
IN THE HUMAN RIGHTS REVIEW TRIBUNAL
I TE TARAIPUNARA MANA TANGATA

[2024] NZHRRT 13

	Reference No. HRRT 002/2021
UNDER	THE PRIVACY ACT 2020
BETWEEN	KERRY N MITCHELL
	PLAINTIFF
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS
	DEFENDANT

AT WELLINGTON

BEFORE:

Ms SJ Eyre, Chairperson

Mr JS Hancock, Deputy Chairperson

Ms SB Isaacs, Member

Ms L Ashworth, Member

REPRESENTATION:

Ms K Mitchell in person

Ms S Leslie for defendant

DATE OF HEARING: 17 – 18 October 2023

DATE OF DECISION: 28 March 2024

DECISION OF TRIBUNAL¹

[1] In late December 2019 and early January 2020, Ms Mitchell made five separate information privacy requests under the Privacy Act 1993² ('the Act') to the Chief Executive

¹ This decision is to be cited as *Mitchell v Corrections* [2024] NZHRRT 13.

² The Privacy Act 1993 was repealed and replaced by the Privacy Act 2020 on 1 December 2020. However, the transitional provisions in the Privacy Act 2020 sch 1 cl 9(1) provide that these proceedings must be continued and completed under the 2020 Act, but that does not alter the relevant legal rights and obligations in force at the time

of the Department of Corrections ('Corrections') regarding matters relating to her treatment while in the custody of Corrections.

[2] In response to her requests, Corrections provided Ms Mitchell with some information but refused to provide certain other information on the grounds that it did not exist or was otherwise not held.

BACKGROUND

[3] Ms Mitchell's requests for personal information arise from a number of incidents during her time in the custody of Corrections. These included:

[3.1] A complaint that Ms Mitchell lodged with the Police in September 2019 alleging that she had been mistreated by Corrections staff at Arohata Prison (Arohata); and

[3.2] Ms Mitchell's transfer from Arohata to Auckland Region Women's Correctional Facility (ARWCF) on 28 November 2019.

[4] Ms Mitchell issued five separate information privacy requests to Corrections:

[4.1] On 17 December 2019 Ms Mitchell sought all documentation relating to her transfer from Arohata to ARWCF (the first request).

[4.2] On 17 December 2019 Ms Mitchell also sought copies from Corrections of documentation relating to the receipt by the Police of her complaints made in September 2019 (the second request).

[4.3] On 24 December 2019 Ms Mitchell sought all Police CCTV footage, all Corrections staff camera footage, and all documentation regarding her escort to ARWCF (the third request).

[4.4] On 4 January 2020 Ms Mitchell sought her s 60 medical segregation papers³ that she had recently filed with Corrections (the fourth request).

[4.5] On 4 January 2020 Ms Mitchell also sought copies of two PC.01 prisoner complaint forms she had lodged with Corrections two days earlier (the fifth request).

[5] Corrections responded to all of Ms Mitchell's information privacy requests on 27 February 2020 as set out below:

that actions subject to this claim were taken. Accordingly, all references in this decision are to the Privacy Act 1993, which was in force at the time of the information privacy request and the response from Corrections.

³ Corrections Act 2004, s 60.

[5.1] In response to the first request, Corrections provided Ms Mitchell with a copy of the prison transfer record and a letter explaining why she was transferred and why she was not provided with information at the time.

[5.2] Corrections refused Ms Mitchell's second request on the grounds that the information could not be located or did not exist. Corrections informed Ms Mitchell that she should re-direct her request for Police complaint documentation to the Police.

[5.3] Corrections refused Ms Mitchell's third request on the grounds that the information could not be located or did not exist. Corrections informed Ms Mitchell that she should re-direct her request for CCTV footage to the Police directly.

[5.4] Corrections provided Ms Mitchell with a copy of the signed M.07 s 60 medical segregation order in response to her fourth request.

[5.5] In response to her fifth request, Corrections provided Ms Mitchell with the requested PC.01 prisoner complaint forms.

[6] Ms Mitchell was unhappy with these responses and complained to the Privacy Commissioner, who investigated Corrections' response to her five information privacy requests. The Privacy Commissioner discontinued his investigation into Ms Mitchell's complaints in June 2020 and she filed this claim in the Tribunal.

THE CLAIM

[7] Ms Mitchell claims that Corrections have interfered with her privacy by:

[7.1] Failing to provide its responses to her information requests within the timeframe required under s 40(1) of the Act.

[7.2] Failing to provide her the reasons for refusing access to personal information, as required by s 44 of the Act.

[7.3] Failing to make available her personal information without undue delay, pursuant to s 66(4) of the Act.

[8] Corrections has admitted it failed to provide Ms Mitchell with its responses in accordance with timeframes required and accepts this constitutes an interference with Ms Mitchell's privacy.

[9] Corrections otherwise denies that it failed to substantively respond to Ms Mitchell's requests in accordance with the requirements of the Act.

ISSUES

[10] To determine the claim, the Tribunal must consider the following issues:

[10.1] Did Corrections respond to Ms Mitchell's information privacy requests within the timeframes required under s 40(1) of the Act?

[10.2] Was the information provided to Ms Mitchell without undue delay, including a document provided at the hearing?

[10.3] If the decision was made to refuse any of the requests, was this conveyed to Ms Mitchell in the manner required in s 44 of the Act?

[10.4] If the answer to any of the questions above is no, was there an interference with Ms Mitchell's privacy?

[10.5] If so, what is the appropriate remedy?

DID CORRECTIONS RESPOND TO THE INFORMATION PRIVACY REQUEST IN ACCORDANCE WITH THE PRIVACY ACT TIMEFRAMES?

[11] Section 40(1) requires that on receipt of a request for personal information an agency 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, decide whether the request is to be granted and advise the individual who made the request of the decision on that request.

[12] Corrections admits that it did not respond to Ms Mitchell's information privacy requests within the timeframes required by s 40(1).

[13] Corrections concedes that this constituted an interference with Ms Mitchell's privacy.⁴

WAS THE INFORMATION PROVIDED WITHOUT UNDUE DELAY?

[14] After a decision has been made on a request, an agency is required to provide the documents included in that request without undue delay.

[15] Sections 66(2)(a)(i) and 66(4) of the Act provide that undue delay in making information available constitutes a refusal to provide information and (so long as there is no proper basis for that delay) is an interference with privacy, as detailed below:

⁴ Privacy Act 1993, s 66(3).

66 Interference with privacy

...

- (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;
- ...
- (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

[16] The Tribunal has held that “undue” delay, for the purposes of s 66(4), means delay that is inappropriate or unjustifiable in the circumstances of the case.⁵ Whether delay in providing information is inappropriate or unjustifiable, is dependent on the context in which it has occurred.⁶ Undue delay has been found in cases where the delay in providing information is extensive.⁷

The initial Corrections response

[17] While Corrections did not separately provide a response under s 40(1), it did provide the documents in response to Ms Mitchell’s information privacy requests on 27 February 2020. This was 33 working days after the first request was made and 29 working days after the fifth request was made. When these timeframes are considered in the context of the time of year, the delays are not considered undue.

[18] We therefore find that the provision of information to Ms Mitchell on 27 February 2020 was not unduly delayed for the purposes of s 66(4).

The information provided at the hearing

[19] The new information disclosed by Corrections prior to the hearing was provided to Ms Mitchell on 13 October 2023, well over three and a half years after Ms Mitchell’s information privacy requests. Corrections has appropriately not sought to justify this delay. We find that such a substantial delay is clearly not justifiable and constitutes undue delay for the purposes of s 66(4).

DID CORRECTIONS COMPLY WITH s 44 OF THE ACT?

[20] Section 44 of the Act requires that agencies must provide an individual with reasons for refusing an information privacy request and provide information about the individual’s right to complain to the Privacy Commissioner.

⁵ *Sansom v Department of Internal Affairs* [2016] NZHRRT 17 at [28], citing *Koso v Chief Executive. Ministry of Business, Innovation and Employment* [2014] NZHRRT 39 at [6].

⁶ *Koso* as above n 5, at [6].

⁷ See *Reekie v Attorney-General* [2022] NZHRRT 20 at [31], where 2.5 years was considered undue.

[21] Corrections refused Ms Mitchell's second and third requests on the grounds that the information could not be located, did not exist or was held by the Police.

[22] There is no dispute that Corrections provided Ms Mitchell with its reasons for refusing her request and advised her of her right to lodge a complaint with the Privacy Commissioner in accordance with s 44(b).

[23] However, in its response letter Corrections referred to the Official Information Act 1982 rather than the Privacy Act 1993. Nonetheless, the refusals were particularised against each specific information request and were in a table itemising Corrections' responses to 37 separate requests that Ms Mitchell had made to Corrections since 9 December 2019. Only five of those requests are the subject of this claim.

[24] Corrections accordingly complied with s 44 of the Act.

[25] Ms Mitchell also submitted that Corrections failed to take steps to transfer her request to the Police, as required under s 39 of the Act. However, this issue was not pleaded by Ms Mitchell in her statement of claim and is not within the scope of the issues for the Tribunal's determination and so cannot be determined.

REMEDIES

[26] When the Tribunal determines on the balance of probabilities that there has been an interference with privacy, it may grant one or more of the remedies set out in s 85 of the Act.

[27] The Tribunal has found that Corrections interfered with Ms Mitchell's privacy by providing its decision on her information privacy requests outside the timeframe required by the Act and by its unduly delayed release of information to Ms Mitchell prior to the hearing. Accordingly, the Tribunal must consider what remedies, if any, should follow.

[28] Ms Mitchell seeks the following remedies:

[28.1] A declaration that Corrections has interfered with her privacy.

[28.2] The following orders to remedy the interference with her privacy, or redressing any loss or damage she has suffered because of the interference:

[28.2.1] An order that Corrections undertake training; and

[28.2.2] An order that Corrections provide Ms Mitchell with access to personal information yet to be provided to her in response to her information privacy request.

[28.3] The following categories of damages:

[28.3.1] Damages for pecuniary loss; and

[28.3.2] Damages for loss of a benefit; and

[28.3.3] Damages for humiliation, loss of dignity and injury to her feelings.

[29] Ms Mitchell also sought an order under s 85(1)(b) to restrain Corrections from repeating its interference with her privacy or the privacy of other prisoners or persons under its control. However, at the hearing Ms Mitchell agreed with the submission made by Corrections that a restraining order is not applicable in the circumstances of her case. Ms Mitchell accordingly withdrew this aspect of her claim for remedies.

Declaration

[30] The grant of a declaration by the Tribunal under s 85(1)(a) of the Act is discretionary. However, the Tribunal will not normally deny such relief where it finds there has been an interference with privacy.⁸

[31] As the Tribunal has found that Corrections' release of personal information to Ms Mitchell prior to the hearing was unduly delayed, and Corrections have conceded that its decision on her information privacy requests were made outside the timeframe required by the Act, it is appropriate to issue a formal declaration that Corrections has interfered with Ms Mitchell's privacy. A declaration is made accordingly.

Training order

[32] The Tribunal has previously issued training orders where it is found that an agency has demonstrated little to no awareness of its privacy obligations,⁹ and where a training order may assist an agency to comply with those obligations.¹⁰

[33] A training order is not required in this case. Corrections' delay in responding to Ms Mitchell's requests was not due to a lack of awareness of its obligations but appears to have been due to delays over the Christmas period. The undue delay in providing the final document was due to an administrative oversight by Corrections rather than ignorance.

[34] No training order will be made.

⁸ *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [107]-[108].

⁹ *Taylor v Orcon Ltd* [2015] NZHRRT 15 at [84]-[86]; *Hammond v Credit Union Baywide* [2015] NZHRRT 6 at [185]; and *Director of Human Rights Proceedings v Crampton* [2015] NZHRRT 35 at [123].

¹⁰ *Hammond* as above n 10, at [186].

Order for access to information

[35] Ms Mitchell considers that Corrections has withheld certain personal information that falls within the scope of her information privacy requests, but there is no evidence that it has.

[36] Ms Mitchell suggested that Corrections has still not provided documents such as the transfer documentation, use of force documentation, debrief meeting notes and entries in the prison wing book which fall within her information privacy request. While Ms Mitchell may expect that Corrections holds such information, there was insufficient evidence before the Tribunal of the existence of those documents. As such, an order for their production cannot be made.

[37] No order for access to information is made.

Damages

Pecuniary loss

[38] Ms Mitchell did not provide evidence of any financial loss she incurred as a direct result of Corrections' interference with her privacy.

[39] In the absence of any evidence of this nature, the Tribunal is not able to consider an award of damages for pecuniary loss.

Loss of a benefit

[40] Ms Mitchell claims that Corrections' interference with her privacy has prevented her from commencing with litigation against Corrections regarding the incidents that gave rise to her information privacy requests. Ms Mitchell says the way in which Corrections dealt with her information privacy requests prevented her from seeking information regarding her prison transfer within the one-month timeframe specified under s 56 of the Corrections Act 2004. Ms Mitchell submits that this has resulted in the loss of a benefit through the loss of a chance to challenge her prison transfer and commence with related litigation.

[41] To award damages for loss of benefit, the Tribunal must be satisfied that the interference with privacy was a contributing or material cause.¹¹ Further, where a loss of benefit is claimed through an inability to use documents in a court proceeding, the High Court has held that it is necessary to consider the extent to which the information would have likely affected the outcome of the case.¹²

[42] We find that there is no evidence that Corrections' delay in responding to Ms Mitchell's privacy requests was material to her ability to request information under s 56

¹¹ *Patel v Dean* [2020] NZHRRT 37 at [44]; and *Reekie* as above n 7, at [61].

¹² *Attorney-General v Dotcom* [2018] NZHC 2564, [2019] 2 NZLR 277 at [207].

of the Corrections Act. There is also no evidence that outcomes for Ms Mitchell would have been any different had she done so. We note that the Regional Commissioner's letter of 27 February 2020 provided Ms Mitchell with the reasons for her transfer and other related decisions made by Corrections.

[43] In conclusion, we find that Ms Mitchell has not suffered any loss of a benefit because of Corrections' interference with her privacy and decline to award damages.

Humiliation, loss of dignity and injury to feelings

[44] For damages to be awarded under this head, a causal connection must be established between the humiliation, loss of dignity and injury to feelings experienced by the plaintiff and the interference with their privacy.¹³

[45] Ms Mitchell provided an account of the distress and emotional harm she experienced because of her prison transfer and its aftermath, including what she perceived as a lack of responsiveness from Corrections when she sought to query it. Ms Mitchell submitted that Corrections did not meet its duty to treat her with "due care" nor its human rights obligations under the UN Standard Minimum Rules for the Treatment of Prisoners to treat her with dignity while she was in its custody.

[46] We acknowledge Ms Mitchell's evidence and submissions regarding the impact of the transfer and other experiences she had while in prison. However, for the purposes of this case we are only concerned with humiliation, loss of dignity and injury to feelings arising from Corrections' delay in responding to Ms Mitchell's information privacy request. In this respect, Ms Mitchell did not establish a sufficient causal connection between the distress she says she experienced and Corrections' interference with her privacy. Ms Mitchell's evidence was instead focused upon the events that gave rise to her information privacy requests, rather than the impact of Corrections' delayed response itself.

[47] Regarding the unduly delayed provision of the 28 November 2019 incident report, we have found that this was due to an isolated oversight that occurred during Corrections' preparation of its response to Ms Mitchell. Ms Mitchell provided no evidence that this caused her emotional harm or distress.

[48] No damages will be awarded for humiliation, loss of dignity and injury to her feelings.

¹³ See *Gorgus v Department of Corrections* [2023] NZHRRT 22 at [117]; and *Reekie* as above n 7, at [66].

ORDER

[49] The Tribunal is satisfied on the balance of probabilities that Corrections has interfered with Ms Mitchell's privacy. The following order is made:

[49.1] A declaration is made under s 85(1)(a) of the Privacy Act 1993 that the Chief Executive of the Department of Corrections interfered with Ms Mitchell's privacy by failing to respond to her information privacy requests in accordance with the Privacy Act 1993.

COSTS

[50] As both parties have attained a measure of success in this proceeding, applying the principles adopted by the Tribunal in relation to costs¹⁴ this is not a case where costs should be awarded. We note that Ms Mitchell is self-represented and that neither party has made submissions in respect of costs nor indicated that they intend to do so in the event they are successful.

[51] Accordingly, costs are to lie where they fall.

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Ms SJ Eyre
Chairperson

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Mr JS Hancock
Deputy Chairperson

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Ms SB Isaacs
Member

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Ms L Ashworth
Member

¹⁴ See *Beauchamp v B & T Co (2011) Ltd (Costs)* [2022] NZHRRT 30 at [14]-[16], citing *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515 and *Andrews v Commissioner of Police (Costs)* [2014] NZHRRT 31. See also *Director of Proceedings v Smith (Costs)* [2020] NZHRRT 35; and *Turner v University of Otago (Costs)* [2021] NZHRRT 48.