IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2012] NZHRRT 5**

	Reference No. HRRT 021/2011
IN THE MATTER OF	**A CLAIM UNDER THE PRIVACY ACT 1993**
BETWEEN	**JAMES LOCHEAD-MACMILLAN**
	PLAINTIFF
AND	**AMI INSURANCE LIMITED**
	DEFENDANT

AT PUKEKOHE

Mr RPG Haines QC, Chairperson
Mr R Musuku, Member
Mr B Neeson, Member

Mr Lochead-MacMillan in person
Mr C Hurren for Defendant

DATE OF HEARING: 22 February 2012

DATE OF DECISION: 27 March 2012

DECISION OF TRIBUNAL

INDEX

Introduction

[1] According to its website (last accessed 29 February 2012) AMI Insurance Limited (AMI) is presently the largest wholly New Zealand owned fire and general insurance company. Its primary business is insuring homes, contents and vehicles, as well as some farms and boats.

[2] In September 2006 Mr and Mrs Lochead-MacMillan insured their Waiuku home and contents with AMI. On 9 January 2010 a fire occurred at a garage/sleepout and a claim to AMI was notified the following day. In the course of the investigation and during the negotiations over the claim Mr and Mrs Lochead-MacMillan requested that AMI provide specific personal information. In these proceedings under the Privacy Act 1993 they contend that AMI failed to respond to their requests in a manner that complied with AMI's responsibilities as an agency under the Privacy Act.

Background

[3] The fire occurred at the Lochead-MacMillan home on 9 January 2010. The claims on the house and household contents policies were notified to AMI the following day. On 22 January 2010 AMI engaged VFR Consulting Limited (VFR) to carry out initial investigations regarding the circumstances of the fire. Mr Neil McKay of VFR inspected the scene of the fire and audio-recorded two interviews with Mr and Mrs Lochead-MacMillan with the intention that transcripts be prepared and signed by them.

[4] On 4 February 2010 Mrs Lochead MacMillan sent an email to Ms Shepperson, Branch Manager of AMI Pukekohe, requesting a copy of:

[4.1] The audio files recorded by Mr McKay.

[4.2] The transcripts.

AMI did not respond to this request but on 22 February 2010 Mr Lochead-MacMillan received from Mr McKay an incomplete transcript of the second interview with a request that it be signed as accurate and returned. Because Mr Lochead-MacMillan had reservations as to the accuracy of the transcript he declined to sign it. A transcript of the first interview was not provided until several months later.

[5] On 24 February 2010 Ms Shepperson received the VFR fire investigation report through the solicitors for AMI, Wynn Williams & Co.

[6] Unaware of this fact, Mrs Lochead-MacMillan by email dated 2 March 2010 wrote again to Ms Shepperson seeking reasons why the claim was still under investigation and renewing the request for a copy of the audio files made by VFR. It is clear that at this stage Mr and Mrs Lochead-MacMillan were worried by reason of the fact that settlement of the claim appeared to be taking a long time and Mr Lochead-MacMillan had been told by AMI that there were "serious areas of concern". Mr and Mrs Lochead-MacMillan themselves held concerns about aspects of the investigation conducted by VFR.

[7] On 5 March 2010 Ms Shepperson wrote to Mr and Mrs Lochead-MacMillan to the effect that the investigations had been completed and that the claim had been formally accepted. The information requests under the Privacy Act were not, however, addressed by Ms Shepperson. In her evidence to the Tribunal she said that the reason was that she (Ms Shepperson) was of the view that acceptance of the insurance claims would dispose of the need for the information to be provided. This assumption was incorrect as demonstrated by the fact that on 13 April 2010 Mrs Lochead-MacMillan sent a further email pressing for the requested information. AMI Pukekohe replied on 14 April 2010 to the effect that Mrs Lochead-MacMillan's concerns would be responded to early in the week following. There was in fact no response. It also transpired that on some indeterminate date the audio files of the two interviews were destroyed by VFR. Mr and Mrs Lochead-MacMillan were not aware of this development.

[8] On 6 May 2010 Ms Shepperson met with Mr and Mrs Lochead-MacMillan at AMI Pukekohe to discuss settlement of the insurance claims. Mr and Mrs Lochead-MacMillan say that at that meeting they requested a copy of the fire investigation report from VFR and reminded Ms Shepperson of the earlier requests of 4 February 2010 and 2 March 2010. Ms Shepperson says that at the 6 May 2010 meeting no mention was made of the information request. As to this both Mr and Mrs Lochead-MacMillan gave evidence on the point and neither were challenged in cross-examination. We accept their evidence. As will be seen, it is clear that by 21 May 2010 Ms Shepperson knew that disclosure of the VFR fire investigation report had been requested because she wrote on that date advising Mr and Mrs Lochead-MacMillan that the report would not be released. There is no record of a written request for the document prior to Ms Shepperson's letter of 21 May 2010 and it is logical to assume that the request she was responding to was that which had been made orally at the 6 May 2010 meeting when access to it was of concern to Mr and Mrs Lochead-MacMillan.

[9] At the meeting on 6 May 2010 there was also discussion of the amount AMI was prepared to pay in settlement of the insurance claims. At first the offer was for a cash settlement in relation to both the home and the home contents claims. Mr and Mrs Lochead-MacMillan rejected the cash offer in relation to the home policy and at a later point it was agreed that AMI would reinstate the building. As to the contents, AMI offered $59,789.20 at the 6 May 2010 meeting. On 10 May 2010 Mrs Lochead-MacMillan responded with a recalculation of the AMI spreadsheet and claimed $74,029.98. To this Ms Shepperson responded with a counter-offer of $64,525.36. By email dated 19 May 2010 Mr and Mrs Lochead-MacMillan accepted this offer. It is clear from the terms of their email that the AMI figure was accepted with reluctance. They referred again to the unmet requests under the Privacy Act and the fact that the twenty working days prescribed for the provision of the information had long since passed.

[10] They told the Tribunal that at the time of their acceptance they felt substantially disadvantaged by reason of the fact that they had neither the audio tapes nor the VFR fire investigation report. They wanted this information to help establish that the settlement ought to have been at their figure of $74,029.98 but not having access to the requested information and believing that the matter would drag on, they reluctantly decided that it was better to accept the AMI offer. Mr Lochead-MacMillan was at that time in his final year of a teaching degree and also working full-time. He and his wife were not then aware that they had the right to complain to the Privacy Commissioner both as to the delay in responding to their Privacy Act requests and as to the decision to withhold the VFR fire investigation report.

[11] As mentioned, by email dated 21 May 2010 Ms Shepperson advised that the fire investigation report from VFR would not be disclosed on the grounds that legal advice had been received that the report was privileged. On the same day Ms Shepperson sent to Mr and Mrs Lochead-MacMillan a General Discharge in relation to the contents claim showing an agreed settlement at $64,528.44. This offer was accepted by Mr and Mrs Lochead-MacMillan on 26 May 2010.

[12] A transcript of the first interview was eventually received in early June 2010.

[13] Still being unhappy, on 8 July 2010 Mr and Mrs Lochead-MacMillan made an oral request for a full copy of the AMI insurance claim files. By letter dated 29 July 2010 AMI released the requested documents with the exception of the fire investigation report from VFR.

[14] Mr and Mrs Lochead-MacMillan then lodged a complaint with the Privacy Commissioner after discovering from research on the internet that they were able to do so. The outcome of that complaint and investigation was that AMI accepted that the VFR fire investigation was to be released and by letter dated 3 November 2010 AMI:

> **[14.1]** Provided Mr and Mrs Lochead-MacMillan with the requested VFR report.
>
> **[14.2]** Apologised for not responding to the 2 March 2010 Privacy Act request until 21 May 2010.

Analysis of facts

[15] The facts establish that Mr and Mrs Lochead-MacMillan made multiple requests to AMI for personal information. A summary follows with a note as to the outcome:

[15.1] 4 February 2010 - request for copy of audio files and transcripts. The request for the audio files was never acknowledged and never complied with. At some point the audio files were destroyed by VFR. An incomplete transcript of the second interview was received by Mr and Mrs Lochead-MacMillan from VFR on 22 February 2010. The request for the transcripts was not acknowledged by AMI until 21 May 2010 and a transcript of the first interview was not provided until early June 2010.

[15.2] 2 March 2010 - request for audio files repeated.

[15.3] 13 April 2010 - requests of 4 February 2010 and 2 March 2010 repeated.

[15.4] 6 May 2010 - request for copy of the VFR fire investigation report. Request declined on 21 May 2010. Report provided on 3 November 2010 after complaint to Privacy Commissioner.

[15.5] 19 May 2010 – requests of 4 February 2010, 2 March 2010 and 13 April 2010 repeated.

[15.6] 8 July 2010 - request for copy of AMI file. File provided on 29 July 2010 minus VFR fire investigation report. Report eventually provided on 3 November 2010.

[16] It will be seen that while the first three requests were ignored, the requests made on 6 May 2010 and 8 July 2010 resulted in a decision (ie whether the particular request was to be accepted) within the 20 working day period prescribed by s 40 of the Privacy Act. Whether the VFR fire investigation report was properly withheld is an issue addressed later in this decision.

[17] It has not been disputed by AMI that the documents requested were "personal information" or that the personal information held by VFR was within AMI's responsibilities under the Privacy Act.

The obligations of AMI under the Privacy Act

[18] This being a case in which access to personal information was required by Mr and Mrs Lochead-MacMillan it is to be recalled that Principle 6 of the information privacy principles set out in Part 2 of the Privacy Act confers on an individual an entitlement:

[18.1] To obtain from the agency confirmation of whether or not the agency holds personal information; and

[18.2] To have access to that information.

The text of Principle 6 follows:

> 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.

[19] 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.

[20] 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.

[21] 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) ...

[22] 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.

[23] 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) and (4). These deeming provisions are of particular significance to the present case given that in relation to the requests of 4 February 2010, 2 March 2010 and 13 April 2010 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 is received" standard was unquestionably breached.

66 Interference with privacy

(1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—

(a) in relation to that individual,—

(i) the action breaches an information privacy principle; or

(ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or

(iii) the provisions of Part 10 (which relates to information matching) have not been complied with; and

(b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—

(i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or

(ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or

(iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

(2) Without limiting subsection (1), an action is an interference with the privacy of an individual if, in relation to an information privacy request made by the individual,—

(a) the action consists of a decision made under Part 4 or Part 5 in relation to the request, including—

(i) a refusal to make information available in response to the request; or

(ii) a decision by which an agency decides, in accordance with section 42 or section 43, in what manner or, in accordance with section 40, for what charge the request is to be granted; or

(iii) a decision by which an agency imposes conditions on the use, communication, or publication of information made available pursuant to the request; or

(iv) a decision by which an agency gives a notice under section 32; or

(v) a decision by which an agency extends any time limit under section 41; or

(vi) a refusal to correct personal information; and

(b) the Commissioner or, as the case may be, the Tribunal is of the opinion that there is no proper basis for that decision.

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

(4) Undue delay in making information available in response to an information privacy request for that information shall be deemed, for the purposes of subsection (2)(a)(i), to be a refusal to make that information available.

Whether AMI complied with Privacy Act

[24] The breaches by AMI fall into three broad categories:

[24.1] Failure to comply with the statutory time limits for making and notifying the decision on the requests of 4 February 2010, 2 March 2010 and 13 April 2010 (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].

[24.2] In relation to those decisions made by AMI "in time" in respect of the requests of 6 May 2010 and 8 July 2010, the failure to notify Mr and Mrs Lochead-MacMillan of their right to seek an investigation and review of the refusals by the Privacy Commissioner (s 44(b)).

[24.3] The refusal to release the VFR fire investigation report (Principle 6 and s 30).

Each of these categories will be addressed in turn.

[25] The first category – s 40 – no decision on requests – deemed refusal

The undisputed evidence shows that the privacy requests of 4 February 2010, 2 March 2010 and 13 April 2010 were simply never acknowledged by AMI. The only "mitigating" point (if it can be so described) is that an incomplete transcript of the second interview was provided to Mr and Mrs Lochead-MacMillan by VFR on 22 February 2010 but its very incompleteness brought into focus the need for the audio files to be provided. This was not done and eventually AMI was disabled from complying with the request by the

surprising destruction of the files. At no time subsequent to learning of the destruction did AMI take advantage of s 29(2)(b) of the Act which allows a request to be refused if the information requested does not exist or cannot be found. The transcript of the first interview was not provided until early June 2010, a delay in the region of some five months. It is not difficult to understand the frustration experienced by Mr and Mrs Lochead-MacMillan at this delay given their repeated monthly requests of February, March, April and May 2010.

[26] The second category – s 44 – failure to notify right of complaint to Privacy Commissioner

When Ms Shepperson wrote on 21 May 2010 advising that the VFR fire investigation report would be withheld neither at this time nor at any subsequent point did AMI give to Mr and Mrs Lochead-MacMillan the information mandated by s 44(b) of the Act namely, their right, by way of complaint under s 67, to seek an investigation and review of the refusal by the Privacy Commissioner. As mentioned, at this critical time (ie May 2010) Mr and Mrs Lochead-MacMillan were not aware of their right to seek the assistance of the Privacy Commissioner and felt that they had no choice but to accept the $64,528.44 offered by AMI.

The VFR fire investigation report was again withheld by AMI when releasing the file on 29 July 2010. The AMI letter of that date similarly failed to inform Mr and Mrs Lochead-MacMillan of their right to complain to the Privacy Commissioner.

[27] The third category – Principle 6 and s30 – refusal to make information available

The decisions of 21 May 2010 and 29 July 2010 to withhold the VFR fire investigation report were said by AMI to be justified on the basis that litigation privilege applied. AMI relied on s 29(1)(f) of the Act (disclosure of the information would breach legal professional privilege). Legal professional privilege and litigation privilege are related but distinct concepts, as explained by Andrew Beck in *Principles of Civil Procedure* (3rd ed, Brookers, Wellington, 2012) at 10.6.2:

> Legal professional privilege relates to confidential communications between clients and their legal advisers for the purpose of obtaining legal advice; the idea is that the client should have the opportunity to be entirely candid without fear of subsequent disclosure. It is irrelevant whether legal proceedings are contemplated; the privilege is directed at protecting the confidence of a professional relationship ...
>
> In contrast to this there is the claim of litigation privilege. Although litigation privilege is generally described as an aspect of legal professional privilege, this is misleading. It is based not on a professional relationship, but on protecting material gathered for the purpose of a legal proceeding; its foundation is the traditional adversarial nature of litigation in terms of which evidence is disclosed only at trial. Communications between the client and legal advisers, between legal advisers and other legal advisers and between the client and third parties are protected if the dominant purpose for which they are brought into being is for use in existing or contemplated litigation. In the case of contemplated litigation, legal proceedings must be a definite prospect rather than a vague possibility. The test adopted by the Court of Appeal is whether litigation is reasonably apprehended at the time the document comes into existence; this will be a question of fact in each case. [citations omitted]

[28] The Court of Appeal decision referred to at the end of this passage is *General Accident Fire & Life Assurance Corporation Ltd v Elite Apparel Ltd* [1987] 1 NZLR 129. The common law position set out in that decision has since been adopted by s 56 of the Evidence Act 2006 which addresses the privilege for preparatory materials for proceedings. At common law and under s 56 litigation privilege applies to a communication or information only if the communication or information was made,

received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding and the party, on reasonable grounds, contemplates becoming a party to the proceeding.

[29] The important point for present purposes is the high threshold before litigation privilege applies – was the dominant purpose for bringing the document into being for use in existing or contemplated litigation? It is not necessary to consider to what extent s 56 simply restates the common law beyond the adoption of this test. Contrast *Jeffries v Privacy Commissioner* [2010] NZSC 99, [2011] 1 NZLR 45 at [14].

[30] In the present case the facts are clear. At the time VFR were instructed on 22 January 2010 and at the time of the receipt of their report by Ms Shepperson on 24 February 2010 no litigation was then in train or reasonably apprehended. In terms of both the common law test and the statutory test in s 56 of the Evidence Act litigation privilege could not apply. Nor on the facts was there any suggestion that the VFR report was a confidential communication between a client and a legal adviser in the course of the client obtaining professional legal services. In fairness to AMI no such claim was made. Litigation privilege alone was relied on. It follows that the VFR fire investigation report ought to have been disclosed at the time it was first requested. The first AMI refusal of 21 May 2010 and the second AMI refusal of 29 July 2010 were plainly mistaken.

[31] For AMI it was submitted that it reasonably believed that it was proper to withhold the investigation report by relying on litigation privilege and that once the claims had been settled AMI promptly accepted the ruling by the Privacy Commissioner that privilege no longer attached. The document was consequently disclosed. This submission, however, is divorced from the facts in that the report was not made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding. It was never covered by "litigation privilege".

Summary of findings regarding compliance

[32] In summary, therefore, in favour of AMI is the fact that the oral request for the VFR report made on 6 May 2010 was responded to within the "as soon as reasonably practicable"/20 working day timeframe prescribed by s 40(1) of the Privacy Act as was the request for the AMI file made on 8 July 2010. But these two positive points are overshadowed by the failures identified in relation to the requests of 4 February 2010, 2 March 2010 and 13 April 2010. Even the "in time" responses to the requests of 6 May 2010 and 8 July 2010 breached the Act in that the duty to communicate the right to complain to the Privacy Commissioner was not observed. Most importantly there was no proper basis for the withholding (on two occasions) of the VFR fire investigation report. All breaches have been established on the balance of probabilities.

Legal consequences of non-compliance

[33] The breach of s 44(b) (failure to advise right to complain to Privacy Commissioner) does not 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 in respect of non-compliance with s 44(b). This does not mean that the established failure to comply with s 44(b) is irrelevant in the overall context of determining the seriousness of any interference with privacy which might otherwise be established.

[34] The breaches of the time limits are in a different category. As earlier explained, the legal consequence of the failure by AMI 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". 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 in ss 85 and 88 are:

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
>
> > (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
> >
> > (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
> >
> > (c) damages in accordance with section 88:
> >
> > (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
> >
> > (e) such other relief as the Tribunal thinks fit.
>
> (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.
>
> **88 Damages**
>
> (1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:
>
> > (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:
> >
> > (b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:
> >
> > (c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

[35] Finally, as to the refusal by AMI to provide the VFR report, such refusal is defined by s 66(2)(a)(i) as "an interference with the privacy of an individual" and if that interference is established on the balance of probabilities and the Tribunal is of the opinion that there was no proper basis for the refusal the remedies in s 85 become available. In this respect we are indeed satisfied on the balance of probabilities that s 66(2)(a)(i) applies, that is AMI refused to make the information available on two occasions and we are further satisfied that, for the reasons given, there was no proper basis for that decision.

Remedies

[36] As to the s 40 time limits, the evidence clearly satisfies the balance of probability standard that the statutory time limits were not observed in relation to the requests of 4 February 2010, 2 March 2010 and 13 April 2010 and that an interference with the privacy of an individual has been established. Similarly, for the reasons given we are further satisfied to the same standard that the VFR report was unjustifiably withheld on two occasions. The question now to be addressed is whether remedies under s 85 of the Privacy Act should be granted.

[37] For AMI it was accepted that the refusal to provide the VFR report was an interference with privacy but only in respect of the request which was made after the claims by Mr and Mrs Lochead-MacMillan had been settled (ie the 8 July 2010 request). The Tribunal was also asked to give "considerable weight" to the fact that the report was released some fifteen months ago, together with an apology. Further, it was submitted that as the investigation report had now been supplied, Mr and Mrs Lochead-MacMillan must demonstrate an "interference with privacy" in terms of s 66(1) of the Act. That is, that they have "suffered some adverse consequence(s)" in order to establish an interference with privacy.

[38] We do not accept this is a permissible reading of s 66. As stressed in *Winter v Jans* at [83] an action is an interference with the privacy of an individual if the provisions of both subsections of s 66(2) are satisfied. The adverse consequences set out in s 66(1)(b) are not relevant in such circumstances. Here, until the intervention of the Privacy Commissioner, AMI refused to make the VFR report available. The fact that the report was eventually disclosed does not mean that there was no earlier breach. For the reasons given we are of the view that the earlier refusal amounted to an interference with the privacy of an individual and that there was no proper basis for that refusal. This compounded the earlier failure to respond to the personal information requests of February, March and April 2010.

[39] It was then submitted for AMI that no remedy whatsoever should be awarded in that any interference with privacy was at "the very lower end of the scale", AMI took corrective action and Mr and Mrs Lochead-MacMillan suffered "no hardship or humiliation" from the delay in providing the reports. The thrust of the submissions for AMI was that Mr and Mrs Lochead-MacMillan had brought the proceedings before the Tribunal for the purpose of re-opening the claims settlement and the Tribunal's attention was drawn to the fact that:

> Since the release of the reports, a further fifteen months has passed with continual challenges.

[40] The Tribunal does not agree that this is a case at the very lower end of the scale. We return to this point shortly. Nor do we agree that Mr and Mrs Lochead-MacMillan are using these proceedings to revisit the settlement of the insurance claims. Their point is that they were entitled to have access to the personal information held by AMI "as soon as reasonable practicable" and in any case not later than 20 working days after the day on which the request was received so that they could more effectively deal with the potentially devastating situation they found themselves in. They had experienced a fire at their home and the loss of chattels valued in excess of $60,000. Were AMI to decline liability on both policies their economic loss would be enormous. Mr Lochead-MacMillan had been told by AMI that there were "serious areas of concern" and their unease was increased by the fact that when provided with a transcript of the second interview it was found to be incomplete. They were not provided with the transcript of the first interview

until after settlement. They never received the audio files. Their request for access to the audio files and the transcripts was a logical response to a highly stressful situation and an attempt to ensure that whatever was being reported to AMI by VFR was an accurate representation of what had been said at the two recorded interviews. Their request of 2 March 2010 for reasons why the insurance claim was still under investigation reflects this purpose as well as the level of anxiety. So too does the repeated month-by-month pressing of the request for the audio files and transcripts. Even when Ms Shepperson advised on 5 March 2010 that the investigations had been completed and the claim formally accepted, the focus of Mr and Mrs Lochead-MacMillan remained on the content of the VFR report as it was logical to assume it was relevant to the discussions as to the quantum of the contents claim. The withholding of the report meant that they had to deal with AMI across an information barrier. For all they knew the VFR report might contain a suggestion that they had acted improperly or were artificially inflating their claim. This was undoubtedly behind their assiduous attempts (fully documented in the evidence) to establish the cause of the fire and the extent of their loss. This is the context in which their rights under the Privacy Act are best seen. While these rights are related to the insurance claim, these proceedings cannot reasonably be characterised as an attempt to reopen the claims settlement.

[41] Before assessing damages three other points require clarification:

> **[41.1]** Mr and Mrs Lochead-MacMillan are both named as customers in the two contracts of insurance and both were intimately involved in the dealings with AMI over the Privacy Act requests. But in assessing damages under s 88 we will make a global award only to avoid unjustifiable "doubling up".
>
> **[41.2]** In the statement of claim Mr and Mrs Lochead-MacMillan have sought an award of damages to (in effect) make up the difference between the settlement to which they agreed and the settlement they would have liked to have achieved. But this is not a pecuniary loss or the loss of any benefit in terms of s 88(1)(a) and (b) which has been established by the evidence. We have not seen the withheld information and cannot speculate as to its content. We note that in two similar cases considered by the High Court, namely *Proceedings Commissioner v Health Waikato Ltd* (2000) 6 HRNZ 274 and *Winter v Jans* it appeared possible to either determine from the withheld documents themselves or to infer from the circumstances that the withheld information had led to a pecuniary loss or the loss of a benefit. But in the present case, in the absence of the documents or other evidence, we are not in a position to determine whether Mr and Mrs Lochead-MacMillan could have expected to obtain a higher payout from AMI had they been in possession of the information requested pursuant to Principle 6 prior to signing the settlement on 26 May 2010. Compare *Proceedings Commissioner v Health Waikato Ltd* at [71]. It is true that in *Winter v Jans* at [48] it appears to have been accepted that the "loss of benefit" in s 88(1)(b) can be the benefit of not having certainty. But on the facts and for the reasons enlarged upon below we are of the view that the more appropriate provision under which damages should be awarded is s 88(1)(c). Were a separate award to be made under s 88(1)(b) there would be a real danger of not only overlap but also of doubling up.
>
> **[41.3]** Section 88(1)(c) permits an award of damages for an interference with the privacy of an individual in respect of "humiliation, loss of dignity, and injury to feelings" of the aggrieved individual. As in the case of *Winter v Jans*, we do not find humiliation or loss of dignity established by the evidence. We do find,

however, injury to the feelings of Mr and Mrs Lochead-MacMillan. We address this next.

[42] In summary the principle remedies to which Mr and Mrs Lochead-MacMillan are entitled are a declaration under s 85(1)(a) and damages (in accordance with s 88) under s 85(1)(c). The facts do not call for a restraining order under s 85(1)(b). Whether there should be an order under s 85(1)(d) or (e) is addressed at the conclusion of this decision.

Injury to feelings

[43] The injury to the feelings of Mr and Mrs Lochead-MacMillan are not difficult to understand. They found themselves cooperating in good faith with AMI during the course of a stressful investigation and subsequent negotiations only to find that the good faith discharge of legal obligations seemed, in the view of AMI, to operate in favour of AMI only. The company repeatedly ignored the February, March and April 2010 requests and unjustifiably withheld the VFR fire investigation report. It also failed to notify Mr and Mrs Lochead-MacMillan of their right to seek an investigation by the Privacy Commissioner. The unfortunate impression given was that Mr and Mrs Lochead-MacMillan were being kept in the dark as to the information being collected about them. The atmosphere of uncertainty and possibly suspicion made it difficult for them to deal with a novel and stressful situation. AMI also gave the impression that while the obligations of Mr and Mrs Lochead-MacMillan under the contract of insurance were important, AMI's obligations under the Privacy Act were not. In this unequal relationship AMI held all the power. When Mr and Mrs Lochead-MacMillan tried to access the information to which they were entitled they were ignored and made to feel insignificant, ineffectual and impotent, if not troublesome. AMI does not appear to have understood the injury to feeling it caused. Even at the hearing before the Tribunal reference was made to the "continual challenges" made by Mr and Mrs Lochead-MacMillan and indeed AMI has since declined to insure them. We return to this point later.

[44] The ignoring of the repeated requests for information in February, March and April 2010 and the unjustified withholding of the VFR fire investigation report, in our view, led to injury to feelings in terms of s 88(1)(c) of the Act. For the reasons given in *Winter v Jans* at [39] it is not necessary, in the context of the damages assessment in s 88, that the adjective "significant" be read into this provision though we would add that having seen and heard Mr and Mrs Lochead-MacMillan the injury to feelings was indeed significant.

[45] We accept that there must be a causal connection between the breach of the information privacy principle and damages. Causation may in appropriate circumstances be assumed or inferred: *Winter v Jans* at [33]. For the reasons given we are satisfied on the balance of probabilities that the causal connection has been established.

[46] In assessing damages under ss 85(1)(c) and 88(1)(c) for "humiliation, loss of dignity and injury to the feelings of the aggrieved individual" we have taken into account that in *Winter v Jans* the High Court in April 2004 awarded Mr and Mrs Jans $7,000 for "injury to feelings". There are some similarities with the present case. Both sets of facts involve the unjustified withholding of personal information in circumstances where that information was required to protect the requester's legal interests. While the assessment of damages for injury to the feelings of the aggrieved individual is not

capable of precise mathematical calculation, we are of the view that the facts of the present case justify a higher award because of the repeated failures to comply with key elements of the information access provisions of the Privacy Act. It is a serious case of its kind. We have determined that $10,000 is the appropriate figure to reflect the particular facts of the case and the fact that the award in *Winter v Jans* was eight years ago (allowance has been made for simple interest at approximately 5% per annum). That our award is close to the monetary loss claimed to have been suffered by Mr and Mrs Lochead-MacMillan is entirely coincidental. The factors we have taken into account have to some extent been adverted to earlier. We expand on them now.

[47] First we address s 85(4) of the Act which provides that while it is not a defence to proceedings under ss 82 and 83 that the interference was unintentional or without negligence on the part of the defendant, the Tribunal must take the conduct of the defendant into account in deciding what, if any, remedy to grant.

[48] We take into account the mitigating factors referred to, particularly the provision of an admittedly incomplete transcript of the second interview and the provision of the VFR report once the Privacy Commissioner intervened. We also take into account the tendering of the apology.

[49] But as mentioned we do not accept this is a case at the lower end of the scale. To the contrary it is a serious case of its kind. The failures were multiple, sustained and systemic. They placed the insured persons at significant disadvantage. It is a matter of some concern that the largest wholly New Zealand owned fire and general insurance company has failed in significant respects to comply with its responsibilities under the Privacy Act.

[50] What does not seem to have been appreciated is that the information privacy principles set out in Part 2 of the Act are not abstract concepts of little relevance to daily commercial life. They are in fact fundamentals of good administration and designed to reconcile the interests of the agency collecting the personal information (an often valuable commercial asset) with those of the individual about whom the information is collected or held. The principles stress that if an agency is to collect and hold personal information there is a need for the information to be accurate. For example, the information must be collected for a purpose and be necessary for that purpose (principle 1). The information should be collected directly from the individual (principle 2) and the individual must know that the information is being collected and the purpose for which it is being collected (principle 3). The agency must protect against (inter alia) loss, unauthorised access, modification or disclosure. Above all the agency is under a mandatory duty to give to the individual access to the information (principle 6) and the individual has a right to request correction of that information (principle 7). Indeed the agency has an obligation on its own initiative to take such steps to correct the information as are, in the circumstances, reasonable to ensure that, having regard to the purposes for which the information may lawfully be used, the information is accurate, up to date, complete, and not misleading (principle 7). It is not surprising that an agency holding personal information is under a mandatory duty not to use the personal information without taking such steps as are in the circumstances reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant and not misleading (principle 8).

[51] Against this background requests for access to personal information cannot be ignored by an agency or dismissed as being part of an unimportant, if not bothersome process unrelated to the legal relationship between the agency and the individual. Quite

apart from the fact that the obligations under the Privacy Act are imposed on an agency by law (often in mandatory terms) self-interest alone, if not principles of good administration, demand full "good faith" compliance with the Act. The benefit of such compliance to both the agency and the individual are not difficult to identify and include:

> **[51.1]** Where, as here, the personal information is relevant to a matter in issue between the individual and the agency, the individual will be in a better position to understand the case he or she must meet and to more effectively present his or her case in reply or to challenge possibly mistaken or incomplete information, reports or assessments.
>
> **[51.2]** The benefit to the agency is that it, in turn, is better informed as to the facts and therefore more likely to arrive at a sound decision.

[52] The bottom line is that the Privacy Act is a two way street. As emphasised in the Long Title, the purpose of the Act is as much about ensuring timely access by individuals to information relating to them as it is about authorising the collection, use and disclosure of public and private sector agencies of such information.

Summary of findings regarding remedies

[53] In summary Mr and Mrs Lochead-MacMillan are entitled to a declaration under s 85(1)(a) and damages under s 85(1)(c) for injury to feelings. We now address whether any other orders are necessary.

Whether any other order necessary

[54] By letter dated 12 September 2011 AMI Pukekohe wrote to Mr and Mrs Lochead-MacMillan advising that they would, on the expiry of the policies, refuse to continue insurance cover:

> Your above policies expire on 06/10/11.
>
> We regret that we are unable to continue insurance cover past the present policy expiry date, and therefore cover will cease at 4.00pm on that date.
>
> You should make alternative arrangements to insure your house, contents and lifestyle block from that time.

[55] On 14 September 2011 Mrs Lochead-MacMillan wrote to AMI Pukekohe recording her distress at receiving the letter and requesting reasons for the decision. On the same day AMI Pukekohe replied:

> We can cancel your policy at any time by giving you fourteen working days' written notice at your last known postal address.
>
> In view of the continued litigation against AMI Insurance Ltd the goodwill relationship between us has broken down and we therefore feel your interests would be better represented by another insurance company.

[56] At the hearing the Tribunal was told by AMI that the "litigation" referred to was the appeal brought by Mr Lochead-MacMillan to this Tribunal and the complaint he apparently made to the Insurance & Savings Ombudsman.

[57] Taken literally this evidence would suggest that by exercising their rights under law, Mrs and Mrs Lochead-MacMillan put in jeopardy the insurance policies held with AMI. On any view, this would be a remarkable, if not astonishing outcome and a direct

challenge to the principle that rights conferred on individuals by law are to be exercised without fear of penalty. When the issue arose during the course of the hearing both witnesses for AMI conceded that the email of 14 September 2011 was unhappily worded and that it would be inappropriate for AMI to cancel a policy were the policyholder to rely on his or her rights under the Privacy Act or to complain to the Insurance & Savings Ombudsman. The Tribunal was assured that what AMI intended to convey (albeit infelicitously) was that it believed that the commercial relationship with Mr and Mrs Lochead-MacMillan had broken down and for that reason it would be better were they to be represented by another insurance company. With some hesitation the Tribunal accepts these assurances.

[58] However, looked at overall the serial defaults by AMI in complying with the Privacy Act and the unhappily worded correspondence referred to underline the need for AMI 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 purpose. We had considered making an order under s 85(1) that AMI undertake such review with the assistance of the Privacy Commissioner. We would hope, however, that in light of the exchanges between the Tribunal, the two AMI witnesses and counsel for AMI at the hearing that the making of such order is unnecessary and that AMI will engage with the Privacy Commissioner on a voluntary basis. In the result we have determined that the appropriate remedies are the formal orders set out below.

Formal orders

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

> **[59.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that AMI interfered with the privacy of Mr and Mrs Lochead-MacMillan by:
>
> > **[59.1.1]** Failing to respond to their personal information requests of 4 February 2010, 2 March 2010 and 13 April 2010 within the time allowed by s 40 of the Act; and by
> >
> > **[59.1.2]** Refusing to provide the VFR fire investigation report in response to the requests of 6 May 2010 and 8 July 2010.
>
> **[59.2]** Damages of $10,000 are awarded against AMI under ss 85(1)(c) and 88(1)(c) of the Act for injury to the feelings of Mr and Mrs Lochead-MacMillan.

Costs

[60] We make no award of costs as Mr and Mrs Lochead-MacMillan were self-represented.

.....	.....	.....
Mr RPG Haines QC	**Mr R Musuku**	**Mr B Neeson**
Chairperson	**Member**	**Member**