(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND IDENTIFYING PARTICULARS OF EFG AND JKL

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 34**

	Reference No. HRRT 001/2012
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**IAN RUSSELL GEARY**
	PLAINTIFF
AND	**ACCIDENT COMPENSATION CORPORATION**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Mr MJM Keefe JP, Member
Dr AD Trlin, Member

REPRESENTATION:
Mr AC Beck for Plaintiff
Mr I Hunt and Ms S Grieve for Defendant

DATE OF HEARING: 3, 4, 5 and 6 September 2012

DATE OF LAST SUBMISSIONS: 30 August 2013 and 3 September 2013

DATE OF DECISION: 20 September 2013

DECISION OF TRIBUNAL

INDEX

INTRODUCTION	**[1]**
Non-disclosure order	**[5]**
Post-hearing submissions	**[6]**
PRINCIPLE 6	**[11]**
Background circumstances	**[11]**
The complaint to the Privacy Commissioner	**[27]**
The closed hearing	**[32]**
The interim ruling given after the closed hearing	**[36]**
The open hearing	**[42]**
The submissions for Mr Geary	**[45]**
The submissions for ACC	**[51]**
JURISDICTION – SECTIONS 82 AND 83 PRIVACY ACT 1993	**[58]**
DISCUSSION OF PRINCIPLE 6 ISSUES	**[66]**
Burden of proof	**[66]**
Section 29(1)(a) – the point in time when a proper basis for refusing to make information available must exist	**[72]**
Section 29(1)(a) – analysis	**[78]**
Section 29(1)(b) – analysis	**[90]**
Section 29(1)(f) – analysis	**[110]**
Section 29(2)(b) – analysis	**[122]**
The initial withholding of the Patterson – Morrell correspondence	**[131]**
Summary of conclusions in relation to Principle 6	**[132]**
Remedy – submissions by ACC	**[133]**
Remedy – discussion	**[134]**
Remedy – assessment	**[140]**
PRINCIPLE 11	**[161]**
Background circumstances	**[161]**
The submissions for Mr Geary	**[183]**
The submissions for ACC	**[187]**
DISCUSSION OF PRINCIPLE 11 ISSUES	**[188]**
Principle 11	**[188]**
Burden of proof	**[189]**
Findings of fact – the confidentiality issue	**[197]**
Findings of fact – whether ACC's responsibilities to Mr Geary properly addressed	**[199]**
"believes on reasonable grounds"	**[201]**
Principle 11(a) – analysis	**[205]**
Principle 11(c) – analysis	**[206]**
Principle 11(d) – analysis	**[208]**
Section 29(1)(a) – analysis	**[209]**
Remedy	**[212]**
FORMAL ORDERS	**[219]**
The Principle 6 claim	**[220]**
The Principle 11 claim	**[221]**
FINAL NON-PUBLICATION ORDER	**[222]**
COSTS	**[223]**

INTRODUCTION

[1] This case is about two information privacy principles. First, the principle that where an agency holds personal information about an individual, that individual is entitled to have access to that information (Principle 6) and to request correction of the information. Second, the principle that an agency which holds personal information cannot disclose that information unless the agency believes, on reasonable grounds, that disclosure of the information is permitted by one or more of the nine grounds enumerated in Principle 11.

[2] In relation to Principle 6 it is common ground that when on 13 May 2005 Mr Geary requested access to personal information held by the Accident Compensation Corporation (ACC), he was refused access to 21 documents. Mr Geary says there were two further documents which should also have been disclosed. The primary issue is whether ACC had proper grounds under s 29 of the Privacy Act 1993 to refuse to disclose the documents.

[3] In relation to Principle 11, Mr Geary says that on 21 June 2005, on receiving a guarantee of anonymity and confidentiality, he provided ACC with information which allegedly showed that a former ACC-referred client of Mr Geary had committed fraud against ACC. Mr Geary's complaint is that notwithstanding this guarantee, ACC disclosed to the former client Mr Geary's identity as informant along with all the information he had provided to ACC about her. This information was, in turn, admitted as propensity evidence in proceedings then faced by Mr Geary before the Health Practitioners Disciplinary Tribunal. The primary issue is whether the disclosure by ACC was permitted by Principle 11.

[4] In the interests of clarity the two limbs of Mr Geary's case will be addressed separately. The factual circumstances do at times overlap and there may be a degree of repetition.

Non-disclosure order

[5] The separate narratives of evidence refer to former ACC-referred clients of Mr Geary. The client in relation to the Principle 6 matter will be referred to as EFG and the client in relation to the Principle 11 matter as JKL. We order non-publication of their names, addresses and of any other details which might lead to their identification. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson. The reasons are:

> **[5.1]** In the Principle 6 matter, common bundle Vol 1 contains a statement by EFG in which she describes not only intimate details of her counselling and personal relationship with Mr Geary, but also intimate personal details concerning her daughter and her son. These private interests need to be protected. See *BNK v Trainor* [2004] NZHRRT 18 at [46] to [47].
>
> **[5.2]** In the Principle 11 matter, the ACC client of Mr Geary, JKL, is also at risk of having highly personal health information disclosed. In addition, on 18 December 2008 the Health Practitioners Disciplinary Tribunal made a permanent order prohibiting publication of her name and of any details which might identify her. See *Decision No. 255/Psy08/85P* (16 October 2009) at [6]. The proceedings before the Human Rights Review Tribunal, to which JKL was neither a party nor a witness, should not put this order at risk.

Post-hearing submissions

[6] At the conclusion of the hearing on 6 September 2012 leave was granted to the parties to file further submissions regarding the Evidence Act 2006 (particularly, ss 64, 65 and 67) and certain issues under the Privacy Act 1993. Mr Geary's submissions were to be filed and served by 21 September 2012 and those of ACC by 5 October 2012. While the Tribunal received Mr Geary's submissions on 21 September 2012, those by ACC were not filed until 24 October 2012. Mr Geary's reply submissions came in on 9 November 2012. In the ACC submissions received on 24 October 2012 it appeared to be suggested that had s 64 of the Evidence Act been pleaded by Mr Geary, ACC would, in turn, have pleaded a defence and called additional evidence. By *Minute* dated 19 November 2012 ACC was required to give notice whether it wished to call further evidence. By memorandum dated 30 November 2012 ACC confirmed that it did so wish to call further (unspecified) evidence and to further cross-examine Mr Geary. By *Minute* dated 20 December 2012 a timetable was set for ACC to file an application for leave to call further evidence and for a notice of opposition by Mr Geary to be filed. That timetable was amended at the request of ACC (see the *Minute* dated 21 December 2012). In the result the ACC documents were to be filed by 15 February 2013 and the notice of opposition by Mr Geary by 1 March 2013.

[7] By memorandum dated 1 March 2013 Mr Beck drew attention to the fact that ACC had not filed any application nor had it sought an extension of time. By memorandum dated 4 March 2013 Mr Hunt submitted that Mr Geary was not entitled to rely on ss 64 and 67 of the Evidence Act (an issue raised by the Tribunal during closing submissions) and complained that ACC faced procedural unfairness. It was also submitted that res judicata or issue estoppel precluded the Evidence Act point being raised so late in the hearing. The Tribunal was asked to address these issues before any consideration was given to whether, and if so how, any further evidence might be adduced. Mr Hunt advised that a hearing would likely be required. On 26 May 2013 Mr Beck expressed concern regarding the proportions the case had reached.

[8] It will be seen that as a result of the findings of fact made in relation to the Principle 11 point, the Evidence Act issue has fallen away and does not need to be addressed. The Tribunal does not intend relying on ss 64, 65 or 67 of that Act. It is therefore unnecessary for consideration to be given to the question whether the hearing should be re-convened for the taking of further evidence and submissions.

[9] Finally, after the Tribunal had engaged with the issues raised by the parties both at the hearing and in their post-hearing submissions, it was found that not all relevant decisions had been cited. To ensure that the parties had an opportunity to comment on the additional cases discovered by the Tribunal's own research, the Chairperson by *Minute* dated 6 August 2013 disclosed the new case law and invited the parties to make such submissions as they wished. Mr Geary's submissions were received on 30 August 2013 and those by ACC on 3 September 2013.

[10] All of the post-hearing memoranda and submissions filed by the parties have been taken into account by the Tribunal in the preparation of this decision.

PRINCIPLE 6

Background circumstances

[11] Mr Geary, now retired, was for many years a registered psychologist who conducted a professional practice in Timaru. From 1998 until December 2002 he was a

registered counsellor with ACC. However, by letter dated 5 December 2002 he was advised that his ACC registration had been terminated on the grounds that he was not then a member of one of the seven professional bodies listed in the Accident Insurance ("Counsellor") Regulations 1999, reg 6. This had an immediate effect on his practice as he was no longer able to undertake counselling for ACC clients.

[12] Unbeknown to Mr Geary, the termination of his registration was the product of other processes within ACC. Specifically, some time earlier in 2002, most likely in early September, ACC had received a signed statement from a former ACC-referred client of Mr Geary, namely EFG. This statement was treated by ACC as a complaint against Mr Geary. ACC had in addition received other complaints regarding Mr Geary. None of these complaints were disclosed to Mr Geary at the time.

[13] The four page handwritten statement by EFG is a factual narrative of her marriages, the birth of her children, the circumstances in which she met Mr Geary in 1980 and an overview of what she described as her "affair" with Mr Geary. She also detailed an incident in which Mr Geary allegedly offered her a marijuana cigarette and described how, in September 1982, she broke off the relationship before leaving on an overseas trip.

[14] The statement does not expressly make a complaint against Mr Geary, but as mentioned, it was treated by ACC as a complaint. In an internal ACC email dated 5 September 2002 the statement is referred to as having been received by ACC officer Ms Colleen Davey and the author of the email refers to having also received a written complaint about Mr Geary from a person other than EFG. The documentation shows that thereafter there was discussion and debate within ACC as to what was to be done about the complaints and how they were to be handled. There was a clear consensus that Mr Geary be held to account. A handwritten file note dated 6 September 2002 refers to a discussion with Ms Davey about the statement provided by EFG and concludes with the notation:

> Want him off books.

[15] In another internal email also dated 6 September 2002 Ms Davey refers to the willingness of EFG to have her written statement and her name used in any action taken:

> I agree to be the contact person in SCU for this matter – just let me know if you need anything to be followed up – the claimant has indicated that she is willing to have her written statement and name used in any action.

[16] In a later internal email dated 25 September 2002 an ACC officer, Ms S Patterson, referred to an allegation that Mr Geary's "clinical notes were sadly lacking" and because of this she had requested from him clinical notes in relation to five patients. She then commented:

> I do not believe that Geary is an appropriate person to have counselling ACC Claimants and the desired result is his removal as an approved person.

[17] After obtaining from Mr Geary his clinical notes relating to the five patients, Ms Patterson by letter dated 17 October 2002 submitted the documents to Ms Linda Morrell, a forensic document examination and handwriting expert. She was instructed to examine the documents to ascertain if there were indications that the notes had been prepared recently. In her letter of instruction Ms Patterson observed that it was her belief "that some have been freshly prepared as a result of my request". On 5 November 2002 Ms Morrell reported that she found no real evidence to suggest that the

notes had been prepared on one occasion and considered it more likely that they had been written over a period of time.

[18] By letter dated 30 October 2002 addressed to Dr David Rankin, General Manager of what was then a division of ACC called Healthwise, the (then) Health and Disability Commissioner (HDC) (Ron Paterson) wrote that he had received a complaint from EFG regarding Mr Geary but had found himself unable to take any action as the Health and Disability Commissioner Act 1994 had only come into force on 1 July 1996. Mr Paterson asked to be notified of any steps taken by ACC to address the complaint.

[19] In a reply dated 25 November 2002 Dr Rankin wrote to Mr Paterson stating that ACC "has now removed Mr Geary from our register of approved counsellors". The letter also referred to other alleged improprieties on the part of Mr Geary and concluded with Dr Rankin expressing the hope "that our actions limit the damage that this provider can perpetrate in New Zealand".

[20] It is to be recalled, however, that the ACC letter to Mr Geary terminating his ACC registration was not sent until 5 December 2002. Indeed, in the present proceedings ACC accepted that removal of Mr Geary's approval as a treatment provider was eventually not based on his alleged improper relationships with ACC clients, but rather on the basis that he was no longer a member of one of the seven bodies listed in the Accident Insurance ("Counsellor") Regulations 1999. This followed legal advice that termination of registration on the basis of complaints of impropriety would be unwise. See the ACC letter dated 29 June 2006 to Mr Mike Flahive, Manager, Investigations, Office of the Privacy Commissioner:

> The matter was referred to ACC's Fraud Unit for investigation. A number of concerns were identified about Mr Geary's behaviour and relationships with some of the claimants he counselled, as well as possible billing inaccuracies. It also became apparent that Mr Geary did not belong to any of the professional bodies that were a requirement for ACC approved treatment provider status. The investigation raised some serious concerns about the harm Mr Geary may be causing to the claimants he was counselling. Because of the serious nature of the concerns ACC sought advice from its legal services regarding removal of Mr Geary's registration to provide ACC funded counselling.
>
> ACC's legal advisors recommended that ACC should not terminate Mr Geary's registration upon the basis of complaints of impropriety against him. The reason being, there was insufficient evidence without obtaining full evidence of the complainants or their authority to complain in their names. ACC took the view that vulnerable claimants could be protected from the risk of improper counselling from Mr Geary without causing them additional stress.
>
> Mr Geary did not have membership with any of the six professional bodies mentioned in regulation 6 of the Accident Insurance Regulations 1999. On that basis, ACC wrote to Mr Geary on 5 December 2002 to advise him that he no longer met the criteria to remain registered with ACC as a recognised counsellor (copy enclosed).

[21] In the result, at the time he received the 5 December 2002 letter of termination, Mr Geary was not aware that EFG had provided ACC with a statement alleging an affair. Nor was he aware of the other allegations recorded by ACC and which eventually led to the termination of his ACC registration on 5 December 2002. However, whether ACC followed a fair process in the lead up to the termination of Mr Geary's registration is not an issue for determination by the Tribunal in the present proceedings.

[22] In June 2003 Mr Geary faced disciplinary charges before the New Zealand Psychologists Board. Those proceedings concerned a Family Court matter, but ACC were also involved. During the period 2003 to 2005 Mr Geary became aware that various agencies he had been involved with were having contact about him for various reasons. To work out what was going on, he made requests to the Psychologists Board

and the Health and Disability Commissioner under the Official Information Act 1982 and the Privacy Act 1993. Documents released to him showed, he believed, that ACC had been active in influencing these other agencies. He points in particular to the letter dated 25 November 2002 sent by Dr Rankin to Mr Paterson, the Health and Disability Commissioner.

[23] With these concerns in mind Mr Geary by email dated 13 May 2005 requested access to all personal information held by ACC. It is not intended to recite the terms of his email at length. Only the relevant passage is reproduced:

> Now specifically, what do I want re the Privacy request. I want all private information regarding myself that has been generated by activity, internally or interagency wise with respect to me. **I am aware that HDC were in contact with ACC 2002, and that there exists material re sensitive claims Unit (allegations of fraud/Rankin mentioned) etc.** I want all that material immediately. [Emphasis in original]

[24] By letter dated 29 June 2005 ACC replied substantively, releasing some information to Mr Geary but withholding other information. It provided a schedule of the 21 documents withheld, specifying the grounds upon which it relied in withholding the information. That schedule follows:

	Description	**Date**	**Full Or Part**	**Reason**	**Statutory Reference**
1	Complainant's description	Undated	Full	Information was given to ACC under an understanding that it would be kept in confidence	Section 29(1)(b) of the Privacy Act 1993
2	Email	5/9/02	Part	Includes some details of the allegations, that were given in confidence	Section 29(1)(b)
3	Email	6/9/02	Part	Includes same email (2)	Section 29(1)(b)
4	File note	6/9/02	Part	Includes some details of the allegations, that were given in confidence	Section 29(1)(b)
5	Email	6/9/02	Part	Includes same email (2)	Section 29(1)(b)
6	Email	25/9/02	Part	Includes some details of the allegations, that were given in confidence	Section 29(1)(b)
7	File note	16/9/02 & 24/9/02	Part	Includes some details of the allegations, that were given in confidence	Section 29(1)(b)
8	Letter	17/10/02	Part	The provision of the entire letter will provide you with details of ACC's investigative processes, thereby prejudicing the maintenance of law and detection etc of offences	Section 27(1)(c)
9	Email	25/10/02	Part	Includes some details of the allegations, that were given in confidence	Section 29(1)(b)
10	Email	30/10/02	Part	Includes some details of the allegation	Section 29(1)(b)
11	Email	1/11/02	Part	Includes same email (10)	Section 29(1)(b)
12	Report	31/10/02	Full	The report on the person who made the allegations includes some details of the allegations, that were given in confidence	Section 29(1)(b)
13	Letter	3/9/02	Full	Covering letter, enclosing the statement of the person making the allegation	Section 29(1)(b)
14	Memo	7/11/02	Part	The section dealing with the allegations has been deleted	Section 29(1)(b)

15	Report	5/11/02	Full	The report includes the findings of the forensic document examiner, and disclosure will you with details of ACC's investigative processes, thereby prejudicing the maintenance of law and detection etc of offences	Section 27(1)(c)
16	Letter & transcript of interview with person who made allegations	18/11/02	Full	The letter and transcript disclose details of the allegations given in confidence	Section 29(1)(b)
17	Activity report	23/1/03 to 27/1/03	Part	Names of the callers and the person who made the allegation are removed, as they were given in confidence	Section 29(1)(b)
18	Email	27/1/03	Part	Names of person making allegation has been removed, as it was given in confidence	Section 29(1)(b)
19	Legal opinion	3/12/02	Full	The legal advice is protected by legal professional privilege	Section 29(1)(f)
20	File note	Undated	Full	Written records of phone call given in confidence	Section 29(1)(b)
21	Activity report	30/10/02 to 4/4/03	Part	Written records of information provided in confidence deleted	Section 29(1)(b)

[25] In addition to these 21 documents, ACC did not disclose the correspondence between the Health and Disability Commissioner and the General Manager of ACC Healthwise, being the letters dated 30 October 2002 (Paterson to Rankin), and 25 November 2002 (Rankin to Paterson). The evidence given to the Tribunal was that after ACC had conducted a search of its files the letters could not be found. The documents do, however, exist and are in the common bundle of documents because Mr Geary has his own copies, having obtained them from the HDC under the Privacy Act.

[26] Further correspondence passed between Mr Geary and ACC regarding Mr Geary's belief that other relevant documentation had not been disclosed. It is not intended to detail that exchange.

The complaint to the Privacy Commissioner

[27] On 10 April 2006 Mr Geary lodged a complaint with the Privacy Commissioner.

[28] In a letter dated 29 November 2007 Mr Mike Flahive, Assistant Commissioner (Investigations) wrote to ACC setting out his preliminary view that ACC did not have a proper basis for its decision to withhold documents 8 and 15 in the schedule, being the letter of instruction dated 17 October 2002 from Ms Patterson to Ms Morell, the forensic document examination and handwriting expert and Ms Morell's report dated 5 November 2002. ACC had sought to withhold both documents under s 27(1)(c) of the Act (disclosure would prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial).

[29] ACC accepted this ruling and by letter dated 7 December 2007 the two documents were released to Mr Geary. In effect there is a concession that in relation to these two documents there has been an interference with the privacy of Mr Geary as defined in s 66(2) and (3) of the Privacy Act. ACC nevertheless denies that the failure to earlier produce the documents caused any damage to Mr Geary.

[30] In relation to the matter of the correspondence passing between the HDC and Dr Rankin, it was submitted by ACC that this issue was not within the jurisdiction of the

Tribunal as the Privacy Commissioner had not investigated the failure to disclose these two documents. We address this point later.

[31] The balance of the 19 documents listed in the schedule have been inspected by the Tribunal in the context of a closed hearing. The procedure followed is described next.

The closed hearing

[32] The Tribunal has had to devise a process to accommodate cases where the defendant agency cannot adequately explain the nature of the withheld information and its reasons for withholding that information without compromising the very matters that the agency submits warrant withholding the information from the plaintiff. The Tribunal needs to see the information at issue to form its own view whether the information ought to be disclosed. But the plaintiff cannot see the information unless and until the Tribunal decides that it ought to be disclosed.

[33] The procedure adopted by the Tribunal is to hold both open and closed hearings. A closed hearing is one in which it receives the closed evidence and the closed submissions in the absence of the party seeking access to the information.

[34] As early as the second teleconference Mr Hunt indicated that he would be seeking a closed hearing. In response the Chairperson by *Minute* issued on 14 August 2012 explained the open and closed hearing process. Consequently, in advance of the hearing, ACC filed and served an open brief of evidence for Mr KT Seymour who is responsible for the unit within ACC which processes requests for personal information under the Privacy Act. In 2005 he prepared the initial response to the Privacy Commissioner following the lodging of the complaint by Mr Geary under s 67 of the Privacy Act. When Mr Hunt opened the case for ACC on the morning of 4 October 2012 those submissions were received in open hearing. Thereafter, after Mr Seymour had been sworn, his evidence in chief as set out in his open brief was read and received in open hearing. However, once the hearing reached the point where it was necessary for the Tribunal to see the withheld information itself the hearing was closed to all except for Mr Hunt, Ms Grieve and Mr Seymour. In the closed hearing the Tribunal received the closed evidence of Mr Seymour together with a closed bundle of documents, being the information withheld from Mr Geary. During the closed hearing Mr Hunt expanded on his opening submissions with the advantage of now being able to address the closed documents without restriction. Once that process had been concluded the hearing returned to open format.

[35] At that point the Tribunal delivered an interim ruling on whether some or all of the closed evidence was to be disclosed to Mr Geary prior to Mr Beck cross-examining Mr Seymour.

The interim ruling given after the closed hearing

[36] The closed hearing commenced at 12.45pm on 4 September 2012 and concluded at 5pm that day.

[37] At 9.30am on 5 September 2012 the Tribunal gave an oral ruling that it had reached the preliminary view that none of the 19 withheld documents scheduled to the ACC letter dated 29 June 2005 were to be made available to Mr Geary. The Tribunal stressed, however, that this was a preliminary view only and that a final determination would only be possible once the Tribunal had heard all of the evidence of Mr Seymour (particularly his cross-examination) and the submissions of both counsel.

[38] The Tribunal's preliminary ruling also noted that during the closed hearing little if anything had been said about document 19, being the ACC legal opinion dated 3 December 2002. This was because Mr Hunt had properly recognised that the issues raised by this document could without difficulty be addressed in open hearing.

[39] The Tribunal was then asked by Mr Hunt to resume the closed hearing to receive submissions on a point raised by the Tribunal's decision in *Director of Human Rights Proceedings v Commissioner of Police* [2007] NZHRRT 22 (6 November 2007).

[40] The open hearing resumed at 10.05am on 4 September 2012 and the cross-examination of Mr Seymour commenced.

[41] As will be seen, after hearing all the evidence, the closing submissions of the parties and having had further opportunity to consider the evidence, the Tribunal has come to the view that with the exception of the legal opinion, all the withheld documents should have been disclosed to Mr Geary.

The open hearing

[42] It is not practical to provide a detailed summary of the evidence given by Mr Seymour in the open hearing. For present purposes only the following points are noted.

[43] Mr Seymour told the Tribunal:

> **[43.1]** At the time the ACC letter dated 29 June 2005 and its schedule were prepared it was the understanding of ACC that an agency intending to withhold personal information on more than one ground would be expected by the Privacy Commissioner to rely on only the strongest ground in contradistinction to multiple grounds of secondary importance. For this reason ACC had not in the schedule stated expressly that in addition to relying on s 29(1)(b) (evaluative material), it also relied on s 29(1)(a) of the Act (unwarranted disclosure of the affairs of another individual) to justify withholding information relating to EFG. Now that the matter was before the Tribunal it was Mr Seymour's evidence that ACC wished to rely on s 29(1)(a) in addition to the provisions cited in the schedule. He conceded under cross-examination by Mr Beck that the first occasion on which s 29(1)(a) had been raised by ACC was in the opening submissions for ACC on 4 September 2012 and in Mr Seymour's own evidence in chief.
>
> **[43.2]** As far as Mr Seymour could tell, the only scheduled documents which Mr Geary did not presently have were documents 7, 12, 13, 15, 16, 17, 18, 19, 20 and 21, Mr Geary having obtained the balance of the documents from other sources or because two had been disclosed following the preliminary ruling by the Privacy Commissioner.
>
> **[43.3]** In relation to the 2002 correspondence between the HDC and Dr Rankin, then General Manager of Healthwise, Mr Seymour explained that Healthwise had been a division of ACC responsible for monitoring the performance of providers and was closely associated with the Fraud Group. Ms Patterson was one of the fraud investigators. ACC had later been restructured and Mr Seymour was unaware of what had happened to the Healthwise files after that reorganisation. Asked whether there was any system for tracking where Healthwise files went to, Mr Seymour answered "No". Asked whether ACC files had disappeared, Mr Seymour said that ACC was a large organisation and its filing system was not as good as it should be.

[43.4] The only ACC employees who would know whether an undertaking of confidentiality had been given to EFG were Ms Colleen Davey, then an ACC Case Manager with the Sensitive Claims Unit (an email footer describes her as ACC Case Manager, Sensitive Claims Unit, PO Box 1426, Wellington) and Ms Sharon Patterson who was an Examining Officer who specialised in provider fraud and whose email footer at times described her as "Provider Investigations Manager, Risk & Assurance and Fraud, Christchurch". Ms Davey is no longer with the ACC and Ms Patterson has passed away.

[43.5] He was told by Ms Patterson that an undertaking had been given to EFG that the information she provided would be kept confidential.

[43.6] It was important for ACC, to preserve its ability to receive complaints against providers, that information provided to ACC was treated in confidence.

[44] A brief overview of the competing submissions for the parties follows.

The submissions for Mr Geary

[45] As to the non-disclosure by ACC of the correspondence between the Health and Disability Commissioner and Dr Rankin, Mr Beck submitted that it was difficult to accept the evidence given by Mr Seymour that the letters cannot now be found. The Tribunal should not readily accept that correspondence to and from a senior ACC executive had been lost. It did not appear that any enquiry with Dr Rankin had been made as to what might have happened to the letters. If it was correct that the documents were no longer in ACC records, there was a serious issue as to its record keeping.

[46] As to the letter of instruction from Ms Patterson to Ms Morrell and Ms Morrell's report, it had been conceded by ACC both to the Privacy Commissioner and to the Tribunal that the withholding of the documents could not be justified. It followed that in relation to these two documents, their late supply was an interference with Mr Geary's privacy in terms of s 66(2)(a)(i) of the Privacy Act.

[47] As to the belated reliance by ACC on s 29(1)(a), in determining whether there would be an unwarranted disclosure of the affairs of another, the interests of the individuals had to be weighed against each other. Here the disclosure of the information provided by EFG was not sought by an unrelated or third party, but by the very person with whom she was allegedly having an affair. For him to be able to request correction of the information provided by EFG, disclosure was necessarily required.

[48] As to s 29(1)(b), it must be shown that the document contained evaluative material, that disclosure would breach an express or implied promise made to the supplier, that the promise was one of confidentiality and that the evaluative material must have been provided in reliance on the promise. If any of these requirements was not satisfied in relation to each document, then that document could not legitimately be withheld.

[49] As to the document withheld under s 29(1)(f) (legal professional privilege), there had been a waiver of privilege when ACC disclosed to the Privacy Commissioner the essence of the nature of the advice given.

[50] In relation to Principle 6 Mr Geary seeks by way of remedy:

[50.1] A declaration that there has been an interference with his privacy.

[50.2] Damages of $5,000 for humiliation, loss of dignity and injury to feelings.

[50.3] Costs.

The submissions for ACC

[51] In relation to the correspondence between the Health and Disability Commissioner and Dr Rankin, two points are made:

> **[51.1]** No complaint concerning the withholding of the correspondence having been investigated by the Privacy Commissioner, there is no jurisdiction for the Tribunal to enquire into an allegation that Principle 6 had been breached in relation to these documents.
>
> **[51.2]** In any event, there was no withholding of the documents as ACC was unable to locate them.

[52] In relation to the Patterson-Morrell correspondence, being documents 8 and 15 in the schedule, ACC accepts it did not have grounds to withhold them. However, ACC denies that the failure to earlier produce the correspondence has caused any damage to Mr Geary.

[53] As to ACC's reliance on s 29(1)(a), the statement provided by EFG was provided pursuant to an express promise that the information would be kept confidential. That promise was made to EFG by Ms Patterson. Without it the information would not have been provided. As to the internal email of 6 September 2002 ("[EFG] has indicated that she is willing to have her written statement and name used in any action taken"), no action was taken at that time or at any later time. Having given a promise to keep the information confidential, ACC was not only obliged to withhold the information, but also to resist any attempt to obtain access to it. The information provided was of an intimate and personal nature while on the other hand Mr Geary was not the subject of any investigation by ACC or the subject of any adverse action in respect of which Mr Geary was required to defend himself and in respect of which this information might have been important.

[54] As to s 29(1)(b), the withheld documents were evaluative material. The information was relevant to an assessment whether Mr Geary should remain an ACC-approved counsellor. It was irrelevant that ACC's ultimate decision on 5 December 2002 to terminate his registration was not based on a determination regarding the information provided by EFG. At the time the information was received ACC was engaged in an evaluation and the information provided by EFG was relevant to that evaluation. The existence of the promise of confidentiality was a conclusive consideration in terms of the decision to withhold the information.

[55] In any event Mr Geary had not shown that any damage occurred as a result of the withholding of the documents. In addition, he had obtained copies of the withheld documents from other sources apart from the ten documents listed earlier, being documents 7, 12, 13, 15, 16, 17, 18, 19, 20 and 21.

[56] As to the document for which legal professional privilege had been claimed, disclosure of the gist of the legal opinion to the Privacy Commissioner was necessary for the purpose of demonstrating to the Commissioner that the document had been properly withheld under s 29(1)(f) and there had thereby been no waiver of the privilege. Disclosure to the Privacy Commissioner in response to Mr Geary's complaint was not inconsistent with the confidentiality which otherwise protected the opinion.

[57] We address first the jurisdiction point relating to the HDC – Rankin correspondence.

JURISDICTION – SECTIONS 82 AND 83 PRIVACY ACT 1993

[58] The effect of s 82 of the Privacy Act 1993 is that an aggrieved individual (ie a plaintiff) is required to establish that the defendant in any proceeding is a person in respect of whom an investigation has been conducted by the Privacy Commissioner under Part 8 of the Act in relation to any action alleged to be an interference with the privacy of the aggrieved individual. Similarly, before an aggrieved individual can bring proceedings before the Tribunal under s 83 the complaint must first have been considered by the Privacy Commissioner as a complaint. See *L v T* (1998) 5 HRNZ 30 (Morris J, A Knowles, GDS Taylor) at 35 and 36; *Steele v Department of Work and Income* [2002] NZHRRT 12; *DAS v Department of Child, Youth and Family Services* [2004] NZHRRT 45; *Lehmann v Radio Works* [2005] NZHRRT 20 and more recently *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10:

> **82 Proceedings before Human Rights Review Tribunal**
>
> (1) This section applies to any person—
> (a) in respect of whom an investigation has been conducted under this Part in relation to any action alleged to be an interference with the privacy of an individual; or
> (b) in respect of whom a complaint has been made in relation to any such action, where conciliation under section 74 has not resulted in a settlement.
>
> (2) Subject to subsection (3), civil proceedings before the Human Rights Review Tribunal shall lie at the suit of the Director of Human Rights Proceedings against any person to whom this section applies in respect of any action of that person that is an interference with the privacy of an individual.
>
> (3) ...
>
> **83 Aggrieved individual may bring proceedings before Human Rights Review Tribunal**
>
> Notwithstanding section 82(2), the aggrieved individual (if any) may himself or herself bring proceedings before the Human Rights Review Tribunal against a person to whom section 82 applies if the aggrieved individual wishes to do so, and—
> (a) the Commissioner or the Director of Human Rights Proceedings is of the opinion that the complaint does not have substance or that the matter ought not to be proceeded with; or
> (b) in a case where the Director of Human Rights Proceedings would be entitled to bring proceedings, the Director of Human Rights Proceedings—
> (i) agrees to the aggrieved individual bringing proceedings; or
> (ii) declines to take proceedings.

[59] To ensure clarity as to what "action alleged" has been investigated by the Privacy Commissioner, the Commissioner issues a Certificate of Investigation particularising the subject of the investigation. It is this certificate which sets the boundary of the Tribunal's jurisdiction. The certificate does not have any statutory basis and in that respect is informal and is capable of challenge. See in the analogous context of the Human Rights Act 1993 the recent decision in *Peters v Wellington Combined Shuttles Ltd (Application by Defendant that Jurisdiction be Declined)* [2013] NZHRRT 21 (28 May 2013).

[60] In the present case the Certificate of Investigation provided by the Privacy Commissioner states:

Certification of Investigation for Human Rights Review Tribunal

Complainant	**Ian Geary (Our Ref: C/09449)**
Respondent	**ACC**
Matters investigated	Mr Geary made a request in May 2005 for all the personal information ACC held about him. ACC responded on 29 June 2005, providing some information but withholding other information under sections 27(1)(c), 29(1)(b) and 29(1)(f) of the Act. Mr Geary made subsequent requests for specific information, which ACC refused under section 29(2)(c).

Principle(s) applied	Principle 6
Commissioner's opinion: • **application of principle(s)** • **adverse consequences** • **interference with privacy**	 Breach of principle 6 in respect of the decision to withhold some information; no breach in respect of the decision to withhold some other information n/a Yes in respect of the information withheld in breach of principle 6.

[61] The certificate is couched in broad terms. It shows that the "matter investigated" by the Privacy Commissioner was the request made by Mr Geary in May 2005 "for all of the personal information ACC held about him".

[62] Consistent with s 105 of the Human Rights Act (incorporated into the Privacy Act by s 89 of that Act), the certificate is not to be construed in a narrow or technical way.

> **105 Substantial merits**
>
> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
> (2) In exercising its powers and functions, the Tribunal must act—
> (a) in accordance with the principles of natural justice; and
> (b) in a manner that is fair and reasonable; and
> (c) according to equity and good conscience.

[63] It cannot have been intended that a plaintiff show that each particular document has been the subject of a specific investigation by the Privacy Commissioner. Indeed, at a practical level it would in most cases not be possible for a plaintiff to establish such. There is also the point that an investigation under Part 8 of the Act by the Privacy Commissioner is required by s 90 of the Act to be conducted in private. The proceedings are privileged (s 96). In addition, ss 94 and 95 make provision for the protection of witnesses and their privileges in relation to the giving of information to and the production of documents to the Commissioner. We accordingly reject the submission, implicit in the argument advanced by ACC, that Mr Geary must establish document by document, that each was the subject of an investigation by the Privacy Commissioner. It is sufficient to show that the Privacy Commissioner investigated an alleged breach of Principle 6 following a request by Mr Geary for access to personal information. All personal information requested fell within the ambit of that investigation and accordingly within the jurisdiction of the Tribunal.

[64] It should be added that it is not uncommon for the Tribunal to be told by an agency that, subsequent to the institution of proceedings before the Tribunal, the agency has discovered previously overlooked information. Such information has always been treated as being within the ambit of the proceedings then before the Tribunal. See recently *Rafiq v Commissioner of Police* [2012] NZHRRT 13 (23 May 2012) at [16] and [17]. The decision in *Waugh v New Zealand Association of Councillors Inc* [2005] NZHRRT 24 at [93] – [97] makes very much the same point. As that decision observes, any other interpretation would be pedantic. It would raise the prospect of multiple claims in the Tribunal arising out of essentially the same facts. So if in the present case the Tribunal concluded that it did not have power to deal with the correspondence passing between the HDC and Dr Rankin then presumably Mr Geary would simply ask the Privacy Commissioner to investigate the withholding of those two documents and thereafter bring the matter back to the Tribunal. We do not believe that such a result

would have been intended, particularly given the terms of s 105 of the Human Rights Act.

[65] We turn now to the primary issues relating to Principle 6.

DISCUSSION OF PRINCIPLE 6 ISSUES

Burden of proof

[66] To establish a breach of Principle 6, a plaintiff must show that:

> **[66.1]** He or she made an information privacy request; and
>
> **[66.2]** The agency to whom that request was addressed refused to make information available in response to that request or failed to respond to the request within the time fixed by s 40(1) of the Act.

[67] The Privacy Act creates a strong right to access personal information. The Long Title provides that the legislation is intended to "promote and protect" individual privacy in general accordance with the OECD *Guidelines Concerning the Protection of Privacy and Transborder Flows of Personal Data*. The Explanatory Memorandum appended to those *Guidelines* notes that:

> The right of individuals to access and challenge personal data is generally regarded as perhaps the most important privacy protection safeguard.

Where (as here) the personal information is held by a public sector agency the entitlements conferred on the requester by Principle 6(1) are by virtue of s 11(1) legal rights which are enforceable in a court of law.

[68] The fundamental right of an individual to access personal information held by a public sector agency is reinforced and underlined by:

> **[68.1]** First, s 44 which stipulates that when an information privacy request made by an individual is refused, it is mandatory for the agency to give to the individual (inter alia) the reason for the refusal and for the agency to notify the individual of his or her right, by way of complaint to the Privacy Commissioner, to seek an investigation and review of the refusal.
>
> **[68.2]** Second, s 30 which further provides that, subject to limited exceptions which are not here relevant, no reason other than one or more of the reasons listed in ss 27, 28 and 29 justifies a refusal to disclose information requested pursuant to Principle 6.

[69] Where an agency relies on any of the withholding grounds in ss 27 to 29 of the Act, the agency has the onus of proving the exception. See s 87:

> **87 Proof of exceptions**
>
> Where, by any provision of the information privacy principles or of this Act or of a code of practice issued under section 46 or section 63, conduct is excepted from conduct that is an interference with the privacy of an individual, the onus of proving the exception in any proceedings under this Part lies upon the defendant.

[70] While Mr Geary must satisfy the Tribunal, on the balance of probabilities, that any action of ACC is an interference with his privacy (s 85(1)), it is for ACC to establish, on the balance of probabilities, that the provisions of s 29 on which it relies do indeed apply.

[71] The order in which we now address the issues is as follows:

> **[71.1]** Section 29(1)(a) – unwarranted disclosure of the affairs of another.
>
> **[71.2]** Section 29(1)(b) – evaluative material plus promise of confidentiality.
>
> **[71.3]** Section 29(1)(f) – legal professional privilege.
>
> **[71.4]** Section 29(2)(b) – information cannot be found.
>
> **[71.5]** The initial withholding of the Patterson-Morrell correspondence.

Section 29(1)(a) – the point in time when a proper basis for refusing to make information available must exist

[72] It is to be recalled that s 29(1)(a) was not relied on by ACC in its reasons for withholding the requested information nor was it pleaded by ACC in its statements of reply dated 2 March 2012 and 18 June 2012. It was first raised when Mr Hunt opened the case for ACC on the second day of the hearing before the Tribunal. The question which arises is whether the point has been raised too late.

[73] Where an information privacy request is made, the obligation of the agency is to decide within 20 working days "whether the request is to be granted" and to give or post to the individual "notice of the decision on the request". See s 40(1):

> **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.
>
> (2) Where any charge is imposed, the agency may require the whole or part of the charge to be paid in advance.
>
> (3) Where an information privacy request is made or transferred to a department, the decision on that request shall be made by the chief executive of that department or an officer or employee of that department authorised by that chief executive, unless that request is transferred in accordance with section 39 to another agency.
>
> (4) Nothing in subsection (3) prevents the chief executive of a department or any officer or employee of a department from consulting a Minister or any other person in relation to the decision that the chief executive or officer or employee proposes to make on any information privacy request made or transferred to the department in accordance with this Act.

[74] It follows that the relevant date on which the agency must have good reason for refusing access to personal information is the date on which the decision is made whether the request is to be granted.

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

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.

[76] Unless in relation to an information privacy request an interference with the privacy of an individual is established, the Tribunal has no jurisdiction to grant a remedy. See s 85.

[77] In the present case the evidence given by ACC was first, at the time it refused to disclose the information requested by Mr Geary it believed (inter alia) that the disclosure of the information would involve the unwarranted disclosure of the affairs of EFG; and second, following the process which at that time had been recommended by the Privacy Commissioner, it did not offer s 29(1)(a) as one of the reasons for refusing to disclose the information. There is no reason to doubt this evidence and it follows that ACC is entitled to rely on s 29(1)(a). The Tribunal, in turn, is required to determine whether ACC has established on the balance of probabilities that the refusal to make the information available was a refusal properly made within the terms of s 29(1)(a).

Section 29(1)(a) – analysis

[78] Section 29(1)(a) provides:

(1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
(a) the disclosure of the information would involve the unwarranted disclosure of the affairs of another individual or of a deceased individual;

[79] This withholding provision has two requirements. First, that the disclosure of the information would disclose the affairs of another person and second, that such disclosure would be unwarranted.

[80] It has been correctly said that particular weight needs to be given to the word "unwarranted". This, together with the use of the phrase "the affairs of another individual" rather than "privacy" appears to narrow the scope of this provision. See Taylor and Roth *Access to Information* (LexisNexis, Wellington, 2011) at [3.5.4].

[81] The term "unwarranted" requires the Principle 6 right of access held by the requester to be weighed against the competing interest recognised in s 29(1)(a). As to how the balance is to be struck and a determination made whether disclosure of the information would involve the "unwarranted disclosure" of the affairs of another individual will depend on the circumstances. See *Director of Human Rights Proceedings v Commissioner of Police* [2007] NZHRRT 22 at [63]. In that decision the Tribunal made reference to some of the considerations which may be relevant when weighing the competing interests.

[82] Our reasons for deciding that ACC has not proved the s 29(1)(a) exception follow.

[83] First, the legal right of access to personal information conferred by Principle 6 and s 11 of the Act is, as mentioned, a strong right. This right is a necessary precondition to the exercise of the entitlement in Principle 7 to request the correction of personal information. In the present case the information provided by EFG was highly prejudicial and substantially contributed to a view within ACC that Mr Geary's registration as a recognised ACC-counsellor was to be terminated. While that termination was eventually based on his failure to meet the requirements of the Accident Insurance (Counsellor) Regulations, the motivation for finding a means of termination was driven, to a substantial degree, by the content of the EFG statement. It was important, therefore, that when some 2.5 years after the ACC termination letter Mr Geary sought access to personal information, he be given the opportunity to know what had been said about him and to request correction of that information or to request that there be attached to it a statement of the correction sought but not made. This, in turn, would assist ACC to discharge its duty under Principle 8 not to use the information without taking reasonable steps to ensure that, having regard to the purpose for which the information was proposed to be used, the information was accurate, up to date, complete, relevant, and not misleading. Given that ACC or its employees were involved as witnesses in disciplinary proceedings brought against Mr Geary as late as 2009, there were compelling reasons in favour of disclosure of the withheld information.

[84] Second, ACC claims that the information was received from EFG in confidence. For reasons we expand upon in the context of s 29(1)(b), we do not accept that to have been established on the evidence. To the contrary, the ACC file clearly records that EFG was willing to have her written statement and name used in any action taken. There is no evidence that this broad authority is to be read down (as now submitted by ACC) and confined literally to taking action against Mr Geary. In any event, even in that narrow sense action was taken against Mr Geary by ACC in that the information provided by EFG clearly contributed to the process which led to his termination. The broad terms of the file note do not suggest EFG meant action in the form of prosecution, disciplinary proceeding or similar. Indeed it is not even clear that the term "action" was a term used by EFG.

[85] Third, EFG was not called as a witness by ACC to support the "unwarranted interference" claim, nor was any secondary form of evidence from her produced to support the claim. Contrast *Director of Human Rights Proceedings v Commissioner of Police* at [36] to [41].

[86] Fourth, the request by Mr Geary was made 2.5 years after the information had been provided by EFG. After such a long elapse of time the case for withholding under s 29(1)(a), if there ever was one, had become considerably weak.

[87] Fifth, there is no evidence whatsoever that harm of any kind would have resulted to EFG had disclosure been made to Mr Geary in June 2005. Contrast *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10 at [37.2]. On the other hand, the prejudice to Mr Geary was considerable. He could not request correction of the information at a point when disciplinary proceedings were being taken against him, proceedings in which one or more ACC officers were witnesses.

[88] Overall, when weighing the competing interests, the interests of Mr Geary decisively outweigh those of EFG. It follows that we conclude that ACC has failed, by a significant margin, to demonstrate that as at June 2005 the refusal to disclose information to Mr Geary was justified on the ground that disclosure would involve the unwarranted affairs of another individual, namely EFG. It was suggested that the withholding ground had also been established as at the date of hearing before the Tribunal. Our finding is that the ACC case for withholding has weakened, not improved over the years and in any case, the relevant date is the date of refusal, being 29 June 2005.

[89] We turn now to ACC's reliance on s 29(1)(b).

Section 29(1)(b) – analysis

[90] Section 29(1)(b) provides:

> **29 Other reasons for refusal of requests**
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
> (a) …
> (b) the disclosure of the information or of information identifying the person who supplied it, being evaluative material, would breach an express or implied promise—
> (i) which was made to the person who supplied the information; and
> (ii) which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence; or
> …
>
> (2) …
>
> (3) For the purposes of subsection (1)(b), the term *evaluative material* means evaluative or opinion material compiled solely—
> (a) for the purpose of determining the suitability, eligibility, or qualifications of the individual to whom the material relates—
> (i) for employment or for appointment to office; or
> (ii) for promotion in employment or office or for continuance in employment or office; or
> (iii) for removal from employment or office; or
> (iv) for the awarding of contracts, awards, scholarships, honours, or other benefits; or
> (b) for the purpose of determining whether any contract, award, scholarship, honour, or benefit should be continued, modified, or cancelled; or
> (c) for the purpose of deciding whether to insure any individual or property or to continue or renew the insurance of any individual or property.
>
> (4) …

[91] The potential complexities of s 29(1)(b) are illustrated by the flowcharts set out in Taylor and Gorman *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at [9.68] and in Taylor and Roth *Access to Information* at [3.7.3] ("Taylor and Gorman" and "Taylor and Roth" respectively).

[92] Leaving aside, however, the question whether the withheld information was "evaluative material" the primary issue on the facts is whether an express or implied promise was made to the person who supplied the information and which was to the effect that the information or the identity of the person who supplied it or both would be held in confidence.

[93] ACC says such express or implied promise was made to EFG. We do not accept, however, that this contention is established by the evidence and it is to the evidence that we now turn.

[94] The evidence relied on by ACC was that of Mr Seymour coupled with the documentary evidence in the common bundle of documents. That evidence is silent as to who within ACC dealt with EFG at the critical point in time, being the point at which EFG provided the information in the form of her apparently undated written statement. To confuse matters even further it is possible that the statement was provided not by EFG in person but via a counsellor at Presbyterian Support by letter dated 3 September 2002. Furthermore, in a memorandum dated 7 November 2002 Ms Patterson describes the statement as "self-initiated". More importantly, the evidence is silent as to what (if anything) was said to EFG when the information was supplied to ACC. The Act requires the promise of confidence to be made prior to or at the time of the supply. See *Westwood v University of Auckland* (1997) 4 HRNZ 107 at 114 (CRT) and also Taylor and Gorman at [9.71] and Taylor and Roth at [3.7.6]:

> The provision speaks of an express or implied promise. While an express promise is easy enough to understand, what may qualify as an implied promise has posed repeated problems for the Ombudsmen. The word is "promise" not expectation or habit, and the Ombudsmen looked for something which induced the supplying of information and went beyond past habits which may have lead to expectations at least so far as information supplied after the Acts came into operation is concerned. Thus, the promise must pre-date the supply. Nor would the Ombudsman find an implied promise on the basis of the supplier's statement that he would not have supplied the information if he thought it could be disclosed to the subject or if the provider of the opinion is an employee or contractor where this is part of the job. It follows that unsolicited information is not generally protected on this ground. [footnote citations omitted]

[95] It must also be shown that the promise of confidentiality was relied on when the information was provided.

[96] The documentary evidence suggests that it was ACC officer Colleen Davey who "dealt" with EFG. There is an internal email dated 5 September 2002 (common bundle Vol 1 pp 10 and 11) from an officer called Gail Kettle in which she reported:

> …
>
> Colleen Davey, Case Manager, has received a written complaint from a claimant that alleges that she had an "affair" with Ian Geary in the early 1980s (she was not an ACC claimant at that time).
>
> She also claims he gave her marijuana.
>
> When she lodged the ACC claim this year, the new counsellor advised ACC that "legal proceedings are pending, with other clients also laying charges.

[97] By internal email dated 6 September 2002 Ms Davey responded to Ms Kettle (common bundle Vol 1 p 10) in the following terms:

> I agree to being the contact person in SCU for this matter – just let me know if you need anything to be followed up – the claimant has indicated that she is willing to have her written statement and name used in any action taken.

[98] The context is strongly suggestive of Ms Davey being the ACC officer with whom EFG "dealt" initially. There is no evidence that ACC officer Patterson spoke with or otherwise communicated with EFG at this all important point in time.

[99] Of the two persons within ACC potentially involved with EFG, Ms Patterson is deceased and Ms Davey is no longer with ACC. The Tribunal was not told whether efforts had been made to call Ms Davey or EFG as witnesses. In the result, the only evidence before the Tribunal as to any express or implied promise to EFG is the documentary evidence (and such inferences as can be drawn from it) and the evidence of Mr Seymour. We now address that evidence.

[100] In support of his belief that the information received from EFG was to be treated in confidence by ACC Mr Seymour said that he had been told by Ms Patterson that an undertaking had been given to EFG that the information she provided would be kept confidential. It is not known when this undertaking was given or by whom it was given. He conceded there are no notations on the file recording such undertaking or recording an assurance of confidentiality.

[101] Mr Seymour also pointed to the stamped endorsement "Private & Confidential" which appears on the first page of the four page statement by EFG. However, he had no personal knowledge of the circumstances in which, or the time at which that stamp was placed on the page. He also referred to a handwritten memo from Ms Patterson dated 7 June 2005 addressed to a Mr Paul Miller which read:

> Hi Paul,
>
> File from archives.
>
> You will see some initial information from Ministerials.
>
> Please treat informant/witness information, as marked, as confidential.
>
> Please return file to me when you have finished with it.

It is not clear from this note what Ms Patterson is referring to when she speaks of "informant/witness information" nor is it clear whether the "treat as confidential" was an internal decision by her or ACC compared with the carrying out of an assurance of confidentiality given to whoever the unidentified "informant/witness" was.

[102] Mr Seymour also referred to a handwritten slip of paper signed by Ms Patterson that reads:

> Send please to Paul Millar … Mark as confidential.

and he produced as an exhibit a cover sheet marked

> Not for disclosure. All confidential [illegible] – informants.

which appears to relate to a file held by Ms Patterson.

[103] The reference to the plural "informants" means that there must be real doubt as to what the intended reference was. More fundamentally the endorsements referred to by Mr Seymour leave unanswered the question whether EFG was given an assurance of confidentiality. The most likely scenario is that she was not. There are three reasons. First, if a promise of confidence or undertaking had been given to EFG, it is to be expected that such would have been recorded on the ACC file. That no such record appears is surprising, to say the least and is consistent with the absence of such promise or undertaking. Second, the principal author of the "confidential" endorsements appears to have been Ms Patterson. She was not the case officer for EFG and the contact between EFG and ACC appears to have been Ms Colleen Davey. Third, the email from Ms Davey dated 6 September 2002 expressly contra-indicates any assurance of confidentiality:

> … the claimant has indicated that she is willing to have her written statement and name used in any action taken.

Colleen Davey was not called by ACC as a witness.

[104] Mr Seymour's attention was drawn to the email from Colleen Davey dated 6 September 2002 which (inter alia) states:

> … the claimant has indicated that she is willing to have her written statement and name used in any action taken.

He was asked why this document had been withheld from Mr Geary. Mr Seymour said that it was because there was an agreement with EFG to keep her complaint confidential. This assertion is at odds with the express language of the email and at odds with the fact that nowhere on the file is any assurance or undertaking of confidentiality to be found. There are only the subsequent assertions by Ms Patterson (not Colleen Davey) that certain information was to be kept confidential. There is nothing to show that Ms Patterson's assertions were based on assurances given to EFG as opposed to Ms Patterson's own subjective view that the information was to be kept confidential, especially from Mr Geary, about whom she had fixed views, including a belief (not supported by expert evidence) that he had falsified clinical notes. There is no evidence to show that any assurance of confidentiality was given to EFG at the time she provided ACC with her written statement or that the statement was provided in circumstances of an implied assurance of confidentiality. As to the statement itself, the circumstances in which the notation "Private & Confidential" came to be stamped on the first page are not known. Nor is it known whether it was placed at a date subsequent to the making of the document by EFG.

[105] We conclude that ACC has failed, by a significant margin, to demonstrate that the terms of s 29(1)(b) have been satisfied. Having re-examined all of the documents withheld under s 29(1)(b) we are of the view that none have been established to have been supplied under an express or implied promise to the effect that the information or the identity of the person who supplied it or both would be held in confidence.

[106] It is therefore strictly unnecessary to consider whether the information was evaluative material. We note, however, that an Activity Report apparently made by Ms Patterson on 2 October 2002 shows that even she was puzzled as to the purpose of the written statement provided by EFG. In a note recorded on this Report she refers to a telephone call from Karen Walsh, Timaru ACC:

> Rec call from Kay Walshe. [EFG] concerned that no-one has contacted her – explain confusion regarding the memo – complaint or otherwise??

In this regard it is to be recalled that the statement by EFG is on stationery with the logo "ACC Memorandum".

[107] Given that so little is known of the circumstances in which the statement by EFG was made and further given that even Ms Patterson recorded "confusion … complaint or otherwise??", we are unpersuaded that the "compiled solely" requirement of the term "evaluative material" has been met. The Act does not allow mixed purposes. See Taylor and Gorman at [9.68] and Taylor and Roth at [3.7.3]:

> The provision makes it clear that it applies only to the listed purposes – "compiled solely". There is no allowance for mixed purposes, even if the different purpose or purposes are of only minor importance. In determining a sole purpose of compilation, the first point to be looked at would normally be the time of seeking and receiving the information. If there is no direct temporal connection with the determinations listed, then it would be difficult to find that the information was compiled solely for that purpose. Other factors bearing on assessment include the nature of the file on which the information was placed. It should, however, be noted that attention is directed at compilation not holding.

[108] There is also the point that a distinction is to be drawn between fact on the one hand and evaluative or opinion material on the other. In the present case the statement by EFG is entirely factual. It contains no evaluative or opinion material. See further Taylor and Gorman at [9.69] and Taylor and Roth at [3.7.4]:

> The definition limits the material to "evaluative or opinion" material. "Evaluative" is the adjective which relates to the verbs to appraise or assess. "Opinion" is considered to be used in this provision in contradistinction to "fact". Thus, where it is the information and not the identity of its supplier which is sought to be withheld, parts of the material which are not assessing the subject or expressing opinion, but rather stating the facts on which assessment or opinion is based will not be protected. This meets proper policy objectives, for it is often the repetition of incorrect facts which doom, for example, a person's application for employment. It also dove tails with the right to correction of information contained in s 26 of the OIA and s 25 of the LGOIMA, and Information Privacy Principle 7. So far as identity of supplier is concerned, if part of the information supplied is evaluative or opinion material then the paragraph will apply. [footnote citations omitted]

[109] We turn now to ACC's reliance on s 29(1)(f).

Section 29(1)(f) – analysis

[110] Section 29(1)(f) provides:

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

[111] In *Rafiq v Civil Aviation Authority of New Zealand* [2013] NZHRRT 10 (8 April 2013) the Tribunal held at [41] to [43] that s 54(1) of the Evidence Act 2006 is to be treated as an appropriate definition of the term "legal professional privilege" in s 29(1)(f) of the Privacy Act. In *Hart v Bankfield Farm Ltd* HC Timaru CIV-2008-476-72, 21 May 2008, (2008) 9 NZCPR 685 at [45] French J emphasised that by protecting communications made for the purpose of obtaining professional legal **services**, s 54 has a wider scope than would have been the case if the protection was granted only for communications made for the purpose of obtaining legal **advice**. The privilege extends to documents prepared for the purpose of obtaining legal **services**: *Simunovich Fisheries Ltd v Television New Zealand Ltd* [2008] NZCA 350 at [159] – [160] and *R v Huang* HC Auckland, CRI 2005-004-21953, 19 September 2007, Rodney Hansen J at [53] – [57].

[112] In the present case we accept that schedule document 19 is protected from disclosure by legal professional privilege.

[113] The real issue is whether that privilege was waived when ACC wrote to the Privacy Commissioner on 29 June 2006 in response to Mr Geary's complaint that ACC had improperly withheld information from him. In this letter ACC advised the Commissioner that:

> The matter was referred to ACC's Fraud Unit for investigation. A number of concerns were identified about Mr Geary's behaviour and relationships with some of the claimants he counselled, as well as possible billing inaccuracies. It also became apparent that Mr Geary did not belong to any of the professional bodies that were a requirement for ACC approved treatment provider status. The investigation raised some serious concerns about the harm Mr Geary may be causing to the claimants he was counselling. Because of the serious nature of the concerns ACC sought advice from its legal services regarding removal of Mr Geary's registration to provide ACC funded counselling.
>
> ACC's legal advisors recommended that ACC should not terminate Mr Geary's registration upon the basis of the complaints of impropriety against him. The reason being, there was insufficient evidence without obtaining full evidence of the complainants or their authority to complain in their names. ACC took the view that vulnerable claimants could be protected from the risk of improper counselling from Mr Geary without causing them additional stress.
>
> Mr Geary did not have membership with any of the six professional bodies mentioned in regulation 6 of the Accident Insurance Regulations 1999. On that basis, ACC wrote to Mr Geary on 5 December 2002 to advise him that he no longer met the criteria to remain registered with ACC as a recognised counsellor …

[114] There is no doubt that the gist or essence of the legal advice received by ACC was disclosed to the Privacy Commissioner.

[115] Waiver of privilege can occur expressly or impliedly. What constitutes a "waiver" is defined generally in s 65(2) of the Evidence Act:

> **65 Waiver**
>
> (1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.
> (2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.
> (3) A person who has a privilege waives the privilege if the person—
> (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
> (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.
> (4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.
> (5) A privilege conferred by section 57 (which relates to settlement negotiations or mediation) may be waived only by all the persons who have that privilege.

[116] Here there was a voluntary disclosure of a significant part of the privileged communication but the question is whether this occurred in circumstances inconsistent with a claim of **confidentiality**. As Asher J noted in *Body Corporate 191561 v Argent House Ltd* (2008) 19 PRNZ 500 at [18], that is a different consideration to whether disclosure is inconsistent with the claim of **privilege**.

[117] The purpose of the disclosure was, as mentioned, to answer the allegation made by Mr Geary that information had been improperly withheld. It would make little sense that by presenting a full argument to the Privacy Commissioner in support of a decision to withhold a document under s 29(1)(f), an agency thereby risks losing the claim of

confidentiality. It would also be inconsistent with those provisions of the Privacy Act which stipulate that every investigation of the Commissioner is to be conducted in private (s 90), which protect the privileges of witnesses (s 94), which preserve the secrecy or non-disclosure duties of any person (s 95) and which stipulate that neither the Commissioner nor any person engaged in connection with the work of the Commissioner can be required to give evidence of anything coming to his or her knowledge in the exercise of his or her functions (ss 96 and 116). These provisions are reinforced by s 55(e) which states that nothing in Principle 6 or Principle 7 applies in respect of information contained in any correspondence or communication that has taken place between the office of the Commissioner and any agency and that relates to any investigation conducted by the Commissioner other than information that came into existence before the commencement of that investigation.

[118] It is our view that waiver may occur for one purpose and not another. That is, there may be a waiver for the purpose of making submissions to the Commissioner without waiving the privilege or confidentiality for all purposes. See Mathieson (ed) *Cross on Evidence* (9th ed, LexisNexis, Wellington, 2013) at [EVA 65.6]:

> **EVA65.6 What is the waiver in respect of? Can you waive for some purposes and not others?**
>
> The Act does not answer these questions at all. Logically it ought to follow that the waiver only applies to the actually disclosed information, and for the sole purpose of the relevant disclosure only.
>
> In relation to the materials that the waiver might extend to, however, the use of the term "significant part" in s 65(2) may suggest otherwise. That term could, however, simply be an indication that there is a threshold of disclosure that must be met before a waiver can be held to have occurred in whatever material is disclosed.
>
> Regardless, if the Act does not provide an answer to these questions the solution will need to be found in ss 10(c) and 12, and the common law.
>
> At common law, an express waiver can be for limited purposes. Indeed it is in the overall interests of justice that this be so. If this occurs, privilege is then maintained for all but those purposes. In this situation, the privilege in the document is not lost, and the status of the document as such ought to determine the way a Court approaches any application for orders to restrain unauthorised use, or to return the documents to their owner. [footnote citations omitted]

[119] Our conclusion on the evidence is that the circumstances surrounding the disclosure of the legal opinion dated 3 December 2002 did not occur in circumstances inconsistent with a claim to confidentiality. We therefore uphold the refusal by ACC to disclose the document.

[120] However, this is the only document in the schedule in relation to which ACC has successfully established lawful justification for its refusal to make disclosure to Mr Geary.

[121] We turn now to the reliance by ACC on s 29(2)(b).

Section 29(2)(b) – analysis

[122] Section 29(2)(b) provides:

> (2) An agency may refuse a request made pursuant to principle 6 if—
>
> …
>
> (b) the information requested does not exist or cannot be found; or

[123] This withholding ground has been advanced in relation to the correspondence between the Health and Disability Commissioner and Dr Rankin. It was said by Mr Seymour that the information could not be found. His evidence in chief was remarkably bland. See for example para 15(a) of his open brief of evidence:

> … I do not know how Mr Geary obtained this letter but ACC has conducted a search of its files and cannot find a copy of the letter. ACC cannot disclose a document that it does not have in its possession.

[124] It is surprising, to say the least, that ACC claims not to have in its possession correspondence passing between a second tier manager and the Health and Disability Commissioner. It is even more surprising that Mr Seymour should reveal in cross-examination that it is not known what happened to the Healthwise file after the internal ACC re-organisation in 2005, that there is no tracking system to identify where Healthwise files were sent and that ACC's filing is "not as good as it should be".

[125] Evidence as to the efforts made by ACC to find the documents (copies of which had been obtained by Mr Geary from other agencies and then provided to ACC) was less than fulsome. Ordinarily an agency relying on the "cannot be found" ground in s 29(2)(b) must show that reasonable attempts have been made to find the information. If that were not the case, then as pointed out in *Mitchell v Police Commissioner* [1995] NZAR 274 (CRT) at 286:

> … an agency making no attempt to find information, or only a desultory attempt, would be justified in refusing a request, and the object of the legislation thwarted.

[126] The search must not only be a reasonable one but also thorough, intelligent rather than mechanical.

[127] In the present case we have hesitated before concluding, by a narrow margin, that the search by ACC for the missing file can be presumed to have been a thorough one. Although we have doubt, in the end we conclude that the evidence satisfies the balance of probability standard given the assertion by Mr Seymour that ACC has conducted a search of its files and that files relating to Healthwise are in disarray.

[128] Our finding that ACC was not in breach of Principle 6 by reason of not being able to find the two relevant documents is not to be read as an exoneration of ACC. The inability to track the files of Healthwise and the admission by its Chief Advisor of Customer Relations that its filing system is "not as good as it should be" ought to be of concern to senior management given ACC's statutory responsibilities under the Accident Corporation Act 2001 and its responsibilities under the Privacy Act.

[129] The final matter to address under s 29(2)(b) is the letter dated 3 September 2002 from EFG to the Health and Disability Commissioner. This document was produced by Mr Geary. Mr Seymour says that this letter cannot be found in the records kept by ACC. As the letter is not addressed to ACC and as Mr Seymour says it cannot be found by ACC, we find that the withholding ground of "cannot be found" in s 29(2)(b) has been made out to the probability standard.

[130] We turn now to the last issue.

The initial withholding of the Patterson – Morrell correspondence

[131] It is conceded by ACC that these two documents were withheld without proper grounds. It follows that their late supply was an interference with Mr Geary's privacy in terms of s 66(2)(a)(i) of the Act. We address later the question of damages.

Summary of conclusions in relation to Principle 6

[132] Our conclusions are:

> **[132.1]** With the exception of documents 8 and 15 (Patterson-Morrell) and 19 (legal professional privilege), all documents listed in the schedule to the ACC letter dated 29 June 2005 and in relation to which ACC refused disclosure pursuant to s 29(1)(a) and s 29(1)(b) of the Privacy Act, ACC has failed to establish on the balance of probabilities that its refusal was in terms of these two provisions. As there was no proper basis for that refusal there has been an interference with the privacy of Mr Geary as defined in s 66(2).
>
> **[132.2]** Documents 8 and 15 (the instructions dated 17 October 2002 from Ms Patterson to Ms Morrell and Ms Morrell's report of 5 November 2002) are conceded by ACC to have been unjustifiably withheld from Mr Geary. They were requested on 13 May 2005 but not provided until 17 December 2007. This was well outside the 20 working day period allowed by s 40(1) of the Act and there was a deemed refusal to make the information available. In relation to these two documents there has been an interference with the privacy of Mr Geary as defined in s 66(2).
>
> **[132.3]** In relation to document 19 (the legal opinion), ACC has established, to the probability standard, that this document is protected by legal professional privilege and was therefore properly withheld under s 29(1)(f).
>
> **[132.4]** The correspondence passing between the Health and Disability Commissioner and Dr Rankin cannot be found, nor can the letter dated 3 September 2002 from EFG to the Health and Disability Commissioner. Section 29(2)(b) applies to all three documents and ACC properly refused the request made for these documents.

Remedy – submissions by ACC

[133] For ACC it was submitted (inter alia):

> **[133.1]** As Mr Geary obtained copies of schedule documents 1, 2, 3, 4, 5, 6, 9, 10, 11 and 14 from other agencies (including the Health and Disability Commissioner and the Psychologists Board) a remedy should be denied in relation to these documents.
>
> **[133.2]** As to documents 8 and 15 (the Patterson-Morrell correspondence), no damage or harm was caused by the unjustified refusal to provide these two documents. Any breach of Principle 6 was technical.
>
> **[133.3]** Mr Geary has not shown that damage occurred as a result of the withholding of the documents, having regard to the content of them and the date of Mr Geary's request for disclosure (13 May 2005). In particular, Mr Geary did not lose his accreditation as an ACC registered counsellor, nor was he subject to disciplinary action as a result of this information. Nor was he unable to defend

himself given that the loss of his accreditation as an ACC registered counsellor was not a result of allegations made against him, but because he was not a member of any of the professional bodies mentioned in the relevant Regulations.

Remedy – discussion

[134] In our view ACC cannot so easily dismiss its responsibilities under the Privacy Act.

[135] First, it is unrealistic to advance a submission that Mr Geary lost his accreditation as an ACC registered counsellor not because of the undisclosed allegations made by EFG (and the related documents) but because he was not a member of any of the relevant professional bodies. That may have been how the decision was ultimately articulated and justified, but the evidence unequivocally shows that the entire process to get him "off [the ACC] books" (file note 6 September 2002) was driven by the allegations of improper conduct made by EFG and others. This was made clear by Dr Rankin in his letter to the Health and Disability Commissioner on 25 November 2002, just days before the legal opinion of 3 December 2002 suggested a way of sidestepping a process which would give Mr Geary an opportunity to be heard in relation to the allegations made against him. Dr Rankin's letter reflects the motivation behind ACC's search for a path with the least legal complications:

> The Fraud Unit examined a number of letters from Mr Geary to [EFG] clearly indicating that Mr Geary was intent in pursuing a relationship even after [EFG] had moved out of the country to avoid contact with him.
>
> The investigator was also able to uncover several pregnancies attributable to Mr Geary from other claimants who wished to remain anonymous. These pregnancies appeared to have occurred after Mr Geary was registered with the Psychologists Board.
>
> On the basis of these observations the Corporation has now removed Mr Geary from any register of approved counsellors.
>
> I find it frustrating that the Psychologists Board have chosen not to investigate the clinical practice of Mr Geary as our investigations clearly indicate that his aberrant behaviour has continued since 1983.
>
> I thank you for your letter and hope that our actions limit the damage that this provider can perpetrate in New Zealand.

[136] Second, termination of Mr Geary's accreditation clearly impacted on him both in terms of his practice and in terms of his professional reputation. He was also at the time of his Privacy Act request involved in disciplinary proceedings before the Psychologists Board and further disciplinary proceedings followed, the latter resulting in a decision by the Health Practitioners Disciplinary Tribunal on 21 December 2009 that Mr Geary was guilty of professional misconduct and that his registration as a psychologist was to be cancelled. Mr Geary had a clear interest in knowing what personal information was held by ACC and in being able to request correction of that information or to request attachment to it of the correction sought but not made.

[137] In this context we return to the central importance of the right of access to personal information. As emphasised in the Long Title to the Privacy Act, the Act is as much about ensuring timely access by individuals to information relating to them as it is about authorising the collection, use and disclosure by public and private sector agencies of such information. A request by an individual for access to personal information is not to be responded to defensively, as if the request were the opening move in a game of chess. Access to the information must be given promptly and

fulsomely unless withholding is expressly permitted by the Act. The grounds on which an agency may refuse to disclose information are strictly circumscribed by ss 27, 28 and 29 of the Privacy Act. Section 30 emphasises that no reasons other than one or more of the reasons set out in these sections justifies a refusal to disclose any information requested pursuant to Principle 6.

[138] Where the same personal information is held by two or more agencies, the fact that an individual has been given access to that personal information by one agency does not in any way affect the legal duty on the second agency to similarly give access to the information. The requester is entitled to know what personal information is held by **each** agency. The requester has no other means of knowing what the second agency holds or the context in which that personal information is held. The right to request correction of personal information is thereby compromised. Access to personal information under Principle 6 is clearly intended to be a simple, straightforward exercise for both the individual and the agency. An agency cannot defend its own default by relying on the fact that the requester has been able to secure by patch-work application the release of common personal information held by the other agency. It follows that we see no merit at all in the submission that as Mr Geary had been able to get some of the withheld documents from other agencies, this somehow mitigates the default by ACC. The point which is missed by the ACC submission is that ACC had an independent statutory duty to provide to Mr Geary his personal information as held by ACC. He was entitled to request correction of **that** information in the context it was held by **that** agency.

[139] Third, the Tribunal is required by s 85(4) to take into account the conduct of the defendant in deciding what, if any, remedy to grant. Here ACC unsuccessfully relied on the withholding grounds in s 29. However, an analysis of the documents held by ACC shows that the preconditions to the operation of s 29(1)(a) and 29(1)(b) were absent. There appeared to be a reflexive response that because EFG was an "informant" her interests prevailed over those of Mr Geary. There is no record of ACC having addressed Mr Geary's interests in deciding whether, in terms of s 29(1)(a), disclosure of the information would involve the "unwarranted" disclosure of the affairs of EFG. In addition, there is no record of ACC having addressed the question whether, in terms of s 29(1)(b), a promise had been made to EFG to the effect that the information and her identity would be held in confidence. Account must also be taken of the fact that the only personal information favourable to Mr Geary (the Morrell report which exonerated him from the unfounded allegation that the clinical notes requested by Ms Patterson had been fabricated) was withheld on a basis which ACC now accepts was unjustified. We conclude that there is little, if anything, by way of mitigation as far as ACC is concerned.

Remedy – assessment

[140] We address first the question of a declaration. In *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, Ms SL Ineson and Ms PJ Davies) at [107] and [108] it was held that while the grant of a declaration under s 85(1)(a) is discretionary, the grant of such declaratory relief should not ordinarily be denied and there is a "very high threshold for exception". On the facts we see nothing that could possibly justify the withholding from Mr Geary of a formal declaration that ACC interfered with his privacy.

[141] Next we address the need for Mr Geary to be provided with the withheld information. Section 85(1)(d) provides that the Tribunal may:

> … 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.

[142] In our view it is necessary to order that Mr Geary be given access to the personal information listed in the ACC letter dated 29 June 2005 with the exception of document 19, being the legal opinion dated 3 December 2002. It is noted that he was provided with copies of documents 8 and 15 by ACC letter dated 7 December 2007.

[143] We come now to the request for an award of damages under s 88(1)(c) for humiliation, loss of dignity and injury to feelings. The amount sought ($5,000) is modest when compared with recent awards made by the Tribunal under s 88(1)(c). For example, in *Lochead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5 (27 March 2012) and in *Fehling v South Westland Area School* [2012] NZHRRT 15 (6 July 2012) damages of $10,000 were awarded. In *Director of Human Rights Proceedings v INS Restorations Ltd* [2012] NZHRRT 18 (23 August 2012) the amount was $20,000 and in *Director of Human Rights Proceedings v Hamilton* [2012] NZHRRT 24 (1 November 2012) the award was $15,000. While the Tribunal is not bound by the amount sought by a plaintiff (as to which see *Chief Executive of the Ministry of Social Development v Holmes* [2013] NZHC 672, [2013] NZAR 760 (8 April 2013) (Fogarty J, GJ Cook JP and Hon KL Shirley) at [103] to [108]), we are of the view that Mr Geary's objective in nominating relatively modest damages is to underline that his Principle 6 claim has been brought to achieve vindication and that the damages are of secondary, if not symbolic importance.

[144] We turn now to the question whether humiliation, loss of dignity and injury to feelings have been established. Under the s 66(2) definition of an interference with the privacy of an individual it is not a requirement that the individual establish "significant humiliation, significant loss of dignity or significant injury to the feelings" of that individual. Such emotional harm is relevant only in the context of the s 66(1) definition of "interference with privacy".

[145] Because in the present case the relevant definition of interference with privacy is that in s 66(2), "emotional harm" is not part of the "interference with privacy" definition. But once an interference with privacy as defined in s 66(2) has been established, the Tribunal has jurisdiction to grant the remedies listed in s 85(1), including damages under s 88(1)(c) for "humiliation, loss of dignity, and injury to the feelings of the aggrieved individual" whether of a significant degree or not.

[146] It will be seen, however, that even if this case is to be assessed according to the s 66(1) definition of interference with privacy, Mr Geary has established a breach of an information privacy principle and that this has resulted in significant humiliation, significant loss of dignity, or significant injury to feelings. That is, Mr Geary has satisfied both definitions of "interference with privacy" in s 66.

[147] There must be a causal connection between the action which is an interference with the privacy of an individual and the damages sought. In appropriate circumstances causation may be assumed or inferred. See *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [33] and [34].

[148] It is also to be noted that the aggrieved individual is not required by s 88 to establish all three of the heads of damages referred to in s 88(1)(c). Those heads of damages are to be read disjunctively and it is not to be assumed that because one head of damages is established, the others are as well. So in *Winter v Jans* at [36] the High Court, while accepting that the evidence established "injury to the feelings", found that

"humiliation" and "loss of dignity" had not been established. To similar effect see *Lochead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5 at [41.3].

[149] The very nature of the s 88(1)(c) heads of damages means that there is a subjective element to their assessment. Not only are the circumstances of humiliation, loss of dignity and injury to feelings fact specific, they also turn on the personality of the aggrieved individual.

[150] As to what is included in "injury to the feelings", it was held in *Winter v Jans* at [36] that "injury to the feelings" can include conditions such as anxiety and stress.

[151] Mr Geary gave evidence that during the period 2003 to 2005 he had not only lost his ACC registration, in June 2003 a disciplinary hearing had gone against him and he had appealed that decision. He had also reapplied for membership of the New Zealand Psychological Society. He became aware that ACC and the Society had been having discussions regarding his application and the Society was also in communication with the Psychologists Board. Having become aware that the various agencies were having contact with each other about him, and in an effort to find out what was going on, he made information requests to the Psychologists Board and to the Health and Disability Commissioner. The documents released to him showed that ACC had been active in influencing other agencies against him. Mr Geary points, by way of example, to the letter from Dr Rankin dated 25 November 2002, much of which is reproduced above. Against this background he made a decision in 2005 to access the personal information held by ACC. Some information was released, some information was withheld. Having inspected the withheld information the Tribunal can see that that information was highly significant in terms of explaining the background to the termination of Mr Geary's ACC registration. We accept that not knowing what was said about him caused Mr Geary great anxiety and distress as did his inability to request the correction of prejudicial information which ACC so clearly had in its possession. Nor could Mr Geary access information which exonerated him from at least one allegation (that he had fabricated certain clinical notes).

[152] Advice by ACC that significant documents were being withheld led to disappointment, frustration and injured feelings. The more so when Mr Geary had obtained from other agencies some of the information withheld by ACC. From this information Mr Geary could well appreciate its prejudicial content and therefore the greater need to access the balance of the withheld information so that he could better make an assessment of it and to then request correction. In short, he sought, so far as it was possible to achieve, a level playing field in which he had possession of the same information as the agencies (including ACC) which had substantial power to influence his professional future. Even personal information which was in his favour (the Morrell report) was withheld. Having no control over how ACC was collecting information about him and using that information, Mr Geary's only remedy was to gain access to that information. He could then decide whether and how to deploy it in his dealings with the various agencies or to more effectively respond to that information when the other agencies sought to use it in those other proceedings. His case has parallels with *Winter v Jans* HC Hamilton CIV 2003-419-854, 6 April 2004, *Grupen v Director of Proceedings* [2012] NZHC 580, *Lochead-MacMillan v AMI Insurance Ltd* [2012] NZHRRT 5 (27 March 2012), *Fehling v South Westland Area School* [2012] NZHRRT 15 (6 July 2012) and *Director of Human Rights Proceedings v Hamilton* [2012] NZHRRT 24 (1 November 2012).

[153] Even leaving aside for the moment his need for the information to better engage with the other agencies, as Mr Geary explained he needed access to the withheld

information so that he could take effective steps to correct the misapprehensions circulating within ACC itself. Had he known what rumours, hearsay and supposition was on the file, he would have been able to provide correct information. He also needed access to the withheld documents to counteract a negative report that ACC apparently provided to the New Zealand Psychological Society. He here refers to an email dated 27 January 2003 sent by Ms Patterson to another ACC officer seeking that officer's approval that ACC write to the Psychological Society outlining the "concerns" held by ACC. It is not intended to reproduce the email in full. The most relevant passages follow:

> I have been advised that he [Mr Geary] is endeavouring to become a member of The Psychological Society …
>
> My enquiries with the Society indicate that they would encourage the ACC to write to the board and advise them of their objections to his membership. I also believe that the ACC would be remiss if they did nothing …
>
> I believe that he is not an appropriate person to be providing therapy to sexual abuse victims irrespective of the fact that the complaint investigated is historical.
>
> The claimant, [EFG], through her counsellor, has expressed her desire to see this complaint through and will support any further action the Corporation takes.
>
> I recommend that a letter is prepared and forwarded to the Psychological Society outlining the corporation's concerns. I am happy to prepare this letter….

[154] In summary, Mr Geary is justified in stating that had proper disclosure of personal information been made by ACC when requested on 13 May 2005 he would have been in a better position to challenge the information (Mr Geary says misinformation) held by ACC and apparently shared with other agencies. By being deprived of this opportunity and the opportunity to challenge or to correct the personal information provided by ACC to other agencies he has suffered humiliation, loss of dignity and injury to feeling of significant kind.

[155] But the overarching point is the fundamental nature of the right to access personal information. Reference has already been made to the reasons why this right is properly described as a strong right, generally regarded as perhaps the most important privacy protection safeguard. In the assessment of damages, it is not a prerequisite that the requester for information demonstrate a specific use for the material had it been disclosed. The principle of access is a standalone one. The individual has a **right** to access the information and to then request correction. When information is unjustifiably withheld by an agency the individual is not to know when that material is going to be drawn upon and used to his or her potential detriment. The right to correction cannot be lightly put to one side. The denial of that right of itself can cause humiliation, loss of dignity and injury to feelings. Mr Geary had a vital interest in knowing what material was held by ACC – particularly as it had earlier caused his removal from the provider list. He also had a vital interest in being able to request correction. Being wrongly deprived of this opportunity was, in Mr Geary's case, the cause of frustration, anger, impotence and de-motivation. It must not be overlooked that he was a professional man who was being deprived of a significant source of work (and income). It is not a situation in which the failure to disclose was one which could be dismissed as inconsequential.

[156] As to the causation point, it should be clear from our findings that this has been established.

[157] We are well aware that damages under s 88(1)(c) are not to compensate Mr Geary for any breach of the rules of fairness which may have occurred when his ACC registration was terminated, nor to "punish" ACC for refusing to disclose information which ought to have been disclosed, nor to compensate for upset at the content of the information. The fact remains, however, that ACC have been able to justify the withholding of only one of the 21 documents listed in the schedule to the letter dated 29 June 2005 and only by the most narrow of margins succeeded in relation to the "cannot be found" documents. We do not regard these "successes" as in any way diminishing the fact that Mr Geary has been substantively successful in relation to this limb of his case.

[158] Taking all these factors into account we conclude that Mr Geary has suffered humiliation, loss of dignity, and injury to feelings in terms of s 88(1)(c) of the Act and that an award of damages under s 88(1)(c) should be made. We are of the view that damages are to be in the amount sought, namely $5,000, modest though this sum may be.

[159] Our formal orders follow at the end of this decision.

[160] We now turn to the second limb of the case namely, whether the disclosure by ACC of Mr Geary's personal information was permitted by one or more of the nine grounds enumerated in Principle 11.

PRINCIPLE 11

Background circumstances

[161] In March 2005 the Psychologists Board heard a complaint by Ms JKL against Mr Geary. She was a former client and it would appear from the somewhat incomplete evidence before the Tribunal that of her three complaints against Mr Geary, only one was eventually upheld namely, the making of inappropriate disclosures of various matters to her in the context of a professional relationship. The Board's liability decision was issued in May 2005 and its penalty decision in June 2005.

[162] On 30 May 2005 Mr Geary sent a letter to the New Zealand Police alleging, inter alia, that the claim by JKL that she had been sexually abused (by others, not by Mr Geary) was false and that she had lied to ACC in order to obtain monetary compensation.

[163] On 15 July 2005 at the Christchurch office of ACC Mr Geary met with Ms Heather Kerr, an investigating officer, to make the same complaint to ACC. Prior to the meeting he checked the ACC website and noted that it said that the identity of an informant would be protected. The same information was given on the ACC Information Line. Mr Geary says that before he provided any information to Ms Kerr she gave to him a guarantee of anonymity and of confidentiality. In this regard Mr Geary's evidence is supported by an unsworn and undated letter from a Mr Jim Firth who accompanied Mr Geary to the meeting as a support person. Mr Firth has since passed away. His letter (apparently written in December 2009 or in 2010) relevantly states:

> At the outset of the meeting I recall a reasonable lengthy discussion around your enquiry to Heather on the question of your request that Heather explain the ACC's policy on maintaining confidentiality for informants.
>
> I recall that the woman, Heather, stated that ACC could guarantee that the identity of informants and any information passed on by informants would remain confidential and that no matter which might lead to the identification of an informant would be disclosed.

> The woman, Heather, stated the ACC conducted its own investigations whether the matter had come to the attention of ACC through an informant or otherwise. She also said that ACC did not require informants to give evidence and that this was part of ACC's policy on confidentiality for informants.
>
> I recall that after the woman, Heather, had given these assurances you introduced the matter on which you were going to provide certain information to ACC.

[164] Ms Kerr was called as a witness by ACC. She confirmed that she had met with Mr Geary on 15 July 2005 and recalls that he (Mr Geary) had a support person with him, whose name she could no longer recall. Due to the length of time that has passed she can no longer remember all the details of the meeting, though she does remember taking notes and concedes the possibility that there was a discussion of confidentiality. After the meeting she did not create a file as such but discussed the matter with her manager who instructed her (Ms Kerr) to send her notes together with the documentation received from Mr Geary to a colleague in the ACC Masterton office, Ms Phillipa Frederiksen. On 15 July 2005 Ms Kerr sent a letter to Mr Geary advising him that it would take "some time" to review the information he had provided:

> I refer to our meeting in this office on 21 June 2005.
>
> I have forwarded the papers which you gave to me along with a memorandum detailing our meeting, to my colleague, Phillipa Frederiksen, in our Masterton Branch. Phillipa manages investigations dealing with sensitive claims.
>
> As discussed at our meeting, it will take some time to review all the information which you have sent to us, along with any relevant claims lodged by [JKL].
>
> Thank you for providing the information.

[165] Ms Kerr was not thereafter involved in the investigation.

[166] On 11 August 2005 Ms Frederiksen reported to Prue Cotty of ACC that, because of the nature of ACC claims based on sexual abuse, the Fraud Unit was unable to investigate allegations of fraud and that, in effect, the investigation had been closed. The memorandum concluded with the statement that the information would not be disclosed to JKL:

> I refer to the attached documentation alleging false claiming of sensitive claims involving lump sum payment for [JKL].
>
> The issues allege that the claimant has made false statements surrounding sexual abuse.
>
> Last year my senior, Craig Shipton, wrote to your branch manager about claims such as this.
>
> The difficulty the Fraud Unit faces with allegations such as this is that the examining officers are effectively unable to investigate such allegations. It is neither appropriate nor desirable to have examining officers refer work out to a private investigator to commence enquiries into false sexual abuse claims.
>
> The area of sexual abuse is not an area that any concrete evidence of a false claim could be proven beyond a reasonable doubt.
>
> It was decided that the information should be passed onto a case manager managing the claim so that they are made aware of the nature of the allegations and recommend that perhaps more expertise was needed when making referrals to medical providers for these claimants.

> I have kept the original documentation, in case you don't wish to file it on the claim file, and will file it in my sensitive claims investigation information file. (This information would not be disclosed to the claimant).

[167] Mr Geary was not given a copy of the memorandum or told that his allegations would be taken no further.

[168] On the question whether Mr Geary was given a guarantee of anonymity and of confidentiality, Ms Kerr acknowledged to the Tribunal that her notes were no longer on the ACC file. While she cannot, without her notes, confirm exactly what she said at the meeting with Mr Geary and Mr Firth, she believes it "unlikely" she would have given such guarantee. It was her practice to explain to an informant that where documents are provided by an informant, a guarantee of confidentiality cannot be given as the material might have to be shown to the subject of the investigation to allow him or her opportunity to answer the allegations. This gives the informant the ability to decide whether or not they wish to disclose the information in their possession. ACC did, however, take fraud investigations very seriously and was assisted by informants. Before the information provided was disclosed to the suspect, she would discuss this first with the informant.

[169] In October 2007 Mr Geary decided to follow up the matter and by email dated 10 October 2007 advised ACC that he had evidence in relation to his complaint and wanted to present it for consideration. He was put in contact with Mr Roy Mitchell, a senior investigating officer with ACC Christchurch. Mr Mitchell had previously been a police officer in Christchurch for 28 years. On the same day Mr Mitchell replied, asking Mr Geary to provide the further information. On 26 October 2007 Mr Mitchell received a first set of documents and a second set was received shortly thereafter on or about 7 November 2007.

[170] Meanwhile, on 19 October 2007 Mr Mitchell received the ACC file relating to Mr Geary's approach to ACC on 21 June 2005 but noticed that the papers appeared incomplete, with gaps in the correspondence. On 23 October 2007 he spoke to Ms Kerr who could not recall many details.

[171] Mr Mitchell stated that there was no mention on the file of any undertaking of confidentiality having been given to Mr Geary nor did Ms Kerr tell him (Mr Mitchell) about any such undertaking. He concedes he did not ask her if one had been given. He also said that Mr Geary made no mention of confidentiality or of an undertaking until much later, in an email of 9 December 2009. Yet Mr Mitchell nevertheless concedes that he never asked Mr Geary whether any undertaking or promise of confidentiality had been given to him.

[172] Mr Mitchell decided that it would be necessary to approach JKL to put to her the allegation that she had committed a fraud against ACC. Without first advising Mr Geary, on 8 January 2008 Mr Mitchell telephoned JKL and advised her that Mr Geary had made an allegation to ACC that she had misled ACC for monetary gain. He disclosed also details of the allegations made by Mr Geary. JKL informed him that there was to be a hearing by the Psychologists Board in relation to a complaint made by her that Mr Geary had breached her privacy. As a result of the telephone discussion Mr Mitchell was satisfied with the explanations provided by JKL.

[173] During the telephone discussion JKL specifically requested a copy of the letter of complaint dated 30 May 2005 that Mr Geary had made to the Christchurch Police, the existence of which Mr Mitchell had disclosed in the telephone discussion. Mr Mitchell was of the view that this letter contained personal information about JKL and that he was accordingly obliged to disclose it to her. Mr Mitchell was also aware of the fact that it

could be relevant to the Disciplinary Tribunal hearing in which JKL was to be a witness. On 24 January 2008 Mr Mitchell telephoned JKL and informed her that the 30 May 2005 letter would be sent to her as well as a letter from Mr Mitchell setting out the conclusions of his investigation into Mr Geary's allegations. In expanding on this evidence orally, Mr Mitchell said that he thought a lot about the letter before it was sent to JKL. He said that until his telephone call of 8 January 2008, JKL had been unaware of the allegations made by Mr Geary, allegations which could have a bearing on her evidence before the Disciplinary Tribunal. Mr Mitchell felt that JKL "needed to be on an even standing and not caught out of the blue". He accordingly decided to write to her for two reasons. First, to finalise the enquiry. Second, to let her know what allegations Mr Geary had made.

[174] The letter dated 25 January 2008 sent by Mr Mitchell to JKL is too long to reproduce in its entirety. For present purposes it is sufficient to note that it sets out in some detail the allegation made by Mr Geary, the documents provided in support of that allegation and Mr Mitchell's assessment of the evidence. It then concludes:

> I hope that all of this has not caused you any undue concern. Because there is another Tribunal hearing in the near future where you will once again be giving evidence against Mr Geary, it is important that you are made aware of his allegations and the outcome.
>
> As promised I have enclosed a copy of the letter he sent to the Christchurch Police in 2005. That letter pretty much sums up the allegations he has reiterated in 2007.
>
> Do not hesitate to phone or write to me should you need to know more.

[175] On the same date Mr Mitchell sent to Mr Geary an email stating (inter alia) that Mr Mitchell had reached the view that there was an insufficient evidential basis for further investigation. In this email Mr Mitchell made no reference to his having disclosed to JKL Mr Geary's identity as an informant as well as the information which Mr Geary had provided to ACC. Nor did he disclose the fact that he had provided to JKL Mr Geary's 2005 letter to the Christchurch Police. He nevertheless asked Mr Geary to treat as "confidential" Mr Mitchell's email to Mr Geary.

[176] In March 2008, on the strength of a telephone request from JKL, Mr Mitchell provided a number of documents on the ACC file to Minter Ellison, Rudd Watts, the solicitors acting for the "prosecutor" before the Health Practitioners Disciplinary Tribunal. The documents in question had been provided by Mr Geary to ACC in support of the fraud allegation first made on 21 June 2005. Mr Mitchell did not advise Mr Geary of the request or of the provision of the documents. Nor did he keep a record of what information he provided but recalls withholding his working and planning notes. He was later involved with Minter Ellison over the preparation of his nine page brief of evidence filed in support of the prosecution case against Mr Geary in which he produced approximately 78 documents, most of them comprising the documents which Mr Geary had provided to ACC.

[177] Some 16 months later, on 14 August 2009, the Health Practitioners Disciplinary Tribunal issued a witness summons to Mr Mitchell requiring him to attend a hearing at Timaru on 22 September 2009 and to produce (inter alia) all documents given to ACC by Mr Geary. This evidence was admitted at the hearing as propensity evidence. See *Geary v Professional Conduct Committee* HC Wellington CIV 2009-485-002641, 22 July 2010 at [44].

[178] Mr Geary subsequently made enquiry of ACC as to its policy regarding informers. In date order he received the following responses:

[178.1] 12 October 2009 from Daryn Mitchell, Intelligence Analyst, ACC:

> ACC conducts investigations into concerns around fraudulent activity. Sometimes, the investigation may have been initiated as a result of information received via e-mail, a letter or a phone call.
>
> ACC collects and collates its own evidence and does not rely on the informant to give evidence in court. **Informants remain anonymous and the identity of informants is not revealed**.
>
> If you have particular concerns, or awareness of any fraudulent activity, you may feel more comfortable ringing our toll free fraud line which is 0800 372 830. The person taking your call does not need to know who you are. [emphasis added]

[178.2] 18 November 2009 from James du Plessis, Project and Services Manager, ACC:

> I have checked with the Head of the Investigations Unit and he has said that the informant can provide the information anonymously. You can either email investigations@acc.co.nz or phone the Fraud helpline on 0800 372 830. There is no set Policy on protection **but ACC follows usual police protocol**.
>
> The information will be investigated so if you can supply as much detail/supporting information as possible that would be good.
>
> ACC's stance on fraud is that we believe that any person who defrauds ACC steals from every New Zealander. [emphasis added]

[178.3] 3 February 2010 from Paul Berry, Detective Inspector, National Criminal Investigations Group, Police National Headquarters addressing Police protocol:

> **In general terms Police do not disclose information regarding informers or any information that may lead to discovering the identity of an informer**. This information is usually held because the "*disclosure of the information is likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences*" and also to protect the identity of the informer. [emphasis added]

[179] By way of contrast Mr Roy Mitchell, on 25 November 2009, said that ACC did not have a policy regarding informants:

> Sorry about the delay, but I have had to check with a number of people regarding the existence or not of ACC policy regarding "informants". My response is that this document does not exist, or cannot be found. In other words it appears that no such policy document exists. This response I give complies with section 18(e) of the Official Information Act 1982.

In a letter to Mr Geary dated 29 March 2010 Mr Roy Mitchell stated:

> ACC does not have written protocols regarding the protection of informants; therefore there is no document to disclose.

Mr Mitchell then went on to explain why Mr Geary's identity had been disclosed to JKL:

> Please be advised that in almost all circumstances ACC will undertake to protect the identity of persons providing fraud information in confidence. However in all of the circumstances surrounding the information provided by you to investigate ACC claimant [JKL], including your intrinsic connection to the allegations and the fact that you were a potential witness against [JKL], protecting your identity was not a realistic option, and clearly not sought by you at any stage prior to or during the investigation.

[180] We address shortly the claim that because Mr Geary was a potential witness against JKL, his identity as **informant** was properly disclosed to JKL. We also address the claim by Mr Roy Mitchell that Mr Geary had not at any stage sought protection of his identity.

[181] Giving evidence to the Tribunal, Mr Roy Mitchell was asked to comment on the communications from Mr Daryn Mitchell and Mr James du Plessis. He said that neither were investigators and he, Roy Mitchell, "objected" to their responses. He was of the view that what they told Mr Geary was wrong. Asked about his 29 March 2010 statement that ACC does not have written protocols regarding the protection of informants, Mr Roy Mitchell stated that even as at the date he was giving evidence he was not aware whether ACC had a protocol for the protection of informants.

[182] A brief overview of the submissions by the parties follows.

The submissions for Mr Geary

[183] Mr Geary points to the provision by ACC to JKL of:

> **[183.1]** Mr Geary's identity as an informant.
>
> **[183.2]** The letter dated 30 May 2005 from Mr Geary to the Christchurch Police.
>
> **[183.3]** The documents and other information provided by Mr Geary to ACC in support of his allegation that a fraud on ACC had been committed.

[184] This information was conveyed in Mr Roy Mitchell's telephone call to JKL on 8 January 2008, in his letter to JKL dated 25 January 2008 and in the subsequent delivery of the documents and information to Minter Ellison at the request of JKL.

[185] He submits that the provision of this information was in breach of Principle 11 of the Privacy Act.

[186] In relation to Principle 11 Mr Geary seeks by way of remedy:

> **[186.1]** A declaration that there has been an interference with his privacy.
>
> **[186.2]** Damages of $5,000 for humiliation, loss of dignity and injury to feelings.
>
> **[186.3]** Costs.

The submissions for ACC

[187] It is submitted for ACC that:

> **[187.1]** The information provided by Mr Geary to ACC was not provided in confidence.
>
> **[187.2]** In terms of Principle 11(a) ACC relied on a belief, based on reasonable grounds, that disclosure of the information to JKL was directly related to the purposes in connection with which the information was obtained by ACC.
>
> **[187.3]** ACC also relied on a belief, based on reasonable grounds, that disclosure was being made of personal information to JKL as "the individual concerned" (Principle 11(c)). The personal information was that of JKL, including the identity of Mr Geary as complainant.

[187.4] ACC also relied on a belief, based on reasonable grounds, that the disclosure was authorised by the individual concerned (Principle 11(d)). The individual concerned in this context being Mr Geary.

[187.5] When JKL requested access to personal information held by ACC there was no reason, in terms of s 29(1)(a) of the Act to refuse to disclose the requested information.

[187.6] Even if a breach of the Privacy Act has occurred, no harm or loss has been proved by Mr Geary.

DISCUSSION OF PRINCIPLE 11 ISSUES

Principle 11

[188] Principle 11 provides:

Principle 11
Limits on disclosure of personal information

An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—

(a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
(b) that the source of the information is a publicly available publication; or
(c) that the disclosure is to the individual concerned; or
(d) that the disclosure is authorised by the individual concerned; or
(e) that non-compliance is necessary—
  (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
  (ii) for the enforcement of a law imposing a pecuniary penalty; or
  (iii) for the protection of the public revenue; or
  (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
(f) that the disclosure of the information is necessary to prevent or lessen a serious threat (as defined in section 2(1)) to—
  (i) public health or public safety; or
  (ii) the life or health of the individual concerned or another individual; or
(g) that the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or
(h) that the information—
  (i) is to be used in a form in which the individual concerned is not identified; or
  (ii) is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
(i) that the disclosure of the information is in accordance with an authority granted under section 54.

Burden of proof

[189] Section 87 of the Act provides:

87 Proof of exceptions

Where, by any provision of the information privacy principles or of this Act or of a code of practice issued under section 46 or section 63, conduct is excepted from conduct that is an interference with the privacy of an individual, the onus of proving the exception in any proceedings under this Part lies upon the defendant.

[190] Applying this provision to Principle 11, it was established in *L v L* HC Auckland AP95-SW01, 31 May 2002, Harrison J at [20] (and see the Tribunal decisions collected in *Harris v Department of Corrections* [2013] NZHRRT 15 (24 April 2013) at [43]) that the sequential steps to be followed are:

> **[190.1]** Has there been a disclosure of personal information. The plaintiff carries the burden of proving this threshold element on the balance of probabilities.
>
> **[190.2]** If the Tribunal is satisfied that personal information has been disclosed, the burden shifts to the defendant to establish to the same standard that that disclosure fell within one of the exceptions provided by Principle 11.
>
> **[190.3]** Third, if the Tribunal is satisfied that the personal information was disclosed and that the defendant has not discharged his or her burden of proving one of the exceptions in Principle 11, the Tribunal must then determine whether the disclosure constituted an interference with the individual's privacy as defined in s 66 of the Privacy Act. That is, has the plaintiff established one of the forms of actual or potential harm contemplated by s 66(1)(b). The burden of proof reverts to the plaintiff at this stage.
>
> **[190.4]** Fourth, if the Tribunal is satisfied to this stage, then its final task is to determine whether, in its discretion, it should grant any of the statutory remedies identified in s 85 of the Act.

[191] It is not a defence that the interference was unintentional or without negligence on the part of the defendant. See s 85(4) and *L v L* at [13] and [99].

[192] Addressing first the question whether there has been a disclosure of personal information, the evidence unequivocally establishes that Mr Roy Mitchell disclosed to JKL Mr Geary's name, the fact that he was the informant, the letter he wrote to the Police in Christchurch and the information he had communicated to ACC.

[193] "Personal information" as defined in s 2(1) of the Act means "information about an identifiable individual". Clearly Mr Geary's name and the fact that he was the informant is personal information. So too were his communications to the Police and to ACC. They were "about" him in that they told what he had said, what he had alleged and what he had compiled. It follows that Mr Geary has proved the threshold element to the probability standard.

[194] Before moving to the next issue, it is to be observed that the identity of an informant is also personal information about the person informed upon. See, for example, *Director of Human Rights Proceedings v Commissioner of Police* at [33]. In that sense the information disclosed by ACC was personal information not just in relation to Mr Geary, but also in relation to JKL. But it does not follow that an informer is unprotected:

> **[194.1]** Section 27(1)(c) can be used to protect the identity of an informant. As noted in *Nicholl v Chief Executive of the Department of Work and Income* [2003] 3 NZLR 426 at [16]:
>
> > [16] There is therefore a substantial body of decisions dating from 1982 which have recognised that in a proper case, s 27(1)(c) may be relied on to deny access to the name of an informant. The decisions are firmly grounded in the words of the statute and in the pragmatic concerns which, since R v Hardy (1794) 24 St Tr 199, have conferred public interest immunity on police informants. For more than two centuries it has been accepted that the public interest favours preserving the anonymity of police

informers by keeping open avenues of information which will assist in the detection and investigation of crime.

[194.2] Section 29(1)(a) can also be deployed, the Principle 6 right of access to personal information having to be weighed against the Privacy interest recognised in this section. See recently *Fehling v South Westland Area School* [2012] NZHRRT 15 (6 July 2012) at [82].

[195] We turn now to the question whether ACC has established, on the balance of probabilities, that the disclosure fell within one or other of the exceptions relied on, namely Principle 11(a), (c) and (d).

[196] We address first our findings of fact.

Findings of fact – the confidentiality issue

[197] We believe Mr Geary when he gave evidence that prior to his meeting with Ms Kerr at Christchurch on 21 June 2005 he had seen from the ACC website that the identity of an informer would not be disclosed and had ascertained that the same advice was given on the ACC Information Line. We further accept Mr Geary's evidence that Ms Kerr gave him a guarantee of anonymity and of confidentiality regarding his identity and the information he wished to provide to ACC. Only after that guarantee had been given was the information disclosed. We make this finding independent of the letter from Mr Firth and accordingly there is no need for us to address the question whether this letter can be taken into account and if so, the weight to be attached to it.

[198] The reasons for our finding follow:

[198.1] Mr Geary was an honest and credible witness.

[198.2] Ms Kerr says that while she cannot now remember details of the meeting, she concedes the possibility there was a discussion of confidentiality. This concession is properly made given that Mr Geary was intending to disclose information which he would otherwise be required to keep confidential arising as it did out of the counsellor-client relationship. Nor does Ms Kerr directly contradict Mr Geary's evidence that the guarantee was given. On the contrary, she stated that ACC takes investigations into fraud very seriously adding that it is an important aspect of ACC's business and that the control of fraud helps ensure that ACC assists only those individuals who are entitled to cover, entitlements and payments under the ACC scheme. She is therefore not in a position to contradict Mr Geary's evidence. While she spoke of what she normally does when asked about the protection of informers, that evidence does not affect our view that Mr Geary's account of the interview is an honest one. Ms Kerr does not have her notes and what she "normally" does is not evidence of what happened on this particular occasion and it is not evidence to which we give weight.

[198.3] Mr Geary's account is also consistent with the fact that when Ms Frederiksen effectively closed the file and wrote her memo of 11 August 2005, she specifically recorded that the documentation received from Mr Geary "would not be disclosed to the claimant".

[198.4] In her letter dated 15 July 2005 Ms Kerr advised Mr Geary that "it will take some time to review all the information". When Mr Geary next contacted ACC to find out what was happening he was not to know that owing to poor record keeping by ACC, the notes made by Ms Kerr at the meeting had gone missing

and that, as described by Mr Roy Mitchell in his written statement, the papers "appeared incomplete, with gaps in the correspondence". In his oral evidence Mr Mitchell agreed that if the guarantee of confidentiality had been given by Ms Kerr, it would have been reasonable for Mr Geary to assume that that assurance would continue to apply.

[198.5] In these circumstances it was entirely credible, if not logical, that in all his subsequent dealings with ACC Mr Geary would assume that the guarantee of anonymity and confidentiality continued to operate. The emails he received from Daryn Mitchell and James du Plessis and the Police Protocol support him in this regard.

[198.6] Faced with an incomplete file, a Ms Kerr who could remember little and the note by Ms Frederiksen that the information would not be disclosed to the claimant, it was Mr Roy Mitchell's responsibility to make enquiry of Mr Geary whether he had been given a promise of confidentiality. It is no answer for Mr Mitchell to say, as he did on more than one occasion when giving evidence, that Mr Geary never informed him that ACC had guaranteed confidentiality. There was no cause for Mr Geary to do this. He was dealing with an institution which he had first contacted on 21 June 2005 and been given a guarantee of confidentiality. The fact that ACC then misplaced the documents in the transfer from Ms Kerr to the Masterton office and then to Mr Mitchell was not something Mr Geary could be expected to know of or could be expected to take responsibility for. In addition, Mr Mitchell claimed long experience in dealing with informants and issues surrounding informants. With that experience the onus was on him and ACC to make enquiry as to whether there had been an earlier assurance of confidentiality.

[198.7] Nor was Mr Geary to know that Mr Mitchell decided, without notice to Mr Geary, to approach JKL and to make full disclosure to her of Mr Geary's identity and of the allegations made by him. This action is to be contrasted with the evidence of Ms Kerr that it is her practice, before making disclosure to the person complained about, to advise the informant. In our view there are good reasons for this practice. It puts the informant on notice that disclosure of his or her identity will be at risk and gives the informant an opportunity to decide whether it would be in his or her best interests for the allegations to be withdrawn.

[198.8] Mr Mitchell's disclosure of information to JKL is also at odds with Ms Frederiksen's determination that the information not be disclosed to JKL.

[198.9] Much was made by Mr Mitchell of the fact that, given the nature of the material provided by Mr Geary and the nature of his allegations, it was unavoidable that Mr Geary would be a witness should any proceedings be taken against JKL. This is true as far as it goes. But what does not appear to have been understood is that there is a clear distinction between a person's identity as an informant and his or her separate identity as a witness. There is no contradiction between Mr Geary acknowledging he would be a witness and his desire that JKL not be told that it was he who had informed on her.

Findings of fact – whether ACC's responsibilities to Mr Geary properly addressed

[199] We are of the view that in making the disclosures to JKL on 8 January 2008 and 25 January 2008 (and later to Minter Ellison) Mr Mitchell failed to properly address the responsibilities which ACC owed to Mr Geary under the Privacy Act. Our reasons follow.

In making these findings we put entirely to one side the provisions of the Evidence Act 2006 relating to informers.

> **[199.1]** Mr Mitchell's approach to the Privacy Act was regrettably over-simplistic. He believed that as JKL had requested personal information, that information had to be disclosed. Addressing her oral request for Mr Geary's letter to the Police at Christchurch he said in his written statement:
>
> > It [the letter to the Police] clearly contained personal information about her in terms of the Privacy Act and was therefore information to which [JKL] was entitled. I considered that this request was one made under the Privacy Act and as such I was obliged to disclose a copy of the letter to her. I was also aware of the fact that it could be relevant to the Disciplinary Tribunal hearing that [JKL] was acting as a witness in.
>
> The Privacy Act requires a more nuanced approach. In particular, consideration must be given to Principle 11 and to the withholding grounds in ss 27, 28 and 29. At least two withholding grounds had potential relevance here, being ss 27(1)(c) and 29(1)(a). Asked what he had taken into account before deciding to release to JKL the letter from Mr Geary to the Police he said that he relied on s 27(1)(c) to withhold his working notes. He asserted that the interests of others was not a ground for withholding information.
>
> **[199.2]** The clear impression gained from the evidence given by Mr Mitchell was that at no time did he give any real or meaningful consideration to the terms of the Privacy Act or to Mr Geary's interests. Not only did he fail to make the simple enquiry of Mr Geary as to whether he had been promised confidentiality, Mr Mitchell was influenced, to a substantial degree, by a desire to "help" JKL against Mr Geary. Hence the significance of the last sentence in the earlier quote – "I was also aware of the fact that it could be relevant to the Disciplinary Tribunal hearing that [JKL] was acting as a witness in".
>
> **[199.3]** Expanding on this in his oral evidence, Mr Mitchell said that prior to writing to JKL on 25 January 2008 he came to the conclusion that she needed to be on an even standing and not "caught out of the blue". One of the purposes of sending the letter to her was so that she was made aware of the allegations that Mr Geary had made. While he never turned his mind to telling Mr Geary of the intended disclosure of information to JKL, the fact that Mr Geary had not told Mr Mitchell that JKL was to be a witness in the disciplinary hearing led Mr Mitchell to feel that she should be put on "an equal footing".
>
> **[199.4]** Mr Mitchell's approach to the Privacy Act was also heavily influenced by the process of discovery with which he was more familiar, being the disclosure process in the Criminal Disclosure Act 2008. Mr Mitchell did not appear to appreciate that whereas the Privacy Act aims to promote and protect individual privacy, the Criminal Disclosure Act has as its stated purpose the disclosure of relevant information between the prosecution and the defence for the purposes of criminal proceedings. The Privacy Act limits the circumstances in which personal information may be disclosed. The Criminal Disclosure Act compels the disclosure of such information in specified circumstances. See further *Andrews v Commissioner of Police* [2013] NZHRRT 6 (4 March 2013) at [2] and [53].
>
> **[199.5]** It is also to be observed that the Criminal Disclosure Act only applies once criminal proceedings have been commenced. At the time Mr Mitchell made disclosure to JKL (and indeed at no time thereafter) had such proceedings been commenced or were in contemplation. Mr Mitchell's vigorous disagreement with

the two officers who advised Mr Geary of ACC's policy on informers might also reflect an idiosyncratic view by him as to ACC's policy regarding informers, as does his claim that even at the date of hearing before the Tribunal he was unaware of ACC's protocol for the protection of informers.

[199.6] We found Mr Mitchell to be a defensive witness, quick to justify his own actions and as quick to be critical not only of Mr Geary, but of anyone holding a view different to his own. The clear sympathy he had for JKL (as seen, for example in his letter to her dated 25 January 2008) and his apparent disapproval of Mr Geary appear to have distracted him from a dispassionate application of the Privacy Act, an application uninfluenced by the process of criminal disclosure with which he was more familiar.

[200] Against these findings of fact we analyse the relevant statutory provisions.

"believes on reasonable grounds"

[201] Returning to Principle 11, it is to be noted that to escape the statutory prohibition on disclosure of personal information, an agency must establish that at the time of disclosure, it possessed the requisite belief on reasonable grounds:

> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,….

[202] There is a subjective component (the belief) and an objective component (the reasonable grounds). It must be established that both elements existed as at the date of disclosure.

[203] The need for reasonable grounds for belief requires the agency to address its mind to the relevant paragraph of Principle 11 on which it intends to rely. See by analogy *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [63]:

> We consider that the need for reasonable grounds for belief in the necessity of disclosure requires the agency concerned to first inspect and assess the material being disclosed. The exception is not engaged where there is a failure to check the contents of the disclosure material before transmission.

There must be an **actual** belief based on a proper consideration of the relevant circumstances. An explanation devised in hindsight will not suffice.

[204] We address now Principle 11(a).

Principle 11(a) – analysis

[205] In the present case Mr Roy Mitchell's approach to and understanding of the Privacy Act was less than adequate and it is clear from his evidence that neither in fact nor as a matter of inference did he address the question whether, at the time he made disclosure to JKL, there were reasonable grounds to believe that Principle 11(a) had application. The disclosure of Mr Geary's identity as an informer was not one of the purposes in connection with which the information had been obtained, nor was it directly related to the purposes in connection with which the information had been obtained. The fact that Mr Mitchell mistakenly believed that unqualified disclosure to JKL was required by Principle 6 and that she needed to be on an even footing with Mr Geary and not at risk of being "caught out", preclude satisfaction of the statutory prerequisites being inferred. So too does ACC's loss of Ms Kerr's notes, the provision to Mr Mitchell of a file

with gaps in the correspondence, a failure to take account of the note by Ms Frederiksen that "[t]his information would not be disclosed to [JKL]" and the surprising omission by Mr Mitchell to make a simple enquiry of Mr Geary as to whether any assurance of confidentiality had been given to him by ACC. These failures cumulatively lead us to the conclusion that no reasonable grounds existed for Mr Mitchell (and through him ACC) to believe that Principle 11(a) applied.

Principle 11(c) – analysis

[206] As to Principle 11(c), the information disclosed to JKL was personal information both as to her and as to Mr Geary. But no consideration was given by Mr Mitchell to the provisions of the Privacy Act which have as their purpose the balancing of these competing interests. He gave no consideration at all to Mr Geary's interests, just as he never turned his mind to telling Mr Geary that he (Mr Mitchell) had decided to disclose Mr Geary's identity to JKL along with his allegations and supporting documents. Indeed he said in his evidence that the interests of other persons is not a ground for withholding personal information.

[207] In our view the entirely misconceived view by Mr Mitchell as to how the Privacy Act operates along with the failure to give meaningful consideration to Mr Geary being an informer precludes ACC from asserting that it had reasonable grounds to believe that Principle 11(c) permitted disclosure of the information to JKL.

Principle 11(d) – analysis

[208] As to Principle 11(d), our findings of fact mean that it is untenable for ACC to plead that it had reasonable grounds to believe that Mr Geary authorised the disclosure to JKL.

Section 29(1)(a) – analysis

[209] As to the claim that Mr Geary had no expectation of privacy and therefore there was no reason, in terms of s 29(1)(a), to refuse to disclose the information to JKL:

> **[209.1]** Our findings of credibility and of fact are that Mr Geary was given a promise of confidentiality, a promise kept by ACC until Mr Roy Mitchell's involvement. It was his conduct of the case which led to the failings earlier described.
>
> **[209.2]** ACC relies on statements by Mr Geary that he would provide the information to other agencies, including the media, Ministers of the Crown and others. However, these statements post date the January 2008 release of information to JKL and are therefore irrelevant. In any event, Mr Geary said (and we accept) he had no intention of carrying out his statements and there is no evidence before us that he did so.
>
> **[209.3]** ACC also relies on a line in an email dated 25 October 2005 from Mr Geary to Ms Kerr in which Mr Geary draws attention to the delay since the meeting on 21 June 2005. Mr Geary stated that he would be contacting the Minister responsible for ACC to complain about the delay and referred to a private prosecution as another option. Again, there is no evidence that either step was taken. Mr Geary was simply expressing his sense of frustration. We fail to see how this 2005 document has a bearing on the 2008 assessment by ACC (if such assessment is assumed, against the facts, to have taken place) of Mr Geary's "expectation of privacy".

[210] We have found that the relevant decision-maker gave no thought to Mr Geary's interests and that no consideration was in fact given to s 29(1)(a). The failure of process was almost complete. In these circumstances it is not sufficient to point to Principle 6 as being the trump to the competing privacy interests and to the need for an agency to balance the relevant privacy principles. Particularly when no balancing in fact took place. Nor is it an answer to the failure to consider in any meaningful way the withholding grounds in ss 27 and 29. The failure by Mr Mitchell to recognise, let alone to give thought to Mr Geary as an informer, is surprising to say the least. It rather seems that his sympathy for JKL and suspicion, if not disapproval of Mr Geary, led to a situation in which the Privacy Act was seen as benefiting JKL and her alone. But no matter how little sympathy there was for Mr Geary, he too had rights under the Act. Regrettably, those rights were overlooked.

[211] It follows from our findings that ACC breached information privacy Principle 11 vis-à-vis Mr Geary.

Remedy

[212] For the Tribunal to have jurisdiction to award a remedy to Mr Geary, it must be satisfied, on the balance of probabilities, that any action of ACC was an interference with the privacy of Mr Geary. On the present facts Mr Geary must bring himself within that part of the definition of "interference with privacy" which is set out in s 66(1) of the Act:

> **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
>   (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.

[213] As to s 66(1)(a)(i) we have found that ACC has breached information privacy Principle 11.

[214] As to s 66(1)(b), in the interests of brevity we intend addressing only subs (b)(iii). The humiliation, loss of dignity or injury to feeling must in each case be "significant".

[215] Here Mr Geary was given an explicit guarantee of anonymity and of confidentiality. That guarantee notwithstanding, ACC disclosed to JKL not only Mr Geary's identity as informer but also his allegations and the material he had provided to the Police in Christchurch and to ACC in support of his allegations against JKL. ACC also provided (at the request of JKL) all this information to the prosecutor in the disciplinary proceedings then being taken before the Health Practitioners Disciplinary Tribunal.

[216] In these circumstances we are more than satisfied on the balance of probabilities that the dishonouring of the guarantee caused significant humiliation, significant loss of dignity and significant injury to the feelings of Mr Geary. In making this finding we have

excluded from consideration any emotional harm experienced by Mr Geary as a consequence of the disciplinary proceedings themselves and the accompanying publicity.

[217] We accordingly find that ACC interfered with the privacy of Mr Geary. In our view he is entitled to a declaration that the action of ACC was an interference with his privacy. We are of the further view that he is also entitled to damages under s 88 for the humiliation, loss of dignity and injury to feelings referred to. The amount sought ($5,000) is, however, too modest. As explained earlier, the Tribunal is not bound by the amount nominated by a plaintiff (see *Chief Executive of the Ministry of Social Development v Holmes*). Mr Beck in his most recent submissions understandably points out that in light of the developing state of privacy law and the approach taken by the Tribunal, it is difficult for a plaintiff to make a realistic assessment of an appropriate claim that would be consistent with other cases. In this decision we have already made reference to the poor record keeping by ACC and Mr Roy Mitchell's regrettable failure to meaningfully address the obligations owed by ACC to Mr Geary under the Privacy Act. We have found that the failure of process was almost complete. ACC has caused Mr Geary significant humiliation, significant loss of dignity and significant injury to feelings. We see no mitigating factors. We recognise, however, that damages under s 88(1)(c) are not punitive in intent.

[218] Taking all these factors into account we conclude that damages in the sum of $15,000 are to be awarded to Mr Geary. We are of the view that this sum is appropriate given the significance of the privacy rights engaged by Principle 11 and the seriousness of the breach. The humiliation, loss of dignity and injury to feeling was of a significantly different degree to that which justified the award of $10,000 in *Lochead-MacMillan v AMI Insurance Ltd* and in *Fehling v South Westland Area School*. On the other hand, the circumstances are not as serious as those in *Director of Human Rights Proceedings v INS Restorations Ltd* where the element of fraud aggravated the emotional harm and justified an award of $20,000.

FORMAL ORDERS

[219] We will refer to the separate limbs of Mr Geary's case as "the Principle 6 claim" and "the Principle 11 claim" respectively.

The Principle 6 claim

[220] For the foregoing reasons the decision of the Tribunal is that:

> **[220.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that ACC interfered with the privacy of Mr Geary by refusing, without good reason, to make personal information available to him in response to his personal information request dated 13 May 2005.
>
> **[220.2]** Damages of $5,000 are awarded against ACC under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for humiliation, loss of dignity and injury to feelings.
>
> **[220.3]** An order is made under s 85(1)(d) of the Privacy Act 1993 requiring ACC to provide Mr Geary with access to the personal information hitherto withheld by ACC and listed as documents 1 to 7, 9 to 14, 16-18 and 20 to 21 in the schedule to the ACC letter dated 29 June 2005 addressed to Mr Geary. Such access is to be given as soon as reasonably practical and in any case not later than ten working days from the day after the date of this decision.

The Principle 11 claim

[221] In relation to the Principle 11 claim the decision of the Tribunal is that:

> **[221.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that ACC interfered with the privacy of Mr Geary by disclosing to a third party Mr Geary's personal information without a belief, on reasonable grounds, that such disclosure was in accordance with the requirements of information privacy Principle 11.
>
> **[221.2]** Damages of $15,000 are awarded against ACC under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for significant humiliation, significant loss of dignity and significant injury to feelings.

FINAL NON-PUBLICATION ORDER

[222] A final order is made prohibiting publication of the name, address and any other details which might lead to the identification of EFG or of JKL. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

COSTS

[223] Costs are reserved:

> **[223.1]** Mr Geary is to file his submissions within 14 days after the date of this decision. The submissions for ACC are to be filed within a further 14 days with a right of reply by Mr Geary within 7 days after that.
>
> **[223.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without any further oral hearing.
>
> **[223.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

....	....	....
Mr RPG Haines QC	**Mr MJM Keefe JP**	**Dr AD Trlin**
Chairperson	**Member**	**Member**