(1) ORDER PROHIBITING PUBLICATION OF MEDICAL REPORT

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2023] NZHRRT 18**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 015/16
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**KERRYN MITCHELL**
	PLAINTIFF
AND	**CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS**
	DEFENDANT

AT WELLINGTON

BEFORE:
Ms SJ Eyre, Chairperson
Ms L Ashworth, Member
Ms S Isaacs, Member

REPRESENTATION:
Ms K Mitchell in person
Ms S Shaw and Ms VE Squires for defendant

DATE OF HEARING: **11 – 12 April 2023**

DATE OF DECISION: **11 July 2023**

(REDACTED) DECISION OF TRIBUNAL [1]

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[1] Ms Mitchell was in the custody of the Department of Corrections (Corrections), when in November 2014, she undertook an assessment with [redacted] Ian Britton, at the

[1] This decision is to be cited as *Mitchell v Corrections* [2023] NZHRRT 18 (Note publication restrictions).

request of the Parole Board. Later that year the New Zealand Police (the Police) requested the [medical] assessment to assist them in preparing a plan to manage the risk of harm to Police staff if Ms Mitchell was released. After consultation with colleagues, Mr Britton provided excerpts of the [medical] assessment to Police under cover of a letter dated 10 December 2014.

[2] A few months later in the course of a pre-trial hearing regarding Ms Mitchell's criminal charges, a request was made by the Police to Corrections for Prisoner Complaint (PC01) forms created by Ms Mitchell.

[3] On 31 August 2015 under cover of an email of the same date, Kelly Puohotaua, the acting Prison Manager for Auckland Regional Women's Corrections Facility (ARWCF), sent 47 pages of Ms Mitchell's PC01 forms to Police. The forms were requested for the pre-trial hearing, but the Crown Prosecutor ultimately decided they were not required, and they were not filed in the Court.

[4] Ms Mitchell considers both these disclosures by Corrections interfered with her privacy and she complained to the Privacy Commissioner accordingly.

MS MITCHELL'S CLAIM

[5] In February 2016 Ms Mitchell filed this claim against Corrections. Ms Mitchell claimed that Corrections had breached the Information Privacy Principles (IPPs) in the Privacy Act 1993 and caused her harm by disclosure of the [medical] assessment on 10 December 2014 and the PC01 forms on 31 August 2015.

[6] Corrections denies it has breached the IPPs and maintains it was entitled to disclose the information on both occasions in accordance with the exceptions set out in rule 11 of the Health Information Privacy Code 1994 (HIPC) and Information Privacy Principle (IPP) 11 of the Privacy Act 1993 respectively.

ISSUES

[7] In order to determine Ms Mitchell's claim, the Tribunal must determine the following issues:

The [medical] assessment

[7.1] Was Mr Britton's [medical] assessment health information and/or is Corrections a health agency for the purposes of the HIPC?

[7.2] Was the disclosure of Mr Britton's [medical] assessment of Ms Mitchell to the Police on 10 December 2014 allowed under the exception in IPP 11(f) or if it was health information, in rule 11(2)(d) of the HIPC?[2]

[7.3] If not, has Ms Mitchell established one of the forms of harm contemplated by s 66(1)(b) of the Privacy Act 1993, which would mean it was an interference with her privacy?

[2] Corrections initially defended the claim on the basis the disclosure was justified under the exceptions in rule 11(2)(d) or 11(2)(i) of HIPC, however at the hearing this was changed to being justified only under IPP 11(2)(d).

[7.4] If Mr Britton's [medical] assessment is health information, did Corrections use it in a manner that was not authorised by rule 10 of the HIPC?

[7.5] If so, has Ms Mitchell established one of the forms of harm contemplated by s 66(1)(b), which would mean it was an interference with her privacy?

The PC01 forms

[7.6] Was Corrections' disclosure of the PC01 forms to the Police on 31 August 2015 allowed by the exception in IPP 11(e)(iv)?[3]

[7.7] If not, has Ms Mitchell established one of the forms of harm contemplated by s 66(1)(b), which would mean it was an interference with her privacy?

Remedy

[7.8] If there has been an interference with Ms Mitchell's privacy, what (if any) remedy should be granted, having regard to the factors in the Privacy Act 2020 and the Prisoners' and Victims' Claims Act 2005?

WAS THE [MEDICAL] ASSESSMENT HEALTH INFORMATION?

[8] The Privacy Act 1993 (the Act) provided that agencies dealing with personal information of individuals up to 30 November 2020 must comply with the IPPs and any relevant codes of practice issued under the Act, including the HIPC. [4]

[9] The HIPC provides specific requirements that health agencies must abide by when dealing with personal information that is health information. Health information and health agencies are defined in clause 4, the relevant parts are set out as follows:

> 4 (1) This code applies to the following information or classes of information about an identifiable individual:
>
> (a) information about the health of that individual, his or her medical history; or
>
> (b) information about any disabilities that individual has, or has had; or
>
> (c) information about any health services or disability services that are being provided, or have been provided to that individual; or
>
> (d) information provided by that individual in connection with the donation, by that individual, of any body part or any bodily substance of that individual or derived from the testing or examination of any body part, or any bodily substance of that individual; or

[3] Corrections initially defended the claim on the basis the disclosure was justified under the exceptions in IPP 11(f) and 11(e)(iv), however, at the hearing this was changed to being justified only under IPP 11(e)(iv).

[4] The Privacy Act 1993 was repealed and replaced by the Privacy Act 2020 on 1 December 2020, however, this claim was filed under the Privacy Act 1993. The transitional provisions in the Privacy Act 2020 enable this claim to be continued and completed under the 2020 Act, but do not alter the relevant legal rights and obligations in force at the time the disclosures to the Police were made. Accordingly, this claim is assessed against the IPPs as detailed in the Privacy Act 1993 and the Health Information Privacy Code 1994.

> (e) information about that individual which is collected before or in the course of, and incidental to, the provision of any health service or disability service to that individual
>
> (2) This code applies in relation to the following agencies or classes of agency:
>
> Health and disability service providers
>
> (a) an agency which provides health or disability services;
>
> (b) with a larger agency, a division or administrative unit (including an individual) which provides health or disability services to employees of the agency or some other limited class of persons;
>
> (c) a person who is approved as a counsellor for the purposes of the [[Accident Compensation Act 2001]];
>
> […]

[10] The HIPC will apply to this claim, if it is established that Corrections is a health agency and that the [medical] assessment of Ms Mitchell is health information.

Health Information

[11] Health information is defined widely, as set out above and case law suggests that health information:[5]

> Need not even bear directly on a person's health or on health services they have received, provided it concerns an identifiable individual and was collected in the course of, or incidental to, the provision of health or disability service.

[12] While the [medical] assessment was prepared at the request of the Parole Board, it is Corrections' submission that the assessment is health information as it addresses Ms Mitchell's treatment and talks about her medical history.

[13] Ms Mitchell submits that the [medical] assessment is not health information as she was a registered patient at all material times of a general practice in Lower Hutt and she had explicitly opted out of health services provided by Corrections. Ms Mitchell therefore considered Corrections was not her health provider and the [medical] assessment was not health information.

[14] However, the definition of health information encompasses many aspects of a person's overall health, including both positive and negative attributes and would encompass the [medical] assessment of Ms Mitchell, which specifically referred to [redacted] of Ms Mitchell.

[15] The Tribunal is therefore satisfied that the [medical] assessment of Ms Mitchell comes within the definition of health information, the application of the HIPC to this assessment is also consistent with the purpose of the HIPC which is to impose stringent requirements on health agencies in dealing with health information.

[5] See *Marshall v Idea Services Ltd (Redactions)* [2019] NZHRRT 53 at [18] citing *Jones v Waitemata District Health Board* [2014] NZHRRT 52 at [35].

Health Agency

[16] Corrections submits that it is a health agency as defined in rule 4(2)(b) of the HIPC, which states that a health agency includes "with a larger agency, a division or administrative unit (including an individual) which provides health or disability services to employees of the agency or some other limited class of persons".

[17] It is submitted that Corrections provides health or disability services to prisoners, which are a limited class of persons. Corrections is specifically required under the Corrections Act 2004 to have a health centre manager and Medical Officer and to ensure that prisoners have health care that is reasonably equivalent to the standard of health care available to the public.

[18] Ms Mitchell submits that Corrections is not a health agency as it cannot issue NHI numbers and [redacted] are contractors, so not part of a health agency in any event. However, the fact Corrections cannot issue an NHI number is not indicative of whether it is a health agency. It is apparent from Schedule 2 of the HIPC, which sets out the agencies that can assign NHI numbers, that those agencies are fewer than the agencies that would be considered to be health agencies, accordingly this is not a determinative issue in establishing the status of a health agency.

[19] Corrections is an agency with a division (which includes individuals such as Mr Britton) that provide health services to prisoners. Accordingly, the health service division of Corrections and Mr Britton in particular, as an individual health practitioner, fall within the definition of an agency at rule 4(2)(b) of the HIPC. The HIPC explicitly notes that an individual can be a health agency. The fact that Ms Mitchell opted out of her routine health care being provided by Corrections does not change the status of the health division of Corrections. Nor does the employment status of Mr Britton alter this finding, if Mr Britton was a contractor, he as an individual is a health agency. If he was an employee, then his employer is a health agency and the HIPC still applies.

Conclusion

[20] The [medical] assessment was health information, and the health division of Corrections is a health agency, as is Mr Britton himself. Accordingly, the HIPC applies to the disclosure of excerpts of the report by Mr Britton.

WAS THE DISCLOSURE OF THE [MEDICAL] ASSESSMENT ALLOWED?

[21] Corrections has accepted they disclosed Ms Mitchell's health information (namely the [medical] assessment) and maintain they were entitled to do so under the exception in rule 11(2)(d) of the HIPC as set out below:

> **Rule 11 Limits on disclosure of health information**
>
> (1) […]
>
> (2) Compliance with subrule (1)(b) is not necessary [patient authorisation] if the health agency believes on reasonable grounds that it is either not desirable or not practicable to obtain authorisation from the individual concerned and that—
>
> (a) […]

(d) the disclosure of the information is necessary to prevent or lessen a serious threat to—
(i) public health or public safety; or
(ii) the life or health of the individual concerned or another individual;

[22] To determine if Corrections can rely on this exception, the Tribunal is guided by the process set out in *L v L;*[6] and must be satisfied to the standard of the balance of probabilities that:

[22.1] Mr Britton believed on reasonable grounds that it is not desirable or practicable to obtain authorisation from Ms Mitchell to disclose the health information (rule 11(2)); and that;

[22.2] Mr Britton also believed, on reasonable grounds at the time of the disclosure, that the disclosure was necessary to prevent or lessen a serious threat to the life or health of another individual (rule 11(2)(d)).

[23] A belief on reasonable grounds, has a subjective component (the belief) and an objective component (the reasonable grounds), both components must exist at the time of disclosure to successfully rely on the exception to rule 11.[7]

[24] Serious threat was defined at the relevant time in the Privacy Act 1993 as follows, this provides useful guidance on the nature of a threat which might be appropriate to result in a disclosure:

An agency reasonably believes to be a serious threat having regard to all of the following:

a. The likelihood of the threat being realised; and
b. The severity of the consequences if the threat is realised; and
c. The time at which the threat must be realised.

Not desirable or practicable to obtain authorisation?

[25] Corrections submitted that Mr Britton believed on reasonable grounds that it was not desirable or practicable to obtain Ms Mitchell's authorisation as Ms Mitchell had told him she did not want further contact with him and had withdrawn consent for a further interview. Ms Mitchell does not dispute this.

[26] The [medical] assessment records that when Mr Britton attempted to contact Ms Mitchell after she had withdrawn her consent to a further interview, Ms Mitchell remained in her cell and did not engage with him. This is evidence prepared close to the date of the disclosure that corroborates Mr Britton's subjective belief that it was not desirable or practicable to obtain Ms Mitchell's consent. This belief was objectively reasonably held. Ms Mitchell was unequivocal in her desire not to engage with Mr Britton at the time of the disclosure and she reiterated that in her evidence in the hearing. Ms Mitchell has not disputed the submission that it was not desirable or practicable to obtain her authorisation. Accordingly, it is accepted that Mr Britton did believe on reasonable grounds that it was not desirable or practicable to obtain Ms Mitchell's authorisation to the disclosure.

[6] HC Auckland AP95-SW01, 31 May 2002, Harrison J (*L v L*) at [20], as applied by this Tribunal in a number of decisions, including *Ruddelle v Auckland District Health Board* [2021] NZHRRT 5 at [16] and *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 *(Geary)* at [190].
[7] See *Geary* at [201]-[203].

Disclosure was necessary?

[27] Mr Britton recorded in the letter dated 10 December 2014 his reasons for disclosing excerpts of the report, as follows:

> Your request has been considered under the provisions of the Privacy Act 1993 and the Health Information Privacy Code 1994.
>
> Due to concerns about her potential for serious harm to specific groups of people [medical] Services has agreed to share information with the Police who are in a position to potentially lessen this harm as per rule 11(2)(d) of the Health Information Privacy Code 1994.
>
> …
>
> The information that we believe the Police should know has been extracted in an edited form from that assessment and is replicated below. Other information held about Ms Mitchell by [medical] Services is not thought to be relevant or necessary to disclose to external agencies in order to lessen the risk of harm.

[28] Mr Britton clearly turned his mind to the reason why he was disclosing the information and what information was necessary to disclose to lessen a serious threat to the life or health of another individual (namely Police staff). Corrections submitted that this demonstrated that Mr Britton held a subjective belief that he could disclose this information and further that the belief was reasonably held based on Ms Mitchell's previous offending and the risk assessment carried out by Mr Britton himself. Corrections submitted that the threat and risk to the life or health of Police staff if Ms Mitchell was released was an actual threat given Ms Mitchell's previous offending and was a serious threat as it could result in physical harm to Police staff.

[29] The Tribunal accepts that Mr Britton held the necessary subjective belief at the time he made the disclosure to the Police. It is apparent from the letter he sent, and the email communications prior to that, that Mr Britton actively turned his mind to whether he could release excerpts of the report and took the time to assess and only release relevant excerpts.

[30] The Tribunal has had regard to Ms Mitchell's submissions that she did not pose a serious threat to Police staff as her previous offending had not been serious and had only been when she was at a Police station (rather than when she was in the community). However, Mr Britton decided based on his detailed understanding of her history that this was a serious threat, and the Tribunal accepts that was his view, particularly given the remote location under consideration for her release, the time when the threat may be realised, which was at Christmas which also meant related resourcing constraints and the severity of the consequences.

[31] While Ms Mitchell maintains that previous offending against Police staff only occurred when she was at a Police station, Mr Britton could not be expected to know that Ms Mitchell would only harm Police at the Police Station and not in the community. Mr Britton was expected to weigh up the overall likelihood of harm and the Tribunal is satisfied he did so subjectively based on his own understanding of the circumstances.

[32] Ms Mitchell had initially submitted that there was no intention she would ever be released to the Rodney district and therefore there was no possible justification for disclosing the excerpts of the [medical] assessment to Police in that district. However, it was apparent from evidence provided by Senior Sergeant Mark Hobbs, who gave evidence regarding attending meetings about Ms Mitchell begin granted bail pending trial,

that there had been consideration by Corrections of releasing Ms Mitchell to that district. While Ms Mitchell was not aware of that possibility, her submission in this regard falls away.

[33] A further submission made by Ms Mitchell was that Mr Britton had told her that the [medical] assessment was "null and void", however there is no evidence to corroborate that and in any event the focus of the Tribunal's inquiry in this claim is to consider whether Corrections was entitled to disclose excerpts of the report in accordance with the Act, not to determine the status of the report as agreed between Ms Mitchell and Mr Britton.

[34] Notwithstanding Ms Mitchell's submissions outlined above, the Tribunal finds that Mr Britton's subjective belief was objectively reasonable. Ms Mitchell's history of offending, the fact she had previously harmed Police staff and the timing of her intended release are justifiable matters upon which Mr Britton based his decision on. They are also consistent with the matters an agency is required to have regard to when assessing a serious threat, namely the likelihood, severity and timing of when the threat may be realised. Furthermore, Mr Britton had personally met with Ms Mitchell and assessed her himself adding weight to the conclusion that Mr Britton had an objectively reasonable basis for determining that it was necessary to disclose parts of the [medical] assessment.

[35] Corrections has established to the standard of the balance of probabilities that Mr Britton believed on reasonable grounds that the disclosure was necessary to prevent or lessen a serious threat to the life or health of Police staff. Therefore, Corrections was entitled to disclose excerpts of the [medical] assessment to the Police.

[36] Accordingly, it is not necessary for the Tribunal to consider whether Ms Mitchell has established one of the forms of harm contemplated by section 66(1)(b) of the Act as there can be no interference with privacy and no remedy in respect of the disclosure of this assessment.

[37] The Tribunal acknowledges Ms Mitchell's distress at the disclosure of excerpts of the [medical] assessment, particularly as she disagrees with the [medical] assessment. However, the Tribunal has determined that the disclosure was in accordance with the exception in rule 11(2)(d) of the HIPC so it is not a breach of rule 11 but the distress this has caused is unfortunate.

USE OF THE [MEDICAL] ASSESSMENT

[38] The Privacy Commissioner referred to rule 10 of HIPC (as well as rule 11 and IPP 11) in his communications with Ms Mitchell regarding her complaint. However, Ms Mitchell's statement of claim and statement of evidence provides no substantive evidence alleging unlawful use of the [medical] assessment and Corrections submits that rule 10 is not engaged in this claim.

[39] The Tribunal agrees there is no claim under rule 10 to be determined. Ms Mitchell has expressed dissatisfaction with many aspects of Corrections' conduct in relation to the [medical] assessment but there is no evidence sufficient to support a finding that it is more probable than not that there has been a breach of rule 10, nor has Ms Mitchell submitted on this point.

WAS THE DISCLOSURE OF THE PC01 FORMS ALLOWED?

[40] IPP 11 sets out limits on the disclosure of personal information held by an agency. Corrections maintains that it was entitled to disclose the PC01 forms in accordance with the exception set out in IPP 11(e)(iv) which is set out below:

> Principle 11
>
> *Limits on disclosure of personal information*
>
> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
>
> (a) […]
>
> (e) that non-compliance is necessary-
> (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
> (ii) for the enforcement of a law imposing a pecuniary penalty; or
> (iii) for the protection of the public revenue; or
> (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or […].

[41] As with the exception under the HIPC, the Tribunal must consider the factors set out in *L v L,*[8] to establish if Corrections can rely on this exception, which means the Tribunal must be satisfied to the standard of the balance of probabilities that Corrections believed on reasonable grounds that the disclosure was necessary for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation).

[42] A belief on reasonable grounds, has a subjective component (the belief) and an objective component (the reasonable grounds), both components must exist at the time of disclosure to successfully rely on the exception in IPP 11.[9]

[43] It is undisputed that the disclosure of 47 pages of PC01 forms was made by Corrections to Police on 31 August 2015. The disclosure was made following a chain of requests put in motion after a request for further information by a Judge in a pre-hearing matter involving criminal charges against Ms Mitchell. The Crown Prosecutor asked Detective Jared Rowe to obtain a number of documents relating to the prison mail system and to Ms Mitchell's awareness of matters relating to the prison mail system. In particular, the request was for

> The PC.01 requests made by Ms Mitchell for information as described by Hine Khan setting out what information Ms Mitchell would have had access to whilst in prison. Please note, that the Court is interested in information relating to the prison mail system.

[44] Following the request from the Crown Prosecutor, Detective Rowe emailed Ms Khan and Ms Mikaere on 25 August 2015 requesting

> The PC.01 requests made by Ms Mitchell while at AWRCF – relating to information as described by Hine Khan setting out what information Ms Mitchell would have had access to whilst in prison.

[8] See earlier discussion at [22].
[9] See *Geary*, as above n 6 at [201]-[203].

[45] Detective Rowe acknowledged under cross-examination that this request was wider than what the Crown Prosecutor had actually requested. The request from Police to Corrections removed the reference to the prison mail system which had the result of widening the scope of the request to include all PC01 forms Ms Mitchell had ever made.

[46] In response to Detective Rowe's request, 47 pages of PC01 forms were provided to the Police on 31 August 2015, but ultimately none of the PC01 forms were filed with the Court as the Crown Prosecutor considered none of them related to the mail system.

Did Corrections believe on reasonable grounds that the disclosure was necessary?

[47] The PC01 forms were emailed to Detective Rowe by Kelly Puohotaua, but there were three individuals from Corrections who were arguably involved with this disclosure. Hine Khan, who was at the time the Principal Corrections Officer at Auckland Region Women's Corrections Facility (ARWCF); Cheryl Mikaere, the Prison Director at the time and Mr Puohotaua who was acting Prison Director when he sent the email as Ms Mikaere was on leave.

[48] It is Corrections' submission that collectively Ms Khan, Ms Mikaere and Mr Puohotaua held the subjective belief that non-compliance with IPP11 was necessary for the conduct of proceedings. However, there is no evidence of that. Only Ms Mikaere provided evidence in the hearing. Ms Mikaere's evidence was that she did not turn her mind to specifically authorising the disclosure of the documents to the Police. Ms Mikaere was on leave at the time, and she understood that Mr Puohotaua who was filling in for her as acting manager of the ARWCF had authorised the release of the documents.

[49] Mr Puohotaua is no longer employed by Corrections and did not provide any evidence, nor is there any evidence indicating his reasoning for releasing the documents, it appears from the wording of the email sent on 31 August 2015 that he simply sent the PC01 forms on the instruction of Ms Khan. There is no evidence at all that he turned his mind to whether he believed he could disclose these documents. The email Mr Puohotaua sent to Detective Rowe disclosing the documents simply stated that he was instructed to send it by Ms Khan.

[50] Corrections subsequently submitted that Ms Khan was the individual who formed the necessary subjective belief that the documents should be disclosed to Police. However, there is no evidence from Ms Khan, nor is there any contemporaneous documentation such as an email or a case note which could indicate to the Tribunal that Ms Khan had turned her mind to the relevant considerations. Mr Miller, Chief Privacy Officer for Corrections, gave evidence that he would expect that where a disclosure has been made, it would be best practise that case notes record the reasons for a disclosure such as this, or that there be some other record. There are no such notes or records as evidence before the Tribunal in relation to this disclosure.

[51] In order to rely on the exception to IPP 11, Corrections must prove to the standard of balance of probabilities that it had reasonable grounds to believe that non-compliance with IPP 11 was necessary for the conduct of proceedings. This requires a subjective belief, which then must be found to be objectively reasonable. There is no evidence before the Tribunal of any such subjective belief.

[52] The Tribunal cannot infer that subjective belief where there are significant gaps in the paperwork of Corrections, and gaps in the communication trail between the request

being made by Detective Rowe and the information being sent by Mr Puohotaua and no evidence at all of the decision being made.

[53] As conceded by Mr Miller in his evidence, there must be consideration by someone within Corrections, prior to the disclosure of documents (whether to Police or any other agency) that it is in fact necessary to disclose, based on one of the exceptions in IPP 11. There is no evidence of any such consideration in respect of this disclosure.

[54] The Tribunal finds that Corrections did not have reasonable grounds to disclose the 47 pages of PC01 forms to the Police.

[55] Corrections is not entitled to rely on the exception in IPP 11(e)(iv), accordingly the disclosure of the PC01 forms by Corrections to the Police was a breach of IPP 11.

HAS MS MITCHELL ESTABLISHED HARM?

[56] Ms Mitchell will only be entitled to a remedy for the breach of IPP 11 if both limbs of s 66(1) of the Act are met and an interference with her privacy is therefore established.

[57] Section 66(1) is set out below:

> **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.

[58] Section 66(1)(a) has been met as IPP 11 has been breached. Section 66(1)(b) requires that the Tribunal be satisfied that the breach of IPP 11 caused one of the forms of harm detailed at (i) to (iii) above.

[59] Ms Mitchell claims that she has suffered harm as a result of the disclosure of the 47 PC01 forms. However, the harm she has described was all related to the disclosure of the [medical] assessment, not the PC01 forms, for instance:

> **[59.1]** Ms Mitchell specifically referred to a loss of freedom as the [medical] assessment meant she missed out on bail;
>
> **[59.2]** Ms Mitchell expressed concern that the [medical] assessment may have been released to the Family Violence Team in Lower Hutt who were working with her alleged victims; and
>
> **[59.3]** Ms Mitchell maintains that the use of the [medical] assessment in her parole hearings and bail resulted in a loss of the non-monetary benefit to her of the fact she was not allowed to return to Wellington where she had family and friends and pets.

[60] Despite being specifically questioned about consequences of the disclosure of the PC01 forms to the Police, Ms Mitchell provided no evidence that the release of the PC01 forms caused her loss, detriment, damage, or injury or adversely affected rights, benefits, privileges, obligations or interests she has.

[61] This lack of harm is not unexpected, given that the PC01 forms were only disclosed to the Police Prosecutor and the Crown solicitor. While Ms Mitchell suggested they may have been shared further than that or retained inappropriately on the Police system, there is no evidence of that.

[62] The Tribunal acknowledges that the circumstances Ms Mitchell currently finds herself in are challenging and that she has explained that she feels not valued as a New Zealand citizen. However, in order to find that there was an interference with Ms Mitchell's privacy the Tribunal would need to be satisfied that any harm or consequences that Ms Mitchell suffered were as a result of and had a causal connection to the disclosure by Corrections of the PC01 forms to Police. There is no evidence linking this disclosure to significant humiliation, significant loss of dignity, or significant injury to the feelings that Ms Mitchell may be experiencing for other reasons.

[63] Corrections has breached IPP 11 by disclosing the PC01 forms, but the scheme of the Act is such that an interference with privacy cannot be found and no remedy can be provided unless the Tribunal is satisfied that Ms Mitchell has established actual or potential harm as described in section 66(1)(b) of the Privacy Act 1993. This requirement has not been met; therefore, the Tribunal finds there has been no interference with Ms Mitchell's privacy.

[64] As there has been no interference with Ms Mitchell's privacy the Tribunal cannot award Ms Mitchell any remedy and it is not necessary to consider the Prisoners and Victims Claims Act 2005.

CONCLUSION

[65] Ms Mitchell's claim against the Department of Corrections is dismissed.

[66] Notwithstanding the finding above, the Tribunal has previously issued non-publication orders in respect of this claim.[10] They are final orders and remain in force as detailed below:

> **[66.1]** A final order is made prohibiting publication (in part, in full or any excerpts) of the medical report written by Ian Britton in respect of Kerryn Mitchell, dated 6 November 2014.
>
> **[66.2]** A final order is made that there is to be no search of the Tribunal file without leave of the Chairperson or Deputy Chairperson or of the Tribunal. The parties are to be notified of any request to search the file and given the opportunity to be heard on that application.

COSTS

[67] While no submissions as to costs were made, both parties have attained a measure of success in this claim. Ms Mitchell has proven a breach of IPP 11, but Corrections has successfully proven the breach was not an interference with privacy.

[68] Accordingly, applying the principles recently adopted by the Tribunal in relation to costs,[11] we are of the view that this is not a case where costs should be awarded. Costs are to lie where they fall.

.....	.....	.....
Ms SJ Eyre	**Ms L Ashworth**	**Ms S Isaacs**
Chairperson	**Member**	**Member**

[10] See *Mitchell v Corrections (Application for non-publication orders)* [2023] NZHRRT 7.
[11] See by way of example of the Tribunal's approach to costs in *Beauchamp v B & T Co (2011) Ltd (Costs)* [2022] NZHRRT 30 at [14] to [16].