

Reference No. HRRT 043/2011

UNDER THE PRIVACY ACT 1993

BETWEEN JUNE KOSO

PLAINTIFF

AND CHIEF EXECUTIVE, MINISTRY OF  
BUSINESS, INNOVATION, AND  
EMPLOYMENT

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Ms WV Gilchrist, Member

Mr MJM Keefe JP, Member

REPRESENTATION:

Mr R Small for Plaintiff

Mr S Cohen-Ronen for Defendant

Ms K Evans for Privacy Commissioner

DATE OF HEARING: 9 and 10 July 2012; 1 and 2 August 2012

DATE OF DECISION: 29 August 2014

---

## DECISION OF TRIBUNAL

---

### Introduction

[1] An agency which receives a request under Information Privacy Principle 6 for access to personal information has two key obligations. Both are governed by a statutory timeframe:

[1.1] First, to make a **decision whether the request is to be granted**. This decision must be made “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. See s 40(1) of the Privacy Act 1993 (PA). Failure to comply is deemed to be a refusal to make available the information to which the request relates (s 66(3)). The governing test is “as soon as reasonably practicable”. The 20 working day period is a maximum limit to what can be said to be “as soon as reasonably practicable”.

[1.2] Second, **to make the information available** without “undue delay”. This obligation is contained in s 66(4) of the Act. Where undue delay occurs there is similarly a deemed refusal to make the information available (s 66(4)).

### Undue delay – interpretation of

[2] As much of this case turns on the question of undue delay it is necessary at the outset that we set out our understanding of this statutory requirement. We acknowledge the substantial assistance given by the submissions presented on behalf of the Privacy Commissioner, many of which we have adopted.

[3] In practice the **decision** to release and the **provision** of the information will often (or even usually) be contemporaneous. The decision whether to release tends to take most “thinking” time. Providing access to the information is often more straightforward, involving a simple question of photocopying or making arrangements for the requester to come in and view the information. Mailing the decision and the information at the same time is common and is often helpful for both requester and agency.

[4] However, the Privacy Act does not **require** the decision and the provision of the information to be made at the same time. This recognises the reality that even once the decision is made, providing access to the information may take further time. For instance, there may be a large amount of documents to copy. Some items of information in the documents may need to be redacted because they are not information about the requester, or to protect interests recognised in ss 27 and 29 of the Act. The information may need to be carefully checked before sending it to the requester to make sure that the redactions are correct or that information about others has not been inadvertently included. Physical files may need to be brought from remote locations.

[5] The Privacy Act does not set a fixed time for providing access to the information. Instead, s 66(4) states that it is an interference with privacy if access is “unduly delayed” and if there is no proper basis for the delay.

[6] The phrase “undue delay” as used in s 66(4) is not defined in the Privacy Act. It carries its ordinary meaning of inappropriate or unjustifiable. See *OED Online* (Oxford University Press, June 2014). What is undue is clearly dependent on context: *R v B* [1996] 1 NZLR 385 (CA) at 387. For the Privacy Commissioner it was submitted that in theory, time begins to run from the time of the request but in practice the question of undue delay will only arise after the decision on release has been made. This is because the decision must be made as soon as reasonably practicable. If it is not reasonably practicable to make a decision on the request earlier, an agency cannot be said to have unduly delayed in providing access to the information. We agree. In *L v T* (1998) 5 HRNZ 30 the High Court briefly considered the relationship between ss 66(3) and 66(4). It concluded that s 66(4) must relate to a delay **within** the 20 working day period in s 40. This conclusion was *obiter* as s 66(4) did not, on the facts, have relevance. This much is expressly acknowledged by the High Court itself at p 39 of the decision. In our respectful view the *obiter* comment is clearly incorrect because the High Court failed to recognise that s 40 applies to the obligation to make a **decision** on the

request whereas s 66(4) applies to the quite distinct process of **making information available**. In addition, as the Privacy Commissioner correctly submitted, the High Court did not turn its mind to the fact that an agency can agree to provide a document within the statutory timeframe but then fail to actually provide it within a reasonable time after that. Furthermore, the Act anticipates situations (eg large and complex requests) where an agency needs to extend the period for making a decision on release. In such circumstances it is entirely conceivable that the agency may well need further – even considerable – time to actually make the information available.

[7] In these proceedings brought by Ms Koso, breach of the 20 working day time limit is conceded by the Ministry but breach of the undue delay limitation is contested. To a large degree the outcome of the case turns on the wording of the access request itself and in particular, whether we find that it contained two requests or one. At the heart of the case is the contention by Ms Koso that the Ministry should provide electronically stored information at an earlier date than paper files.

### **An apology to the parties**

[8] Before the evidence is addressed the long delay in publishing this decision is acknowledged and an apology offered to the parties. This case was not overlooked. Rather delays regrettably occurred because all members of the Tribunal are part-time appointees and despite best endeavours it is not always possible to publish decisions timeously.

### **The immigration setting**

[9] A lawyer or licensed immigration adviser giving advice on immigration matters needs to know the citizenship and immigration status of the client. Citizenship determines whether the Immigration Act 2009 (IA) applies to any particular individual and if so, the degree to which it applies. New Zealand citizens may enter and be in New Zealand at any time (IA, s 13) while citizens of certain countries enjoy waiver of visa requirements (IA, s 14 and the Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010). Certain categories of non-New Zealand citizens are not eligible for a visa or for entry permission. This includes persons previously removed or deported from New Zealand or from any other country (IA, s 15(1)(d) and (e)).

[10] Even holders of resident class visas do not enjoy the same entitlements. The holder of a permanent resident visa is entitled, for example, not only to leave New Zealand but on return, to be granted a further permanent resident visa. The holder of a mere resident visa, however, while having the same right to leave, does not have an automatic entitlement to return (IA, ss 73 and 74). Holders of temporary entry class visas have different entitlements depending on which class of temporary entry visa is held (transit visa, limited visa and temporary visa). Temporary visas are further divided into visitor, work and student visas. Each category of visa is governed by conditions found not only in the Immigration Act but also in the relevant policy published under the authority of the Immigration Act and known as “immigration instructions”. These instructions are found in the compendious *INZ Operational Manual*.

[11] The holder of a temporary visa who, during the currency of that visa, applies without success for a further temporary visa has a limited right to reconsideration of the decline decision provided the application for reconsideration is made not later than 14 days after notification of the decline decision (IA, s 185).

[12] Judicial review rights are also time restricted. Such proceedings must be commenced not later than 28 days after the date on which the person is notified of the relevant decision unless the High Court decides that by reason of special circumstances, further time should be allowed (IA, s247(1)).

[13] A person who is unlawfully in New Zealand has an obligation to leave (IA, s 18), has no right to apply for a visa, no right to work or study in New Zealand (IA, ss 20 and 21) and is liable for deportation (IA, s 154). A person unlawfully in New Zealand may, not later than 42 days after first becoming unlawfully in New Zealand, appeal on humanitarian grounds against his or her liability for deportation (IA, s 154(2)).

[14] The foregoing account of the complexities of New Zealand immigration law is by no means comprehensive. It is illustrative only of the challenges inherent in the legislation and of the need for those giving advice in this field to have available as much information as possible about the particular individual's immigration history.

### **The Privacy Act in the immigration context**

[15] Experience shows that non-citizens are not always comprehending of their precise immigration status, have often lost or mislaid their passports and are not the most reliable source of information as to their past interactions with Immigration New Zealand (INZ).

[16] The right of access to personal information held by INZ is therefore a right of first importance. This is recognised by the Ministry itself which has published a 74 page document under the title *Privacy Act Policy* (October 2005). At para B.1 it recognises that compliance with the Privacy Act is "core business, not a chore":

The Ministry has a statutory responsibility to meet the requirements of the Privacy Act.

So, meeting our obligations under the Act is just as important to the Ministry as is meeting our obligations as the Ministry which administers such Acts as the Employment Relations Act, and the Health and Safety in Employment Act.

But more than that, we regard these obligations as another service to the public that we take pride in!

Accordingly, staff must treat the handling of Privacy Act requests as core business, not a chore. This means it is of equal importance to their other everyday work, and indeed, because of the statutory timeframes and the timeframes required by this Policy, it may often have to take priority.

It also means that this Policy must be adhered to by all staff involved in actioning Privacy Act requests so that the Ministry can be better assured of consistently meeting its statutory obligations and our Ministers can be assured we will assist them to meet their statutory obligations.

In addition, unlike the Official Information Act, a failure to properly process a Privacy Act request can result in an award of damages against the Ministry.

[17] Immigration New Zealand generally processes around 16,500 privacy requests a year, of which 1,200 are processed by offshore Branches. Innovation Branch, or iBranch in Auckland processes all privacy requests for Auckland, Hamilton, Palmerston North and Wellington. Those requests relate to:

[17.1] Electronic files held on the INZ Application Management System (AMS) which is presently being replaced in stages by the Immigration Global Management System (IGMS).

[17.2] Physical files held either by Branches in New Zealand or by INZ Branches offshore.

### **The processing of privacy requests by iBranch**

[18] It is not intended to recite at length the detailed evidence given by INZ describing the processing of privacy requests by iBranch. The main points for present purposes are:

[18.1] At the relevant time there were nine privacy officers whose primary role was to process information privacy requests.

[18.2] On receipt, a privacy request is logged into the AMS system under the client's personal client number and each request is given its own unique identifier.

[18.3] The privacy team works with two separate cabinets – the “Non-Actionable” and the “Actionable” cabinets. Requests which require further collation or are not ready to be determined are located in the “Non-Actionable” cabinet. The “Actionable” cabinet includes requests and files ready to be decided and then released.

[18.4] If the request is for **electronic files** and the information is readily available from AMS, a print-out of the request is filed in the “Actionable” cabinet. It is filed in date order whereby the oldest request is always at the front. The next available privacy officer will collect the request at the front, read the AMS notes in totality and make a decision on what information is to be released and whether redactions are necessary. When the decision has been made, the privacy officer will release the information under the Privacy Act.

[18.5] If the request is for **physical files** or documents provided with an application, the files are first requested from the various locations. Those files can be held at any of the INZ branches around the world or at archiving facilities in New Zealand. Those facilities are located in Auckland, Christchurch, Wellington and Porirua. A support officer will print off a description of the files and their location and staple it to the request and cover sheet. This is done so that any staff member who processes the file can easily identify that the files have been requested. The officer who requests the file will also update AMS notes to show that the necessary files have been requested.

[18.6] Until the files arrive, the privacy request is held in the “Non-Actionable” cabinet. When the documents arrive at iBranch, the staff member receiving them will update electronic notes in AMS and send the files to an external photocopying company. A physical check is conducted to ensure that all files requested have actually arrived. When the files have been copied and returned to iBranch they are married with the request and the whole bundle is moved into the “Actionable” cabinet ready for processing. Again, they are filed in date order so the oldest request is dealt with first.

[18.7] The system is designed for all requests to be processed in date order. This is especially important when high volumes of requests are managed and timeframes are to be adhered to. The process also provides for a consistent approach which is fair for all applicants. While there is flexibility to accommodate cases of genuine urgency, routine queue jumping is not allowed in the normal day to day management of the model.

**[18.8]** When a privacy officer takes the next allocated information request from the “Actionable” cabinet, the AMS notes are at this point printed in full. That is, the privacy officer dealing with the file will process the electronic and physical files in one exercise and as one full request. The reasons for this are as follows:

**[18.8.1]** It allows the officer to “touch it once and touch it right”. This ensures consistency in the release and in the withholding of material.

**[18.8.2]** It allows for processing efficiency to deal with a request only once without the need to repeat work.

**[18.8.3]** It fits the operating model for a high volume of requests.

**[18.9]** Urgent requests can and will be given priority but only when it has been determined that the request is legitimately urgent. The mere fact that a request may be labelled urgent does not mean that INZ will necessarily treat it as urgent. The test used to determine urgency is based on substance, not form. If the circumstances outlined by the requester indicate genuine urgency, the request will be prioritised. Typical examples that justify an urgent response include where there is a child or other person at risk, where the requester advises that they are involved in or considering court or judicial proceedings, where the requester requires medical attention, where the passport needs to be renewed for urgent travel or where a person’s entitlement to funded study is about to expire. The support team will raise the urgency with the Immigration Manager who then determines the request for priority after considering (inter alia) the following factors:

**[18.9.1]** The availability of staff to process the request against the impact on actionable queued work on hand; and

**[18.9.2]** The severity of the impact on the individual if urgency is not given.

**[18.10]** However, if the request is of a more general and unspecific nature and there is no explanation or reason given for the urgency, then the request will not be treated as urgent. Specifically, where the person representing the individual uses a template request which includes a request for urgency, such requests are addressed on the merits and are not considered “urgent” automatically.

### **Electronic files and physical files – simultaneous or staged release**

**[19]** Mr Small has a large immigration practice. He is often instructed by clients who are unable to give an accurate account of their immigration status or of their interactions with INZ. The issue of time limits, especially for reconsideration and appeals to the Immigration and Protection Tribunal, is often a pressing one, as is the ever present possibility of enforcement action where the client’s visa has expired. AMS electronic files will usually contain sufficient basic information to fill these gaps, including citizenship, date of arrival in New Zealand, visa category held, expiry date, appeals lodged and removal action taken.

**[20]** In the past Mr Small has pressed INZ for personal information stored on AMS to be provided immediately on request with the physical files provided later. This at least was the de facto arrangement he had with the INZ Wellington Branch prior to the centralisation of Privacy Act requests with iBranch in Auckland. On centralisation iBranch adopted a uniform practice of processing and releasing electronic and physical files simultaneously.

[21] When Mr Small complained, a meeting was convened on 14 July 2010 at Auckland attended by the then Branch Managers of Auckland Central Branch, Compliance Operations and of iBranch. Mr Small attended with his then employee, Mr Hurring. The key issue was the question of the provision of electronic files in response to information requests. Mr Small took issue with the practice of providing electronic AMS notes and physical files together and requested that all electronic files be sent out first, as a matter of course.

[22] Following the meeting INZ considered the matters raised and reflected on whether the process for responding to information requests should be changed. The conclusion reached was that the process for non-urgent information requests was both correct and appropriate and would not be changed. Given the large number of information requests received by INZ it was of the view that it should endeavour to make **one** decision and to make **one** disclosure. The aim was to place the privacy officer in a position to process all the information at the same time and for decisions on release and withholding to be made in the context of the entire content of the information held, whether in the form of electronic or paper based records. There were also considerations of administrative and workload constraints. INZ wished to avoid double-up of the work inherent in the processing of the information request twice – first the electronic files and then the physical files.

[23] By email dated 22 July 2010 Mr Kevin Cameron, then Branch Manager, Auckland Central Branch, advised Mr Small of the decision:

We have considered this matter [whether electronic notes can be sent out first] in light of feedback received, however due to volume of information requests received and our view that the current process is efficient, we are unable to release electronic information in advance of paper based information as part of our normal process.

[24] Mr Cameron subsequently added a qualification to this advice in that it was accepted that the electronic records would be released first where there would otherwise be a delay in retrieving all paper-based records. See his email dated 19 October 2010 to Mr Small:

Our preferred position is to send out all information simultaneously, that is when an information request is allocated to a case officer they will forward out all information at the same time, that is electronic and paper based records, however when there will be a delay in retrieving all paper based records, the electronic record, and any paper based records that are available, will be released rather than wait until all paper based records are received.

## **Urgency**

[25] Where an individual making an information privacy request asks that his or her request be treated as urgent, that individual is required by s 37 of the Privacy Act to give his or her reasons why the request should be treated as urgent:

### **37 Urgency**

If an individual making an information privacy request asks that his or her request be treated as urgent, that individual shall give his or her reasons why the request should be treated as urgent.

[26] INZ policy is to determine urgency requests according to the substance of the reasons given by the requester. There must be genuine urgency, not the mere assertion that urgency is required. The evidence given to the Tribunal was that not all requests for urgency are actually urgent. Requests for urgency not supported by adequate reasons are not given urgency.

[27] Requests for urgency are considered on a case-by-case basis. There are no hard and fast rules but among the factors considered are whether the individual has been served with a removal order, is detained pending removal or has court proceedings. It has been the longstanding policy of INZ that the fact that an individual is unlawfully in New Zealand is not a reason on its own for urgency. See relevantly the INZ Internal Administration Circular *Timeframes for Privacy Act Requests* (IAC 10/07, 23 July 2010).

[28] This position is supported by the Privacy Commissioner. The submissions presented by Ms Evans stressed:

[28.1] Neither s 37 nor any other provision of the Act triggers an automatic obligation on the agency to treat the request urgently. The Act appears to recognise that urgency is something easy to claim even if a genuine case for urgency cannot be established. The agency is not compelled to allow an “urgent” request to jump the queue or displace other workload priorities. Instead, urgency becomes a factor in deciding whether information has been provided without undue delay so as to give rise to a finding of interference with privacy under s 66(4).

[28.2] It is not possible to come up with a finite list of the circumstances that might give rise to genuine urgency. However, common examples in the immigration context could include that the requester is about to be deported or arrested and requires the information to resist this happening. Or a lawyer might take on a new client only a week or two before an appeal hearing and require information for the case.

[28.3] In the Commissioner’s view a plea for urgency on the grounds that the client is an overstayer and that the lawyer needs to “advise [the] client about their status” (the ground given in the present case) is not a clear enough reason to find an agency in breach. If this were the case, then every lawyer or licensed immigration adviser with a new client could claim that their request was urgent. But advising clients is a routine matter (even where there are important rights potentially at stake). Genuine urgency requires circumstances that are more than routine. Also, the reasons for urgency should be capable of clear explanation and, once explained, should be obvious. Truly urgent circumstances will speak for themselves.

[29] We agree with the Commissioner’s submissions.

### **The plaintiff’s immigration history**

[30] The plaintiff is a Tongan citizen who between January 1999 and November 2010 lodged fourteen applications either through the Nuku’alofa office of INZ or in New Zealand. Of these fourteen applications, five applications for visitor visas were granted, three applications for visitor visas were declined, three applications for a limited purpose visa were granted, three ballot applications for residence (Pacific Quota) were unsuccessful and one of the applications for a visitor visa was converted to an application for a limited purpose visa.

[31] When making the visa applications the plaintiff stated that most of her siblings were living in New Zealand. Consequently, on several occasions INZ was concerned the plaintiff had no incentive to return to Tonga and might overstay. As a result of those concerns some of the applications were declined while others were issued for short terms or limited purposes.

[32] The plaintiff's most recent visa application was lodged on 4 November 2010 at Nuku'alofa. The application was to visit New Zealand with her seven year old daughter. On 11 December 2010 INZ proposed to decline the application and advised the plaintiff that it was not satisfied she was a bona fide visitor given a lack of incentive to return to Tonga, the lack of family ties in Tonga and the risk that she would remain in New Zealand with her daughter. The plaintiff was invited to provide further information in support of her application. In her response the plaintiff undertook not to overstay or to seek employment in New Zealand. She assured INZ she would return to Tonga in compliance with the conditions of her visa. Based on the plaintiff's undertaking, INZ issue a visitor visa to the plaintiff and her daughter on 23 December 2010 valid for three months from the date of arrival. The plaintiff arrived in New Zealand with her daughter on 15 January 2011. Her visitor visa expired on 15 April 2011. She is now liable for deportation.

### **The plaintiff's request for personal information**

[33] In April 2011 Mr Small was instructed by Ms Koso. By email dated 26 April 2011 Mr Hurring made a request that she be given access to all personal information held by INZ. Mr Hurring had not at that point spoken to Ms Koso or discussed with her the effect of any possible delay in obtaining the information from INZ. The only information he had been provided with was that her visa had expired though he did not sight her passport. The email was a standard "template" request for personal information used in Mr Small's office and which Mr Hurring had helped design:

From: SPL Privacy <smallpacific.privacy@gmail.com>  
Subject: **June Koso CN: 1002434 DOB: 26 Jan 1971**  
Date: 26 April 2011 7:48:13 PM NZST  
To: Sulan Bian <sulan.bian@dol.govt.nz>

---

Sulan Bian  
Privacy Officer  
Immigration New Zealand

Dear Sulan

**June Koso CN: 1002434 DOB: 26 Jan 1971**

#### **Authority**

I act for the above-named and I refer to recent IAC 08/04 and 09/09 which dispenses with the need for client authority. Please update all AMS records to indicate that I act and am the sole contact point in all my client's immigration matters and treat all former authority as cancelled. This includes currently pending applications or requests.

#### **Electronic and Physical Disclosure**

I request that electronic copies of information covered by this request be provided, in addition to physical copies. I understand that it is Immigration New Zealand's standard practice to scan copies of the physical disclosure.

#### **New address for email communication on privacy matters**

Please note that I have a new email contact address for all information request and privacy complaint applications: [smallpacific.privacy@gmail.com](mailto:smallpacific.privacy@gmail.com). Generally, and for all other application types my email contact address remains [smallpacific.legal@gmail.com](mailto:smallpacific.legal@gmail.com).

My physical address and PO Box number remain unchanged.

#### **First Request**

Pursuant to that authority, and under the Privacy Act 1993, may I please have disclosure of all personal and official information concerning my client and any dependant or secondary applicant. Please ensure that this includes:

- The AMS Client Information Report;
- AMS Tab Screenshots;
- All AMS alerts;
- All customer interaction notes, printed as one sequential report,
- All AMS Application Information Sheets/Reports for each application number;
- All template documents/correspondence

I understand all this information is readily to hand and directly accessible from AMS. Could you please provide this information as soon as practicable.

The request is made urgently on the ground that my client's permit has expired and they are unlawful, and I need to urgently advise my client about their status.

I request a list of every item provided in the disclosure.

I request a list of every item withheld and full grounds and reasons for doing so in each case. I ask that no action be taken on the file or against my client until disclosure and reasonable opportunity to seek correction have first been provided.

The directive from Deputy Secretary Legal Graeme Buchanan, dated 16 February 2009, confirms that Officers are not to approach clients directly when counsel is acting.

In the event of arrest, my client declines to make a statement until my client has had the opportunity to speak with me as counsel and I request to be present at any Humanitarian interview.

### **Second Request**

I make a further information request under the Privacy Act 1993 regarding the above-named client.

May I please have disclosure of all personal and official information concerning my client and any dependants or secondary applicant. Please ensure that this includes:

- Client tabs and subfields, or other AMS information not already provided;
- All application forms and evidence in support in any form;
- File Assessment Sheet for all applications;
- File summary and cover sheet for all applications;
- All cross check and verification documentation whether not relied upon in decision making;
- All decision making templates;
- All Assessment templates;
- All file notes and reports including to or from the medical referee/consultant physician;
- All appeal and review documentation;
- QAP;
- SMEAC reports;
- Case Synopsis for a proposed Compliance Operation;
- Ministerials, summaries;
- Case Notes;
- All Expression of Interest records and documentation, including assessment and verification sheets/reports;
- Investigation Enquiry Sheets;
- Residence 2pc Check sheet;
- Compliance Action Sheet;
- Compliance Operations Enquiry Worksheet;
- Compliance Template;
- Credibility Check Assessment Report;
- All correspondence;
- All internal correspondence concerning the location of any of the information I have requested;
- And all other personal and official information whatsoever.

Could you please provide this information as soon as practicable before the statutory time frame ends.

I request a list of every item provided in the disclosure.

I request a list of every item withheld and full grounds and reasons for doing so in each case. I ask that no action be taken on the file or against my client until disclosure and a reasonable opportunity to seek correction have first been provided.

The directive from Deputy Secretary Legal Graeme Buchanan, dated 16 February 2009, confirms that Officers are not to approach clients directly when counsel is acting.

In the event of their arrest, my client declines to make a statement until my client has had the opportunity to speak with me as counsel and I request to be present at any Humanitarian interview.

Please acknowledge receipt of these requests, in writing, and could you please also provide the application numbers for these requests. Thank you for your assistance.

Yours faithfully,

Richard Small  
Barrister

My reference: Steve Hurring

### **One request or two?**

**[34]** For Ms Koso it is submitted that in this communication two requests were made. First, for the electronic files held on the AMS system. For this category urgency was requested on the grounds that the visa held by Ms Koso had expired. Second, for the physical files containing personal information about Ms Koso. For personal information held in this format no request for urgency was made.

**[35]** A large part of Ms Koso's case turns on this contention because it impacts on the timeframe within which INZ was required to make a decision on the request (or requests) and to provide the information.

**[36]** Immigration New Zealand submits that the request was unnecessarily complex, lacking in clarity, failed to make clear that urgency was in fact requested, did not give proper reasons for urgency and it was reasonable in the circumstances for it to be treated as a single request in which both electronic and physical files were sought.

**[37]** We agree that there was one request, not two and that no case for urgency was established in relation to the AMS records:

**[37.1]** This was a standard template request used in Mr Small's practice and not one drafted around the specific circumstances of Ms Koso's case. Indeed Mr Hurring, who helped design the template, had not met with Ms Koso or discussed with her the effect of the delay. He had not spoken to her at all. There is a distinct lack of focus on Ms Koso's personal circumstances.

**[37.2]** While there are minor variations in the wording, both the "first" and "second" requests are essentially the same, if not identical. Only the lists of information sought are materially different. Those lists are of secondary, if not marginal relevance as both the "first" and the "second" requests are "everything" requests:

... may I please have disclosure of all personal and official information concerning my client ...

The second paragraph of the email reinforces the “everything” ambit of the request:

I request that electronic copies of information covered by this request be provided, in addition to physical copies.

**[37.3]** The needless and unhelpful complexity of personal information requests made by Mr Small’s firm was the subject of pointed comment at the meeting held at Auckland on 14 July 2010 attended by Mr Small and Mr Hurring. The evidence (which we accept) of Ms Fesola’i then Manager of the Auckland Privacy Team, on this point was blunt. Mr Small and Mr Hurring were advised to simply ask for the full file. Her evidence was:

7. The key issue that we discussed at the meeting related to the provision of electronic notes in response to information requests. Mr Small took issue with INZ’s existing practice of providing physical files and electronic notes being processed and released together. He complained about the time it was taking INZ to respond to information requests and requested that all electronic notes be sent on first, as a matter of course.
8. I remember I told Mr Small that the template he was using to request personal information was too detailed, and the specification used in his requests was unnecessary and did not help us to provide the information sooner. I remember I told him that if he wanted to obtain a specific document – he should specify it, but otherwise he should simply ask to see the full file. I told him the template he was using, and its specification in particular, was confusing the team.

**[37.4]** The template used for the 26 April 2011 request illustrates the wisdom of this advice. Even Mr Hurring accepted in cross-examination that the “two” requests could take on the appearance of being identical and that the main difference was in the content of the lists.

**[37.5]** The request for “urgency” was part of the standard template, as was the proffered, “reason” for urgency. Mr Hurring said he was aware at the time that INZ did not accept that being an overstayer was a ground for requesting urgency.

**[37.6]** The request for urgency, such as it was, was not given prominence. It appears under the heading “First Request” but not under “Second Request”. Even then there are three preambular paragraphs before the “First Request” heading appears. Unhelpfully the request for urgency is preceded by a request for the information “as soon as practicable”.

**[37.7]** The reason given for the requested urgency was vague and lacking in cogency.

**[37.8]** The letter of complaint by Mr Small to the Privacy Commissioner made no mention of the request for urgency. The complaint had as its focus the alleged failure by INZ to “split” the request into AMS and physical file components and for the request that the information be provided simultaneously, not contemporaneously.

**[38]** In these circumstances we are of the view that no genuine case for urgency was made out.

**[39]** We are of the further view that it was reasonable for INZ to read the email as containing one request for personal information (being all information held electronically

and in hard copy) with only one time period running. This too was the reading urged by the Commissioner in closing submissions. We reject as unreasonable the contention that the email contained two separate requests, each triggering separate time limitations.

### **The INZ response to the information request**

[40] The email request was sent by Mr Hurring at 7:48pm on the evening of 26 April 2011. It is accepted that the effective date of receipt was the following day, 27 April 2011. The email was first seen by the privacy officer in Wellington that morning and it was sent to the iBranch in Auckland. By email Mr Hurring was advised that the request was being dealt with in Auckland.

[41] In Auckland the privacy officer noted the email's reference to "first request" and "second request" but did not understand that the two required different treatment. She compared the two detailed lists of items and correctly concluded that the requester was interested in the complete information held by INZ about her. She overlooked the paragraph where it was indicated that urgency was requested but in the circumstances this was immaterial as no proper or adequate reasons for urgency were given.

[42] On 9 May 2011 the email, now treated as one request, was allocated to a specific privacy officer who checked the INZ records relating to Ms Koso and found that eight of the 15 physical files relating to her were located in Nuku'alofa. On 11 May 2011 the Nuku'alofa branch was requested by email to send all files relating to Ms Koso.

[43] On 23 May 2011 (20 working days after Mr Hurring's email was received) the privacy officer noted that the physical files had not yet arrived from Tonga and accordingly sent a letter to Mr Small's firm advising that INZ had extended the time allowed under s 41 of the PA by 15 working days. The letter relevantly stated:

I wish to advise you that under Section 41 of the Privacy Act and Section 15(1) of the Official Information Act, I am extending the time limit for your request by an additional 15 working days.

This is because your request necessitates a search through a large quantity of information and as such a proper response cannot be made within the original time limit of 20 working days.

[44] The following day the privacy officer was advised by email from the Nuku'alofa branch that of the eight files kept in Nuku'alofa, six had been destroyed and the remaining two would be sent in the next diplomatic bag. The other files were archived in New Zealand.

[45] On 2 June 2011, in light of the delays in receiving the physical files, the privacy officer decided to release the information presently collected. That information included copies of both electronic and physical records. The information was released to Ms Koso on the following day, 3 June 2011.

[46] The remaining files arrived about a week later. Copies of those files were released to Ms Koso on 10 June 2011. Nothing in these proceedings turns on whether the physical files covered by the "second request" were provided in time as no issue was made in relation to that information.

### **The INZ extension of time**

[47] The ground given for the extension of time was the necessity to search through a large quantity of information. This mirrors the statutory terms of s 41(1)(a):

41 Extension of time limits

- (1) Where an information privacy request is made or transferred to an agency, the agency may extend the time limit set out in section 39 or section 40(1) in respect of the request if—
  - (a) the request is for a large quantity of information or necessitates a search through a large quantity of information, and meeting the original time limit would unreasonably interfere with the operations of the agency; or
  - (b) consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit.

**[48]** However, as pointed out by Ms Evans in her questions to Ms Whittaker, Branch Manager of iBranch, the true reason for the extension was not because there was a large quantity of information to search through, but because the files requested from the Nuku'alofa branch had not yet arrived in New Zealand. Such circumstances are not permissible grounds for extending the time limit in s 40(1) of the Act. It follows that INZ cannot rely on the purported extension of time. The point is conceded by INZ.

### **Time calculation**

**[49]** The 20 working day period in s 40(1) began running on 27 April 2011. The last day for compliance was 24 May 2011. Most of the information (comprising the AMS records and all but two of the physical files) were provided on 3 June 2011 with the two remaining physical files provided on 10 June 2011.

**[50]** The last day for making a decision on the request being 24 May 2011, the default in complying with s 40(1) was 8 working days.

**[51]** In view of the concession by INZ that the extension of time for making a decision on the request was invalid, it follows that the plaintiff has established:

**[51.1]** A breach of s 41. The purported extension of time was based on factual circumstances outside the narrow statutory grounds prescribed by s 41.

**[51.2]** A breach of s 40(1). As there was no valid extension of time, the decision on the request was made eight working days out of time.

**[52]** The plaintiff's case does not, however, rest there. She asserts that INZ was in further breach of the Act by:

**[52.1]** Failure to accord urgency to the request.

**[52.2]** Failure to make a decision under s 40(1) "as soon as reasonably practicable".

**[52.3]** Failure to make the information available without "undue delay".

### **The "urgency" point**

**[53]** Section 37 of the Privacy Act permits an individual making an information privacy request to ask that the request be treated as urgent but the individual is required to give his or her reasons why the request should be treated as urgent:

#### **37 Urgency**

If an individual making an information privacy request asks that his or her request be treated as urgent, that individual shall give his or her reasons why the request should be treated as urgent.

**[54]** The requirement to give reasons is mandatory. It is not difficult to understand why. Such requests must be considered on a case-by-case basis. The determination of genuine urgency is a content-based exercise and it is insufficient for the requester to simply assert urgency, as occurred here.

**[55]** For the reasons given earlier, no genuine case for urgency was established in the request. The lawyers representing Ms Koso knew that being an overstayer would not be accepted, without more, as a reason for urgency. Something more specific was required but such was not offered up.

**[56]** It was submitted for Ms Koso that the request for urgency was part of the balancing exercise implicit in the s 40(1) formula “as soon as reasonably practicable”. Assuming, without deciding, that that is the case, the difficulty with the submission is that no substantive case for urgency was made out. Rather the request was made in template form without Mr Hurring knowing anything about Ms Koso other than that her visa had expired. No enquiry had been made of her to ascertain whether lodging a humanitarian appeal was a live issue or whether enforcement action had commenced. If there were genuine reasons for urgency an experienced immigration practitioner (such as Mr Hurring) could have offered them. Unless and until such reasons were given, the asserted balancing exercise could not be undertaken in a meaningful way, bearing in mind the enormous volume of requests received by INZ and the need for there to be a logical, efficient system for those requests to be processed within the timeframes prescribed by the Privacy Act. The terms of s 37 are both explicit and clear. Adequate reasons must be given to justify affording urgency to a particular information privacy request ahead of others in the queue, all of whom could no doubt equally assert “urgency”.

**[57]** It would be a mistake to read into the circumstances of Ms Koso’s case that INZ took a “hard line” in its dealings with Mr Small and his clients. To the contrary. Ms Whittaker was the INZ Branch Manager in Nuku’alofa in the years 2008 to 2011. She gave evidence that between 1 July 2009 and 30 June 2010 the Nuku’alofa branch processed 514 information requests. All of these requests were received from Mr Small’s practice. Before taking up her position in Tonga Ms Whittaker visited Mr Small at his Lower Hutt office to introduce herself and to facilitate a smooth working relationship. At this meeting she invited Mr Small to contact her about any matter concerning his clients.

**[58]** During her tenure in Tonga Ms Whittaker realised that the INZ office found it difficult to provide Mr Small with the amount of information he requested within the timeframes under the Act due to the fact that INZ is restricted to utilising the Ministry of Foreign Affairs mailbag that arrives and departs only once a week. Technology is extremely limited in the Pacific and it was frequently difficult to fax or scan by email information directly to Mr Small. Ms Whittaker therefore arranged for the Auckland Pacific Branch privacy officer to assist with Mr Small’s requests. The privacy officers in Tonga and the Auckland Pacific Branch worked in unison on those requests. All physical files held in Tonga were copied and despatched along with AMS notes directly to Mr Small. All physical files held in New Zealand were copied, released and despatched directly to Mr Small as well. The two privacy officers concerned had a very good working relationship and the processing model introduced to accommodate Mr Small’s privacy requests worked extremely well.

**[59]** Ms Whittaker does not know why in Ms Koso’s case Mr Small and Mr Hurring chose to send the request to Wellington instead of following the special arrangement with Mr

Small for Tongan clients. Mr Small did not contact Ms Whittaker (or any other INZ officer in Tonga, as far as she is aware) with his request for information regarding Ms Koso.

[60] Ms Whittaker also referred to a meeting with Mr Small on 8 September 2011 to discuss urgent requests. It was agreed that urgent requests would not be included by him with ordinary information requests. INZ also agreed to prioritise requests for AMS notes and to disclose them before physical files when their urgent release was clearly requested and justified. Since that time she has not received any requests from Mr Small to prioritise any of the Privacy Act requests made on behalf of his clients.

### **The “as soon as reasonably practicable” point**

[61] The s 40(1) obligation to make a **decision** on an information privacy request contains two expressions of time. First, an agency is required to make the decision “as soon as reasonably practicable”. Second, that decision must be made not later than 20 working days after the day on which the request is received by that agency.

[62] The governing test is “as soon as reasonably practicable”. The 20 working days is the upper limit to what can be reasonably practicable. It follows that in any particular case it is a question of fact whether the decision on the request was made as soon as reasonably practicable. As pointed out by the Commissioner, sometimes it may be possible to decide quickly whether to provide some of the requested information. It will be obvious that the information must be provided or alternatively, that it must be withheld. Decisions about other items of information may be harder and take longer (for example the decision may need to be signed off by senior staff or may require the agency to talk to others whose privacy could be implicated by the release of the information).

[63] However, the directive to make a decision on the request “as soon as reasonably practicable” does not require the agency to “split” its decision. That is, to make the easy decisions at an early stage and the more difficult decisions later. The Act allows the agency to have a single decision point. As long as that decision point is within the statutory timeframe (“as soon as reasonably practicable, and in any case not later than 20 working days”), there is no breach.

[64] Of course, in some circumstances, split decisions may help requesters and may be practicable for agencies. Maximum assistance is to be encouraged, and it is possible to read “as soon as reasonably practicable” as a direction to provide that assistance. However, as the submissions for the Commissioner stress, it should be recognised that in other circumstances split decisions can be seriously unhelpful. They can create confusion for requesters about what will and will not be provided. They can also increase the resources that agencies spend on requests. If there is one decision, the agency will be much clearer about what it has and has not done. The Commissioner points out that requesters do occasionally argue that they should be drip-fed information as it comes to hand. However, in the Commissioner’s view it is undesirable and impracticable to create a rule that makes agencies **legally liable** if they fail to split the decision as the requester (or, indeed, the Commissioner or the Tribunal) might in hindsight think was preferable. We share the Commissioner’s view.

[65] For Ms Koso it was submitted that INZ not only breached the maximum limit of 20 working days, it breached also the “as soon as reasonably practicable” limit because a decision on the release of the electronic AMS information could have been made almost immediately, well before the 20 working day maximum was reached. In other words, it is

submitted that there were two deemed refusals to make available the information to which the request related, not one.

[66] Conceivably an agency can be in breach of the “as soon as reasonably practicable” standard while nevertheless making a decision on the request within the statutory 20 working day period. But such are not the facts of the present case.

[67] Prior to the centralisation of North Island privacy requests at iBranch in Auckland it appears Mr Small enjoyed a favourable relationship with the INZ privacy officer in Wellington. Information stored electronically on AMS was provided to Mr Small almost immediately on request without reference to whether a proper case for urgency had been established. Centralisation of the process at iBranch, however, demanded a uniform and consistent approach to the processing of the very large number of privacy requests received by INZ in the iBranch catchment area. Localised practice, inconsistency in approach and the possible appearance of favouring one particular representative were casualties of centralisation.

[68] Underlying the claim made by the plaintiff [that it was reasonably practicable for INZ to make a quick decision on the release of AMS files and to provide them expeditiously] is the premise that as the information was stored on a computer, that information was available for immediate inspection. By a simple reading of the entries a decision on the request could be made almost instantly and the files sent to print.

[69] This is an over-simplistic if not naive view of the process involved and of the obligations of INZ under the Privacy Act. It also assumes that privacy officers are able to give immediate attention to any information request that comes in and that they are not burdened by the need to process all information requests within a system that must meet strict time limits in relation to all (not some) requests and when the volume of requests is such that queuing is an inevitable and practical necessity.

[70] In particular, the withholding grounds in ss 27 and 29 of the Act cannot be passed over lightly in the immigration context. The detection of fraud is important as is the need to protect the privacy of other individuals identified in the information held by INZ (such as informants). Further illustrative of the difficulties inherent in the determination of information privacy requests is s 29(1)(b) which requires the agency to make a finding whether information is “evaluative”. The complexities of this provision are highlighted by the flowchart published in Taylor and Roth *Access to Information* (LexisNexis, Wellington, 2011) at [3.7.2] and by the decision of the Tribunal in *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [91] to [108]. A decision on the release of personal information is not always the simple and straightforward exercise imagined by the plaintiff’s submissions.

[71] There is also the compelling point made both by Ms Whittaker and by Ms Fesola that unless and until the privacy officer has before him or her **all** the information held by INZ, an informed decision on release cannot be made. The information held on one file will shed light on information held elsewhere, highlighting a need, not readily apparent from (say) the AMS records, to withhold. In addition, from a resource perspective, there is no sense in processing the same request twice. As mentioned, INZ generally processes around 16,500 privacy requests a year, of which 1,200 are processed by offshore Branches.

[72] There is an air of unreality to the submission for the plaintiff that the decision whether to release the AMS information could have been made almost immediately, certainly earlier than 20 working days after the day on which the request was received

by INZ. We reject the submission and find that the “as soon as reasonably practicable” time limit was not separately breached. It was reasonable for a decision to be postponed until all the physical files had been collected for assessment, or at least for best efforts to be made to assemble that information prior to the expiry of the 20 working day period. In the present case, when it became clear that the files from Nuku’alofa would not arrive within the initial statutory timeframe the decision on the request should have been communicated instead of invoking s 41. This much is conceded by INZ. But there is only one breach of s 40(1), not two.

### **The “failure to make the information available” point**

[73] The plaintiff’s complaint under this heading has as its focus not the **decision** on the request, but the **handing over** of the information. It is submitted that the AMS information should have been “split” from the request and provided separately at an earlier date than it was, namely eight working days after the expiry of the **decision** deadline in s 40(1).

[74] Because we are of the view that there was only one request for information (it was an “**everything**” request) and that it was reasonable, if not necessary, for INZ to attempt to assemble all the requested information together before making a decision on the request, we do not see time running against INZ until 24 May 2011, the day after the expiry of the decision deadline stipulated by s 40(1). The information was made available eight working days after the expiry of that deadline. We cannot see how this time lapse can reasonably be stigmatised as “undue delay” in terms of s 66(4).

[75] If the Privacy Act had intended an agency to release information as it became available on a drip feed basis it would have so provided. In our view the term “undue delay” in s 66(4) must be interpreted in a way which recognises that an agency, particularly a large one processing a great volume of requests, will need to have in place a system which enables it to deal properly and thoroughly with each and all of those requests. Where, as here, there is a single request for both electronic and physical files, the agency is entitled to have a single decision-point on that request, not two (or more) and a single process for providing that information which avoids doubling the workload involved in processing any particular request. The statutory standard (undue delay) is not framed in finite, absolute terms, unlike the very specific time limit in s 40(1). The fact that INZ may on occasion provide some information in advance of the main release is not a reason for the Tribunal to require it as a matter of law. The Tribunal cannot impose a burden not stipulated or necessarily required by the Act. Provided an agency complies with the timeframes prescribed by the Act, it must be allowed a degree of latitude to discharge its obligations as it sees best. It is not the Tribunal’s function to micro-manage agencies in their day to day implementation of the Act.

### **Conclusion**

[76] Our conclusions can be summarised as follows:

[76.1] INZ failed to make a decision on the plaintiff’s request within the 20 working days allowed by s 40(1) of the Act. This was an interference with the privacy of the plaintiff by virtue of s 66(2)(a)(i).

[76.2] There was no valid extension of time under s 41 as neither of the statutory grounds on which such extension can be based had application. This, in turn, contributed to the breach of s 40(1).

[76.3] In terms of s 66(2)(b) there was no proper basis for both failures.

**[76.4]** There was no separate breach of the “as soon as reasonably practicable” standard in s 40(1).

**[76.5]** There was no undue delay in making the information available to the plaintiff.

**[77]** The consequence of the first three findings is that the Tribunal has jurisdiction to grant one or more of the remedies permitted by s 85 of the Act. In making that decision the Tribunal must take into account the conduct of INZ:

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

## **Remedies**

**[78]** Although the statement of claim originally sought remedies in the nature of declarations and mandamus, on 1 August 2012 Mr Small advised that the plaintiff abandoned all requests for relief apart from a declaration of interference and costs.

**[79]** Given our findings we are of the view that it is appropriate to grant a declaration in respect of the failure to comply with the 20 working day time limit in s 40(1) of the Act brought about by the mistaken belief that INZ had proper grounds under s 41 to extend that limit.

**[80]** We do not, however, see any ground for criticising INZ’s compliance with the Privacy Act. To the contrary, the evidence shows a conscientious and determined commitment to the proper discharge of the Service’s obligations under that Act. In particular there has been proactive engagement with Mr Small’s firm at senior level on more than one occasion and open discussion of his perceived concerns. The errors which occurred in the present case arose not out of indifference to the statutory period for making a decision on a request, but out of an endeavour to provide both the decision and the information within the 20 working days. This is not a requirement of the Privacy Act but an ambition commonly encountered both under the Privacy Act and under the parallel regime in the Official Information Act 1982. See the Law Commission Report *The Public’s Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012) at [10.10]:

- 10.10 The time limit for processing requests requires a decision to be made within 20 working days but does not expressly require information to be released within that timeframe. Nevertheless, the time limit tends to be interpreted by agencies and requesters as including the release of information. In his research, Steven Price found that, almost invariably, any information to be released is provided to the requester at the same time as the release decision. [footnote citation omitted]

**[81]** In the present case waiting for the files to arrive from an offshore branch led to the inadvertent breach of the decision deadline.

## **FORMAL ORDERS**

**[82]** The decision of the Tribunal is that:

**[82.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that Immigration New Zealand interfered with the privacy of the plaintiff by refusing,

without proper basis, to make personal information available to her in response to her personal information request dated 26 April 2011.

**[82.2]** The balance of the plaintiff's claims are otherwise dismissed.

### **COSTS**

**[83]** Costs are reserved:

**[83.1]** The plaintiff is to file her submissions within 14 days after the date of this decision. The submissions for the Chief Executive are to be filed within a further 14 days with a right of reply by the plaintiff within 7 days after that.

**[83.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.

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

.....  
**Mr RPG Haines QC**  
**Chairperson**

.....  
**Ms WV Gilchrist**  
**Member**

.....  
**Mr MJM Keefe JP**  
**Member**