IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2021] NZHRRT 18**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 011/2015
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**LISA TURNER**
	PLAINTIFF
AND	**THE UNIVERSITY OF OTAGO**
	DEFENDANT

AT DUNEDIN

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms GJ Goodwin, Member
Ms DL Hart, Member

REPRESENTATION:
Mr AC Beck and Mr W Forster for plaintiff
Mr BCS Dorking and Mr M Couling for defendant

DATE OF HEARING: **12 and 13 October 2015; 2 to 5 May 2016**

DATE OF DECISION: **25 March 2021**

DECISION OF TRIBUNAL[1]

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[1] [This decision is to be cited as *Turner v University of Otago* [2021] NZHRRT 18.]

INTRODUCTION

[1] This case is about a request for access to personal information held by an agency, a request repeated on multiple occasions. In the four month period from 14 February 2013 to 15 June 2013 (the period covered by the amended statement of claim dated 15 January 2016 (ASoC)) no fewer than twelve access requests were allegedly made by the plaintiff. The legal consequences of those requests are addressed in this decision.

Background to the requests

[2] Dr Lisa Turner is a Consultant Psychiatrist who has worked in the public health system since 1995. For approximately nine years in the period from late 2004 to 2 July 2013 she also worked part-time at the Department of Psychological Medicine, the University of Otago as Senior Teaching Fellow. At the point her employment with the University ended her appointment was 0.2 FTE and her principal duties were to conduct a weekly case study session with fourth year medical students.

[3] The students were divided into four groups. Each group for which Dr Turner had responsibility was scheduled to take part in five three hour case study sessions on a Friday morning.

[4] For some years Dr Turner had used Room 119 for her sessions. In December 2012 she was advised that in the New Year, on two separate days in March 2013, she would need to use an adjoining room owing to pressure on space. Dr Turner was unhappy at this news. To avoid teaching in a room other than Room 119 she advised the Head of Department, Professor Paul Glue, she would not teach on the two days in question.

[5] Professor Glue was concerned at the impact this would have on six students who were on placement outside Dunedin. Dr Turner then proposed a programme for the whole of 2013, showing teaching over three sessions, not five. In addition her teaching hours at each session were shown to be reduced from 9am to 12pm to 9am to 10:30am. Professor Glue, however, was not prepared to accept the reduction in teaching hours intended by Dr Turner.

[6] The relationship between Dr Turner and the University deteriorated. On 23 April 2013 Dr Turner gave formal notice of a personal grievance of unjustified disadvantage. On 2 July 2013 the University dismissed Dr Turner for failing to follow an instruction that she teach what she had previously taught, without reduction of content, in five sessions of three hours each on Friday mornings in the room she was allocated.

The Employment Relations Authority

[7] In a decision given on 10 June 2015 the Employment Relations Authority found that while the University had been entitled to consider Dr Turner's failure to follow its instructions was serious misconduct, the University had not followed the correct process and as a consequence Dr Turner had been unjustifiably dismissed. However, the $10,000 compensation for humiliation, loss of dignity and injury to feelings sought by Dr Turner was reduced by 50% for what the Authority described as Dr Turner's blameworthy behaviour which had led to the situation giving rise to her personal grievance.

[8] The proceedings under the Employment Relations Act 2000 (ERA) are mentioned for two reasons. First, the ERA makes separate provision for the disclosure of information (including personal information) by an employer to an employee within the context of the

employment relationship. See ERA, s 4(1A) and 4(1B). However, this does not affect an employer's obligations under the Privacy Act 1993 (PA 1993). See ERA, s 4(1C):

> *Good faith employment relations*
>
> **4 Parties to employment relationship to deal with each other in good faith**
> …
>
> (1A) The duty of good faith in subsection (1)—
> (a) is wider in scope than the implied mutual obligations of trust and confidence; and
> (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
> (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
> (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
> (ii) an opportunity to comment on the information to their employer before the decision is made.
>
> (1B) However, subsection (1A)(c) does not require an employer to provide access to confidential information—
> (a) that is about an identifiable individual other than the affected employee if providing access to that information would involve the unwarranted disclosure of the affairs of that other individual:
> (b) that is subject to a statutory requirement to maintain confidentiality:
> (c) where it is necessary, for any other good reason, to maintain the confidentiality of the information (for example, to avoid unreasonable prejudice to the employer's commercial position).
>
> (1C) To avoid doubt,—
> (a) subsection (1B) does not affect an employer's obligations under—
> (i) the Official Information Act 1982 (despite section 52(3) of that Act); or
> (ii) the Privacy Act 2020 (despite section 24(1) of that Act):
> (b) an employer must not refuse to provide access to information under subsection (1A)(c) merely because the information is contained in a document that includes confidential information.

[9] Second, the overlapping employment background contextualises the access requests made by Dr Turner under the Privacy Act. This is an issue relevant to the question whether the IPP 6 requests made by her under the PA 1993 were limited in scope or what is known as "everything requests". In her oral evidence Dr Turner confirmed she was not asking the University for everything ever written about her. She was asking for personal information relevant to the employment issues.

The complaint to the Privacy Commissioner

[10] Because Dr Turner was of the view the University had not complied in full with her access requests under the PA 1993, on 23 April 2013 she lodged a complaint with the Privacy Commissioner.

[11] By letter dated 16 October 2014 the Commissioner gave notice he had formed the view the University had released all the information Dr Turner had been entitled to. The Commissioner noted Dr Turner disputed that view but had other remedies. First, she could apply to the Employment Relations Authority for a disclosure order under ERA, s 4(1A)(c) and second, she could commence proceedings before the Human Rights Review Tribunal. The Certificate of Investigation, also dated 16 October 2014 recorded the investigation had been discontinued under PA 1993, ss 71(1)(g) and 71(2).

[12] The Tribunal is not bound by the determination made by the Commissioner whose processes are focused on mediation. See the description of PA 1993, Part 8 in *Gray v Ministry for Children (Strike-Out Application)* [2018] NZHRRT 13 at [17] to [23]. Proceedings before the Tribunal, on the other hand, are adversarial. This facilitates the determination of credibility and fact finding in relation to a body of evidence not seen by the Commissioner. For these reasons the Tribunal does not, in reaching its own independent conclusions on the evidence heard by it, give weight to the Commissioner's determination. See further *Watson v Capital & Coast District Health Board* [2015] NZHRRT 27 at [148].

Delay

[13] The long delay in the delivery of this decision is both acknowledged and regretted. The reasons for the delay have been explained in the *Minute* dated 14 July 2020 issued by the Chairperson.

Legislative changes

[14] The information access requests were made in 2013. While the then Privacy Act 1993 had application, that Act was repealed from 1 December 2020 by the Privacy Act 2020 which came into force on that date. The effect of the transitional provisions in Schedule 1, Part 1, cl 9(1) of the 2020 Act is that the present proceedings must be continued and completed under that Act:

> **9 Proceedings**
>
> (1) Any proceedings commenced before the Human Rights Review Tribunal under Part 8 of the Privacy Act 1993 before the commencement day, but not completed by that day, must be continued and completed under this Act.

[15] In this decision the provisions of the 1993 Act will be referred to unless otherwise expressly indicated as it was the 1993 Act which applied at the relevant time.

[16] It is now possible to address the twelve requests made by Dr Turner for access to her personal information held by the University. One of the critical issues will be the effect of the repetition of her requests. Before the evidence is addressed the legal framework is explained and later returned to.

REQUESTS FOR ACCESS TO PERSONAL INFORMATION – THE LEGAL OBLIGATIONS ON AN AGENCY UNDER THE PRIVACY ACT 1993

[17] The closing submissions by Dr Turner made three submissions in relation to each of the requests for information:

> **[17.1]** The University was in breach of its duties under the Act by failing to confirm what pieces of Dr Turner's personal information it held at the material time. Consequently the University came within the deeming provisions in PA 1993, s 66(3).
>
> **[17.2]** The University did not make or give notice of decisions to refuse access to personal information, or withheld Dr Turner's personal information. It provided that information only with undue delay with the consequence that it was deemed by PA 1993, s 66(4) to have refused to provide access to Dr Turner's personal information.

[17.3] Any decision to refuse access to Dr Turner's personal information breached IPP 6.

[18] As the Tribunal does not accept Parts 4 and 5 of the Act are to be interpreted in the manner intended by Dr Turner, it is necessary that this decision commence with an analysis of IPP 6 and PA 1993, ss 40(1) and 66.

Information privacy principle 6

[19] Where an agency holds personal information about an identifiable individual in such a way that that information can readily be retrieved, the individual is entitled to confirmation whether or not the agency holds such information and to have access to that information. See IPP 6:

> Principle 6
> *Access to personal information*
>
> (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—
> (a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
> (b) to have access to that information.
> (2) Where, in accordance with subclause (1)(b), an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.
> (3) The application of this principle is subject to the provisions of Parts 4 and 5.

[20] Because the University of Otago is a public sector agency the "entitlement" in IPP 6 is a legal right. See PA 1993, s 11(1).

Decision whether request to be granted

[21] As noted in *Armfield v Naughton* [2014] NZHRRT 48, (2014) 9 HRNZ 808 at [70] and in *Koso v Chief Executive, Ministry of Business, Innovation, and Employment* [2014] NZHRRT 39, (2014) 9 HRNZ 786 at [1] to [6] (*Koso*), an agency which receives a request under IPP 6 for access to personal information has two key obligations, each driven by a different expression of time:

[21.1] 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:

> **40 Decisions on requests**
>
> (1) Subject to this Act, the agency to which an information privacy request is made or transferred in accordance with this Act shall, as soon as reasonably practicable, and in any case not later than 20 working days after the day on which the request is received by that agency,—
> (a) decide whether the request is to be granted and, if it is to be granted, in what manner and, subject to sections 35 and 36, for what charge (if any); and
> (b) give or post to the individual who made the request notice of the decision on the request.

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 the upper limit to what can be said to be "as soon as reasonably practicable". See further *Koso* at [1] to [6] and [62].

[21.2] 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 (but separately) a deemed refusal to make the information available (s 66(4)).

As soon as reasonably practicable – s 40(1)

[22] The decision required by s 40 is a decision "whether the request is to be granted". It is this decision which must be given to the requester. It is not required that that decision identify each specific item of personal information held and whether the specific item is to be released or withheld under any of ss 27 to 29.

[23] 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. Some decisions about other items of information may be challenging and take longer. For example a search for information may have to be made or files retrieved from storage. 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.

[24] It is sufficient for an agency to respond to the effect that (unspecified) information will be made available (or will not be made available, or that it is not held).

[25] It is not a requirement of the PA 1993 that both the decision on the request as well as the personal information be provided within the 20 working day limit imposed by PA 1993, s 40(1). It is, however, an ambition commonly encountered both under the PA 1993 and under the parallel regime in the Official Information Act 1982.

[26] There is no authority for the proposition that the decision required by s 40(1) is a decision on each and every item of personal information held by the agency about the requesting individual. It could not have been intended that an agency have at most only 20 working days to receive the request, retrieve and assemble all the personal information and to then make a decision on each separate item under ss 27 to 29. This is recognised by the fact that as explained below, no specific timeframe for making the information available is prescribed. The requirement is that the information be provided without "undue delay".

[27] While it is a question of fact whether the decision on the request was made as soon as reasonably practicable, the 20 working day period is the upper limit.

Undue delay – s 66(4)

[28] Section 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**.

[29] 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 on the request has been 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 to remove information not 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 justified or that information about others has not been inadvertently included. Physical files may need to be brought from remote locations.

[30] 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.

[31] 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, December 2020). What is undue is clearly dependent on context: *R v B* [1996] 1 NZLR 385 (CA) at 387.

The definition of interference with privacy and its relationship to the two deeming clauses in PA 1993, s 66(3) and (4)

[32] Having explained the obligations of an agency under s 40(1) measured in relation to the 20 working day time limitation, it is now necessary to explain also the operation of the time limitations in the context of what a plaintiff must prove to establish an interference with privacy. Such interference is a jurisdictional prerequisite to the grant of remedies by the Tribunal.

[33] The Tribunal has jurisdiction to grant a remedy only if a plaintiff first establishes an interference with his or her privacy. Section 66 defines when such interference is established.

> **66 Interference with privacy**
>
> (1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—
>
> (a) in relation to that individual,—
>
> (i) the action breaches an information privacy principle; or
>
> (ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or
>
> (iia) the action breaches an information privacy principle or a code of practice as modified by an Order in Council made under section 96J; or
>
> (iib) the provisions of an information sharing agreement approved by an Order in Council made under section 96J have not been complied with; or
>
> (iii) the provisions of Part 10 (which relates to information matching) have not been complied with; and
>
> (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—
>
> (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or
>
> (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
>
> (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.
>
> (2) Without limiting subsection (1), an action is an interference with the privacy of an individual if, in relation to an information privacy request made by the individual,—
>
> (a) the action consists of a decision made under Part 4 or Part 5 in relation to the request, including—
>
> (i) a refusal to make information available in response to the request; or
>
> (ii) a decision by which an agency decides, in accordance with section 42 or section 43, in what manner or, in accordance with section 40, for what charge the request is to be granted; or
>
> (iii) a decision by which an agency imposes conditions on the use, communication, or publication of information made available pursuant to the request; or
>
> (iv) a decision by which an agency gives a notice under section 32; or
>
> (v) a decision by which an agency extends any time limit under section 41; or
>
> (vi) a refusal to correct personal information; and
>
> (b) the Commissioner or, as the case may be, the Tribunal is of the opinion that there is no proper basis for that decision.

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

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

[34] There are, in effect, two separate definitions of an interference with privacy. The first is contained in s 66(1) while the second is contained in s 66(2). The latter applies to (inter alia) information which should have been provided but was not.

[35] Under the first limb (s 66(1)) the plaintiff must:

[35.1] Prove an action by the agency which has breached an information privacy principle; **and**

[35.2] Satisfy the Tribunal that that action:

[35.2.1] Has caused or may cause her loss, detriment, damage or injury; **or**

[35.2.2] Has adversely affected, or may adversely affect, her rights, benefits, privileges, obligations, or interests; **or**

[35.2.3] Has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to her feelings.

[36] Under the second limb (s 66(2)), the plaintiff must (in the particular circumstances of her case):

[36.1] Establish a refusal to make personal information available. In the absence of an actual refusal, a refusal is "deemed" by statute to have occurred where:

[36.1.1] The agency either fails to comply with the s 40(1) time limit for deciding whether a request is to be granted and for giving notice of that decision (s 66(3)); **or**

[36.1.2] There is undue delay in making the information available (s 66(4)); **and**

[36.2] Persuade the Tribunal to conclude there is no proper basis for that decision (s 66(2)(b)).

[37] It can be seen breach of an information privacy principle does not on its own satisfy the statutory definition of "interference with the privacy of an individual" in s 66(1). Before the Tribunal can grant a remedy a harm threshold must be crossed and in addition, a causal connection established between that harm and the defendant's "action" as defined in s 2(1).

Agency not at risk of double jeopardy

[38] At the risk of some repetition (but in the interests of ensuring clarity on a point significant to the outcome of the present case) it will be seen from *Taylor v Corrections*

(No. 2) [2018] NZHRRT 43 at [122] to [125] that the PA 1993 anticipates at least three possible responses by an agency in receipt of an IPP 6 request:

> **[38.1]** First, the request is granted and notice of that decision is given to the requester. Such notice can be inferred from the fact of making the information available. The Act does not prescribe a fixed number of days within which access to the information must thereafter be provided. The statutory obligation is to make the information available without "undue delay". If undue delay does ensue, the agency is deemed to have refused to make the information available. See PA 1993, s 66(4):
>
> > (4) Undue delay in making information available in response to an information privacy request for that information shall be deemed, for the purposes of subsection (2)(a)(i), to be a refusal to make that information available.
>
> **[38.2]** Second, the request is refused and notice of that decision is given to the requester. Reasons for the refusal must be provided. See PA 1993, s 44. No reason other than one or more of the reasons listed in PA 1993, ss 27 to 29 can justify such refusal. See PA 1993, s 30:
>
> > **30 Refusal not permitted for any other reason**
> >
> > Subject to sections 7, 31, and 32, no reasons other than 1 or more of the reasons set out in sections 27 to 29 justifies a refusal to disclose any information requested pursuant to principle 6.
>
> If the refusal cannot be justified under ss 27 to 29, there is an interference with the privacy of the individual as defined in s 66(2)(a)(i) and (b) as there is a refusal combined with an absence of a proper basis for that decision.
>
> **[38.3]** Third, the request is, for whatever reason, simply not responded to within the statutory timeframe prescribed by PA 1993, s 40(1). There is no decision to grant and no decision to refuse. In such circumstance the request is deemed to have been refused. See PA 1993, s 66(3):
>
> > (3) If, in relation to any information privacy request, any agency fails within the time limit fixed by section 40(1) (or, where that time limit has been extended under this Act, within that time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 40(1), that failure shall be deemed, for the purposes of subsection (2)(a)(i) of this section, to be a refusal to make available the information to which the request relates.
>
> The word "deemed" in this context creates a presumption which is conclusive. See generally Burrows and Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 450-453.

[39] In the third scenario the breach lies in the failure to make a s 40 in-time decision on the request and to communicate that decision. Contrary to the submissions made by Dr Turner, there is no additional breach by reason of undue delay in providing the information. This is because there is a conclusive statutory presumption that the request has been refused. The focus then switches to s 66(2)(b) and whether there was a "proper basis" for the deemed refusal. If there was no such basis, an interference with privacy is established. The liability inquiry does not include the separate and distinct s 66(4) issue of "undue delay" because s 66(4) applies only to grant cases. There is no indication that Parliament intended that breach of one of s 66(3) or (4) means a breach of the other. An agency does not face double jeopardy.

[40] In summary:

[40.1] Where an agency makes an in-time decision to make information available, the information must be made available without undue delay.

[40.2] Where an agency makes a decision to refuse to make available the information to which the request relates, the question of undue delay in the provision of the information does not arise because the agency has declined to provide the information. The decline decision may be correct or incorrect; it may be challenged or not. In the meantime the agency is entitled to act on the basis of the decision. If it is later determined by the Privacy Commissioner or by the Tribunal that there was no proper basis for the refusal, an interference with privacy is established by the operation of s 66(3). There is no additional breach by reason of undue delay via s 66(4).

[40.3] Should the agency make no decision on the request at all, there will be a deemed refusal under s 66(3) but no additional breach of s 66(4) by reason of undue delay in providing the information.

[40.4] Where an agency which has interfered with the privacy of an individual by virtue of the deeming provisions in either s 66(3) or (4) nevertheless attempts to mitigate that interference by the provision of some or all of the requested information, such mitigation is a mandatory relevant consideration under PA 1993, s 85(4) which provides:

> (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.

[40.5] Likewise, the failure of an agency to attempt remedial action when such action might reasonably have been expected may also be taken into account.

THE REQUESTS

[41] It is now possible to describe the 12 requests pleaded in the ASoC and relied upon by Dr Turner as separate causes of action. An evaluation of those requests follows later in this decision.

[42] Dr Turner told the Tribunal that an email dated 31 January 2013 from Professor Glue advising he was not prepared to accept the reduction in teaching hours proposed by Dr Turner signified the start of the employment dispute. There had then been a meeting with Professor Glue on 8 February 2013 which had not resolved any of the issues. On 13 February 2013 at 10:50am Dr Turner sent an email to Professor Glue requesting a copy of his correspondence to Human Resources in relation to her. That email was copied to Lianne Smith who then worked in Human Resources. That same day at 12:04pm Dr Turner sent an email to Professor Glue and Ms Smith asking to "see the correspondence from Paul [Glue]" prior to a further meeting which was then under discussion. At 8:42am the following day (14 February 2013) Dr Turner sent a further email to Professor Glue and Ms Smith reminding Professor Glue she had now "twice requested a copy of the correspondence you sent to Lianne [Smith]".

[43] None of these requests are pleaded as causes of action. Their relevance is that they make clear that the 12 requests which followed and which are pleaded in the ASoC

were made by Dr Turner at a time she knew she was in an employment dispute with the University. The context shows that the personal information sought by her was confined to that dispute. The University emphasises that the requested information was delivered to Dr Turner on 11 March 2013 by being served on the barrister (Mr W Forster) who was by then acting on her behalf.

First request: 14 February 2013

[44] On 14 February 2013 at 4:14pm Dr Turner sent an email to Ms Smith asking her to send to Dr Turner:

> all correspondence you have on record relating to me from any source and send me any future correspondence you receive according to the Privacy Act.

[45] It was not in dispute before the Tribunal that the request for future correspondence lay outside the PA 1993 as the right of access applies only to information held by an agency at the time of the request.

[46] The 20th working day following this request was 14 March 2013.

[47] The University reply is that:

[47.1] The parties understood the request to be limited to correspondence relevant to the employment dispute.

[47.2] By letter dated 8 March 2013 the relevant information was on 11 March 2013 delivered to Mr Forster, the barrister acting for Dr Turner.

[48] Our finding is that both points raised by the University have been established.

Second request: 22 February 2013

[49] On 22 February 2013 Mr Forster sent a letter to Dr John Adams, Dean of the School of Medicine advising he (Mr Forster) was now acting for Dr Turner and that he would be representing Dr Turner at a meeting scheduled to be held the following week on 26 February 2013 in Dr Adams' office. The letter did not itself request the provision of any personal information. Attached to the letter was an 11 page memorandum by Mr Forster which he intended to address at the forthcoming meeting. The argument made in the document was that Dr Turner had been unjustifiably disadvantaged by her employer.

[50] While the memorandum asserted the University had not communicated effectively with Dr Turner or been "responsive to her communications regarding the provision of the relevant information" there was, as in the case of the letter, no request for personal information.

[51] The 20th working day from 22 February 2013 was 22 March 2013.

[52] The University reply is that:

[52.1] Neither the letter nor the memorandum contained a request for personal information. The list of remedies sought by Dr Turner as set out in the memorandum made no mention of the University being asked to provide information under the PA 1993.

[52.2] The allegation that Dr Turner had not been provided with relevant information was premature because there had been less than eight calendar days between the request of 14 February 2013 and the receipt of the 22 February 2013 memorandum.

[52.3] The personal information requested by Dr Turner on 14 February 2013 was provided on 11 March 2013.

[53] Our finding is that all three aspects of the University reply have been established.

Third request: 26 February 2013

[54] At the conclusion of the meeting held on 26 February 2013 Mr Forster made an oral request for Dr Turner's personal information. The terms of the request, as recorded by Mr Forster in his notes were:

> Again I request that all information is provided to Lisa [Turner] in regard to relevant communications, emails and records.

[55] The 20th working day from 26 February 2013 was 26 March 2013.

[56] The University reply is that:

[56.1] The request was limited in scope to the relevant communications, emails and records relating to the employment issues that were then under discussion.

[56.2] Twenty working days following the request of 14 February 2013 had not expired.

[56.3] The personal information requested by Dr Turner was in any event provided on 11 March 2013.

[57] Our finding is that all three aspects of the University reply have been established.

Fourth request: 4 March 2013

[58] On 4 March 2013 Mr Forster sent a two page follow-up letter to Dr Adams with reference to the meeting held the previous week on 26 February 2013. Notice was given that Dr Turner was considering "legal action". The letter made a request under the PA 1993 in the following terms:

> i) the information provided to the HOD in the email that triggered the response of 31 January 2013;
> ii) the information Dr Adams was made "aware" of prior to 8 February 2013 referred to by the Head of Department in his email dated same;
> iii) all information regarding Dr Turner provided to Human Resources between 7 February 2013 and 4 Match 2013, separated by source;
> iv) any other personal information held by the employer that has not been provided.

[59] Also requested was:

> 5 Information that is held electronically should be printed out and provided in hard copy. Information that is held in the mind of the people involved should be transferred to written form and printed out.

[60] The letter went on to record that "[t]his information has been requested previously" and was therefore required no later than 8 March 2013.

[61] While the self-asserted deadline of 8 March 2013 gave the University four days within which to comply, the actual 20th working day from 4 March 2013 was 3 April 2013.

[62] The University reply is that:

> **[62.1]** The letter correctly stated the information had been requested previously. This was not a new request but confirmation of the earlier requests.
>
> **[62.2]** The letter incorrectly stipulated 8 March 2013 as the due date. It was in fact 14 March 2013.
>
> **[62.3]** The information was provided on 11 March 2013.

[63] On these points we find in favour of the University.

Fifth request: 18 March 2013

[64] In a letter dated 18 March 2013 addressed to Dr Adams, Mr Forster acknowledged receipt of "a bundle of documents" provided by the employer (the date of receipt was not given) and then repeated, in identical terms, the terms of the fourth Privacy Act request made on 4 March 2013. He asserted, without elaboration or justification, that "it is reasonable to believe more electronic information is available". He also complained the University had not provided any information "held in the mind of the people involved".

[65] Twenty working days following this letter was 17 April 2013.

[66] The University reply is that:

> **[66.1]** By letter dated Friday 8 March 2013 all the personal information requested by Dr Turner was delivered to Mr Forster on Monday 11 March 2013.
>
> **[66.2]** The fifth request dated 18 March 2013 simply repeated earlier requests.

[67] On these points we find in favour of the University.

Sixth request: 12 April 2013

[68] In the context of an exchange of correspondence about Dr Turner's personal grievance, Mr Forster by letter dated 12 April 2013 addressed to Dr Adams requested:

> **[68.1]** Information how statements dated 21 March 2013 by John Canton and Anita Admiraal had come to be provided. It is necessary to explain here that both statements concerned the contingency arrangements put in place on 15 February 2013 when Dr Turner had failed to attend her scheduled class.
>
> **[68.2]** Information about apparent differences in particular Handbooks.
>
> **[68.3]** The duration of the "actual sessions for each year from 2000".
>
> **[68.4]** The information was requested by 17 April 2013 "so that we can provide proper advice to the employee".

[69] The twentieth working day from 12 April 2013 was 13 May 2013.

[70] The University reply is that:

> **[70.1]** The information requested was not personal information about Dr Turner and therefore not subject to the PA 1993.
>
> **[70.2]** It was a request for the University's justification in relation to the employment dispute.
>
> **[70.3]** No proper reason was given as to why urgency was necessary. The fact that Mr Forster wished to advise Dr Turner did not explain why he needed to do that urgently.

[71] On these points we find in favour of the University.

Seventh request: 23 April 2013

[72] On 23 April 2013 Dr Turner lodged a formal complaint with the Privacy Commissioner. She simultaneously served on the University her personal grievance dated 23 April 2013.

[73] The seven page complaint dated 23 April 2013 sent to the Privacy Commissioner summarised the various requests for information which had been made up to that point. The covering letter from Mr Forster to Dr Adams enclosing a copy of the privacy complaint and personal grievance did not say anything about the privacy complaint other than to mention it as an attachment:

> Please see attached the following:
>
> i) Personal grievance dated 23 April 2013.
> ii) Complaint to the Privacy Commissioner dated 23 April 2013.
> iii) Bundle of relevant documents dated 22 April 2013.

[74] The twentieth working day from 23 April 2013 was 22 May 2013.

[75] The University reply is that neither the complaint to the Commissioner nor the letter to Dr Adams contained a request that the University provide personal information about Dr Turner.

[76] On this point we find in favour of the University.

Eighth request: 14 May 2013

[77] Without waiting for an investigation and ruling by the Privacy Commissioner Mr Forster on 14 May 2013 wrote to Mr Dorking of Anderson Lloyd (the solicitors for the University) repeating the earlier requests in the following terms:

> … we again ask that your client provide the information that we have requested. This is required so that we can give proper advice to our client and it is urgently required.

[78] The twentieth working day from 14 May 2013 was 12 June 2013.

[79] The University reply is that:

[79.1] The 14 May 2013 letter was not a new request for personal information. It was merely a follow up and a statement of Dr Turner's position.

[79.2] As there was then an unresolved complaint to the Privacy Commissioner and because the University believed it had on 11 March 2013 provided all relevant personal information to Dr Turner via Mr Forster, it could not be expected to explain its position on the PA 1993 requests again and again.

[80] On both points we find in favour of the University.

Ninth request: 22 May 2013

[81] In a ten page letter dated 22 May 2013 to the lawyers acting for the University Dr Turner again requested the information she had previously asked for between February 2013 and May 2013:

> 5. Our client made repeated requests for information in writing in February 2013 (13 February 2013, (10:50am and 12:04pm), 14 February 2013 (8:42am and 4:14pm). Your client simply ignored these requests. As set out in our many letters to your client and to yourself (our letters of 18 March 2013, 12 April 2013, 23 April 2013, 9 May 2013, 10 May 2013 and 14 May 2013), our client requires information and again requests that proper information be provided. Our client's requests have been duly specific. As it appears that you are unaware of what we have previously set out, a summary of the request in each letter is Included below.

[82] The information was requested inside two days ie by 24 May 2013 "to give proper advice to our client". This deadline was described as reasonable as the letter was "largely a summary of information we have sought for months".

[83] The twentieth working day from 22 May 2013 was 20 June 2013.

[84] The University reply is that:

[84.1] The letter was not a new request. Rather it was a summary of earlier requests. The letter itself stated "this letter is largely a summary of information we have sought for months".

[84.2] No valid reason was given for the information to be provided within two days.

[85] On both points we find in favour of the University particularly given the requested information had already been provided on 11 March 2013.

Tenth request: 30 May 2013

[86] By letter dated 30 May 2013 Mr Forster requested provision of "the information that has been previously requested".

[87] The twentieth working day from 30 May 2013 was 28 June 2013.

[88] The University reply is that the letter was not a new request.

[89] On this point we find in favour of the University.

Eleventh request: 7 June 2013

[90] On 7 June 2013 Mr Forster again requested the information previously requested between February 2013 and May 2013. The information was required by 21 June 2013.

[91] The twentieth working day from 7 June 2013 was 5 July 2013.

[92] The University reply is that:

> **[92.1]** By asking the University to demonstrate good faith and to provide the information requested, Dr Turner was not asking the University to respond under the Privacy Act. She was relying on the good faith provisions in ERA, s 4.
>
> **[92.2]** Two weeks was given for the information to be provided. The PA 1993 timeframe is different which again suggests the request was made under the ERA, not the PA 1993.
>
> **[92.3]** The letter was in any event a repetition of the earlier requests.

[93] On each point we find in favour of the University.

Twelfth request: 25 June 2013

[94] On 25 June 2013 Mr Forster sent a nine page letter to Anderson Lloyd. The 56 paragraphs set out in fine detail Dr Turner's argument as to why in her opinion the University had repeatedly failed to provide the requested information. Within the submission were requests related to the provision of information. The principal requests, as identified in the ASoC were:

> **[94.1]** If there were specific documents that existed but now cannot be found, the University was to specify what those documents were and what they contained.
>
> **[94.2]** For each piece of personal information over which privilege had been claimed, the information, the date, the parties and the reasons for the claim.
>
> **[94.3]** Information held in the minds of staff.
>
> **[94.4]** Information about whether the voluntary teaching allegedly provided by Dr Turner was in the curriculum.
>
> **[94.5]** The reallocation of teaching from Dr Turner to others.
>
> **[94.6]** Information as to which of the Handbooks was correct.
>
> **[94.7]** An index of information not provided and the grounds on which that information had been withheld.

[95] The twentieth working day from 25 June 2013 was 23 July 2013.

[96] The University reply is that:

> **[96.1]** The letter was not a new request for information.

[96.2] What Dr Turner never did, despite requests by the University, was to identify precisely what information she alleged existed but had not been provided. Despite these requests Dr Turner invited the University to read through Mr Forster's letter dated 22 May 2013 and the original requests for information. She suggested the University might like to go through "paragraph by paragraph" and reconsider.

[97] On each point we find in favour of the University. It could also be added that:

[97.1] In relation to the requests formulated in the language used by the discovery and inspection regime prescribed by the High Court Rules 2016, Part 8, there is no counterpart obligation under the PA 1993 to identify documents which cannot be found or to specify what they contained.

[97.2] Similarly, the obligation to list documents for which privilege is claimed (see the affidavit of documents in Form G37 in the High Court Rules) is not carried over into the PA 1993 regime.

GENERAL POINTS ABOUT THE TWELVE REQUESTS

[98] The 12 "requests" pleaded in the ASoC are problematical for at least three reasons:

[98.1] Certain correspondence has been characterised as making a "request" when the documents contained no request as such.

[98.2] The repetitive nature of the requests.

[98.3] The claim that each of the 12 pleaded requests triggered a separate 20 working day time limit under PA 1993, s 40 notwithstanding:

[98.3.1] The information had been provided in response to an earlier request; or

[98.3.2] That the University, having allegedly failed to comply with s 40, had already been deemed by s 66(3) to have refused the request.

[99] Each of these will be dealt with in turn. First, however, it is necessary to address the issue of the general ambit of the request made by Dr Turner.

Whether an everything request

[100] At the hearing there was some discussion as to whether Dr Turner had made an "everything" request or a request for only personal information relevant to the employment dispute. As to this, Dr Turner's evidence was clear, namely she sought only such of her personal information relevant to that dispute.

[101] The oral request made at the meeting on 26 February 2013 was also for "relevant" communications ie relevant to the employment dispute. Read in context, the categories sought by Mr Forster in his letter dated 4 March 2013 make this clear. In addition sight must not be lost of the fact that the University's obligations arose not only under the PA 1993 but also from ERA, s 4(1A) which requires an employer to be responsive and communicative and must provide access to certain categories of information.

[102] Consequently, if a shorthand description is to be used, the better description might be that the request was for "everything related to the employment dispute and which could readily be retrieved".

Instances in which no request for personal information in fact made

[103] In our view some correspondence characterised by the ASoC as a "request" for personal information cannot properly be so characterised. There are at least three such instances.

[104] The first in time is the letter and "Memorandum for Dr Turner" dated 22 February 2013.

[105] It is to be recalled that by email dated 14 February 2013 Dr Turner had (in person) requested "all correspondence you have on record relating to me from any source". One week later on 22 February 2013 Mr Forster sent to Dr Adams a letter to which was attached what was described as a "memorandum and bundle of emails which will be addressed when we meet [on the following Tuesday, 26 February 2013]". Mr Forster's letter makes no request for personal information about Dr Turner. The memorandum, while making reference to Dr Turner's "repeated requests" for her personal information does not itself contain any such request. In addition the list of remedies sought by Dr Turner listed at the end of the memorandum are focused on employment issues and do not include a request for access to personal information. This is consistent with the fact that Dr Turner had already made her request on 14 February 2013 and the 20 working days allowed to the University was still running. We accordingly find no request dated 22 February 2013 has been proved.

[106] The second instance in which no request for personal information was made relates to the alleged request dated 23 April 2013. It was on that date that Dr Turner filed a complaint with the Privacy Commissioner. A copy of that complaint was on the same day sent to Dr Adams. The letter from Mr Forster to Dr Adams relevantly stated:

> 1. We note that no response has been provided to our letter dated 12 April 2013 and that the issues surrounding the employee's relationship with the University have not been resolved.
>
> 2. Please see attached the following:
>
> i) Personal grievance dated 23 April 2013.
> ii) Complaint to the Privacy Commissioner dated 23 April 2013.
> iii) Bundle of relevant documents dated 22 April 2013.

[107] Neither in this letter nor in the complaint letter to the Privacy Commissioner was separate request made for access to Dr Turner's personal information. Nor can the copying of the complaint to the Dean of the School of Medicine be sensibly characterised as a further "request" triggering an obligation under PA 1993, s 40. We accordingly find no request dated 23 April 2013 has been proved.

[108] The third instance in which no request for personal information was made is the letter dated 25 June 2013 from Mr Forster to Anderson Lloyd.

[109] After listing twelve "previous communications … requesting relevant information" this nine page letter comprising 56 paragraphs sets out (inter alia) Dr Turner's argument why her previous communications requesting "relevant information" had not been complied with. Request was made for greater specificity as to the grounds on which information had been withheld by the University. Mr Forster also asked for a list of "specific

documents that existed but now cannot be found … and what they contained". He also said Dr Turner disputed the contention by the University that information held in the mind of staff was not readily retrievable. The University was also asked to "read our letter of 22 May 2013 and the original requests for information" so that the dispute could proceed to mediation:

> 44. To resolve the information issues so this can proceed to mediation, please read our letter of 22 May 2013 and the original requests for information. Please go through it paragraph by paragraph and consider whether your client has provided the information that was requested.

[110] In short, as the letter states in its final paragraphs, the University is asked to "deal properly with the [earlier] requests for information" as "[a]ny mediation of the substantive dispute or personal grievance can only proceed after information has been provided and properly considered". While Mr Forster's letter disputes the University contention that the earlier requests had been complied with, the letter dated 25 June 2013 cannot fairly be construed as a separate request which triggered separate obligations under PA 1993, s 40.

[111] Even if our conclusions in relation to these three mis-characterised requests is wrong, the repetition of requests by Dr Turner does not strengthen her case on liability and even if liability is established, they are at best, of limited value in the context of remedies.

The repetition of requests

[112] In the four month period from 14 February 2013 to 25 June 2013 and in the context of an employment dispute no fewer than 12 "requests" (only nine in fact) were made by Dr Turner for access to personal information held by the University and relevant to that dispute. Every request (apart from the first) substantially overlapped with or repeated an earlier request.

[113] The original request of 14 February 2013 made by Dr Turner in person for "all correspondence" was repeated (orally) by Mr Forster at the conclusion of the 26 February 2013 meeting. He asked for "all information … in regard to relevant communications, emails and records". The requests of 14 and 26 February 2013 are identical. The second added nothing to the first.

[114] When Mr Forster wrote to Dr Adams a few days later on 4 March 2013 three specific categories of information were requested together with "any other personal information held by the employer that has not been provided". These categories were already included in the "everything related to the employment dispute" request. The request was repeated, word for word in Mr Forster's follow-up letter dated 18 March 2013. The subsequent letter dated 14 May 2013 again simply repeated the earlier requests:

> … we again ask that your client provide the information that we have requested.

[115] As Dr Turner had already made a request for everything related to the employment dispute, the successive requests added nothing meaningful. Read together and in context, there was in truth only one request.

[116] So the subsequent letter dated 22 May 2013 lists the "many letters" in which information had been requested and summarises each letter. Then on 30 May 2013

Mr Forster asked the University to "provide the information that has been previously requested". His next letter dated 7 June 2013 is also a pro-forma repetition:

> Our client again asks that your client demonstrate good faith and provide the information that has been requested.

[117] The unhelpfulness of these repetitive requests is underlined by the fact that even before the 20 working day period set in motion by the first request of 14 February 2013 had expired on 14 March 2013, Dr Turner had, according to her ASoC, made three further repeat requests and had on 11 March 2013 received the documents provided by the University.

[118] The point which must not be lost is that if an agency in receipt of a request fails within the time limit fixed by s 40(1) to comply with para (a) or para (b) of s 40(1), that failure "shall be deemed" for the purposes of s 66(2)(a)(i) to be a refusal to make available the information to which the request relates. The word "deemed" in this context creates a presumption which is conclusive. This means that once an agency has via the deeming provision refused an access request, either in whole or in part, an interference with privacy is established and the Tribunal has jurisdiction under s 85 to award one of the statutory remedies. In that context it is a requirement of s 85(4) that the conduct of the defendant be taken into account in deciding what remedy to grant:

> (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.

[119] Once an agency has refused to make information available under s 66(2)(a)(i) or s 66(3) an interference with privacy is established and the utility of making 12 identical or overlapping requests in the space of four months is to be doubted. Particularly as here, the University did in fact make the information available.

[120] It is now appropriate to address the more particular issues raised by the submissions by Dr Turner.

THE OBLIGATIONS OF AN AGENCY UNDER PA 1993, SECTION 40 AND IPP 6

The decision required by s 40

[121] Section 40 of the Privacy Act requires an agency to:

[121.1] Decide whether the request is to be granted, in what manner and for what charge (if any); and

[121.2] Give or post to the individual who made the request notice of the decision on the request.

[122] In the present case payment could not be required as the University is a public sector agency. See PA 1993, s 35(1). It follows no decision regarding charging was required.

[123] Dr Turner submits the University:

[123.1] Breached IPP 6 by failing to confirm whether or not it held personal information about her; and

[123.2] Failed to provide notice of the decision on her request within the 20 working days stipulated by s 40.

[124] This submission is based on the fact that the University sent no "confirmation" advice. It simply provided the information listed in Mr Forster's letter of 4 March 2013. The letter from Dr Adams to Mr Forster said:

> I refer to the request in your letter dated 4th March 2013 for personal information in accordance with the Privacy Act 1993. Enclosed is the following documentation:
>
> I. Information provided to Professor Paul Glue that prompted the response to Dr Turner dated 31 January 2013
> II. The email from Lisa Turner dated 1 February 2013 that was provided to Dr Adams by Professor Glue during a meeting on the 1 February 2013 at 2.30pm
> III. Information regarding Dr Turner between 7 February 2013 and 4 March 2013.
> IV. Copy of Dr Turner's personal file.

[125] The letter made no reference to documents being withheld. This is because, as stated by Dr Adams in his subsequent letter dated 8 April 2013 to Mr Forster, it was believed the University had provided all of the documentation which had been requested. The documents for which privilege was claimed did not come into existence until the period 8 May 2013 to 3 July 2013. So no withholding ground was relied on until then.

[126] It is correct the University did not follow precisely the steps mandated by the Privacy Act. No expressly articulated "confirmation" or "decision on the request" was communicated to Dr Turner. The University simply provided the requested information within the time prescribed by the Act. Dr Turner submits this omission or shortcut was a breach of the Act which resulted in a deemed refusal of the request.

[127] The reality, however, was that:

[127.1] The information was provided not only within the 20 working day timeframe (rendering inapplicable s 66(3)), but also within the "undue delay" stipulation (rendering inapplicable s 66(4)).

[127.2] The fact of in-time delivery of the requested information was, by clear inference, a decision to provide the requested information.

[128] In these circumstances the submission by Dr Turner (that there needed to be an additional "confirmation" and "decision" letter) is disconnected from reality and the Act should not be interpreted and applied in such literal fashion. The better view is that where a s 40(1)(b) notice is not given it can be inferred from an in-time delivery of the requested information that the agency has made a decision on the request and that the information is being provided as a consequence of that decision.

Confirmation whether personal information held

[129] Where an agency holds personal information in such a way that it can readily be retrieved, IPP 6(1) entitles the individual to:

[129.1] Obtain from the agency confirmation whether or not the agency holds such personal information; and

[129.2] To have access to that information.

[130] Dr Turner had held a part-time teaching position from early 2005. It was a given that the University held personal information about her. She knew this and so did the University. On the facts, this common assumption did not require formal articulation in a letter or email.

[131] Then Dr Turner submitted that over and above the decision required by s 40(1), the first limb of IPP 6 requires the agency to give advice of the "particular pieces" of personal information held. It is not sufficient for an agency to simply state that "personal information" about the individual is held.

[132] As to this, IPP 6 refers to "confirmation of whether or not the agency holds such personal information". The phrase "such … information" refers back to the first sentence of IPP 6 which uses the phrase "personal information … that … can readily be retrieved". In other words the obligation on the agency is to confirm whether it holds personal information about the requester in such a way that it can readily be retrieved. There is no obligation to identify the particular pieces of such information.

[133] Nor is there such obligation in s 40 which addresses the timeframe for making the decision on the request. It does two things:

[133.1] Sets an upper time limit of 20 working days.

[133.2] Sets out what must be done within that timeframe ie:

[133.2.1] Decide whether the request is to be granted

[133.2.2] Give notice of that decision.

[134] There is no obligation in s 40 to confirm what pieces of personal information are held. The reason, as set out in *Koso* at [3] to [6], is that while an agency may realise at an early point within the 20 working day period that the request is to be granted (subject to later assessment of the application of the withholding grounds), it might take some time to actually identify what is held and what is readily retrievable. This is made particularly clear by the fact that s 41 allows an extension of the s 40 time limit and that delivery of the information, once retrieved, is governed by the non-prescriptive timeframe of without "undue delay" in s 66(4).

[135] The written submission for Dr Turner at paras 4, 48 and 135 based on the Complaints Review Tribunal decision in *L v N* [1997] CRT 11 would impose a duty on the agency to identify within the initial 20 working days and with precision what individual pieces of information are held and what pieces of information are readily retrievable and give notice to that effect (presumably) within the 20 working day timeframe. Yet this is not what the Act says. The early decision of the CRT in *L v N* made reference to "the obligation to confirm the existence of personal information". We are not persuaded the decision is authority for the proposition cited but if we are wrong, we are not in any event bound by the decision and the facts of Dr Turner's case are clearly distinguishable.

[136] IPP 6 which alone uses the word "confirmation", read contextually, requires only confirmation whether personal information is held. It does not require identification of particular pieces of information. Identification of particular pieces occurs when the particular document or item of information is provided to the requester; or identified as a withheld document (or category of documents) under ss 27, 28 and 29. There is no reason why the action of providing the requested information should not be taken as confirmation

personal information is held by the agency. A separate communication or letter stating that the information is held is required neither by the Act nor by implication.

[137] The conclusion we have reached is that there is no obligation to notify the existence of a document or item of personal information prior to the document or item being provided to the requester. Listing each of the documents so provided may be good practice but is not required by the Act. Furthermore, where large volumes of material are involved separate listing may be burdensome, if not impractical. It may also be time consuming and the cause of delay in complying with the statutory timeframe.

[138] As to the argument that there is no evidence of any decision to grant the request, the provision of the document(s) is the evidence of the decision.

Whether a duty to list information not provided

[139] Dr Turner also complained the University had failed to list information not provided to her.

[140] As to this the evidence of Ms McNichol, Divisional Human Resources Manager, Health Sciences was that when information was provided to Dr Turner under cover of a letter dated 8 March 2013 from Dr Adams to Mr Forster and delivered to Mr Forster on 11 March 2013 the University did not provide a list of information not provided because at the time it was believed all the information requested had been provided. It was not until Dr Turner gave notice she believed there was information being withheld that the University could explain that the information to which she referred did not exist.

Information not readily retrievable

[141] At times the submissions made on behalf of Dr Turner appeared to suggest that the obligation of the University under IPP 6 and s 40 was to leave no stone unturned when locating the personal information requested by Dr Turner.

[142] If such was the submission, it is misconceived. The breadth of a response to an information privacy request is regulated by the inbuilt statutory limitation that the information be readily retrievable. See IPP 6, cl (1) and PA 1993, s 29(2)(a) and (b). While information may be technically retrievable, it might not be readily retrievable. The amount of time and cost required to retrieve the information and the manner in which the information is stored are relevant factors going towards ready retrievability. In *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 (*Geary*) at [125] and [126] the Tribunal held that an agency must show that reasonable attempts have been made to find the information. The search must not only be a reasonable one but also thorough, intelligent rather than mechanical. But as said by the Tribunal in *Yiasoumi v Attorney-General* [2017] NZHRRT 12 at [55.7], "… a 'no stone unturned' inquiry is not the standard set by the Privacy Act. An agency is not required to invest unlimited time and resources in the search for information which may well not exist or which cannot with reasonable diligence be found."

[143] As to the facts regarding readily retrievability, the Tribunal heard evidence from Dr Turner herself. She did not call any additional witness. The University called Ms Simone McNichol (Divisional Human Resources Manager, Health Sciences), Mr Kevin Seales (Director of Human Resources) and Professor Paul Glue, Head of the Department of Psychological Medicine.

[144] Our assessment of Dr Turner was that in her dealings with the University she was demanding and unreasonable in her expectations of the University's obligations under IPP 6 and the PA 1993 generally. The University witnesses, on the other hand, impressed as careful and conscientious in processing the serial IPP 6 requests. They approached their responsibilities seriously and Ms McNichol in particular has satisfied us she did her absolute best to ensure all information that could be readily retrieved was in fact provided to Dr Turner. When further personal information which could not earlier have been readily retrieved was subsequently located, that too was conscientiously provided at the earliest opportunity.

[145] We are satisfied the search by the University for the information requested by Dr Turner and which was readily retrievable was thorough, intelligent and not mechanical. Dr Turner has not established that the University failed to provide personal information about her that could be readily retrieved, a finding we make also in relation to her claim the University wrongfully failed to provide information held in the minds of staff. That subject is addressed next in greater detail.

The request for information held in minds of staff

[146] In *Re Application by L [information stored in person's memory]* (1997) 3 HRNZ 716 at 720 it was established that in some circumstances information about an individual held in the memory of another can be said to be personal information for the purposes of the Privacy Act.

[147] The circumstances of that case were unusual. A notation on the plaintiff's file held by the defendant stated "Not a current volunteer – refer to ex manager". This was intended to indicate that the executive manager held undocumented information about the plaintiff which was accessible in the course of the defendant's business. The information was also readily retrievable because the documentary record suggested it could be obtained from the executive manager and because the defendant offered to provide a written summary of the information requested and did in fact provide the plaintiff with access to it. The fact that the information had already been retrieved for the police, for other members of the defendant's staff and for the investigating officer from the Privacy Commissioner meant the defendant could not subsequently argue the information was not readily retrievable.

[148] In the present case Mr Forster on 4 March 2013 made the first request that "information that is held in the mind of the people involved should be transferred to written form and printed out". That request was repeated in identical terms on 18 March 2013. No indication was given as to which persons or category of persons the request related to, or as to the particular category of personal information about Dr Turner. Nor were bookend dates given, a significant point given Dr Turner had been part-time lecturer at the University from early 2005. Even read as relating to the employment dispute, the request was unreasonably wide and unmanageable, a point underlined by the University in its response and by the subsequent particularisation by Dr Turner herself in her communications with the Privacy Commissioner, particularisation which was never communicated in her requests to the University. We address first the University's response and then Dr Turner's communications with the Privacy Commissioner.

[149] By letter dated 8 April 2013 the University refused the "held in minds" request under s 29(2)(a) because the information was not readily retrievable:

> 12. You have asked for provision of information held in the minds of people who have attended meetings where your client was discussed. No such transcript currently exists. It is not clear what specific personal information you are asking for. Rather this appears a generic request

> for each of the participants in any such meeting to transcribe their recollections of what was discussed about your client. This information is not readily retrievable, nor does it exist in documentary form. Therefore the unspecified request for any information known to staff members is refused in reliance on section 29(2)(a) Privacy Act 1993.

[150] When Dr Turner on 23 April 2013 complained to the Privacy Commissioner it was said the complaint was urgent and that:

> Information held in the minds of the employer's staff has been requested. It is important that this information is recorded immediately whilst the employer's staff recall what was said in the various meetings.

[151] It was in this complaint letter that for the first time Dr Turner provided information which might identify the "non written communications" sought by her:

> vi) It is clear that much of the employee's personal information is not held in written form. Specifically, there are no records that have been provided regarding the non written communications between the following staff of the employer:
>
> (a) Dr John Adams, Dean.
> (b) Professor Paul Glue, HOD
> (c) Ms Anita Admiraal, Course Administrator
> (d) Dr John Canton, Course Convenor
> (e) Ms Lianne Smith, HR
>
> vii) Please direct that these people place on written record all of the employee's personal information they hold in their minds regarding the events of December 2012, and January, February and March 2013. This will include any conversations they have had regarding the employee, including date, time, who the communication was with, what was discussed and decisions made.

[152] Such particularisation had not been given to the University, a factor which is also relevant to the question whether the information was readily retrievable.

[153] It is notable Mr Forster's next information privacy request dated 22 May 2013 to the University again failed to narrow or particularise the "information held in minds" request. Instead the information sought was described as:

> Any other personal information that has not been provided including information held electronically and also information held in the minds of your client's staff.

[154] Given that Dr Turner had found it possible to be very specific in her complaint to the Privacy Commissioner but was consistently non-specific in her requests of 4 March 2013, 18 March 2013 and 22 May 2013 addressed to the University, the facts of the present case are clearly distinguishable from those in *In Re Application by L [information stored in person's memory]*.

[155] We accordingly uphold the University decision to refuse the extraordinarily vague "in the mind" requests on the ground that the information was not readily retrievable.

[156] The next submission by Dr Turner was that because the University witnesses (Simone McNichol, Kevin Seales, John Adams, Paul Glue and Ms Anita Admiraal) at the hearing before the Employment Relations Authority filed briefs of evidence for the purpose of that hearing and because those briefs of evidence contained personal information about Dr Turner, that information should have been disclosed earlier in response to her IPP 6 requests as the information had been held in the minds of the witnesses.

[157] This submission overlooks the fact that the briefs of evidence responded to specific issues crystallised in the form of the personal grievance filed by Dr Turner in the Authority and in response to Dr Turner's own brief of evidence. The University briefs were no doubt prepared after extensive thought, investigation and preparation. Considerable effort would have been required to retrieve the relevant information from the minds of the witnesses. Having inspected the documents we do not accept that the information in them about Dr Turner was "readily retrievable" and beyond that we do not accept that the Privacy Act imposes an obligation on agencies to continuously record all personal information in written form just in case an individual later requests access to that person's personal information held by the agency. The point was made by Mr Seales in his evidence to the Tribunal:

> 47 On 18 March 2013 Dr Turner demanded "*information that is held in the mind of people involved should be transferred to written form and printed out*". (bundle, page 266, paragraph 8) This request was vague and unspecific and was not capable of being fulfilled. Even if the request was precise there are practical difficulties in getting every person at the University who has had a thought about Dr Turner or discussed her with a colleague to write this down, but this was a very clear example of the difficulty the University faced when dealing with Dr Turner's requests.
>
> 48 Dr Turner suggested that the full content of any meeting where she was discussed should also be recorded and provided to her. Dr Turner suggested that a failure to do so would amount to a failure in our duty to keep proper records. Dr Turner was suggesting that the University (and by implication all public institutions) should keep a record of everything discussed at all meetings.
>
> 49 There is no requirement for the University to keep such records and to do so would place an impossible burden on public institutions and significantly impede open and frank discussion.
>
> 50 The general approach taken by public institutions is to record decisions and key points and if appropriate convey these to the person concerned, subject to any statutory exceptions. For example, evaluative material, information provided in confidence and privileged communications.

[158] In case it is thought Mr Seales has overstated the case, it must be remembered that when Mr Forster was making closing submissions he was asked by the Tribunal if the information privacy requests were everything related to the employment issues (and readily retrievable) or simply "everything". He asserted it was "everything". While we have found to the contrary, Dr Turner's case as presented in closing is that the "in the minds of staff" request did require the University to embark upon a massive exercise. In these circumstances it is for good reason IPP 6 has an inbuilt limitation of ready retrievability.

[159] Mr Seales also told the Tribunal that in the many years he had been dealing with information requests he had never observed a more frustrating and convoluted process. This was solely due to Dr Turner's requests being vague, too broad to be understood, consisting of incomplete or irrelevant information, misrepresenting what the University was required to do and containing unsupported and unspecified allegations that information was incorrect, false or had not been proved. Nevertheless he observed that in his opinion Ms McNichol had gone to extraordinary lengths to meet Dr Turner's requests and had gone out of her way to try and understand what information Dr Turner was asking for. It is necessary we add that we have independently reached the same opinion.

[160] In her evidence Ms McNichol described the difficulties in the following terms:

> 88 As I will explain later in my evidence (starting at paragraph 170) Dr Turner's letter [dated 18 March 2013] appeared to me to have attached a 43 page bundle of documents which she said "the employer has provided" and which had been "paginated for ease of reference."

This bundle was less than 25% of the information actually provided by the University on 8 March 2013. The most obvious documents missing (we had provided 188 pages to Dr Turner) was a copy of Dr Turner's HR file.

89 This was the start of a sequence of correspondence between the University and Dr Turner, or to be more accurate Dr Turner's representative Mr Forster. For convenience I will address the problems we encountered with the letter of 18 March and note that we encountered similar problems with every subsequent exchange.

90 The over-riding issue was that Dr Turner would make a generalised assertion that the information requested had not been provided. For the most part no acknowledgement was made of what had been provided, and little or no attempt was made to identify what was supposedly missing with limited exceptions referred to below.

91 This was incredibly frustrating, particularly given that it seemed that while we were still trying to understand what one letter was asking for and what information had supposedly not been provided, another would arrive repeating earlier requests for information which had been responded to previously and adding more requests about information Dr Turner believed must exist.

92 The requests for information that Dr Turner inferred must exist were unsupported by any logic or evidence other than Dr Turner's apparent belief that nothing ever happened without it first having been discussed between other staff and that there must be notes of those discussions. Despite it being pointed out to her that this was not the case (for example bundle page 381 para 25) the requests continued.

93 Even when our lawyers asked for a specific list of the information supposedly being withheld and that the University would not revisit earlier correspondence to see if it could identify the missing information, nor analyse non-specific requests for documents which Dr Turner believed might exist (bundle page 466) the response was a letter stating that the University should go through the earlier requests paragraph by paragraph and consider whether the information had been provided (bundle page 472 para 44). That letter purportedly attached a list of information which had not been provided but it was simply a repeat of some of the requests which for the most part did not relate to personal information about Dr Turner or which arose from speculation as to what information might exist.

[161] We accordingly uphold the University decision to refuse the "in the mind" requests on the ground that the information was not readily retrievable. That decision was communicated to Dr Turner by the University letter dated 8 April 2013. We also find that the University has satisfied us that any late supplied information was similarly not readily retrievable at the time it was first requested.

[162] The University also properly applied the "not readily retrievable" withholding ground in s 29(2)(a) to the 18 March 2013 request for student Handbooks. In this request concern had been expressed about the "authorship of and accuracy" of the extracts of the 2004 to 2013 ALM4 Psychological Medicine Attachment student handbooks that had been provided to Dr Turner on 8 March 2013. To enable her to verify the accuracy of the handbook extracts Dr Turner said she required provision of original copies of the handbooks together with an electronic copy of each so their authenticity could be analysed. She asserted it appeared the documents had been recently created "which constituted falsification of evidence".

[163] Ms McNichol said in her evidence that Dr Turner had not actually requested the information causing her concern. It had been provided to her because it illustrated the requirements of her teaching duties. Dr Turner also requested "all internal communication surrounding [the 2004-2013 student handbooks]" and she required "an accurate [written] record of what was said" of anything not already in writing.

[164] As to this McNichol told the Tribunal that in each of the ten years in the 2004-2013 period it was likely there would have been four handbooks, that there could have been a number of people potentially involved in the development and production of each

handbook and possibly hundreds of emails exchanged between various accounts. The information was not provided as it was not personal information about Dr Turner, it was not readily retrievable and what may or may not have been in the earlier handbooks was not relevant to the employment issues she had raised. This evidence is accepted.

Other examples of difficulty in meeting Dr Turner's requests

[165] In Mr Forster's 18 March 2013 letter Dr Turner required written evidence of when her employment tasks had been reallocated, why they had been reallocated and to whom. If there was no written record, she required one to be created.

[166] Yet as deposed by Ms McNichol, the whole proposition rested on the false assumption a reallocation had taken place. None of the teaching done by Dr Turner had been reallocated to anyone so the requested evidence did not exist.

[167] Then there is the matter of the written statements made by Anita Admiraal and Dr John Canton. Both statements were dated 21 March 2013 and had been created following a request from Dr Turner in her 18 March 2013 letter in which she asked for evidence that on 15 February 2013 she had failed to attend work and perform her required duties. The two statements had been duly obtained and provided to Dr Turner.

[168] On 12 April 2013, despite herself having asked for the statements to be written, Dr Turner demanded to know how those statements had come to be created and what had been said to Dr Canton and Ms Admiraal.

[169] Also in the 12 April 2013 letter Dr Turner had stated:

> 14. We note that the scheduled times differ from the actual time taken to fulfil the teaching requirements of the case base presentations. Please provide evidence of the duration of the actual sessions for each year from 2000. Please explain why the duration of the actual teaching sessions increased significantly across this period.

[170] As to this Ms McNichol told the Tribunal that the University does not operate a "clock in – clock out" process for monitoring the actual time taken to deliver a lecture, tutorial or the like. This was something Dr Turner was well aware of, as at no time (as far as Ms McNichol was aware) had she (Dr Turner) ever reported on the times of her teaching or been asked to provide such a report. Consequently the only person who would have the requested information was Dr Turner herself and Ms McNichol recalled that at the hearing before the Authority Dr Turner had agreed that such was the case. Similar evidence was given by Dr Turner at the Tribunal hearing.

[171] Ms McNichol also addressed Dr Turner's suggestion that the University could have obtained the information from the individuals who took the sessions prior to 2004. Ms McNichol said that in her experience the chances of an academic having recorded when a lecture started and finished, or to recall those details many years later were close to zero and in any case that would not have been personal information about Dr Turner.

[172] In the same letter Dr Turner asked why the scheduled length of her session times increased and when this occurred. Ms McNichol explained it was likely only Dr Turner herself and possibly the then Head of Department (who had died some years previously) would have known this information. In any event Ms McNichol observed that it would seem Dr Turner already had this information as when she gave evidence she said that she was the one who had made the decision to increase the length of her teaching sessions.

The question of urgency

[173] One of the complaints made by Dr Turner is that the University ignored her requests that the University respond urgently to her IPP 6 requests.

[174] Section 37 of the Privacy Act provides:

> **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.

[175] While this provision allows a requester to ask that urgency be given to the request, it also requires that reasons must be given for the request. The requirement for reasons is mandatory as the determination of genuine urgency is a context-based exercise and it is insufficient for the requester to simply assert urgency. See *Koso* at [28] and [53]–[54].

[176] The decline of a request for urgency does not of itself give rise to a remedy because such decline is not included in the PA 1993, s 66 definition of "interference with privacy". Consequently no remedy for such decline can be granted under PA 1993, s 85. Failure to accord urgency only has legal consequence if, on the facts, the requester can show that proper reasons were given for requesting urgency and that the unjustified failure to comply led to undue delay in making the information available, contrary to PA 1993, s 66(4).

[177] In the present case no request for urgency was made until 14 May 2013 (the eighth of the successive information privacy requests). No such request was made after that date. Nor was the supposed failure to accord urgency the subject of the complaint made to the Privacy Commissioner on 23 April 2013, which reinforces the inference that no request for urgency had been made prior to 14 May 2013.

[178] The case for Dr Turner is that whenever her requests unilaterally sought provision of the information by a date earlier than the 20 working days allowed by s 40 and inside the "undue delay" timeframe imposed by s 66(4), that by inference urgency was being requested.

[179] But in our view the unilateral stipulation by the requester of a compliance deadline is not of itself a request for urgency. To put the agency on notice that the requester seeks to abridge the s 40(1) and s 66(4) statutory periods, the request for urgency must be explicit and accompanied by reasons why the request should be treated as urgent.

[180] The reason given in the 14 May 2013 letter was "to give advice to our client":

> 1. Further to our letters to you dated 9 and 10 May 2013, and our letters to your client in March and April 2013, we again ask that your client provide the information that we have requested. This is required so that we can give proper advice to our client and it is urgently required. It is a breach of your client's statutory obligations to fail to provide this information.

[181] But as stated in *Koso* at [28.3] and [29], a request for urgency based on the grounds that a lawyer needs to give his or her client advice is not a clear enough reason to find an agency in breach of s 37. If this were not the case every lawyer could claim that the request is urgent. But advising clients is a routine matter even when there are important rights potentially at stake. Genuine urgency requires circumstances that are more than

routine. The reasons for urgency must also be clearly articulated. Something specific was required but such was not provided by Dr Turner.

[182] The more so given the access requests consistently stipulated timeframes well outside those in ss 40(1) and 66(4) as the following table illustrates:

Date of request	**Information requested by**	**Number of days between the request and the deadline self-stipulated by Dr Turner**
4 March 2013	8 March 2013	4 days
18 March 2013	28 March 2013	10 days
12 April 2013	17 April 2013	5 days
14 May 2013	Urgency requested but no date stipulated	
22 May 2013	24 May 2013	2 days
30 May 2013	No date given	
7 June 2013	21 June 2013	14 days
25 June 2013	No date given but reference made to Dr Turner being on leave and Mr Forster's office being closed between certain dates.	

[183] Given the repetitive nature of the requests, the habitual unilateral stipulation of timeframes much earlier than the statutory period, the failure to include the urgency issue in the complaint to the Privacy Commissioner and the failure to offer good reason for the urgency request of 14 May 2013 leads us to the conclusion there has been no breach by the University of s 37.

Some broad conclusions

[184] We are not confident our rulings on the lengthy (375 paragraphs and 86 pages) closing submissions for Dr Turner can be neatly summarised in a few sentences. But it may help if the following (non-exhaustive) key points are made:

[184.1] Of the 12 "requests" pleaded in the ASoC, three were not requests at all.

[184.2] Of the remaining nine requests, the first three were properly responded to by delivery of the requested information to Dr Turner's barrister on 11 March 2013. The remaining six requests repeated the earlier requests notwithstanding the information had been provided. Contextually, there was in fact a single request for everything related to Dr Turner's employment dispute and which was readily retrievable.

[184.3] Delivery of the information on 11 March 2013 was within the statutory time limit prescribed by s 40(1) of the Act and there was no undue delay. In the

circumstances there was no requirement for a separate confirmation that the information was held by the University or for formal notice of the decision on the request to be given. The in-time delivery of the information necessarily satisfied the statutory requirements of s 40.

[184.4] The University correctly refused to provide information held in the minds of staff on the ground that the information was not readily retrievable.

[184.5] Dr Turner has not established that any of the information allegedly not provided by the University was information which, at the time of the relevant "request", was held in such a way it could readily be retrieved.

[184.6] The University was not required to give Dr Turner access to any personal information about her which did not relate to the employment dispute and which was readily retrievable.

[184.7] There was no duty on the University to list the information not provided or which did not exist.

[184.8] The University has not been shown to be in breach of the urgency provisions in the Act.

[185] It is now necessary to address the privilege claim made by the University in relation to certain documents.

LEGAL PROFESSIONAL PRIVILEGE

Introduction

[186] Although at the initial October 2015 hearing the Tribunal was invited to determine the privilege claim before hearing the whole case, that invitation was declined for the reasons recorded in *Turner v The University of Otago (Legal professional privilege claim)* [2016] NZHRRT 15 (15 April 2016). It is not intended to recite the content of that decision here.

The statutory provisions

[187] While IPP 6 confers a right of access to personal information, the agency holding such information is permitted by PA 1993, s 29(1) to refuse to disclose such information if (inter alia) the disclosure would breach legal professional privilege:

> **29 Other reasons for refusal of requests**
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
> …
> (f) the disclosure of the information would breach legal professional privilege; or
> …

[188] In the present case the University relied on s 29(1)(f) when withholding 75 documents from Dr Turner. She challenges that decision. The University also sought to withhold two further documents under s 29(1)(b) (evaluative material) but that claim was abandoned at the conclusion of the hearing and will not be addressed in this decision. The issue for determination by the Tribunal is whether the 75 documents (not including documents numbered 52 and 53 which were added to the common bundle) are properly subject to legal professional privilege of one kind or another.

[189] There are two distinct limbs of legal professional privilege, each with different characteristics. See Elisabeth McDonald and Scott Optican and others (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at [EV54.01].

[190] The first limb, commonly called legal advice privilege, is recognised by the Evidence Act 2006 (EA), s 54. Protection is given to any communication between a person and a legal adviser if the communication was intended to be confidential and made in the course of and for the purpose of the person requesting or obtaining professional legal services from the legal adviser or the legal adviser giving such services:

> **54 Privilege for communications with legal advisers**
>
> (1) A person who requests or obtains professional legal services from a legal adviser has a privilege in respect of any communication between the person and the legal adviser if the communication was—
> (a) intended to be confidential; and
> (b) made in the course of and for the purpose of—
> (i) the person requesting or obtaining professional legal services from the legal adviser; or
> (ii) the legal adviser giving such services to the person.
> (1A) The privilege applies to a person who requests professional legal services from a legal adviser whether or not the person actually obtains such services.
> (2) In this section, **professional legal services** means, in the case of a registered patent attorney or an overseas practitioner whose functions wholly or partly correspond to those of a registered patent attorney, requesting or obtaining or giving information or advice concerning intellectual property.
> (3) In subsection (2), **intellectual property** means 1 or more of the following matters:
> (a) literary, artistic, and scientific works, and copyright:
> (b) performances of performing artists, phonograms, and broadcasts:
> (c) inventions in all fields of human endeavour:
> (d) scientific discoveries:
> (e) geographical indications:
> (f) patents, plant varieties, registered designs, registered and unregistered trade marks, service marks, commercial names and designations, and industrial designs:
> (g) protection against unfair competition:
> (h) circuit layouts and semiconductor chip products:
> (i) confidential information:
> (j) all other rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.

[191] The second limb, commonly called litigation privilege, is recognised by EA, s 56. Under that provision a communication or information is protected only if it was made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding to which a person is a party or who has reasonable grounds to contemplate becoming a party:

> **56 Privilege for preparatory materials for proceedings**
>
> (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the **proceeding**).
> (2) A person (the **party**) who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of—
> (a) a communication between the party and any other person:
> (b) a communication between the party's legal adviser and any other person:
> (c) information compiled or prepared by the party or the party's legal adviser:
> (d) information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.
> (3) If the proceeding is under, or to be under, Part 2 of the Oranga Tamariki Act 1989 or the Care of Children Act 2004 (other than a criminal proceeding under that Part or that Act), a Judge may, if satisfied that it is in the best interests of the child to do so, determine that

subsection (2) does not apply in respect of any communication or information that the Judge specifies.

[192] The protection conferred by these two provisions is specified in EA, s 53:

> **53 Effect and protection of privilege**
>
> (1) A person who has a privilege conferred by any of sections 54 to 59 in respect of a communication or any information has the right to refuse to disclose in a proceeding—
> (a) the communication; and
> (b) the information, including any information contained in the communication; and
> (c) any opinion formed by a person that is based on the communication or information.
> (2) A person who has a privilege conferred by section 60 or 64 in respect of information has the right to refuse to disclose in a proceeding the information.
> (3) A person who has a privilege conferred by any of sections 54 to 59 and 64 in respect of a communication, information, opinion, or document may require that the communication, information, opinion, or document not be disclosed in a proceeding—
> (a) by the person to whom the communication is made or the information is given, or by whom the opinion is given or the information or document is prepared or compiled; or
> (b) by any other person who has come into possession of it with the authority of the person who has the privilege, in confidence and for purposes related to the circumstances that have given rise to the privilege.
> (4) If a communication, information, opinion, or document, in respect of which a person has a privilege conferred by any of sections 54 to 59 and 64, is in the possession of a person other than a person referred to in subsection (3), a Judge may, on the Judge's own initiative or on the application of the person who has the privilege, order that the communication, information, opinion, or document not be disclosed in a proceeding.
> (5) This Act does not affect the general law governing legal professional privilege, so far as it applies to the determination of claims to that privilege that are made neither in the course of, nor for the purpose of, a proceeding.

[193] It is necessary that attention be drawn to s 53(5) because proceedings before the Tribunal are not proceedings within the meaning of EA, s 4(1), that is a proceeding conducted by a "court". So it is relevant to note that the underlying common law is unchanged by ss 54 and 56. See further the commentary in Mathew Downs (ed) *Cross on Evidence* (11th ed, LexisNexis, Wellington, 2020) at [EVA 53.1], [EVA 53.4], [EVA 53.5] and [EVA 56.3].

[194] Fortuitously an analysis of the common law is unnecessary because the Human Rights Act 1993, s 106(4) applies the Evidence Act to the Tribunal "in the same manner as if the Tribunal were a court" within the meaning of the Evidence Act. In the result ss 53, 54 and 56 do apply to the present case. Section 106(4) provides:

> (4) Subject to subsections (1) to (3), the Evidence Act 2006 shall apply to the Tribunal in the same manner as if the Tribunal were a court within the meaning of that Act.

[195] Reference to this provision was inadvertently overlooked by the Tribunal in *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10 at [41] and in *Geary* at [111]. In those two decisions s 54(1) was treated as an appropriate definition of "legal professional privilege". That reference ought to have been more narrowly framed as legal advice privilege. The oversight having been noted we intend in this decision to determine the case on the basis of the statutory language in EA, ss 54 and 56 respectively.

The facts

[196] The evidence given by Ms McNichol establishes the key dates relevant to the University's decision to withhold documents on the ground of legal professional privilege.

[197] The first date is 4 March 2013 being the date of Mr Forster's letter to Dr Adams. In this letter Mr Forster put the University on notice Dr Turner was considering legal action and that destruction of records "will amount to spoliation". This is a reference to the duty of a party to litigation (or litigation which is anticipated) to take all reasonable steps to preserve documents likely to be discoverable in the proceeding. See for example High Court Rules 2016, r 8.3.

[198] After the University had corresponded with Mr Forster on 8 March 2013 he repeated the exact same statement in a letter two weeks later on 18 March 2013.

[199] On 20 March 2013 Ms McNichol instructed the University's solicitors (Anderson Lloyd) to act.

[200] On 23 April 2013 Dr Turner commenced legal action when Mr Forster sent to the University an 11 page notification of a personal grievance together with a copy of Dr Turner's simultaneous complaint to the Privacy Commissioner.

[201] Against this background Ms McNichol considered that from 23 April 2013 litigation was underway.

[202] In addition the University had been in discussion with Dr Turner regarding the extent of her teaching following her unilateral decision made at the end of January 2013 to reduce her contact hours by 50%.

[203] On 10 May 2013 an instruction was given to Dr Turner by Mr Seales to the effect she was to continue to teach in the allocated classroom the full three hour session on the days and times scheduled without reduction in content.

[204] From 10 May 2013 (when Dr Turner failed to comply with that instruction) until the time of her dismissal on 2 July 2013 the University was actively considering and evaluating what, if any, action should be taken against Dr Turner, including dismissal.

[205] In summary the University's position is that from 4 March 2013 Dr Turner herself contemplated that litigation was apprehended. This was made explicit by the reference by Mr Forster to the duty on the University to prevent the destruction of relevant documents. The University submits that while it could have reasonably apprehended litigation from 4 March 2013, its position is that litigation was beyond doubt when Dr Turner's dual claims were served on 23 April 2013, both of which thereafter resulted in extensive litigation.

[206] The submissions for the University further point out that during this period there were also two other significant events. The first was that the parties had agreed to attend mediation in late June 2013, which never proceeded. The second was the University's decision to issue Dr Turner with the instruction to carry out her full teaching responsibilities. As mentioned, that instruction was given to Dr Turner on 10 May 2013.

[207] Consequently, throughout this period the University was seeking legal advice from its solicitors on a range of issues. There were communications among staff evidencing the planning and other arrangements necessary to enable meetings with the University lawyers to respond to the personal grievance proceedings, the mediation and the complaint to the Privacy Commissioner. There were also specific requests for legal advice on issues as they arose and communications between staff relating to the collating of documents for provision to the University's legal advisers for advice.

Assessment

[208] By virtue of PA 1993, s 87 the University has the onus of proving that disclosure of the withheld information would breach legal professional privilege.

[209] Having inspected the documents (in the absence of Dr Turner and her counsel) and having taken into account the open submissions presented by both parties we are satisfied that onus has been discharged.

[210] Specifically, those documents for which legal advice privilege has been claimed in the spreadsheet annexed to Ms McNichol's closed evidence fall broadly within the category of documents intended to be confidential and generated for the purpose of obtaining legal advice in relation to Dr Turner and her intended legal proceedings. The justification for such broad construction is explained in *Mitre 10 (NZ) Ltd v Thistle Dome Holdings Ltd* [2015] NZHC 2719, [2015] NZAR 1909 at [15].

[211] In relation to the documents subject to the claim of litigation privilege the issue is whether the documents were "made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding".

[212] On the evidence we have accepted, the University contemplated litigation from at least 23 April 2013. There were certainly more than sufficient reasonable grounds for such conclusion, a conclusion which could have been reached much earlier in the light of Mr Forster's letter dated 4 March 2013.

[213] As to the dominant purpose requirement, the University was required to respond to the personal grievance, the intended mediation and the privacy complaint. In her evidence, Ms McNichol described the process that was put in place to gather and collate information which was then provided and discussed with the University's solicitors so that a formal response could be prepared and the allegations defended. To enable that process to occur a number of communications between University staff members were necessitated. We have been satisfied the dominant purpose of all these communications was to strategize and plan and prepare the University's defence in conjunction with and in accordance with the legal advice given by the University's solicitors.

[214] We are satisfied that in terms of PA 1993, s 56 the communications or information were made, received, compiled, or prepared for the dominant purpose of preparing for the proceedings or apprehended proceedings by Dr Turner.

[215] Having found the University has discharged its onus under PA 1993, s 87 and that the documents were properly withheld under PA 1993, s 29(1)(f) it is now necessary to address Dr Turner's further submission that:

> **[215.1]** The University did not make and give notice of any decision to withhold with the result the privilege claim was not properly made and the documents for which privilege has been claimed should have been disclosed and the deeming provisions in s 66(3) and (4) apply.
>
> **[215.2]** The University did not notify Dr Turner that it held the particular pieces of personal information in the closed bundle.

Whether requirement to notify decision to withhold

[216] The relevant date on which an agency must have good reason under ss 27 to 29 for refusing access to personal information is the date on which the decision is made whether the request is to be granted. See *Watson v Capital and Coast District Health Board* [2015] NZHRRT 27 at [84] and [85]. The Act requires only that good reason exist at the date of the denial of the request. Failure by the agency to offer that reason at the time does not of itself amount to an interference with the privacy of the individual:

> **[85]** Provided such good reason exists at the date of the decision on the request, the failure by the agency to offer that reason at the time it communicates its decision on the request does not amount to an interference with the privacy of the individual as defined in s 66 (though it is undoubtedly bad practice). Such interference only occurs if there is both a refusal to make information available in response to the request **and** a determination by the Commissioner, or as the case may be, the Tribunal that there is no proper basis for that decision. See s 66(2)(a)(i) and (b): …

[217] In the present case the information requested by Dr Turner in her first four "requests" was delivered to her (via Mr Forster) on 11 March 2013. There was no communication about any of the withholding grounds because no information had in fact been withheld. None of the documents for which legal professional privilege are now claimed were in existence at that time. In fact the period covered by the privilege claim (8 May 2013 to 3 July 2013) lies outside the first seven "requests" pleaded in the ASoC. Put quite simply, there was no withholding decision to communicate.

[218] As to the remaining five requests (14 May 2013, 22 May 2013, 30 May 2013, 7 June 2013 and 25 June 2013) failure by an agency to communicate reliance on any of the ss 27 to 29 withholding grounds does not constitute an interference with privacy as defined in s 66. Nor does a failure to comply with s 44 (reason for refusal to be given). As already mentioned, provided good reason in terms of ss 27 to 29 existed at the date of the decision on the request, the failure by the agency to offer that reason at the time it communicates its decision on the request does not amount to an interference with the privacy of the individual as defined in s 66. In addition, as will be seen shortly, notice of the withholding of information on the legal professional privilege ground was given by the University's solicitors on 18 June 2013 which was inside the twenty working day periods then running in relation to the identical repeat requests except in relation to the 25 June 2013 request made just under two weeks later. That too was a repetition of the earlier requests and no separate decision was required.

Whether a duty to list withheld documents

[219] Notice of the withholding of information under the s 29(1)(f) legal professional privilege ground was given by the University's solicitors to Mr Forster by email dated 18 June 2013 in the following terms:

> These are all the documents you requested except those which fall into one of the following categories.
>
> - Documents which may exist, or may have once existed, but which are now unable to be found.
> - Documents created after notification of a PG and therefore subject to litigation privilege.
> - Communications seeking/giving/discussing legal advice and so subject to legal professional privilege.

- Information not in a readily retrievable form such as information in the minds of individuals, information about the history of the course here and on other campuses and the like.

- Information which does not exist, such as records of meetings where no records were made.

- Information which is not personal information about Dr Turner and would take significant time to compile such as all internal communications regarding the 4th year handbooks. Our client is prepared to search for that information but only if Dr Turner pays the reasonable costs of it doing so. Please let me know if you would like an estimate of those costs.

[220] Dr Turner complains this notice did not identify or particularise the withheld documents. As to this we have already held there is no obligation under the Act to identify what pieces of personal information are held. The position is the same in relation to information that is withheld. We are further of the view that, as already earlier noted, the PA 1993 has no counterpart to the discovery and inspection regime prescribed by the High Court Rules, Part 8. Specifically, the obligation under those Rules to identify the individual documents to be withheld from disclosure or to specify what they contain is not part of the Privacy Act regime. Similarly, the obligation to list documents for which privilege is claimed (see the affidavit of documents in Form G37 in the High Court Rules) is not carried over into the PA 1993 regime. While the reason for the refusal is required by s 44(a)(i), the grounds in support of that reason are required only if the individual so requests. See s 44(a)(ii). There is no separate, freestanding obligation to particularise each item of withheld information.

Waiver

[221] Waiver arises as an issue in relation to the "information held in minds" point. The challenge is based on the following exchange between Mr Beck and Ms McNichol during her cross-examination:

Q. And when it comes to information held in the minds of persons, your view is that that doesn't have to be provided?

A. Well we took legal advice on that.

Q. And that supported your view?

A. Well yes, we were prepared to follow that advice.

Q. And that would explain why you didn't take any steps to provide information held in the minds of persons.

A. Well I don't believe that we have.

[222] In this exchange we see no evidence of waiver in terms of the Evidence Act, s 65 which provides:

65 Waiver

(1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.
(2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.
(3) A person who has a privilege waives the privilege if the person—
  (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or

(b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.

(4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.

(5) A privilege conferred by section 57 (which relates to settlement negotiations or mediation) may be waived only by all the persons who have that privilege.

[223] If there was any disclosure, s 65(4) would have application.

[224] In the brief exchange an honest witness was doing the best she could to give full answers to the questions put in cross-examination. The cross examiner knew of the privilege claim and while leading questions are the essence of cross-examination, it was the second question "And that supported your view?" which opened the door to the nature of the advice given. If the answer "Well yes, we were prepared to follow that advice" is at a stretch to be construed as disclosing the advice given, the door was barely opened. If any disclosure occurred, it was involuntary, mistaken and most importantly, without the consent of the University. We do not find in this brief exchange any evidence of the "mischief" to which the waiver rule is addressed, namely the assertion of privilege while also seeking to inject the substance of the communication into evidence.

Whether the withholding grounds no longer apply

[225] It was submitted by Dr Turner that the claim to litigation privilege expired when the litigation before the Employment Relations Authority expired. That did not happen until the Authority gave its decision some years later on 10 June 2015, just a few months prior to the commencement of the Tribunal's own hearing on 12 October 2015.

[226] However, the issue before the Tribunal is whether, at the time the privileged documents were withheld, the University had good reason for so withholding in terms of s 29(1)(f). That proposition was not challenged by Mr Beck when the issue was discussed during the course of his closing submissions.

[227] It follows we are of the view there is no obligation under the Privacy Act for an agency to reconsider, on its own initiative, an individual's refused IPP 6 request at a later date. This is so even when circumstances have changed and good reasons for withholding personal information might no longer apply.

[228] As the claim to legal professional privilege has been upheld and as the collateral challenges by Dr Turner have failed, the challenge to the privilege claim is dismissed.

OVERALL CONCLUSION

[229] As we can find no merit in any of the submissions advanced on behalf of Dr Turner and as we are satisfied her IPP 6 requests were properly complied with no interference with her privacy has been established. Consequently the claim must be dismissed in its entirety.

Costs

[230] Costs are reserved. Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

[230.1] The University of Otago is to file its submissions within 14 days after the date of this decision. The submissions for Dr Turner are to be filed within a further 14 days with a right of reply by the University within seven days after that.

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

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

ORDERS

[231] The following orders are made:

[231.1] Dr Turner's proceedings are dismissed.

[231.2] Costs are reserved.

.....	.....	.....
Mr RPG Haines ONZM QC	**Ms GJ Goodwin**	**Ms DL Hart**
Chairperson	**Member**	**Member**