IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2021] NZHRRT 13**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 080/2016
UNDER	**THE PRIVACY ACT 2020**
BETWEEN	**MOGAMBIREE PILLAY**
	PLAINTIFF
AND	**NEW ZEALAND TRANSPORT AGENCY**
	DEFENDANT

AT AUCKLAND

BEFORE:
Ms SJ Eyre, Deputy Chairperson
Dr SJ Hickey MNZM, Member
Mr RK Musuku, Member

REPRESENTATION:
Mr M Pillay in person
Mr A Wicks for defendant

DATE OF HEARING: **27 November 2019**

DATE OF DECISION: **15 March 2021**

DECISION OF TRIBUNAL[1]

[1] In 2014, Mr Pillay imported a 1982 Lancia Montecarlo car (the car). The car required entry certification in accordance with New Zealand Transport Authority (NZTA) requirements as well as some repair work. Mr Pillay was dissatisfied with the repair and certification of the car, so he filed a claim in the Disputes Tribunal against the NZTA, Vehicle Testing New Zealand (VTNZ), Mr Barlass who was the repair certifier and Bute Collision Repairs, who repaired the vehicle.

[1] [This decision is to be cited as *Pillay v New Zealand Transport Agency* [2021] NZHRRT 13.]

[2] After the filing of the Disputes Tribunal claim, NZTA provided VTNZ with information relating to Mr Pillay on two occasions. The circumstances of these disclosures and the manner in which this information was stored are the subject of this claim. Mr Pillay claims NZTA has interfered with his privacy.

[3] NZTA disputes that there has been any interference with Mr Pillay's privacy and claims immunity in respect of both the disclosures.

BACKGROUND

[4] In November 2014 Mr Pillay imported the car and requested advice and repair from Mr Barlass, a NZTA accredited repair certifier. Mr Barlass worked with Bute Collision Repairs to have the repairs done for Mr Pillay. The car was then presented to VTNZ for compliance certification in accordance with NZTA requirements. After initially failing, in mid-February 2015 the car was certified as compliant and subsequently gained a warrant of fitness.

[5] Mr Pillay then noticed a crack in the chassis and complained to NZTA about Mr Barlass, the repairer. Mr Pillay's complaint was investigated by NZTA and in June 2015 NZTA advised Mr Pillay that it was not possible to ascertain that the car was not up to the required standard at the time the certification was issued, so it would not be taking any further action on his complaint.

[6] In September 2015 Mr Pillay filed the Disputes Tribunal claim against NZTA, VTNZ, Mr Barlass and Bute Collision Repairs. On 5 October 2015 VTNZ emailed NZTA and requested under the OIA, information regarding "any previous complaints involving Mr Pillay". NZTA undertook a search of its records and responded to the OIA request on 13 October 2015 by providing a copy of a complaint Mr Pillay had made in 2005 which also resulted in a Disputes Tribunal claim.

[7] The 2005 complaint was made by Mr Pillay to NZTA regarding the certification of a vehicle that Mr Pillay had imported at that time. Following inaction on that complaint by NZTA, Mr Pillay had filed a Disputes Tribunal claim against NZTA and others. That Disputes Tribunal claim was dismissed as the Disputes Tribunal found there was no duty of care owed by NZTA to Mr Pillay.

[8] Having been alerted to Mr Pillay's 2005 Disputes Tribunal hearing, NZTA emailed the Disputes Tribunal on 16 October 2015 and requested that Mr Pillay's claim against NZTA be dismissed, for the same reasons the 2005 claim had been dismissed. As required by the Disputes Tribunal procedures, the correspondence to the Disputes Tribunal Registrar was copied to Mr Pillay, VTNZ and the other respondents.

[9] Mr Pillay then withdrew his claim against NZTA and was unsuccessful in his Disputes Tribunal claim against VTNZ and the other parties.

[10] In late 2015 and early 2016 Mr Pillay requested, under the OIA, copies of email communications between VTNZ and NZTA. He also requested clarification of who had accessed his personal information. Mr Pillay subsequently complained to the Privacy Commissioner about an interference with his privacy by NZTA.

[11] On 1 September 2016 the Privacy Commissioner issued a Certificate of Investigation confirming it had investigated alleged breaches of Information Privacy Principles (IPP) 5, 8, 10 and 11 but that it found no interference with privacy. Mr Pillay did

not agree with the Privacy Commissioner's decision, so he filed this claim in November 2016.

MR PILLAY'S CLAIM

[12] Mr Pillay originally claimed a breach of IPPs 5, 7, 10 and 11 of the Privacy Act 1993. However, that was subsequently amended to replace IPP 7 with a breach of IPP 8. Accordingly, Mr Pillay's claim is that NZTA breached IPPs 5 (storage and security of information), 8 (accuracy of information used), 10 (limits on use of personal information) and 11 (limits on disclosure of personal information).

[13] On 1 December 2020 the Privacy Act 1993 was repealed and replaced by the Privacy Act 2020. However this claim was filed under the Privacy Act 1993 and heard under that Act. The transitional provisions in Privacy Act 2020 Schedule 1, Part 1, cl 9(1) provide that these proceedings must be continued and completed under the 2020 Act, but that does not alter the relevant legal rights and obligations in force at the time the actions subject to this claim were taken. Accordingly, all references in this decision are to the Privacy Act 1993 (the Act).

[14] Mr Pillay seeks a determination that there has been an interference with his privacy, an appropriate award of damages, and compensation for out of pocket expenses.

[15] NZTA disputes that there was any interference with Mr Pillay's privacy under IPP 5 and claims it is immune from the present proceedings as a consequence of s 58(3) of the Disputes Tribunal Act 1988 (DTA) and s 48 of the OIA. In the alternative, NZTA submits that IPP 11 allowed it to disclose the information it provided in the context of the Disputes Tribunal proceedings.

ISSUES

[16] The issues to be determined by the Tribunal are:

[16.1] Does s 48 of the OIA prohibit proceedings against NZTA in respect of the provision of information to VTNZ under the OIA?

[16.2] Was NZTA's disclosure by email dated 16 October 2015 to the Disputes Tribunal and parties to the hearing, immune from proceedings in accordance with s 58 of the DTA and/or permissible in accordance with IPP 11(e)?

[16.3] If NZTA does not have immunity under s 48 of the OIA or s 58 of the DTA, did NZTA take reasonable steps to ensure the information it shared about Mr Pillay was up to date, complete, relevant and not misleading before using that information?

[16.4] Notwithstanding any immunity in respect of IPPs 8, 10 and 11, does NZTA have reasonable security safeguards against access, use and disclosure or other misuse of personal information as required by IPP 5?

[16.5] If NZTA has breached IPP 5 does that amount to an interference with privacy as defined in s 66 of the Act?

[16.6] If so, what is the appropriate remedy?

IMMUNITY UNDER THE OFFICIAL INFORMATION ACT

[17] The OIA enables access to official information by the public, through a prescribed process and framework. If official information is provided in good faith, then the agency that provides it is protected from legal proceedings arising from the provision of official information. Section 48 sets out the specific protections for those who provide information under the OIA:

> **48 Protection against certain actions**
>
> (1) Where any official information is made available in good faith pursuant to this Act,—
> (a) no proceedings, civil or criminal, shall lie against the Crown or any other person in respect of the making available of that information, or for any consequences that follow from the making available of that information; and
> (b) no proceedings, civil or criminal, in respect of any publication involved in, or resulting from, the making available of that information shall lie against the author of the information or any other person by reason of that author or other person having supplied the information to a public service agency or Minister of the Crown or organisation.
>
> (2) The making available of, or the giving of access to, any official information in consequence of a request made under this Act shall not be taken, for the purposes of the law relating to defamation or breach of confidence or infringement of copyright, to constitute an authorisation or approval of the publication of the document or of its contents by the person to whom the information is made available or the access is given.

[18] The Privacy Act 1993 provides that agencies dealing with personal information of individuals up to 30 November 2020 must comply with the IPPs in that Act. However, s 7 of that Act recognises that an action is not a breach of certain IPPs if the action is authorised or required by or under law. Accordingly, it is possible for the IPPs to be overridden by other legislative requirements, such as the requirement to provide information under the OIA.

[19] The immunity conferred under s 48 of the OIA can result in the striking out of proceedings in this Tribunal, if it is established that s 48 has been engaged and that the information was provided under the OIA in good faith. See recent Tribunal discussion at [46] to [48] in *Williams v Police (Strike-Out Application No. 2)* [2020] NZHRRT 26 (*Williams*). Accordingly, as the s 48 immunity has been claimed by NZTA:

> **[19.1]** NZTA must establish that official information was made available under the OIA; and
>
> **[19.2]** NZTA must prove that the information was made available in good faith.
>
> **[19.3]** To successfully challenge this claimed immunity, Mr Pillay must establish to the standard of the balance of probabilities that the information was not provided in good faith. In *Williams* it was noted that this would ordinarily require a particularised allegation of a failure to provide the information under the OIA in good faith.
>
> **[19.4]** The Tribunal must then determine whether NZTA acted in good faith in making the official information available.

[20] NZTA has clearly made official information available under the OIA and has now claimed immunity under s 48 of the OIA. Mr Logan has given evidence of that and NZTA has submitted it responded in good faith.

[21] Mr Pillay did not specifically address s 48 of the OIA in his submissions. However, Mr Pillay is self-represented, and alleged that there was cronyism between NZTA and VTNZ in the timing and overall response to the OIA request and has alleged racial profiling. These claims are effectively allegations of bad faith and a breach of the duty of good faith. Therefore while Mr Pillay may not have appreciated the need to specifically plead in response to s 48 of the OIA, the Tribunal will, in accordance with the approach set out in s 105 Human Rights Act 1993, consider whether these allegations amount to a breach of good faith by the NZTA.

[22] The full wording of the OIA request made on 5 October 2015 and sent at 11.32am, from Brian Simmons at VTNZ to Tom Logan at NZTA, was:

> VTNZ have today received notification from the North Shore District Court regarding a Mr Mogie Pillay, which I note NZTA are also listed as a co-defendant.
>
> As the content of this submission indicates Mr Pillay has a sound knowledge of entry certification processes I would request under the Official Information Act that any previous complaints involving Mr Pillay are released to ourselves, so we can ascertain the extent of this apparent knowledge as it may have a bearing on his own culpability and any relevant pattern of behaviour around complaints.

[23] Mr Pillay submitted that the reference to his culpability in the OIA request, given he was a "person of colour" was racism and offensive. Mr Pillay suggested the fact that NZTA responded to this request made it complicit in this. Mr Pillay also alleged that the prompt response time to the OIA request and the tone of the response demonstrated familiarity and suggested a culture of cronyism between NZTA and VTNZ. The first response to the emailed OIA request was sent at 12.37pm on 5 October 2015 and was as follows:

> Hi Brian,
>
> I have cc'd the OCU so they can log this request, I will start to look into this and get the information you have requested ready in the meantime.
>
> Regards
>
> Tom

[24] The substantive response to the OIA request and the disclosure of the first complaint file made in 2005 was sent to VTNZ on 13 October 2015, with some redactions of personal details by Mark Rounthwaite.

[25] Mr Logan was Senior Advisor, Complaints at NZTA at the time of Mr Pillay's complaint. Mr Logan's evidence filed on behalf of NZTA expressly rejected the allegations of collusion and the suggestion that there was "some sort of pre-judgment" based on Mr Pillay's race. Taken at face value the communications between NZTA and VTNZ suggest that Mr Logan and Mr Simmons do know each other, but that is not considered unusual in the context of two individuals working in entities which necessarily have contact with each other. The timing of the initial response and then the substantive OIA response is prompt, however the OIA requires agencies to respond as soon as reasonably practicable. There is nothing in the communications which the Tribunal considers is linked in any way to Mr Pillay's race.

[26] The Tribunal finds that Mr Pillay has provided insufficient evidence to prove that there was any cronyism, collusion, racism or other form of bad faith in the NZTA response under the OIA. NZTA was required to respond to the VTNZ request under the OIA and it responded accordingly. The Tribunal finds that this response was made in good faith.

[27] This means the claims by Mr Pillay against NZTA under IPPs 8, 10 and 11 in relation to the provision to VTNZ of Mr Pillay's complaint file are struck out. Section 48(1) of the OIA prohibits this aspect of Mr Pillay's claim being pursued.

DISCLOSURE TO THE DISPUTES TRIBUNAL

[28] The DTA governs procedure in the Disputes Tribunal and s 58 specifically provides:

> **58 Protection of Referees, Investigators, etc**
>
> (1) A Referee, in the performance of his or her duties under this Act, shall have and enjoy the same protection as a Justice of the Peace acting in his or her criminal jurisdiction has and enjoys under sections 4A to 4F of the Justices of the Peace Act 1957.
> (2) For the avoidance of doubt as to the privileges and immunities of Referees, parties, representatives, and witnesses in the proceedings of the Tribunal it is hereby declared that such proceedings are judicial proceedings.
> (3) The privileges and immunities referred to in subsection (2) shall extend and apply to—
> (a) the Tribunal acting under section 40(2); and
> (b) an Investigator acting under section 41; and
> (c) a person who gives information, or makes any statement, to the Investigator or Tribunal on any such occasion.

[29] The second instance of disclosure by NZTA challenged by Mr Pillay, was made in an email dated 16 October 2015. The email was sent from Mr Logan to the generic email address for the Auckland Disputes Tribunal. The email was also copied to the parties to the Disputes claim. The disclosure consisted of an email to the Registrar requesting that the claim against NZTA be dismissed, based on the decision of the Disputes Tribunal in 2005 to dismiss the 2005 claim against NZTA. The email therefore attached a copy of the 2005 Disputes Tribunal decision in NZTA's favour.

[30] NZTA maintains it has immunity from proceedings arising from this disclosure, but even if there was no immunity it was entitled to disclose this information under IPP 11(e).

Section 58 Disputes Tribunal Act 1988 immunity

[31] Section 58(2) DTA states that:

> For the avoidance of doubt as to the privileges and immunities of Referees, parties, representatives, and witnesses in the proceedings of the Tribunal it is hereby declared that such proceedings are judicial proceedings.

[32] The disclosure in question was made by Mr Logan on behalf of NZTA, as a party to the proceedings. Mr Logan was clearly communicating as a party to the proceeding and is therefore included in the definition of those who have privileges and immunities under s 58(2) above.

[33] As the Disputes Tribunal proceedings are deemed to be judicial proceedings, the privileges and immunities are those provided at common law for participants in civil proceedings. Those privileges and immunities were described by Elias, CJ in *Auckland District Law Society & Anor v B & Ors* CA 151/00 (15 October 2001) at [10] as:

> By common law those who participate in judicial proceedings (as witnesses, counsel, judges, jurors, or solicitors) are protected from civil actions arising out of pleadings, evidence, statements or submissions. In defamation claims, for example, statements in court proceedings have absolute privilege. Witnesses, parties, and solicitors are privileged from arrest on civil process while attending court. A witness is protected from civil proceedings in respect of the evidence given in court and this immunity is not confined to actions for defamation.

[34] These privileges and immunities mean that NZTA are protected from civil actions arising out of its conduct in the Disputes Tribunal proceeding. While there is no case law on whether this would specifically exclude actions commenced in this Tribunal under the Act, this Tribunal has previously accepted that a very similar section of the Residential Tenancies Act 1986 has the effect of preventing proceedings being taken against a witness from a Tenancy Tribunal hearing. See *Maguire v Brazier Property Management Limited (Preliminary Issues)* [2009] (6 July 2009) at [29].

[35] The Tribunal is satisfied that when considering the plain meaning of s 58(2) of the DTA, the purpose of that section, and the well-established common law privileges and immunities for participants in judicial proceedings, that the NZTA conduct in sending the 2005 Disputes Tribunal decision to the Disputes Tribunal and other parties, is immune from civil proceedings.

[36] NZTA has immunity from proceedings arising from its actions in the Disputes Tribunal, accordingly Mr Pillay's claim against NZTA under IPPs 11 and 8 in relation to this disclosure are struck out.

IPP 11(e) exception

[37] IPP 11 states:

> Principle 11
>
> Limits on disclosure of personal information
>
> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
>
> (a)
> …
> (e) that non-compliance is necessary—
> (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
> (ii) for the enforcement of a law imposing a pecuniary penalty; or
> (iii) for the protection of the public revenue; or
> (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
> …

[38] The NZTA also submitted that, notwithstanding the immunity, it was entitled to disclose the information to the Disputes Tribunal and other parties under IPP 11 (e). For the sake of completeness, the Tribunal has considered this submission also.

[39] IPP 11 requires an agency not to disclose personal information unless it believes one of the exceptions detailed in the IPPs apply. NZTA has relied on the exception in IPP 11(e) to justify its disclosures to the Disputes Tribunal and the other respondents.

[40] To successfully rely on this exception *L v L* HC Auckland AP95-SW01, 31 May 2002 requires NZTA to prove that Mr Logan subjectively believed the ground for the exception existed and that the ground was objectively reasonable.

[41] Mr Logan's evidence was that he emailed Disputes Tribunal registrar and attached the 2005 decision to support the NZTA argument that the 2015 claim should be dismissed. NZTA submitted that this was a necessary action as the proceedings had already commenced and it was necessary for the 2005 decision to be provided to the Disputes Tribunal to support the NZTA response to the claim, namely that the claim should be

dismissed. NZTA also submitted it was necessary to copy the other parties in to the communication as the Disputes Tribunal required this to be done. Ultimately the sending of this submission and the attached decision resulted in Mr Pillay withdrawing the Disputes Tribunal claim against NZTA.

[42] The High Court found in *Geary v New Zealand Psychologists Board* [2012] NZHC 384 (21 March 2012) (*Geary*) at [64] that for a party to rely on the exception in IPP 11(e)(iv), the agency must have inspected and assessed the information being disclosed before disclosing it. In *Geary* the High Court found this was not done, as an attachment was sent to a witness without it being assessed by the sender. In contrast with that, Mr Logan has given evidence of his assessment of the 2005 decision and the reason why he considered the email and the decision were necessarily sent to the Disputes Tribunal, and why he was required to copy it to other parties in the Disputes Tribunal.

[43] The Tribunal accepts that Mr Logan did subjectively believe it was necessary to send this information. As to whether it was objectively reasonable, it is usual when defending oneself or one's employer in a Court proceeding to refer to and rely on any information that is relevant. It is clear this was relevant information. The Tribunal is satisfied that NZTA turned its mind to whether to send the decision to the Disputes Tribunal and did so having determined it was necessary to defend themselves in the Disputes Tribunal. This Tribunal accepts that was objectively reasonable. Accordingly, even without the immunity afforded by s 58 DTA the Tribunal finds the email to the Disputes Tribunal and the respondents was not a breach of IPP 11.

DOES NZTA HAVE REASONABLE SAFEGUARDS?

[44] IPP 5 states:

> Principle 5
>
> Storage and security of personal information
>
> An agency that holds personal information shall ensure—
>
> (a) that the information is protected, by such security safeguards as it is reasonable in the circumstances to take, against—
> (i) loss; and
> (ii) access, use, modification, or disclosure, except with the authority of the agency that holds the information; and
> (iii) other misuse; and
>
> (b) that if it is necessary for the information to be given to a person in connection with the provision of a service to the agency, everything reasonably within the power of the agency is done to prevent unauthorised use or unauthorised disclosure of the information.

[45] Mr Pillay has also claimed that NZTA breached IPP 5. Mr Pillay submits that the searching of the archive records at NZTA by entering his name into the search field was "essentially a form of racial profiling" and at the very least an interference with his privacy. NZTA rejected the accusation of racial profiling and Mr Logan gave evidence that as the OIA request was made for information relating to Mr Pillay, the search of the records required a search by name. Using Mr Pillay's name to search for information about him is logical and reasonable in these circumstances and does not provide any evidence of a failure of NZTA to maintain reasonable security safeguards over personal information, as required by IPP 5.

[46] The second aspect of Mr Pillay's claim under IPP 5 is that he was told information on his 2005 complaint was accessed once, but the access records indicate it was accessed more than once. NZTA has clarified that Mr Pillay's information was accessed twice, once for the OIA request and once when Mr Pillay himself requested a copy of it. NZTA submitted that the reason it told Mr Pillay the information had been accessed once, was because it assumed his query did not include his own access to the information.

[47] The evidence of Mr Logan presented in the hearing provided significant detail on the storage system used by NZTA and Mr Logan explained clearly to the Tribunal the audit function on the records database, which showed the limited access to the records. The Tribunal is satisfied that this shows a system which is robust and has clear audit trails. It was also apparent there were reasonable safeguards against access and use of information unless authorised. The only access that has been shown in relation to Mr Pillay's records was clearly explained by Mr Logan, and despite Mr Pillay's concerns of cronyism the access for the VTNZ OIA request showed the access was after the OIA request was received.

[48] Mr Logan demonstrated clearly the safeguards utilised by NZTA and the way in which they operated and Mr Pillay has presented no evidence to prove to the standard of the balance of probabilities that the storage methods used by NZTA are inadequate or unreasonable.

[49] The Tribunal finds there is no breach of IPP 5. Accordingly, there has been no breach of any IPP and there has been no interference with Mr Pillay's privacy.

ORDER

[50] The claim by Mr Pillay against NZTA in respect of IPPs 8, 10 and 11 regarding the response to VTNZ made under the Official Information Act 1982 is struck out.

[51] The claim by Mr Pillay against NZTA in respect of IPPs 8 and 11 regarding the disclosure in the Disputes Tribunal proceedings is struck out.

[52] The claim by Mr Pillay against NZTA in respect of IPP 5 is dismissed.

[53] Mr Pillay's claim against NZTA has been unsuccessful in its entirety, accordingly no orders are made in favour of Mr Pillay.

COSTS

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

> **[54.1]** NZTA is to file its submissions within 14 days after the date of this decision. The submissions for Mr Pillay are to be filed within the 14 days which follow. NZTA is to have a right of reply within seven days after that.
>
> **[54.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

[54.3] In case it should prove necessary, the Chairperson or Deputy Chairperson of the Tribunal may vary the foregoing timetable.

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Ms SJ Eyre	**Dr SJ Hickey MNZM**	**Mr RK Musuku**
Deputy Chairperson	**Member**	**Member**