IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2018] NZHRRT 38**

	Reference No. HRRT 051/2015
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**ALLAN NELSON WATI**
	PLAINTIFF
AND	**CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS**
	DEFENDANT
	Reference No. HRRT 079/2016
BETWEEN	**ALLAN NELSON WATI**
	PLAINTIFF
AND	**CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIONS**
	DEFENDANT

AT CHRISTCHURCH

BEFORE:
Ms MA Roche, Co-Chairperson
Ms GJ Goodwin, Member
Mr RK Musuku, Member

REPRESENTATION:
Mr AN Wati in person
Ms V McCall for defendant

DATE OF HEARING:	**21, 22 and 23 May 2018**
DATE OF LAST SUBMISSIONS:	**22 June 2018 and 9 July 2018 (plaintiff)** **26 June 2018 (defendant)**
DATE OF DECISION:	**31 August 2018**

DECISION OF TRIBUNAL[1]

[1] [This decision is to be cited as *Wati v Corrections* [2018] NZHRRT 38.]

Introduction

[1] On 12 June 2014, Allan Wati was transferred to Christchurch Men's Prison where he was held on remand while facing criminal charges. On the same day, Detective Constable Lindsay Tilbury sent an email to the Intelligence Unit at the Prison, requesting that he be provided with copies of letters sent from prison by Mr Wati. One letter was provided to him, but Detective Constable Tilbury was told that a production order would be required before Corrections could provide the Police with anything further.

[2] For a period of several weeks, Corrections withheld Mr Wati's mail from delivery, awaiting receipt of the production order. After some time, Mr Wati realised his mail was not being delivered, became upset and complained. In late July 2014, Corrections stopped holding his mail and sent it out for delivery.

[3] A production order was provided to Corrections on 18 August 2014 authorising letters written by Mr Wati between 30 May 2014 and 17 September 2014 to be disclosed to Detective Constable Tilbury. Following service of this order, Corrections provided copies of Mr Wati's mail to Detective Constable Tilbury.

[4] Mr Wati complained to the Privacy Commissioner that Corrections' handling of his mail breached various information privacy principles and constituted an interference with his privacy. Following the discontinuance of the Privacy Commissioner's investigation into his complaint under s 71(2) of the Privacy Act 1993, Mr Wati filed a claim against Corrections with the Tribunal.

[5] There are some factual issues in dispute, particularly concerning the period during which Corrections retained Mr Wati's mail and whether they copied the mail prior to sending it on before being served with the production order. The essential issue to determine, however, is whether the actions of Corrections with respect to Mr Wati's mail were authorised by the provisions of the Corrections Act 2004 concerning prisoner mail, or, if not, whether these actions breached information privacy principles. As will be seen, it is also necessary to consider whether the Tribunal has jurisdiction to consider Mr Wati's complaint under information privacy Principle 11, which was not the subject of a completed investigation by the Privacy Commissioner.

Background

[6] Some reference to the background facts is necessary.

[7] On 29 May 2014, following an incident in Blenheim, Mr Wati was remanded in custody and charged with serious offences. The victims of the offences were Mr Wati's partner and a police officer who had been called to the scene.

[8] On 12 June 2014, Mr Wati was transferred to Christchurch Men's Prison. On the same day, his partner showed Detective Constable Tilbury of the Blenheim Police letters written to her by Mr Wati while he was in custody. Detective Constable Tilbury was concerned that Mr Wati might be attempting to get his partner to withdraw her complaint. He emailed the intelligence officer at the prison and asked for copies of correspondence sent by Mr Wati. Arrangements were then made for Mr Wati's outgoing mail to be directed to the Prison Intelligence Unit.

[9] On 18 June 2014, the prison Intelligence Officer, Anthony Pike, emailed Detective Constable Tilbury telling him that he had permission from the Custodial Services Manager

to provide him with a copy of one letter, "the Thora letter", but that a production order would be required before any other copies of Mr Wati's mail could be provided. Officer Pike understood that a production order would be forthcoming and held Mr Wati's mail in anticipation of receiving it.

[10] Mr Wati was a prolific letter writer. He sent two or three letters a day to friends and family and organisations such as church groups and the Salvation Army. He also wrote to his partner who reconciled with him while he was on remand. The content of his letters was highly sensitive and personal to him.

[11] In mid-July 2014, Mr Wati became suspicious that Corrections were interfering with his mail. In a telephone conversation with his partner, she told him she had just received a letter written to her and the neighbour, Thora, which had been sent a month earlier.

[12] Mr Wati complained to his Unit Manager, Terry Austin, that he believed the Prison Intelligence Unit, along with the Blenheim Police, were interfering with his mail. In his evidence, Mr Wati said that the interference with his mail made him angry, anxious, paranoid and upset. He said that he was provided with anti-anxiety medication and remained paranoid that Corrections were interfering with his mail for the remainder of his time in prison.

[13] In late July 2014, because Mr Wati was making complaints about the withholding of his mail, and a production order had not been provided, the Intelligence Unit sent Mr Wati's mail on to the intended recipients.

[14] On 14 August 2014, Corrections wrote to Mr Wati in response to a letter he had sent to the Parole Board concerning his mail. The letter stated that the Prison Intelligence Unit wished to apologise for the delay in sending his mail and noted that, as Mr Wati was aware, his outgoing mail was screened for inappropriate content, such as threats or attempts to pervert the course of justice, and none had been found.

[15] On 18 August 2014, Detective Constable Tilbury applied for a production order. The order was issued the same day and was served on the prison.

[16] Mr Wati's mail was thereafter forwarded to Detective Constable Tilbury, until the expiration of the order on 17 September 2014.

[17] Mr Wati accepts that Corrections are entitled to screen prisoner mail and to withhold it if appropriate. However he considers that, as his letters contained no inappropriate content, Corrections had no legal right to collect them and withhold them for several weeks as they did. Mr Wati believes that prior to the production order being served, his letters were copied and that, again, Corrections had no legal right to do this. He takes no issue with his mail being disclosed to the Police from the date the production order was served, but says this should not have included copies of mail that pre-dated the production order. He takes no issue with the "Thora" letter being provided to the Police in June 2014.

[18] In his statement of claim Mr Wati complained that:

[18.1] His mail was collected unlawfully, in breach of Principle 1.

[18.2] His mail was collected indirectly and covertly, in breach of Principle 2.

[18.3] His mail was collected without him being informed, in breach of Principle 3.

[18.4] His mail was collected unlawfully and in a manner that intruded upon his personal relationships with his partner and family members, in breach of Principle 4.

[18.5] His mail was retained without good cause, in breach of Principle 9.

[18.6] His mail was copied and retained between 12 June 2014 and 18 August 2014 and the disclosure of these copied letters breached Principle 11.

Preliminary issue – Jurisdiction to consider Principle 11 complaint

[19] Mr Wati's claim concerns complaints about alleged breaches of information privacy Principles 1, 2, 3, 4, 9 and 11. It is necessary to determine whether the Tribunal has jurisdiction in respect of the Principle 11 claim. The position of Corrections is that we do not because the Privacy Commissioner did not complete an investigation of this complaint.

[20] The background of the Principle 11 complaint is complicated. According to a Certificate of Investigation issued by the Office of the Privacy Commissioner on 21 August 2015, after receiving a complaint from Mr Wati, the Commissioner investigated an alleged breach of Principles 1 to 4 and Principle 9. The Commissioner's Office subsequently confirmed by letter dated 8 September 2015 that there had been no investigation under Principle 11.

[21] Sometime after 21 August 2015, Mr Wati asked the Privacy Commissioner to carry out (on the same facts) an investigation under Principle 11. A further Certificate of Investigation, dated 18 January 2016, recorded that the Privacy Commissioner had investigated whether the Department of Corrections inappropriately disclosed letters written by Mr Wati under Principle 11 but did not come to a final view as Mr Wati had requested a Certificate of Investigation. In a memorandum filed on 6 May 2016, Corrections advised that as the Privacy Commissioner did not conclude his investigation under Principle 11 before Mr Wati withdrew his complaint, it did not accept that the Tribunal had jurisdiction to hear Mr Wati's complaint of a breach of Principle 11 under ss 82 and 83 of the Privacy Act.

[22] Mr Wati subsequently returned to the Privacy Commissioner requesting a resumption of the investigation of the Principle 11 complaint but was advised that the Office of the Privacy Commissioner would not reinvestigate the Principle 11 claim and that it was not necessary for the Commissioner to come to a final view on the complaint for him to be able to proceed with the case before the Tribunal.

[23] In *Gray v Ministry for Children (Strike-Out Application)* [2018] NZHRRT 13, the Tribunal considered the issue of whether the Tribunal had jurisdiction to determine proceedings based on a complaint that had been withdrawn prior to the completion of the Privacy Commissioner's investigation.

[24] The Tribunal noted that in the first instance, complaints must be dealt with by the Privacy Commissioner and proceedings before the Tribunal are permitted by ss 82 and 83 only where an investigation by the Commissioner has been conducted under Part 8 or where conciliation (under s 74) has not resulted in settlement. The Tribunal concluded at [26] that powerful policy reasons supported a submission made by the Ministry for Children that if a claim has been withdrawn or discontinued, the jurisdiction threshold in ss 82(1) and 83 cannot be crossed as there is no longer a complaint with which the provisions of the Privacy Act can engage. The Tribunal determined that in the circumstances before it,

where Mr Gray had withdrawn a complaint to the Privacy Commissioner's Office in order to "move on" to the Tribunal for assistance, it did not have jurisdiction to hear and determine Mr Gray's claim that the Ministry interfered with his privacy.

[25] Corrections submitted that the *Gray* decision stands for the proposition that the Tribunal has jurisdiction over claims where the Privacy Commissioner has come to a decision, either on the merits of the complaint, or that an investigation should be discontinued under s 71 of the Privacy Act. Corrections noted that prior to the Tribunal's decision in *Gray,* it is understood that the Privacy Commissioner routinely advised potential plaintiffs that a Certificate of Investigation was sufficient to give the Tribunal jurisdiction to hear a claim.

[26] It is not in dispute that Mr Wati withdrew his complaint under Principle 11 and requested a Certificate of Investigation so that he could bring his Principle 11 claim along with his other claims to the Tribunal. While acknowledging that Mr Wati was in no way attempting to "game the system", Corrections submitted that as a matter of law, the Tribunal lacked jurisdiction to hear the Principle 11 claim.

[27] In arguing that jurisdiction did exist, Mr Wati relied on the fact that he had returned to the Office of the Privacy Commissioner to have them investigate his complaint under Principle 11 and the advice he was given was that they would not investigate and that it was not necessary for them to come to a final view on his Principle 11 claim for him to be able to proceed with his case before the Tribunal.

[28] The position in *Gray* is clear. Where a complaint has been withdrawn or discontinued, there is no jurisdiction under ss 82(1) and 83 for the Tribunal to consider it. Having withdrawn the Principle 11 complaint before the investigation into it was completed, Mr Wati cannot bring it to the Tribunal, even having been advised to the contrary by the Office of the Privacy Commissioner.

[29] While we conclude the Tribunal does not have jurisdiction in respect of Mr Wati's Principle 11 complaint it must be noted that that complaint, as articulated in the statement of claim, alleged that between 30 May 2014 and 18 August 2014 Corrections disclosed Mr Wati's personal information to Police prior to the receipt of a production order. At the hearing, Mr Wati clarified that he did not allege that letters other than the "Thora" letter had been provided prior to the production order. Rather, his complaint was that his letters had been copied and held. He also clarified that he took no issue with the Thora letter having been provided to the Police.

[30] In his closing submissions Mr Wati clarified that the Principle 11 claim he had wished to pursue related to the disclosure to the Police of letters that had been written and copied prior to the service of the production order. These letters were written within the period covered by the production order (which was back-dated to 31 May 2014). However, in Mr Wati's view, as copying them was prohibited, no copies of letters dated prior to 18 August 2014 should have existed. Consequently such copies should not have been disclosed. As will be seen later in this decision, we find that the letters were not unlawfully copied as alleged by Mr Wati. The copying issue falling away, the complaint is reduced to concerns regarding the collection and retention of personal information, which fall under Principles 1 to 4 and 9 rather than Principle 11. Mr Wati is not therefore disadvantaged by the inability of the Tribunal to consider Principle 11 in the context of the facts as found.

The legal framework

[31] Sections 104 to 110 of the Corrections Act contain provisions concerning the handling of prisoners' mail.

[32] Section 108 deals with the withholding of prisoner mail. It provides:

> **108 Withholding mail**
>
> (1) A prison manager may withhold mail between a prisoner and another person if—
> …
> (d) it is correspondence that the manager believes on reasonable grounds is likely to—
> (i) threaten or intimidate a person to whom it is being sent by the prisoner; or
> (ii) endanger the safety or welfare of any person; or
> (iii) pose a threat to the security of the prison; or
> (iv) promote or encourage the commission of an offence, or involve, or facilitate the commission or possible commission of, an offence; or
> (v) prejudice the maintenance of the law (including the prevention, detection, investigation, prosecution, and punishment of offences, and the right to a fair trial); or
> (vi) breach an order or direction of any court or constitute contempt of court.
> (2) If mail or an unauthorised item found in any mail is withheld, the prisoner to or from whom the mail was directed must be informed that the mail or item, as the case may be, has been withheld, unless it is to be forwarded to an enforcement officer.

[33] Section 110C of the Corrections Act provides:

> **110C Application of Privacy Act 1993**
>
> The Privacy Act 1993 applies to any activity authorised under any of sections 104 to 110B relating to correspondence to or from a prisoner.

[34] Regulation 84 of the Corrections Regulations 2005 relates to the copying of prisoners' mail. It provides:

> **84 Copying of correspondence**
>
> No correspondence to or from a prisoner may be copied unless—
> (a) it is correspondence between the prisoner and the department; or
> (b) it is copied for the purpose of sending the copy to an enforcement officer, in circumstances to which section 108(1)(d)(iv) of the Act applies; or
> …

[35] While the Long Title of the Privacy Act states that it is an Act to promote and protect individual privacy in general and to establish certain Principles with respect to (inter alia) the collection of personal information, there is an important limitation in s 7. It relevantly provides:

> **7 Savings**
>
> …
> (4) An action is not a breach of any of Principles 1 to 5, 7 to 10, and 12 if that action is authorised or required by or under law.
> …

[36] Mr Wati's complaint concerns alleged breaches of Principles 1 to 4 and 9 (jurisdiction with respect to Principle 11 not being found). Although the provisions of the Corrections Act relating to prisoner mail are subject to the Privacy Act, the effect of s 7(4) is that, if the actions of Corrections with regard to Mr Wati's mail were authorised or required by s 108 of the Corrections Act and/or reg 84(b) of the Corrections Regulations, they were not a breach of Principles 1 to 4 and 9.

[37] In order to establish whether the actions of Corrections with regard to Mr Wati's mail were authorised or required by s 108 or reg 84(b), it is necessary to determine what those actions were. There are two disputes of fact. They concern first, the length of the period during which Corrections held Mr Wati's mail and secondly, whether Corrections copied that mail prior to their receipt of the production order on 18 August 2014.

What was the period during which the mail was held?

[38] There was some dispute as to the length of the period that Mr Wati's mail was retained by the Prison Intelligence Unit, in anticipation of the production order. Mr Pike gave evidence that the Intelligence Unit began to collect the mail when requested to do so by Detective Constable Tilbury on 12 June 2014, although it may have been a day or two after that that any letters from Mr Wati arrived at the Intelligence Unit. Both Mr Pike and another Corrections officer, Terry Austin, gave evidence that they recalled Mr Wati's mail being retained for two to three weeks and then being passed on because Mr Wati was becoming upset by the delays in delivering his mail.

[39] Mr Wati's recollection is that his mail was held until late July 2014. He gave evidence that in mid-July 2014, his partner informed him she had received a letter from him that he had written a month earlier and that this gave rise to his concern that Corrections and the Blenheim Police were interfering with his mail. His evidence was that on Friday 26 July 2014, Terry Austin advised him that the Intelligence Unit at the prison were holding his mail for the Blenheim Police and that the Police had been advised that if no valid reason was given by Monday 28 July 2014, the mail would be forwarded without interference.

[40] Mr Wati's recollection is supported by an email from an intelligence officer at the prison to Detective Constable Tilbury dated 25 July 2014 in which the officer noted that the mail was "starting to build up a bit", that Mr Wati was getting "wound up" that it was not getting through and enquiring as to whether the mail could be sent along. (Common Bundle p 19).

[41] Neither Mr Pike nor Mr Austin claimed to be certain as to the period that Mr Wati's mail was collected. In contrast, Mr Wati has a clear recollection of this which is supported by the documentary evidence suggesting the mail was still being collected as of 25 July 2014. Given Mr Pike's evidence that the mail began to be collected soon after 12 June 2014, we find that the period for which the mail was being held was approximately six weeks and extended from around 12 June 2014 to 27 July 2014.

Was the mail copied prior to service of the production order?

[42] There is a dispute between the parties as to whether Mr Wati's mail was copied prior to being sent on to its intended recipients during the period when the Prison Intelligence Unit was waiting for the production order. At the hearing, Mr Wati submitted that this issue constituted the nub of his case as he believed that any such copying would have been unlawful under reg 84 of the Corrections Regulations.

[43] Mr Pike gave evidence that he did not copy any letter except for the Thora letter prior to receiving the production order on 18 August 2014. His evidence appeared to contradict assertions made in a number of documents produced at the hearing. An email sent by Mr Pike to Detective Constable Tilbury on 25 July 2014 stated:

> Just enquiring as to where we are with WATI's mail. Are we able to send it along? It's starting to build up a bit and he is getting quite wound up that it's not getting through. This unfortunately impacts on the unit staff who have to deal with him. Your advice would be greatly appreciated.

Detective Constable Tilbury replied on 26 July 2014 stating:

> Hi there, is there any chance of taking copies of them (before you send them on) and when I return from leave I will get a production order done and sent through? I don't want to cause any issues with your guys, so if need be send them through.

On 28 July 2014 Mr Pike replied to Detective Constable Tilbury as follows:

> Thanks for getting back to me. No worries, I'll get some copies ready for you and as soon as the production order arrives I can email them to you. Enjoy your leave!

On 19 August 2014 Mr Pike emailed Detective Constable Tilbury stating:

> I have a large file of copies sitting with me that I will post to you. There will be a gap in the mail as we had to send most of August's mail on straightaway.

[44] The application for the production order, made by Detective Constable Tilbury stated:

> 5. I have also been in contact with Anthony PIKE, an intelligence officer with the Department of Corrections. He advises me that WATI has attempted to send several more letters to the victim.
>
> 6. PIKE has taken copies of these letters.

[45] The emails between Mr Pike and Detective Constable Tilbury, in particular Mr Pike's advice that he would take copies of the letters, were put to Mr Pike at the hearing. In response, he gave evidence that after this email exchange, he spoke to a senior manager at the prison and was advised that he was not to copy Mr Wati's correspondence and, accordingly, did not.

[46] Detective Constable Tilbury gave evidence at the hearing that appeared to contradict the evidence of Mr Pike that the mail had not been copied prior to the service of the production order. It will be recalled that the mail was delivered without being held from approximately 28 July 2014. When asked, Detective Constable Tilbury said he was "fairly certain" that he received letters from before the production order was served (18 August 2018) and that he recalled receiving the letters as attachments to a large number of emails. When asked whether some of these letters were dated in June, he said that he was only surmising that there were, as this was four years ago. He also said that he had refreshed his memory of events by reading the email chains included in the common bundle of documents. Detective Constable Tilbury was recalled on the last day of the hearing to clarify the issue of whether letters were copied. He was advised that there appeared to be no record of emails from Corrections to him attaching correspondence from Mr Wati. He responded that although he had thought he recalled receiving letters as attachments to emails, he did remember receiving courier packages of letters.

[47] Because Detective Constable Tilbury was unable to clearly recall in his evidence whether he had received Mr Wati's letters by email or by courier, and whether these letters had predated the service of the production order, the Tribunal directed Corrections to file an affidavit by him following the hearing confirming whether or not it is possible to locate any emails from the Department of Corrections to him, sent in accordance with the production order, attaching copies of the letters written by Mr Wati, and to provide details

of the search for such emails. It was directed that should Detective Constable Tilbury be able to locate the emails, they and their attachments should be annexed to the affidavit. It was further directed that Detective Constable Tilbury should also attempt to locate the copies of Mr Wati's letters that were provided to Mr Wati's counsel pursuant to the Criminal Disclosure Act 2008, and to locate the file of the letters provided to the Police pursuant to the production order and, should these be located, to annex copies to his affidavit. The affidavit, dated 14 June 2018, was duly filed and both Mr Wati and Corrections were given the opportunity to make submissions about it.

[48] In the affidavit, Detective Constable Tilbury deposed that he was unable to locate any emails but that he had found copies of the letters sent to him by Corrections saved in an operations folder on the Police network and that it appeared that when he received physical copies of the letters, he had scanned and saved them. These letters were annexed to the affidavit. The earliest of these was a lengthy letter to Mr Wati's partner, dated 19 August 2014.

[49] In submissions, Mr Wati pointed out that no document in which Mr Pike retracted his offer to Detective Constable Tilbury to copy the letters was before the Tribunal. He also submitted that the affidavit did not explain the reference to the "large file of copies" referred to in Mr Pike's email to Detective Constable Tilbury on 19 August 2014. If the only letter held by Mr Pike at this date was the one dated 19 August 2014, it could not be said to be a large file. In a final submission to the Tribunal, Mr Wati attached copies of two letters written by him to his partner in September 2014 which he stated had been received by his lawyer in the context of criminal discovery and submitted that as copies of these letters were not included in the annexures to Detective Constable Tilbury's affidavit, this suggested that not all letters received by the Police were disclosed in the affidavit.

[50] The Crown submitted that the language used by Mr Pike in his emails was loose and that what he meant by a "large file" is context dependent and cannot on its own determine whether copies were made. With regard to the assertion in the application for the production order that, "Pike has taken copies of these letters" the Crown submitted that Detective Constable Tilbury was unaware of prison processes and his assertion does not establish that copies actually existed. With regards to Detective Constable Tilbury's initial evidence that he was fairly certain he had received letters from before the production order was served, the Crown submitted that he was clearly mistaken and was recalling events from four years ago.

[51] A further complexity regarding the issue of copying arose at the hearing concerning the provisions of the Prisons Operation Manual (POM) relating to prisoner mail. The prisoner mail provision of the POM included in the common bundle was not the version that was current at the time that Mr Wati's mail was being withheld. Mr Wati produced the version current in 2014 on the third day of the hearing. This provided, at paragraph C.01.07-2, that an additional copy of any correspondence copied (in accordance with the policy set out above at C.01.07-1) must be made and placed in a centralised filing system together with a record of the justification for copying the correspondence.

[52] Paragraph C.01.07-2 was not present in the version of the POM provided in the common bundle. When asked by Mr Wati, Mr Pike denied having taken file copies of letters that were sent to the Police either prior to or after the production order was served. Mr Pike had given his evidence on the second day of the hearing, before the Tribunal and parties were aware that the policy document in the common bundle post-dated events. Mr Wati said that he had wished to put to Mr Pike that it was prison policy to copy mail, to strengthen his argument that the mail had been copied before the production order was

served. Mr Pike's evidence was however that he had not taken additional copies of the letters supplied under the production order and that he was advised by senior management that he was not to copy prisoner mail.

[53] As can be seen from the above review of the evidence and submissions concerning the issue of copying, there are difficulties in determining the issue of whether mail was copied prior to the production order being served. Mr Wati has acknowledged that the copies of his mail provided to his lawyer by the Police in the context of criminal disclosure all post-dated the service of the production order. He has also acknowledged that the same letters, provided to him in accordance with an Official Information Act request, did not pre-date the production order. Mr Wati submits that unlawfully copied letters that pre-dated the service of the production order were not disclosed to his defence in 2014, and were disposed of by Detective Constable Tilbury to protect Mr Pike who had unlawfully made the copies at his request. A finding that copies were made therefore requires a further finding that they were disposed of in 2014 by Detective Constable Tilbury to protect Mr Pike.

[54] There is no direct evidence before us that the letters were copied. No letters predating the service of the production order are before the Tribunal. Although Detective Constable Tilbury initially indicated he had received letters that had predated this order, he qualified this evidence and stated he was only surmising as he could not remember. While the emails between Mr Pike and Detective Constable Tilbury clearly indicate that copies were made, Mr Pike's evidence was that they were not because, after offering to copy them, he was told not to by a senior manager. Although Mr Wati questions why the change of position was not communicated to Detective Constable Tilbury, Detective Constable Tilbury's final email indicated that he was about to go on leave and Mr Pike's email in response wishes him well on leave. The next communication between them before the Tribunal is on 18 August 2014 when the production order was served.

[55] Weighing all the evidence and submissions, we conclude that it is not established that Corrections made copies of Mr Wati's mail prior to being served with the production order. However, had we come to a contrary view, we consider that such copying would have been authorised by reg 84 because the criteria set out in s 108(1)(d)(iv) of the Corrections Act was met. This requires the prison manager to believe on reasonable grounds that correspondence is likely to promote or encourage the commission of an offence, or involve, or facilitate the commission or possible commission of, an offence.

[56] Detective Constable Tilbury gave evidence of his concern that the victim was being manipulated by Mr Wati and that, having seen the letters provided to him by the victim on 12 June 2014, he was of the view that Mr Wati's correspondence could lead to other charges such as perverting the course of justice. He was concerned that letters sent to others could have the purpose of manipulating the victim and deterring her from pursing her complaint against him. Detective Constable Tilbury stated that, in respect of charges relating to perverting the course of justice, "We didn't go down that line but it was certainly considered". Corrections has submitted that to the extent that Mr Wati's mail may have involved the possible commission of or facilitated the possible commission of the offence of attempting to pervert the course of justice, it was lawful for it to be copied by Corrections pursuant to reg 84(b) of the Corrections Regulations. We accept that submission. As noted at [62] and [63] below, Detective Constable Tilbury's concerns were communicated to the prison. They support the belief (held by Corrections officers) on reasonable grounds that the correspondence may have been used to attempt to pervert the course of justice. See by analogy the "good cause to suspect" requirement in the transport context and in particular *Police v Cooper* [1975] 1 NZLR 216 (CA) at 221:

> … we conclude that in deciding whether he has "good cause to suspect" an officer may consider, according to its weight, all relevant material before him, whether derived from personal observation or inquiry or hearsay reports alone.

The facts as found

[57] The facts as found are as follows:

> **[57.1]** Between around 12 June 2014 and 28 July 2014 Corrections withheld letters written by Mr Wati from delivery while waiting for a production order to be served.
>
> **[57.2]** From 28 July 2014 Corrections delivered Mr Wati's mail without holding it because Mr Wati had become distressed by the interference with his mail.
>
> **[57.3]** No inappropriate content was found in any of Mr Wati's mail.
>
> **[57.4]** A production order was issued and served on 18 August 2014. After this date, Corrections sent copies of Mr Wati's mail to the Police until the production order expired on 18 September 2014.

Were the actions of Corrections authorised by s 108 of the Corrections Act? Were information privacy principles breached?

[58] It will be recalled that s 108 of the Corrections Act authorises the withholding of mail between a prisoner and another person in a number of circumstances. Of relevance in this case are the circumstances described in s 108(1)(d)(v) which allow mail to be withheld if a prison manger believes on reasonable grounds the correspondence is likely to:

> (v) prejudice the maintenance of the law (including the prevention, detection, investigation, prosecution, and punishment of offences, and the right to a fair trial) -

[59] It will also be recalled that s 108(2) requires that if mail is withheld, the prisoner from whom it was directed must be informed, unless it is to be forwarded to an enforcement officer.

[60] Given the provisions of s 7(4) of the Privacy Act discussed above, if the actions of Corrections with respect to Mr Wati's mail were authorised by s 108 of the Corrections Act, they were not in breach of information privacy Principles 1 to 4 and 9. In determining whether they were so authorised, it is necessary to consider what is meant by the phrase, "likely to prejudice the maintenance of the law (including the prevention, investigation, and detection of offences and the right to a fair trial)".

[61] The same phrase (without the brackets) appears in s 27(1)(c) of the Privacy Act which is in Part 4 of the Act, which deals with good reasons for refusing access to personal information. In *Lohr v Accident Compensation Corporation* [2016] NZHRRT 31 the Tribunal considered the interpretation of the phrase at [34]–[35.2]. The Tribunal stated:

> **[34]** The term "likely" is to be understood as requiring the agency to show there is a real and substantial risk to the interest being protected: *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391, 404 and 411 and *Nicholl v Chief Executive of the Department of Work and Income* [2003] 3 NZLR 426 at [13]. See also *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10 (8 April 2013) at [31]. To similar effect (but in a different context) see *St Peter's College v The Crown* [2016] NZHC 925, [2016] NZAR 788 at [10].

> **[35]** As to the meaning of the phrase "to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences and the right to a fair trial" we do not in the context of the present case attempt an exhaustive analysis. It is sufficient to note:
>
> > **[35.1]** Law enforcement is not the whole of the provision (see the reference to the right to a fair trial) but the specific mention of "the prevention, investigation, and detection of offences" indicates the importance placed by the legislature on protecting these activities. See Ian Eagles, Michael Taggart and Grant Liddell in *Freedom of Information in New Zealand* (Oxford, Auckland, 1992) at 177 commenting on the identical provision in s 6(c) of the Official Information Act 1982.
> >
> > **[35.2]** By inserting into s 6(c) of the Official Information Act the words "including the prevention, investigation, and detection of offences" after the words "the maintenance of the law" the framers of the Official Information Act have recognised that one of the ways in which the law can be maintained is in the prevention, investigation and detection of offences against it. See *Commissioner of Police v Ombudsman* at 405 per McMullin J. In our view the same must necessarily apply to the identical s 27(1)(c) of the Privacy Act.

[62] Prior to Mr Wati arriving at Christchurch Prison, Detective Constable Tilbury communicated his concern to the prison that Mr Wati would try to manipulate his victim into withdrawing her complaint against him. In his first email to the prison dated 12 June 2014, he stated:

> Hi there, we have an ALLAN WATI,PRN 731341 heading your way. He is remanded in custody in relation to a violent domestic attack on his partner …
>
> He has already sent her a number of letters from the prison last week and will no doubt make contact with her when he is in Christchurch Prison again. He is a very manipulative person and I believe he has and will continue to try and get the victim to withdraw her complaint.
>
> Is there any chance we could get copies of any letters sent or received by him and the recordings of his phone calls while there??

This email was forwarded to the Prison Intelligence Unit and on its receipt Mr Pike emailed Detective Constable Tilbury advising:

> I have made arrangements for all of WATI's mail to be redirected to the Intelligence Unit.
>
> As of yet, he has made no phone calls but I will continue to monitor.

[63] Given this email exchange, we find that the grounds for withholding Mr Wati's mail under s 108(1)(d) are made out and that the Prison Intelligence Unit, having been advised by Detective Constable Tilbury that Mr Wati had, and would continue to try, to get his victim to withdraw her complaint, believed on reasonable grounds that Mr Wati's correspondence was likely to prejudice the maintenance of the law, specifically its enforcement.

[64] Mr Wati's mail was withheld while the Prison Intelligence Unit were waiting for a production order in respect of it so it could be forwarded to Detective Constable Tilbury. As the mail was held in order to be forwarded to an enforcement officer, s 108(2) applied, meaning that Corrections had no obligation to inform Mr Wati that his mail was being withheld.

The length of time the mail was withheld

[65] There is no time limit for withholding mail under s 108. The question arises as to whether, prison intelligence having held and screened the mail and having found no content which on its face appeared inappropriate, could have continued to have maintained a belief on reasonable grounds that the mail was likely to prejudice the maintenance of the law. In other words, whether the grounds which allowed the mail to be withheld under s 108, continued to exist for the period during which the mail was withheld.

[66] This issue received some focus at the hearing. Mr Wati's position was that prison intelligence were competent to screen the mail and that having found that it contained no inappropriate content such as threats or attempts to pervert the course of justice (see the letter of 14 August 2014 from Corrections to Mr Wati referred to at [14] above) they no longer could have reasonably believed that it could have prejudiced the maintenance of the law. They therefore should have sent it on, rather than holding it while waiting for a production order. He submitted that following screening, they had no lawful right to retain his mail.

[67] The position of Corrections was that the Police were better placed than Corrections to determine what was relevant to their enquiries. In his evidence, Detective Constable Tilbury said that he believed that the Police were better placed than the Intelligence Unit staff to determine what was relevant to the enquiry and that even letters to Church groups or priests could have been relevant as there were a number of people that Mr Wati was trying to manipulate. He said that he believed that Mr Wati was trying to manipulate the victim by writing letters to "all sorts of people". It was therefore hard to narrow down what mail was relevant to the Police enquiry. It follows that without the information available to the Police in the context of their enquiry, Corrections were not able to definitively determine whether Mr Wati's correspondence could have prejudiced the maintenance of the law.

[68] As noted above at [65], s 108 does not place a time limit on the withholding of prisoner correspondence. It requires only the existence of a belief on reasonable grounds that one of the conditions listed under s 108(1) is made out. In this case, the belief that the correspondence was likely to prejudice the maintenance of the law. Having received email advice from Detective Constable Tilbury that Mr Wati was very manipulative, that he had, and would continue to try and get the victim to withdraw her complaint, and that the Police therefore wanted copies of **any** letters he sent, the Tribunal finds that, despite screened letters having apparently appropriate content, the belief that they could have prejudiced the maintenance of the law remained reasonable.

[69] We have found that the withholding of Mr Wati's mail by Corrections between mid-June and late July 2014 was authorised by s 108 of the Corrections Act. Given this conclusion, we must find, pursuant to s 7(4) of the Privacy Act, that the actions of Corrections did not breach information privacy Principles 1 to 4 and 9. In any event, even had the savings provision in s 7(4) not been applied, we would find that Principles 1 to 4 and 9 were not breached. We briefly explain why below.

Principle 1

[70] Principle 1 provides:

> Personal information shall not be collected by any agency unless—

(a) the information is collected for a lawful purpose connected with a function or activity of the agency; and

(b) the collection of the information is necessary for that purpose.

[71] If Mr Wati's mail was withheld (collected) for a lawful purpose connected with the function of Corrections, and necessary for that purpose, this will not be in breach of Principle 1. We have found that Mr Wati's mail was withheld pursuant to s 108(1)(d)(v) of the Corrections Act as it was believed on reasonable grounds that it was likely to prejudice the maintenance of the law. The withholding of the mail was therefore for a lawful purpose. It was also necessary for that purpose. It follows that the actions of Corrections in withholding the mail did not breach Principle 1.

Principle 2

[72] Principle 2 requires that when an agency collects personal information about a person, the information shall be collected directly from the individual concerned unless one of the exceptions in subs (2) is made out. Corrections has submitted that the mail was collected directly from Mr Wati in that it was sent to the Intelligence Unit once Mr Wati asked that it be posted. It submits, in the alternative, that the exception in Principle 2(2)(d)(i) applies. That requires Corrections to believe on reasonable grounds that non-compliance was necessary to avoid prejudice to the maintenance of the law, including the prevention, detection, investigation, prosecution and punishment of offences.

[73] We accept that the information (the letters) were collected directly from Mr Wati. We also find, in any case, there were reasonable grounds to believe that the collection of the information, in the manner that it was collected, was necessary to avoid prejudice to the maintenance of the law. It follows that the actions of Corrections did not breach Principle 2.

Principle 3

[74] Principle 3 requires that where an agency collects personal information directly from the individual concerned, the agency must take such steps as are, in the circumstances, reasonable to ensure (inter alia) that the individual concerned is aware of the fact that the information is being collected and the purpose for which the information is being collected. Again, an exception to Principle 3 exists where an agency believes on reasonable grounds that non-compliance is necessary to avoid prejudice to the maintenance of the law including the detection and investigation of offences.

[75] As the Tribunal noted in *Lohr v Accident Compensation Corporation* [2016] NZHRRT 31 at [35.1], the specific mention of "the prevention, investigation, and detection of offences" in the exceptions to Principle 3 indicates the importance placed by the legislature on protecting these activities. We find the exception to Principle 3 concerning the avoidance of prejudice to the maintenance of the law is made out. There were reasonable grounds for believing that Mr Wati should not be informed that his mail was being collected in order to avoid prejudice to the maintenance of the law. It follows that the actions of Corrections did not breach Principle 3.

Principle 4

[76] Principle 4 states that personal information cannot be collected by unlawful means or by means which, in the circumstances, are unfair or which intrude to an unreasonable extent upon the personal affairs of the individual concerned. In our view, the retention of

Mr Wati's mail was not unlawful as the Corrections Act authorises the opening, reading and withholding of prisoner mail. Given the lawful purpose for which the mail was both screened and withheld we find that the means of its collection by Corrections were neither unfair or intrusive to an unreasonable extent. We acknowledge that Mr Wati's mail was sensitive in its content and highly personal to him. However, the intrusion into Mr Wati's personal affairs that necessarily occurred when his highly personal mail was read and withheld was not unfair or such as to intrude to an unreasonable extent upon Mr Wati's personal affairs in the circumstances. These circumstances included the request by the Police to see the mail because of concern that, through it, attempts would be made to have the victim withdraw her complaint. It follows that a breach of Principle 4 is not established.

Principle 9

[77] Principle 9 provides: "An agency that holds personal information shall not keep that information for longer than is required for the purposes for which the information may lawfully be used". The lawful purpose for which Mr Wati's mail was intended to be used was the avoidance of prejudice to the maintenance of law. The mail continued to be required and accordingly withheld for this purpose for the time that it was retained by the Intelligence Unit pending the receipt of the production order. It is unfortunate that, having indicated that a production order would be forthcoming, Detective Constable Tilbury did not attend to the issue of this order promptly. As is noted earlier, after withholding the mail from mid-June in reliance on the advice that a production order was forthcoming, Corrections began to deliver it in late July because of the distress being caused to Mr Wati. It remains the case however that during this period, the mail was required for the purpose for which it was being withheld. It follows that there was no breach of Principle 9.

Conclusion

[78] It follows from the conclusions on the facts and the application of both s 108 of the Corrections Act and s 7(4) of the Privacy Act that there was no breach of information privacy Principles 1 to 4 and 9. In any case we have found that these principles would not have been breached. No interference with Mr Wati's privacy in terms of s 66(1) of the Privacy Act can therefore be established. The claim is accordingly dismissed.

.....	.....	.....
Ms MA Roche	**Ms GJ Goodwin**	**Mr RK Musuku**
Co-Chairperson	**Member**	**Member**