of s 88(2) is that while the damages are payable to the Director, it is his responsibility to pay to Ms Powell any damages awarded.

Damages – loss of any benefit

[83] As s 88(1)(b) makes explicit, the loss of benefit need not be of a monetary kind but the benefit must be one which the aggrieved individual might reasonably have expected to obtain but for the interference.

[84] The submission for the Director was that the refusal by Mr Hamilton to release the personal information meant that Ms Powell lost the benefit of providing information and returns to the Inland Revenue Department in a timely fashion. The situation is said to be analogous to those circumstances where the personal information was either required for or could have been deployed in court or tribunal proceedings as in *Proceedings Commissioner v Health Waikato Ltd* (2000) 6 HRNZ 274, *Winter v Jans* and *MacMillan v Department of Corrections* (Decision No. 08/04, HRRT40/03, 16 April 2004). The submissions for the Director emphasised the evidence of Ms Powell to the effect that she has for some time sought peace of mind in relation to her obligations to Inland Revenue, a benefit she has clearly lost. This loss of peace of mind is a provable damage under this heading. See *Winter v Jans* at [45] and [48].

[85] While it may be a matter of phrasing, we are of the view that an alternative formulation of the benefit lost is that were it not for Mr Hamilton's sustained and obdurate refusal to provide the requested personal information, Ms Powell would have been able to obtain advice and assistance from a competent accountant able to provide effective representation. The benefit of timely and competent accounting advice which Ms Powell has lost is underlined by the letter from Inland Revenue dated 7 April 2010

set out in the first few paragraphs of this decision threatening prosecution. But however framed we are satisfied a loss of benefit is established by the evidence.

[86] In *Director of Human Rights Proceedings v Grupen* [2010] NZHRRT 22 a barrister was found to have interfered with the privacy of a client by failing to provide that client with access to a diary in which the barrister had recorded her attendances relating to the affairs of the client and the nature of those attendances. The Tribunal awarded the client $5,000 for "loss of any benefit" under s 88(1)(b) and $3,500 under s 88(1)(c) for emotional harm. Both awards were upheld by the High Court in *Grupen v Director of Human Rights Proceedings*. In the much earlier decision of *Winter v Jans* the High Court awarded damages under s 88(1)(b) of $8,000 and under 88(1)(c) of $7,000 against a real estate agent who had declined to make available to Mr and Mrs Jans a file relating to the mortgagee sale of their property. The file later went missing. This April 2004 award requires upward adjustment to make it comparable to current money values.

[87] In our view the award under s 88(1)(b) in the present case is to be fixed at $5,000 which, in the circumstances may be thought to be on the conservative side.

Emotional harm

[88] We turn now to s 88(1)(c) and the issue of humiliation, loss of dignity and injury to the feelings of Ms Powell.

[89] The very nature of these heads of damages means that there is a substantial subjective element to their assessment. Not only are the circumstances of humiliation, loss of dignity and injury to feelings fact specific, they also turn on the personality of the aggrieved individual.

[90] Having had the opportunity to see and hear Ms Powell we have arrived at the conclusion that not only is she is a credible witness, she is an intrinsically sincere individual, trusting of professional persons and of limited understanding of business accounting matters and finances. Above all, however, her life experiences from the time of her separation from Mr Moodie in 2004 have led to emotional fragility. These experiences include not only the separation but also the death in March 2007 of her 19 year old son and the subsequent hospitalisation of her elder son. In October 2007 Ms Powell separated from her husband permanently. The degree of anxiety generated by the chronic failure of Mr Hamilton to provide timely and competent accounting services has already been described under the heading "The effect on Ms Powell on the failure to provide access to her personal information". Those effects included her decision not to return to the United Kingdom to see her family following the death of her son and her ongoing preoccupation to ensure that Inland Revenue is given regular updates concerning her attempts to extract from Mr Hamilton sufficient information to instruct another accountant. Those attempts began with the letter from Argyle Welsh Finnigan dated 19 August 2008 and continued with the subsequent Privacy Act request dated 23 September 2009, the second Privacy Act request of 7 April 2010 and the letter from Everist Gilchrist Lawyers sent later in the same year.

[91] Mr Hamilton frankly concedes that he was aware of the separation, the tragic events relating to the two sons and the fact that Ms Powell made a relationship property claim.

[92] Mr Hamilton was in a professional relationship with Ms Powell and abused her trust. His constant turning away of her requests for information led to her having to beg for indulgences from Inland Revenue. His intractable indifference to her visible suffering

coupled with his complete absence of remorse compounds the humiliation, loss of dignity and injury to feelings experienced by Ms Powell. Even at the hearing before the Tribunal Mr Hamilton displayed an attitude of almost complete contempt for Ms Powell by unashamedly self-characterising his single delivery of documents as a "token gesture". When asked about the intervening eight months in which no further documents had been delivered up Mr Hamilton was without conscience or concern. Asked by the Tribunal whether he, with the benefit of hindsight, would have acted differently, Mr Hamilton replied in the negative, placing the responsibility for events on Mr Moodie and the lawyers representing Ms Powell and Mr Moodie.

[93] Asked about his financial circumstances Mr Hamilton said that he had little in the way of financial assets outside his accounting practice. His main asset is his home. A family trust owned the building in which his practice was situated. That asset was sold to satisfy debts owed to financial institutions. The penalties imposed by the Disciplinary Tribunal were paid from money borrowed from the family trust. He said the trust still has some proceeds from the sale of the practice building.

[94] In the circumstances we are of the view that an award of $15,000 is appropriate under s 88(1)(c).

Costs

[95] The Director has applied for costs. In our view an award of costs is fully justified. These proceedings should never have been necessary. The evidence overwhelmingly establishes that Mr Hamilton made no effort to comply with his obligations under Principle 6. The time span of his default is measured in years. The first access request was dated 23 September 2009 and the second dated 12 July 2010. Even disciplinary proceedings did not shake his resolve to refuse access. His unwavering determination to do things his way is illustrated by the contemptuous manner in which he breached the undertaking he gave to the Disciplinary Tribunal in December 2011.

[96] The discretion to award costs under s 85(2) of the Privacy Act 1993 is a broad one. Where, as here, a defendant has no defence to the proceedings and needlessly wastes the time of the plaintiff and of the Tribunal, costs will usually follow the event. Quantum is ordinarily to be fixed to reflect a reasonable contribution (rather than full recovery) of the costs actually incurred by the successful party: *Herron v Speirs Group Limited (Costs)* [2006] NZHRRT 29 (4 August 2006) at [7] and [14].

[97] In the present case we will follow the approach taken in *Orlov v Ministry of Justice and Attorney-General* [2009] NZHRRT 28 (14 October 2009) by making an award of $7,500 based on $3,750 for each of the two days of the hearing. This sum is intended to be all inclusive and so encompasses all disbursements and any GST.

Formal orders

[98] For the foregoing reason the decision of the Tribunal is that:

> **[98.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that Mr Hamilton interfered with the privacy of Ms Powell by failing to respond to her personal information requests dated 23 September 2009 and 12 July 2010 within the time allowed by s 40 of the Act.
>
> **[98.2]** Damages of $5,000 are awarded against Mr Hamilton under ss 85(1)(c) and 88(1)(b) of the Act for loss of benefit.

[98.3] Damages of $15,000 are awarded against Mr Hamilton under ss 85(1)(c) and 88(1)(c) of the Act for humiliation, loss of dignity and injury to feelings.

[98.4] An order is made under s 85(1) of the Act that Mr Hamilton is to make available to Ms Powell all of the personal information to which she has sought access in the requests dated 23 September 2009 and 12 July 2010. Mr Hamilton is to comply with this order within twenty working days after the date of this decision. If Mr Hamilton is in doubt whether any information in his possession is personal information about Ms Powell that information is to be made available for inspection by the Director in any event with leave reserved to both parties to come back to the Tribunal for a ruling if differences cannot be resolved. Leave is also reserved for the parties to seek such amendment or modification of this order as the circumstances may require.

[98.5] Costs of $7,500 are awarded against Mr Hamilton in favour of the Director.

.....	.....	.....
Mr RPG Haines QC	**Ms W Gilchrist**	**Hon K Shirley**
Chairperson	**Member**	**Member**