IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2020] NZHRRT 13**

	Reference No. HRRT 015/2017
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**EAMON HENNING MARSHALL**
	PLAINTIFF
AND	**IDEA SERVICES LIMITED**
	DEFENDANT

AT NAPIER

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms GJ Goodwin, Deputy Chairperson
Ms LJ Alaeinia JP, Member
Mr MJM Keefe QSM JP, Member

REPRESENTATION:
Mr GW Marshall as agent for his son
Ms I Reuvecamp for defendant

DATE OF HEARING: **2 and 3 December 2019**

DATE OF DECISION: **18 May 2020**

DECISION OF TRIBUNAL[1]

INTRODUCTION

Eamon Marshall

[1] Eamon Marshall is 17 years of age and profoundly disabled. He is fully dependant for all aspects of his care, including his continence, bathing, dressing, feeding and mobility. He has been diagnosed with tuberous sclerosis, intractable epilepsy, generalised brain dysfunction, cerebral palsy and visual impairment.

[1] [This decision is to be cited as: *Marshall v IDEA Services Ltd (Privacy Act)* [2020] NZHRRT 13]

[2] Because of Eamon's high and complex needs, his parents (Glenn Walter Marshall and Franziska Jane Marshall) have, in their words, been "unable and unwilling" to care for him. In January 2004, when he was 18 months old, Eamon was by agreement under the then Children, Young Persons and their Families Act 1989, placed in the care of IDEA Services Limited (IDEA Services). Full-time foster caregivers were contracted by IDEA Services to care for Eamon. Eamon remained in their care for approximately 11 years.

[3] In about November 2015, Mrs Marshall on four occasions found medication down the side of Eamon's wheelchair or in his clothing. This raised concerns that Eamon had not received the medication on those occasions. Those concerns (and others) were set out by Mr and Mrs Marshall in an email dated 8 December 2015 addressed to Kai Jugo of the Needs Assessment and Service Co-ordinator (NASC) service of the Hawkes Bay District Health Board. In that same email Mr and Mrs Marshall expressed their view that Eamon should be transitioned out of foster care into full-time residential care. Mr Marshall asked that his email be forwarded by NASC to IDEA Services. This was done on 9 December 2015.

[4] IDEA Services took immediate action. Eamon was uplifted from his foster caregivers and was placed in Ikanui, a full-time adult residential care facility provided by IDEA Services. The placement at Ikanui was intended by IDEA Services to be a temporary one until other full-time foster caregivers could be appointed or another permanent arrangement could be made.

IDEA Services' investigation and report

[5] As a result of Mr and Mrs Marshall's email of 8 December 2015, IDEA Services conducted an internal investigation. Ms Brown, the Area Manager of IDEA Services, led the investigation. In the course of her investigation Ms Brown, or her colleague Ms Bland, spoke to Eamon's previous foster caregivers, the principal of Fairhaven School which Eamon attended, and two holiday programme support workers. Ms Brown did not specifically speak with Mr or Mrs Marshall in connection with her investigation. She was, however, in regular daily contact with the Marshalls.

[6] Following the investigation, Ms Brown produced a draft report on 16 December 2015. After input from Ms Malcolm, the General Manager Central Region of IDEA Services, the full report was finalised on 18 December 2015. It was prepared in a form which responded to each of the issues raised by Mr and Mrs Marshall in their email of 8 December 2015. The full report was an internal one, prepared for IDEA Services itself.

[7] Ms Brown also prepared a summary of the report to give to NASC. This summary report was approved by Ms Malcolm to go to NASC on 18 December 2015.

[8] As a consequence of her investigation, Ms Brown also commissioned a health advisor's report. That report was concluded on 21 December 2015 and emailed to Ms Brown on the same day. The health advisor's report was not referred to in Ms Brown's report, as her report had been completed and finalised before the health advisor's report was received.

[9] On 22 January 2016 the Marshalls requested a copy of the findings of the IDEA Services investigation. Ms Brown sent an email to the Marshalls on 26 January 2016, attaching what she described as a letter of her findings. The attachment was the summary report prepared for NASC. Ms Brown's full report was not sent to the Marshalls.

[10] During Eamon's placement at Ikanui Mr and Mrs Marshall became firmly of the view that Eamon should remain there. As Ikanui was an adult facility, IDEA Services considered this was not appropriate for Eamon. The relationship between IDEA Services and Mr and Mrs Marshall became strained as a result of these conflicting views.

[11] On Sunday 15 May 2016 the Marshalls made the first of several requests for personal information under the Health Information Privacy Code 1994 (Code). IDEA Services responded to this request, supplying information to the Marshalls on 30 May 2016. Mr and Mrs Marshall formed the view that the response was inadequate and on 1 June 2016 lodged a complaint with the Privacy Commissioner.

[12] By 8 June 2016 Mr and Mrs Marshall were in receipt of Ms Brown's full report. On comparing the summary report earlier provided to them with Ms Brown's full report, Mr and Mrs Marshall considered that IDEA Services had been involved in a "cover up". They considered IDEA Services had "sanitised" the summary report given to NASC, by omitting findings that were adverse to IDEA Services but which were contained in the full report. This view coloured all of their future interactions with IDEA Services.

[13] All of the Marshalls' subsequent requests for health information and the responses they received from IDEA Services were interpreted by them in light of their views that IDEA Services was corrupt and trying to cover things up. Mr and Mrs Marshall remained dissatisfied:

> **[13.1]** With the manner in which IDEA Services responded to their requests for personal information.
>
> **[13.2]** With the investigations undertaken by IDEA Services in the course of the preparation of Ms Brown's report.

SCOPE OF THE PRESENT PROCEEDINGS

Statements of claim and reply

[14] Mr and Mrs Marshall are the legal guardians of Eamon. Mr Marshall brought and conducted the present proceedings in that capacity.

[15] The original statement of claim dated 11 March 2017 named Mr Marshall as the second plaintiff and Mrs Marshall as the third plaintiff. It referred to breaches of Rules 5, 6 and 8 of the Code. Following concerns raised by the Chairperson as to the discursive nature of this statement of claim, further statements of claim were filed on 9 December 2018, 15 February 2019 and 29 March 2019 (final statement of claim).

[16] The principal changes introduced between the first and final statements of claim are:

> **[16.1]** Only two causes of action are now advanced, being breaches of Rule 6 and Rule 8 of the Code.
>
> **[16.2]** Mr and Mrs Marshall are no longer plaintiffs. A formal notice of discontinuance was filed by them on 6 March 2019.

[16.3] Although the claim initially sought damages for humiliation and loss of dignity, Mr Marshall has withdrawn the humiliation ground and now confines Eamon's claim to damages for "loss of dignity".

[17] The statement of reply dated 12 April 2019 from IDEA Services denies the allegations of a breach of both Rule 6 and Rule 8 of the Code.

The evidence

[18] IDEA Services did not file any written statements of evidence but relied on the documents contained in the common bundle.

[19] The evidence given by Mr and Mrs Marshall focussed on whether Ms Brown had interviewed Mr and Mrs Marshall as part of her investigation into the concerns which they had expressed following the discovery of the four pills. There were also references to dealings with other IDEA Services employees and an account of a chance meeting in Wellington with the CEO of IDEA Services, Mr Ralph Jones.

[20] The alleged failures by IDEA Services to meet information requests were not addressed in oral evidence. Likewise, the majority of Mr Marshall's specific allegations made in the final statement of claim, in relation to the alleged breach of Rule 8, were not addressed in his or Mrs Marshall's oral evidence.

ALLEGED BREACH OF RULE 6

The allegations in summary

[21] In the final statement of claim Mr Marshall says:

[21.1] Following his original request for information on 16 May 2016 he had to resort to multiple additional information requests for information that had previously been withheld. These are set out in the statement of claim and particularised at [38] to [64].

[21.2] There are multiple breaches of Rule 6.

[21.3] He received five "information packs" between 30 May 2016 and 16 February 2017 responding to his various email requests for information.

[21.4] He received two other information packs on 30 September 2016 and 13 October 2016 which were not linked to any requests for information.

[21.5] A request for information made on 14 February 2017 was declined on 16 February 2017.

[22] The final statement of claim does not specify whether the numerous email requests made after 16 May 2016 were new requests for information or were made to clarify the request of 16 May 2016. It does not specify the time frames within which decisions to supply information should have been made. It does not indicate any time frames within which information should have been able to be provided. It does not specify whether it is considered any information is still outstanding.

[23] IDEA Services:

[23.1] Denies any breaches of Rule 6.

[23.2] Says it made decisions regarding the Marshalls' requests for information within the time frame required under the Privacy Act (PA).

[23.3] Says it provided information within a reasonable time frame and without delay, as required under the PA. The statement of reply analyses this in detail.

[24] IDEA Services also raises some jurisdictional issues, which are considered below.

The law

[25] Section 22F(1) of the Health Act 1956 together with Rule 11(4) of the Code entitles a child's representative (their parent or guardian) to request access to the child's health information. Any such request is treated as an access request under Rule 6. Mr and Mrs Marshall are Eamon's parents and guardians. Rule 6 provides:

> **ACCESS TO PERSONAL HEALTH INFORMATION**
>
> (1) Where a health agency holds health information in such a way that it can readily be retrieved, the individual concerned is entitled –
> (a) to obtain from the agency confirmation of whether or not the agency holds such health information; and
> (b) to have access to that health information.
> …
> (3) The application of this Rule is subject to:
> …
> (b) Part 5 of the Act (which sets out procedural provisions relating to access to information).

[26] In relation to the procedural provisions referred to in r 6(3)(b) of the Code, PA, s 40 provides:

> **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.

[27] An interference with the privacy of an individual is defined in PA, s 66. In connection with of the allegations of a breach of Rule 6 of the Code only PA, s 66(2), (3) and (4) are relevant. Section 66(1) is, however, relevant in connection with the alleged breach of Rule 8 of the Code.

> **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.

[28] The obligations to make a decision on a request, to communicate that decision and to supply information without undue delay apply in the same way to a request for information under Rule 6 of the Code as they do to IPP 6 (PA, ss 63 and 66(1)(a)(2)).

[29] In summary, once a request for health information is received:

[29.1] The agency must decide whether the request is to be granted and must communicate that decision to the requester within 20 working days of receipt of the request (PA, s 40(1)).

[29.2] Where the agency decides to supply information, it must do so without undue delay.

[29.3] If there is undue delay in the supply of the information, the agency will be deemed to have refused to make the information available (PA, s 66(4)).

[29.4] A deemed refusal (for undue delay) will be an interference with privacy, where the Tribunal is of the view that there is no proper basis for that deemed refusal (PA, ss 66(2)(a)(i) and 66(2)(b)).

[30] Accordingly, the Tribunal must consider:

[30.1] Whether or not Mr Marshall's various email requests for information were new requests or merely clarifications of an earlier request.

[30.2] Whether a decision was made by IDEA Services that each request was to be granted, and whether that decision was communicated to the Marshalls, within 20 working days of the date of receipt of the request.

[30.3] Where a decision was made to provide information, whether that information was provided without undue delay.

[31] The 20 working days commences to run separately in respect of each separate information request.

[32] We set out a chronology of the Marshalls' information requests and IDEA Services' responses in [38] to [64]. To determine whether there has been an interference with Eamon's privacy, we then analyse the requests and responses in terms of the questions posed in [30].

Jurisdiction

[33] Before considering the Marshalls' requests for information and IDEA Services' responses, there is a preliminary issue of jurisdiction.

[34] IDEA Services says the Tribunal lacks jurisdiction to consider any of IDEA Services' responses made after 29 August 2016, as these were not part of the complaint submitted by Mr Marshall to the Privacy Commissioner. IDEA Services relies on a letter of 7 September 2016 from the Commissioner to Mr Marshall, setting out the basis of his complaint of 1 June 2016 to the Commissioner.

[35] The Commissioner's letter of 7 September 2016 is a preliminary one, in which he advises Mr Marshall that the Commissioner has asked for comments from IDEA Services. The Commissioner's Certificate of Investigation was not issued until 10 March 2017. That Certificate refers to the Marshalls' request for information of 15 May 2016.

[36] Of note are the following passages from *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [62] to [64]:

> [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 *Waug 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.

[37] In light of the above, the Tribunal has jurisdiction to consider all responses to the Marshalls' request for information of 15 May 2016 (including subsequent clarifications of that request) whether IDEA Services' responses were made before or after 29 August 2016.

Information requests and responses – chronology

[38] The first request for information was made by Mr Marshall in an email sent on Sunday 15 May 2016 as follows:

> Under the Privacy Act 1993 Principle 5 and Health Information Privacy Code 1994 r 6 we request a copy of all information held regarding Eamon. This should include communications regarding Eamon, including all internal and external IDEA Services correspondence regarding Eamon leading up to and post Eamon being uplifted from his previous foster care placement ….

[39] The scope of this request was clarified by Mr Marshall's subsequent email of Monday 16 May 2016:

> Further to my discussion with the Commissioner's office, we wish to receive all health and personal information relating to Eamon and/or Glenn and Fran Marshall held by IDEA Services.
>
> For the sake of clarity we wish to ensure that the information provided by IDEA Services should include every internal and external communication relating to Eamon sent or received by any member of IDEA Services including the following individuals …

[40] IDEA Services received these two emails (which together comprise the first request) on 16 May 2016 (being the first working day after 15 May 2016). Pursuant to PA, s 40(1) the time within which IDEA Services was obliged to advise whether or not information would be made available was 20 working days after 16 May 2016, being 13 June 2016.

[41] On 16 May 2016 IDEA Services responded by email to the first request, advising that the information would be available "by the end of the week". This time estimate was

revised by IDEA Services on 18 May 2016 due to what it said was the significant amount of information being uncovered. IDEA Services advised that the information would be ready by 31 May 2016.

[42] On 30 May 2016 IDEA Services wrote to Mr and Mrs Marshall enclosing personal information. This letter and the information enclosed with it was collected by Mr Marshall from the Hastings office of IDEA Services on 31 May 2016.

[43] Mr and Mrs Marshall almost at once formed the view that the 30 May 2016 disclosures were inadequate as on 1 June 2016 Mr Marshall lodged a complaint with the Privacy Commissioner.

[44] On 6 June 2016 Mr Marshall emailed Ms Malcolm at IDEA Services, raising concerns that information was missing from that provided to him on 30 May 2016. He specifically referred to email correspondence between Fairhaven School and Ms Brown, the "home school notebook", documents from Fairhaven School cataloguing ongoing concerns around Eamon's welfare and email correspondence regarding the report of the investigation conducted by Ms Brown.

[45] It is immaterial whether the email of 6 June 2016 from Mr Marshall to Ms Malcolm is characterised as a new request for information under the Code, or a clarification of the earlier request. If it is treated as a new request, the time frame for making the response starts to run again. On the other hand, if the 6 June 2016 request is simply by way of clarification of the earlier request, the time frame under PA, s 40(1) for advising whether information would be provided would still expire on 13 June 2016. But nothing turns on this, as IDEA Services responded within the statutory time frame, whichever characterisation is applicable.

[46] On 7 June 2016 Ms Malcolm responded to the Marshalls' email of 6 June 2016. She said there was no intention to withhold information and that IDEA Services believed they had completed a thorough search. She promised to complete a further search by 29 June 2016.

[47] Mr and Mrs Marshall were now in receipt not only of the summary of Ms Brown's report, made to give to NASC (which had been sent to the Marshalls in January 2016), but also the full report on Ms Brown's investigation.

[48] Mr Marshall's views that there was a "cover up" in the preparation of the summary report are evidenced by an email he sent to Ms Malcolm on 8 June 2016, copied to, inter alia, the Hawkes Bay District Health Board and the Minister of Health:

> Hi Michelle
>
> I refer to my brief phone call to you earlier today that finished at 2pm whereby I afforded you the courtesy of informing you that I finally have enough jigsaw pieces to put together. It beggars belief that even in our brief conversation when I advised you we have <u>both</u> reports you still feigned ignorance.
>
> I remain perplexed by your comment below "*It is not our intention to withhold information* and we believed that we had completed a thorough search".
>
> I refer to attached emailed dated 10/12/15 whereby you state to your COO Tracey Ramsay "…until Maggie has investigated all of the concerns raised by Eamon's parents. The NASC has also asked Maggie to rely her findings of her investigation – *which of course she will run pass me (I will check with you as well) before sharing anything*".

> And yet there was no internal IDEA Services email correspondence provided under our request for information under the Privacy Act 1993 Principle 5 and the Health Information Privacy Code regarding either the full report of the filtered/sanitised report. In my opinion it is extremely unlikely that there is no internal email correspondence that exists in regards to who signed off on the decision to provide us and the NASC with the filtered/sanitised version of the report. There is historical emails where both Karen Mora from the NASC and Fran and I requested a copy of your report findings.
>
> We have complaints in with the Health and Disability Commissioner, Privacy Commissioner and very recently NASC/MOH and these parties have been provided with numerous and damning documents.
>
> …
>
> Only when the tide goes out do you discover who's been swimming naked. Warren Buffett
>
> Please note low tide is fast approaching!
>
> Regards
>
> Glenn Marshall – guardian and proud dad of Eamon Henning Marshall

[49] As a result of this email, Ms Rhodes, General Manager Health and Aging at IDEA Services, wrote to Mr Marshall on 10 June 2016 advising that IDEA Services would carry out a further search for information and provide that by 29 June 2016.

[50] Mr Marshall replied by email dated 11 June 2016. He asked that IDEA Services provide him with all information he had previously requested. Ms Rhodes again wrote to Mr Marshall on 14 June 2016 advising that she intended to carry out a further search and provide information by 29 June 2019. This response merely reiterates the earlier response of 10 June 2016. It is not a separate response for the purpose of determining whether it is within or outside the statutory 20 working day period within which the decision to provide information must be taken.

[51] On 29 June Ms Rhodes did respond to Mr and Mrs Marshall. She advised that IDEA Services had located some further records it had been able to identify. She advised that these had not been previously included as part of the initial search, as IDEA Services understood that the Marshalls' request for information related particularly to the uplift of Eamon from the foster care placement. Included in the additional information was Eamon's "home school book", recording reports from Fairhaven School and a copy of the information provided to Ms Brown (for the purpose of her report) from the principal of Fairhaven School. Ms Rhodes said the omissions were inadvertent and not deliberate. This information was supplied only seven weeks after the first request of 16 May 2016.

[52] Ms Rhodes' letter of 29 June 2016 did, however, note that some emails were not delivered. Ms Rhodes advised that IDEA Services' systems were predominantly hard copy files, so that emails not placed on hard copy files were no longer readily retrievable. She advised that IDEA Services was refusing to make these available under PA, s 29(2)(a). We consider this subsequently.

[53] On 3 August 2016 Mr Marshall sent an email to Ms Rhodes at IDEA Services with the following request:

> We request that Idea Services' Privacy Officer conducts an independent search of the relevant Idea Services staff emails including the staff noted above in an effort to locate and provider the information to us. If Nicola Bland, Maggie Brown, Michelle Malcolm and Tracey Ramsay etc have deleted emails (and they cannot be readily retrieved) and they did not print off a copy of the emails and place them on Eamon's central hardcopy file and you therefore deem the information is not "readily available" as defined in the Privacy Act then we required [sic] a detailed explanation.

> In summary we require all inwards and outwards email correspondence/documentation from Idea Services concerning Eamon, Glenn and Fran Marshall that has not already been provided to us under our previous two requests. If the information is no longer in existence and therefore not "readily available" then we will be requesting that the "Privacy Commissioner investigate whether there are any systemic problems relating to the way in which the agency stores and secures its information".

[54] The level of detail in the information sought by Mr Marshall properly categorises this as a separate and new request for personal information (the second request). Under PA, s 40(1) the time within which IDEA Services was obliged to advise whether or not the information sought in the second request would be made available was 20 working days after 3 August 2016, being 31 August 2016.

[55] On 5 August 2016 Ms Ramsay responded by email advising the second request was being considered.

[56] On 29 August 2016 Ms Rhodes wrote to the Marshalls providing some additional information. Her response is set out in full below. It sets out IDEA Services' position that email correspondence withheld on 29 June 2016 was properly categorised as not readily retrievable. Enclosed with the letter of 29 August 2016 were eight emails and minutes of the meeting of 10 December 2015.

> As set out in our earlier letter of 29 June 2016, by that date we had already made reasonable attempts to locate all relevant documents that were readily retrievable, including the emails.
>
> But, as you will appreciate, IDEA Services as an organisation is constrained by its existing systems and the funding it receives, which is limited. As explained to you in our earlier letter of 29 June 2016, our record system for Eamon is a hard copy file. It was, and remains not an organisational requirement to print all emails for the hard copy file. The emails you have requested had not been printed for Eamon's file. We had also searched for the emails electronically.
>
> Nevertheless, IDEA Services has now made further attempts to locate the emails for you. This has included arranging for our Information Technology team to retrieve emails from historical email records that were archived. Their work has been extensive. It has been at significant additional time and cost to IDEA Services. It has taken several weeks to complete.

[57] Notwithstanding its letter of 29 August 2016, IDEA Services continued to try to locate further information about Eamon.

[58] On 30 September 2016 Ms Rhodes again wrote to Mr Marshall enclosing documents that had not previously been disclosed. There were some further emails which had been archived but which, by 30 September 2016, had been recovered. There was also an audit undertaken by IDEA Services' health advisor, a file note dated 18 April 2016 and a review report dated 21 April 2016.

[59] Disclosure of the emails is properly categorised as a response made to the second request of 3 August 2016 for email correspondence. The audit by the health advisor, the file note and the review report are, however, properly categorised as information supplied in response to the first request of 16 May 2016.

[60] On 13 October 2016 Ms Rhodes again wrote to the Marshalls, enclosing copies of seven separate file notes made between 10 December 2015 and 18 December 2015. These are properly categorised as being made in response to the first request of 16 May 2016.

[61] In his final statement of claim Mr Marshall refers to emails of 28 December 2016 and 1, 3, 6 and 7 of January 2017 that he sent to IDEA Services. Only the emails of 1 and

3 January 2017 are relevant, the others not relating to requests for personal information. The email of 1 January 2017 requested a copy of an internal email from Ms Malcolm to Ms Ramsay. The email of 3 January 2017 requested copies of internal emails which would have had attached to them a document entitled "Analysis of Medication Folder".

[62] On 13 February 2017 the Privacy Officer of IDEA Services responded advising the internal email from Ms Malcolm to Ms Ramsay was unable to be located. The request was therefore refused under PA, s 29(2)(b).

[63] In relation to the email of 3 January 2017 the Privacy Officer advised that IDEA Services had searched its records and found the Analysis of Medication Folder document was handed to Ms Bland personally and emailed to Ms Rhodes and Ms Malcolm. Copies of those emails were provided. IDEA Services was unable to definitively confirm that the document was not sent to any other person. IDEA Services therefore advised that, to the extent the report might have been more widely circulated, no relevant correspondence was able to be readily retrieved or found and the request was therefore refused under PA, s 29(2)(a) and (b).

[64] On 14 February 2017 Mr Marshall sent an email to IDEA Services following up a request for information he made on 24 January 2017. The email of 24 January is not referred to in the final statement of claim. On 16 February 2017 IDEA Services refused the request for information pursuant to PA, ss 29(2)(a) and (b).

Information requests and responses – Privacy Act analysis

[65] We proceed to consider the requests for information from the Marshalls and the responses from IDEA Services, in light of the requirement to decide on a request within 20 working days and to provide information without undue delay.

The first request – decision to provide information

[66] The first request was received by IDEA Services on 16 May 2016. Requests supplementary to the first request were received on 6 June and 11 June 2016.

[67] Under PA, s 40(1) IDEA Services was required to respond to the Marshalls' first request within 20 working days of 16 May 2016, advising whether it had decided the request would be granted and, if so, in what manner. The first request therefore had to be responded to on or before 13 June 2016 (an allowance being made for Queen's Birthday holiday).

[68] On 16 May 2016 IDEA Services made a decision to provide information and communicated this decision to the Marshalls. IDEA Services followed this by further communications to the Marshalls on 7 June and 10 June 2016, advising the information would be made available.

[69] All responses were within the 20 working days, as required by PA, s 40(1).

The first request – provision of information

[70] While there is no time frame prescribed for which information must be supplied, under PA, s 66(4) "undue delay" in making information available will be deemed to be a refusal to provide information under s 66(2)(a)(i) and so to be an interference with privacy, where the Tribunal is of the opinion there is no proper basis for that decision.

[71] Information in response to the first request was provided by IDEA Services to Mr and Mrs Marshall on 30 May 2016, 29 June 2016, 30 September 2016 and 13 October 2016. The issue is whether these responses were made without undue delay.

[72] The question of what constitutes undue delay was considered in *Koso v Chief Executive, Ministry of Business, Innovation and Employment* [2014] NZHRRT 39 as follows:

> [4] However, the Privacy Act does not require the decision and the provision of the information to be made at the same time. This recognises the reality that even once the decision is made, providing access to the information may take further time. For instance, there may be a large amount of documents to copy. Some items of information in the documents may need to be redacted because they are not information about the requester, or to protect interests recognised in ss 27 and 29 of the Act. The information may need to be carefully checked before sending it to the requester to make sure that the redactions are correct or that information about others has not been inadvertently included. Physical files may need to be brought from remote locations.
>
> [5] The Privacy Act does not set a fixed time for providing access to the information. Instead, s 66(4) states that it is an interference with privacy if access is "unduly delayed" and if there is no proper basis for the delay.
>
> [6] The phrase "undue delay" as used in s 66(4) is not defined in the Privacy Act. It carries its ordinary meaning of inappropriate or unjustifiable. See OED Online (Oxford University Press, June 2014). What is undue is clearly dependent on context: R v B [1996] 1 NZLR 385 (CA) at 387. For the Privacy Commissioner it was submitted that in theory, time begins to run from the time of the request but in practice the question of undue delay will only arise after the decision on release has been made. This is because the decision must be made as soon as reasonably practicable. If it is not reasonably practicable to make a decision on the request earlier, an agency cannot be said to have unduly delayed in providing access to the information. We agree…

[73] IDEA Services' responses to the first request made on 30 May 2016 and 29 June 2016 were made within two weeks and seven weeks respectively, after the first acknowledgement that information would be provided. We find that these response times were not inappropriate or unjustifiable and so the responses were made without undue delay.

[74] The responses made on 30 September 2016 and 13 October 2016 were made within 20 weeks and 22 weeks respectively after the first acknowledgement that information would be provided. The issue of whether this constitutes undue delay will be governed by the nature of the information and how easily it could be retrieved and supplied in the circumstances.

[75] On 30 September 2016 IDEA Services provided the Marshalls with an audit undertaken by its health advisor, a file note dated 18 April 2016 and a review report dated 21 April 2016. The review report had already been provided to the Marshalls, albeit in a slightly different format, on 22 April 2016. The audit and the file note should have been readily able to be retrieved and supplied. IDEA Services did not advance any reason for the delay in supplying these documents. The 20 weeks it took IDEA Services to supply this information does constitute undue delay and, as there is no proper basis for that delay, gives rise to a deemed refusal to provide information.

[76] On 13 October 2016 IDEA Services provided the Marshalls with file notes made between 10 December 2015 and 18 December 2015. As IDEA Services, by its own admission, ran a paper-based filing system these file notes should have been readily able to be retrieved and supplied. Once again, IDEA Services did not advance any reason for the delay in supplying these documents, so there is no proper basis for that delay. Twenty- two weeks, in these circumstances, does constitute undue delay, again giving rise to a deemed refusal to provide information.

[77] In relation to the supply on 30 September 2016 and 13 October 2016 of the audit and the file notes, we find that there has been an interference with Eamon's privacy under PA, s 66 (2)(a)(i).

Summary of conclusion regarding Rule 6 of the Code

[78] In summary, there was undue delay by IDEA Services in its provision of the following documents to the Marshalls:

[78.1] An audit undertaken by its health advisor.

[78.2] A file note dated 18 April 2016.

[78.3] File notes made between 10 December 2015 and 18 December 2015.

Ancillary Matters

[79] While we have found an interference with Eamon's privacy, for the sake of completeness we briefly canvass three additional matters:

[79.1] Whether, in relation to information IDEA Services said on 29 June 2016 was not readily retrievable, it has discharged its onus of proof of that assertion.

[79.2] Whether the Tribunal has jurisdiction to consider any alleged breaches of Rule 6 of the Code in relation to the second request made on 3 August 2016. If there is jurisdiction, whether IDEA Services made a decision in relation to that second request as required by PA, s 40(1) within 20 working days and whether information was thereafter supplied without undue delay, as required by PA, s 66 (4).

[79.3] Whether the Tribunal has any jurisdiction to consider any alleged breaches of Rule 6 in relation to Mr Marshall's email requests of 1 and 3 January 2017 or 14 February 2017.

Withholding information not readily retrievable

[80] In her response of 29 June 2016 Ms Rhodes identified that some emails had not been printed and placed on hard copy files and so were not readily retrievable.

[81] Information can be withheld if any of the statutory withholding grounds in PA, ss 27 to 29 apply. An agency may refuse a request if the information is not readily retrievable (PA, s 29(2)(a)).

[82] If an agency seeks to rely on any of the statutory grounds for refusal in PA, ss 27 to 29, it has the onus of proof of that exception.

> **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.

[83] While Mr and Mrs Marshall must satisfy the Tribunal, on the balance of probabilities, that an action of IDEA Services is an interference with their privacy, it is for IDEA Services

to establish, on the balance of probabilities, that the provision of PA, s 29 on which it relies does indeed apply.

[84] The first time IDEA Services raised the issue of emails not being readily retrievable is in its letter of 29 June 2016. This is clearly outside the original 20 working days within which a decision must be made regarding whether the information must be provided (that date being 13 June 2016). This is, however, not fatal. The following Passage in *Watson v CCDHB* [2015] NZHRRT 27 is of note:

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

[85] The matter for consideration is not whether the emails that were not printed and placed on the hard files, were retrievable, but whether they were readily retrievable. Information which may be technically retrievable may not be readily retrievable. The amount of time and cost required to retrieve the information and the manner in which the information is stored are relevant factors going towards ready retrievability.

[86] In this case, certain of the information characterised on 29 June 2016 as not being readily retrievable was subsequently disclosed on 30 September 2016 (being eight recovered emails). The fact that these emails were discovered some three months later following a thorough forensic search does not mean the initial categorisation of them as not readily retrievable made on 29 June 2016 was incorrect.

[87] Documents only discovered after a thorough forensic search cannot be said to be readily retrievable. Accordingly, we find that IDEA Services has satisfied the onus required of it under s 87 of the Privacy Act that this information was not readily retrievable.

The second request – decision to supply and provision of information

[88] The Commissioner's Certificate of Investigation refers only to the Marshalls' request for information of 15 May 2016. We have found the request for information made by the Marshalls on 3 August 2016 was a separate and new request. There was nothing to indicate that the Marshalls made any complaint to the Privacy Commissioner about IDEA Service's response to this request. Equally, while the Commissioner was aware of the request, there is nothing to indicate that IDEA Service's response was investigated by the Commissioner. On this basis the Tribunal has no jurisdiction to consider any alleged breaches of Rule 6 which arise from the second request of 3 August 2016.

[89] For the sake of completeness, we note that even if the request of 3 August 2016 had been the subject of a complaint by the Marshalls and an investigation by the Commissioner, so within the Tribunal's jurisdiction, there was no interference with Eamon's privacy in relation to that request.

[90] This is because under PA, s 40(1) IDEA Services was required to respond within 20 working days, advising whether it had decided that the request would be granted. The response was therefore required by 31 August 2016. Thereafter, the information was required to be supplied without undue delay (PA, s 66(4)).

[91] IDEA Services made a response and supplied information on 29 August 2016. The response was within the time required by PA, s 40(1) and the information was supplied without undue delay. Further information, responding to request of 3 August 2016 was supplied on 30 September 2016. A response within this time frame did not give rise to undue delay.

Requests of 1 and 3 January and 14 February 2017

[92] There is no evidence that Mr Marshall ever complained to IDEA Services that his requests of 1 and 3 January and 14 February 2017 were not properly responded to. There is no evidence that Mr Marshall made any complaint to the Privacy Commissioner about any alleged failure by IDEA Services in relation to responding to them. There is no evidence that there was ever any investigation made by the Privacy Commissioner. In the absence of such evidence the Tribunal lacks jurisdiction to consider any alleged breach of Rule 6 in relation to these email requests.

ALLEGED BREACH OF RULE 8

The allegations in summary

[93] The final statement of claim alleges that IDEA Services, in conducting the investigation led by Ms Brown, failed to take reasonable steps to ensure the personal information in that report was accurate, up to date, complete, relevant and not misleading. It says that this constitutes a breach of Rule 8 of the Code. It sets out five matters that Mr Marshall says breach Rule 8.

[94] IDEA Services denies any breach of Rule 8. It does acknowledge certain of the matters referred to by Mr Marshall did occur. Those acknowledgements are, however, not made in the language used in the final statement of claim. IDEA Services says these matters do not show any breach of Rule 8.

The law

[95] Rule 8 states:

> **Rule 8 Accuracy etc of Health Information to be Checked Before Use**
>
> (1) A health agency that holds health information must not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant and not misleading.

[96] As PA, s 66(1) applies the Tribunal must be satisfied not only that an action breaches an IPP but also that, in the opinion of the Tribunal, that action has resulted in one or more of the forms of harm listed in s 66(1)(b).

The scope of the Rule 8 complaint

[97] The five matters that Mr Marshall relies on to establish IDEA Services failed to take reasonable steps to ensure the personal information in the full report was accurate, up to date, complete, relevant and not misleading, are:

> 8. IDEA Services:
>
> (a) Failed to interview or speak to the complainants.

(b) Failed to interview the interviewees in a professional, robust and thorough manner, and properly record those interviews.
(c) The Area manager engaged Lyn Burns IDEA Services Health Advisor to undertake a medication audit review on 17 December 2015. Yet the Area Manager Maggie Brown finalised her investigation and furnished her internal report to her superiors, prior to receiving the Health Advisors report. Even once the Area Manager received the Health Advisors report (post the investigation report being finalised) she failed to do an addendum to her report.
(d) Failure to include in the investigation report that there had been a separate sentinel event with Eamon's medication in August 2013.
(e) Maggie Brown failed to provide a draft report to us to comment on to ensure that the information was accurate, complete and not misleading.

[98] Of note is that Mr Marshall's allegation of a breach of Rule 8 refers to the full report prepared by Ms Brown for IDEA Services and the steps that she took prior to issuing that report. His allegation does not refer to the summary of that report prepared for NASC. While Mr and Mrs Marshall felt that the summary report given to NASC was a "sanitised" version of the full report, that is not the issue before the Tribunal. The Tribunal is not called upon to determine whether the summary report was a fair one.

[99] Equally, the Tribunal cannot "second guess" the views reached in the report. Rule 8 goes not to the content of the report, but to the steps taken to ensure the accuracy of the report, in light of the use to which the report is to be put.

Jurisdiction

[100] In relation to the five matters Mr Marshall alleges show a breach of Rule 8, IDEA Services says that all but one of those is outside the jurisdiction of the Tribunal. It says this is because the Privacy Commissioner only investigated the alleged breach of Rule 8 on the basis of Mr Marshall's first point, namely that IDEA Services failed to interview Mr or Mrs Marshall in connection with the preparation of the report. For this, IDEA Services relies on the Privacy Commissioner's Certificate of Investigation.

[101] Under PA, s 82 an aggrieved individual 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.

[102] Similarly, before an aggrieved individual can bring proceedings before the Tribunal under PA, 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:

[103] 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 decision in *Peters v Wellington Combined Shuttles Ltd (Application by Defendant that Jurisdiction be Declined)* [2013] NZHRRT 21 (28 May 2013).

[104] The Certificate of Investigation issued by the Privacy Commissioner in this case records:

Complainant	Glenn, Fran, Eamon Marshall (Our Ref: C/28032)
Respondent	IDEA Services Limited ("IDEA Services")
Matters investigated	Whether IDEA Services responded appropriately to the Marshall's 15 May 2016 request for personal information (concerning his family and son). Whether IDEA Services took reasonable steps to check information was accurate, complete, relevant, up to date and not misleading before producing a report for the Ministry of Health on 16 December 2015. Whether IDEA Services had reasonable safeguards in place to prevent loss, misuse or disclosure of personal information.
Rules applied	5, 6, 8
Commissioner's opinion: Application of rules Adverse consequences Interference with privacy	Breach of rule 6 as IDEA Services did not respond appropriately to the Marshall's request for information. Breach of rule 8 as IDEA Services did not speak with the Marshalls before producing the 16 December 2015 report to the Ministry of Health, which resulted in adverse consequences. As complaint withdrawn, no finding made on rule 5. Breach of rule 6 Breach of rule 8 No finding made in relation to rule 5 Yes Yes

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

[106] The matters investigated by the Commissioner are usually couched in broad terms in the certificate. The certificate summarises the Commissioner's opinion and does not refer to the detail of all matters looked into in the course of the investigation. The important matter is which rules of the Code the Commissioner applied in the conduct of his investigation. It is clear that the Commissioner did apply both Rules 6 and 8 of the Code. We therefore reject IDEA Services' submission that the Tribunal does not have jurisdiction to consider only one of Mr Marshall's allegations relating to the alleged breach of Rule 8.

Whether IDEA Services breached Rule 8

[107] Rule 8 focuses on the reasonableness of the steps taken to check information, having regard to how that information is to be used. As was said in *Mullane v Attorney- General* [2017] HRRT40 at [102] and [103], with reference to the near identical provisions of IPP 8:

> [102] The phrasing of Principle 8 underlines that in its application, context is everything. The key words or phrases (which are themselves of some imprecision) are:
>
> - such steps (if any).
> - as are in the circumstances.
> - reasonable.
> - having regard to the purpose for which the information is proposed to be used.
>
> [103] It must also be remembered that Principle 8 is open-textured and does not impose the "certainty" of a bright line rule. A degree of flexibility as to how an agency complies with it must be allowed. The elements of "reasonableness" and "circumstances" also underline the need to avoid reading the Principle 8 requirements as an inflexible test to be applied in a literal and mechanical manner.

Use of the information

[108] The onus is on Mr Marshall to show that IDEA Services failed to take reasonable steps, having regard to the purpose for which the information is proposed to be used. The key to considering the alleged breach of Rule 8 is the identification of the purpose for which the information was proposed to be used. Neither Mr Marshall's final statement of claim nor any of his witness statements address this matter.

[109] While the purpose for which Ms Brown thought the information was proposed to be used was addressed in a statement prepared for the Health and Disability Commissioner on 13 November 2017, that statement is not in evidence before the Tribunal. The result is that the Tribunal has no evidence as to the proposed use of the report. What is clear is the report cannot have been intended to be used or actually used for any matters relating to Eamon's continuing foster care, as he had been uplifted from that foster care prior to the commencement of the investigation giving rise to the report.

[110] We are left to determine the alleged breach of Rule 8 without any evidence from either party as to the use of the full report.

Failure to Interview

[111] Turning nevertheless to the specifics that Mr Marshall alleges support his contention of a breach of Rule 8, the first of these is that IDEA Services failed to interview or speak to either him or Mrs Marshall.

[112] IDEA Services accepts that in conducting its investigation it did not interview or speak to the Marshalls. IDEA Services says Ms Brown was, however, in regular daily contact with Mr and Mrs Marshall and it is reasonable to assume she would have been well acquainted with their concerns. Mr Marshall has not shown why interviewing him or his wife was a reasonable step to ensure the information in the investigation report was accurate, complete and not misleading. We find Mr Marshall has not proved a failure to interview him or Mrs Marshall gave rise to a breach of Rule 8.

[113] We do note that Ms Brown's report did initially state that the Marshalls were interviewed, when it was accepted this did not formally occur. However, this was

addressed in a response to a request by the Marshalls dated 28 December 2016 that the inaccuracy be corrected. This was done by IDEA Services and confirmed to the Marshalls on 13 February 2017.

No robust interviews

[114] The second matter Mr Marshall alleges supports a breach of Rule 8 of the Code is that IDEA Services failed to interview the interviewees in a professional, robust and thorough manner and to properly record those interviews. This is denied by IDEA Services. Mr Marshall was provided with notes of interviews made by Ms Brown and Ms Bland in the course of the investigation. Mr Marshall does not say that these notes were inadequate or that they showed the interviewees were interviewed in a less than professional, robust and thorough manner. Once again Mr Marshall has not advanced any evidence to support this assertion and, in the absence of such evidence, his contention cannot succeed.

No reference to the health advisor's report

[115] The third matter Mr Marshall relies upon is that Ms Brown finalised her investigation and furnished her report to IDEA Services prior to receiving the health advisor's report which she had requested. Mr Marshall says that even once the health advisor's report was received it was not included as an addendum to Ms Brown's report.

[116] IDEA Services accepts this. It says the health advisor's report was initiated as a result of and following on from Ms Brown's investigation. We agree with this analysis. The evidence shows Ms Brown's report and the subsequent health advisor's report are clearly separate, the one commissioned as a result of the other. Mr Marshall has not advanced any basis on which he says this step ought to have been taken to ensure the accuracy of Ms Brown's report.

Separate sentinel event

[117] The fourth matter raised by Mr Marshall is that IDEA Services failed to include in Ms Brown's report that there had been "a separate sentinel event with Eamon's medication in August 2013". Mr Marshall gives no details in relation to this event nor how it is relevant to the claim. This complaint is accordingly not established.

Failure to provide draft report

[118] The final matter raised by Mr Marshall is that Ms Brown failed to provide a draft of the report to the Marshalls to comment on, to ensure the information was accurate, complete and not misleading. IDEA Services acknowledges it did not provide the Marshalls with the report in draft. It says Mr Marshall has not set out the basis on which it is argued that this was a reasonable step which ought to have occurred. We find that Mr Marshall has not made out any argument that IDEA Services' failure to provide a draft of the report to him or Mrs Marshall was needed, to ensure the report was accurate, up to date, complete, relevant or not misleading.

Conclusion

[119] Mr Marshall has failed to establish on the evidence why any of the five matters listed in his statement of claim give rise to a breach of Rule 8. Overall, however, the inescapable point is that there is no evidence at all as to the use of the report. Mr Marshall's allegation of a breach of Rule 8 of the Code must fail.

REMEDY

[120] The provision of personal information on 30 September 2016 and 13 October 2016 by IDEA Services to the Marshalls was unduly delayed and so constitutes an interference with Eamon's privacy. We must therefore consider potential remedies.

The law

[121] Where the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant one or more of the remedies allowed by PA, s 85 as follows:

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
>
> (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
>
> (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
>
> (c) damages in accordance with section 88:
>
> (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
>
> (e) such other relief as the Tribunal thinks fit.

Remedies sought

[122] The remedies sought by Mr Marshall on behalf of Eamon are:

[122.1] A declaration that an action of IDEA Services is an interference with Eamon's privacy.

[122.2] $300,000 by way of damages for loss of dignity.

Conduct of IDEA Services

[123] Section 84(5) of the Privacy Act provides that while it is no defence that the interference with privacy was unintentional or without negligence, the Tribunal must nevertheless take the conduct of the agency into account in deciding what, if any, remedy to grant.

[124] IDEA Services asks the Tribunal to take into account its prompt acknowledgement of the information requests and the fact that it provided information as soon as it could. IDEA Services also asks the Tribunal to take into account the repeated apologies it made and its repeated attempts to meet with Mr and Mrs Marshall to communicate those apologies in person.

[125] Specifically, IDEA Services says:

[125.1] It repeatedly, from May 2016 onwards, stressed that it did not intend to withhold any information from the Marshalls.

[125.2] The Marshalls appear to have taken the view that there was a cover up by IDEA Services from 1 June 2016 onwards (the day on which they complained to the Privacy Commissioner) before IDEA Services had even had the opportunity to respond to concerns held by the Marshalls.

[125.3] It repeatedly apologised to the Marshalls regarding the management of their requests.

[125.4] It continued to acknowledge further requests and correspondence from the Marshalls, and to respond to such requests and correspondence in a considered and prompt way, despite the relentlessness of such requests and correspondence; the tone of some correspondence received from the Marshalls; the Marshalls' litigious approach; and the extensive time and resources that had been consumed by their complaints.

[125.5] In a letter dated 20 January 2017 Ms Ramsay referred to a discussion the previous week in which she had offered to visit Mr and Mrs Marshall to hear directly from them the various concerns which they had raised. The intended purpose of the meeting had been for IDEA Services to offer an apology in person. The apologetic and conciliatory terms and tone of the letter are relevant:

> As discussed last Friday, I was pleased to speak to you and offered to visit, along with Wendy, to hear from you directly regarding the various concerns that you are raising with us. I understand why you have decided not to accept that offer, but hope that we may have the chance again in future to meet. As mentioned, we are very sorry that matters have reached this point and we really felt that it would be good to meet with you and offer a direct apology in person for the way in which matters have developed. It was useful to hear from you in our phone call and to understand a bit more about what you would like to happen next.
>
> Before I address the matters raised in your recent correspondence further below, I would firstly like to state here that IDEA Services truly is sorry that you feel we have not addressed your concerns sufficiently and that you have felt let down by our processes taken to-date. It is our intention to address each of the matters that you have raised and to ensure that senior management has reviewed these points appropriately.
>
> IDEA Services places client safety and support as the upmost priority in all services that we are involved in. We have high expectations from all staff and caregivers in this regard, and so it is disappointing if we do not deliver on those expectations. **In this case, we have become aware that the issues that you raised in late 2015 may not have been adequately addressed including carrying out the relevant review and follow up that we would have expected.** Although senior management were aware of various aspects of the issues that you had raised, unfortunately we did not become aware of the way in which this had been handled (or not) with you until much later. **The internal review carried out by the local manager lacked sufficient detail and was then not appropriately followed up. We regret that this has caused you distress and a significant amount of time needing to be invested in order to follow up the issues raised. It would have been our expectation that the manager had completed a more detailed review and report, and that she would then have met with you in person to go through her findings and suggested next steps.**
>
> As you are aware, in terms of our review and other related issues that you have subsequently raised, we have recently participated in a review commissioned by the Ministry of Health in respect of your complaints – we are waiting on the final report and recommendations in respect of that review. It is our hope that we can use the various findings from this process with you as learnings for the future with our other clients. We regret Eamon is no longer with us but wish you all the best for the future.
>
> …

> On the information available at the time it was appropriate for the Area Manager to investigate your concerns which were communicated to us by Options (NASC). **It is unfortunate that the Area Manager did not link directly with you as part of her investigation and her report writing skills and follow up communication with you was not to expected standard.** [Emphasis added]

[125.6] On 13 February 2017, it corrected Ms Brown's investigation report to state that IDEA Services had not interviewed the Marshalls.

[125.7] While it denies having breached Rule 6 or Rule 8 of the Code, IDEA Services did at an early stage recognise deficiencies in the process followed by Ms Brown by not discussing the investigation report with Mr and Mrs Marshall and by not making it clear they were being provided with only a summary of the report. For that reason it acknowledged the steps taken had not been robust or within the expectations of IDEA Services. IDEA Services was also at pains to assure the Marshalls that there had been no deliberate policy to withhold information or to cover up any matters.

[125.8] In a letter also dated 12 April 2017 Mr Ralph Jones, Chief Executive of IDEA Services, wrote to Mr and Mrs Marshall with an apology, noting he would like to meet with them personally to discuss their various complaints and concerns and how IDEA Services had handled those to date:

> In particular, I would like to apologise to you in person and to update you on the company's position going forward.
>
> Importantly, I wish to acknowledge that we agree with you in respect of a number of your concerns raised. We are already taking steps to address the identified faps and errors to ensure something similar does not occur again in future.
>
> At the same time, I would like to discuss with you the recent Human Rights Review Tribunal claim and propose a way forward.
>
> Finally, I want you to know that IDEA Services will be acknowledging the following points in our discussions with the HDC and also in relation to your HRRT claim:
>
> 1. IDEA Services places client safety and support as the upmost priority in all services that we are involved in. We have high expectations from all staff and caregivers in this regard, and so it is disappointing when we do not deliver on those expectations.
>
> 2. IDEA Services acknowledges your complaints and we accept that we have not responded adequately to those complaints at the critical times.
>
> 3. Your initial concerns raised in November 2015 were not sufficiently investigated or responded to as required by company policy.
>
> 4. You were not communicated with as the company would have expected — both at the time of complaint, or afterwards. The company's approach is usually to be upfront and transparent, and to ensure the complainants are fully informed and their information requests are promptly acted on. It is disappointing that this did not occur for you.
>
> 5. The Area Manager involved in this case, and all other Area Managers, are receiving further guidance and training on complaints management and carrying out investigations.
>
> 6. IDEA Services accepts that its client and complaints information collection and storage system requires urgent review and development.
>
> 7. It took too long for senior management to become aware of your escalating concerns and the nature of those concerns. This is another key learning for the company to work on for the future – we have already engaged external assistance in this regard to review and assist the development of our complaints management framework.
>
> 8. IDEA Services acknowledges that this process has been time-consuming and stressful for you, as well as key staff involved. We have apologised for that, and we are keen to continue engaging with you about this process going forward.

9. IDEA Services has nothing to hide – and there has been no cover up – although we understand why you may have come to that view. It is our intention to respond in a fully transparent manner, and try to put things right for you, and ensure we have a robust framework in place for addressing issues raised in relation to other clients.

10. Despite the process issues acknowledged above, we consider Eamon was not at high risk at any point throughout this process. Although there appear to have been medication documentation and mishandling errors, we believe he would always have been cared for appropriately in the circumstances.

11. The company is working through the identified gaps and learnings from this complaints process, in the hope that it can ensure it has more robust complaints management framework that can better respond to complaints such as yours in the future.

I will understand if you do not wish to meet in person – but I also hope that you will consider it as an opportunity for us to, at the very least, talk things through. If you are willing to meet, I would propose that meeting takes place in late April or early May (as I am away for large periods over the next few weeks). Alternatively, we can continue to discuss matters via email if that is your preference. My email address is: ralph.jones@ihc.org.nz. I will leave it to you to make that decision. I believe it is never too late to put things right and I wish to continue to engage on the best way forward together.

[125.9] Mr and Mrs Marshall stated they preferred to allow the investigations to run their course. Mr Jones noted in an email dated 21 April 2017 that "IDEA Services would be happy to jointly engage an independent mediator to help us work through the matters at issue (at our cost)".

[125.10] In a letter dated 9 May 2017 Mr Jones once again apologised and added:

As previously acknowledged in the investigation completed by the Area Manager in December 2015, and reiterated in the attached final investigation report into three aspects of medication management, it is accepted that the oversight of medication for Eamon fell short of organisational expectations including the structure, organisation and contents of Eamon's medication folder alongside other service management procedures. It is also accepted that home visits were irregular and incomplete during 2014-15 and that due to the lack of oversight of medication and the absence of regular audits, there is no record of the caregivers' practice in terms of the management of Eamon's medication generally, or more particularly, changes to that medication. We apologise for letting you and Eamon down in this regard.

As you are aware, we agree with you in respect of a number of the concerns raised and we are already taking steps to address the identified gaps and errors to ensure something similar does not occur again in future.

To that end, we have accepted a number of points as set out in my previous letter of 12 April 2017, including that we did not respond adequately to your complaints at the critical times; that your initial concerns were not investigated or sufficiently responded to in accordance with company policy; that you were not communicated with as the company would have expected; that our client and complaints information collection and storage system needs urgent development; and that it took senior management too long to become aware of your escalating concerns and the nature of those concerns. We also apologised that this process had been time-consuming and stressful for you and noted that we intended to respond in a fully transparent manner, and to try to put things right for you.

in short, we do not consider that we responded to your concerns in an appropriate manner and we sincerely apologise for that. However, we feel that your complaint has provided us with significant learning opportunities and are now working hard to implement change and generally improve the services we provide.

We acknowledge your commitment to your son and to ensuring that he is provided with the best care. We would welcome an opportunity to work with you more closely to implement the proposed changes if that was at all possible/of interest.

[125.11] The "conduct" of the defendant which IDEA Services asks the Tribunal to take into account is conduct of early, genuine acknowledgment of error together with contrition and apology.

Relevance of apology

[126] The relevance of an apology was addressed in *Williams v Accident Compensation Corporation* [2017] NZHRRT 26 at [38] and [41]:

> **[38]** An appropriate and timely apology can be taken into account under s 85(4) of the Privacy Act when considering whether the defendant's conduct has ameliorated the harm suffered as a result of the breach of privacy. See *AB v Chief Executive, Ministry of Social Development* [2011] NZHRRT 16 at [37]:
>
> > … an appropriate apology given at the right time is a matter that can be taken into account under s.85(4) of the Act in considering whether and to what extent the defendant's conduct has ameliorated the harm suffered as a result of an interference with privacy.
> >
> > …
>
> **[41]** The apology cannot "erase" the humiliation, loss of dignity or injury to feelings caused by the interference with privacy. Nor is it a "get out of jail free" card. The question in each case is whether and to what degree the emotional harm experienced by the particular plaintiff has been ameliorated. While this is a fact specific inquiry it can be said that ordinarily an apology must be timely, effective and sincere before weight can be given to it. It is not inevitable an apology, even if sincerely and promptly offered, will ameliorate the emotional harm experienced by the plaintiff. Much will depend on who the particular plaintiff is and the particular circumstances of the case.

[127] Having considered the evidence we are of the view substantial weight must be given to the apologies offered to Mr and Mrs Marshall and to the repeated efforts made by IDEA Services and its employees to meet with them in an effort to enter into a dialogue and to better understand each other's view.

[128] In light of these actions of IDEA Services, we turn to the question of the remedies sought.

Declaration

[129] The first remedy sought by Mr Marshall for Eamon is a declaration that IDEA Services has interfered with Eamon's privacy.

[130] While the grant of a declaration is discretionary, declaratory relief should not ordinarily be denied unless there has been a clear, exceptionally egregious breach of the standards to be expected of a litigant. See *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [107]:

> **[107]** Second, we reach a rather different view in relation to the issue of declaration. It is clear that the Tribunal regarded Mr Geary's conduct as sufficiently egregious to disentitle him to the discretionary remedy of a formal declaration. This despite the finding already made as to breach of Principle 6 by the board. We accept that the granting of a declaration under s 85(1)(a) of the Privacy Act 1993 is discretionary in nature. The same is the case with declarations under the Declaratory Judgments Act 1908, although that consideration is there made explicit. A declaration may be declined generally on the basis of disentitling conduct. Whether the applicant has acted with clean hands, or has acted "fairly and appropriately" are relevant questions.

[131] Mr Marshall has accepted that at times leading up to this case his conduct has been "less than exemplary". We are not, however, of the view his behaviour has been sufficiently egregious as to deny Eamon the remedy of a declaration of breach. In any

event, it is not Eamon bringing the case, but Mr Marshall. Eamon should not be denied the remedy of a declaration because of the actions of his father.

[132] We conclude that a declaration of breach should be made. The terms of that declaration follow at the end of this decision.

Damages

[133] Mr Marshall is claiming damages of $300,000 on behalf of Eamon, for Eamon's loss of dignity under PA, s 88(i)(c).

[134] Section 88 provides:

> **88 Damages**
>
> (1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:
>
> (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:
>
> (b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:
>
> (c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.
>
> (1A) Subsection (1) applies subject to subpart 1 of part 2 of the Prisoners' and Victims' Claims Act 2005.
>
> (2) Damages recovered by the Director of Human Rights Proceedings under this section shall be paid to the aggrieved individual on whose behalf the proceedings were brought or, if that individual is a minor who is not married or in a civil union or lacks the capacity to manage his or her own financial affairs, in the discretion of the Director of Human Rights Proceedings to Public Trust.
>
> (3) Where money is paid to Public Trust under subsection (2),—
>
> (a) sections 103 to 110 of the Contract and Commercial Law Act 2017 shall apply in the case of a minor who is not married or in a civil union; and
>
> (b) Part 9A of the Protection of Personal and Property Rights Act 1988 shall apply in the case of an individual who lacks the capacity to manage his or her own financial affairs.

[135] The issue of how damages for loss of dignity should be approached in the context of someone lacking legal capacity to understand the circumstances of a breach of the Code (or even understand there has been a breach) was very recently considered in *Marshall v IDEA Services Ltd (HDC Act)* [2020] NZHRRT [9].

[136] The Tribunal's detailed analysis of the interpretation of dignity at [66] to [107] of *Marshall v IDEA Services Ltd (HDC Act)* [2020] NZHRRT [9] is adopted in full in this case. Likewise, the Tribunal's approach to the method by which an assessment of any quantum of damages is to be made at [111] to [116] of that case is adopted in full.

[137] We have found that IDEA Services interfered with Eamon's privacy by failing to supply to the Marshalls the following information, without undue delay:

[137.1] An audit undertaken by its health advisor.

[137.2] A file note dated 18 April 2016.

[137.3] File notes made between 10 December 2015 and 18 December 2015.

[138] All of these documents were produced after Eamon had been uplifted from his foster caregivers. Failure to provide them at an earlier date had no consequences in relation to Eamon's ongoing care. While the audit undertaken by the health advisor showed the shortcomings in records relating to Eamon's medication, the focus of the interference with privacy for a breach of Rule 6 is not on a failure to review medication folders but on the length of time IDEA Services took to provide the requested information.

[139] The file notes made between 10 December 2015 and 18 December 2015 were made as part of the investigation led by Ms Brown, following Eamon being uplifted from his previous foster caregivers. Once again, failure to provide these file notes at an earlier date had no consequences in relation to Eamon's ongoing care. The focus of this interference with privacy does not go to the adequacy of the investigations made prior to Ms Brown's report being concluded. It goes solely to the time it took IDEA Services to supply these notes to the Marshalls.

[140] We are concerned solely with an alleged loss of dignity arising from the late provision of a very small number of documents, in a situation where there were no consequences for Eamon or the care he was receiving from that late provision.

[141] In our consideration as to whether damages should be awarded we have also taken into account:

> **[141.1]** That the Tribunal has, in this decision, provided a remedy for Eamon in the form of a declaration that IDEA Services interfered with Eamon's privacy.
>
> **[141.2]** The significant weight which must be given to IDEA Services' repeated and genuine apologies and offers to meet with the Marshalls.

[142] The late provision of information does not give rise to treatment of Eamon that violates his right to equality. Eamon's dignity has not been diminished at all by the failure to provide information in a timelier fashion. No evidence has been shown establishing that Eamon suffered any loss of dignity by the delay in providing the documents referred to in [137].

[143] In these circumstances we see no justification for Eamon's rights to be further vindicated by any additional award of damages.

FORMAL ORDERS

[144] A declaration is made under s 85(1)(a) of the Privacy Act 1993 that IDEA Services interfered with the privacy of Eamon Marshall by IDEA Services failing to supply, without undue delay:

> **[144.1]** An audit undertaken by its health advisor.
>
> **[144.2]** A file note dated 18 April 2016.
>
> **[144.3]** File notes made between 10 December 2015 and 18 December 2015.

[145] The application by Eamon Marshall for damages for loss of dignity is dismissed.

COSTS

[146] Each party has enjoyed a measure of success. Costs are accordingly reserved.

[147] Should Mr Marshall consider applying for costs on behalf of his son he is to note the only recoverable costs are the disbursements incurred in preparing and presenting the case. An itemised list will have to be sent to Ms Reuvecamp for her comment.

[148] Unless the parties come to an arrangement on costs, the following timetable is to apply:

> **[148.1]** Mr Marshall is to file his submissions within 14 days after the date of this decision. The submissions for IDEA Services are to be filed within the 14 days which follow. Mr Marshall is to have a right of reply within 7 days after that.
>
> **[148.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.
>
> **[148.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....	.....
Mr RPG Haines ONZM QC **Chairperson**	**Ms GJ Goodwin** **Deputy Chairperson**	**Ms LJ Alaeinia JP** **Member**	**Mr MJM Keefe QSM JP** **Member**