

Reference No. HRRT 078/2015

UNDER THE PRIVACY ACT 1993

BETWEEN ANDREW BROOKS

PLAINTIFF

AND TAEKWONDO UNION OF NEW ZEALAND
INC

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines QC, Chairperson

Ms ST Scott, Member

Mr RK Musuku, Member

REPRESENTATION:

Ms T Coleman, agent for plaintiff

Mr R Gordon for defendant

DATE OF HEARING: 6 and 7 March 2017

DATE OF DECISION: 7 June 2017

DECISION OF TRIBUNAL¹

INTRODUCTION

[1] From the age of 15 years, Mr Brooks has participated in Taekwondo and is an avid sparring competitor. He has won eight black belt national titles and numerous other competitions. He represented New Zealand in Taekwondo at the 2005 World

¹ [This decision is to be cited as: *Brooks v Taekwondo Union of New Zealand Inc* [2017] NZHRRT 20.

Championships and the 2006 Commonwealth Championships. He received his black belt when 20 years of age.

[2] Until 2008 Mr Brooks always participated in Taekwondo as a member of the Taekwondo Union of New Zealand Inc (TUNZ).

[3] In September 2008 Mr Brooks was suspended by TUNZ. The grounds given by TUNZ in justification for this step have always been strongly contested by Mr Brooks. It would be fair to say that the relationship between Mr Brooks and the TUNZ Executive has for some time been strained, hindering the ability of the parties to communicate with each other effectively.

[4] From at least early 2014 Mr Brooks and his supporters (including his mother and Ms T Coleman) have made requests to TUNZ under the Privacy Act 1993 for copies of documents relevant to the suspension and subsequent events. These early requests under the Privacy Act are not the subject of the present proceedings.

[5] It is sufficient to note that Mr Brooks, having resolved to rejoin TUNZ, e-mailed the secretary on 1 April 2014 stating that he would like to pay his membership fees for 2014 and asked whether that would be a problem. On 8 April 2014 TUNZ replied to the effect that he would need to submit a formal application for membership together with his Taekwondo résumé and other supporting material. Mr Brooks was surprised at this response as in the years prior to 2008 his membership had been renewed without any formality upon payment of the annual fee. He had not previously been asked to submit a formal application and supporting documents and did not on this occasion submit the requested application.

[6] In early August 2014 Mr David Aldridge, a friend of Mr Brooks, tried to renew Mr Brooks' membership of TUNZ. Mr Aldridge has trained and competed in Taekwondo for the past 37 years and has represented New Zealand on numerous occasions. He has been a member of TUNZ since its inception over 20 years ago. He has known Mr Brooks for 17 years and each has coached the other at competitions. Mr Aldridge has supported Mr Brooks in his post-2008 standoff with TUNZ. Being aware Mr Brooks wanted to renew his membership with TUNZ Mr Aldridge, when applying to register new members with TUNZ, included a payment for Mr Brooks.

[7] By e-mail dated 11 August 2014 the secretary of the TUNZ returned the payment, stating that membership of TUNZ was not automatic and that the Executive Committee had asked Mr Brooks to submit a formal application, résumé and supporting material. The e-mail concluded that the committee would consider a formal written application from Mr Brooks when such was submitted.

[8] It was against this background that Mr Brooks resolved to obtain as much information as he could regarding the information TUNZ held about him. On 11 December 2014 a request was made by him for access to his personal information held by TUNZ. Two further requests were made on 17 December 2014. The case for Mr Brooks is that TUNZ declined the first two requests and only complied with the third when the time for doing so had expired.

[9] The issue in these proceedings is whether TUNZ did in fact comply with its obligations under the Privacy Act and if not, whether there was a consequential interference with the privacy of Mr Brooks as defined in s 66 of the Act.

Credibility

[10] Mr Brooks gave evidence in person as did Mr Aldridge. The witnesses for TUNZ were Ms J Killalea, the then secretary of TUNZ, and Mr V Chhika, the current President of TUNZ. He has been on the Executive Council since 2004 and a member of TUNZ since its inception in 1994.

[11] While there were understandable differences in the accounts given by the witnesses, those differences were minor. The essential facts relevant to the determination of the Privacy Act issues are not really in dispute. Credibility is not an issue in this case.

THE REQUESTS FOR ACCESS TO PERSONAL INFORMATION AND THE RESPONSES BY TUNZ

The first request

[12] By e-mail dated 11 December 2014 timed at 4:41pm addressed to TUNZ Mr Brooks recorded his understanding that his membership of TUNZ had not been accepted. He therefore requested the date and time of the meeting at which that decision had been reached, the minutes of the meeting and “all information [TUNZ] has on me”. The e-mail relevantly stated:

I have been informed that my membership into the union has not been accepted.

I am requesting the date and time of the meeting at which this was decided and all people involved.

I also request the minutes of this meeting.

I also request all the information the union has on me.

[13] It can be seen from the last line of this e-mail that the request is what is sometimes referred as an “everything” request. Such requests are perfectly permissible. The Privacy Act does not require requests to be specific. See *Dotcom v United States of America* [2014] NZHC 2550 at [83]. The reason for this is self-evident. In most circumstances the person requiring access to personal information held by an agency will not know what information about the requester is held by the agency. Expressed more colloquially, “You don’t know what you don’t know”.

[14] The response by TUNZ was prompt. By e-mail dated 17 December 2014 timed at 3:17pm the secretary advised:

[14.1] The 1 April 2014 inquiry by Mr Brooks regarding membership of the TUNZ was considered by the Executive Council via e-mail and no meeting was held.

[14.2] TUNZ had provided the requested information in the past and did not hold any new information:

TUNZ has previously provided the information you have requested in relation to past events. As you are not a current member, TUNZ does not hold any new information on you.

[15] The evidence heard by the Tribunal makes it clear this response was erroneous in two respects. First, the information requested had not been provided in the past. When the information was eventually provided to Mr Brooks on 3 September 2015 it came in the form of some 247 pages of e-mail correspondence, letters and other documentation, some of which pre-date 17 December 2014. In particular the 2013 review of the

suspension had not been earlier disclosed to Mr Brooks. The fact that an e-mail dated 26 January 2015 makes reference to charging Mr Brooks for three hours to collate and print the information also suggests there was far more information than had previously been disclosed to Mr Brooks. Second, the fact that some information may have previously been released to Mr Brooks was not on its own a permissible ground for denying access to personal information. Only the reasons set out in ss 27 to 29 of the Act justify a refusal to disclose information requested pursuant to information privacy principle 6. See s 30 of the Act. Previous supply of information is not included in the reasons allowed by these provisions but may be relevant in the context of the “frivolous or vexatious” ground in s 29(1)(j). That ground has no application to the present case.

The second and third requests

[16] Upon receiving the TUNZ refusal decision of 17 December 2014 Mr Brooks at 7:58pm that same day replied by e-mail requesting all e-mail correspondence relating to his membership request:

I request the e-mail correspondence in which I was discussed and all e-mails relating to my request for membership.

[17] Then, little more than 40 minutes later Mr Brooks at 8:37pm made a further request, this time specifying the e-mail correspondence between TUNZ and Mr Aldridge regarding Mr Brooks’ application to join TUNZ. This e-mail will be referred to as the “Aldridge request”:

I also require the e-mail correspondence between TUNZ and Dave Aldridge regarding my application to join TUNZ.

[18] Because the 11 December 2014 access request was an “everything” request it was not really necessary for Mr Brooks to make the second and third requests identifying specific categories of the information sought. The documents were already covered by the first request. As mentioned, a requester will seldom know what personal information is held by the relevant agency. It is for the agency to make disclosure, not for the requester to second guess what might be held. If the agency is in doubt as to what is in fact sought by the requester or what is included in the request, s 38 of the Act encourages a dialogue between the two parties, particularly in those cases where the requester has a specific issue in mind when making the access request. But an “everything” request is not required to be particularised if the requester is indeed seeking all the personal information about the requester held by the agency.

[19] In the present case TUNZ did not at any stage engage in a dialogue with Mr Brooks about his requests.

[20] Be that as it may TUNZ did seek legal advice from its solicitors, Gibson Sheat. By letter dated 30 January 2015 Gibson Sheat advised Mr Brooks that the access request was refused on two grounds. First, the information had already been provided and second, the withholding ground in s 29(1)(b) applied, namely that the information was evaluative material:

- 8 We also understand you have made a privacy request for your personal information which you believe is held by the Union.
- 9 The Union wishes to inform you that it has refused your request for personal information based on the following grounds:
 - a it does not hold your personal information other than that which has already been provided to you.

- b if it is incorrect in 9(a) above, it refuses your request on the grounds provided in section 29(b) of the Privacy Act 1993.

[21] It can be seen the communication by Gibson Sheat makes no differentiation between the three requests. They are all referred to as “your request for personal information”.

[22] Mr Brooks thereupon on 9 February 2015 lodged a complaint with the Privacy Commissioner.

[23] Responding to the complaint, TUNZ by letter dated 15 April 2015 told the Privacy Commissioner:

[23.1] As to the e-mail correspondence discussing the membership request by Mr Brooks, TUNZ did not accept this information was “personal information” for the purposes of the Privacy Act. In the alternative, TUNZ was entitled to refuse the request under s 29(1)(b) on the basis the correspondence was evaluative material in relation to a “benefit”, being membership of TUNZ. Disclosure of the information would breach an implied promise that both the discussion and the identity of the Executive Committee members taking part in that discussion would be held in confidence.

[23.2] As to the “Aldridge request”, TUNZ had decided to disclose the requested information and by e-mail dated 15 April 2015 addressed to Mr Brooks the e-mail correspondence between TUNZ and Mr Aldridge was sent as an attachment. By e-mail dated 28 April 2015 Mr Brooks advised the Privacy Commissioner the attachment could not be opened and that he required a file in readable format. It is not clear when this issue was resolved. For the purpose of this decision it is sufficient to note only that the provision on 15 April 2015 of a few pages of correspondence passing between Mr Aldridge and TUNZ is at some distance in time from the request made on 17 December 2014. We return to this point shortly.

[24] In a preliminary response to Mr Brooks the Investigating Officer at the Office of the Privacy Commissioner notified Mr Brooks:

[24.1] She was satisfied a portion of the information withheld was legally privileged information and that in relation to those documents s 29(1)(f) of the Act applied.

[24.2] In relation to the reliance by TUNZ on the evaluative material provision in s 29(1)(b), the investigation was continuing.

[24.3] TUNZ had confirmed it had released all the information held by it in relation to Mr Brooks (and which had not been withheld under the withholding provisions of the Act). Mr Brooks, in turn, had said he did not accept all the information had been provided and had pointed, in particular, to the withholding of the 2013 review of his suspension.

[25] By letter dated 13 July 2015 the Investigating Officer wrote to the solicitors for TUNZ expressing the preliminary view that the internal e-mails between TUNZ executive members did not meet the definition of evaluative material and that Mr Brooks was entitled to the information which had been withheld under s 29(1)(b) of the Act. The

Investigating Officer was also satisfied the information was indeed “personal information” as defined in the Act.

[26] Responding to this preliminary view TUNZ maintained it was justified in relying on s 29(1)(b) but nevertheless decided not to challenge the opinion expressed by the Investigating Officer. Eventually, after a substantial exercise involving the collation of some 700 pages of correspondence relating to Mr Brooks the withheld information was released to Mr Brooks on 3 September 2015.

The final position taken by the parties on liability and remedies

[27] In his statement of claim Mr Brooks challenged each and every of the withholding grounds relied on by TUNZ. He also sought a number of remedies including a declaration of interference with his privacy, an order that TUNZ release all personal information not already released, an order that the information released on 3 September 2015 be re-released in a legible and structured format and finally, damages of \$30,000 for humiliation, loss of dignity and injury to feelings. However, in the course of the hearing Mr Brooks modified his stance:

[27.1] He no longer challenged the withholding of those documents to which legal professional privilege attached under s 29(1)(f) of the Act.

[27.2] In the event of the Tribunal finding there had been an interference with his privacy (as defined in s 66), the only remedy sought was a declaration of interference with privacy under s 85(1)(a).

[28] For its part TUNZ conceded in closing that of the 247 pages withheld from Mr Brooks under the evaluative material ground (s 29(1)) closer examination showed only four of the pages qualified for protection under that provision. In addition, while at the commencement of the case TUNZ had said it would be applying for costs in the event of the claim by Mr Brooks failing, that position was retracted in the course of closing submissions.

[29] In this decision we accordingly proceed on the basis that the “evaluative material” withholding ground does not apply to the withheld documents with the exception of the four pages in question, being pp 292, 299, 306 and 307 of the Common Bundle.

[30] Having also seen the 2013 report on the process followed by TUNZ when suspending Mr Brooks in 2008 (a copy of which was included in the 3 September 2015 release) we are of the view there can be no doubt this document qualifies as “personal information” about Mr Brooks. The content is all about him and the process which led to his suspension.

[31] Finally, we also proceed on the basis that the documents withheld under s 29(1)(f) were documents to which legal professional privilege properly applied.

WHETHER TUNZ IN BREACH OF STATUTORY TIME LIMITS

[32] Relevant to the outcome of this case is the question whether TUNZ complied with the time limits prescribed by the Act.

The statutory provisions affecting time

[33] As stated in *Koso v Chief Executive, Ministry of Business, Innovation and Employment* [2014] NZHRRT 39 at [1], an agency which receives a request under information privacy principle 6 for access to personal information has two key obligations. Both are governed by a statutory timeframe:

[33.1] First, to make a **decision whether the request is to be granted**. This decision must be made “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. See s 40(1) of the Privacy Act. Failure to comply is deemed to be a refusal to make available the information to which the request relates (s 66(3)). The governing test is “as soon as reasonably practicable”. The 20 working day period is a maximum limit to what can be said to be “as soon as reasonably practicable”.

[33.2] Second, **to make the information available** without “undue delay”. This obligation is contained in s 66(4) of the Act. Where undue delay occurs there is similarly a deemed refusal to make the information available (s 66(4)).

[34] The Privacy Act does not require the decision on the request (under s 40) and the provision of the information to occur at the same time. Indeed the Privacy Act does not set a fixed time within which access to the requested information must be given. Instead, s 66(2)(b) and (4) state that it is an interference with privacy if access is “unduly delayed” and there is no proper basis for the delay. That is, s 40 applies to the obligation to make a **decision** on the request whereas s 66(4) applies to the distinct process of **making information available**. This was explained in *Koso v Chief Executive, Ministry of Business, Innovation and Employment* at [2] to [6]:

Undue delay – interpretation of

[2] As much of this case turns on the question of undue delay it is necessary at the outset that we set out our understanding of this statutory requirement. We acknowledge the substantial assistance given by the submissions presented on behalf of the Privacy Commissioner, many of which we have adopted.

[3] In practice the **decision** to release and the **provision** of the information will often (or even usually) be contemporaneous. The decision whether to release tends to take most “thinking” time. Providing access to the information is often more straightforward, involving a simple question of photocopying or making arrangements for the requester to come in and view the information. Mailing the decision and the information at the same time is common and is often helpful for both requester and agency.

[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. In *L v T* (1998) 5 HRNZ 30 the High Court briefly considered the relationship between ss 66(3) and 66(4). It concluded that s 66(4) must relate to a delay **within** the 20 working day period in s 40. This conclusion was *obiter* as s 66(4) did not, on the facts, have relevance. This much is expressly acknowledged by the High Court itself at p 39 of the decision. In our respectful view the *obiter* comment is clearly incorrect because the High Court failed to recognise that s 40 applies to the obligation to make a **decision** on the request whereas s 66(4) applies to the quite distinct process of **making information available**. In addition, as the Privacy Commissioner correctly submitted, the High Court did not turn its mind to the fact that an agency can agree to provide a document within the statutory timeframe but then fail to actually provide it within a reasonable time after that. Furthermore, the Act anticipates situations (eg large and complex requests) where an agency needs to extend the period for making a decision on release. In such circumstances it is entirely conceivable that the agency may well need further – even considerable – time to actually make the information available.

[35] The issue in the present case is whether the statutory time provisions were complied with by TUNZ.

The calculation of time over Christmas and New Year

[36] Time began running against TUNZ over the Christmas and New Year period. Fortunately the Privacy Act recognises the special challenges created by the annual shutdown which occurs at this time.

[37] Section 40 requires the decision on the access request to be made and communicated not later than 20 working days after the day on which the request was received. “Working day” as defined in s 2(1) does not include a day in the period commencing with 25 December in any year and ending with 15 January in the following year.

The statutory timeline

[38] In the result, allowing also for Wellington Anniversary Day to be included in the calculation, the final date for TUNZ to comply with the 11 and 17 December 2014 requests was:

11 December 2014	2 February 2015
17 December 2014	10 February 2015

[39] While s 41 allows for the time limits to be extended, TUNZ did not avail itself of this provision.

[40] The requested information was provided on 3 September 2015 with the exception of the provision on 15 April 2015 of the few pages covered by the “Aldridge request”.

Findings in relation to the 11 December 2014 request

[41] Addressing first the 247 pages released on 3 September 2015 (but excluding the four pages of evaluative material), the request was made on 11 December 2014 and promptly refused by TUNZ on 17 December 2014. While the 20 working day period prescribed by s 40 for a decision on the request was complied with the requested information was not provided until 3 September 2015. On any view this was “undue delay”. The same conclusion would follow even if the s 40 decision is to be taken as the one communicated by Gibson Sheat in their letter dated 30 January 2015. While the

decline decision was likewise within the 20 working day period the information itself was not provided until 3 September 2015. This constituted undue delay.

[42] TUNZ submitted two factors should be taken into account when determining whether there was undue delay in terms of s 66(4):

[42.1] TUNZ was of the genuine belief that apart from the small category of documents covered by legal professional privilege, the balance of the documents were protected from disclosure by the evaluative material provisions in s 29(1)(b).

[42.2] TUNZ is a voluntary organisation. With limited time and resources the secretary faced a formidable task assembling the requested information while at the same time having to deal with a heavy and demanding workload in her professional employment. Her availability over key periods in the disclosure process was limited. Complicating factors were said to be the wide and vague nature of the requests, the fact that TUNZ rarely, if ever, has received requests for access to personal information, does not possess in-house knowledge of privacy law and was required to seek professional legal assistance on such questions as what amounts to personal information and the permissible reasons for refusing requests. Because communication within the Executive Council is largely by e-mail it was a time consuming process to collect the e-information and to then process it.

[43] As to the first point, the fact that personal information has been mistakenly withheld under ss 27 to 29 of the Act does not affect the time calculation under s 40 and s 66(4). It is not a defence that the agency honestly but mistakenly relied on one or more of the withholding grounds permitted by ss 27 to 29 of the Act. Nor can an agency's lack of familiarity with the Act justify a stretching of the "undue delay" test. Resource issues, while relevant, are not determinative. On the facts, even allowing in favour of TUNZ all the factors described by Ms Killalea in her evidence we are of the view that the nine month delay from 17 December 2014 (the refusal by TUNZ) as well as the eight month delay from the Gibson Sheat letter of 30 January 2015 was undue.

[44] The fundamental flaw in the TUNZ defence on the "undue delay" point is that from December 2014 and January 2015 it wrongly assumed the information was properly withheld under the evaluative material provisions of s 29(1)(b). It was not until the Privacy Commissioner by letter dated 13 July 2015 expressed the preliminary view s 29(1)(b) did not have application that assembly of the requested material began. But time did not run from 13 July 2015. It ran from the December 2014 and January 2015 decisions to decline the access requests. TUNZ cannot rely on its mistaken application of the provisions of the Act to justify the late delivery of the information on 3 September 2015.

Findings in relation to the 17 December 2014 request for the Aldridge documents

[45] We turn now to the question whether there was delay in providing the Aldridge documents. In this regard the following points are to be made:

[45.1] The request of 17 December 2014 for e-mail correspondence between TUNZ and Mr Aldridge regarding the application by Mr Brooks to join TUNZ was necessarily included in the "everything" request made on 11 December 2014.

[45.2] Even were this point to be put to one side the request made on 17 December 2014 at 8:37pm was declined by the Gibson Sheat letter dated 30 January 2015 on the mistaken grounds that the information had already been provided and in any event s 29(1)(b) applied. This position was reversed once the investigation by the Privacy Commissioner commenced and the requested correspondence was provided to Mr Brooks on 15 April 2015 by way of e-mail attachment.

[45.3] Leaving aside the complaint that the attachment could not be opened and assuming in favour of TUNZ that the delay is to be calculated from the decline on 30 January 2015 to the supply on 28 April 2015 we are of the view there has been undue delay. Only a few e-mails were involved and their location a simple exercise, the documents being confined to correspondence between Mr Aldridge and TUNZ. The real reason for the delay was not the difficulty in locating the documents but the mistaken reliance on the evaluative material ground in s 29(1)(b) and the belated reversal of that position once the investigation by the Privacy Commissioner commenced. TUNZ cannot rely on that mistake.

[46] In the circumstances we are of the view the two and a half month delay from 30 January 2015 to 15 April 2015 was clearly “undue delay” in terms of s 66(4) of the Act.

Findings in relation to the other 17 December 2014 request for e-mail correspondence

[47] It will be clear from our findings in relation to the 11 December 2014 request and in relation to the Aldridge request that the e-mail correspondence required by Mr Brooks in his first e-mail of 17 December 2014 was for the same reasons provided out of time.

[48] In summary our conclusion is that in relation to the requests of 11 December 2014 and 17 December 2014, TUNZ was in breach of the statutory time limits. This finding does not automatically lead to a decision in favour of Mr Brooks. The failure to comply with the statutory time limits must also qualify as an interference with privacy as defined in s 66(1) of the Act.

WHETHER THERE HAS BEEN AN INTERFERENCE WITH THE PRIVACY OF MR BROOKS

[49] The jurisdiction of the Tribunal to grant a remedy under s 85 of the Act is enlivened only if the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual. See s 85(1).

[50] The circumstances in which an action is an interference with the privacy of an individual are set out in s 66. That provision is in two separate and distinct parts. It is s 66(2) which has application to the present case along with subs (3) and (4):

- (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.

[51] Because we have found there was undue delay by TUNZ in making information available in response to Mr Brooks' information privacy requests the deeming provision in s 66(4) applies; that is there is on the facts a deemed refusal to make the information available in response to the requests. This satisfies s 66(2)(a)(i). But before a finding of interference with privacy can be made s 66(2)(b) requires the Tribunal to also be of the opinion that there was no proper basis for that (deemed) refusal to make the information available.

[52] In the present case it follows from our earlier findings that the Tribunal is indeed of the opinion there was no proper basis for the withholding decision. As TUNZ conceded in the closing stages of the hearing, with the exception of four pages, s 29(1)(b) did not apply to the balance of the 243 withheld pages. Where an agency erroneously relies on a withholding ground listed in ss 27 to 29 of the Act and consequently fails to make the information available within the time limits prescribed by the Act it must inevitably follow that in terms of s 66(2)(b) there was no proper basis for the withholding of the information.

Overall conclusion

[53] It follows from our several findings there was an interference by TUNZ with the privacy of Mr Brooks.

REMEDY

[54] In *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, Ms S L Ineson and Ms P J 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".

[55] TUNZ opposed the making of a declaration of interference with privacy, arguing it had employed its best endeavours to comply with the Privacy Act. Specifically it took legal advice as soon as the access requests were received and subsequently accepted the ruling by the Privacy Commissioner.

[56] However, it can now be seen the advice received by TUNZ was based on incomplete information. Only a small fraction of the withheld pages qualified under the evaluative material provisions of s 29(1)(b). Consequently the personal information requested by Mr Brooks was unjustifiably withheld. The mistaken refusal to provide the information caused Mr Brooks genuine frustration, anxiety and stress. He did not in any way contribute to the delay in the provision of the information or to the mistaken basis for the withholding decision.

[57] On the facts we see nothing that could possibly justify the withholding from Mr Brooks of a formal declaration that TUNZ interfered with his privacy. Indeed TUNZ is fortunate Mr Brooks abandoned his request for damages as TUNZ was at real risk of having an award made against it.

FORMAL ORDERS

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

[58.1] A declaration is made under s 85(1)(a) of the Privacy Act 1993 that Taekwondo Union of New Zealand Inc interfered with the privacy of Mr Brooks by refusing, without proper basis, to make personal information available to him in response to his personal information requests dated 11 and 17 December 2014.

[58.2] In the circumstances there will be no award of costs. The parties are to bear their own costs.

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Mr RPG Haines QC
Chairperson

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Ms ST Scott
Member

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Mr RK Musuku
Member