IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2018] NZHRRT 43**

Reference No. HRRT 035/2014

UNDER **THE PRIVACY ACT 1993**

BETWEEN **ARTHUR WILLIAM TAYLOR**

PLAINTIFF

AND **DEPARTMENT OF CORRECTIONS**

DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Mr RK Musuku, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr AW Taylor in person
Ms K Muller and Mr T Westaway for defendant

DATE OF HEARING: **5, 6 and 7 October 2015**

DATE OF LAST SUBMISSIONS: **13 June 2016 (Mr Taylor)**
13 May 2016 (Corrections)

DATE OF DECISION: **27 September 2018**

DECISION OF TRIBUNAL[1]

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[1] [This decision is to be cited as *Taylor v Corrections (No. 2)* [2018] NZHRRT 43.]

INTRODUCTION

[1] Mr Taylor is a sentenced prisoner who at the relevant time was held at Auckland Prison. On 15 October 2013 he was involved in an incident with Corrections officers at a time when he was talking to his partner on the prisoner payphone. That incident led to the laying of two misconduct charges against Mr Taylor. When on 18 October 2013 he was served with the charges Mr Taylor requested a copy of the recording made by the Department of Corrections (Corrections) of the telephone conversation in train at the time of the incident.

[2] Corrections concede this was a request by Mr Taylor for access to personal information under information privacy principle 6 (IPP 6) and that no decision on that request was made inside the 20 working days allowed by s 40(1) of the Privacy Act 1993 (PA). It is further conceded this resulted in an interference with Mr Taylor's privacy as defined in PA, s 66(2)(a)(i) and (b) and (3).

[3] The primary issue in these proceedings is the nature of the remedy (if any) to be granted to Mr Taylor.

[4] In this decision we give our reasons for finding:

> **[4.1]** A declaration is to be made that there was an interference with the privacy of Mr Taylor.
>
> **[4.2]** That interference did not cause Mr Taylor humiliation, loss of dignity or injury to feelings. Consequently Mr Taylor's application for damages is dismissed.
>
> **[4.3]** No other remedy is to be granted.

Delay

[5] At the conclusion of the third day of the hearing (7 October 2015) it was agreed the parties would file their closing submissions in writing. The agreed timetable anticipated (inter alia) Mr Taylor would file his submissions by 20 November 2015. However, in the circumstances detailed in the *Minute* issued by the Chairperson on 18 December 2015 that date was extended to 19 February 2016. The submissions were not in fact filed until 12 April 2016, necessitating an adjustment to the balance of the filing dates. The submissions for Corrections were received on 13 May 2016 and Mr Taylor's reply was filed on 13 June 2016.

[6] The reasons for the subsequent delay by the Tribunal in the delivery of this decision have been explained by the Chairperson in the *Minutes* issued on 21 July 2017, 19 April 2018 and 20 June 2018 respectively. The last of these *Minutes* followed a teleconference in which Mr Taylor confirmed the Tribunal was asked to deliver its decision in HRRT025/2015: Taylor v Corrections first and thereafter a decision in the present proceedings, being those in HRRT035/2014. Mr Taylor and Mr McKillop (for Corrections) confirmed they did not wish to file updating submissions.

[7] At the substantive hearing itself and prior to the Tribunal hearing evidence, the Tribunal was required to rule on challenges by Mr Taylor to certain evidence intended to be given by Corrections and, in turn, a challenge by Corrections to certain evidence tendered by Mr Taylor. After hearing the parties the Tribunal ruled that, for reasons to be

given in its substantive decision, the evidence to which objection had been made would be admitted subject to issues of weight to be decided at the conclusion of the hearing.

[8] Our reasons for admitting the evidence now follow.

RULING ON ADMISSIBILITY

THE CHALLENGE BY MR TAYLOR TO EVIDENCE TENDERED BY CORRECTIONS

[9] By application dated 15 September 2015 Mr Taylor sought the exclusion of:

[9.1] All of the Offender Notes (Common Bundle pp 1-44).

[9.2] All of the partial transcript of the telephone call made by Mr Taylor on 15 October 2013 to his partner and which was in train at the time of the incident which gave rise to the present proceedings (Common Bundle pp 45-48).

[9.3] All of the PC.01 complaints made by Mr Taylor in the period 21 September 2013 to 19 March 2015 (Common Bundle pp 186 to 221 with ten exceptions).

[9.4] All documents (with four exceptions) in the Supplementary Bundle of Documents.

[10] The grounds of the application were that the evidence was irrelevant (Evidence Act 2006, s 7(2)), would have an unfairly prejudicial effect on the proceeding and would needlessly prolong the proceeding (Evidence Act, s 8). It was also submitted disclosure would breach information privacy principles 10 and 11 (PA, s 6) and the Corrections Act 2004, ss 118 and 119.

General principles

[11] As stated in s 7 of the Evidence Act, the fundamental principle is that relevant evidence is admissible. Evidence is relevant if it has a tendency to prove or disprove anything of consequence to the determination of the proceeding. Evidence which is inadmissible or excluded under any statute remains inadmissible:

> **7 Fundamental principle that relevant evidence admissible**
>
> (1) All relevant evidence is admissible in a proceeding except evidence that is—
> (a) inadmissible under this Act or any other Act; or
> (b) excluded under this Act or any other Act.
> (2) Evidence that is not relevant is not admissible in a proceeding.
> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[12] To satisfy the test of relevance, s 7(3) requires only that the evidence have a "tendency" to prove or disprove anything of consequence to the determination of the proceeding.

[13] Evidence must be excluded if its probative value is outweighed by the risk the evidence will have an unfairly prejudicial effect on or needlessly prolong the proceeding. See s 8 of the Evidence Act:

> **8 General exclusion**
>
> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—

(a) have an unfairly prejudicial effect on the proceeding; or
(b) needlessly prolong the proceeding.

(2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

Evidence in proceedings before the Tribunal

[14] By virtue of the Human Rights Act 1993 (HRA), s 106(1)(d), the Tribunal has power to receive any evidence which may, in its opinion, assist it to deal effectively with a matter before it, whether or not it would be admissible in a court of law:

> **106 Evidence in proceedings before Tribunal**
>
> (1) The Tribunal may—
> (a) call for evidence and information from the parties or any other person:
> (b) request or require the parties or any other person to attend the proceedings to give evidence:
> (c) fully examine any witness:
> (d) receive as evidence any statement, document, information, or matter that may, in its opinion, assist to deal effectively with the matter before it, whether or not it would be admissible in a court of law.
> (2) The Tribunal may take evidence on oath, and for that purpose any member or officer of the Tribunal may administer an oath.
> (3) The Tribunal may permit a person appearing as a witness before it to give evidence by tendering a written statement and, if the Tribunal thinks fit, verifying it by oath.
> (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.

The relationship between the Evidence Act and the Human Rights Act

[15] Subject to the general power in HRA, s 106(1)(d) to receive evidence that may assist, the provisions of the Evidence Act apply to the Tribunal as if it were a court. See HRA, s 106(4).

[16] If there is an inconsistency between the provisions of HRA, s 106 and any provision of the Evidence Act, the provisions of the Human Rights Act prevail. See s 5(1) of the Evidence Act:

> **5 Application**
>
> (1) If there is an inconsistency between the provisions of this Act and any other enactment, the provisions of that other enactment prevail, unless this Act provides otherwise.

[17] Of these provisions the Tribunal in *DML v Montgomery* [2014] NZHRRT 6 (12 February 2014) at [50] and [51] stated:

> **[50]** The Tribunal's discretion under s 106(1)(d) of the HRA to receive otherwise inadmissible evidence is a wide one and it is not appropriate to lay down any prescriptive rule for the exercise of that discretion. This much is clear from the language of the provision which emphasises the case-specific context in which the exercise of the power arises. The issue is whether the challenged evidence will assist the Tribunal to deal effectively with the matter before it. It must also be borne in mind that the stated purpose of the HRA, as found in the Long Title, is to provide better protection of human rights in New Zealand. That purpose must not be overlooked when assessing whether the evidence will assist the Tribunal to deal effectively with the matter before it. As both this provision and the judgment in *Carlyon Holdings Ltd v Proceedings Commissioner* at 533 recognise, a technical approach by the Tribunal to evidentiary matters is inappropriate.
>
> **[51]** ... Section 106(1)(d) of the HRA is not a secondary or fall-back provision which comes into play only if the challenged evidence is inadmissible under the Evidence Act 2006. Rather it is the primary provision under which admissibility decisions are made. This is clear from s 106(4) which stipulates that the Evidence Act applies to the Tribunal "subject to" s 106(1) of the HRA.

> In turn s 5(1) of the Evidence Act states that if there is any inconsistency between the provisions of that Act and any other enactment the provisions of that other enactment, prevail unless the Evidence Act provides otherwise.

[18] Whether the Evidence Act test of "tendency to prove" is materially different to the Human Rights Act test of "may assist [the Tribunal] to deal effectively with the matter before it" does not need exploration in the present case. If there is such difference, the provisions of the Human Rights Act prevail.

[19] Addressing the evidentiary issues in the present case the Tribunal posed the question whether the material objected to "may assist" the Tribunal to deal effectively with the present matter.

[20] At the commencement of the hearing the parties were agreed the essential issues to be resolved by the Tribunal were:

> **[20.1]** Whether there was an interference with Mr Taylor's privacy and if so,
>
> **[20.2]** Whether it is appropriate for the Tribunal to grant any remedy.

The opening submissions by Corrections conceded that the decision on Mr Taylor's information privacy request was not made within the 20 working days prescribed by PA, s 40(1) and, in terms of PA, s 66(2)(a)(i) and (b) and (3) that failure was deemed to be a refusal to make available the information to which the request related. Corrections expressly conceded there was no proper basis for the deemed decision in terms of PA, s 66(2)(b).

[21] Returning to the admissibility challenge, it was necessary to start with the grounds on which Corrections justified the admission of the evidence.

The case put forward by Corrections to support the admission of the evidence

[22] For Corrections it was submitted (Opening Submissions dated 25 September 2015 at paras 30 to 32) that the Offender Notes, the PC.01 forms and the record of calls to the prison inspectorate's 0800 complaints line were necessary to respond to the wide-ranging and unparticularised assertions made by Mr Taylor in his brief of evidence. Mr Taylor had claimed:

> **[22.1]** He had asked D Block staff "at least twice" to pass on requests for information as to what was happening with his request.
>
> **[22.2]** He had made it clear to D Block staff he "still required the recording". He also "made requests to D Block staff at least once a month over the next few months" as to when he would receive the recording.
>
> **[22.3]** He had "complained to the prison inspector via the 0800 complaints line about the non-compliance with the Privacy Act".
>
> **[22.4]** He made "numerous complaints ... to staff".
>
> **[22.5]** He had "at some point earlier" told Departmental staff he "needed to be able to listen to the recording and make a written transcript of it".

[23] It was further submitted by Corrections the evidence was also relevant to:

[23.1] Mr Taylor's assertion that the Department's response to the particular request for information was a deliberate attempt to breach the Act, motivated by bad faith. The evidence explains the Department's handling of the request in the context of numerous interactions between Mr Taylor and the Department at this time, through a variety of channels.

[23.2] All of the above issues are relevant to the operation of the Prisoners' and Victims' Claims Act 2005 (PVCA).

Discussion

[24] The weight which will ultimately be given to contested evidence is an issue to be determined after all the evidence has been heard. The question for determination at the preliminary stage of the present hearing was whether the evidence "may" assist the Tribunal to deal effectively with the proceedings brought by Mr Taylor and with the defence raised by Corrections.

[25] In this regard we reached a clear view that:

[25.1] For the reasons advanced by Corrections, the evidence was admissible. The challenge by Mr Taylor was rejected.

[25.2] In a case about the alleged non-provision of the requested audio file it would be helpful for a transcript of the relevant extract to be produced in evidence to provide the context and perhaps an explanation for the events which thereafter unfolded, including Mr Taylor's request for a copy of the file.

[25.3] The evidence was relevant for the reasons advanced by Corrections at paras 30, 31 and 32 of the submissions dated 25 September 2015. The brief of evidence of Mr Post at paras 51 to 58 provided a clear explanation as to why, viewed from Corrections' perspective, the evidence was of potential relevance.

[25.4] The evidence was also relevant to the question of remedies. Should Mr Taylor establish there was an interference with his privacy the range of remedies available under ss 84, 85 and 88 of the Privacy Act necessarily required the Tribunal to make an overall assessment of the case. This brought into play not only the factors specified by the Privacy Act (see eg s 88(1)(c)), but also the factors prescribed in subpart 1 of Part 2 of the PVCA. For example, ss 13 and 14 of that Act provide:

> **13 Restriction on awarding of compensation**
>
> (1) No court or tribunal may, in proceedings to which this subpart applies, award any compensation sought by a specified claim unless satisfied that—
> (a) the plaintiff has made reasonable use of all of the specified internal and external complaints mechanisms reasonably available to him or her to complain about the act or omission on which the claim is based, but has not obtained in relation to that act or omission redress that the court or Tribunal considers effective; and
> (b) another remedy, or a combination of other remedies, cannot provide, in relation to the act or omission on which the claim is based, redress that the court or Tribunal considers effective.
> (2) In this section, reasonable use of a complaints mechanism means the use that the court or Tribunal considers it reasonable for the plaintiff to have made in the circumstances.

14 Guiding considerations for awarding of compensation

(1) A court or tribunal must take into account the matters specified in subsection (2) in determining, in proceedings to which this subpart applies,—
  (a) whether compensation is required to provide effective redress; and (if it is)
  (b) the quantum of an award of compensation required to provide effective redress.
(2) The matters referred to in subsection (1) are—
  (a) the extent (if any) to which the plaintiff, the defendant, or both took, within a reasonable time, all reasonably practicable steps to mitigate loss or damage arising from the act or omission on which the claim is based; and
  (b) whether the defendant's breach of, or interference with, the right concerned was deliberate or in bad faith; and
  (c) the relevant conduct of the plaintiff; and
  (d) the consequences for the plaintiff of the breach of, or interference with, the right concerned; and
  (e) the freedoms, interests, liberties, principles, or values recognised and protected by the right concerned; and
  (f) any need to emphasise the importance of, or deter other breaches of or other interferences with, the right concerned; and
  (g) the extent (if any) to which effective redress in relation to that act or omission has been, or could be, provided otherwise than by compensation; and
  (h) any other matters the court or Tribunal considers relevant.
(3) In this section, the **right concerned** has the meaning given to it by the definition of specified claim in section 6.

[26] We accordingly found (in terms of HRA, s 106(1)(d)) the evidence to which objection was made "may" assist the Tribunal to deal effectively with these proceedings. The weight to be given to the evidence was to be determined at the conclusion of the hearing.

[27] Mr Taylor made two further objections:

[27.1] First, that admission of the transcript would breach ss 118 and 120 of the Corrections Act 2004. As to this claim, s 118(1) of the Corrections Act permits disclosure of a prisoner call in accordance with the Privacy Act. Section 117(2)(b) also permits disclosure if that is necessary for the conduct of proceedings before a court or tribunal. While s 120 requires the destruction of a prisoner call, s 120(4) stipulates this does not apply to "any record of any information adduced in proceedings in any court or tribunal". In addition, as the submissions for Corrections point out, a prisoner call only needs to be destroyed once the call is two years old and as at the date of hearing that time had not elapsed in relation to the recording in issue. In addition, the notice requirements in s 121 of the Corrections Act do not apply to proceedings before a tribunal but in any event reasonable notice of Corrections' intention to adduce the recording was given through the common bundle of documents which was provided to Mr Taylor on or about 7 September 2015. That bundle contains a transcript of the relevant part of the call.

[27.2] Second, that admission of the transcript would breach information privacy principles 10 and 11. As to this claim, both principles recognise that personal information can be used and disclosed for the conduct of proceedings before any court or tribunal. See IPP 10(c)(iv) and IPP 11(e)(iv).

Conclusion on the challenge to the evidence tendered by Corrections

[28] It was for these reasons that at the commencement of the hearing on 5 October 2015 we determined that the evidence tendered by Corrections was admissible in terms of HRA, s 106(1)(d) and in terms of the Evidence Act, ss 7 and 8.

[29] In fairness to Mr Taylor, once Corrections clarified that the Tribunal was asked to receive in evidence only that part of the recorded telephone discussion reproduced in the common bundle at p 47, the objection was not pressed.

[30] We address now the admissibility of evidence tendered by Mr Taylor but challenged by Corrections.

THE CHALLENGE BY CORRECTIONS TO EVIDENCE TENDERED BY MR TAYLOR

[31] In his memorandum dated 15 September 2015 Mr Taylor submitted a copy of the judgment given by Ellis J in *Taylor v Chief Executive, Department of Corrections* [2015] NZHC 2196 (11 September 2015). The Tribunal was asked to take the judgment into account as supporting the contention by Mr Taylor that Corrections "has a history of acting in bad faith, with improper purpose, and unlawfully" towards Mr Taylor. It was submitted it was "propensity evidence" as defined in s 40 of the Evidence Act namely, evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved. The attention of the Tribunal was drawn to some 27 specific paragraphs. It was submitted that:

> Much of what is in her Honour's judgment and the Ombudman's Report, Visiting Justice's Report and Inspector Louise MacDonald's Report helped to 'paint the picture' as to the reality of [Corrections'] treatment of [Mr Taylor] including total disregard for his statutory rights under the Privacy Act. The findings of a range of people - including Corrections' own inspector and a High Court judge - of what amounts to sustained and serious unlawful treatment of [Mr Taylor] and disregard of his legal rights are particularly relevant to remedy.

[32] The submissions for Corrections dated 25 September 2015 at para 39 did not formally object to the admission of the documents referred to, but submitted their content was irrelevant and inadmissible. In particular, it was submitted the judgment of Ellis J concerned:

> **[32.1]** The process for assessing Mr Taylor's security classification which was separate from the question before the Tribunal namely, whether Corrections complied with the Privacy Act and if not, the remedy (if any) to be granted to Mr Taylor.
>
> **[32.2]** A decision made in October 2014, well after the events in issue in this proceeding.

[33] In the course of making oral submissions in support of the Corrections challenge to the evidence Ms Mueller, in the spirit of cooperation suggested that the Tribunal admit the evidence subject to the parties making submissions as to relevance and weight in their closing submissions. The Tribunal accordingly ruled that the evidence be admitted on that basis.

Conclusion on the challenge to the evidence tendered by Mr Taylor

[34] As will be seen, by the conclusion of the hearing the Tribunal had reached the clear view that the objection had been properly made for the two reasons given. Section 40(1)(a) defines "propensity evidence" as evidence that tends to show the matters referred to in that provision. Having heard the evidence and examined the proffered evidence we concluded it does not contain propensity evidence as so defined. The issues determined by Ellis J and the issues the Tribunal must address under the Privacy Act are so very different that no matter how liberal an interpretation is given to the Tribunal's discretion to receive any evidence, it is not possible to see how admission of the High Court judgment assists. The broad assertion that Corrections "has a history of acting in bad faith, with improper purpose, and unlawfully" towards Mr Taylor is not established by the evidence. Mr Taylor has a large number of complaints regarding Corrections but it is not possible within the confined parameters of proceedings under the Privacy Act for those complaints to be properly determined. The Tribunal must be careful to ensure its statutory jurisdiction is not exceeded. There is also the requirement of the Evidence Act, s 8 that evidence be excluded if its probative value is outweighed by the risk that the evidence will needlessly prolong the proceeding. In our view admission of the evidence would breach that requirement.

[35] It will also be seen we have not been persuaded that in the present case Corrections acted in bad faith when complying with its obligations under the Privacy Act. Nor was any improper purpose pursued in relation to Mr Taylor in the context of his information privacy request.

THE EVIDENCE

[36] Although each side has disputed aspects of the evidence given by the other, many of the central events are not in substantial dispute. Nor is liabliity contested. The focus of the case is on whether any remedy is to be granted to Mr Taylor and that, in turn, requires an examination of the conduct of Corrections. See PA, s 85(4). In the factual narrative which follows we address only those conflicts of evidence which have a material bearing on the case, having regard to the explicit concessions made by Corrections regarding liability.

The incident

[37] The incident which gave rise to the present proceedings occurred on the afternoon of 15 October 2013 at a time when Mr Taylor was speaking to his partner on a prison payphone. Such calls are recorded by Corrections, a fact known by Mr Taylor. During the call Corrections officers required Mr Taylor to return to his cell because it was change-over time. This angered Mr Taylor as he believed highly valued contact with a family member was being terminated before expiry of the standard allocated time for such contact. A verbal altercation with Corrections officers followed.

[38] Because the line to Mr Taylor's partner was still connected at the time of the incident, part of the altercation was recorded. A transcript follows:

> **Synopsis of call content:**
>
> TAYLOR places a call to his partner [redacted].
>
> At 11.57 minutes into the call TAYLOR can be heard arguing with staff.

TAYLOR: [yelling at staff in background] What! Eh? … yeah well don't forget I need to make my legal calls. I've only had fucking five minutes … on here, I've only had five minutes … you there babe?

[redacted] I love the way you talk to them.

TAYLOR: [yelling at staff in background] Fuck off will you, I'm going to get annoyed.

[…]

TAYLOR: What they'll do darling, they'll start provoking me, and then we will see what happens then … They are fucking rude cunts. [Yelling at staff] It's pretty rude to fucking listen, how would you like if I came and listened to fucking you and your missus's phone numbers cunt. You wouldn't would ya? … I'll be ten minutes because I'm supposed to have fifteen minute calls.

[…]

TAYLOR: [yelling at staff in background] You fucking hang that phone up cunt and see what happens. I'm warning you now cunt, hang that fucking phone up and see what happens.

[redacted] Is that a screw?

TAYLOR: [yelling at staff in background] Get your fucking hands off there – fuck off cunt. Fuck off cunt. Hey! Hey! I want my fucking time.

TAYLOR continues to argue with and abuse staff who ask him to finish his call.

TAYLOR ends the call at 15:08 minutes into the call.

[39] Mr Taylor subsequently lodged a complaint with the New Zealand Police alleging that during the incident he had been assaulted by a named Corrections officer. As will be seen, that complaint was not pursued.

The IPP 6 request for the audio file

[40] As a consequence of this incident two misconduct charges were laid against Mr Taylor.

[41] Mr Taylor was then next due to appear before the Parole Board on 8 July 2014 and he was aware conviction on the charges could be taken into account at that hearing. He believed the correct determination of the charges had potentially important consequences. Previous experience had shown any conflict in evidence during the misconduct hearing would be resolved in favour of the Corrections officers. Mr Taylor concluded a recording of the call offered the only realistic possibility of undermining the prosecution case against him.

[42] So when on 18 October 2013 notice of the charges was served on Mr Taylor he made the following endorsement on the receipt signed by him, a receipt retained by Corrections. Corrections accept this was an IPP 6 request for the audio file in question and that the request applied to both charges:

> I request that the video of this incident and any other information held by Corrections that relates to or is about it, including any email traffic between staff about it or where the incident is mentioned, is made available for the purposes of preparing my defence. This includes the phone call I was making at the time and records of the time I was on of all personal phone calls I made that day 15/10/13. A copy of the CCTV footage should be sent to Mr Richard Francois Barrister.

Arthur Taylor

18 – 10 – 13

[43] It is to be noted the stated purpose of the request for the recording was "preparing my defence" to the misconduct charges.

[44] The Corrections officer who served notice of the charges was Mr AG Van Schalkwyk who at that time acted as prosecutor at Auckland Prison. He told Mr Taylor that he (Mr Van Schalkwyk) would not be able to get the audio file for him because it would be dealt with by the Intelligence Unit as they were the ones who monitored and dealt with phone calls. Mr Van Schalkwyk went to the Intelligence Unit with Mr Taylor's request but was told Mr Taylor needed to fill out a PC.01 form to request the recording. This information Mr Van Schalkwyk passed on to Mr Taylor who on 5 November 2013 filed a PC.01 form (No. 298631). The request was in the following terms:

> I have requested a copy of the audio recording of a telephone call I made to [redacted] on 15-10-2013 at about 2.15pm to 2.23pm. This recording is required for my VJ Hearing. Although I wish to listen to it beforehand. Alan (Prosecutor) says I require to request it by PCO.1 which I hereby do. Please provide ASAP – VJ is coming Wednesday 06-11-2013 I understand. This request is under Section 6 of the Privacy Act.

The calculation of time

[45] Corrections concedes the IPP 6 request made on Friday 18 October 2013 was a valid information privacy request. Consequently, applying the Interpretation Act 1999, s 35(2), the 20 working day period prescribed by PA, s 40 began running on Monday 21 October 2013. Taking into account Labour Day which fell on 28 October 2013, the last day for Corrections to comply with the request was Monday 18 November 2013. The deemed refusal occurred on Tuesday 19 November 2013. It was the day after that (Wednesday 20 November 2013) that Mr Taylor withdrew his appeal to the Visiting Justice.

[46] Although it is unnecessary to do so, were one to make a similar calculation in relation to the PC.01 request dated Tuesday 5 November 2013, the last day for Corrections to respond in time was Tuesday 3 December 2013 and the second deemed refusal occurred on Wednesday 4 December 2013. The reason why we say this calculation is unnecessary is that as the original request had been refused on 19 November 2013, repetition of the refusal on 4 December 2013 did not add anything to the liability issue. However, the fact that Corrections had a second opportunity to address the request within the second timeframe is, by virtue of PA, s 85(4) of potential relevance when determining what remedy, if any, to grant.

The course of the misconduct charges

[47] On 25 October 2013 the two misconduct charges were heard by the Hearing Adjudicator. Mr Taylor pleaded guilty to both charges. The penalty imposed was four days forfeiture or postponement of privileges. This was described by Mr Van Schalkwyk as a relatively light penalty. Mr Taylor says he did not want to plead guilty but as his only realistic possibility of successfully defending the charges was gaining access to the audio file he pleaded guilty in the knowledge he could appeal to a Visiting Justice once he had received the audio file. He did not request an adjournment of the hearing.

[48] Mr Taylor said that immediately following the hearing before the Hearing Adjudicator he (Mr Taylor) had told Mr Van Schalkwyk that he (Mr Taylor) still required the

audio file in order to make an informed decision whether an appeal to the Visiting Justice was to be made. Mr Taylor alleges Mr Van Schalkwyk said he understood this and would ensure the urgency of the matter was passed on to the appropriate person in the office of the Prison Manager. Mr Van Schalkwyk says he cannot recall this happening. If it did, he would have told Mr Taylor that requests for recordings were to be made through the Intelligence Unit and that he (Mr Van Schalkwyk) would not be able to assist Mr Taylor.

[49] By letter dated 29 October 2013 Mr Taylor advised the Police he did not want to pursue the assault allegation he had made against the named Corrections officer. Mr Taylor also confirmed that on 8 November 2013 he told a Corrections officer that he (Mr Taylor) had dropped the case against the named Corrections officer "internally and externally".

[50] Mr Taylor did in fact appeal to the Visiting Justice by notice dated 31 October 2013. At the foot of the notice of appeal he repeated his request for the audio file in the following terms:

> Please ensure I receive a copy of the phone call to [redacted] that was occurring during the time of the alleged offence – 15 October 2013 about 2:15pm.

[51] It is therefore plain that whether or not Mr Van Schalkwyk was told by Mr Taylor on 25 October 2013 that the recording was still required for the purpose of defending the charges, Mr Taylor did give clear written notice on the appeal form that it was so required.

[52] As mentioned, the next step taken by Mr Taylor was on 5 November 2013 when he filed PC.01 form (No. 298631).

[53] The PC.01 records that the action taken by Corrections on 5 November 2013 was that an email had been sent to the Prosecutor to collate the information as requested.

[54] When the appeal was called before the Visiting Justice on 6 November 2013 the audio file had not been provided. The appeal was adjourned to 20 November 2013, the Visiting Justice recording the reason for the adjournment as:

> Telephone records to be obtained.

[55] When the appeal was next called before the Visiting Justice on 20 November 2013 Mr Taylor withdrew the appeal even though the audio file had not by then been provided.

Audio file placed on disk but overlooked

[56] The evidence of Mr CAM Post, Manager, Ministerial Services (Acting) at the Department of Corrections was that there is nothing in the Corrections Act or the Corrections Regulations 2005 to prevent a hearing before a Visiting Justice being adjourned more than once, especially if the adjournment is necessary to enable a prisoner to prepare for the appeal. It had therefore been open to Mr Taylor to request additional adjournments of the appeal until such time as he had received the recording. He had not taken this step.

[57] Regarding the PC.01 dated 5 November 2013 Mr Post said that although the form states that on 8 November 2013 Mr Taylor's request had been discussed with Mr Taylor and sent to National Office for response, it appears the form was not sent until 20 November 2013 (the same date as the second call of the misconduct case before the Visiting Justice) when Auckland Prison emailed staff in the Ministerial Services Unit (MSU)

to ask for an update on the request. It then became apparent that the request was with the Intelligence Unit, which on 25 November 2013 offered to burn a disk and provide it to the Principal Corrections Officer if Mr Taylor still required it. A copy of the recording was in fact subsequently burnt to a disk.

[58] As mentioned, at the adjourned Visiting Justice hearing on 20 November 2013 Mr Taylor withdrew his appeal. Up to this point, the manner and content of Mr Taylor's requests had led Departmental staff to believe he required the recording only for the purpose of defending the disciplinary offences before the Hearing Adjudicator or for appealing to a Visiting Justice.

[59] When Mr Taylor withdrew his appeal, staff concluded the underlying reason for the request no longer existed. Consequently the Prosecutor did not pick up the compact disk which had been burnt and which contained the audio file because it was believed Mr Taylor was no longer seeking the recording.

Whether Mr Taylor made request for the audio file subsequent to withdrawal of his appeal

[60] Mr Taylor said that although the initial purpose in requesting the recording was related to his defence of the misconduct charges, once his ability to utilise it in an appeal had passed he made it clear to both the prosecutor (Mr Van Schalkwyk) and to D Block staff he still required the recording. He said this was primarily so he could bring a complaint against the charging officer for bringing a false allegation though he also said he wanted it out of curiosity. He made requests to D Block staff at least once a month over the next few months as to when he was going to receive the recording. He also complained to the Prison Inspector via the 0800 complaints line about non-compliance with the Privacy Act. He felt Corrections was deliberately failing to provide the recording to protect its staff and to frustrate his attempts to obtain information that could assist him in achieving satisfaction in the matter. However, we have not been satisfied by Mr Taylor that these claims have been established. Our reasons follow.

[61] As to Mr Taylor's claim that he needed the file to bring a complaint against the charging officer, it is to be remembered that on 29 October 2013, nearly one month before the appeal was withdrawn, Mr Taylor had confirmed in writing he did not want the Police to take action in relation to the assault allegation he had made against one of the Corrections officers involved in the incident on 15 October 2013 and on 8 November 2013 he had advised a Corrections officer that he had dropped the case with Police and he did not wish to continue with the complaint against the named Corrections officer "internally and externally". By 20 November 2013 (the date on which the appeal was withdrawn) the recording was not genuinely required for the claimed purpose.

[62] Mr Van Schalkwyk said that he cannot recall being told by Mr Taylor after the withdrawal of the appeal that he (Mr Taylor) still required the recording so he could bring a complaint against the charging officer for bringing a false allegation but does not think the conversation occurred because he (Mr Van Schalkwyk) had already told Mr Taylor he needed to file a PC.01 form to obtain a copy of the call rather than pursuing the request through him (Mr Van Schalkwyk). If the conversation had taken place, he would have told Mr Taylor to file a PC.01 form as previously advised.

[63] Regarding the alleged requests to D Block staff Mr Taylor conceded he had not kept a record of the requests because they had not been formal requests. It was more like a "can you chase up so and so on this for me please". None of these requests had

been followed up by him in writing with a PC.01. He had, however, raised the matter with the Prison Inspector and then complained to the Privacy Commissioner. There had only been two or three informal requests to D Block staff.

[64] Mr Taylor further claimed in his evidence that Corrections officers had told him he would never get the recording and made belittling comments. This caused him stress, anxiety and injury to his feelings. But in spite of describing himself as "pretty meticulous" Mr Taylor could not give particulars of when these interactions with Corrections officers took place nor could he remember the names of the D Block staff involved.

[65] The Tribunal was told by Mr DC Bullians, then Principal Corrections Officer employed by the Department of Corrections at Auckland Prison that one of his roles was to deal with complaints from prisoners and for that reason had had a large number of dealings with Mr Taylor over the past several years. He said that because Mr Taylor made a large number of requests for information and frequently lodged complaints using the PC.01 internal complaints form, he has had a large number of interactions with Mr Taylor. This included following up on PC.01 forms completed by Mr Taylor. He often had one-on-one meetings with Mr Taylor to discuss various issues raised by him. On average they probably met for about two hours a week.

[66] Mr Bullians said that he could not remember any specific time when Mr Taylor had raised with him issues about the recording or when Mr Taylor had sought to follow up the PC.01 request made on 5 November 2013 for the audio file.

[67] In cross-examination Mr Taylor was asked whether he had ever asked Mr Bullians when he (Mr Taylor) was going to receive the recording. Mr Taylor conceded he could not say definitely that he had.

[68] As to Mr Taylor's claim that he complained to the Prison Inspector via the Complaints Line about non-compliance with the Privacy Act, in cross-examination it was pointed out to him that no date or dates had been given by him for such complaints. It was further pointed out that Corrections had filed in evidence the log of the prison inspectorate and it showed there was no record of any complaint having been made by Mr Taylor about delays in relation to the IPP 6 audio file request. Mr Taylor replied that he thought his complaints had been made in November or December 2013 or January 2014. Nevertheless the log of complaints made by Mr Taylor to the Inspectorate Office between 1 September 2013 and 30 June 2014 has no record of any complaint regarding the Privacy Act in connection with the request for the audio file. The log does, however, show that in relation to other Official Information Act or Privacy Act matters Mr Taylor had made complaints to the Inspectorate. Mr Taylor conceded that when he spoke to the Inspector who dealt with his calls on 3 and 4 December 2013 he did not discuss with her any issue relating to the request for the audio file.

[69] Mr Taylor further conceded he does not have any document which shows he alerted Corrections to the fact that notwithstanding his guilty plea before the Hearing Adjudicator and the subsequent withdrawal of his appeal to the Visiting Justice, he still wanted the audio file. He relies on his contention that he told Mr Van Schalkwyk and that he made informal oral requests to officers on D Block on two or three occasions. We do not accept this evidence. For a person who is otherwise meticulous in his dealings with Corrections officers we found the absence of evidence surprising. While Mr Van Schalkwyk cannot recall whether Mr Taylor said he still required the recording, he did not think the conversation had happened because he had already told Mr Taylor he needed to use the PC.01 procedure. There is also the fact that Mr Bullians, who was meeting with Mr Taylor

for about two hours each week, has no recollection of any occasion on which Mr Taylor raised with him Mr Taylor's need for the recording notwithstanding termination of the disciplinary process. Mr Taylor, in turn, admitted he could not definitely say he had asked Mr Bullians for the recording. We are also troubled by the fact that although Mr Taylor claims to have contacted the Inspectorate about non-provision of the recording, he was unable to provide a date (or dates) while the Inspectorate log itself shows no contact by Mr Taylor regarding the request for the recording. In the circumstances we have concluded Mr Taylor has not proved his assertion he told Corrections staff he still required the recording.

[70] Mr Taylor submitted that internal Corrections email traffic which post-dates the 20 November 2013 withdrawal of the appeal shows that Corrections officers "were well aware the request [for the recording] was still live". We are of the view the documents do not support this submission. On 20 November 2013 an Auckland Corrections officer made inquiry with the MSU. After setting out the relevant parts of PC.01 298631 the officer requested an update. The following day a staff member in the MSU inquired of a second staff member whether she could "please check this out and let them know where [PC.01 298631] was at"? The response by that officer was to send an email to the Auckland Corrections officer stating that the MSU did not have any record of a PC.01 relating to an audio recording of the telephone call. Auckland was asked to advise the date on which the PC.01 had been referred to the MSU and was asked to "check with the prisoner if this is still required". On 25 November 2013 the Auckland officer replied without responding to the question whether Mr Taylor still required the recording:

> The audio recording was unfortunately referred to the Opintel by an SCO so I don't think it came to you. The Opintel team has been doing some work around it.
>
> [redacted] can you please confirm if your team had a look at this one.

[71] On the same day (25 November 2013) an email from another Auckland-based officer stated:

> If the prisoner still requests to hear the audio recording we can burn it to disk and give to his PCO. The disk should be able to be played on a CD Player.

[72] On 27 November 2013 the Auckland Corrections officer replied:

> Sorry [redacted] just got your email yes please I think if we can play the CD to him to hear then we can close off the PC01.

[73] It can be seen that while the MSU asked that a check be made with Mr Taylor and the second email dated 25 November 2013 opened with the phrase "if the prisoner still requests to hear the audio recording", the subsequent reply did not address the question. There is no suggestion in the terms of the communication that inquiry had been made with Mr Taylor or anyone else as to whether the recording was still required. The opening phrase "sorry [redacted] just got your email" suggests the Auckland office had not made any inquiry. The overarching point, however, is that nowhere in the email exchange is there any suggestion the MSU and the Auckland officers with whom they were corresponding were aware that on 6 November 2013 the appeal had in fact been adjourned to obtain the telephone recording and that on 20 November 2013 the appeal had been withdrawn. In these circumstances we do not accept the email traffic shows staff in the MSU or at Auckland knew the appeal had been withdrawn and that the request for the recording was still live. The communications were in respect of the scheduled hearing before a Visiting Justice, not a continuing request for the recording notwithstanding the withdrawal of the appeal to the Visiting Justice.

[74] When this was drawn to the attention of Mr Taylor during the hearing he responded with the same answer as before, namely that he had made informal oral inquiry to D Block staff. As to this we accept the submission by Corrections that Mr Taylor possesses undoubted administrative skills, evidenced by his ability to conduct a number of legal cases simultaneously, and claimed computer skills and at all times has had access to writing materials. Despite this he has not been able to furnish any details of his claimed contacts with D Block staff in relation to his request for the recording. His admitted distrust of most prison officers, combined with his extensive use of formal complaint mechanisms, makes it surprising he would have used the unnamed "D Block staff" as informal conduits for a follow-up to his 2013 written requests. In addition neither the alleged requests to D Block staff nor the alleged complaints to the Inspectorate were mentioned by Mr Taylor in his complaint to the Privacy Commissioner.

[75] Bearing in mind Mr Taylor carries the burden of proof, the conclusion we have come to is that he has not satisfied us that, subsequent to the withdrawal of his appeal to the Visiting Justice, he put Corrections on notice that the audio file was still required by him notwithstanding that the reason for the request (use in the prosecution proceedings) had fallen away. We therefore determine the case on the footing that subsequent to the withdrawal of the appeal to the Visiting Justice, no notice was given to Corrections that the recording was still required until Corrections were notified in mid-February 2014 by the Privacy Commissioner that Mr Taylor had lodged a complaint regarding non-delivery of the recording.

[76] It is necessary to emphasise this finding is relevant not to liablity but to remedy. Corrections explicitly conceded that its mistaken belief the audio file was no longer required by Mr Taylor did not excuse the failure to make and communicate a decision on the request as required by PA, s 40(1).

The Inspectorate

[77] Although possibly repetitive, we address specifically Mr Taylor's claim that he complained to the Inspectorate.

[78] In his evidence Mr Taylor asserted he had complained to the Prison Inspector via the 0800 complaints line about non-compliance with the Privacy Act. However, no date (or dates) were given for the contact(s). For that reason Corrections tendered in evidence the log of complaints made by Mr Taylor to the Inspectorate Office between 1 September 2013 and 30 June 2014. The log shows Mr Taylor made contact with the Inspector 0800 line 47 times in that period. Not all of the contacts were counted as complaints; 12 were deemed to be complaints. The remainder were either requests for information or classified as repeat calls about matters that had been previously raised. None of these calls related to Mr Taylor's request for a recording of the 15 October 2013 telephone call.

[79] As earlier mentioned, although Mr Taylor stated in cross-examination he thought his complaints to the Inspectorate had been made in November or December 2013 or January 2014, he conceded that when he spoke to Inspector Rimmer on 3 and 4 December 2013 he did not discuss with her any issue relating to the request for the audio file.

[80] In these circumstances we do not accept Mr Taylor has established that he did contact the Inspectorate regarding the non-provision of the audio file and his complaint that the provisions of the Privacy Act had been breached.

The format issue

[81] It was common ground at the hearing that an audio file in CD format can be played on a personal CD player but a recording in DVD format cannot.

[82] The request for the audio file made on 18 October 2013 did not specify the format of the audio file preferred by Mr Taylor. Nor was the format referred to in his notice of appeal to the Visiting Justice. Likewise the PC.01 filed by him on 5 November 2013 was non-specific. He referred only to "a copy of the audio recording". In his complaint to the Privacy Commissioner dated 5 February 2014 he referred, for the first time, to being advised "at some point" that the recording would be made available "on CD/DVD".

[83] Mr Taylor was provided with a disk on 12 May 2014 but because it was not playable on his CD player he returned it to Corrections. A recording (in CD format) was eventually provided on 11 June 2014.

[84] The format issue was highlighted by the evidence of Mr Bullians who told the Tribunal he was unaware the recording had been burnt to a disk until it was provided to him by an Intel officer at Auckland Prison. At that point he organised a laptop so Mr Taylor could listen to the recording. On 4 June 2014 he and Mr Taylor met in Mr Bullians' office for that purpose. However, Mr Taylor refused to listen to the recording, saying he wanted it in a format which he could play on his personal CD player in his cell.

[85] At the hearing the parties expended some energy on the question whether Mr Taylor had requested the audio file in a particular format. Mr Taylor conceded he could not point to any document in which he had requested the audio file in CD format. He nevertheless argued that the context, including email correspondence between Corrections officers, supported the inference he had either requested the recording in CD format or Corrections knew that under the prison regulations he only had access to a personal CD player and did not have access to a computer. It was therefore obvious the audio file would have to be provided in a format he was able to utilise. Mr Taylor also relied on email correspondence passing between Corrections officers in mid to late November 2013. In his submission this correspondence showed those officers understood the disk should be playable on a CD player.

[86] In our view the correspondence is ambiguous in that it is plain that at times the officers were at cross-purposes. However, it is not an issue which has to be resolved because Mr Van Schalkwyk (who prosecuted the misconduct charges) conceded he told the Intelligence Unit the audio file should be in a format which could be played on Mr Taylor's personal CD player. In addition Mr Post, the Manager, Ministerial Services, conceded that by at least 25 November 2013 Corrections officers in Auckland were aware the audio file would have to be played on a CD player.

[87] We accordingly approach this case on the basis of that concession.

The complaint to the Privacy Commissioner – Corrections alerted that recording not provided to Mr Taylor

[88] By letter dated 5 February 2014 Mr Taylor lodged a complaint with the Privacy Commissioner, saying that his complaint was to be treated "as a deemed refusal – failure to comply with statutory requirements of the [Privacy Act]".

[89] The evidence of Mr Post was that by letter dated 17 February 2014 the Office of the Privacy Commissioner (OPC) gave notice of the complaint to Corrections and requested a response.

[90] As a result of the OPC letter departmental staff in the MSU in Wellington became aware Mr Taylor's request for the audio file was still operative. Unfortunately that realisation did not occur until about 20 March 2014. It was discovered a disk which contained the recording had in fact been burnt for the prosecutor (Mr Van Schalkwyk) to pick up. The disk was still with the Intelligence Unit because Mr Van Schalkwyk had advised it would not be needed. After discussion with the Intelligence Unit the MSU determined there were no grounds for withholding any part of the disk and it was agreed that it could be released to Mr Taylor. This decision was made on 24 March 2014.

[91] On 26 March 2014 the MSU wrote to the OPC confirming Mr Taylor's request for the recording had been referred to National Office for consideration but that the request had unfortunately been overlooked because it was one of a number of matters which had been raised by Mr Taylor at the time. The OPC was further advised there were no concerns with the recording being provided to Mr Taylor and that the MSU had been assured a copy of the recording would be provided by staff at Auckland Prison to Mr Taylor without delay.

[92] No further action was taken regarding delivery of the file because the MSU was operating on the assumption the disk would be provided to Mr Taylor by Auckland staff.

[93] However, on 12 May 2014 the MSU received a telephone call from the OPC to say Mr Taylor had again been in touch with the OPC to report he had still not received the recording. The MSU contacted the Auckland Intelligence Unit to find out what had happened. The Intelligence Unit replied to the effect that the disk had not been picked up by the Principal Corrections Officer in Mr Taylor's unit for delivery to Mr Taylor. The Intelligence Unit subsequently reported Mr Taylor had been provided with the disk later that day ie on 12 May 2014. However, as the disk could not be used on his personal CD player, the disk had been returned to the Intelligence Unit. The MSU was told attempts were being made to find a way to enable Mr Taylor to play the disk. It was then that Mr Bullians met with Mr Taylor to play the disk on a laptop and, as mentioned, Mr Taylor refused to listen to the recording because he wanted a copy in a format which he could play on his own equipment. A compatible disk was not provided to Mr Taylor until 11 June 2014.

The apology

[94] By letter dated 28 July 2014 the Privacy Commissioner notified Corrections that his provisional view was that the eight month delay in providing a copy of the recording amounted to undue delay for the purposes of PA, s 66(4) and that there had been a deemed refusal to make the information available to Mr Taylor. This had amounted to an interference with his privacy. The application of s 66(3) was not addressed. Corrections was asked to comment on Mr Taylor's contention that to resolve the complaint Corrections should provide:

> **[94.1]** A formal written apology.
>
> **[94.2]** Advice as to what staff training or other action was being taken to ensure breaches of the statutory timeframe would no longer be a regular occurrence.

[94.3] Nomimal monetary compensation to acknowledge the interference with his privacy.

[95] Corrections duly prepared a letter of apology addressed to Mr Taylor. It was dated 28 August 2014 and in the following terms:

> I write in reference to your complaint to the Office of the Privacy Commission regarding the delay in providing you with a copy of the audio recording of a telephone call that you made to [redacted] at approximately 2.15pm on 15 October 2013.
>
> The Department apologises for the length of time taken to provide you with a copy of this call. The delay occurred for multiple reasons, including the PC.01 form not being forwarded to National Office; the site prosecutor advising Operational Intelligence staff that the information was no longer required (presumably as your misconduct proceedings had concluded); and your refusal to listen to the call with staff present as a result of the disk not being able to be played on your stereo.
>
> I can assure you that we are working to ensure that all of our staff across New Zealand are aware of their obligations when managing a request for personal information. Explicit reference to the statutory timeframes contained in the Privacy Act is included in the Department's Privacy Guides which are available to all staff. I am advised that the Privacy Officer intends to bring this aspect to the attention of all Prison Managers, so that this can be further reinforced. You will appreciate that in a work place as large and diverse as Corrections, this knowledge will take some time to embed.

[96] This letter of apology was sent directly to Mr Tom Sherlock, the Prison Manager at Auckland Prison with a request that he ensure delivery of the letter to Mr Taylor. The email from MSU to Mr Sherlock was in the following terms:

> Please find enclosed a letter to Arthur Taylor regarding a complaint to the Privacy Commissioner, and a copy for your records.
>
> Would you please ensure the enclosed letter is given to Mr Taylor and ask him to sign and date below to acknowledge receipt.
>
> Thank you for your assistance in this matter.

[97] Regrettably, the apology letter was not delivered to Mr Taylor until 20 November 2014, some three months later. When Mr Sherlock gave evidence to the Tribunal he said he had no idea why the delay had occurred. He disputed Mr Taylor's allegation that there had been an orchestrated attempt to delay provision of the information.

[98] Mr Taylor drew the attention of the Tribunal to the fact that in his evidence Mr Van Schalkwyk had contridicted the assertion in the apology letter that he (Mr Van Schalkwyk) had told the Intelligence Unit the recording was no longer required. We do not see significance in the error. Corrections accept causing an interference with Mr Taylor's privacy. It is clear there were miscommunications between the MSU in Wellington and the prison in Auckland and among Auckland staff. In our view nothing of significance turns on the point.

The training issue

[99] Because one of the remedies sought by Mr Taylor is a training order Corrections called Mr PD Miller who from January 2008 has been the Chief Privacy Officer at Corrections. Since the beginning of 2013 he has also been in charge of training in respect of the obligations of Corrections under the Privacy Act. We do not intend in this decision detailing the extensive steps taken by Corrections since early 2013 to raise awareness of its privacy obligations with staff and to provide them with appropriate training, particularly

staff dealing with complex requests. It is sufficient for present purposes to note that according to Mr Miller Corrections received advice from the Government Chief Information Officer in October 2014 that he commended the Corrections training programme, noting that "the Department was taking privacy management seriously". The Government Chief Privacy Officer has also supported the depth of Corrections' work programme on many occasions.

[100] In cross-examination Mr Miller pointed out that no matter how effective training may be, mistakes will nevertheless occur owing to human error.

[101] The evidence given by Mr Miller was reinforced by the evidence of Mr Post who pointed out that Auckland Prison staff received 2,568 information requests or complaints from prisoners through the PC.01 process during the 2013/14 reporting period. Nationally approximately 10,500 PC.01 forms were lodged of which 2,500 were general requests for information. Auckland Prison contains the most difficult and challenging prisoners and they generate a proportionally much higher volume of correspondence through PC.01 forms.

[102] Mr Taylor himself files a large number of PC.01 forms on a range of matters. For example, between 21 September 2013 and 19 March 2015 he submitted 154 PC.01 forms. Of those, 38 involved requests for information under either the Official Information Act or the Privacy Act. Between 13 October 2013 and 6 June 2014, the period to which Mr Taylor's complaint relates, he filed 84 PC.01 forms, some covering multiple issues. Over 30 of the forms dealt with requests for information.

[103] Because of the high volume of complex requests made by Mr Taylor, the MSU and Auckland Prison have an arrangement whereby the prison refers some PC.01 forms submitted by Mr Taylor to the MSU for consultation. This excludes general day-to-day operational issues. Some that are referred (particularly those that include requests for personal or official information) are then managed and answered by Ministerial Services. This approach ensures that Auckland Prison staff are able to carry out their core custodial duties. This approach is not unique to Mr Taylor.

[104] Mr Post went on to say that since Mr Taylor's complaint to the Privacy Commissioner Corrections has taken steps to address the issues and to act on the assurance given to Mr Taylor in the letter of apology dated 28 August 2014. The Department is now aware of the technical issues relating to the provision of copies of recordings of telephone calls for use on personal entertainment units. In addition Corrections staff are provided with training in relation to the Privacy Act and the Official Information Act. This applies not only to staff working at head office but also to those on the front line. In cross-examination Mr Post said that because Corrections receive an exceptionally large volume of information requests on a daily basis there will be occasion when things will go wrong owing to human error.

[105] Having heard the evidence of Mr Miller and of Mr Post we are satisfied that the Department of Corrections is taking proper and adequate steps to ensure compliance with its obligations under the Privacy Act and a training order from the Tribunal will serve no real purpose, assuming for the moment there is jurisdiction to make such order.

The propensity evidence tendered by Mr Taylor

[106] Mr Taylor contended that the judgment given by Ellis J in *Taylor v Chief Executive, Department of Corrections* together with the Ombudsman's report *A review of the*

management of prisoner Arthur Taylor at Auckland Prison 15 June 2011 to 30 April 2012, and the two reports by Visiting Justices dated 16 June 2014 and 11 August 2014 (respectively) show "sustained and serious unlawful treatment" of Mr Taylor and "disregard of his legal rights". He also claimed Corrections' response to more recent PC.01 complaints showed a systemic default by Corrections in its obligations under the Privacy Act. In his closing submissions Mr Taylor submitted there was "a propensity on the Defendant's part to disregard and violate legal requirements and his own policies when it comes to me". He asserted a reasonable inference can be drawn that the actions of Corrections in relation to the request for the audio file were "deliberate and designed to prevent my access to the recording until it was of no use to me".

[107] Although the material referred to was admitted in evidence and while the Tribunal permitted Mr Taylor wide latitude to introduce even further evidence which he claimed showed a systematic disregard by Corrections of its obligations under the Privacy Act, we have not found this so-called "propensity" evidence helpful. The primary reason is that this case about how a simple request for an audio file was not addressed in accordance with the requirements of the Privacy Act. Liability having been conceded the Tribunal must determine the question of remedy. The judgment of Ellis J centred on Mr Taylor's security classification in October 2014. The two Visiting Justice reports also related to Mr Taylor's security classification and the conditions under which he was being managed. The Ombudsman's report is likewise very much focused on Mr Taylor's management at Auckland Prison from June 2011 to April 2012. These issues are far removed from the Tribunal's task of determining what remedy, if any, is to be granted for an admitted interference with privacy arising out of the failure to provide an audio file. We cannot see how the conclusions reached by other decision-makers on other evidence relating to very different issues can assist the Tribunal in the present case in determining whether Corrections acted with improper purpose and unlawfully. Mr Taylor certainly has a large number of complaints regarding Corrections but it is not possible within the confined parameters of proceedings under the Privacy Act for those complaints to be properly determined. The Tribunal must be careful to ensure its limited statutory jurisdiction is not exceeded. It is not without significance that in its jurisdiction under the Privacy Act the Tribunal does not have power to award exemplary damages. Furthermore, the award of damages under PA, s 88(1)(c) is to compensate for humiliation, loss of dignity and injury to feelings, not to punish the defendant. See *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66 at [170.3].

The allegation of bad faith

[108] In his closing submissions dated 11 April 2016 at paras 47.4 and 47.5 Mr Taylor further contended that the audio file was deliberately withheld to undermine Mr Taylor's ability to defend the charges and that the reason why he withdrew his appeal to the Visiting Justice was "sheer frustration".

[109] It is significant that these claims were not advanced by Mr Taylor in his brief of evidence dated 18 June 2015 or in his Supplementary Brief of Evidence dated 30 September 2015. More significantly the claims were not made in the course of Mr Taylor's extensive oral evidence.

[110] Above all, the allegations were not put to the prosecutor, Mr Van Schalkwyk or for that matter to any other Corrections witness.

[111] Having seen and heard the Corrections witnesses (all of whom were extensively cross-examined by Mr Taylor) we see no evidence to support Mr Taylor's claim that the

audio file was deliberately withheld to undermine his ability to defend the charge; that the actions of Corrections staff were deliberate and designed to prevent Mr Taylor's access to the recording until it was of no use to him and that there was bad faith in the processing of the request for the file.

[112] Similarly we do not accept Mr Taylor's assertion that he experienced intense emotional distress by having to withdraw his appeal to the Visiting Justice "in frustration at [his] inability to access the recording". He withdrew the appeal on only the second day of Corrections' default. He could have requested an adjournment in the same way as he had at the initial hearing before the Visiting Justice and he had already given notice to the Police he would not be pursuing his complaint against the named Corrections officer.

[113] For all these reasons we reject the allegations made by Mr Taylor that Corrections acted in bad faith and deliberately to undermine his ability to defend the misconduct charges.

Summary of case for Corrections

[114] Corrections called five witnesses who each addressed different aspects of the case. However, it would seem the main points advanced by Corrections in the context of remedy assessment include the following:

> **[114.1]** Mr Taylor made a valid IPP 6 access request by way of endorsement on the 18 October 2013 notice of the charges. However, the format of the request was out of the ordinary in that the usual process for making such requests is for the prisoner to complete a PC.01 form. So when Mr Van Schalkwyk passed the request directly to the Intelligence Unit there was some confusion within that Unit about Mr Taylor's ability to request the recording through the acknowledgement form, which related to a legal process, or whether he needed to make a more conventional request to Ministerial Services in Wellington. This explains why Mr Van Schalkwyk relayed to Mr Taylor that a PC.01 form should be submitted and Mr Taylor took this step on 5 November 2013.
>
> **[114.2]** It appears Mr Taylor's request was not conveyed by the Intelligence Unit to National Office in Wellington.
>
> **[114.3]** It was open to Mr Taylor to request an adjournment of the first instance hearing before the Hearing Adjudicator on the basis he had not received the recording and was therefore being denied a proper opportunity to prepare his defence. However, Mr Taylor elected to plead guilty.
>
> **[114.4]** While both on the appeal form and at the first hearing before the Visiting Justice Mr Taylor repeated his request for the recording, at the second call of the appeal Mr Taylor withdrew the appeal notwithstanding he could have sought a further adjournment.
>
> **[114.5]** Mr Taylor's PC.01 form dated 5 November 2013 was not sent to National Office until 20 November 2013. It then became apparent the request for the recording was with the Intelligence Unit which on 25 November 2013 offered to burn a disk and to provide it if Mr Taylor still required. A copy of the recording was subsequently burnt to a disk.

[114.6] The context and terms in which Mr Taylor's requests had been made gave Corrections staff the impression he required the recording only for the purpose of defending the disciplinary charges before the Hearing Adjudicator or for appealing the decision to a Visiting Justice.

[114.7] When Mr Taylor withdrew his appeal and also withdrew his assault allegation against the named Corrections officer, staff believed the underlying reason for the request no longer existed and Mr Taylor no longer sought the recording. Consequently Mr Van Schalkwyk did not pick up the disk from the Intelligence Unit.

[114.8] It was only after the Privacy Commissioner notified Corrections of Mr Taylor's complaint that the MSU became aware Mr Taylor's request for the recording was still operative. That awareness occurred on about 20 March 2014.

[114.9] On 21 March 2014 the Northern Region Intelligence Manager emailed the MSU to advise the disk containing the recording was still with the Intelligence Unit. It was agreed the disk would be released and provided by staff at Auckland Prison to Mr Taylor. This did not happen until 12 May 2014. The disk was returned by Mr Taylor because it was incompatible with his compact disk player.

[114.10] On 4 June 2014 Mr Bullians met with Mr Taylor and offered to play the disk on a laptop. Mr Taylor refused the offer.

[114.11] A disk in CD format was provided to Mr Taylor on 11 June 2014.

[114.12] On 28 August 2014 the Manager, MSU wrote a letter of apology and explanation to Mr Taylor. Unfortunately, for reasons not known that letter was not delivered to Mr Taylor until 20 November 2014.

[115] The submission for Corrections is that the record shows an unfortunate sequence of mishaps or misunderstandings. The Department nevertheless acknowledges that its mistaken belief that the audio file was no longer required by Mr Taylor did not excuse the failure to make and communicate a decision on the request as required by PA, s 40(1).

[116] We accept the account of events given by the witnesses called by Corrections.

Key findings

[117] It is not possible to address each nuance and difference canvassed during three days of evidence. In addition, the concession by Corrections that there was an interference with Mr Taylor's privacy has reduced the number of findings required. Consequently the focus is largely on Mr Taylor's allegations that the Department, acting in bad faith, set out to evade its statutory responsibilities under the Privacy Act and to undermine Mr Taylor's ability to defend the misconduct charges.

[118] As to that it can be seen our key findings include:

[118.1] The terms in which Mr Taylor's requests had been made gave Corrections staff the impression he required the recording only for the purposes of defending the disciplinary charges before the Hearing Adjudicator or for appealing the decision to a Visiting Justice or for the purpose of his assault allegation against the

named Corrections officer. By 20 November 2013 at the latest those purposes had evaporated.

[118.2] After withdrawing his appeal on 20 November 2013 and prior to complaining to the Privacy Commissioner on 5 February 2014, Mr Taylor did not tell any Corrections staff the audio file was still required by him. Nor did he raise the issue with or complain to the Inspectorate.

[118.3] It was only after Mr Taylor lodged a complaint with the Privacy Commissioner that Corrections learnt, from the Privacy Commissioner (not Mr Taylor) that the recording was still required by Mr Taylor.

[118.4] We reject Mr Taylor's claims that the audio file was deliberately withheld to undermine his ability to defend the charge; that the actions of Corrections staff were deliberate and designed to prevent his access to the recording until it was of no use to him and that there was bad faith in the processing of the request for the audio file.

[118.5] We accept the submission for Corrections that the record shows an unfortunate sequence of mishaps or misunderstandings arising through human error.

[118.6] The Department's mistaken belief that the audio file was no longer required by Mr Taylor did not excuse the failure to make and communicate a decision on the request as required by PA, s 40(1).

[119] We address now the relevant law before applying that law to the facts as found. This is necessary because in the course of argument there was confusion whether remedies in this case are to be assessed on the basis the admitted interference with privacy occurred by virtue of the operation of PA, s 66(3) or s 66(4).

THE STATUTORY PROVISIONS

Interference with privacy - definition

[120] The Tribunal has jurisdiction to grant a remedy only if an interference with privacy is established by the plaintiff on the balance of probabilities. The term "interference with the privacy of an individual" is defined in PA, s 66(1) and (2):

> **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.

Decisions on requests

[121] When an agency receives a request under IPP 6 for access to personal information there is a statutory obligation under PA, s 40(1) to decide whether the request is to be granted and to communicate that decision to the individual who made the request:

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.

[122] The Privacy Act anticipates at least three possible responses by an agency in receipt of an IPP 6 request:

[122.1] First, the request is granted and notice of that decision is given to the requester. The Act does not prescribe a fixed number of days within which access to the information must 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, 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.

[122.2] Second, the request is refused and notice of that decision is given to the requester. Reasons for the refusal must be provided. See PA, s 44. No reason other than one or more of the reasons listed in PA, ss 27 to 29 can justify such refusal. See PA, 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.

[122.3] Third, the request is, for whatever reason, simply not responded to within the statutory timeframe prescribed by PA, 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, 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.

[123] In the third scenario the breach lies in the failure to make an in-time decision on the request and to communicate that decision. There is no additional breach by reason of undue delay in providing the information 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.

[124] It follows the Tribunal is not required in the circumstances of the present case to explore the meaning of the phrase "undue delay" as it is used in PA, s 66(4) and discussed in *Koso v Chief Executive, Ministry of Business, Innovation, and Employment* [2014] NZHRRT 39, (2014) 9 HRNZ 786 at [6].

[125] In summary:

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

[125.2] 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).

[125.3] 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 by reason of undue delay in providing the information.

[125.4] 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, 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.

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

APPLICATION OF THE STATUTORY PROVISIONS TO THE FACTS

[126] We have accepted Mr Taylor made two requests for the recording:

[126.1] First, the request made on 18 October 2013 by way of endorsement at the foot of the Prisoner Misconduct Acknowledgement Form.

[126.2] Second, the repeat request made on 5 November 2013 by way of a PC.01 form (No. 298631).

[127] In both cases Corrections allowed the PA, s 40(1) timeframe to expire without making a decision on the request. Section 66(3) thereby came into operation and there was a deemed refusal to make the information available.

[128] Before the Tribunal Mr Taylor advanced a case not only under s 66(3) but also under s 66(4). However, for the reasons explained earlier that was misconceived as subs (4) does not, on the facts, have application.

[129] It is now necessary to address the concessions made by Corrections in relation to PA, s 66(2).

The concessions made by Corrections in relation to liability

[130] The closing submissions by Corrections at para 6 confirmed the concessions as to liability made earlier in the proceedings. The concessions as articulated in the closing submissions were:

[130.1] No decision was made on Mr Taylor's request within the 20 working days prescribed by s 40(1) of the Privacy Act and, in terms of s 66(2)(a)(i) and (3) of the Privacy Act, that failure was deemed to be a refusal to make available the information to which the request related; and

[130.2] There was no proper basis for the failure to make a decision on Mr Taylor's request within that timeframe in terms of s 66(2)(b) of the Privacy Act.

[131] The concession is repeated at para 10 of the submissions:

> … as noted above, the Department accepts there was a valid request for information and no decision on it within the required timeframe. It also accepts Mr Taylor was entitled to make requests for information otherwise than formally through the Department's PC.01 process.

[132] On the evidence, these concessions were properly made.

[133] As there was a deemed refusal through the operation of PA, s 66(3) (ie there was no in-time response under s 40(1)) and as s 66(4) has no application to the facts, the issue of undue delay does not fall for consideration in the context of remedy assessment.

[134] There remains for determination the remedy to be granted to Mr Taylor and the related issue of the operation of the PVCA.

THE QUESTION OF REMEDY

[135] Where the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual the Tribunal may grant one or more of the remedies listed in PA, s 85:

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
>
> (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
>
> (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
>
> (c) damages in accordance with section 88:
>
> (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
>
> (e) such other relief as the Tribunal thinks fit.
>
> (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.
>
> (3) Where the Director of Human Rights Proceedings is the plaintiff, any costs awarded against him or her shall be paid by the Privacy Commissioner, and the Privacy Commissioner shall not be entitled to be indemnified by the aggrieved individual (if any).
>
> (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.

[136] In his statement of claim Mr Taylor sought a declaration that IPP 6 had been breached and that the delay in providing the audio recording had been deliberate. In his closing submissions he amended "deliberate" to "negligent". While he initially sought damages of $3,000 for "loss of dignity, injury to feelings, humiliation and distress", in his closing submissions dated 11 April 2016 he increased that sum to $10,000:

> … to compensate me, provide effective redress and ensure it is brought home to the Defendant that his seemingly cavalier attitude to his statutory obligations under the Act must stop.

[137] To the extent this passage suggests one of the purposes of an award of damages under PA, s 88 is to deter or punish the defendant, the submission is misconceived. The award of damages under s 88(1)(c) is to compensate the aggrieved individual for

humiliation, loss of dignity and injury to feelings, not to deter or punish the defendant. See *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66 at [170.3].

The question of a training order

[138] Mr Taylor also sought a training order to the effect that Corrections engage in better training of its staff in relation to the Department's obligations under the Privacy Act. His contention was that there are systemic problems to the observance by Corrections of the requirements of the Act when dealing with prisoner requests. Corrections disputes the claim and it was for this reason Corrections called Mr Miller, Chief Privacy Officer at the Department.

[139] Assuming we have jurisdiction to make the order sought we would not grant such relief in the present case. Having regard to the evidence of Mr Miller, the steps taken by Corrections since February 2013 to better manage Corrections' responsibilities under the Act and to train, advise and assist staff to comply with those obligations extend well beyond the parameters of what the Tribunal could reasonably order. More fundamentally, however, there is doubt whether a training order can be made because the orders (a) to (e) in PA, s 85(1) are designed to provide relief to the aggrieved individual, not to enhance a defendant's observance of the Act. See *Chief Executive of the Ministry of Social Development v Holmes* [2013] NZHC 672, [2013] NZAR 760 at [100].

[140] No other relief having been sought we address the issue whether a declaration of interference should be made and whether damages should be awarded for the emotional harm Mr Taylor claims to have experienced. First it is necessary to assess the conduct of Corrections.

The conduct of the defendant

[141] As earlier mentioned, s 85(4) provides that it is not a defence that the interference was unintentional or without negligence on the part of the defendant. But the conduct of the defendant must be taken into account in deciding what, if any, remedy to grant.

[142] The principal points regarding the conduct of Corrections are:

> **[142.1]** This is not a case about an initial decision to grant followed by undue delay in the provision of the requested information. It is about two successive access requests which were not responded to within the permitted 20 working days. There was an outright (deemed) refusal when there was no proper basis for that decision.
>
> **[142.2]** The recording was requested on 18 October 2013 but not provided to Mr Taylor in the format requested until 11 June 2014. Irrespective of differing opinions as to how that delay is to be calculated, the delay was substantial.
>
> **[142.3]** There was also unexplained delay in the delivery of the letter of apology which while dated 28 August 2014 was not given to Mr Taylor until three months later on 20 November 2014. This delay substantially undermines the weight which can be attached to the apology. See *Williams v Accident Compensation Corporation* [2017] NZHRRT 26 at [38]. In the circumstances we attach little weight to it.

[142.4] The "unfortunate sequence of mishaps or misunderstandings which arose through human error" do not speak well of the way in which Corrections dealt with Mr Taylor's IPP 6 request.

[142.5] On the other hand the Department did not deliberately withhold the audio file to undermine Mr Taylor's ability to defend the misconduct charges. It did not act in bad faith. We accept the submission for Corrections that, bearing in mind the overall volume of the requests or complaints received not only from Mr Taylor and nationally (2568 PC.01 requests from prisoners at Auckland Prison in the 2013/14 period and 10,500 nationally), human error is likely to occur and did occur in this case.

Declaration

[143] Taking into account the circumstances of the case we have concluded the interference with Mr Taylor's privacy has not been technical or trivial. The request for the audio file was simple and straightforward. The chapter of mishaps or misunderstandings reflect poorly on Corrections. While the circumstances are understandable they are serious enough to warrant a declaration of interference.

Damages

[144] Damages under PA, s 88(1)(c) are compensatory and there must be a causative link between the interference with privacy and the asserted humiliation, loss of dignity or injury to feelings.

Whether humiliation, loss of dignity or injury to feelings established

[145] Although Mr Taylor has made much of the fact the recording was sought in the context of disciplinary proceedings, he withdrew his appeal just the day after the date of deemed refusal (19 November 2013). He did not ask for a further adjournment which he knew he could request. This substantially undermines his claim to have suffered intense emotional distress as a consequence of having his rights denied. Mr Taylor has shown himself to be well-practised in dealing with officialdom, a keen appreciator of his rights and an adept user of processes which permit him to challenge official decisions. The contention that he experienced humiliation, loss of dignity or injury to feelings is not supported by the facts we have found.

[146] In post-hearing submissions Mr Taylor claimed he withdrew his appeal in frustration at his inability to access the recording. We have already addressed this submission but reiterate it is not a claim we accept. Mr Taylor well knew the consequences of withdrawing his appeal and equally fully understood he could have requested successive adjournments until the audio recording had been provided to him. The failure to request a further adjournment when Corrections had only the previous day refused his IPP 6 request leaves us unpersuaded Mr Taylor withdrew out of frustration.

[147] We have found that after withdrawing his appeal on 20 November 2013 and prior to complaining to the Privacy Commissioner on 5 February 2014, Mr Taylor did not tell any Corrections staff the audio file was still required by him. Mr Taylor did not raise the issue with or complain to the Inspectorate. In addition Mr Bullians was meeting with Mr Taylor for about two hours a week to discuss various issues raised by Mr Taylor. Mr Taylor said he could not definitely say that at these meetings he raised the failure to provide the recording. For his part, Mr Bullians said he had no recollection of Mr Taylor raising this

subject. There is simply no evidence that Mr Taylor manifested concern about compliance with the request or even an interest in it until he lodged a complaint with the Privacy Commissioner.

[148] Even then that complaint made no reference to circumstances of humiliation, loss of dignity or injury to feelings. Instead it is clear the complaint was pitched at a more general level and was offered as "another example of the blatent refusal" by Corrections to comply with the Privacy Act. In these circumstances it is unsurprising that at the conclusion of his investigation the Commissioner by letter dated 25 November 2014 advised Corrections that while there had been unacceptable delay by Corrections, the Commissioner had also concluded financial compensation was not merited because:

> … his complaint has little merit to deserve financial compensation, as it is not clear what harm has resulted from the Department's delay in getting the information to him.

[149] In the relevant period from 13 October 2013 to 6 June 2014 Mr Taylor filed 84 PC.01 forms, some covering multiple issues. More than 30 of the forms dealt with requests for information. It is surprising, to say the least, that if Mr Taylor was truly concerned and emotionally affected by the failure to provide the recording he did not use the PC.01 complaint system to register he still required the recording and that failure to provide it was causing him humiliation, loss of dignity or injury to feelings.

Conclusion on emotional harm

[150] We find Mr Taylor has not established any humiliation, loss of dignity or injury to feelings as a consequence of the interference with his privacy.

The causation issue

[151] Before damages can be awarded for an interference with the privacy of an individual there must be a causal connection between that interference and one of the forms of loss or harm listed in PA, s 88(1)(a), (b) or (c). See *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [33]. The plaintiff must show the defendant's act or omission was a contributing cause in the sense that it constituted a material cause. See *Taylor v Orcon Ltd* [2015] NZHRRT 15 at [59] to [61].

[152] As we have found Mr Taylor has not established any humiliation, loss of dignity or injury to feelings, the issue of causation does not arise.

The PVCA

[153] As we have determined Mr Taylor suffered no humiliation, loss of dignity or injury to feelings, it follows no damages can be awarded to him. The application of the PVCA is therefore moot and we decline to make speculative findings as to the application of that Act should, contrary to our findings, damages be awarded to Mr Taylor.

FORMAL ORDERS

[154] For the foregoing reasons the decision of the Tribunal is that it has been satisfied on the balance of probabilities that an action of the Department of Corrections was an interference with the privacy of Mr Taylor and a declaration is made under s 85(1)(a) of the Privacy Act 1993 that there was an interference with the privacy of Mr Taylor by a (deemed) refusal to provide access to the personal information requested by him under Principle 6.

[155] The request by Mr Taylor for additional remedies is dismissed.

COSTS

[156] Costs are reserved. Unless the parties come to an arrangement on costs the following timetable is to apply:

> **[156.1]** Mr Taylor is to file his submissions within 14 days after the date of this decision. The submissions for Corrections are to be filed within the 14 days which follow. Mr Taylor is to have a right of reply within seven days after that.
>
> **[156.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.
>
> **[156.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines ONZM QC	**Mr RK Musuku**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**