IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2018-485-286
[2018] NZHC 2564

BETWEEN	THE ATTORNEY-GENERAL Appellant
AND	DOTCOM Respondent

Hearing: 10-12 September 2018

Counsel: V E Casey QC for Appellant
R M Mansfield and S L Cogan for Respondent

Judgment: 1 October 2018

JUDGMENT OF CHURCHMAN J AND
MEMBERS DEBORAH HART AND WENDY GILCHRIST

TABLE OF CONTENTS

Privacy rights [1]
Summary [6]
The Privacy Act [8]
What this case is about [10]
Factual background [20]
Information requests and adjournments [33]
Inferences drawn from the facts [16
The transfer [86]
The statute [86]
One request or two [108]
Were the requests vexatious? [129]
Remedies [189]
Damages [193]
Damages for loss of dignity or injury to feelings [212]
Outcome [239]

Privacy rights

[1] In the 1990s, the New Zealand Government enacted a number of statutes which recognised and articulated various rights which either had not previously existed or had not been readily legally enforceable.[1]

[2] Among the new rights was an expanded privacy right relating to access to personal information and the provision of enforceable legal rights in relation to privacy. The relevant legislation is the Privacy Act 1993 (PA). This Act was a sequel to the Official Information Act 1982 (OIA) and the Local Government Official Information and Meetings Act 1987 which had provided limited rights to access information held by public bodies.

[3] A significant feature of the PA includes the fact that it extended the range of entities that were subject to disclosure duties in relation to personal information from central or local government to "any person or body of persons, whether corporate or unincorporate, and whether in the public sector or the private sector …".[2]

[4] Another significant feature of the PA, relevant to this case, is that an individual making a request for disclosure of personal information about them held by an agency does not have to justify the request nor explain why they need the information. Neither do they need to identify the information sought. They have an absolute right (subject to limited identified exceptions)[3] to make what is sometimes referred to as an "everything" request. In other words, an individual is entitled to ask an agency to provide them with all personal information that they hold about them without having to identify the type of information sought, or the purpose for which the requester might wish to use it.

[5] Among the identified exceptions to compliance with a request for personal information, is the entitlement to transfer the request to another agency.[4] Another is

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1 See, for example, the New Zealand Bill of Rights 1990 and the Human Rights Act 1993.
2 Section 2 PA, definition of "agency".
3 Set out in PA, Part 4.
4 Section 39 PA.

the right to refuse a request where it is vexatious or the information requested is trivial.[5] The case focuses on both of these exceptions.

Summary

[6] We have differed from the conclusions reached by the Human Rights Review Tribunal (HRRT). One of the principal reasons for that is that we have regarded a request which seeks urgency and provides a particular justification for the urgency, as being one request rather than two separate and disconnected requests. We have come to the conclusion that a request which incorporates a requirement for an urgent response and provides a justification for that requirement, justifies the agency receiving the request considering the request as a whole. We consider that, in the present case, this is relevant to both the issues of "transfer" and "vexatiousness".

[7] In relation to whether a request is vexatious, we have concluded that the test is an objective one and that the HRRT fell into error in focusing on the subjective belief or motive of the requester. We now set out our analysis.

The Privacy Act

[8] The structure of the PA has been described as being "principles-based and open textured, and regulat[ing] in a rather light-handed way".[6] The Law Commission described the Act as:[7]

> Rather than setting out strict rules about how personal information may be handled, the Act is based on a set of 12 privacy principles. These principles provide agencies with a high degree of flexibility in terms of how they comply with them.

[9] The default timeframe for an agency to comply with a request under Principle 6 is 20 working days although s 37 provides an individual with a right to ask that their request is dealt with on an urgent basis. It says:

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5 Section 29(1)(j).
6 *Taylor v Chief Executive, Department of Corrections* [2018] NZHRRT 35 at [91].
7 Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at [2.9].

> If an individual making an information privacy request asks that his or her request be treated as urgent, that individual shall give his or her reasons why the request should be treated as urgent.

What this case is about

[10] This case involves issues arising from an "everything" request made by Mr Dotcom and addressed to every Cabinet Minister and almost all Government departments (some 52 entities in all). The requests were made between 17 and 31 July 2015. Although there were some minor differences in wording, the requests were materially identical. Mr Dotcom also invoked s 37 and asked that his information privacy request be treated with urgency and gave as his reason that: "This information sought is required urgently because of pending legal action".

[11] It was common ground that the "pending legal action" alluded to was proceedings relating to a hearing on the eligibility of Mr Dotcom for extradition to the United States of America, which was scheduled to commence in the District Court on 21 September 2015, a matter of seven to nine weeks after the sending of the requests.

[12] Almost all of the agencies receiving the requests transferred them to Crown Law, to be dealt with by the Attorney-General.[8] The Attorney-General declined the requests on the basis that they were vexatious.

[13] Mr Dotcom complained to the Privacy Commissioner in relation to the declining of the requests. However, the complaint related not to all 52 agencies but only to the actions of nine named agencies.[9]

[14] On 15 June 2016, the Privacy Commissioner rejected Mr Dotcom's complaint. The rejection of Mr Dotcom's complaint by the Privacy Commissioner entitled him to take the matter to the HRRT, which he did.

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8 Section 39 PA, provides for such transfer with the relevant subsection being s 39(b)(ii).

9 Crown Law Office; Department of Prime Minister and Cabinet; The Office of Prime Minister; The Office of the Minister of Immigration; Ministry of Business, Innovation and Employment; Ministry of Foreign Affairs and Trade; Office of the Minister of Justice; Ministry of Justice; and New Zealand Police.

[15] The HRRT heard the matter over 10 days in April and May 2017 and issued a decision dated 26 March 2018 upholding Mr Dotcom's complaint and awarding him various remedies, including some $90,000 in damages.

[16] It is that decision the Attorney-General has appealed. The appeal gives rise to three main issues:

(a) the lawfulness of the transfer of the requests to Crown Law;

(b) whether the requests were vexatious; and

(c) whether the remedies awarded by the Tribunal were appropriate, both in terms of jurisdiction and, in relation to damages, quantum.

[17] The appeal is a general appeal[10] and the principles confirmed by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* apply.[11]

[18] The appeal is not confined to issues of law and the Court is required to come to its own view on the merits. The appellant bears the onus of satisfying the Court that it should differ from the decision under appeal but it is a matter for this Court to decide the extent of consideration required to be given to the decision appealed from, subject to the customary caution appropriate where the HRRT has had an opportunity to assess the credibility of witnesses.

[19] This Court is assisted in its task by having two members drawn from the HRRT Panel sit as part of the Court.

Factual background

[20] On 20 January 2012, Mr Dotcom burst onto the New Zealand consciousness as a result of an armed raid on the mansion in which he was residing involving many police officers and two helicopters. He was arrested, remanded in prison and had

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10 See s 89 PA and s 123 of the Human Rights Act 1993.

11 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

New Zealand assets worth many millions of dollars seized. International assets worth hundreds of millions of New Zealand dollars were also frozen.

[21] The reason for Mr Dotcom's arrest was the laying of indictments against him in the United States on charges relating to his Internet business. The United States commenced proceedings to extradite him from New Zealand.

[22] Mr Dotcom has been involved as a participant, either as a plaintiff or defendant, in many sets of proceedings throughout all levels of the New Zealand legal system since then.

[23] Mr Dotcom has also been active in seeking the disclosure of information against him, including the disclosure of information held by the United States of America.

[24] Following his arrest, the initial request for information, made on 22 January 2012, was for disclosure/discovery against the Crown. Part of that request was transferred from Crown Law to the police on 1 February 2012. There was a further disclosure request by Mr Dotcom of Crown Law on 5 March 2012.

[25] The eligibility hearing in relation to the extradition application was initially set down for hearing on 6 August 2012, but was adjourned as a result of Mr Dotcom's counsel submitting that it was premature due to "disclosure" issues. This was the first of some nine adjournments of the hearing of this application over the next three years.

[26] As well as making regular OIA and disclosure requests, from time to time Mr Dotcom also lodged complaints with the Privacy Commissioner.

[27] On 21 March 2012, the Privacy Commissioner advised Mr Dotcom that there had been no interference with his privacy in relation to an Overseas Investment Application Decision on 16 September 2011.

[28] Over the ensuing three years, there were many applications for disclosure/discovery or OIA requests and complaints by Mr Dotcom to the Privacy

Commissioner. There were also regular legal challenges to rulings by different courts on these matters.

[29] In April 2013, Mr Dotcom and others who had been caught up in the January 2012 arrest operation commenced proceedings against the Crown seeking "*Baigent*" damages for Bill of Rights Act breaches, including substantial claims for aggravated and exemplary damages. Various discovery and disclosure requests were pursued for information related to these proceedings. Extensive disclosure was provided and the High Court also made further discovery orders. Mr Dotcom's claim was subsequently settled.

[30] On 29 November 2013, Mr Dotcom and others applied to the District Court in relation to the extradition proceedings for various disclosure and discovery orders. This application alleged that there had been political interference in the granting of Mr Dotcom's residence application.

[31] Mr Dotcom had sought permanent residence status. The New Zealand Security Intelligence Service (NZSIS) had lodged an objection to the immigration application which delayed its processing. Mr Dotcom had issued an ultimatum saying that, unless the application was granted by a particular date, it would be withdrawn. Shortly before that date, NZSIS withdrew its objection and the application was granted.

[32] Mr Dotcom's lawyers developed an argument, subsequently referred to as the "abuse of process" argument, and claimed that alleged political interference had caused the dropping of the opposition and that this amounted to an abuse of process which justified a stay of the extradition proceeding. There were numerous OIA and PA requests by Mr Dotcom in relation to this claim. Some of those requests were transferred from the entity receiving them to other entities.

Information requests and adjournments

[33] On 26 March 2014, the District Court confirmed a backup fixture for the eligibility hearing in July 2014. The following day, Mr Dotcom made "everything" requests to the Ministry of Justice under the PA and OIA.

[34] The following week, on 3 April 2014, Mr Dotcom applied to vacate the eligibility fixture so that the requests for information could be complied with.

[35] On 23 May 2014, the District Court dismissed applications for further disclosure noting that the applications were based on Mr Dotcom's "collusion theory" which was said to found the stay of the extradition process. The District Court held that the abuse of process arguments lacked "any air of reality" and that the material sought was not relevant to the extradition proceeding.

[36] Mr Dotcom challenged that finding by way of judicial review. Throughout 2014, Mr Dotcom continued to make both PA and OIA requests against various government entities.

[37] On 25 August 2014, the District Court issued a further decision on applications for discovery orders against Immigration New Zealand (INZ) and NZSIS, once again considering there was no "air of reality" about the requests.

[38] In a memorandum to the District Court of 25 September 2014, Mr Dotcom foreshadowed an application to stay the extradition proceedings as an abuse of process on the basis of the alleged claim of political interference. The memorandum also asserted that the scheduled eligibility hearing for February 2015 was unrealistic, claiming that the issues relating to the anticipated abuse of process application needed to be resolved first.

[39] It was also claimed that the eligibility hearing should not proceed before the appeal to the Supreme Court in relation to the validity of the search warrants, and the High Court decision in relation to the judicial review of disclosure.

[40] On 17 October 2014, the High Court dismissed Mr Dotcom's application for judicial review of the District Court decision to refuse disclosure orders. Simon France J made a number of comments about the application. He noted that the decision by INZ, which was the subject of the judicial review proceedings, had been available for nearly three years without a review being sought.[12] He also made some

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12 *Dotcom v The United States of America* [2014] NZHC 2550 at [76].

observations about the strength of the "abuse of process" argument in respect of which the various discovery orders were sought. He said:[13]

> I limit myself to observing that it is a far from immediately compelling argument. The basic proposition is that powers were used for an improper purpose and that is always an abuse of process. However, the reality is that as a result of the alleged abuse, Mr Dotcom got what he was seeking, permanent residence. Further, it was he who created the time pressure by imposing a deadline on when a decision had to be made. It is not easy in these circumstances to see that he is a victim of the alleged abuse.

[41] Simon France J also expressed an opinion on the utility of the discovery sought. He said:[14]

> Next, it can be observed that the task involved could be quite onerous. A lot of documents are involved and there is no reason to believe the exercise will yield anything of relevance.

[42] These observations were made in the context of the requests having been made of just two entities, INZ and NZSIS.

[43] As to the nature of the request itself, Simon France J said:

> [83] The second application is hopelessly broad being simply a request for all personal information held by all these agencies in relation to each respondent. It is a perfectly permissible request, but not one with which an extradition court should concern itself. There is no basis at all to consider that the request is relevant to the extradition proceedings. It was rightly described in the court below as a fishing expedition. All the reasons discussed previously apply, but with the added factor of total irrelevance, as cast, to the extradition proceeding. (footnote omitted)

[44] In relation to the remedy sought by Mr Dotcom on the basis of the abuse of process argument, Simon France J said:[15]

> Standing alone, the claim for a stay based on improper manipulation of Mr Dotcom's residency application could not conceivably support the remedy sought, even if it could be shown the requesting state was complicit in the New Zealand Government's alleged actions.
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> I accept some weight can be given to the fact that it is only one part of the argument, but it still needs to be assessed for its own merit. My own view is that if I were hearing the extradition case, I would not stop the point being

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13 At [78].
14 At [79].
15 At [95] and [96].

> argued in the sense that it is not wholly irrelevant, but beyond that I cannot imagine it would seriously add anything of significance to an abuse claim.

[45] Simon France J also dealt with the separate "air of reality" test which Mr Dotcom alleged had been incorrectly applied in the District Court. He said:[16]

> The proposition being advanced is that the United States of America asked the New Zealand Government to direct its officials to give Mr Dotcom permanent residency even though he was not entitled to it so that the applicant would know where he was when they came to get him. It is, as the District Court held, all supposition and the drawing of links without a basis. … Nothing suggests involvement of the United States of America, and nothing suggests the New Zealand Government had turned its mind to extradition issues. These are the key matters and there is no support for either contention.

[46] The High Court's comments were made in the context of whether or not the District Court should use its authority under s 11 PA. However, the relevance in the present case is that the request for disclosure of personal information that this Court is concerned with is a sequel to this decision, and the requests for the disclosure of personal information were of the very broad "everything" type and the justification for the urgency requested in relation to the response was the forthcoming eligibility hearing in respect of which Mr Dotcom was seeking to run the "abuse of process" argument.

[47] This is the same argument that both the District Court and High Court had held to be irrelevant and which "could not conceivably support the remedy sought."[17]

[48] Notwithstanding the comments by Simon France J as to whether an abuse of process argument could ever justify the relief of staying the extradition proceeding, some two weeks after the release of the High Court's decision, on 30 October 2014, Mr Dotcom and others filed a formal application seeking a stay of the extradition proceedings on the grounds of abuse of process. The alleged abuse of process included various matters which had been the subject of prior litigation but also specifically relied on the alleged political interference in the granting of the residency application.

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16 At [101].
17 At [95].

[49] Following the filing of the application for a stay, Mr Dotcom applied to the District Court for an adjournment of the extradition hearing.

[50] On 17 November 2014, Mr Dotcom's then lawyers sought leave to withdraw, which was granted. A new lawyer, Mr Edgeler, sought an adjournment of the eligibility hearing scheduled for February 2015. That hearing was vacated and a further fixture set for June 2015.

[51] On 23 December 2014, the Supreme Court issued a decision upholding the validity of the search warrants.[18] The alleged invalidity of the search warrants had been one of the grounds of the abuse of process claim.

[52] From as early as 19 December 2014, Mr Dotcom's new legal team (Mr Mansfield and Mr Cogan) had raised the issue of the availability of funding for legal counsel as a matter affecting the ability of counsel to be ready for the eligibility fixture.

[53] On 12 March 2015, Courtney J issued a decision on an application by Mr Dotcom to access frozen funds.

[54] That application had been opposed on the basis Mr Dotcom had the ability to meet his expenses out of property that was not restrained, namely the assets of the Trust Me Trust. Mr Dotcom had set that Trust up and had been a discretionary beneficiary of it until November 2014 when he relinquished his status as a discretionary beneficiary. The High Court released $700,000 for living and legal expenses.

[55] On 16 March 2015, the District Court issued a decision on an application by Mr Dotcom and others for adjournment of the extradition hearing date. The District Court declined the application and confirmed the fixture on 2 June 2015. In relation to the claim that lack of funds for legal counsel was impeding trial preparation, the Court noted that since the freezing of some of his assets, Mr Dotcom had generated new assets through new companies and had received some $12 million of which he

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18 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745.

had spent $4.5 million supporting a political campaign by a political party in the general election that took place in September 2014, and a further $1 million in producing and marketing a music DVD in 2014.[19]

[56] Three days after the refusal of adjournment, on 19 March 2015, Mr Dotcom applied for judicial review of that decision.

[57] On 1 May 2015, the High Court adjourned the extradition hearing set for June 2015 on the basis of the change in legal representation and held that the hearing should be no earlier than 1 September 2015 but otherwise dismissed the challenges.[20]

[58] On 6 May 2015, the District Court confirmed the eligibility hearing fixture would be on 21 September 2015.

[59] On 21 May 2015, Mr Dotcom and others filed a memorandum in the District Court stating that any timetable for the eligibility hearing could not be set until the Court of Appeal had decided an appeal against the decision of Katz J of 1 May 2015. However, notwithstanding the implication that such an appeal had been, or would be, filed, no such step was ever taken.

[60] On 10 June 2015, Mr Dotcom filed a memorandum seeking an adjournment of a teleconference in relation to the eligibility hearing arguing that a timetable for the eligibility hearing should not be made. The following day, the District Court issued a minute setting a timetable for remaining steps in preparation for the eligibility hearing.

[61] On 26 June 2015, Mr Dotcom and the other respondents sought a recall of the District Court timetable orders and a suspension of the timetable.

[62] On 3 June 2015, the Court of Appeal issued a minute following a teleconference which had dealt with two appeals: one by the Commissioner of Police in relation to a High Court decision granting Mr Dotcom's application to vary the terms of registration of two foreign restraining orders; and the other by Mr Dotcom

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19 *United States of America v Dotcom* DC North Shore CRI-2012-092-001647, 20 March 2015 per Dawson DCJ.

20 *Ortmann v The District Court at North Shore* [2015] NZHC 901 per Katz J.

and others in relation to the decision of Katz J on 1 May 2015 directing that the extradition proceedings be heard not before 1 September 2015.[21] Harrison J concluded the minute by stating:[22]

> Counsel understand that after all the interlocutory activity which has occurred to date it is essential that the fixture to hear the extradition hearing in the District Court on 21 September 2015 is maintained.

[63] On 14 July 2015, Mr Dotcom filed a second stay application in the District Court seeking to permanently stay the extradition process on the basis of abuse of process. Three days later, on 17 July, Mr Dotcom started sending out the "everything" requests under the PA to every Cabinet minister and most Government departments.

[64] Three days after the requests started being sent out, on 25 July 2015, Mr Dotcom and others filed a memorandum in support of the stay application of 14 July 2015.

[65] On 5 August 2015, shortly after the completion on 31 July 2015 of the sending out of the 52 requests, Mr Dotcom filed an application for judicial review of the District Court timetabling directions and the declining of the District Court to hear the stay applications ahead of the eligibility hearing. Mr Dotcom and the other applicants sought urgency in the hearing of the judicial review application.

[66] The same day, Mr Dotcom filed an interlocutory application and applied to have the judicial review of the District Court timetabling and the stay of eligibility proceedings heard together.

[67] On 13 August 2015, the High Court declined the application for an urgent fixture, noting that a similar application for urgency in relation to a largely identical application had been declined by Katz J the week prior.[23]

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21 *Commissioner of Police v Dotcom & Ors*; *Ortmann & Ors v The District Court at North Shore & Anor* CA269/2015, CA302/2015, 3 June 2015 (Minute) at [10] per Harrison J.

22 At [10].

23 *Dotcom v United States of America and the District Court at North Shore* HC Auckland CIV-2015-404-1770, 13 August 2015 (Minute), per Peters J.

[68] On 21 August 2015, Mr Dotcom filed an appeal against the High Court decision. On the same day, he filed an amended misconduct stay application.

[69] On 3 and 4 September 2015, just short of a month after Crown Law had declined the original requests for personal information, Mr Dotcom made targeted requests, pursuant to the OIA, of the Attorney-General; the Minister of Arts, Culture and Heritage; and Crown Law. The requests were made on a urgent basis.

[70] On 14 September 2015, the Court of Appeal issued its decision dismissing the appeals relating to the original District Court decision not to hear the stay application before the extradition hearing commenced on 21 September.

[71] Immediately after release of that decision, Mr Dotcom again sought an urgent conference with the District Court, filing a memorandum which annexed a copy of the Court of Appeal's decision and claiming that the ability of his lawyers to prepare for the extradition hearing (scheduled to commence in a week's time) had been compromised. He also sought adjournment of the eligibility fixture in any event due to counsel's other commitments (counsel indicated he had a fixture in the Court of Appeal on 22/23 September 2015).

[72] On 21 September 2015, the District Court heard arguments about the stay application of 21 August relating to alleged unlawful/unreasonable conduct, and a further stay application of 14 July 2015 relating to the applicant's alleged policy of depriving the respondent of the funds required to enable him to conduct a proper defence, and alleged conflict of interest between Crown Law's role as counsel for the applicant and counsel for the Crown.

[73] The Court declined to make the stay orders sought and observed:[24]

> This case has now been before this Court for over three and a half years. A number of interlocutory hearings have been held. It is now the 10th time this case has been set down for hearing. Further interlocutory applications continue to arise. In the normal course of a case interlocutory applications will be heard prior to the hearing. That does not act as a bar to further issues being raised during a hearing.

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[24] *United States of America v Dotcom & Ors* DC North Shore CRI-2012-092-001647, 29 September 2015 (Minute) at [7] per Dawson DCJ.

[74] The Court held that the interlocutory applications were best heard and considered during the eligibility hearing and directed that the eligibility hearing commence on 24 September 2015.

[75] The hearing did so commence and, on 1 October 2015, at the completion of the Crown's evidence and submissions on the issue of eligibility for deportation, Mr Dotcom filed a further memorandum claiming that the Court should hear and determine the stay applications before requiring him to respond to the eligibility case.

[76] On 2 October 2015, the District Court issued a minute confirming it was not proposing to determine any of the applications before considering eligibility.

[77] On 15 October 2015, Mr Dotcom filed a further memorandum seeking deferral of the eligibility hearing until the following year and determination of the stay applications prior to that. That memorandum finished with the statement:[25]

> Counsel for Mr Dotcom respectively [sic] requests that this Court resolve this issue urgently. Otherwise Counsel for Mr Dotcom is required to raise these issues with urgency with the High Court.

[78] On 29 October 2015, the District Court issued a decision determining that the two stay applications would not proceed to a full hearing and that the reasons for that decision would be given as part of the substantive judgment on eligibility. The same day, Mr Dotcom filed a memorandum seeking an adjournment of the next phase of the eligibility hearing to 2 November as he was not ready to proceed. The eligibility hearing concluded on 24 November 2015.

[79] On 23 December 2015, the District Court issued its judgment confirming the eligibility for surrender of Mr Dotcom and the other respondents. The same day, Mr Dotcom and the respondents filed a notice of appeal to the High Court.

[80] On 4 March 2016, Mr Dotcom filed an amended statement of claim for judicial review and application for stay of extradition proceedings.

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25 Case on appeal, p 5233 at [32].

[81] In a judgment of 23 September 2016, the High Court refused an application that Mr Dotcom and others could use material obtained by way of a discovery in the *Baigent* damages claim for the purposes of appeal against the District Court eligibility decision.[26]

[82] Mr Dotcom's appeal against the eligibility decision was dismissed by both the High Court and Court of Appeal, and an appeal to the Supreme Court is outstanding.

Inferences drawn from the facts

[83] We have set out the background to the litigation in which Mr Dotcom has been involved in some considerable detail. Among the inferences we draw from this material is that Mr Dotcom and his advisors were adept in seeking information relevant to the proceedings that he was involved in, either by way of disclosure/discovery, OIA or PA requests.

[84] The application on eligibility for extradition was set down for hearing and then adjourned on an extraordinary number of occasions over a period of some three and a half years. The basis upon which adjournments were sought was most often related to claims that further information was required. Mr Dotcom did not accept indications from the courts that the type of information that he was seeking disclosure of was not relevant to his applications for stay of the extradition proceedings and that, even if the claimed collusion existed, it would not justify the relief he sought. Mr Dotcom persisted in making requests for the stay of the hearing of the eligibility for extradition application (including an application for recall of a decision) well after the time when the courts had indicated to him that there was no basis for such a stay.

[85] Mr Dotcom could, when it suited him, file targeted requests either for disclosure/discovery or under the OIA. Requests made by Mr Dotcom of one agency were often transferred to another agency for response. The Crown Law Office was the only agency involved in all of the different legal proceedings that Mr Dotcom was involved in over this period.

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[26] *Dotcom & Ors v Attorney-General* [2016] NZHC 2251.

The transfer

The statute

[86] Section 39 PA, provides that an agency receiving a request must promptly transfer the request to another agency:

> Where–
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> (a) an information privacy request is made to an agency or is transferred to an agency in accordance with this section; and
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> (b) the information to which the request relates–
>
> (i) is not held by the agency but is believed by the person dealing with the request to be held by another agency; or
>
> (ii) is believed by the person dealing with the request to be more closely connected with the functions or activities of the other agency.

[87] Most of the 52 requests made in July 2015 were transferred to Crown Law. Mr Dotcom complained that the transfers arose from what was said to be "unsolicited advice from Crown Law". Whether the advice from Crown Law was solicited or unsolicited is immaterial. The Cabinet Ministers and Government departments concerned were entitled to both seek and receive legal advice from Crown Law.

[88] Before the HRRT, Mr Dotcom had argued that the various agencies who transferred the requests to Crown Law had been dictated to do so by Crown Law. The HRRT did not find that claim established saying;[27]

> Our conclusion, however, is that given the paucity of the evidence and further given the peripheral nature of the issue measured against the substantive matters which do fall for consideration, we do not intend resolving the issue.

[89] The Tribunal held that the more important issue was whether the Attorney-General was the lawful transferee under s 39(b)(ii) PA. We agree and adopt the same approach.

[90] When the Privacy Commissioner determined Mr Dotcom's complaint, he came to the view that a transfer of the requests under s 39 was not necessary; the transfer to

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[27] *Dotcom v Crown Law Office* [2018] NZHRRT 7 [*HRRT Decision*] at [51].

Crown Law essentially involved the Government's legal team centralising a set of difficult requests and that, rather than the relationship being one of transferring agency to recipient agency, the true relationship was that of solicitor and client.

[91] The HRRT noted that many of the agencies had adopted a template suggested by Crown Law and, in their correspondence to Mr Dotcom, asserted:[28]

> We have consulted with the Attorney-General, and our view is that the request is more closely connected with the functions or activities of his office. We have therefore decided to transfer the request to the Attorney-General, in accordance with s 39(a)(ii) [sic] of the Privacy Act.

[92] The HRRT noted that the letters advising Mr Dotcom of the transfer request did not explain the grounds on which the conclusion had been reached by the particular agency that the request was believed to be more closely connected with the functions or activities of the office of the Attorney-General. However, there is no requirement in the Act for the grounds for such a conclusion to be set out.

[93] The HRRT referred to the evidence that it heard from Mr Witcombe of MBIE and Mr Child of the Ministry of Justice who indicated that they had insufficient knowledge of the litigation referred to by Mr Dotcom as the basis for the request for urgency and that, in order to properly assess that request, they felt that Crown Law was best placed to coordinate the Crown's response.

[94] The HRRT acknowledged the Crown's submission that the close linkage between the requests and the extradition litigation (both in timing and given the request for urgency for that purpose) meant that the request raised Crown-wide issues requiring a coordinated and consistent response. Before us that response was described as a "whole of Government" response.

[95] The HRRT also acknowledged the Crown's concession that if Mr Dotcom had wished to maintain the requests in a manner not linked to the litigation (i.e. abandon the request for urgency based on the grounds the information was required for the

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[28] At [58].

extradition hearing), there would have been no basis to transfer the requests to Crown Law.[29]

[96] The HRRT held:[30]

> The decision to transfer and the decline itself were made for reasons other than those related to the assessment of the information itself and what should be disclosed or withheld.

[97] That is undoubtedly correct. However, the issue is whether, in circumstances where the requests made of all 52 agencies specifically sought urgency on the basis that the documentation was needed urgently in connection with the extradition hearing, the transfer under s 39(b)(ii) to Crown Law was justified on the basis that it was the entity conducting that litigation and best placed to analyse and respond to that request.

[98] The template letter sent to Mr Dotcom mis-stated the focus of s 39(b)(ii).[31] It is not the request which needs to be believed to more closely connected with the functions or activities of the other agency but the information to which the request relates.

[99] It is therefore necessary to consider whether, on the facts, it can be said that the information to which the request related was more closely connected with the functions and activities of the Attorney-General. The two witnesses called by the Attorney-General on this point did not address their evidence to how the information that was the subject of the request was connected with the functions and activities of Crown Law. Instead, both Mr Witcombe and Child gave evidence to the HRRT of why they believed that the request, and specifically, the application for urgency and reasons given for it, were more closely connected with the functions and activities of Crown Law. They do not seem to have applied their minds to where it could be said that the information subject to the request was most closely connected with the functions and activities of Crown Law.

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29 At [66.7].
30 At [67].
31 See [88] above.

[100] The question for determination is whether it can be said that the request for urgency and the justification for that by reference to the impending extradition hearing means that the information that is the subject of the request is more closely connected with the functions and activities of Crown Law rather than the agencies holding the information.

[101] Crown Law certainly had information relevant to the request that the other agencies did not. It was Crown Law that was involved in the extradition proceedings in respect of which urgency was sought and, realistically, Crown Law was the only entity that could make a sensible decision as to whether or not the request for urgency was justified given the requests' express link to those proceedings.

[102] The central reasoning of the HRRT in relation to s 39(b)(ii) is set out at [91.3] where the HRRT said:

> The phrase "more closely connected" must be given proper weight. It is the personal information to which the request relates which must be believed to have that closer connection with the functions or activities of the proposed transferee. It is our view that given the scheme of the Act that connection must come from prior engagement (by way of function or activity) with the requested personal information and the context of the information privacy principles.

[103] This last sentence puts an unwarranted gloss on the wording of the Act. There is no requirement in the Act that the agency to whom the request is transferred will have had a prior engagement with the requested personal information. The critical test is whether the information requested is believed to be more closely connected with the functions or activities of the other agencies.

[104] Before us, Mr Mansfield complained that, at the time of the transfer of the requests to Crown Law, it was the agencies who held the information requested of them and not Crown Law, and that there was no basis for the agencies thinking that Crown Law held the information or had reviewed it.

[105] However, this submission overlooks the fact that what is required in terms of s 39(b)(ii) is not a belief on the part of the transferor that the other agency holds the information (that is the ground dealt with by s 39(b)(i)) but that the information that is

the subject of the request is more closely connected with the functions or activities of the other agency. Here, part of the information that was the subject of the request (because of the explicit justification for the claim of urgency) was information about the eligibility proceedings.

[106] In the context of this request and, specifically, in relation to the linking of the request for urgency with the need to have the information for the purposes of the extradition hearing, we find that there is a plausible basis upon which the transferring agencies could have concluded that the information that was the subject of the request was more closely connected with the functions or activities of the other agencies. In this case, the functions or activities were the conduct by Crown Law of the litigation in respect of which the claim for urgency was made.

[107] Indeed, it is difficult to see how any sensible decision on the urgency aspect of the request could have been made by any of the agencies who were not involved in the litigation.

One request or two

[108] One of the important questions to answer is whether the requests could be seen as two separate and distinct requests (as urged upon us by Mr Mansfield) or whether there was in reality only one request which, as a component of that request, sought the information urgently because of the pending extradition hearing.

[109] We have come to the conclusion that the seeking of urgency was not a separate request. In this case it was an integral component of each of the 52 requests. The requests were for "all personal information that you hold about Kim Dotcom, including under his previous names Kim Schmitz and Kim Vestor."

[110] The request also sought not just information held by the receiving agency but that held by "any agency that you have contracted to do work". The search was also expressed as being "not limited to just the information recovered as a result of a search across your email system". The request sought all personal information and was stated to include "information including communications that mention Kim Dotcom's name".

[111] The same document contained the reference to urgency. After setting out the scope and breadth of the request, it said, "This information sought is required urgently because of pending legal action. Therefore, please treat this request as urgent pursuant to s 37 of the Privacy Act."

[112] The information was asked to be sent "as soon as possible".

[113] We have come to the conclusion that because an integral component of the information request was that of urgency, it was open to the receiving agencies to transfer the request for a coordinated response to come from the Attorney-General. The Act does not require that the Attorney-General holds the information nor that he had held it previously.

[114] If the Attorney-General had come to the conclusion that the request was not vexatious, and that the request for urgency was one which should be complied with by some or all of the transferring agencies, he would likely have conveyed that response and coordinated the provision by the agencies of the requested information.

[115] There is nothing in the text, context or purpose of the PA that would preclude a receiving agency from transferring the request to the only other agency that is in any position to make a considered evaluation of the aspect of the request relating to urgency.

[116] The HRRT held that there must be a connection between the transferee and the requested personal information, and that connection must be one arising from the application of one or more of the information privacy principles. It then said, "Being legal advisor to an agency is not enough to provide that contextualised connection."[32]

[117] Although the Privacy Commissioner chose to analyse the transfer as if it were simply a request for legal advice and assistance from Crown Law, that is not how Crown Law had presented the case to the Commissioner.[33] That is not why either Mr Witcombe or Mr Child said they made the transfer.

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32 *HRRT Decision*, above n 27, at [85].

33 The HRRT at [107] notes that, while the statement in reply did not plead an "alternative defence", counsel had submitted that the Privacy Commissioner's approach was valid.

[118] The HRRT said:[34]

> On this interpretation PA, s 39(b)(ii) does not permit a "transfer" to a legal adviser for the purpose of taking legal advice. Nor does it permit transfer to a legal adviser so that the adviser can make a decision on the request or for the purpose of communicating the client's decision on the request. As pointed out by the Privacy Commissioner, a transfer to a legal adviser under s 39 is not necessary for the purpose of taking legal advice or for communicating a client's decision to the requester. That being so there is no reason to strain the language of s 39(b)(ii).

[119] We agree with this analysis. If all the agencies had been doing was obtaining legal advice, there would have been no need for a "transfer". On the facts, the Privacy Commissioner's analysis is also unfounded. The recipient agencies transferred the request because they believed that the information that was a critical component of the request (namely the requirement to treat the request with urgency because of pending legal action) was most closely connected with the functions and activities of Crown Law.

[120] They did not transfer the requests to get legal advice. If Crown Law's only involvement was to provide legal advice, the Attorney-General would not have been authorised to make the decision to decline the request on the ground of vexatiousness.

[121] The HRRT focused on the issue of whether or not the Attorney-General had physical possession of the information requested or had previously had engagement with the information. It said:[35]

> It was not claimed the decline decision was made by the Attorney-General as holder of the information or as an agency which had prior engagement with the information under one or more of the information privacy principles. None of the agencies had transferred to the Attorney-General the personal information held by them.

[122] However, for the reasons set out above, we have concluded that there was no requirement that, in order for s 39(b)(ii) to apply, the Attorney-General held the information or had previously had engagement with it.

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34 *HRRT Decision*, above n 27, at [96.6].
35 At [101].

[123] It is clear that the only component of the request made by Mr Dotcom of the agencies that justified the transfer to the Attorney-General was the request for urgency.

[124] The HRRT actually set out the relevant passage from the letter of the Solicitor-General to the Privacy Commissioner on 31 August 2015 where the Solicitor-General said:[36]

> [44] If Mr Dotcom and his lawyers wish to maintain the requests in a manner not linked to the litigation, we would agree that there would be no basis to transfer the requests to Crown Law.

[125] In its decision, the HRRT appears to have overlooked the fact that all of the 52 recipients of the requests had to address the request for urgency and the justification put forward for it by Mr Dotcom, namely that the information requested was required urgently because of the pending eligibility for extradition hearing.

[126] The HRRT concluded:[37]

> In these circumstances it is inescapable that the transfer to the Attorney-General was a transfer to him as the Law Officer representing the Crown in litigation against Mr Dotcom.

[127] The use of the word "as" is problematic. The use of the words "because he was" in its place would be more accurate. Requests were transferred because the Attorney-General was the only one in a position to sensibly respond to the component of the request relating to urgency. That is because none of the agencies to whom the requests were made could sensibly analyse that aspect of the requests.

[128] If Mr Dotcom had withdrawn the requests and resubmitted them with one which did not seek urgency or justified the seeking of urgency on some basis other than the extradition proceeding then, as properly conceded by the Solicitor-General in his letter of 31 August 2015, there would have been no lawful basis to transfer the requests.

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36 At [102].
37 At [103].

Were the requests vexatious?

[129] The reasons given by the Attorney-General for refusal of the requests were set out in the letter of the Solicitor-General to Mr Dotcom's then lawyer, Mr Edgeler, on 5 August 2015, which said:

> Further, it is my view, considering the s 37 request in its context, that as currently expressed your request must be declined under section 29(1)(j), on the grounds that it is vexatious and includes, due to its extremely broad scope, information that is trivial.

[130] It was not alleged that the reason the request was vexatious was because it included information that was trivial due to its extremely broad scope. The inclusion of trivial information was in addition to the claim of vexatiousness.

[131] Mr Mansfield, for the respondent, submitted that the Attorney-General had attempted to "rewrite the refusal letter of 5 August 2015" in the email from the Solicitor-General to Crown Law of 31 August 2015. He challenged that part of the 31 August 2015 letter which he said: "… sought to re-cast Crown Law's correspondence with ACL as an attempt to enter into constructive dialogue with the Respondent". He submitted that this was "at best, a strained reading of the correspondence".

[132] We do not accept that categorisation of the letter of 5 August 2015.

[133] That letter specifically said:

> Accordingly, should your client wish to obtain personal information under s 37 urgently, I would suggest that he gives specific information as to the nature, time and basis of the legal proceeding sufficient to allow me to identify and obtain any reasonably relevant information, wherever that may be held.

[134] The letter also referred to the recent decision of Simon France J which had related to two discovery applications in the extradition proceedings, one against NZSIS and the other against INZ.[38] The requests had been "everything" requests similar to the ones relevant here.

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[38] *Dotcom v The United States of America*, above n 12.

[135] Simon France J described the application as being:[39]

> … hopelessly broad being simply a request for all personal information held by all these agencies in relation to each respondent. … There is no basis at all to consider that the request is relevant to the extradition proceedings. It was rightly described in the court below as a fishing expedition. All the reasons discussed previously apply, but with the added factor of total irrelevance, as cast, to the extradition proceeding.

[136] At [9] of the 5 August 2015 letter, the Solicitor-General said:

> If the request is maintained as urgent and does relate to [Mr Dotcom's] allegations of abuse of process, the comments of Justice Simon France as to advancing "an air of reality" as a foundation for identifying specific information may assist in narrowing the enquiry for s 37 purposes.

[137] In the circumstances, there is nothing strained about a description of this letter as being an attempt to enter into constructive dialogue with Mr Dotcom.

[138] Neither is there any basis for Mr Mansfield's criticism of the letter of 31 August 2015 on the basis that it expanded on the reasons given by the Attorney-General for declining the request under s 29(1)(j). Consistent with "open textured" structure of the Act, s 29(1)(j) is not prescriptive as to the manner in which that section is to be invoked.

[139] In any event, the letter of 31 August 2015 does not proffer different reasons why the request was declined, it expands the reasons already given.

[140] All of the explanations given in the 31 August 2015 letter focus on the urgency aspect of the requests. Even the issues relating to the breadth of the request were tied to the urgency component. The relevant paragraph in the letter says:

> The requests were extremely broad. Mr Edgeler must have known that it would be impossible for many of the recipients to respond to the requests urgently.

[141] In his submissions, Mr Mansfield claimed that it was unclear as to the basis upon which Crown Law asserted that the information sought by the requests was voluminous. However, this is self-evident. The requests sought all information held

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[39] At [83].

by the agency, as well as any agency that the agency had contracted to do work. As Ms Casey submitted in argument, in relation to the Ministry of Health, this would include every DHB throughout the country. The request was also "not limited to just the information recovered as a result of a search across your email system". It therefore required a manual search of all records. There were no date limits around the information sought, and the request gave, as an example of the level of information sought, "information including communications that mention Kim Dotcom's name".

[142] The HRRT rejected Mr Mansfield's submissions that it could only look at the information given in the letter of 5 August 2015 to ascertain the reasons for the Attorney-General declining the request. It acknowledged that the relevant date that the agency must have good reason under s 29 for refusing access to personal information is the date on which the decision is made but noted that a number of cases had established the principle that, provided a good reason existed on the date of the decision, a failure by the agency to offer that reason at the time did not amount to an interference or the privacy of the individual. We agree with that approach.

[143] The HRRT noted that, in the letter of 31 August 2015 from the Solicitor-General to Mr Dotcom's solicitor, an additional explanation, not in the original letter of 5 August 2015 had been included. This was:

> We declined the transfer requests on the basis they were vexatious and included, due to their extremely broad scope, information that was trivial. It is apparent from the very broad and unfocused nature of the requests, and the request for urgency, that the requests were not genuine and were intended to disrupt the extradition hearing.

[144] The HRRT noted that when counsel for the Attorney-General was asked whether it was the Crown's submission that Mr Dotcom was conducting his defence to the extradition hearing in a vexatious manner, she replied "absolutely not".[40] It is not clear why this question was asked. It does not appear to have been any part of the Crown's case that Mr Dotcom was conducting his defence to the extradition proceedings in a vexatious manner. Indeed, the HRRT acknowledges:[41]

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40 *HRRT Decision*, above n 27, at [125].
41 At [126].

> The Crown written submissions confirm that its case is that it was only this particular request, made at this particular time and in this particular manner that led to the conclusion the request was vexatious and to be declined.

[145] It is the request itself which the declining party has to establish was vexatious, not any aspect of the proceedings to which the individual requester of the information may wish to use the information for.

[146] Whether or not a request is vexatious is simply to be determined objectively. It is not necessary for an agency relying on s 29(1)(j) to establish that the requester acted with an intention to vex. The Court of Appeal in *Brogden v Attorney-General* addressed the concept of commencement of vexatious proceedings set out in s 88B of the Judicature Act:[42]

> Of course, if the litigant is found to have had an improper purpose in commencing proceedings, a finding that the litigation was vexatious is more likely. The test is, however, whether, overall, the various proceedings have been conducted by the litigant in a manner which properly attracts that epithet.

[147] Were it otherwise, the Act could become unworkable.

[148] Unfortunately, a number of litigants who come before the Court appear to become obsessed with the subject matter of their litigation. They are often, but by no means always, self-represented. They will not infrequently make requests for disclosure of information. Sometimes they impose timeframes that are unreasonable in relation to urgency given the extensive nature of their requests.

[149] Such people often believe intensely in the righteousness of their cause, and the reasonableness of their actions. Some are convinced that there are conspiracies at work against them.

[150] If it were necessary to establish that, before s 29(1)(j) could be invoked, such a requester had an intention of being vexatious or had an "ulterior motive" in making the request, the purpose of including in the Act a specific ground of refusal in relation to frivolous and vexatious requests would be undermined.

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42 *Brogden v Attorney-General* [2001] NZAR 809 at [22].

[151] The HRRT acknowledged that the test for vexatiousness was objective and even set out an extract from the decision in *Attorney-General v Hill* where in relation to vexatious litigants in civil litigation the Court had said:[43]

> … the Court can and must look at the totality of all of the proceedings. The Court is not concerned with whether the proceeding was instituted vexatiously but whether it is properly described as a vexatious proceeding.

[152] Given the acknowledgement that the test for vexatiousness was objective, it is surprising that the HRRT made specific findings about the subjective intent of Mr Dotcom in making the requests. It said: [44]

> We make the specific finding that Mr Dotcom has amply satisfied us, to the civil standard, that contrary to the assertion by the Crown, he had no ulterior motive in making the information privacy requests. The requests were entirely genuine and not intended to disrupt the extradition hearing.

[153] That finding is not determinative of an objective assessment of whether or not the request could properly be described as vexatious.

[154] The HRRT made the valid point that:[45]

> … the "frivolous or vexatious" ground is not an all-encompassing ground which swallows the other grounds. It cannot be deployed if another, more appropriate ground has application.

[155] Obviously, if the information cannot readily be retrieved, it falls outside the ambit of privacy principle 6 and any refusal to disclose it should refer to that principle. Similarly, refusal to disclose on the basis that legal professional privilege would be breached, should rely specifically on s 29(1)(f).

[156] The HRRT went on to say:[46]

> An agency is not well placed to determine what is in fact "frivolous" or "vexatious" or "trivial". The agency is not aware of the personal circumstances of the requester nor is it aware of the use to which the information is to be put.

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43 *HRRT Decision*, above n 27, at [146.3], citing *Attorney-General v Hill* (1993) 7 PRNZ 20 at [22].
44 At [143].
45 At [147.2].
46 At [147.4].

[157] As a general statement of principle, this, in most cases, is likely to be correct. However, following the transfer of the request to the Attorney-General, the agency, on the particular facts of this case, was well placed to determine what was frivolous, vexatious or trivial. It was aware of the personal circumstances of the requester and, because the requests specifically indicated the purpose for which the information was wanted urgently, it was also aware of the use to which the information was to be put.

[158] In assessing whether a request is vexatious, the context of the request is important.[47]

[159] The context of this case includes the eligibility proceedings and this basis as the foundation for requesting an urgent response.

[160] Ms Casey set out in her submissions what she said were the relevant factors which support an objective assessment that the request was vexatious. These were:

(a) the close proximity to the (by then 10th) fixture for the substantive eligibility hearing, and the concurrent efforts to vacate or delay the hearing;

(b) the delay between the "misconduct" stay application filed on 30 October 2014 (and formally raised with the Court in November 2013) and these urgent requests in July 2015;

(c) the blanket approach of targeting every Minister and almost every Government department;

(d) the blanket claim for urgency for *all* information and across *all* agencies;

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47 See, for example, *Attorney-General v O'Neill* [2008] NZAR 93; *Chief Executive of the Ministry of Social Development v Shandey* [2015] NZFC 1728 at [25].

(e) the breadth of the request and the explicit insistence on its widest possible application, including demanding disclosure of information that would be trivial and information that was not personal information;

(f) the refusal to narrow the request or engage in a co-operative process to allow practical responses to be made in a sensible timeframe;

(g) the District Court and High Court's prior findings that such disclosure from even the more closely involved agencies would be "totally irrelevant" to the extradition litigation;

(h) the obvious fact that for a number of agencies full compliance with the request would not be possible within 20 days (let alone urgently); and

(i) the history of extensive prior Privacy Act and Official Information Act 1982 requests (including a number phrased in similar terms to this, but to specific agencies only) indicating that timely and more sensibly focused and co-operative requests had been made where the requested information was genuinely sought for the purposes of the litigation.

[161] When analysed objectively, such a broad request for information from the agencies and any agency that they had contracted to do work, unbounded by any time limit, not limited to email searches and extending as far as communications mentioning Mr Dotcom's name, coupled with the requirement that this information be made available urgently, could be seen to be vexatious. Undoubtedly, the scope of such a search would have involved much information that was trivial. In the present case, the Attorney-General was well placed to determine that, in the context of the request for urgency, much of the information sought would indeed be trivial, if not completely irrelevant.

[162] At [160], the HRRT stated:

> The Crown case is based on the narrow contention that in making the requests Mr Dotcom had an improper motive, namely to disrupt the extradition hearing and the Crown had a legitimate and important goal of bringing the eligibility hearing to a conclusion without delay.

[163] The Crown's case was certainly not that narrowly focused before us. As set out above, the Crown relied on some nine separate factors which were said to support a conclusion that the requests were vexatious in the sense of having the effect of vexing or frustrating.

[164] As noted by Simon France J, an "everything request" is perfectly permissible under the PA which does not require requests to be specific.[48]

[165] If Mr Dotcom had made the request without the component of urgency related to the extradition litigation, it would not have been vexatious and the agencies would have had to comply with it, subject to there being no other valid ground for refusal to provide the information such as it being trivial, not able to be readily retrieved or the subject of legal privilege.

[166] In determining that the request was not vexatious, the HRRT appears to have largely ignored the relevance of the urgency component of the request given the stated justification and the breadth of the request. Instead, it has focused on the issue of subjective intention.

[167] The HRRT introduced a new, and in our view unwarranted, element to the concept of "vexatious" as used in s 29(1)(j) PA. It said, "A key component to 'vexatious' is an element of impropriety."[49]

[168] Somewhat confusingly, in the next paragraph, it went on to say, "[we] would not wish to be understood as saying an indirect motive is always essential".[50]

[169] The HRRT further indicates that it sees the requirement for "impropriety" in this context as connoting serious misconduct such as would render a lawyer who participated in it subject to disciplinary processes under the Lawyers and Conveyancers Act 2006.[51]

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48 *Dotcom v The United States of America*, above n 12, at [83].
49 *HRRT Decision*, above n 27, at [146.1].
50 At [146.2].
51 At [161].

[170] In articulating the concept of impropriety as the equivalent of misconduct by a lawyer, the HRRT implies that in declining the request on the ground of vexatiousness, the Attorney-General impugns the integrity of Mr Dotcom's legal team. It says:[52]

> The attribution to Mr Dotcom of an improper motive ("to disrupt the extradition hearing") in making the information requests on their advice might unintentionally suggest that Mr Dotcom's second legal team would act otherwise than as officers of court who owe explicit duties under the Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. As will be seen we find there was simply no basis for any improper motive to be attributed to Mr Dotcom or to his legal team.

[171] It is difficult to see why the HRRT would feel the need to make this comment when they had earlier in their decision expressly noted Ms Casey's concession that the Attorney-General did not allege that Mr Dotcom had been conducting the extradition litigation vexatiously.

[172] In claiming that the concept "vexatious" in s 29(1)(j) required impropriety or serious misconduct on the part of the requester, the HRRT is setting the test much higher than the Act does.

[173] While the Attorney-General might have been of the view that Mr Dotcom's request was motivated by an ulterior motive, he was not required to prove that. The question the HRRT was required to address was whether, on an objective basis, there was "no proper basis" for the Attorney-General concluding that these particular requests, made at this time and in this manner, including the requests for urgency, were vexatious.

[174] For the factors set out by Ms Casey in her submissions,[53] we accept that there was a proper basis under s 29(1)(j) for the Attorney-General to have concluded that, in the particular context of this request, it was vexatious.

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52 At [161].
53 Referred to at [160] above.

[175] The HRRT decision proceeds on the premise that the request for urgency relying on the extradition case was somehow distinct and separable from the request for personal information. The HRRT says:[54]

> If, however, the air of reality and relevance points were made solely in relation to the request for urgency, then it was open for that request to be declined but it was not open for the information privacy request itself to be declined as well.

[176] The facts of this case do not support unpicking the request like this. Indeed we believe it is illogical to do so such was the strength and nature of the urgency request. It was an integral component of all of the requests that all of the information sought was required urgently and the only reason given for that urgency was the connection of the information sought to the extradition proceeding.

[177] Mr Dotcom never resiled from the request that all of the information was required urgently although he did by letter of 17 August 2015 from Anderson Creagh Lai to the Solicitor-General state at [21]:

> However, we do recognise that some of the requests are more urgent than others in that they are directly linked to the extradition hearing. Accordingly while not resiling from or withdrawing any of the requests made, or the appropriateness of the urgency sought, we seek your assistance with providing an urgent response particularly in respect of the following requests [to eight identified individual agencies].

[178] It was Mr Dotcom's choice to continue to maintain that all of the information was required urgently but, having done that, he cannot complain that the Attorney-General regarded such a request as vexatious.

[179] The HRRT sought to separate out the request for urgency from the balance of the claim going so far as to say:[55]

> … it is our view the implicit assertion in the decline letter that the Privacy Act requests had to demonstrate an "air of reality" and that the requested information was "relevant" is justified neither by the Privacy Act nor by the High Court judgment.

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54 *HRRT Decision*, above n 27, at [172].
55 At [172].

[180] It is clear that there is no such implicit assertion in the decline letter of 5 August 2015 where the declining on the basis of the request being vexatious and relating to trivial material was specifically and solely grounded in the claim for urgency on the basis of the extradition litigation. The Solicitor-General said in the letter of 5 August 2015:

> If the request is maintained as urgent and does relate to [Mr Dotcom's] allegations of abuse of process, the comments of Justice Simon France as to advancing "an air of reality" as a foundation for identifying specific information may assist in narrowing the enquiry for s 37 purposes.

[181] The HRRT concluded that, in terms of scope and volume, "[t]he information privacy requests by Mr Dotcom were not in any way out of the ordinary either in terms of the Privacy Act or in terms of the OIA."[56]

[182] This statement ignores the fact that the terms of a request for personal information directed at every Cabinet Minister and nearly every Government agency, of an extraordinarily broad nature and insisting that the response was required urgently, were "out of the ordinary".

[183] Having sought urgency, and having justified that request for urgency on the basis of the relevance of the information sought to the extradition hearing, and having refused to resile from the urgency request, Mr Dotcom cannot complain that the request was regarded as vexatious.

[184] At the heart of its decision, is the HRRT's statement that, "decline of the urgency request did not justify or require also the blanket decline of the information privacy requests themselves on the grounds of vexatiousness".[57]

[185] The Solicitor-General's letter of 5 August 2015 did not purport to separate out the urgency component of the request from the request for disclosure of information.

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[56] At [177.5].
[57] At [193].

[186] The Solicitor-General made it clear that the only component of the request that made it vexatious was that of urgency. At [7] of the letter of 5 August 2015, he expressly said:

> Further, it is my view, considering the s 37 request in its context, that as currently expressed your request must be declined under section 29(1)(j), on the grounds that it is vexatious and includes, due to its extremely broad scope, information that is trivial.

[187] All that Mr Dotcom had to do, to avoid a failure to respond on the ground of vexatiousness, was to resubmit the request without the urgency component. He made the deliberate choice not to do that.

[188] It is our conclusion that it cannot be said that there was "no proper basis" for the decision conveyed in the letter of 5 August 2015 to decline the request on the basis that, when viewed in its totality, it was vexatious.

Remedies

[189] Given the findings that we have already come to, it is not necessary to address the question of remedies. However, in case we are wrong in relation to our findings, we will express our views.

[190] We have particular concerns about the manner in which the HRRT went about setting damages for loss of a benefit, and loss of dignity and injury to feelings.[58]

[191] We also note that, at [255.2], the HRRT purported to make an order under s 85(1)(d) and (e) PA, that all 52 agencies to whom the requests were made, including all Cabinet Ministers, comply with those requests.

[192] The HRRT's power to grant remedies is expressly restricted by s 85(1) PA to defendants in the proceedings before it. There were only eight named defendants in the proceedings before the HRRT.[59] To the extent that the HRRT has purported to grant remedies against agencies other than the named defendants in these proceedings,

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58 Section 88(1)(b) and (c) PA.

59 As the HRRT acknowledged at [11], there was a "degree of untidiness in the naming of the defendants" and one of the named defendants, Immigration New Zealand, was not a separate legal entity.

it has acted beyond its jurisdiction. Mr Mansfield did not seriously challenge that proposition. Accordingly, those remedies must be set aside.

Damages

[193] In relation to the interference with the privacy right of an individual, s 88(1)(b) PA authorises the HRRT to award damages for "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".

[194] Section 88(1)(c) authorises the HRRT to award damages for "… humiliation, loss of dignity, and injury to the feelings of the aggrieved individual".

[195] The HRRT awarded $30,000 damages to Mr Dotcom for loss of a benefit. The HRRT did not expressly say precisely what benefits it found Mr Dotcom had lost. However, it discussed a number of cases where damages had been awarded in cases where the requested information had been sought in connection with litigation in which the requester had been involved. It is safe to assume that the HRRT saw this case as falling in the same category. This is consistent with the statement by the HRRT:[60]

> He also wants to have access to the information so he can be satisfied he has most effectively deployed it in defence of the extradition application and in pursuit of the related litigation either in train or in contemplation.

[196] The HRRT also referred to an earlier instance where the Government Communications Security Bureau had acknowledged, in 2012, that it had unlawfully collected personal information about him which had resulted in the then Prime Minister of New Zealand making an apology to him. Of this matter, the HRRT said:[61]

> It is understandable that in these circumstances Mr Dotcom wants to monitor the collection, storage and use of his personal information by state agencies of New Zealand.

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60 *HRRT Decision*, above n 27, at [239.3].
61 At [239.3].

[197] In its decision, the HRRT referred to six cases where damages in the sum of $5,000 had been awarded in relation to requesters who wanted information for the purposes of conducting litigation.[62]

[198] It also referred to one case where two requesters were awarded $4,000 each.[63]

[199] The HRRT concluded that the awards in the cases discussed (consistently $4,000-5,000) were unhelpful and said that Mr Dotcom's case was unique. It also noted that the earliest of the cases discussed (*Proceedings Commissioner v Health Waikato Ltd*) dated from 2000 and said that:[64]

> According to the Reserve Bank of New Zealand Inflation Calculator, $5,000 in 2000 would today be worth $7,317. The Tribunal's calculation is that were the same $5,000 [to] be compounded at 3%it would presently be worth $8,264. If compounded interest at 5% is applied the adjusted figure is $11,460.

[200] There is no doubt that the HRRT can, in appropriate cases, review whether a particular quantum of award, set in the distant past, needs to be adjusted for inflation or other factors. However, the most likely criterion to be applied is the Reserve Bank of New Zealand Inflation Calculator rather than the figure of 5 per cent compounding interest. It is also significant that, in the present case, all but two of the decisions canvassed by the HRRT dated from 2012 or later.

[201] However, the more important criticism of the HRRT is that they did not consider the effect that the information sought was likely to have actually had on the proceedings in respect of which Mr Dotcom said it was sought.

[202] The HRRT dismissed the Attorney-General's submission that, in assessing damages, it was necessary to consider how the requested information might have affected the outcome of the litigation by saying that the law did not require Mr Dotcom to establish that the information would actually have had an effect on the litigation.

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62 *Proceedings Commissioner v Health Waikato Ltd* (2000) 6 HRNZ 274; *Grupen v Director of Human Rights Proceedings* [2012] NZHC 580; *Director of Human Rights Proceedings v Schubach* [2015] NZHRRT 4; *Watson v Capital and Coast District Health Boards* [2015] NZHRRT 27; *Director of Human Rights Proceedings v Hamilton* [2012] NZHRRT 24; and *Director of Human Rights Proceedings v Valli and Hughes* [2014] NZHRRT 58.

63 *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004.

64 *HRRT Decision*, above n 27, at [240].

[203] In this context, the HRRT cites the High Court decision of *Proceedings Commissioner v Health Waikato Ltd*[65] as authority for the proposition that it is not necessary for a plaintiff to prove that the withheld information would, if available, have meant a different result before the Court or the HRRT, or on appeal.[66]

[204] However, that seems to overstate what the High Court in that case actually found. That case does support the proposition that a requester does not have to establish that the requested information would "inevitably" have meant a different result in the litigation, merely that that was a possible outcome. At [48], the High Court in that case said:

> So, as Mr Illingworth realistically accepted on this appeal, it could not be argued that these letters would inevitably, if available, have meant a different result before either the Tribunal or on appeal. Had they been available, however, at the end of what the CRT correctly described as "protracted" and "stressful" litigation, [the requester] would have felt that all that could have been done, had been done, to win his major point and either succeed on the grievance issues before the Employment Tribunal, or alternatively achieve a better result than $5,000 and $3,000 respectively on the appeal.

[205] The HRRT correctly accepted that:[67]

> Before damages can be awarded for an interference with the privacy of an individual there must be a causal connection between that interference and one of the forms of loss or harm listed in the PA, s 88(1)(a), (b) or (c).

[206] Mr Mansfield, in his written submissions, identified the benefit he said Mr Dotcom lost as being:

> He lost the opportunity to refer to this information in his defence of the extradition proceeding in the District Court, High Court and Court of Appeal and related proceedings challenging the validity of the arrest warrant and the jurisdiction of the extradition court.

[207] As part of analysing the issue of causation, it is therefore necessary to consider the extent to which the information requested is likely to have actually affected the outcome of the litigation for which it was said by Mr Dotcom to be required. That litigation was the forthcoming eligibility hearing in the District Court. It was not

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65 Above n 62.
66 *HRRT Decision*, above n 27, at [226].
67 At [221].

necessary for Mr Dotcom to show that the information sought would inevitably have influenced the outcome but there must be at least some evidential basis for assuming that it was potentially relevant.

[208] In making that assessment, it is necessary to consider the view expressed by the courts that had previously considered "everything" requests by Mr Dotcom of the nature made here. Perhaps the most significant judgment in this regard is that of Simon France J.[68] His view was that the information sought was totally irrelevant to the extradition proceeding. In these circumstances, it is difficult to see how the necessary element of causation has been established.

[209] It may be possible that Mr Dotcom could establish the other loss of benefit referred to by the HRRT at [239.3], namely a need to monitor the collection storage and use it as personal information by State agencies given his prior experience with the GCSB. However, when considering that issue, it would be necessary to have regard to the fact that, as set out earlier in this decision, Mr Dotcom was regularly and frequently making requests under both the OIA and PA prior to this request and, as set out in annexure E to the appellant's submissions, continued to regularly make such requests (and had them complied with) right up until the date of the HRRT hearing.

[210] On an appeal, there are limits around the ability of an appellate court to interfere with the quantum of general damages fixed by the lower court. The Supreme Court in *Taunoa v Attorney-General* said:[69]

> [I]t was not the function of an appellate court to substitute its own assessment of general damages for that of the trial judge. A different award should be made on appeal only if the court was satisfied "that the trial Judge's award was so low (or so high) as to amount to a wholly erroneous figure".

[211] Were we required, for the purposes of this decision, to come to a concluded view in relation to damages under s 88(1)(b) PA, our conclusion would have been that this was the case where a wholly erroneous figure had been arrived at. We would have directed that this aspect of the matter be remitted to the HRRT for consideration in terms of the principles that we have set out in this decision.

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68 *Dotcom v The United States of America*, above n 12, at [78], [79] and [83].
69 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [331] per Tipping J.

Damages for loss of dignity or injury to feelings

[212] The HRRT awarded damages of $60,000 under s 88(1)(c) PA for loss of dignity and injury to feelings. Mr Dotcom had specifically disclaimed any claim for "humiliation" which is the first of the three grounds covered by s 88(1)(c).

[213] The issue both before the HRRT and us on appeal was the extent to which Mr Dotcom was obliged to adduce evidence in support of his claim for this type of damages.

[214] The HRRT got around the fact that the evidence submitted by Mr Dotcom did not specifically address the basis of this claim by saying:[70]

> It is correct that his brief of evidence does not have a discreet heading which reads "loss of dignity or injury to feelings" followed by a neatly packaged statement to the effect that the Crown caused these forms of harm. But as with all evidence, one needs to listen closely to what is being said behind the words in which the testimony is framed.

[215] The HRRT relied on the High Court decision of *Winter v Jans* as authority for the proposition that loss of dignity and injury to feelings can be assumed or inferred notwithstanding an absence of evidence.[71]

[216] The HRRT rejected the Attorney-General's submissions that such an approach should be limited to those cases where harm of this type was so obvious as to not require proof as being "not supported by the decision or by principle".[72]

[217] It is therefore necessary to examine what the High Court in *Winter v Jans* actually said. It is helpful to set out the relevant passages from *Winter v Jans*. The High Court said:[73]

> [34] In our view, while the normal rule is that an applicant must establish a causal connection between the breach and the damage, in appropriate cases the Tribunal or this Court may assume from the nature of the breach that such damages will follow. This is, in effect, what the Tribunal did in this case. If there were evidence which the Tribunal accepted, which led to the inferences which it drew, this Court on appeal should not interfere. We note, however,

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70 *HRRT Decision*, above n 27, at [245].
71 *Winter v Jans*, above n 63.
72 *HRRT Decision*, above n 27, at [248].
73 *Winter v Jans*, above n 63.

> that as the finding was based on inferences, this Court is in the same position as the Tribunal to assess whether the inference can properly be drawn from the facts, and if they cannot, the finding can be reversed. This is not a finding based on credibility findings of witnesses, which an appellate Court will not normally interfere with.
>
> [35] Whether the finding is based on "humiliation", "loss of dignity", or "injury to the feelings of that individual", the mental condition which was caused must be "significant". If "significant" is given its normal dictionary meaning, the impact caused must have been "important" or "notable" or "considerable" for it to have been significant.
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> …
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> [37] There are also difficulties in inferring "significant" injury to feelings, or "significant" humiliation, or "significant" loss of dignity where the claimant does not give evidence. …
>
> [38] We do not draw the inevitable inference from the facts that the injury to the feelings was significant. … In the circumstances, we conclude that while there would naturally be some anxiety and stress from not knowing what additional information may have been on the file the circumstances were such that it cannot be inferred that the "injury to feelings" was "significant".
>
> [39] We therefore conclude that not knowing what may have been on the lost file did not allow the Tribunal to assume that there was significant injury to the feelings of Mr and Mrs Jans. …

[218] Section 66(1)(b)(iii) PA says that, for the purposes of Part 8 of the Act, an action is an interference with the privacy of an individual if, and only if, in relation to that individual, the action "has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual".

[219] Part 8 of the Act includes s 88. As the High Court in *Winter v Jans* noted, in relation to the issue of whether or not there has been an interference with privacy rights under s 66, in the absence of evidence, there are difficulties in inferring significant injury to feelings or loss of dignity where a claimant does not give evidence because of the use of the word "significant" in s 66. Section 88 does not use that word.

[220] We conclude that this means that if, notwithstanding the lack of evidence, this is one of the rare cases where the Court can infer that there has been a significant interference with the privacy rights, the assessment of the damages under s 88(1)(c) does not require significant loss of dignity or injury to feelings. The question then is whether or not the facts of this case get beyond the thresholds set out in s 66.

[221] The HRRT actually set out the passages in the evidence from Mr Dotcom which it relied on to draw the inference that Mr Dotcom had suffered loss of dignity and injury to feelings. It said:[74]

> It was with considerable feeling (genuine, in our view) that he described his injured feelings. See for example the following passages taken from the notes of evidence at pp 51, 139 and 140:
>
> A These are very legitimate requests. I'm providing very legitimate reasons why I would like to have the information and the allegation that any of this is vexatious or is designed to frustrate the Government is just completely nonsensical because if one thing becomes clear in all of this, it's that I have a real desire for this information, for the truth and that I am entitled to it. Under New Zealand law I'm entitled to it and you're not giving it to me.
>
> A … my entire business has been destroyed, I've been put in jail for a month, I've been subject to unlawful surveillance and, you know, my life and my marriage has been destroyed. I was not interested in negotiating, what I'm interested in is the truth because I know I've done nothing wrong and I believe you know I have done nothing wrong and I want to have the documents to prove that and then this whole case is done and I can move on with my life. That is what I'm looking for, I'm looking for the truth and I think I'm entitled to it and everything that has happened so far indicates to me that there's no interest at all on the side of the government or the Crown to provide me with the truth.
>
> …
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> Q My understanding of your evidence to the tribunal is that one of the reasons that you want your Privacy Act request is so that you can have a fair hearing on the stay application?
>
> A Yes.

[222] It is clear that in the passages of Mr Dotcom's evidence set out by the HRRT, Mr Dotcom is not directing his evidence as to any loss of dignity or injury to feelings arising in relation to this particular request. What he is expressing is his emotional response to a whole raft of matters, many of which occurred some years before this request. Some (such as the manner in which he was initially arrested and remanded in custody) were the subject of litigation and settlement.

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74 *HRRT Decision*, above n 27, at [246].

[223] The HRRT has fallen into the error of regarding Mr Dotcom's unhappiness at a whole range of disparate issues as being relevant to its assessment of exactly what loss of dignity and injury to feelings he sustained in relation to the request that was the subject of his complaint to the HRRT.

[224] The HRRT has compounded this error by using emotive language such as "stigmatised" in reference to the Attorney-General describing the request as vexatious. The HRRT said, "The unjustified allegation that his requests were vexatious, not genuine and intended to disrupt the extradition hearing contained a real sting."[75]

[225] The use of this emotive language is inappropriate.

[226] The Attorney-General did not say that Mr Dotcom was conducting the extradition litigation vexatiously. He did not even say that he was vexatious. What he said was that the request was vexatious for the purposes of s 29(1)(j). As explained above, the particular element of vexatiousness relied on was Mr Dotcom's request that this very broad "everything" request directed at 52 agencies was urgent. That is not something that stigmatises him, nor does it have a "real sting".

[227] The approach adopted by the HRRT in effectively ignoring the requirement for evidence of loss of dignity and injury to feelings is at odds with the approach taken in other New Zealand jurisdictions to damages for humiliation, loss of dignity and injury to feelings. The most analogous jurisdiction is the employment one where s 123(1)(c)(i) of the Employment Relations Act 2000 also provides for the award of general damages as compensation for "humiliation, loss of dignity and injury to … feelings".

[228] The Employment Courts have long emphasised the importance of calling evidence in respect of claims for such damages. Chief Judge Inglis in the case of *Waikato District Health Board v Archibald* confirmed that higher awards are generally supported by evidence from third parties who have had the opportunity to observe the

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75 At [249].

impact on the claimant although it was not mandatory that there be evidence other than that of the complainant.[76]

[229] The HRRT referred to the case of *Hammond v Credit Union Baywide*[77] for the proposition that the nature of the harm for which damages can be awarded under s 88(1)(c) PA means that there is an inevitably subjective element to their assessment and that each case is fact-specific in terms of the personality of the aggrieved individual.[78]

[230] We agree with this observation. However, there is little analysis of the specific effect on Mr Dotcom. The obvious reason for that is that, in relation to this particular request, he gave no evidence at all as to its effect on him. He certainly did not claim that its effect had been "stigmatising" as the HRRT concluded.

[231] Standing back and looking at the evidence as a whole, there is no evidence that Mr Dotcom was emotionally fragile, or that his feelings were affected in any particular way as a result of the refusal of this request. The context indicates that this was just one request in a long series of requests stretching over several years where this was the only instance of a request having been declined on the ground of being vexatious. The evidence also disclosed that, over the years, he had used requests for information tactically and, with the assistance of skilled professional advisers, had managed to delay the extradition hearing some three and a half years. In those circumstances, it would be difficult to infer that a person of ordinary fortitude would have suffered significant loss of dignity or injury to feelings, let alone a person of the obvious fortitude of Mr Dotcom.

[232] A further concern with the HRRT's award under this head is that although the HRRT in Part 2 acknowledged that an award of damages under s 88(1)(c) PA, is to compensate for loss of dignity and injury to feelings and not to punish the defendant, it justified its award of $60,000 on the basis of what it said was "stigmatisation".[79] Particularly in the situation where Mr Dotcom had not, in his evidence, ever claimed

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76 *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62]-[66].
77 *Hammond v Credit Union Baywide* [2015] NZHRRT 6.
78 See *HRRT Decision*, above n 27, at [250].
79 At [252] and [254].

that he was stigmatised, or that there was "a real sting" in the Attorney-General's decision to decline his request, it is inescapable that the HRRT had lost sight of the fact that s 88(1)(c) damages are designed for consequences that have either been established by evidence or which, in limited cases, can be inferred, and that punishment of the defendant has no part in such damages.

[233] The Employment Court in the recent case of *Stormont v Peddle Thorpe Aitken Ltd* confirmed the principles in relation to s 123(1)(c)(i) when it said:[80]

> The purpose of an award under s 123(1)(c)(i) is to compensate for loss, not to punish. That means that the egregiousness of the employer's conduct will only be relevant to the extent to which it actually increased the level of loss or harm suffered. While the subjective effect on the employee is the focus of the inquiry, along with causation, the loss to be compensated for must be objectively assessed and quantified. It is the employee who must prove, on the balance of probabilities, that they suffered loss; that the employer's breach was a material factor in the loss they sustained; and quantification of that loss. Direct evidence, rather than inference, is generally required.

[234] There was no evidence that Mr Dotcom had a particularly sensitive personality or was likely to have experienced an emotional response to the declining of his request out of the ordinary range. Indeed, far from being overly sensitive, the evidence would seem to indicate that Mr Dotcom is a particularly robust character, likely to be well able to take disappointments like the refusal of this request on the grounds that it was vexatious, in his stride. Such strength of character would be consistent with him having specifically disclaimed any reliance on the "humiliation" ground of s 88(1)(c).

[235] This case seems to fall into the same category as *Winter v Jans* where, while there would naturally be some anxiety and stress from not knowing what information, additional to that already disclosed to him, might have been found in the records of the 52 recipients, the circumstances was such that it cannot be inferred that the injury to feelings was significant.

[236] Given that this case does not meet the threshold for implying significant consequences, the absence of any direct evidence relating to Mr Dotcom having

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80 *Stormont v Peddle Thorpe Aitken Ltd* [2017] NZEmpC 71, (2017) 14 NZELR 789 at [116].

suffered loss of dignity or injury to feelings means that there is no basis for an award under s 88(1)(c).

[237] We therefore find that the figure for compensation arrived at under s 88(1)(c) is "wholly erroneous".

[238] As with the damages awarded under s 88(1)(b), had we upheld the substantive appeal, we would have directed that this aspect of the matter be remitted to the HRRT for consideration in terms of the principles we have set out in this decision.

Outcome

[239] The appeal is allowed. We find that there was a proper and lawful purpose for the transfer of the requests and that, because of the insistence that all 52 requests were required to be responded to urgently, on the ground that the information sought was relevant to the eligibility proceedings, they were vexatious.

[240] Had we been required to determine the issues of remedies, we would have quashed the remedies ordered against those entities that were not defendants; set the awards of damages aside on the basis they were wholly erroneous and remitted the question of damages to the HRRT for determination in accordance with the principles outlined in this decision.

[241] We invite the parties to settle costs themselves but, in the absence of agreement, the appellant is to file a memorandum within 14 days of this decision, with the respondent to file a memorandum in reply within 14 days of receipt of the appellant's memorandum.

Churchman J | Deborah Hart | Wendy Gilchrist

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