(1) ORDER PROHIBITING PUBLICATION OF ALL INFORMATION RELATING TO PLAINTIFF'S MEDICAL CIRCUMSTANCES

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2018] NZHRRT 7**

	Reference No. HRRT 047/2016
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**KIM DOTCOM**
	Plaintiff
AND	**CROWN LAW OFFICE**
	First Defendant

CONT.

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr RM Mansfield and Mr SL Cogan for plaintiff
Ms V Casey QC and Ms EM Gattey for defendants

DATE OF HEARING:	**11, 12, 13, 18, 19, 20, 21, 26 and 27 April 2017 and 5 May 2017**
DATE OF LAST SUBMISSIONS:	**2 March 2018 (plaintiff)** **8 March 2018 (defendants)**
DATE OF DECISION:	**26 March 2018**

DECISION OF TRIBUNAL[1]

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[1] [This decision is to be cited as: *Dotcom v Crown Law Office* [2018] NZHRRT 7. Note publication restrictions.]

AND	**ATTORNEY-GENERAL** **Second Defendant**
AND	**DEPARTMENT OF THE PRIME MINISTER AND CABINET** **Third Defendant**
AND	**IMMIGRATION NEW ZEALAND** **Fourth Defendant**
AND	**MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT** **Fifth Defendant**
AND	**MINISTRY OF FOREIGN AFFAIRS AND TRADE** **Sixth Defendant**
AND	**MINISTRY OF JUSTICE** **Seventh Defendant**
AND	**NEW ZEALAND POLICE** **Eighth Defendant**

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INTRODUCTION

Short summary of facts

[1] In July 2015 Mr Dotcom sent an information privacy request to all 28 Ministers of the Crown and nearly every government department (the agencies). The 52 requests were in near identical terms and requested all personal information held about Kim Dotcom including information held under his previous names. The requests advised that because the information was required for "pending legal action", urgency was sought. It is common ground that the litigation referred to included (inter alia) an extradition eligibility hearing in the District Court then due to commence on 21 September 2015.

[2] Nearly all the requests were transferred by the agencies to the Attorney-General.

[3] On 5 August 2015 the Solicitor-General provided a response on behalf of the Attorney-General in which the requests were declined on the stated ground that, in terms of the Privacy Act 1993 (PA), s 29(1)(j) the requests were vexatious and included information which was trivial. The Solicitor-General also advised that insufficient reasons for urgency had been provided.

[4] The primary issue before the Tribunal is whether Mr Dotcom has established there has been a consequent interference with his privacy as defined in PA, s 66 and in particular:

> **[4.1]** Whether the transfer of the requests to the Attorney-General was permitted by the transfer provisions in PA, s 39; and if it was
>
> **[4.2]** Whether, in terms of PA, s 66(2)(b), there was no proper basis for the decline decision.

[5] In this decision we explain our reasons for finding the transfers were not permitted by the Privacy Act and that in any event, there was no proper basis for the decline decision.

The evidence

[6] There was no substantive dispute as to the basic narrative of events and the majority of the evidence was produced by consent in the form of a 36 volume agreed bundle of documents. By joint memorandum dated 3 April 2017 the parties stated the documents were to be treated as evidence in the proceeding and did not need to be put to or admitted through a witness. The parties further agreed that material referred to in the common bundle but not included (such as exhibits to affidavits) could be treated as evidence if and only if that material was either put to a witness or referred to in opening submissions by either party. Other material not in the common bundle could be introduced as evidence in the normal way through a witness.

[7] The only witness for the plaintiff was Mr Dotcom who gave evidence by audio-visual link. See Dotcom *v Crown Law Office (AVL)* [2017] NZHRRT 13. He was cross-

examined at some length over two days primarily in relation to the Crown's contention that his requests for access to his personal information were vexatious, or as claimed in a letter sent by the Solicitor-General to the Privacy Commissioner, that the requests "were not genuine Privacy Act requests but rather a litigation tactic and a fishing expedition" and had "an ulterior motive", namely to disrupt litigation and in particular, the extradition hearing. Mr Dotcom firmly denied the allegations.

[8] As will be seen, we found Mr Dotcom to be a persuasive, credible witness. His evidence was, as submitted by his counsel, clear, thorough and consistent. We are satisfied by his evidence that the requests were genuine and based on an honest belief that in the unique circumstances of a truly exceptional case, the July 2015 Privacy Act requests were necessary to ascertain what personal information about him was held by government agencies in New Zealand. We accept his evidence that there was no ulterior purpose to the timing of the requests and that he simply wanted to receive the requested information so that if relevant, it could be used in the extradition proceedings and in other litigation.

[9] As for the case of the Crown, the defendants relied primarily on the documentary material in the common bundle. Oral evidence was called only in relation to one aspect of the defence, namely to demonstrate the scope of the requests from the perspective of the government agencies. Rather than bringing evidence from each of the 52 Ministerial officers and government departments, a "sample of two" was put forward as illustrative of the general position. Each was said to demonstrate a different aspect of "the practical realities". Mr Alan Witcombe of the Ministry of Business, Innovation and Employment (MBIE) gave evidence from the perspective of a large agency with multiple areas of responsibility while Mr Edrick Child of the Ministry of Justice gave evidence from the perspective of a relatively smaller agency.

[10] While there was a challenge to the content of their evidence, the credibility of Mr Witcombe and of Mr Child was not put in issue by Mr Dotcom.

The defendants

[11] There is a degree of untidiness in the naming of the defendants. For example, Immigration New Zealand is not a legal entity separate from MBIE and the New Zealand Police should have been sued through the Attorney-General. See the Crown Proceedings Act 1950, s 14(2). However, it was common ground at the hearing that nothing of substance turns on these points.

[12] Because in substance the Crown (sued through the Attorney-General) is the defendant in these proceedings we see no need to make formal orders amending the manner in which the individual agencies have been joined as defendants. Re-ordering the sequence in which they are presently named in the intituling could lead to confusion.

The Crown

[13] The submissions for the defendants referred to the defendants as "the Crown" (and hence) "the Crown's decisions", "the Crown's letter", "the Crown's approach", "the Crown's reading of the request" and so on. In this decision we intend employing much the same terminology, especially the terms "the Crown", "the Attorney-General", "the Solicitor-General" and "Crown Law". At times the terms are used interchangeably. It is therefore necessary we record that our understanding of those terms has been guided by John McGrath QC "Principles for Sharing Law Officer Power – the Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197 cited in *Berryman v Solicitor-General* [2005] NZAR 512 at [33] and in *R v King* [2007] 2 NZLR 137 at [24]. There is also the more recent article by Dr Matthew Palmer "The Law Officers and department lawyers" [2011] NZLJ 333 as well as the *Cabinet Manual 2017*. We note the following:

[13.1] The law officers of the Crown are the Attorney-General and Solicitor-General who are the Crown's lawyers.

[13.2] The Attorney-General is the senior law officer and a politician. The Solicitor-General is the junior law officer and is also deemed to be the Chief Executive of the Crown Law Office.

[13.3] As a Law Officer the Attorney-General is the principal legal adviser to the government.

[13.4] The Attorney-General and Solicitor-General are the officers of the Crown who determine what legal advice the Crown accepts and who instruct the Crown's lawyers on the conduct of litigation.

[13.5] The Crown Law Office is a government department that assists and supports the law officers of the Crown.

The burden of proof

[14] The conventional rule in civil litigation is that the plaintiff must establish his or her claim on the balance of probabilities. This rule applies expressly in proceedings under the Privacy Act with the result that before the Tribunal can grant any of the remedies provided for in PA, s 85 the Tribunal must be satisfied to the required standard that any action of the defendant is "an interference with the privacy of [the plaintiff]":

> **85 Powers of Human Rights Review Tribunal**
>
> (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
>
> (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
> (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:

(c) damages in accordance with section 88:
(d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
(e) such other relief as the Tribunal thinks fit.

[15] The term "interference with privacy" is defined in PA, s 66. The full text follows but as the section is rather long, it might help if we summarised in simple terms what it requires in the present case. In terms of s 66(2)(a)(i) and (b) the Tribunal must be satisfied, on the balance of probabilities, that:

[15.1] A decision has been made by a relevant agency under PA, Part 4, ("Good reasons for refusing access to personal information") or Part 5 ("Procedural provisions relating to access to and correction of personal information") to refuse to make information available in response to a request. On the facts this means proving:

[15.1.1] Mr Dotcom made an information privacy request. Section 33 relevantly defines such request as a request made pursuant to Principle 6 to obtain confirmation whether or not an agency holds personal information and/or a request to be given access to that personal information; and

[15.1.2] There was a refusal to make information available in response to the request; and in addition

[15.2] There was "no proper basis" for that decision.

[16] Section 66 provides:

66 Interference with privacy

(1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—
  (a) in relation to that individual,—
    (i) the action breaches an information privacy principle; or
    (ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or
    (iia) the action breaches an information privacy principle or a code of practice as modified by an Order in Council made under section 96J; or
    (iib) the provisions of an information sharing agreement approved by an Order in Council made under section 96J have not been complied with; or
    (iii) the provisions of Part 10 (which relates to information matching) have not been complied with; and
  (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—
    (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or
    (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
    (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.
(2) Without limiting subsection (1), an action is an interference with the privacy of an individual if, in relation to an information privacy request made by the individual,—
  (a) the action consists of a decision made under Part 4 or Part 5 in relation to the request, including—
    (i) a refusal to make information available in response to the request; or
    (ii) a decision by which an agency decides, in accordance with section 42 or section 43, in what manner or, in accordance with section 40, for what charge the request is to be granted; or

(iii) a decision by which an agency imposes conditions on the use, communication, or publication of information made available pursuant to the request; or
(iv) a decision by which an agency gives a notice under section 32; or
(v) a decision by which an agency extends any time limit under section 41; or
(vi) a refusal to correct personal information; and

(b) the Commissioner or, as the case may be, the Tribunal is of the opinion that there is no proper basis for that decision.

(3) If, in relation to any information privacy request, any agency fails within the time limit fixed by section 40(1) (or, where that time limit has been extended under this Act, within that time limit as so extended) to comply with paragraph (a) or paragraph (b) of section 40(1), that failure shall be deemed, for the purposes of subsection (2)(a)(i) of this section, to be a refusal to make available the information to which the request relates.

(4) Undue delay in making information available in response to an information privacy request for that information shall be deemed, for the purposes of subsection (2)(a)(i), to be a refusal to make that information available.

[17] The Crown accepts that to the extent it relies on the exception in PA, s 29(1)(j) to justify its decision to refuse the requests, the onus shifts to the Crown. See PA, s 87 which provides:

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

"No proper basis for that decision"

[18] Where an agency makes a decision under PA, Part 4 to refuse to make information available in response to an information privacy request, the Tribunal must reach the opinion that "there is no proper basis for that decision" before the action satisfies the definition of "interference with privacy" in PA, s 66(2).

[19] The submission for the Crown was that:

[19.1] The Tribunal does not have wide-ranging powers to inquire into or to rule on matters that are more properly within the scope of the High Court's supervisory jurisdiction, commonly exercised in the context of applications for judicial review. Nor does it have power to grant the remedies specified in the Judicial Review Procedure Act 2016 or to make orders for remedies under the New Zealand Bill of Rights Act 1990, such as public law damages.

[19.2] That is not to say that in some circumstances, similar analyses or inquiries might not be relevant to the Tribunal's task under PA, s 66. An obvious example will be where the Tribunal considers an agency has misinterpreted or misapplied its legal obligations under the Act. In such a case, that may lead the Tribunal to determine there was "no proper basis for [the] decision" in question.

[19.3] The broad scope of the Tribunal's inquiry under PA, s 66 means it does not need to first determine "unlawfulness" or some type of process error before turning to consider whether there has been an interference with privacy.

[19.4] The Tribunal is engaged in a "merits" review of the decision.

[19.5] Administrative law type errors going to lawfulness are irrelevant: if there was no proper basis for the decision, then s 66(2) is met, regardless whether there was an error of law or of process behind the decision. If the Tribunal considered there was such error, but nevertheless was not of the opinion there was no proper basis for the decision at issue, then the claim before the Tribunal must fail.

[19.6] The Tribunal therefore should not approach the case as if it were a full "rehearing", where the Tribunal reaches its own decision on the basis of the evidence before it. The mandated inquiry is narrower than that: the Tribunal is required to determine whether no proper basis at all existed for the decision at the time it was made. If there was a proper basis for the decision, then there has been no interference with privacy, even if the Tribunal might itself have reached a different view had the decision under review been left to it.

[19.7] The Crown relied exclusively on PA, s 29(1)(j) and did not contend any other reason for refusal of the requests had application.

[20] We largely agree with these submissions but add, by way of emphasis, that the phrase in PA, s 66(2)(b) is not "no basis" for the decision, but "no **proper** basis". It is plain that a merits review is contemplated. As stated in *M v Ministry of Health* (1997) 4 HRNZ 79 (CRT) at [85] "proper" is in this context to be understood as "accurate" or "correct" and the Tribunal is explicitly required to hold an "opinion" as to whether there was no proper basis for the decision. At the risk of attempting too many formulations of the issues to be determined, there must be more than a basis for the refusal decision. The assessment is objective. That basis must be "proper", that is a basis which is rational, lawful and reasonably available on the facts known at the time.

[21] In our opinion an error of law is a sufficient but not a necessary ground for reaching such opinion. In addition the Tribunal must itself assess the facts and circumstances as they were then known by the agency or ought to have been known. If on a merits review as so understood there was **a** proper basis for the decision, then there has been no interference with privacy even if the Tribunal might itself have reached a different view had the decision under consideration been for it to make at first instance.

[22] We agree with the Crown that to the extent that *M v Ministry of Health* suggests a different approach, it should not be followed.

[23] For completeness we add that it was not disputed by Mr Dotcom that the Tribunal does not have a judicial review jurisdiction. See *Director of Human Rights Proceedings v New Zealand Institute of Chartered Accountants* [2015] NZHRRT 54 at [44] and more recently *Mullane v Attorney-General* [2017] NZHRRT 40 at [99].

BACKGROUND TO THE INFORMATION PRIVACY REQUESTS

[24] On 18 January 2012 extradition proceedings were commenced against Mr Kim Dotcom, Mr Mathias Ortmann, Bram Van Der Kolk and Finn Habib Batato when the United States of America (USA) filed a without notice application in the District Court at

North Shore and obtained provisional warrants for the arrest of all four men. The arrests took place on 20 January 2012. Extensive, complex and overlapping litigation has followed.

[25] No purpose would be served by attempting even a general summary of that litigation. Reference will be made to aspects where it is relevant to do so. It is sufficient to note here that as hard as the USA and the New Zealand authorities have pressed the extradition request before the courts of New Zealand, Mr Dotcom (who alone among the four arrested persons is the plaintiff in these proceedings) has resisted to an equal degree. This he is permitted to do under New Zealand law. See the joint judgment of McGrath and Blanchard JJ in *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [184] (Glazebrook J at [284] agreeing):

> [184] The determination of whether requested persons are eligible for surrender is made under a judicial process. The Extradition Act requires a hearing, meaningful judicial assessment of whether the evidence relied on by the requesting state demonstrates a prima facie case, and a judicial standard of process in making the decision. The Act also gives requested persons the right to contest fully their eligibility for surrender, including by calling evidence themselves and making submissions to challenge the sufficiency and reliability of the evidence against them. The record of case procedure does not limit requested persons' ability or right to do this. The consequence is that an extradition hearing under the Extradition Act has the same adversarial character as a committal hearing. All these features reflect a high content of natural justice in the process. [Footnote citation omitted]

[26] Unsurprisingly, Mr Dotcom has in the extradition proceedings sought disclosure by the USA and by the New Zealand authorities of not only evidence and materials relevant to the question whether there is a prima facie case against him in relation to the alleged extradition offences, but also of evidence and materials relevant to the other extensive litigation either in train or in contemplation by him and/or the USA and New Zealand agencies.

[27] In the District Court extradition proceedings Mr Dotcom applied for disclosure orders, arguing he was entitled to the same rights to disclosure as are given to a defendant in domestic criminal proceedings by the Criminal Disclosure Act 2008 and the New Zealand Bill of Rights Act 1990. The District Court made orders for disclosure of most of the information requested. The High Court upheld those orders but that decision was overturned by the Court of Appeal.

[28] Mr Dotcom then appealed (unsuccessfully) to the Supreme Court. It is not intended to attempt a summary of the majority decision in *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355. It is sufficient for present purposes to note that the notion of general discovery in the extradition context was rejected. The majority held:

> **[28.1]** A requested person is entitled to receive, in advance of the extradition hearing, the material that the requesting state is to rely on at the hearing. It is for the requesting state to decide what material it will rely on before the District Court, subject to the duty of candour owed by the requesting state to the court of the requested state. The duty of candour and good faith requires that the requesting

state disclose evidence which renders worthless, undermines or seriously detracts from the evidence on which it relies.

[28.2] The requested person is not entitled to, and the requesting state is not obliged to provide, disclosure of the kind available in domestic criminal proceedings under the common law or under the Criminal Disclosure Act. Nor does the Official Information Act 1982 (OIA) entitle requested persons to information held by a foreign state.

[28.3] When determining eligibility for surrender under the Extradition Act 1999, the District Court has no statutory power to require the production of further information. Nor was there any inherent power to make the general disclosure order made by the District Court at the request of Mr Dotcom.

[29] Nevertheless McGrath and Blanchard JJ at [122] (with Glazebrook J at [274] agreeing) acknowledged that the OIA could be used in relation to New Zealand agencies:

> [122] This issue is to be distinguished from that of the availability to requested persons of information held by New Zealand authorities. We accept that, in extradition cases, as in domestic criminal proceedings, information in the hands of public bodies may be accessible under the Official Information Act 1982 and under the principles stated in the Court of Appeal's judgment in *Commissioner of Police v Ombudsman*. These avenues are available, however, only against New Zealand authorities that are subject to the Official Information Act and against the prosecution respectively. A person whose extradition is sought may seek disclosure from any New Zealand agencies involved in the process, including the Ministry of Justice. But neither the Official Information Act nor the common law entitles requested persons to disclosure of information that is held by a foreign state. [Footnote citations omitted]

[30] William Young J at [231] was of the same view:

> [231] As to the first, a person whose extradition is sought may seek pre-hearing disclosure against any *New Zealand* agencies involved in the extradition process, including, and most particularly, the Minister of Justice. Such disclosure is available by reason of the Official Information Act. Except to the extent that its operation was displaced by the Criminal Disclosure Act, the Official Information Act is able to be directly enforced and it seems to me that the power of direct enforcement of a right to access personal information recognised in *Commissioner of Police v Ombudsman* is therefore vested in an extradition court under s 22(1)(a). [Footnote citations omitted]

[31] Although these passages refer to a right of access to personal information under the OIA, this must necessarily be taken to be a reference to the right to personal information under the Privacy Act. This is because the right to such information, originally enacted as OIA, s 24, was transferred to the Privacy Act in 1993 and is now found in information privacy principle 6 and in s 11 of the 1993 Act. See generally the judgment of Simon France J in *Dotcom v United States of America* [2014] NZHC 2550 at [49] to [56].

[32] Information privacy principle 6 provides:

> **Principle 6**
> *Access to personal information*
>
> (1) Where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled—

(a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
(b) to have access to that information.

(2) Where, in accordance with subclause (1)(b), an individual is given access to personal information, the individual shall be advised that, under principle 7, the individual may request the correction of that information.

(3) The application of this principle is subject to the provisions of Parts 4 and 5.

[33] Alone among the information privacy principles, Principle 6, cl (1) confers a legal right to personal information held by a public sector agency. This right is enforceable not only by complaint to the Privacy Commissioner and by way of proceedings before the Human Rights Review Tribunal under Part 8 of the Act, it is enforceable in a court of law. Section 11 provides:

> **11 Enforceability of principles**
>
> (1) The entitlements conferred on an individual by subclause (1) of principle 6, in so far as that subclause relates to personal information held by a public sector agency, are legal rights, and are enforceable accordingly in a court of law.
>
> (2) Subject to subsection (1), the information privacy principles do not confer on any person any legal right that is enforceable in a court of law.

[34] In *Dotcom v United States of America*, Simon France J at [56] acknowledged that in an appropriate case an extradition court can be an enforcement court for the purposes of PA, s 11:

> [56] The effect of all this in my view is that the reference by William Young J in *Dotcom* to the extradition court having the power of direct enforcement of a right to access personal information must be taken as being a reference to s 11 of the Privacy Act. Consistent with *Commissioner of Police v Ombudsman*, it must be contemplated that in an appropriate case the extradition court can accept responsibility for enforcing the rights given a person under the Privacy Act.

[35] The proviso "in an appropriate case" is an important one, as illustrated by the facts of the case before Simon France J. Mr Dotcom had applied to the District Court (as the extradition court) for discovery orders against various public sector agencies. The purpose was to obtain information to support an abuse of process argument. In the District Court the applications were declined on two grounds. First, that one category of information was not relevant to the extradition application and second, that the remaining category had been insufficiently particularised. It had not been explained how the requested information would assist at the extradition hearing. The application was assessed as having all the hallmarks of a fishing expedition. On an application for judicial review Simon France J held (inter alia) that:

> **[35.1]** In an appropriate case an extradition court can accept responsibility for enforcing the rights given to a person under PA, s 11. See [56].
>
> **[35.2]** There is no obligation on the extradition court to assume this function as part of the extradition proceeding. See [59]:
>
> > [59] The third point is that there is no obligation on the Court to assume this function as part of the extradition proceeding. If an extradition court declines to do so, it will be open to an applicant to commence separate proceedings, but those proceedings will be subject

> to the normal rules of court. Whether the extradition court assumes responsibility must be a case specific assessment which no doubt will be influenced by a large number of factors – the timing of the request and its impact on any scheduled proceedings; the apparent importance of the dispute to the proceeding; whether the matter has been referred to the Privacy Commissioner; and the scale of the request are some obvious considerations.

[35.3] On the facts, the making of what were, in effect, discovery orders was not the correct process. The provisions of the Privacy Act should first be followed. See [61] and [63]:

> [61] The extradition court was faced with two applications that asked it to make, in effect, original discovery orders. I do not consider that is the correct process. The Privacy Act provides a speedy mechanism for requests to be made of agencies. A clear set of rules governs how agencies are to respond and sets timeframes for response. The agencies are familiar with these and can be expected to process the requests in accordance with the Act's requirements. I see no reason why the Court should involve itself at this point. Its role is to enforce the rights and the sensible course is to require a party to first seek the information and obtain an answer. That will immediately define the scope of the dispute. [Footnote citations omitted]
>
> …
>
> [63] For this simple process reason, it is my view that the District Court made no error in declining the respondents' applications as they were framed. There was no reason for the extradition court to make disclosure orders in the way sought. The correct response was to direct the respondents to apply directly to the agencies concerned, and then when a response was had, to articulate a basis for the Court to intervene in relation to documents that had been withheld. There will no doubt be occasions when a matter emerges that requires more immediate action, and the preferable course will be to require the agency to attend. But that did not apply here.

[35.4] While the Privacy Act does not require requests for access to personal information to particularise the information requested (in contrast to the OIA, s 12(2) which requires requests for official information to be specified with due particularity) it would be difficult for the extradition court to concern itself with a broad request for information framed simply as a request for all personal information. See [83] and [88].

[35.5] Consequently, on the facts, it was not the role of the extradition court to make the broad disclosure orders sought by Mr Dotcom in relation to this personal information. He should himself seek that information from the relevant agencies under the PA. See [105].

[36] The position may be summarised as follows:

[36.1] Before an extradition court should exercise an ancillary function under PA, s 11 good reason must be shown.

[36.2] Otherwise the right of a person to access his or her personal information should be enforced through the mechanisms provided in the Privacy Act itself.

[36.3] It is perfectly permissible for an information privacy request to be non-specific in its terms, that is to request (without particularity) all personal information by the agency in relation to the requester.

[36.4] An information privacy request does not have to be justified by reasons, nor does the information sought need to be particularised.

[37] It was in this context that the July 2015 information privacy requests were sent by Mr Dotcom to all 28 Ministers of the Crown and nearly every government department. The interval between the making of these requests and the judgment of Simon France J delivered on 17 October 2014 will be addressed later in the context of the Crown assertion that the requests were vexatious. First, however, it is necessary to record the terms of the requests and the terms of the reply by the Solicitor-General. It will then be necessary to examine the circumstances in which the requests were transferred to the Attorney-General. The lawfulness of the transfers can then be addressed.

THE TERMS OF THE INFORMATION PRIVACY REQUESTS AND THE TERMS OF THE REFUSAL BY THE ATTORNEY-GENERAL TO DISCLOSE THE REQUESTED INFORMATION

The July 2015 requests

[38] The 52 requests were nearly identical. Nothing turns on such variations as there may be. We reproduce here the request dated 20 July 2015 addressed to MBIE:

> I am a lawyer acting for Kim Dotcom. I attach an authority signed by Mr Dotcom allowing me to request personal information on his behalf.
>
> I request under the Privacy Act 1993, all personal information that you hold about Kim Dotcom, including under his previous names Kim Schmitz, and Kim Vestor.
>
> Please make sure your response includes all information held by your agency (and any agency that you have contracted to do work) and is not limited to just the information recovered as a result of a search across your email system. Please make certain that your response includes all personal information, including, for example, information including communications that mention Kim Dotcom's name.
>
> Mr Dotcom recently received a wide range of personal information after a request to the New Zealand Security Intelligence Service (including emails between staff discussing Mr Dotcom) and hopes that all agencies will follow their lead in applying the legislation properly.
>
> 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.
>
> Please send the information as soon as possible to me at the email address provided.

[39] Nearly all requests (the exceptions are not material) were transferred to the Attorney-General. The circumstances in which this happened will be examined shortly. First it is necessary to set out the terms of the decline letter sent by the Solicitor-General to Mr Dotcom's legal representatives.

The 5 August 2015 refusal of the requests

[40] By letter dated 5 August 2015 the Solicitor-General declined all the requests, asserting the requests had been transferred to the office of the Attorney-General and that it had been determined that the requests were vexatious:

1. I refer to your client's request dated 17 July 2015 under s 33(b) of the Privacy Act 1993 for:

> "all personal information that you hold about Kim Dotcom, including under his previous names Kim Schmitz, and Kim Vestor".

2. You have asked that the response include:

> "all information held by [the recipient agency] (and any agency that [the recipient agency has] contracted to do work) and is not limited to just the information recovered as a result of a search across [the recipient agency's] email system."

and

> "all personal information, including, for example, information including communications that mention Kim Dotcom's name."

3. The request has been sent in identical terms to all Ministers of the Crown, and most departments of state. You have requested an urgent response pursuant to s 37 of the Privacy Act. The response is as follows.

4. The urgency request for the information is based on "pending legal action". As there is no further information given to support the request for urgency, it has been assumed that the phrase "pending legal action" refers to applications made to the extradition Court or in contemplation. The issues ruled on by Simon France J in *Dotcom & Ors v USA and District Court* [2014] NZHC 2550, 17 October 2014 therefore arise again. In the particular circumstances of this case, the Attorney-General considers, in terms of s 39(b)(ii) of the Privacy Act, the information sought, to the extent it is held by other agencies, is more closely connected with his functions as Attorney-General. Accordingly, I understand most recipient agencies have informed you the request has been transferred to the office of the Attorney-General. I will have oversight of the response to the request on his behalf.

5. As your client may appreciate, given the scope, nature and duration of the interaction between the Crown and its agencies and Mr Dotcom, the information described in your request will run to a very substantial number of documents. Given the available resources, it is anticipated that to comply with the request as currently stated, including locating and making any necessary decisions under Part 4 of the Privacy Act, will take many months.

6. Having regard to the very limited information in your notification of "pending legal action" and the very broad scope of the request, I do not consider that you have complied with the requirements of s 37 of the Privacy Act to give "reasons why the request should be treated as urgent". In my view, this requires the requestor to give sufficiently specific reasons for urgency to enable the requested agency or agencies to make reasonably informed decisions about the scope of the request, affecting in turn its ability to carry out its statutory obligation.

7. 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.

8. 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.

9. If the request is maintained as urgent and does relate to his 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.

10. Your client has the right, under s 67 of the Privacy Act, to make a complaint to the Privacy Commissioner in relation to my refusal of his request.

Transfer and refusal of the requests challenged

[41] In a lengthy reply dated 17 August 2015 the solicitor for Mr Dotcom challenged (inter alia) the "purported transfer" of the requests to the Attorney-General and addressed, at some length, the request for urgency. The refusal decision was challenged.

The 31 August 2015 response by the Crown

[42] In a letter dated 31 August 2015 addressed to the solicitor for Mr Dotcom, the Solicitor-General denied that the Attorney-General had directed that the requests be transferred. It was also asserted, for the first time, that the requests "were not genuine and were intended to disrupt the extradition hearing". The letter went on to say that the Crown did not intend taking any further steps in relation to the requests and did not consider the "refined request" set out in the lawyer's letter of 17 August 2015 to be a new request. If it was a new request, it was declined on the same basis:

> 1. We refer to your letter dated 17 August 2015.
>
> 2. This letter responds to those parts of your letter that deal with the Privacy Act requests made by Mr Edgeler on behalf of Mr Dotcom. It does not address the requests under the Official Information Act referred to in your letter which, we understand, the recipient agencies are considering.
>
> 3. We do not accept your view that the Privacy Act requests made by Mr Edgeler on behalf of Mr Dotcom were unlawfully transferred to Crown Law, nor do we accept that it was inappropriate for Crown Law to decline those requests.
>
> 4. As you have suggested this matter should be referred to the Privacy Commissioner, we have written to him today to seek his views. A copy of the letter is attached. It sets out our views on the matters raised in your letter. In summary:
>
> 4.1 The decisions made by the recipient agencies to transfer the requests to Crown Law were lawful and appropriate. The Attorney-General did not direct that the requests were to be transferred. In the particular context of Mr Dotcom's litigation, which is expressly referred to in the requests, and in light of the large number and extremely broad nature of the requests, Crown Law was the appropriate agency to respond.
>
> 4.2 The requests did not give any clear ground upon which they required an urgent response. Assuming the litigation referred to in the requests was the extradition hearing, the information requested had no relevance to that hearing. As Simon France J found in respect of the second application for discovery in *Dotcom v USA*, the request is too broad to be relevant.
>
> 4.3 We declined the transferred 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.
>
> 5. We do not propose to take any further steps in relation to Mr Edgeler's Privacy Act requests. We do not consider the refined request in your letter of 17 August 2015 to be a new request. If it is a new request, we consider it is not sufficiently focused to warrant a different response and we would therefore decline it on the same basis.

[43] Also on 31 August 2015 the Solicitor-General wrote to the Privacy Commissioner seeking his advice under PA, s 13(1)(l). In this letter an account was given of the circumstances in which the transfer had taken place together with an explanation of the reasons for the refusal to provide the requested information. The Privacy Commissioner was told:

> 54. Crown Law declined the requests that had been transferred under s 29(1)(j) of the Privacy Act, on the basis that they were vexatious and included, due to their extremely broad scope, information that was trivial. It suggested Mr Dotcom give specific information as to the nature, time and basis of the legal proceeding so that reasonably relevant information could be identified and obtained.
>
> 55. The basis for the decision was that the requests had an ulterior motive (that is, to disrupt the litigation, and in particular the extradition hearing). This is apparent from the very broad and unfocused nature of the requests, along with the request for urgency in the context of the litigation. Mr Edgeler must have been aware that it would be simply impossible for the recipient agencies to respond to such broad requests and, even if some did respond, it would be impossible for Mr Dotcom's legal team to review the information before the extradition hearing in September.
>
> 56. We anticipate these requests will be raised by Mr Dotcom in an application to have the extradition hearing stayed or adjourned. That will, of course, have to be dealt with through the processes of the District Court.

[44] It is necessary to record that Mr Dotcom did not apply for an adjournment of the September extradition hearing on the grounds that his information privacy requests had been declined.

[45] The transfer issue will be addressed first. Our ruling on the refusal of the requests will follow in a separate section of this decision.

THE TRANSFER ISSUE – THE EVIDENCE

[46] In certain circumstances the transfer of an information privacy request is permitted by PA, s 39:

> **39 Transfer of requests**
>
> Where—
> (a) an information privacy request is made to an agency or is transferred to an agency in accordance with this section; and
> (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 another agency,—
> the agency to which the request is made shall promptly, and in any case not later than 10 working days after the day on which the request is received, transfer the request to the other agency and inform the individual making the request accordingly.

Transfer challenged

[47] As earlier mentioned, in his reply dated 17 August 2015 the lawyer for Mr Dotcom challenged the "purported transfer" of the requests to the Attorney-General. That challenge was based on two grounds:

[47.1] The decision to transfer to the Attorney-General had not been made by the 52 agencies to which the requests had been addressed. Instead the Attorney-General had instructed that the requests be forwarded to him.

[47.2] In terms of the transfer provisions in PA, s 39(b)(ii) the requested information could not be "more closely connected with the functions or activities" of the Attorney-General than with those of the agencies to which the requests were addressed.

[48] While Mr Dotcom accepted it might be appropriate for the Crown agencies to seek legal advice from Crown Law regarding the requests, the Attorney-General did not have the legal capacity to lawfully decline the requests as transferee under PA, s 39(b)(ii).

The 31 August 2015 response by the Attorney-General

[49] As mentioned, in a letter dated 31 August 2015 addressed to the solicitor for Mr Dotcom the Solicitor-General denied that the Attorney-General had directed that the requests be transferred. It was also said that in the context of the litigation it had been appropriate for Crown Law to respond to the requests:

> 4.1 The decisions made by the recipient agencies to transfer the requests to Crown Law were lawful and appropriate. The Attorney-General did not direct that the requests were to be transferred. In the particular context of Mr Dotcom's litigation, which is expressly referred to in the requests, and in light of the large number and extremely broad nature of the requests, Crown Law was the appropriate agency to respond.

[50] In the Solicitor-General's letter to the Privacy Commissioner sent simultaneously on 31 August 2015 the Solicitor-General asserted the decisions to transfer were not made at the dictation of the Attorney-General but made by individuals within the agencies which had received the requests.

[51] The Tribunal received little or no evidence to support this claim because the Crown claimed privilege in respect of the relevant exchanges between Crown Law and the agencies. For obvious reasons Mr Dotcom, not having been given access to the relevant material, could do little more than point to inferences which, in his submission should be drawn against the Crown. 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.

[52] The more important point is whether, on the case put forward by the Crown, the Attorney-General was the lawful transferee under PA, s 39(b)(ii).

[53] In his letter of 31 August 2015 to the Privacy Commissioner the Solicitor-General made two key statements justifying the transfer. First, in the context of the litigation, the information privacy requests made by Mr Dotcom were not genuine requests and second, as Crown Law had been leading the Crown's litigation against Mr Dotcom, it was best placed to decide whether the information was required urgently:

> 43. In our view, the information requested was more closely connected with the functions of the Attorney-General in the particular context of this litigation because it was apparent that the requests were not genuine Privacy Act requests, but rather a litigation tactic and a fishing expedition. …
>
> 44. …
>
> 45. Crown Law has been leading the Crown's litigation against Mr Dotcom for more than three years. Crown Law, the agency responsible for litigation on behalf of the Attorney-General, is best placed to consider whether the requests related to information required urgently in the context of litigation. Crown Law was able to provide a coherent, consistent response across all agencies to these, essentially identical, very broad requests.

[54] We do not intend setting out the reply dated 9 October 2015 from the Privacy Commissioner. For this there are two reasons. First, the reply was heavily qualified, the Commissioner correctly pointing out that his advice under PA, s 13(1)(l) was necessarily confined to the operation of the Act and that comment on the merits of the actual case at hand was constrained by the fact that he could not jeopardise his investigative function under Part 8 of the Act. He correctly anticipated Mr Dotcom would in due course lodge a complaint under those provisions. Second, a hearing before the Tribunal proceeds as a de novo hearing, not as an appeal. The fundamental principle is that the Tribunal must decide the case on the evidence and submissions received during the course of the hearing. In this case as in all cases under the Privacy Act, the Tribunal inevitably receives more detailed evidence and submissions than that made available to the Privacy Commissioner during the course of his "on the papers" investigation of a complaint (or when giving advice on the operation of the Act).

[55] It is necessary, however, to record that when the Privacy Commissioner later came to determine Mr Dotcom's Part 8 complaint dated 28 October 2015 the Commissioner by letter dated 28 April 2016 implicitly rejected the Crown claim that the requests had been transferred to the Attorney-General under PA, s 39(b)(ii). In the view of the Commissioner, a transfer had not been necessary. Crown Law had been entitled to respond on behalf of the agencies as their legal adviser. The true relationship had not been that of transferor and transferee, but of solicitor and client:

> 26. I consider that, despite the form used by the agencies and Crown Law to describe Crown Law's assumption of responsibility for responding to the requests (i.e. a transfer under section 39), the substance of the relationships and arrangements was quite different.
>
> 27. The government's legal team has centralised a set of difficult requests. Considering the nature of the relationships between the parties, I consider that centralisation was a step that was open to them in the circumstances.
>
> 28. Accordingly, a transfer of the requests under section 39 was not necessary. As Crown Law was acting as legal advisor to the agencies concerned it was entitled to respond on their behalf. Rather than transferring agency to recipient agency, the true relationship was that of solicitor and client. It is commonplace for a lawyer acting for a client to respond to correspondence associated with litigation on behalf of the client.
>
> 29. On this basis, I do not consider that this part of Mr Dotcom's complaint has substance.

[56] In opening the Crown's case Ms Casey QC said that in relation to the transfer issue the Crown advanced its case on two bases:

[56.1] The decisions by the various agencies to transfer Mr Dotcom's requests were made in accordance with PA, s 39(b)(ii). Mr Dotcom had not established those decisions had "no proper basis" in terms of PA, s 66(2).

[56.2] The "alternative" approach adopted by the Privacy Commissioner was valid. That is the government's legal team centralised a set of "difficult requests" and Crown Law, as legal adviser to the government, was entitled to respond on its behalf.

Transfer – outline of evidence

[57] As can be seen from PA, s 39, in certain circumstances it is permissible for an agency in receipt of an information privacy request to transfer that request to another agency. Under both limbs of PA, s 39(b) the decision to transfer must be made after the person dealing with the request in the agency to which the request is made arrives at a required state of belief. The question is whether the statutory requirements were fulfilled. First it is necessary to outline the relevant evidence.

[58] Apart from being referred to the letters sent by the Solicitor-General to Mr Dotcom and to the Privacy Commissioner, the Tribunal received very little other evidence regarding the decisions made by the 28 Ministers of the Crown and the 24 government departments to which the information privacy requests had been addressed. The standard letter sent by the agencies to Mr Dotcom adopted a template suggested by Crown Law and asserted:

> 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) of the Privacy Act.

[59] The erroneous reference to s 39(a) instead of s 39(b) is in the original template provided by Crown Law to the agencies.

[60] It can be seen the letters to Mr Dotcom 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.

[61] The Crown, having claimed privilege regarding the advice given to the various agencies, conceded it could make no objection to the Tribunal drawing the inference that the advice from Crown Law supported the decision to transfer the requests from the agencies to the Attorney-General.

[62] The only oral evidence received regarding the transfers came from Mr Witcombe of MBIE and Mr Child of the Ministry of Justice.

[63] In summary Mr Witcombe stated:

[63.1] MBIE understood the privacy request had been made in the context of Mr Dotcom's litigation with the Crown.

[63.2] MBIE received advice from Crown Law.

[63.3] After taking that advice into account, MBIE considered it appropriate to transfer the request to Crown Law for response. MBIE had insufficient knowledge of the litigation to properly assess the request for urgency and in addition, given the number of agencies from which information had been requested, Crown Law was best placed to coordinate the Crown's response.

[63.4] The information requested was more closely connected to the functions or activities of Crown Law because it was representing the Crown in litigation to which MBIE was not a party.

[63.5] The transfer was not because MBIE did not hold the information, but because of the ongoing litigation which Crown Law was coordinating and conducting.

[63.6] The involvement of MBIE ended once the request was transferred to Crown Law on 31 July 2015.

[63.7] No list or categories of documents or information regarding the volume of material apparently within the request and held by MBIE was sent to or required by Crown Law.

[64] The evidence given by Mr Child was to the same effect:

[64.1] The Ministry of Justice did not get as far as attempting to collate or assess all potentially relevant documents which could be found because the Ministry decided to transfer the request to Crown Law.

[64.2] The Ministry received legal advice from Crown Law about how to deal with the request. The decision to transfer the request to Crown Law was made after that advice had been considered.

[64.3] The decision was made for the reason that the request was more closely connected with the functions or activities of Crown Law.

[64.4] The Ministry was aware Mr Dotcom was involved in extensive litigation with the Crown. There had already been a number of decisions by the courts about discovery and disclosure in the context of those proceedings, with which the Ministry was not familiar. The Ministry did not consider it was in the best position to make decisions about what information relating to Mr Dotcom's extradition should or should not be released against that backdrop.

[64.5] Had the Ministry had to decide, it would have referred any proposed response to Crown Law for consultation and advice.

[64.6] The Ministry considered it was more appropriate that Crown Law make decisions regarding any information to be provided to Mr Dotcom in connection with the extradition proceedings.

[64.7] The request was transferred to Crown Law on 4 August 2015.

[64.8] At no time prior to the transfer or subsequent to the transfer did the Ministry send to Crown Law any of the documents held by the Ministry and which fell within the request; nor did the Ministry send any document summarising the difficulties which might be encountered in complying with the request.

[64.9] The transfer decision had not been based on the volume of the material sought or on the difficulty in complying.

The submissions for Mr Dotcom

[65] For Mr Dotcom it was not disputed that he had the onus of proving there was "no proper basis" for the transfers. The transfers were challenged on a number of grounds. In the interests of brevity we refer to two only:

[65.1] None of the agencies to which the information privacy requests had been addressed had a reasonable basis to believe that the information to which the specific request related was more closely connected with the functions or activities of the Attorney-General or of Crown Law.

[65.2] As to the alternative ground relied on by the Crown (i.e. Crown Law acting as legal adviser to the agencies and responding on their behalf), there was no evidence any of the agencies made the decline decision which had been communicated by Crown Law. In any event the alternative ground was not available to the Crown as all the communications from the agencies stipulate that the requests had been transferred to the Attorney-General. Furthermore the letters dated 5 August 2015 and 31 August 2015 from the Solicitor-General to Mr Dotcom expressly stated the decline decision had been made by the Attorney-General as transferee under PA, s 39(b)(ii). That is, the alternative submission for the Crown ran contrary to the Crown's own evidence.

The submissions for the Crown

[66] Equally in the interests of brevity it is not intended to attempt an exhaustive account of the Crown's lengthy submissions. The essential points were:

[66.1] The explanation for the transfers given at the time, and confirmed by the Crown witnesses, was that it was recognised that Crown Law and the Attorney-General were best placed to assess and co-ordinate the proper response to the request in the context of the on-going litigation.

[66.2] As stated by the Solicitor-General in his letter dated 31 August 2015 to the Privacy Commissioner, the information requested was more closely connected with

the functions of the Attorney-General in the particular context of the litigation because "it was apparent that the requests were not genuine Privacy Act requests, but rather a litigation tactic and a fishing expedition".

[66.3] The direct link to the extradition litigation made it obvious that every agency's response would have wider implications. Given the known complexity of the range of litigation then under way, matters as simple as the timing of a response could have significance: the prospect that Mr Dotcom might use any agency's decline of urgency or any extension of time under the Privacy Act as grounds to seek to defer the eligibility hearing was very real.

[66.4] Decisions on disclosure or non-disclosure of material would also need to be referred to multiple agencies to ensure that each agency was aware of issues that might be relevant to those decisions. That included Crown Law as the agency responsible for conducting the litigation on behalf of the Crown where there had already been multiple and complex disclosure and discovery arguments.

[66.5] A key aspect of the decision was that agencies did not have sufficient knowledge of the overall complexities of the litigation, and in turn were not sufficiently informed to be in the best position to make decisions about the request for urgency, or whether information should be disclosed or withheld. Importantly, none of the agencies was in a position to assess whether the request should be declined under PA, s 29(1)(j).

[66.6] 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. It would be artificial to suggest that each agency was obliged by law to ignore that context.

[66.7] If Mr Dotcom wished to maintain the requests in a manner not linked to the litigation [i.e. abandoned the request for urgency based on the grounds the information was required for the extradition hearing], it was agreed there would be no basis to transfer the requests to Crown Law.

[66.8] There was no "no proper basis" for the transfer decision. The transfer was not prohibited by the Act and was a justifiable approach to the requests in light of the context in which they had been received.

[67] We give little weight to the claim that one of the reasons for the transfer was that the agencies were not in the best position to decide whether the information should be disclosed. The evidence is that Crown Law at no stage asked for or received from the agencies the information requested by Mr Dotcom. 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. The transfer took place because, as explained to the Privacy Commissioner, the Crown was of the view the requests were not genuine and the Crown had reached the view that to prevent the

requests being used as a litigation tactic and a fishing expedition, a refusal was necessary.

[68] The question is whether in such circumstances the transfer to the Crown's legal advisers was permissible under PA, s 39(b)(ii).

THE TRANSFER ISSUE – LEGAL ANALYSIS

[69] Alone among the information privacy principles, Principle 6 confers (in respect of personal information held by a public sector agency) a right which is enforceable in a court of law. Appropriately, Part 5 of the Privacy Act contains no fewer than 13 procedural provisions relating to the accessing of and the correction of personal information, thereby underlining that, as noted in the Explanatory Memorandum to the OECD *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* at para 58, the right of individuals to access, challenge and to correct personal data is generally regarded as perhaps the most important privacy protection safeguard.

[70] The transfer of requests from one agency to another is governed by Part 5 of the Act. The purpose of the section is to make it easier for individuals to make information privacy requests by requiring the agency to which a request has been made to transfer the request on its own initiative, without requiring the requester to make a repeated request or requests until the proper agency has received it. Although s 39 has already been set out, for convenience it is reproduced again here:

> **39 Transfer of requests**
>
> Where—
> (a) an information privacy request is made to an agency or is transferred to an agency in accordance with this section; and
> (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 another agency,—
> the agency to which the request is made shall promptly, and in any case not later than 10 working days after the day on which the request is received, transfer the request to the other agency and inform the individual making the request accordingly.

[71] It is common ground that s 39(b)(i) has no application to the case. When the requests were transferred by the government agencies to the Attorney-General it was only s 39(b)(ii) which was relied upon. There is and has never been any suggestion the Attorney-General, the Solicitor-General or Crown Law held the information which Mr Dotcom had requested from the various agencies.

[72] Whereas the meaning and effect of s 39(b)(i) is clear, s 39(b)(ii) is opaque. It is therefore best to begin with the Crown's expressly stated reasons for relying on s 39(b)(ii) as given by the Solicitor-General to the Privacy Commissioner in the Solicitor-General's letter dated 31 August 2015 at paras 43 and 45:

> **[72.1]** The information requested was more closely connected with the functions of the Attorney-General in the particular context of the litigation "because it was

apparent that the requests were not genuine Privacy Act requests, but rather a litigation tactic and a fishing expedition".

[72.2] Crown Law had been leading the Crown's litigation against Mr Dotcom for more than three years. As the agency responsible for litigation on behalf of the Attorney-General, it was best placed to consider whether the requests related to information required urgently in the context of litigation. Crown Law was able to provide a coherent, consistent response across all agencies to the essentially identical very broad requests.

Both reasons link the transfer to the role of the Attorney-General and Crown Law as the Crown's legal advisers.

[73] The issue is whether these reasons for the transfer of the requests to the Attorney-General satisfy the requirement of s 39(b)(ii) that the information to which Mr Dotcom's requests related was believed by the persons [in the agencies] dealing with the requests to be more closely connected with the function or activities of another agency [the Attorney-General]. We turn then to the interpretation of s 39(b)(ii).

A short history of Privacy Act, s 39

[74] The language of PA, s 39(b)(ii) is found also in the transfer provisions of the OIA, s 14(b)(ii) and the Local Government Official Information and Meetings Act 1987 (LGOIMA), s 12(b)(ii). In principle the interpretation of all three provisions should be the same, a point underlined by the fact that at the relevant time Mr Dotcom had made (simultaneously) five requests under the OIA. Those requests are referred to in the Solicitor-General's letter dated 31 August 2015 addressed to Mr Dotcom's lawyers and in his letter of the same date addressed to the Privacy Commissioner. There is also the fact that the right of access to personal information in respect of body corporates continues to be governed by OIA, s 24 with the result that the transfer provisions in OIA, s 14(b)(ii) continue to apply to at least this category of personal information.

[75] For ease of reference the text of the three provisions follows:

Official Information Act 1982, s 14(b)(ii)

Where—

…

(b) the information, or some of the information, to which the request relates—

…

(ii) is believed by the person dealing with the request to be more closely connected with the functions of another department or Minister of the Crown or organisation, or of a local authority,—

the department or Minister of the Crown or organisation to which the request is made shall promptly, and in any case not later than 10 working days after the day on which the request is received, transfer the request, or relevant part of the request, to the other department or Minister of the Crown or organisation, or to that local authority, and inform the person making the request accordingly.

Local Government Official Information and Meetings Act 1987, s 12(b)(ii)

Where—

…

(b) the information, or some of the information, to which the request relates—

…

(ii) is believed by the person dealing with the request to be more closely connected with the functions of another local authority or a department or Minister of the Crown or organisation,—

the chief executive of the local authority to which the request is made, or an officer or employee authorised by that chief executive, shall promptly, and in no case later than 10 working days after the day on which the request is received, transfer the request, or relevant part of the request, to the other local authority, or the appropriate department, Minister of the Crown, or organisation, and inform the person making the request accordingly.

Privacy Act 1993, s 39(b)(ii)

Where—

…

(b) the information to which the request relates—

…

(ii) is believed by the person dealing with the request to be more closely connected with the functions or activities of another agency,—

the agency to which the request is made shall promptly, and in any case not later than 10 working days after the day on which the request is received, transfer the request to the other agency and inform the individual making the request accordingly.

[76] All three provisions have as their common origin the Draft Information Bill recommended by the Danks Committee on Official Information in their *Supplementary Report* (1981). Clause 12 of that draft provided:

12. Transfer of requests – Where –

(a) A request in accordance with section 10 of this Act is made to a Department or Minister of the Crown or organisation; and

(b) The information to which the request relates –

(i) Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation; or

(ii) Is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, –

the Department or Minister of the Crown or organisation to which the request is made shall promptly transfer the request to the other Department or Minister of the Crown or organisation and inform the person making the request accordingly.

[77] The Danks Committee comment on this provision was in the following terms:

In addition to the duty cast on it by clause 11, the agency, rather than the applicant, will have the responsibility to take reasonable steps to bring his request to the notice of the most appropriate agency …

[78] The "as-enacted" form of OIA, s 14(b)(ii) was materially in the same terms as the Danks Committee draft:

14. Transfer of requests – Where –

(a) A request in accordance with section 12 of this Act is made to a Department or Minister of the Crown or organisation; and

(b) The information to which the request relates –

(i) Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation; or

(ii) Is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, –

the Department or Minister of the Crown or organisation to which the request is made shall promptly transfer the request to the other Department or Minister of the Crown or organisation and inform the person making the request accordingly.

[79] When the right of access to personal information by individuals (as opposed to body corporates) was in 1993 transferred from the OIA to the Privacy Act, the transfer provisions in the latter Act (PA, s 39(b)(ii)) were framed in terms not materially different in that there remains a requirement that a certain belief be held by the requested agency, namely that "the request [is] more closely connected with the functions or activities of another agency". The particular question is whether that function or activity can be the giving of legal advice to the agency in relation to the request or the conducting of litigation against the requester.

[80] Given the common origin of the provisions it is relevant to inquire whether the interpretation of the equivalent provisions in the OIA, s 14(b)(ii) and the LGOIMA, s 12(b)(ii) provides assistance in finding an answer to this question. Given all the provisions are nearly identical we will, for convenience, refer only to the OIA provision.

Interpretation of the transfer provisions of the OIA

[81] It must be remembered that the OIA applies only to "official information" as defined in OIA, s 2(1). In broad terms such information is information held by a department or a Minister of the Crown in his or her official capacity. But the comparison with the Privacy Act provision is nevertheless apt not only because of their shared origin and language but also because the enforceable right of access under PA, s 11 applies in respect of information held by a public sector agency and in the present case, the information privacy requests were addressed only to departments or Ministers of the Crown.

[82] As can be seen from its Comment to cl 12, the Danks Committee saw the general purpose of the OIA transfer provision as having the purpose of bringing the request to the notice of "the most appropriate agency". Nicola White in *Free and Frank: Making the New Zealand Official Information Act 1982 work better* (Institute of Policy Studies, Wellington, 2007) at 265 notes that the core principle visible in OIA, s 14 is that the person to whom the information most closely relates should make the decision on whether to release it. The administrative protocol is that the request should be transferred to whoever was the primary author of the paper, or had leadership of the relevant issue or process. Her text contains no suggestion that it is appropriate for the transfer provision to be used to obtain legal advice or to better conduct litigation against the requester:

> The core principle in the OIA, which is visible in section 14 and explained more clearly in early supporting documents, is that the person to whom the information most closely relates should make the decision on whether to release it. That is, the person who is likely to be best placed to make the necessary judgments should have formal responsibility for the decision. It does not matter where the requester initially sent the OIA request. The Act gives state sector agencies the responsibility and the power to redirect it to the right place.
>
> The administrative protocol that supports this principle is in broad terms that the request should be transferred to whoever was the primary author of the paper, or had leadership of the relevant issue or process. In large part, these protocols are designed to ensure that the request gets to the right sector. Thus if the Ministry of Health receives a request that is about a food safety issue, it would probably transfer the request to the Food Safety Authority. Such transfers are relatively straightforward, and happen swiftly.

> Much less straightforward, however, is the question of whether a request is better dealt with by the minister or the department in a particular portfolio area or sector. The two are alter egos of each other in substantive terms, and for many aspects of state sector administration and constitutional relationships they are indistinguishable. But the OIA does see them as different, and places separate decision-making responsibility on each of them. The mechanisms in the Act for managing that separation are the provisions that enable consultation on requests, and the transfer of requests.
>
> In general terms, for policy issues working their way through the Cabinet decision-making system, core constitutional and state sector principles would suggest that the minister should be the final decision-maker. This responsibility is obvious for Cabinet papers, which the minister signs and "owns" even if the department has prepared the paper. Each one is the minister's paper and the factors relevant to its potential release are likely to be concerned with its status in and around the process of Cabinet decision-making and political negotiation. Certainly early papers prepared for the Information Authority on these issues assumed that the minister would be the appropriate person to make the judgments on when the decision-making and advice processes of government still needed to be protected. Those arguments are likely to be equally true for documents or information created as part of the process immediately before or after the Cabinet paper or closely connected to it. To the extent that the papers are part of a policy process that ministers are directing and that is feeding into the Cabinet system, ministers can legitimately be seen as best placed to make the necessary judgments about release. [Footnote citation omitted]

[83] The Crown's supplementary submissions of 8 March 2018 focus on the first paragraph of the above passage and emphasise (in bold) the second sentence:

> The core principle in the OIA, which is visible in section 14 and explained more clearly in early supporting documents, is that the person to whom the information most closely relates should make the decision on whether to release it. **That is, the person who is likely to be best placed to make the necessary judgments should have formal responsibility for the decision.**

The submission is that transfer is appropriate if the transferee agency is best placed to make the necessary judgment about the appropriate response. Here that person was the Attorney-General.

[84] If the submission is that the OIA provision permits the transfer of a request to a legal adviser for the purpose of taking legal advice, we do not accept that this is how the quoted passage was intended to be understood. Read in the context of the preceding sentence as well as the balance of the quoted passages, it is clear the author is saying that in the OIA context the purpose of the transfer provision is to locate the person to whom the information most closely relates, that is the person who (as explained in the paragraph which follows the quoted passage) was the primary author of the paper or had leadership of the relevant issue or process. Our understanding of the passage is that the person being referred to is the person who had a relevant connection with the bringing into being or the making of the official information. Agencies do not require a "transfer" provision before being able to take legal advice in relation to the request.

[85] If this interpretation is applied to the Privacy Act it would mean that contextually, there must be a connection between the transferee and the requested personal information, that is a connection arising from the application of one or more of the information privacy principles. Being legal adviser to an agency is not enough to provide that contextualised connection. The function or activity referred to in PA, s 39(b)(ii) does not include the giving of legal advice to the requested agency in relation to the request. Nor does it include the conduct of litigation on behalf of an agency against the requester.

[86] Further assistance in understanding the operation of OIA, s 14 is found in the views expressed by the Ombudsman in Office of the Ombudsmen *Case Notes* (14th Compendium, 2007) at 172-174 cited in Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012) at para 4.48. Here the Ombudsman provides examples of the different forms of connection between the information and the decision-making functions of the relevant Minister:

> This [i.e. State Service Commission Guidance on the Relationship Between the Public Service and Ministers] suggested to the Ombudsman that information related to "policy decisions" was more closely connected to the functions of a Minister whereas information related to "policy advice and implementation" was more closely connected to the functions of a Department. However, whilst in theory the division appeared clear, the Ombudsman acknowledged that in practice the distinction may be more difficult to draw. In general terms, the Ombudsman accepted that a recipient of a request should transfer that request to a Minister if the information relates to the Minister's (or Cabinet's) decision-making function, and release of the information could prejudice the Minister's ability to perform that function. Where no possible prejudice to a Minister's decision-making function could result, the recipient of the request should be responsible for deciding it.

[87] In the report referred to the Law Commission went on to observe that guidance about the fundamental question of when information is more closely related to the functions of a department or Minister would be useful. It opined that while this may be difficult to pin down, the use of examples with reference to decisions of the Ombudsmen would be helpful. It then at para 4.72 suggested two factors which might be influential in this regard:

> **[87.1]** Authorship, so that decisions on release of information written by the Minister or in the Minister's name, such as Cabinet documents, are made at the ministerial level, and
>
> **[87.2]** The extent to which the information relates to the Minister's decision-making function.

[88] The *Cabinet Manual 2017* at paras 8.48 and 8.51 offers the following guidance in relation to OIA requests:

> **[88.1]** When considering a request, a department should consult another department when the information sought:
>
> > **[88.1.1]** Was produced with substantial or critical input from that other department; or
> >
> > **[88.1.2]** Contains material that relates to the activities of the other department or that may result in publicity for that department.
>
> The first of these points is particularly relevant to the requirement in OIA, s 14(b)(ii) that the information be more closely connected with the functions of another department.

[88.2] Departments should consider whether the information requested of them is more closely connected with their Minister's functions. If so the request should be transferred under OIA, s 14(b)(ii). The following illustration is given at para 8.51:

> For example, a request should be transferred if it is for information that relates to executive government decision-making functions, or for information that could, if released, prejudice the Minister's ability to perform these functions.

[89] Although material drawn from the OIA context is necessarily focused on the governmental context, it is nevertheless useful in illustrating the operation of the "original" form of transfer provision where the information to which the request relates is believed to be more closely connected with the functions or activities of another agency. The essence of OIA, s 14(b)(ii) would appear to be an engagement with or dealing with the information either in the context of the making of broad policy decisions or in the context of policy advice where the information is created, collected or used. There is no suggestion in any of the material that the OIA provision can be used in the circumstances which apply in the present case where there was an en masse transfer of the access requests from the state agencies holding the information to the Crown's legal advisers who were conducting Crown litigation against the requester. We turn then to PA, s 39(b)(ii).

Interpretation of PA, s 39(b)(ii) – text, context and purpose

[90] The meaning of PA, s 39(b)(ii) is to be ascertained from its text, purpose and context: Interpretation Act 1999, s 5.

[91] The text of PA, s 39(b)(ii) emphasises:

[91.1] That it is the **information** to which the request relates which is the focus of the transfer exercise. It is the **information** which must be the subject of the belief required to be held by the person in the agency which is in receipt of the request.

[91.2] It is the **information** which must be more closely connected with the functions or activities of another agency.

[91.3] 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 in the context of the information privacy principles. That is, for example, in the context of the collection of the requester's personal information (principles 1 to 4), the storage and security of that information (principle 5), ensuring that the information is accurate, up to date, complete, relevant and not misleading (principle 8), holding the information longer than necessary (principle 9), use of the information (principle 10) or the disclosure of the information (principle 11).

[92] Interpreted in this way, the text and context requires that the "connection" cannot come from being legal adviser to the agency to which the access request is addressed or from giving legal advice in relation to the request or communicating a decision on that request.

[93] To this must be added the purpose of PA, s 39 which, as earlier stated, is to make it easier for individuals to make information privacy requests by requiring the agency to which a request has been made to transfer the request on its own initiative, without requiring the requester to make a repeated request or requests until the proper agency has received it.

[94] The principle is that the agency to which the requested information is more closely connected in the sense just explained is the agency which should make the decision under s 40 whether the request is to be granted and whether there is good reason to withhold it.

[95] Appropriately, this interpretation is congruent with that applied to OIA, s 14(b)(ii) i.e. that the person to whom the official information most closely relates should make the decision on whether it is to be released. If so understood the near identical provisions of the OIA, LGOIMA and Privacy Act can receive a consistent interpretation and application. This is an important factor given their common origin and the fact that the OIA and the LGOIMA both provide for access to personal information. See OIA, s 24 (body corporates) and LGOIMA, s 23 (natural persons). The principles applying to requests under all three Acts should be consistent.

[96] There is perhaps another way in which this interpretation can be expressed:

> **[96.1]** The Long Title to the Privacy Act declares that it is an Act "to promote and protect individual privacy in general accordance with the OECD *Recommendation* of 1980 and its associated *Guidelines*. The right of access to personal information (and to request correction) is the most important privacy protection safeguard, a point reflected in PA, s 11. In the case of personal information held by a public sector agency, that right is a legal right enforceable in a court of law. Given the importance of the right the statutory responsibilities imposed on agencies by the information privacy principles are not to be lightly deflected by the "transfer" of the request to an "agency" whose only "connection" to the information is that it is the legal adviser to the requested agency.
>
> **[96.2]** Access to personal information can be refused only in strictly confined circumstances. Those circumstances are exhaustively enumerated in a part of the Act (Part 4, ss 27, 28 and 29) separate from that part (Part 5) in which s 39 is found. The Act expressly prohibits any other reason being given for refusing to disclose the requested information. See PA, s 30:
>
> **30 Refusal not permitted for any other reason**

> Subject to sections 7, 31, and 32, no reasons other than 1 or more of the reasons set out in sections 27 to 29 justifies a refusal to disclose any information requested pursuant to principle 6.

[96.3] The procedural provisions relating to access to personal information are separately set out in Part 5 of the Act. Section 39 is one of these provisions. The object of this section is to make it easier for individuals to make information privacy requests by requiring the agency to which a request has been made to transfer the request on its own initiative, without requiring the requester to make repeated requests until the proper agency has received it. Section 39 is in this respect explicitly linked to the preceding section (s 38) which requires every agency to give reasonable assistance to an individual who (inter alia) has not made his or her request to "the appropriate agency" and to assist him or her "to direct" the request to the appropriate agency.

[96.4] Section 39 applies with greatest clarity where the information is not held by the agency to which the request has been addressed but is held by another agency. This is the s 39(b)(i) situation. While on ordinary principles of statutory interpretation, s 39(b)(ii) must be read as applying to circumstances other than those covered by s 39(b)(i) it is nevertheless not possible to give to s 39(b)(ii) a meaning untethered from the text, purpose and context of s 39. Proper weight must be given to the fact that all twelve Parts of the Privacy Act are about the twelve information privacy principles set out in Part 2, s 6. Tethering the s 39(b)(ii) "functions or activities" to functions or activities regarding the circumstances addressed in the information privacy principles is therefore sanctioned by conventional principles of statutory interpretation.

[96.5] The requirement in s 39(b)(ii) of a connection with a "function or activity" must mean a function or activity in relation to "the information to which the request relates". The connection to that information must be properly believed to be "more closely connected" to those functions and activities. This necessarily means the function or activity of the proposed transferee must be a function or activity in relation to one or more of the information privacy principles, such as the collection, storage, use or disclosure of the requested personal information. A useful analogy is the interpretation of the OIA which requires the transferee to have had some engagement with or dealing with the information.

[96.6] 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).

[96.7] It must be remembered that the present case was argued on the basis that the requested information was not held by Crown Law. It was held by the agencies

to which the requests had been sent. In our view it was those agencies which had responsibilities under the information privacy principles regarding collection, storage, use and disclosure and it was those agencies which were required to decide if there were any withholding grounds in Part 4, ss 27 to 29 which justified the refusal of the access request made by Mr Dotcom.

[96.8] In these circumstances it was artificial for the Crown to argue that simply because the Attorney-General, Solicitor-General and Crown Law were the Crown's legal advisers and conducting litigation against Mr Dotcom the transferring agencies could properly believe the information to which the requests related were more closely connected to the functions or activities of the Attorney-General, Solicitor-General or Crown Law as the providers of legal advice and representation to the Crown. If in the context of that litigation the Crown had wanted to coordinate its responses to the information requests and to the associated requests for urgency, it could have done so by giving advice to the agencies and by communicating any decision made by those agencies. No transfer under s 39 was required by the circumstances or permitted by s 39 itself.

Findings of fact

[97] The transfer notification letter sent by all agencies did nothing more than assert, without explanation, that the transferring agency was of the view the **request** (the section refers to the **information** to which the request relates) was more closely connected with the functions or activities of the office of the Attorney-General. We refer by way of example to the letter dated 4 August 2015 by the Ministry of Justice:

> 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) of the Privacy Act.

[98] The letters did not disclose the basis of the belief or the "functions or activities" of the Attorney-General to which the information was more closely connected than to the functions or activities of the requested agencies.

[99] The evidence of Mr Witcombe was that MBIE considered it appropriate to transfer the request to Crown Law because Crown Law was representing the Crown in litigation with Mr Dotcom. See his brief of evidence at para 34:

> MBIE considered it appropriate to transfer the request to Crown Law for response. MBIE had insufficient knowledge of the litigation to allow us to assess the proper response to the request and the request for urgency. Also, given the number of agencies from whom information had been requested, Crown Law was best placed to coordinate the Crown's response. The information requested was more closely connected to the functions or activities of the Crown Law Office because it was representing the Crown in litigation to which MBIE was not a party.

[100] In relation to the Ministry of Justice the evidence of Mr Child was much to the same effect. See his statement at para 48:

> In this context, and taking into account advice received from Crown Law, the Ministry considered it was more appropriate that Crown Law make decisions regarding any information to be provided to the plaintiff in connection with the extradition proceedings.

[101] In his decline letter dated 5 August 2015 the Solicitor-General made, without explanation, the conclusory statement that the information sought was more closely connected with the functions of the Attorney-General. But the context of the assertion (the extradition proceedings) and the reference to "his functions as Attorney-General" could only mean the functions of the Attorney-General as senior Law Officer of the Crown and the principal legal adviser to the government in the matter of the extradition proceedings. 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.

[102] The subsequent expressly stated reasons for the transfer, as articulated by the Solicitor-General in his letter dated 31 August 2015 to the Privacy Commissioner at para 55 were that the requests had an ulterior motive that is, to disrupt the litigation, and in particular the extradition hearing. At para 44 the Solicitor-General stated that if the requests were maintained in a manner not linked to the litigation there would be no basis to transfer the requests to Crown Law:

> 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.
>
> …
>
> 45. Crown Law has been leading the Crown's litigation against Mr Dotcom for more than three years. Crown Law, the agency responsible for litigation on behalf of the Attorney-General, is best placed to consider whether the requests related to information required urgently in the context of litigation. Crown Law was able to provide a coherent, consistent response across all agencies to these, essentially identical, very broad requests.

[103] 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. The transfer was a mechanism to assist the Crown's legal advisers to better coordinate the Crown response to the requests in the context of the Crown's litigation against Mr Dotcom, particularly the extradition application. The point is underlined by the Crown's closing submissions at para 308:

> The close linkage between these 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 co-ordinated and consistent response. It would be artificial in the extreme to suggest that each agency was obliged by law to ignore this context.

Overall conclusion

[104] For the reasons given our overall conclusion on the law is that PA, s 39(b)(ii) does not permit a transfer for the purpose put forward by the Crown, namely the obtaining of legal advice or for the purpose of coordinating the response to the request with the Crown's litigation strategy. Consequently our two key conclusions on the facts are:

> **[104.1]** The information to which the requests related was not more closely connected with the functions or activities of the Attorney-General than with the functions or activities of the transferring agencies.

[104.2] The transfers took place in the absence of a properly grounded belief by the transferors that the information to which the requests related was more closely connected with the functions or activities of the Attorney-General.

[105] As the transfers were not made in accordance with the Act the Attorney-General was not the lawful transferee under PA, s 39(b)(ii). The Attorney-General accordingly had no authority, as transferee, to refuse to disclose the requested information. In these circumstances Mr Dotcom has established that in terms of PA, s 66(2)(b) there was no proper basis for the refusal.

[106] Ordinarily that would be the end of the case, particularly given that the statement of reply filed by the Crown at para 38 specifically pleads the decision was made by the Attorney-General as transferee:

> (a) in writing to the plaintiff's solicitor on 5 August 2016 the Crown Law Office was responding on behalf of the Attorney-General as transferee of the requests pursuant to ss 39 and 40 of the Privacy Act;
>
> (b) the Crown Law Office also advises and acts on behalf of the government, including the third to eighth defendants.

The Crown's alternative defence

[107] While the statement of reply does not plead an alternative defence it was said in opening submissions that the Crown contended that "the alternative approach adopted by the Privacy Commissioner [was] valid":

> The Privacy Commissioner considered that the substance of the process adopted was that the government's legal team centralised a set of difficult requests, and Crown Law as legal adviser to the government was entitled to respond on its behalf.

[108] The submission continued that on either approach there had been "no impact" on Mr Dotcom:

> On either approach, there was no impact on Mr Dotcom: the request was responded to well within the 20 day time period of the request emails being sent by Mr Edgeler (in fact between 3 and 13 working days), and it is inconceivable in the context of this request that a government department would have taken a contrary view to the Solicitor-General on the appropriate response.

[109] In oral submissions Ms Casey told the Tribunal that whether transferred or not, the decision was going to be a decline.

Conclusion on the alternative defence

[110] We have difficulty accepting the proposition that a decision-maker who acts unlawfully (here, making a decision in a capacity he did not possess and in the absence of the requisite statutory belief on the part of the transferees) can make the reply, by way of defence, that the same decision could have been reached had all concerned acted within the law. In our view to accept a defence of this nature would require a good deal of cynicism as to the importance of state agencies and of state decision-makers acting within the law. Sight must not be lost of the principle that those who seek to uphold the

law must themselves obey it. There is a substantial public interest in statutory decision-makers making their decisions in accordance with, rather than in disregard, of the law.

[111] It was the Crown which elected to deploy PA, s 39(b)(ii) instead of having Crown Law respond to the requests in its capacity as the lawyer representing all the Crown agencies, including those involved in litigation with Mr Dotcom. It was on legal advice from Crown Law that the various agencies transferred the information requests to the Attorney-General under PA, s 39(b)(ii) without those agencies possessing the requisite statutory belief. The statement of reply explicitly pleads that the Attorney-General acted as transferee of the requests. In all the circumstances we can see no factual or legal basis for the application of the Crown's alternative defence.

THE QUESTION WHETHER THE REQUESTS WERE VEXATIOUS

[112] We now turn to consider, in the alternative, the question whether, if the transfer was lawful, there was a proper basis for the decision that the requests made by Mr Dotcom be declined as vexatious under PA, s 29(1)(j).

[113] It is common ground that by virtue of PA, s 87 the Crown carries the burden of proving that PA, s 29(1)(j) applies.

[114] The terms in which the information privacy requests were refused are found in the Solicitor-General's letter dated 5 August 2015. As that letter has been set out in full earlier in this decision, only para 7 is repeated here:

> 7. 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.

[115] In this letter the assertion of vexatiousness is associated with the request for urgency. It is alleged that request was unsupported by reasons and it is also claimed that the requests were of extremely broad scope and for that reason included information that was trivial.

[116] In the Crown written closing submissions it was explained:

> **[116.1]** The requests were declined because they were assessed as vexatious under PA, s 29(1)(j).
>
> **[116.2]** That it has never been the Crown's position that the requests were declined because it considered the range and volume of material requested made compliance too difficult or impossible.
>
> **[116.3]** The scope and volume of the requests and the time likely to be needed to respond were part of the contextual matrix relevant to the assessment of vexatiousness, although this was not a particularly significant aspect on its own.

[116.4] If the Crown had declined the requests on the basis that they were too big or hard to comply with, then this would have been a decision under PA, s 29(2)(a), not s 29(1)(j).

[116.5] The requests were not declined because the information was trivial. The reference to trivial information in the Solicitor-General's letter was part of the overall assessment of vexatiousness.

[116.6] A broad request cannot be declined in its entirety because it includes information that is likely to be trivial.

[117] In oral submissions it was conceded that the fact that Mr Dotcom wished to use the requested information for the purposes of litigation would not be a reason for decline and was not a reason adopted by the Crown in this case.

[118] On the other hand the submissions for Mr Dotcom pointed out that in the light of the Crown's position as just explained, it is difficult to know to what degree urgency and volume played in the Solicitor-General's decision that the requests were vexatious. Mr Dotcom also drew attention to the evolving nature of the Solicitor-General's "reasons" for decision. The letter dated 5 August 2015 asserted that having regard to the request for urgency the information privacy request:

> … [was] vexatious and includes, due to its extremely broad scope, information that is trivial.

[119] However, in the subsequent letter dated 31 August 2015 from the Solicitor-General to Mr Dotcom's solicitors there was a claim, not made on 5 August 2015, that the requests were not genuine and were intended to disrupt the extradition hearing:

> 4.3 We declined the transferred 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.

[120] This newly articulated claim was repeated in the letter of the same date sent by the Solicitor-General to the Privacy Commissioner.

[121] In her opening submissions Ms Casey said the Crown did not challenge the principle that "the clock stops at the date of decision" [here, the Solicitor-General's letter dated 5 August 2015] but asserted the Tribunal could look at the subsequent letters [dated 31 August 2015] to inform the assessment of the decision.

[122] While Mr Dotcom opposed the Tribunal engaging in an ex post facto reconstruction of the "reasons" offered on 5 August 2015, we see only clarity and no prejudice to Mr Dotcom in addressing the case on the basis that, as submitted for the Crown, the key sentence is that in the letter dated 31 August 2015 sent by the Solicitor-General to the lawyers for Mr Dotcom:

> 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.

[123] There is also the point that in previous cases the Tribunal has held that the relevant date on which an agency must have good reason under PA, ss 27 to 29 for refusing access to personal information is the date on which the decision is made. Provided such good reason exists at the date of the decision on the request, the failure by the agency to offer that reason at the time it communicates its decision on the request does not amount to an interference with the privacy of the individual as defined in PA, s 66, though it is undoubtedly bad practice. Such interference only occurs if there is both a refusal to make information available in response to the request and a determination by the Commissioner, or as the case may be, by the Tribunal that there was no proper basis for that decision. See *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [72]-[77], *Watson v Capital and Coast District Health Board* [2015] NZHRRT 27 at [83]-[86] and *Lohr v Accident Compensation Corporation* [2016] NZHRRT 31 at [33].

[124] In essence, therefore, at the heart of the Crown case is an allegation of ulterior motive, that the requests were intended to disrupt the extradition hearing. It is said this improper purpose permitted a conclusion the requests were vexatious.

[125] Yet when in the course of the hearing the Tribunal asked Ms Casey 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". She said no judgment or comment was being made in relation to the litigation strategies Mr Dotcom and his counsel decided to adopt.

[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.

[127] While this substantially narrows the scope of the Crown's case it is still necessary to provide a brief outline of aspects of the case which have not yet been detailed. It is an outline only and does not claim to be a full exposition of the detailed submissions made by the parties. It does, however, put the Crown's case in context.

Outline of the case for the Crown

[128] We begin with the Crown's chronology covering the ten month period between the delivery by Simon France J of his decision on 17 October 2014 and the Solicitor-General's refusal of the information privacy requests on 5 August 2015.

[129] This chronology (as provided by the Crown) is attached to this decision as Appendix One in slightly amended form.

[130] The Crown submits there was a proper basis for concluding the requests were vexatious. They were "not genuine" and "intended to vex and frustrate … the Crown's legitimate and important goal of bringing the eligibility hearing to a conclusion without further delay". It was submitted this assessment was supported by the following:

[130.1] The blanket approach of targeting every Minister and almost every government department.

[130.2] The blanket claim for urgency for all information and across all agencies.

[130.3] The breadth of the request and the explicit insistence on the widest possible application, including demanding disclosure of information that would be trivial and information that was not personal information.

[130.4] The refusal to narrow the request or engage in a co-operative process to allow practical responses to be made in a sensible timeframe.

[130.5] The prior findings in the District Court and High Court that such disclosure from even those more closely involved agencies would be "totally irrelevant" to the extradition litigation.

[130.6] The insistence by Mr Dotcom that the requested material would be relevant and admissible in the extradition litigation and his failure to acknowledge or accept the adverse findings from the District and High Courts that even his most serious allegations of misconduct would not meet that threshold.

[130.7] The close proximity of the requests to what was then the tenth fixture for the substantive eligibility hearing.

[130.8] The history of prior deferrals of the eligibility hearing (including to allow Mr Dotcom time to pursue disclosure of documents to support his stay application).

[130.9] The then current continuing attempts to vacate or disrupt the upcoming eligibility hearing.

[130.10] The express link to the eligibility hearing in the requests signalling the high likelihood of the requests or responses being used to delay the hearing again.

[130.11] It was obvious that for a number of agencies full compliance with the request would not be possible within 20 days (let alone urgently).

[130.12] The high likelihood of an application to adjourn the eligibility hearing if any agency had extended time or declined urgency in providing disclosure.

[130.13] The high likelihood that even had Mr Dotcom received the volume of information that his request would have generated, he and his legal team would not have been able to review and digest the responses in sufficient time for it to be used (and properly responded to) in the eligibility hearing, and would be likely to seek an adjournment for that purpose (noting that Mr Dotcom was clear that his legal team was already working under significant time constraints preparing for the eligibility hearing, and the lack of preparation time had already been cited as a reason for his application to the High Court to adjourn that hearing).

[130.14] A claimed delay between the "misconduct" stay application filed on 30 October 2014 and the requests in July 2015.

[130.15] An alleged history of extensive prior Privacy Act and OIA requests indicating that timely and more sensibly focused and co-operative requests had been made where requested information was genuinely considered to be relevant to the litigation.

Outline of the case for Mr Dotcom

[131] The submissions for Mr Dotcom included the following points:

[131.1] It is not surprising that the extradition hearing had been adjourned a number of times. All parties have much at stake and at the time the requests were made there had been two appeals to the Supreme Court on interlocutory issues. Of necessity the proceedings in the District Court had had to be adjourned until those issues could be resolved. It would be wrong to attach blame to Mr Dotcom for each and every adjournment.

[131.2] Each adjournment had been granted by a judicial officer after the parties had been heard. That officer must have concluded that an adjournment was appropriate. None of the adjournment decisions were appealed or judicially reviewed by the Crown. Mr Dotcom has never sought an adjournment for the sake of an adjournment.

[131.3] The last application for an adjournment made by Mr Dotcom, while declined in the District Court, was granted by Katz J on 1 May 2015 in *Ortmann v District Court at North Shore* [2015] NZHC 901 following a finding by the High Court that Mr Dotcom would be unable to properly prepare for an extradition hearing on 2 June 2015 due to funding and representation issues. Katz J did however, record at [118] that:

> This should not be taken by the plaintiffs, however, as a signal that any ongoing funding or representation difficulties (if they arise) would be likely to justify further adjournments. On the contrary, the plaintiffs must take full responsibility for preparing for their extradition hearing on whatever new date is allocated, with whatever level of legal support they are able to secure.

[131.4] A month later, in *Commissioner of Police v Dotcom* CA 269/15, 3 June 2015 Harrison J, in declining an urgent fixture in the Court of Appeal to determine an appeal by the Commissioner of Police (against a decision of the High Court granting Mr Dotcom's application to vary the terms of registration of two foreign restraining orders) and an appeal by Mr Dotcom in relation to aspects of the decision given by Katz J (the appeal did not relate to the decision on the adjournment application), reinforced what Katz J had said about the need for the parties to maintain the 21 September 2015 extradition hearing in the District Court:

> [10] 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.

[131.5] When Mr Dotcom by memorandum dated 10 June 2015 (filed in the District Court) submitted that because of funding issues and an appeal by the Commissioner of Police against the judgments of Courtney J (releasing funds for living and legal expenses) no timetable orders should be made in the District Court regarding the eligibility hearing, Judge Dawson by *Minute* dated 11 June 2015 nevertheless issued a timetable order in the form sought by the Crown. The *Minute* made specific reference to the earlier quoted passage from the *Minute* issued by Harrison J in the Court of Appeal on 3 June 2015 to the effect that it was essential that the fixture to hear the extradition application be maintained.

[131.6] Against this background Mr Dotcom understood, prior to making the information privacy requests in mid July 2015, there was little to be gained by applying for an adjournment of the hearing and no such application was in fact made by him.

[131.7] Whereas the Crown's submissions paint Mr Dotcom as the author of numerous proceedings and applications of little merit, the context shows that steps and proceedings taken by the Crown severely disrupted Mr Dotcom's preparation for the eligibility hearing. Examples include:

> **[131.7.1]** unsuccessfully applying to revoke his bail when his then solicitors and counsel were granted leave to withdraw.
>
> **[131.7.2]** unsuccessfully opposing the release of restrained funds for living and legal expenses.
>
> **[131.7.3]** unsuccessfully opposing an adjournment of the eligibility hearing scheduled for 2 June 2015.
>
> **[131.7.4]** applying to register in New Zealand the USA forfeiture order obtained in that country on the basis of a fugitive disentitlement doctrine, a concept unknown to New Zealand law. If successful, this would have meant that Mr Dotcom would have no funds to live on, let alone to defend the extradition proceeding.
>
> **[131.7.5]** unsuccessfully opposing, and seeking to strike out, Mr Dotcom's judicial review of the decision by the Deputy Solicitor-General (Criminal) to authorise the Commissioner of Police to register the USA forfeiture order.
>
> **[131.7.6]** refusing, until 23 June 2015, to respond to the legitimate concerns as to funding for New Zealand counsel raised by counsel for Mr Dotcom on 29 April 2015.

[131.8] Mr Dotcom did not apply for an adjournment of the eligibility hearing notwithstanding the impact of the foregoing circumstances and of the impact of the refusal of the privacy requests on the stay application.

[131.9] Instead of Crown Law waiting to see if an adjournment application was in fact made and (as in every other case) then contesting the application before a judicial officer who would then rule on the merits of the application, Crown Law was using the decline power in PA, s 29(1)(j) to prevent the issue from occurring. Or, in the words of Ms Casey in oral submissions:

> What the Attorney-General was doing in this decline was saying we are not letting this huge Privacy Act request get in the way of the eligibility hearing, we're taking it off the table, we're not going to have a fight with you, we'll keep engaging with you but we're not going to extend time, we're not going to give you any grounds to take this to the Court for an eligibility hearing. Now right or wrong that needs to be assessed on the basis of pragmatic and sensible and realist assessments at the time.

[131.10] Crown Law made an unfounded and unreasonable assumption Mr Dotcom made the requests to obtain an adjournment.

[131.11] The primary motive in refusing the request was litigation strategy, namely to prevent the grant of an adjournment of the extradition hearing notwithstanding that as always, the decision on any adjournment application should be made by a judicial officer after hearing the parties.

[131.12] The fact that the requests could have been made earlier does not make them vexatious. It was not until the Simon France J judgment of 17 October 2014 that Mr Dotcom could have appreciated that he needed to exhaust the processes in the Privacy Act before asking the District Court to be an enforcement court for the purpose of PA, s 11. In addition allowance must be made for the fact that in the period from November 2014 (when Mr Dotcom's then lawyers withdrew) and mid-June 2015 (when the USA provided an assurance that the US government would not take action against Mr Dotcom's new lawyers if they were paid out of forfeited funds released by the High Court) Mr Dotcom was dealing with twin crises regarding his representation and ability to fund his defence to the extradition application and the application by the USA to revoke his bail.

[131.13] The Privacy Act requests were made within the three weeks which followed the filing by the Commissioner of Police in the High Court of the memorandum giving the assurance of the US government that it would not take proceedings against Mr Dotcom's lawyers for being paid out of Mr Dotcom's (forfeited) funds which had been released by Courtney J.

[131.14] The High Court has made a finding that Mr Dotcom's new legal team (principally Mr Mansfield and Anderson Creagh Lai Ltd) were not in a position to commence substantive work on the extradition proceeding any earlier than 12 March 2015. In reality it was much later. They had not been in a position to come to grips with the extradition proceeding and what steps needed to be taken prior to the eligibility hearing. They had been distracted by the need to ensure that Mr Dotcom would in fact have representation at that hearing and that there would be funds available to mount an effective defence. The Privacy Act requests were one part of that preparation but far from the only part.

[131.15] As to the allegation that Mr Dotcom should have refined his requests, he was not in a position to take this step because he did not know whether the agencies did or did not hold information covered by the requests and if they did, the categories or description of the documents, or classes of the documents held.

[131.16] Regarding the claim that the requested information was irrelevant to the extradition hearing, Principle 6 is not the same as discovery. Relevance is not a proper consideration.

[131.17] The request for access to personal information and the request for urgency were separate and distinct requests. Decline of a request for urgency should not be a ground for declining the information privacy request itself.

The evidence of Mr Dotcom

[132] As to the evidentiary basis for these competing submissions, no witness statement was filed by the Crown regarding the refusal of the requests. The evidence given by Mr Witcombe and by Mr Child was of only peripheral relevance in this context. Rather, the Crown relied on the documentary record contained in the common bundle. Mr Dotcom, on the other hand, filed a long (46 pages) and detailed written statement and also relied on the documentary record. He gave oral evidence at the hearing and was cross-examined at some length for nearly two days.

[133] It is not possible in this decision to summarise the evidence given. We simply note some of the more important points made by Mr Dotcom:

[133.1] He wanted to know what personal information the requested agencies held about him. He wanted to know this before the eligibility hearing in the extradition proceeding. He made the July 2015 requests because:

[133.1.1] He considered the requested information to be information to which he was entitled by law. When on previous occasions he had exercised his right to make such requests under the Privacy Act there had never been any suggestion that merely making such a request was vexatious.

[133.1.2] He believed the responses could well contain evidence relevant to the extradition proceedings and in particular, his application that those proceedings be stayed on the grounds of abuse of process.

[133.1.3] He believed it highly likely that at least some of the requested agencies would hold personal information about him, having been involved (directly or indirectly) in the extradition or in matters relating to it.

[133.1.4] His understanding of the effect of the Supreme Court decision in *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 and the decision given by Simon France J was that he should pursue requests for access directly under the Privacy Act and/or the OIA.

[133.1.5] His previous and ongoing experience in the use of the Privacy Act and the OIA was that the New Zealand authorities have routinely withheld information relevant to his case and only disclosed such information when compelled to do so.

[133.2] By making the information privacy requests he was not seeking to be disruptive or vexatious. Rather, based on previous unsuccessful attempts to gain access to information held by various agencies (which had been the subject of judicial review and appeals), he was trying to follow what he understood to be the process identified by the courts as available to him in the circumstances. He was also anxious to avoid the requests being delayed by drawn out litigation as the goal was to obtain the information and to use it in evidence.

[133.3] Two examples were given of occasions on which the NZSIS and the Crown (in the extradition proceeding itself) had, in his opinion, unlawfully withheld personal information requested by him. He believed the difficulties encountered by him were indicative of the tactical withholding of information.

[133.4] He had every reason to want his requests to be complied with. The more evidence he could obtain of misconduct by the New Zealand authorities, the better the prospects of success of the stay application filed in the District Court:

> [3.90] … It never crossed my mind that the [requests] could somehow disrupt the Extradition Proceeding. If this had been suggested to me, I would have dismissed it as highly unlikely, not least because I did not make the [requests] of Crown Law but of individual agencies. I had no reason to think that the majority of the [requests] might be transferred to Crown Law and it did not occur to me.
>
> [3.91] I had everything to gain from being provided the information in time to adduce any relevant evidence in support of the September stay application. There was therefore no incentive for me to make requests that would not be complied with.

[133.5] His reasons for framing the requests in broad terms included:

[133.5.1] Simon France J had acknowledged that a broad request was perfectly permissible under the Privacy Act.

[133.5.2] At the time he made the requests he did not and could not know what personal information the relevant agencies held about him. Had he known that, it would not have been necessary to request such information.

[133.5.3] Similarly, because he did not know what information the requested agencies held, he did not know what information held by them could properly be described as "trivial". He could not make that assessment until such time as he saw the information. He therefore could not narrow the request.

[133.5.4] He wanted to capture as much of his personal information as possible so that such information could then be reviewed for relevance. Because he did not know what personal information was held about him, he

did not want to pre-determine what may or may not have been relevant and run the risk that he might miss something.

[133.5.5] He was concerned that if his request was too specific, potentially relevant personal information might be excluded from the scope of the request. He would not have any way of knowing one way or the other if this had occurred.

[133.5.6] Based on his previous experience he had reason to believe that at least some of the requested agencies would hold personal information about him that was not trivial. The information received in response to his previous requests could not reasonably be described as "trivial".

[133.5.7] Based on his previous experience he was concerned the relevant agencies could take a narrow interpretation of the scope of anything other than a broad request and use this as an opportunity to withhold information as being out of scope.

[133.6] A key purpose of the requests was to gather, as soon as practicable, evidence for what would become known as the September stay application. It would have been counter-productive to this important goal to make the requests any more time consuming or laborious to comply with than necessary.

[133.7] Based on his previous experiences it seemed inconceivable to him that the requested agencies did not hold any information about him that was not trivial or that they would consider they were entitled to withhold all information because some of the requested information might be trivial.

[133.8] The timing of the requests had nothing to do with disrupting the extradition proceeding. The timing was due to the following:

[133.8.1] He was unrepresented and unfunded in the extradition proceeding from November 2014 until 23 April 2015 at the earliest and, more realistically, 23 June 2015.

[133.8.2] In this context he described in some detail his application for adjournment of the then extradition hearing scheduled for 2 June 2015, the decline of that application after a hearing in the District Court on 10 and 11 March 2015 and the subsequent (successful) appeal to the High Court which resulted in the judgment delivered by Katz J on 1 May 2015 ordering that the eligibility hearing be adjourned to a date not earlier than 1 September 2015.

[133.8.3] Reference was also made to the proceedings heard by Courtney J concerning the release of funds for living and legal expenses, to the application by the Commissioner of Police to register the USA foreign forfeiture order and the delay by the USA in responding to the requests for assurances that it would take no civil or criminal enforcement action against

Mr Dotcom's lawyers if they received forfeited funds in accordance with the orders made by Courtney J.

[133.9] In this context Mr Dotcom said it was not until 23 June 2015 that sufficient (albeit still incomplete) assurances by the USA were provided such that his (new) legal team had enough comfort to begin substantive preparation for the extradition hearing scheduled for 21 September 2015, including the stay applications. On legal advice Mr Dotcom accordingly instructed that the information privacy requests be then made.

[133.10] There was no ulterior purpose to the timing of the requests. Mr Dotcom simply wanted to receive the requested information as soon as practicable so that, if relevant, it could be used in the extradition proceeding.

[134] Much of the cross examination focused on the relevance of the information sought by the requests as well as the breadth and timing of the requests (including the request for urgency). Mr Dotcom's credibility was put in issue.

[135] On the relevance issue the cross examination drew attention to the findings made in the District Court and High Court that the information sought by Mr Dotcom in his various discovery applications was irrelevant to the extradition litigation. Mr Dotcom pointed out that those rulings were challenged and that there was a degree of circularity in the Crown argument. The evidence fell short because the Crown had not provided Mr Dotcom with the requested information.

[136] The Crown's general point regarding delay was that the misconduct stay application had been filed on 30 October 2014 and the information privacy requests had not been made until 17 to 31 July 2015. Mr Dotcom pointed out that his first legal team had on 7 November 2014 advised they had terminated their engagement to act for him and there was a long period of time when his new team could not commence work until funding had been secured and until they had familiarised themselves with the detail of the case.

[137] In subsequent questioning it was suggested to Mr Dotcom that there was nothing complex about making a privacy request and that the making of such request would cost little. Mr Dotcom's comprehensive response pointed out the need for the Privacy Act requests to be part of an overall litigation strategy and that that strategy could not be formulated until funding had been secured and a legal team put in place with adequate opportunity to look at the case from all angles. Although lengthy, the following passage best captures Mr Dotcom's reply to an issue of some significance to the Crown:

> A Yes, and it's absolutely correct but it is part of the bigger litigation. It is not a standalone issue that you separate from everything else and just do that on its own. You need to see it in the bigger litigation picture which includes the preparation for the extradition proceeding and that has not at that point been started, simply because the money wasn't there. And I think Mr Mansfield and Mr Cogan have just made clear during the adjournment that that is accurate and they have even provided you with this letter from – or explained to you the letter from the United States that was holding them back and that they were waiting for so I don't even understand all of this. What is the suggestion here, that I should have done more

sooner without funding being available, without legal counsel being prepared to actually endeavour into the extradition proceeding? It just makes no sense at all.

Q It's not a complex thing to do a Privacy Act request, though, is it?

A Well, it becomes complex when you look at the entire history. You don't just off the cuff make some applications. You have to look at everything that happened in the past, all these things that you helpfully took us through that led to the information which allowed me to actually find unlawful activity by the New Zealand Government, has brought us to this point and without understanding that background, you cannot file these applications and it's really a job for my legal counsel to do that and to decide when they are ready and that is what happened.

Q So if I hear you correctly, there are strategic issues involved as to when you do a Privacy Act request like that?

A No, that is not what I've said and it's twisting my words. What I've said is the counsel was not ready for the bigger extradition proceeding litigation. They hadn't even uplifted the files from Simpson Grierson and Paul Davison at that time. They were not prepared to file anything to do with the extradition matter until they actually had access to all the history, looking through everything, and then deciding what has to be the next step and one of the first steps, I don't know if you're aware of this, but we only had roughly three months with a new legal team to prepare for the extradition hearing. That is a very limited timeframe and two months before the extradition hearing, these Privacy Act requests were filed so within a month of the team getting actively engaged in the extradition proceeding, they have filed these requests. I think that is a very reasonable timeframe if you consider the amount of documents and the amount of research that is required to then make the decision to file for these requests.

[138] A further aspect of the timing of the requests is that Mr Dotcom's first legal team had anticipated that the making of the requests should be close to the actual extradition hearing so that there would be a more up to date release of personal information held. In Mr Dotcom's view the making of the requests in mid July 2015, some two months out from the extradition hearing scheduled for 21 September 2015 was reasonable given that he understood the agencies had 20 working days to respond and each agency had a Privacy Officer. In addition urgency was sought. However, while the information was sought for the extradition hearing it had also been sought for use in other current and future litigation.

[139] In the course of being questioned about the breadth and volume of the information which had (potentially) been requested, Mr Dotcom was asked what would have happened if an agency needed more time. He said he would have taken legal advice and if counsel thought that it was appropriate, he would have sought an adjournment of the eligibility hearing. However, none of the requested agencies had in fact requested more time:

Q. I understand you don't agree with the agency's estimate of time required but if an agency have responded to your request by saying, "We have to review the documents. We have to confer with other agencies. We have to do full search. It's going to take us three months to give you a response." You would have sought an adjournment of the eligibility hearing wouldn't you?

A. I would have discussed that with counsel and if they thought that that was the appropriate step to take then yes.

Q. Thank you.

THE CHAIR:

Just before you move on, did any agency respond in the terms that you've just put to Mr Dotcom?

MS CASEY:

No Sir.

Credibility assessment

[140] Mr Dotcom's evidence in chief commenced at about 12.30 pm on 11 April 2017. Cross examination began at 10.00 am on 12 April 2017 and did not conclude until 3.20 pm on 13 April 2017. The fact that his evidence was given by audio-visual link did not in any way make more difficult or impede our credibility assessment.

[141] Notwithstanding a searching cross examination we found Mr Dotcom to be a sincere and honest witness. His evidence was given frankly, without exaggeration or embellishment. If anything, his evidence was understated. He was visibly at pains to ensure that his answers were both accurate and complete. In addition he did not hesitate to concede matters against his interests, such as the possibility of applying for an adjournment in the hypothetical event of an agency needing more time to respond to an information request.

[142] We accordingly determine the case on the basis that Mr Dotcom's evidence was truthful evidence and that the submissions made on his behalf (as earlier summarised in this part of our decision) were well founded.

[143] 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.

[144] Against this background we address the legal issues raised by PA, s 29(1)(j). Thereafter we apply the law to our conclusions on the evidence.

SECTION 29(1)(j) – INTERPRETATION AND APPLICATION

[145] Although the text of PA, s 29(1)(j) has been set out earlier in this decision, it is reproduced for ease of reference:

> **29 Other reasons for refusal of requests**
>
> (1) An agency may refuse to disclose any information requested pursuant to principle 6 if—
> …
> (j) the request is frivolous or vexatious, or the information requested is trivial.

Meaning of "vexatious"

[146] The term "vexatious" is not defined in the Act and it is not intended in this decision to provide one. Nevertheless, some understanding of the term must be attempted. Our views follow:

[146.1] A key component to "vexatious" is an element of impropriety. This is consistent with the "ordinary" or dictionary meaning. The *Oxford English Dictionary* (Online 3rd ed, 2017) offers the following meaning in the legal context:

> Of legal action: instituted or taken without sufficient grounds, purely to cause trouble or annoyance to the defendant.

[146.2] In the context of an information privacy request under the Privacy Act it is not a question whether the making of the request may cause trouble or annoyance to the agency. Rather it is whether there is an element of impropriety to the request. In *O v N (No 2)* (1996) 3 HRNZ 636 (CRT) it was suggested an indirect motive is needed. We agree with this view but would not wish to be understood as saying an indirect motive is always essential. The issue does not arise for determination on the facts of the present case because the Crown does in fact allege an indirect motive, namely the making of requests which were not genuine with the intention of disrupting the extradition hearing.

[146.3] The assessment is objective. See by analogy the approach to vexatious litigants in civil litigation as explained in *Attorney-General v Hill* (1993) 7 PRNZ 20 at [22]:

> The issue of whether the defendant has persistently and without any reasonable ground instituted vexatious legal proceedings is to be determined not in relation to the subjective beliefs of the defendant or his motives, but objectively. Whilst it is appropriate to look in the first instance to the individual proceedings instituted by the defendant to see whether they are vexatious, 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.

[146.4] Also objective is the assessment made by the Tribunal under PA, s 66(2)(b) as to whether there was no proper basis for the refusal decision. Or, to use the wording favoured by the Crown in this context, the Tribunal must determine, objectively, whether the decision made by the Solicitor-General (as to whether the requests were vexatious) was within the parameters of a reasonably justifiable judgment call on the information known to him at the time.

[146.5] The assessment of vexatiousness must relate to the circumstances at the time the decision was made. See *M v Ministry of Health* (1997) 4 HRNZ 79 (CRT) at [86].

"Vexatious" and the broader context of the Privacy Act

[147] The term "vexatious" must also be interpreted in the context of the Privacy Act itself. It is to that we now turn:

[147.1] The reasons permitted by the Act for refusing access to personal information are exhaustively listed in ss 27, 28 and 29. Refusal of a Principle 6 request is not permitted for any other reason. See PA, s 30. Section 29(1) itself allows 11 reasons for refusal and a further three are contained in subs (2).

[147.2] It follows that 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. In some cases, however, there may well be an overlap.

[147.3] Principle 6 is itself qualified. Personal information can only be accessed if "it can readily be retrieved". If ready retrieval is not possible there is no obligation on an agency to provide the information. It follows the "frivolous or vexatious" ground cannot be used to decline an access request where what is really being asserted by the agency is that the information cannot be readily retrieved. Section 29(2)(a) underlines the point. It explicitly provides that a request made pursuant to Principle 6 can be refused if the requested information is not readily retrievable. Section 29(1)(j) is in such circumstance irrelevant.

[147.4] 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. Nor is it aware of the potential relevance of the information to matters of interest to the requester. As stated by Goddard J in *Cornelius v Commissioner of Police* [1998] 3 NZLR 373 at [382] in the context of criminal discovery:

> Although the jobsheets may have no relevance to the prosecution case so far as the police are concerned, I think they ought to be disclosed to the plaintiffs. Whether they contain any material relevant to their case or not can only be determined by them. As I observed to counsel during the course of their submissions, knowledge of relevance depends on the information one already has and on one's perspective of matters. What may not appear relevant to the police, or to me, may nevertheless assume some relevance for the defence.

In *Andrews v Commissioner of Police* [2013] NZHRRT 6 (4 March 2013) at [57] the Tribunal noted that relevancy is a fluid concept:

> [57] The difficulty is that the issues raised by this definition can only be determined within the concrete circumstances of the particular proceeding and in addition, relevancy must be determined as at the date of disclosure. Relevancy can, of course, alter and change during the course of a proceeding. A new charge can be laid (as here) and in addition, as new or further evidence comes to hand there may well be a change in the way in which the prosecutor intends to present the case and/or the way in which the defence intend resisting the case. Relevancy is a fluid concept and is both time and context specific. An ex post facto analysis carried out under the Privacy Act in relation to decisions made by prosecutors in the criminal system is therefore fraught with difficulty.

[147.5] Consequently PA, s 29(1)(j) must be applied with caution, particularly in a case such as this where the parties are engaged in substantive litigation and senior courts have directed Mr Dotcom to use the Privacy Act because the information sought is not available in the highly confined and restricted context of an extradition application.

[147.6] It must at least be possible to say that, looking at all the circumstances objectively, it is manifestly clear the request is frivolous or vexatious or the information requested is trivial. In the making by the agency of this evaluation the person seeking access to his or her personal information is ordinarily to be

> presumed to be unaware of the nature and content of the personal information held by the requested agency. Likewise, the agency is ordinarily to be presumed to be unaware of the reason for the access request and of the potential significance (to the requester) of the information. That is, an agency is not always in the best position to determine, objectively, what is in truth "frivolous" or "vexatious" or "trivial". In a case such as the present it is not to be easily determined that a bona fide requester represented by responsible counsel will make a request that has an improper purpose, particularly the purpose of disrupting court proceedings.

[148] As a final point we note that in the present case neither MBIE nor the Ministry of Justice ever got to the point of being able to assess whether the information was readily retrievable. Mr Witcombe said this was because the MBIE request was transferred to Crown Law. The evidence of Mr Child in relation to the Ministry of Justice was to similar effect. In the absence of evidence from the Crown it can be assumed the same position applied in respect of all, or nearly all, of the agencies.

Vexatiousness and the context of the Dotcom case – the importance of maintaining perspective

[149] We agree with the Crown that whether a request is "vexatious" within the meaning of PA, s 29(1)(j) is highly fact specific and the assessment must be made in the context of the particular request and decision. But in a case such as the present there is a real danger of becoming lost in the detail; or to express it differently, getting so close to the picture that only the pixels can be seen. The Crown submissions on the "vexatious" issue were necessarily detailed but at times so narrowly focused that in our view they became decontextualised. It is therefore necessary that we emphasise the point that whether an information privacy request is "vexatious" is a judgment which can only be reached after an overall objective assessment has been made of the entire context in which the request has been made.

[150] To avoid getting lost in the detail, in this part of the decision we outline important features of the case relevant to the assessment whether there was "no proper basis" for the Crown's refusal to make the requested information available. In a subsequent section of the decision we bring these various points together in explaining our conclusion that there was no proper basis for the Crown's decision.

[151] First, it is necessary to bear in mind the principled reason why people seek access to information. Mr Dotcom has from the outset been seeking discovery against the Crown and the USA in the context of large scale litigation. His reason and justification for doing so hardly requires explanation but reference can be made to the underlying principle of promoting the administration of justice and the public interest in ensuring that all relevant evidence is provided to the court in litigation. For a very recent restatement of these principles see *Tchenguiz v Grant Thornton UK LLP* [2017] EWHC 310, [2017] 4 All ER 895 at [6]:

> **[6]** For all the challenges just summarised, '[f]ew if any common lawyers would doubt the importance of documentary discovery [disclosure] in achieving the fair disposal and trial of civil actions'. Lord Bingham (as Bingham LJ) so observed in *Davies v Eli Lilly & Co* [1987] 1 All ER

801 at 815, [1987] 1 WLR 428 at 445, itself also a piece of large-scale litigation. Lord Donaldson (as Sir John Donaldson MR) described the right of discovery available in litigation in England and Wales as part of what enabled the court to achieve 'real justice between opposing parties' (in the same case, [1987] 1 All ER 801 at 804, [1987] 1 WLR 428 at 431). Lord Bingham (as Sir Thomas Bingham MR) went on to identify the promotion of the administration of justice as the underlying principle (*Process Development Ltd v Hogg* [1996] FSR 45 at 52). Rose and Hobhouse LJJ agreed, and the principle continues to be referenced: see for example *IG Index Ltd v Cloete* [2014] EWCA Civ 1128, [2015] ICR 254 at [28] by Christopher Clarke LJ, with whom Barling J and Arden LJ agreed.

[7] These fundamentals have not dimmed: disclosure exists as a feature of litigation because 'there is a public interest in ensuring that all relevant evidence is provided to the court' in litigation (*Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 1409, [2014] All ER (D) 14 (Nov) at [56] per Jackson LJ, with whom Sharp and Vos LJJ agreed).

[152] Although Mr Dotcom enjoyed some initial success in arguing for broad discovery in the context of an extradition application heard by a New Zealand court, the Supreme Court on 21 March 2014 held that disclosure of the sort available in domestic criminal proceedings under the common law or the Criminal Disclosure Act 2008 did not apply. It was nevertheless explicitly acknowledged that the person whose extradition is sought may seek OIA disclosure from any New Zealand agency. This must necessarily be taken to include disclosure under the Privacy Act, as recognised by Simon France J in his decision at [56]. The Long Title of the OIA recognises the objective of making official information "more freely available" and the principle of "providing for proper access by each person to official information relating to that person". The Long Title to the Privacy Act also refers to the principle of access by each individual to information relating to that individual held by a public or private sector agency. Mr Dotcom's quest for access to his personal information outside civil and criminal discovery is accordingly explicitly sanctioned by law.

[153] Second, the Crown and Mr Dotcom have engaged in hard fought litigation since January 2012. At the time the information privacy requests were made in July 2015 that litigation had been in train for 3.5 years. As is their function, the courts of New Zealand have determined an extensive array of applications, disputes and challenges. In November 2014 Mr Dotcom's defence to the extradition application faltered when his then legal team terminated their engagement because Mr Dotcom had run out of money. The immediate reaction of the Crown was to apply to have Mr Dotcom's bail revoked. Simultaneously a number of Hollywood movie studio plaintiffs obtained a freezing order over Mr Dotcom's remaining unrestrained assets in New Zealand earned by Mr Dotcom post his arrest in January 2012.

[154] In December 2014 Mr Dotcom engaged Mr Mansfield, subject to obtaining the release of the frozen funds to meet legal fees. That application to the High Court eventually resulted in the 17 April 2015 release of funds. A few days before that the Commissioner of Police applied to the High Court to register a USA foreign forfeiture order. Had it been registered it would have had the effect of vesting Mr Dotcom's property, including the funds released by the High Court, in the Official Assignee. Mr Dotcom had no option but to apply for an order restraining the Commissioner. On 3 June 2015 Ellis J granted the interim restraining order.

[155] At the same time the extradition eligibility hearing was scheduled for 2 June 2015 but it was not until 23 June 2015 that sufficient assurances were provided by the USA that Mr Dotcom could begin substantive preparation for the extradition hearing without putting his legal team at risk of civil or criminal proceedings.

[156] To the extent that any of these pivotal events are referred to in the Crown's submissions, they are unjustifiably given insufficient significance. Yet they go a considerable distance in answering many of the Crown's complaints regarding delay and timing.

[157] The District Court declined the adjournment application but on judicial review the High Court on 1 May 2015 ordered that the eligibility hearing be adjourned to a date not earlier than 1 September 2015. On 6 May 2015 the District Court allocated a new hearing date of 21 September 2015.

[158] The privacy requests were sent out in the period mid to late July 2015.

[159] Third, the Crown expressly accepted Mr Dotcom was not conducting his defence to the extradition application in a vexatious manner and that no comment was being made in relation to the litigation strategies he and his counsel decided to adopt. As earlier recorded, the Crown case is that it is only these information requests made at this particular time and in this particular manner which led to the decline of the requests on the grounds they were vexatious.

[160] 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. At the same time the Crown accepted before the Tribunal that notwithstanding the refusal of the requests it had in any event been perfectly open to Mr Dotcom to seek an adjournment of the District Court hearing on the grounds the requests had been declined, a concession also made by the Solicitor-General in his letter of 31 August 2015 to the Privacy Commissioner. It was also conceded Mr Dotcom could have, for example, renewed his request to the District Court that it become an enforcement court for the purposes of PA, s 11. The undoubtedly contested application would then have been heard and determined by the District Court. Given these other avenues by which an adjournment application could have been "engineered" it is difficult to see what point there was to designating the requests as vexatious because (so the Crown alleged) they created the possibility of an adjournment application being made.

[161] The context in which the decision by the Solicitor-General is to be assessed also includes the fact that at all times Mr Dotcom has been represented by responsible counsel who have fearlessly defended their client's interests. 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.

[162] Mr Dotcom and his legal team were under immense pressure to secure funding, to get on top of a complex, difficult case with multiple, inter-related strands and to prepare for an extradition hearing in which Mr Dotcom's future was at stake. The timing of the requests was part of a considered strategy formulated by responsible legal advisers. As with all litigation strategies there was an element of risk which in this context was that the information would not be provided in time for the extradition hearing. But making a "wrong" judgment call under pressure in the context of complex litigation does not provide a proper basis to support the strong allegation made by the Crown that there was a deliberate strategy to frustrate the extradition hearing.

[163] Fourth, there is the further point that were Mr Dotcom to apply for an adjournment, that application would undoubtedly be strongly resisted by the Crown and a judicial officer would then, as a matter of standard court procedure, make a decision based on the merits of the application and the interests of justice. The refusal of the requests was not in any way necessary to "protect" the extradition hearing.

[164] As mentioned, the Crown explicitly conceded that even after the refusals Mr Dotcom could have sought an adjournment of the extradition hearing on other grounds related to the information privacy requests. Those grounds potentially included that he had asked the Privacy Commissioner to investigate or that he intended testing the refusals before the Tribunal. He could have renewed his application to the District Court for it to accept an enforcement role under PA, s 11. But in our view it was obvious any such adjournment application would have had little prospect of success given the firm line taken by the District Court to protect the September commencement date, reinforced by what had been said by Katz J in the High Court and by Harrison J in the Court of Appeal regarding the need for the hearing to get under way. Similarly any adjournment application based on delays in complying with the information privacy requests would have had little chance of success. The Solicitor-General must have been aware of the circumstances.

[165] The specific factors relied on by the Solicitor-General in his letters of 5 and 31 August 2015 will now be separately analysed. We conclude from this analysis that whether assessed individually or taken cumulatively they do not provide a proper basis for the refusal decision even were the factors to be assessed without taking into account the context to which we have just referred.

Claim: information sought irrelevant

[166] In both civil and criminal discovery the relevance of the requested information is of critical importance to the obligation to disclose. Not so under the Privacy Act. No reason at all is required to justify a request for access to personal information. This follows from the importance of the right and from the practical reason that the requester does not know what information is held. Relevance, utility and need have equally been

dismissed in the OIA context. See *Television New Zealand Ltd v Ombudsman* [1992] 1 NZLR 106 at 118 observed:

> … requests for information do not have to be accompanied by reasons why the information is required. That is fundamental to the spirit and purpose of this Act [OIA]. If it was trammelled by requirements to justify a request for information, much of the spirit of the Act would be lost.
>
> …
>
> There is no question of establishing a need for the information. Information by its very nature needs to be available if the purposes of the Act are to be achieved. That the onus is cast on the holder of information to show good reason why it should be withheld, runs contrary to any question as to its ultimate relevance or utility …

[167] Another feature of requests under the Privacy Act is that a request for access to personal information does not have to specify the information requested. Compare OIA, s 12(2) which requires the official information the subject of the request to be "specified with due particularity".

[168] It is now possible to address the decision of Simon France J given on 17 October 2014 which is cited by the Solicitor-General in his refusal letter of 5 August 2015 as authority for the proposition that Mr Dotcom must advance "an air of reality". The Crown also relied on the statement in the judgment at [83] that the then disclosure sought was of "total irrelevance" to the eligibility hearing.

[169] We are not persuaded the judgment of Simon France J is authority for the propositions advanced by the Solicitor-General in his letter. At the very least the references require substantial qualification. The judgment at [69] explains that there are two different paths to enforce the right of access to personal information held by a public agency. The first is to make an access request to the agency with the option of thereafter complaining to the Privacy Commissioner. The second is to request a court to be an enforcement court under PA, s 11. There is no obligation on a court to assume this function as part of the extradition proceeding and a case-specific assessment is required. See [59]. On the facts there was no reason for the extradition court to make the disclosure orders sought by Mr Dotcom. The correct response was for Mr Dotcom to apply directly to the agencies and when a response was had, to articulate a basis for the court to intervene in relation to documents which had been withheld. See [63] and [81]. In the result the application to the District Court for an order requiring the Crown to provide all information held about Mr Dotcom (which was in all but name an information privacy request under the Privacy Act), while permissible under that Act, was not a request with which an extradition court should concern itself. It was only in this context that the information request made to the District Court was described at [83] in the following terms:

> [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 citations omitted]

[170] Put shortly, the "total irrelevance" observation was in respect of the question whether the disclosure order sought should be made by the extradition court exercising its ancillary powers under the Privacy Act. See also [107]. The High Court was not addressing the Privacy Act, Part 4 grounds of refusal available to all agencies to which an access request is addressed directly pursuant to the procedural provisions in PA, Part 5. None of the Part 4 "good reasons" for refusing access (ss 27, 28 and 29) include "irrelevance". That a requester does not have to give reasons for the request or specify the information requested underlines the misconceived nature of the Crown's point.

[171] The "air of reality" issue is only addressed by Simon France J in the context of discovery which is sought outside of the Privacy Act. See the judgment at [92] to [102].

[172] For these reasons 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. 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. This is an issue to which we return shortly in the context of the urgency request.

[173] There is also the point made by Mr Dotcom that without being given access to the information held by the Crown agencies, he cannot know whether the information is relevant to the extradition hearing. To require him to first establish relevance before being given access to the information turns the Privacy Act upside down and renders illusory the legal right of access to personal information held by state agencies.

Claim: the scope and volume of the requests

[174] The submission by the Crown complains of the breadth of the request and the explicit insistence on the widest application, including demanding disclosure of information that would be trivial and information that was not personal information.

[175] First, it must be said that any request for information that is not personal information can simply be disregarded (under the Privacy Act) and cannot reasonably be advanced as a ground for a finding that that part of the request which does relate to personal information is itself vexatious. Second, the breadth of a request is regulated by the inbuilt statutory limitation that the information be readily retrievable. See Principle 6, cl (1) and PA, s 29(2)(a) and (b). An agency may lawfully refuse any access request if the information is not readily retrievable or does not exist or cannot be found. Third, in closing submissions the Crown explicitly stated that the scope and volume of the requests and the time likely to be needed to respond "are part of the contextual matrix relevant to the assessment of vexatiousness but not a particularly significant aspect on its own".

[176] In these circumstances it is difficult to see how the scope and volume of the requests could reasonably be said to be part of the "matrix" except in the most minor way.

[177] To emphasise the orthodoxy of the terms of Mr Dotcom's broad requests the following additional points must be made:

[177.1] The most common form of Privacy Act request encountered by the Tribunal is known as an "everything" request. That is, a request for everything that is readily retrievable. It is not required and in most circumstances it is not possible for the request to specify the information sought beyond the description of "all personal information about me". Attempts by the requester to exhaustively enumerate categories of information potentially held by the agency are both unnecessary and unhelpful. An everything request means "everything" and attempts at particularisation do not add to the agency's legal obligation to disclose "everything" unless the information is not readily retrievable or unless a withholding ground applies. Particularisation and breadth are not a ground for stigmatising the request as "vexatious".

[177.2] With most government information now being created and stored electronically, the volume of information held by government agencies has increased exponentially. See *Not a game of hide and seek: Report on an investigation into the practices adopted by central government agencies for the purpose of compliance with the Official Information Act 1982* (Office of the Ombudsman, 2015) at 97. It follows, in our view, that it cannot be held against Mr Dotcom that information about him is being collected by a number of state agencies and that in some instances, the volume of that information is substantial.

[177.3] In the OIA context it is common place for agencies to increasingly receive requests for bulk data and the entire contents of their data bases rather than individual documents. See *Not a game of hide and seek* at 97. This is part of a long term trend recognised also in the text by Nicola White *Free and Frank: Making the Official Information Act 1982 work better* (2007) at 31 and 127:

> It is now routine for requesters, and parliamentary requesters in particular to make frequent blanket requests for information defined by either category or topic.

[177.4] In *Not a game of hide and seek* Dame Beverley Wakem noted at 99 that most officials interviewed by her accepted that broad and substantial requests were, for the most part, genuine.

[177.5] All this must be taken as known by the state agencies to which the requests were addressed as well as by the Crown's legal advisers. The 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.

Claim: a history of extensive prior PA and OIA requests

[178] The submission by the Crown is that Mr Dotcom had a history of "extensive" prior Privacy Act and OIA requests indicating that "timely and more sensibly focused and co-operative" requests can be made where the requested information has been genuinely considered to be relevant to the litigation.

[179] This claim fails on the facts. The Tribunal was not given any or any sufficient evidence to support the claim that these prior requests were timely or that they were more "sensibly focused". The implicit concession by the Crown that these prior requests were genuine makes it more difficult to accept that only the July 2015 requests were "vexatious".

[180] It must be added that in the Tribunal's experience, for a person engaged in the most complex of litigation with the Crown over a number of years, Mr Dotcom has been sparing in his use of the Privacy Act and OIA. Exhibit 5 shows that in relation to the defendants the number of such requests in the period January 2012 to December 2014 were DPMC (nil), MBIE (3), MFAT (1), MoJ (1) and Police (5).

[181] Consequently we see little merit in the Crown's submission.

Claim: a long delay

[182] It is said the delay between the filing of the misconduct stay application on 30 October 2014 by Mr Dotcom's first legal team and the making of the requests in July 2015 by his new legal team is indicative of the requests being not genuine and intended to disrupt the extradition hearing.

[183] For the reasons given earlier when addressing the importance of perspective, we are of the view there is no factual basis for this claim. The reason for making the requests closer to the extradition hearing is logical. In the experience of the Tribunal it is commonplace for requesters to make their information privacy requests proximate to the event for which it is required so that the information obtained is up to date. This is often preferable to the repetitive lodging of requests for progressively updated disclosures. In addition, given the formidable challenges Mr Dotcom had to overcome in the period in question, there is no rational or reasonable basis for the claim that there was a delay in making the requests, let alone a claim that the "delay" was indicative of an absence of genuineness or of an intent to disrupt the extradition hearing. The point raised by the Crown lacks substance.

Claim: the potential volume of any information released would have led to an adjournment application

[184] The claim is that had all the requested information been provided there would have been insufficient time for it to be reviewed and digested, increasing the likelihood of an adjournment application.

[185] As to this, any adjournment application would have been addressed on its merits but the Crown's hypothetical is not evidence of the alleged concealed motive to frustrate the hearing. The "late" making of the requests is amply explained by the events in the period from October 2014 to July 2015.

[186] Finally, reference must be made to Mr Dotcom's evidence that because of his background and experience he knows how to best mine large quantities of data by using an appropriate search programme. In his evidence he stated:

> … I went through 100,000 emails in 30 days, that is seven years of emails that I have sent to others and I spent about six hours per day, so it took me 180 hours to go through 100,000 emails and that's an average of nine emails per minute. So it is possible for someone like me who can read quite fast to go through a large number of emails in a reasonable timeframe.
>
> … Yes I agree and instead of nine hours I would sometimes only sleep three hours in a day to be able to make time for this work.

[187] In view of our credibility finding we accept Mr Dotcom was justifiably confident in his ability to review and to digest any information supplied prior to the hearing. The "potential volume of information released" point has no substance. A hypothetical of this kind cannot reasonably contribute to a finding of vexatiousness.

[188] In any event we have difficulty with the Crown's submission. The reasons for the refusal set out in the letters dated 5 and 31 August 2015 make no reference to the time which would be taken by Mr Dotcom to analyse the information. Rather the reference is to the time it would take some agencies to assemble the information.

Claim: the request for urgency

[189] The July 2015 information privacy requests uniformly requested that the requests be treated as urgent, as is allowed by PA, s 37. But that provision also requires that reasons must be given for the request. The requirement for reasons is mandatory as the determination of genuine urgency is a context-based exercise and it is insufficient for the requester to simply assert urgency. See *Koso v Chief Executive, Ministry of Business, Innovation and Employment* [2014] NZHRRT 39, (2014) 9 HRNZ 786 at [28] and [53]-[54].

[190] The decline of a request for urgency does not of itself give rise to a remedy because such decline is not included in the PA, s 66 definition of "interference with privacy". Consequently no remedy for such decline can be granted under PA, s 85. Failure to accord urgency only has legal consequence if, on the facts, the requester can show that proper reasons were given for requesting urgency and that the unjustified failure to comply led to undue delay in making the information available, contrary to PA, s 66(4).

[191] In the present case the requests uniformly requested urgency by reason of the fact that the information sought was required for "pending legal action". As is made clear from the Solicitor-General letters dated 5 and 31 August 2015, this was taken by the Crown as a reference to the extradition proceedings.

[192] The request for urgency was refused on the grounds insufficient reasons had been given for the requested urgency and that was the end of the request unless Mr Dotcom later chose to argue that proper reasons for urgency had been given and that

as a consequence of the refusal, the information had not been provided without undue delay.

[193] But 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, particularly given the Crown accepts that neither decision would have precluded an adjournment application being made. The Crown further accepted that had Mr Dotcom abandoned the request for urgency there would have been no basis to transfer the requests to Crown Law. We emphasise again the vexatious ground must be applied with caution and is not to be a "catch all" ground to be used because it is convenient to terminate a request.

[194] Bearing in mind that the urgency point has been raised in this case not as a stand-alone ground of refusal but as a "part of the matrix" point, a reasonable decision-maker would, as part of the matrix, also take into account the context earlier referred to, including the extreme difficulties faced by Mr Dotcom in relation to funding and legal representation, that the pursuit of the information privacy requests had been the inevitable outcome of the earlier litigation in the Supreme Court and before Simon France J, that Mr Dotcom was represented by experienced, responsible counsel, that no other aspect of Mr Dotcom's defence to the extradition was characterised as vexatious and that in difficult, complex litigation simultaneously conducted on several fronts, missteps in litigation strategy could well occur. Finally, the District Court, High Court and Court of Appeal had made it abundantly clear that any further adjournment application would not be looked at with any sympathy.

[195] In all the circumstances we have concluded that there was no proper basis to regard the request for urgency as an indication the requests were not genuine and made with the intention of disrupting the extradition hearing. Furthermore, the Crown had ample remedies under the Privacy Act and under court processes (opposing any adjournment application). Terminating the requests by stigmatising them as vexatious was not objectively justifiable.

Claim: refusal to engage in a co-operative process

[196] The claim by the Crown is that the Solicitor-General attempted to engage Mr Dotcom in a process whereby the requests could be narrowed or refined. The Crown's written submissions asserted Mr Dotcom "had multiple opportunities to engage in a more constructive approach, but chose not to do so".

[197] We do not accept the correspondence can be so characterised:

> **[197.1]** The Solicitor-General's letter dated 5 August 2015 to Mr Dotcom's lawyers unambiguously declined the request for urgency and indeed deployed the request for urgency as part of the reason for equally unambiguously declining the entire request for information on the grounds it was vexatious:

7. 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.

[197.2] Contrary to the Crown's submission, Mr Dotcom's lawyers (Anderson Creagh Lai) did respond in detail to the points raise by the Solicitor-General. Their letter of 17 August 2015 is five pages in length.

[197.3] It is significant that in his first letter dated 5 August 2015 the Solicitor-General did not allege that the requests were not genuine and were intended to disrupt the hearing. When Anderson Creagh Lai on 17 August 2015 responded to the Solicitor-General's letter they could not address this issue as the allegation had not yet been made.

[197.4] The allegation that the requests were not genuine and intended to disrupt the hearing was first made by the Solicitor-General in his letter dated 31 August 2015 to Anderson Creagh Lai, an allegation repeated in the letter sent simultaneously by the Solicitor-General to the Privacy Commissioner. In these circumstances it is difficult to understand just what the Crown means by a "cooperative process". Particularly when the Solicitor-General stated in his 31 August 2015 letter that the Crown did not propose to take any further steps in relation to what the Solicitor-General conceded was "the refined request" in the Anderson Creagh Lai letter of 17 August 2015. We therefore do not accept the correspondence can be characterised as an invitation by the Solicitor-General for Mr Dotcom "to engage in a cooperative process":

> 4.3 We declined the transferred requests on the basis they were vexatious and included, due to the 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.
>
> 5. We do not propose to take any further steps in relation to Mr Edgeler's Privacy Act requests. We do not consider the refined request in your letter of 17 August 2015 to be a new request. If it is a new request, we consider it is not sufficiently focused to warrant a different response and we would therefore decline it on the same basis.

[197.5] The Crown's submission is also difficult to accept given that not knowing what personal information was held by the agencies, Mr Dotcom could not be expected to identify information which was relevant to the stay application. As he said: "you do not know what you do not know". The suggestion by the Solicitor-General that Mr Dotcom could be more specific was, in the circumstances, not helpful.

[197.6] Finally, the "process", such as it was, was inherently flawed in that it was not until the day on which the Solicitor-General sought advice from the Privacy Commissioner that the true ground for the refusal was disclosed to Mr Dotcom. He can hardly be blamed for failing to respond to the alleged "invitation" when the operative decline letter dated 5 August 2015 failed to disclose the actual basis on which the information privacy requests had been declined.

Claim: continuing attempts to vacate or disrupt the upcoming eligibility hearing

[198] The alleged attempts to vacate or disrupt are summarised in the Crown's submissions at footnote 167:

> … from May (when the fixture was set) to the beginning of August 2015 (when the requests were declined), these include objections to Crown Counsel appearing in the proceeding, a further application for a permanent stay, applications to suspend or recall the timetable for the necessary pre-hearing steps, and arguments to defer the eligibility hearing until the stay application was heard and determined.

[199] As to this, it remains the case that only one adjournment application was made by Mr Dotcom post-delivery of the judgment by Simon France J on 17 October 2014. That application was declined by the District Court but granted by the High Court. This can hardly be stigmatised as "disruption". The other matters of which the Crown complains are legitimate trial or litigation steps and cannot be characterised as attempts to disrupt the extradition and eligibility hearing. The Crown must accept that an extradition application is likely to be strongly resisted, the more so in Mr Dotcom's case given its history and context. But perhaps the two most important points are first, that the Crown specifically told the Tribunal that it was not contended that Mr Dotcom's defence of the extradition application was vexatious. The allegation that Mr Dotcom was attempting to disrupt the eligibility hearing is at odds with this concession. Second, whether the various applications had merit was not for the Solicitor-General to determine (the Crown was, after all, the party affected by the applications) but for decision by an independent judicial officer after hearing the parties.

Conclusion

[200] As earlier stated at [18], where an agency makes a decision under PA, Part 4 to refuse to make information available in response to an information privacy request, the Tribunal must reach the opinion that "there is no proper basis for that decision" before that "action" satisfies the definition of "interference with privacy" in PA, s 66(2). The test to be applied has been set out earlier at paras [18] to [23] of this decision.

[201] For the reasons given we have concluded (using the Crown's preferred formulation noted earlier at [146.4]) it was not within the parameters of a reasonably justifiable judgment call on the information then known for the Crown to reach the view that the requests were not genuine; that they were made as part of a scheme to defer or delay the eligibility hearing; that they were intended to vex and frustrate what the Crown described as its "legitimate and important goal of bringing the eligibility hearing to a conclusion without further delay" and that they were vexatious.

[202] The question is not whether the Crown subjectively held these views. It is whether the Tribunal is of the opinion there was no proper basis for those views. Assessing the circumstances objectively, we are of the clear view that on the facts known at the time there was no reasonably justifiable basis for the refusal decision. In the language of PA, s 66(2)(b), there was no proper basis for the refusal to make the information available.

[203] The Tribunal accordingly finds in respect of s 66(2)(a)(i) and (b) that there has been an interference with the privacy of Mr Dotcom. It is therefore necessary to address the question of remedies.

REMEDIES

The Tribunal's findings

[204] The Tribunal has made two findings which in summary are:

> **[204.1]** The transfer of the information privacy requests to the Attorney-General was not permitted by the transfer provisions in PA, s 39 and the Attorney-General had no lawful authority, as transferee, to refuse the requests.
>
> **[204.2]** In any event, in terms of PA, s 66(2)(b) there was no proper basis for the decision to refuse to disclose the requested information.

[205] These findings give the Tribunal jurisdiction under PA, s 85 to award one or more of the remedies listed in that section after taking the conduct of the defendants into account:

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

[206] As the findings are based on alternative scenarios, only one set of remedies can be granted. As will be seen the remedies granted under each alternative scenario are the same but they are not "doubled".

Remedies sought by Mr Dotcom

[207] The remedies sought by Mr Dotcom are detailed in his statement of claim. In broad terms they are:

> **[207.1]** A declaration of interference with his privacy (PA, s 85(1)(a)).
>
> **[207.2]** An order to perform directing the Crown to remedy that interference by providing access to the requested personal information (PA, s 85(1)(d)).

[207.3] Damages for loss of benefit (being loss of the benefit of the requested information in the extradition proceeding in the District Court and the appeal and judicial review in the High Court), loss of dignity and injury to his feelings (PA, s 88(1)(b) and (c)).

Submissions for the Crown

[208] The Crown made no submissions in respect of the declaration.

[209] As to the order to perform, it was accepted the Tribunal had jurisdiction to make the order sought provided the order recognised that the refusal of the requests occurred before any of the requested material was reviewed, or any other grounds were considered. It was submitted it would not be reasonable or appropriate for the Tribunal to direct any agency to comply with the requests without also allowing that agency to reserve its position on:

[209.1] Whether any other grounds to refuse some or all of the request apply (such as under PA, s 27, or whether the information sought is privileged, or would interfere with the privacy of other persons).

[209.2] Whether some or all of the request does not relate to personal information.

[209.3] Whether a transfer of part or all of the request is appropriate.

[209.4] The timeframe within which the request can reasonably be complied with; and

[209.5] The extent to which the information requested is readily retrievable.

[210] On the question of damages for loss of benefit (PA, s 88(1)(b)) the Crown submitted:

[210.1] Mr Dotcom had been unable to suggest what evidence relevant to his extradition might be held by the agencies to which the requests had been directed "that might be so new and compelling that it would shift the courts from the view that his allegations were highly speculative and unfounded".

[210.2] Both the District Court and the High Court had ruled that the allegations of misconduct made by Mr Dotcom, even if proved to be true, would have no effect on the courts' task of determining Mr Dotcom's eligibility for surrender. The District Court had struck out the stay application without hearing any evidence and the High Court had upheld that decision.

[210.3] There was no basis to consider that any documentation held by the range of Ministers and agencies to whom the requests had been sent would make any difference to these findings.

[210.4] There was a complete failure of causation as the information would have made no difference.

[210.5] Mr Dotcom had failed to respond to invitations to narrow his requests and to work constructively with the Crown agencies. It was this decision which was the direct cause of any harm, as well as a significant failure in mitigation.

[211] In respect of the damages claim for loss of dignity or injury to feelings, the submission was Mr Dotcom had adduced no evidence of loss of dignity or injury to feelings caused by the decision to decline his requests and it was not possible on the facts to infer such harm.

[212] We have decided all the remedies sought by Mr Dotcom are to be granted. Our reasons follow. However, we first address the conduct of the defendants who, consistent with the manner in which the case was conducted by the parties, will be referred to as the Crown.

Section 85(4) – the conduct of the defendant

[213] Section 85(4) provides that it shall not be a defence to proceedings that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal must take the conduct of the defendant into account in deciding what, if any, remedy to grant.

[214] In the present case we see no mitigating circumstances for the Crown.

[215] The criticisms levelled by the Crown against Mr Dotcom in the "remedies" section of the Crown's closing submissions are addressed separately. It will be seen those criticisms are not accepted.

A declaration

[216] While the grant of a declaration is discretionary, declaratory relief should not ordinarily be denied. See *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, Ms SL Ineson and Ms PJ Davies) at [107] and [108] and *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66 at [164].

[217] We have found the Crown to be in clear breach of its obligations under the Privacy Act. There has been no breach of standards by Mr Dotcom and in any event there is a very high threshold for exception. There is no disentitling conduct to deny Mr Dotcom expression of the findings made by the Tribunal in the form of a formal declaration.

An order to perform

[218] The Tribunal has a wide jurisdiction to grant a remedy in the form of an order to perform. Section 85(1)(d) provides:

(d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:

[219] Given that the entitlements conferred on an individual by Principle 6, cl (1) are a legal right (in the context of a public sector agency) to confirmation whether or not the agency holds personal information and to have access to that information, an order to perform is not ordinarily to be denied. We see no reason why, in the circumstances of the present case, such an order should be withheld. It will be obvious from the earlier sections of this decision that we see only reasons why the order should be granted.

[220] An order that a defendant provide access to personal information must be framed in terms which do not conflict with these provisions of the Privacy Act which apply to information privacy requests, particularly the provisions of Parts 4 and 5. It will be seen from the form of the order which follows later in this decision that the concerns expressed by the Crown have been addressed. We have also allowed a five working day pause before the 20 working day period in PA, s 40 begins to run. This will provide sufficient time for the Crown to give notice of our decision to the various agencies to which the original information privacy requests were addressed.

DAMAGES

Causation

[221] 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 PA, s 88(1)(a), (b) or (c). This causation requirement applies to both s 66(1) and s 66(2) cases. The plaintiff must show the defendant's act or omission was a contributing cause to the loss or harm in the sense that it constituted a material cause. See *Taylor v Orcon Ltd* [2015] NZHRRT 15, (2015) 10 HRNZ 458 at [59]-[61]:

> **[59]** While it has been accepted causation may in appropriate circumstances be assumed or inferred (see *Winter v Jans* HC Hamilton CIV-2003-419-8154, 6 April 2004 at [33]), it would appear no clear causation standard has yet been established in relation to s 66(1).
>
> **[60]** As pointed out by Gaudron J in *Chappel v Hart* (1998) 195 CLR 232, 238 (HCA), questions of causation are not answered in a legal vacuum. Rather, they are answered in the legal framework in which they arise. In the present context that framework includes the purpose of the Privacy Act which is to "promote and protect individual privacy" and second, the fact that s 66(1) does not require proof that harm has actually occurred, merely that it may occur. Given the difficulties involved in making a forecast about the course of future events and the factors (and interplay of factors) which might bring about or affect that course, the causation standard cannot be set at a level unattainable otherwise than in the most exceptional of cases. Even where harm has occurred it is seldom the outcome of a single cause. Often two or more factors cause the harm and sometimes the amount of their respective contributions cannot be quantified. It would be contrary to the purpose of the Privacy Act were such circumstance to fall outside the s 66(1) definition of interference with privacy. The more so given multiple causes present no difficulty in tort law. See Stephen Todd "Causation and Remoteness of Damage" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [20.2.02]:
>
> > Provided we can say that the totality of two or more sources caused an injury, it does not matter that the amount of their respective contributions cannot be

> quantified. The plaintiff need prove only that a particular source is more than minimal and is a cause in fact.
>
> **[61]** Given these factors a plaintiff claiming an interference with privacy must show the defendant's act or omission was a contributing cause in the sense that it constituted a material cause. The concept of materiality denotes that the act or omission must have had (or may have) a real influence on the occurrence (or possible occurrence) of the particular form of harm. The act or omission must make (or may make) more than a de minimis or trivial contribution to the occurrence (or possible occurrence) of the loss. It is not necessary for the cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. No form of words will ultimately provide an automatic answer to what is essentially a broad judgment.

[222] In *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [33] and [34] it was accepted that causation may in appropriate circumstances be assumed or inferred from the nature of the breach.

Damages for loss of benefit

[223] Section 88(1)(b) of the Act confers jurisdiction on the Tribunal to award damages against a defendant 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.

[224] It is to be noted the benefit can be of a monetary kind but is not required to be so and in a series of cases the High Court has given an expansive reading to "benefit".

[225] In *Proceedings Commissioner v Health Waikato Ltd* (2000) 6 HRNZ 274 a Privacy Act request was made in the context of an employment dispute before the (then) Employment Tribunal. Two letters which should have been provided to the requester were wrongfully withheld with the result the requester lost the benefit of utilising the letters in cross examination and in submissions before the Tribunal. The High Court accepted that was a benefit included in PA, s 88(1)(b) and awarded the requester $5,000 in damages. See [71]:

> [71] On the contrary, we are of the clear view that the evidence establishes that there was a loss of benefit of a non monetary kind occasioned by the denial of the opportunity to cross-examine Mr Dibble and make submissions on the letters at the Tribunal hearing. That disadvantage was exacerbated by the necessity to have to make a contested application to use the letters as fresh evidence on the appeal. The failure to take those matters into account, and to consider the loss of a non-monetary benefit in relation to them, amounts, in our judgment, to an error of law which justifies this Court interfering with the exercise of the CRT's discretion as to remedy.

[226] The High Court made three additional points relevant to Mr Dotcom's claim:

[226.1] 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 tribunal or on appeal. See [48], [70] and [71].

[226.2] A serious view was taken of the non-disclosure of the letters. See [49] and [50]:

> [49] As to the effect upon Mr Mason when he became aware of the letters and the fact that they had been withheld from him, we are of the view that his statement that he felt

> "ambushed" and stressed is what would be expected. Furthermore, he would not have had to incur the further expense and suffer the further stress of applying to have the letters introduced as evidence in the appeal and then facing the issue as to whether he abandoned that application or tolerated a further delay in bringing the matter to a conclusion. More importantly, however, it may be difficult for him to avoid carrying with him for the rest of his life the nagging doubt as to whether, had his rights not been denied to him in respect of these letters, the result of the litigation might have been different.
>
> [50] Experience of litigation and litigants (especially those who lose) suggests that the bitterness of this kind of experience never completely dissipates. Whereas many litigants who feel that their case has been conducted according to the rules and before an impartial tribunal will, in the end, accept defeat with good grace and put the experience behind them. It seems to this Court, with respect, that these aspects of the respondent's failure to disclose have either not been appreciated, or overlooked by the CRT. As will emerge later, we take a more serious view of the breach and its consequences than did the CRT.

[226.3] The High Court placed "considerable significance" on the fact the plaintiff had lost the benefit of feeling satisfied that his case had had the best presentation possible and that he had had "a fair crack of the whip". See [84].

[227] The decision in *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 involved a privacy case brought by Mr and Mrs Jans against a real estate agent (Mr Winter) who had been instructed to sell their farm at a mortgagee sale. Mr and Mrs Jans were unhappy with the outcome of the sale and requested a copy of Mr Winter's file relating to the sale. This was not done and it was eventually said by Mr Winter that the file had been lost. As recorded at [19] of the judgment, the Tribunal had found:

> The real detriment suffered by Mr and Mrs Jans was the burden of not knowing (nor now ever being able to find out) whatever it was that access to personal information about them on the Bayleys file might have revealed to them. If Mr and Mrs Jans were to sue the ANZ Bank or Bayleys for damages arising from the mortgagee's sale, they "will always wonder whether the outcome might have been different had they been able to have access to the personal information about them on the file held by Mr Winter". The fact that Mr and Mrs Jans will never know what personal information there was about them in the lost file must inevitably give rise to significant humiliation, and loss of dignity and injury to feelings under s 66(1)(b)(iii) of the Act;

[228] In upholding this finding the High Court at [48] agreed that the loss of benefit (for which a total of $8,000 was awarded in the form of $4,000 to each of Mr and Mrs Jans) was the benefit of not having certainty. The fact that Mr and Mrs Jans had not yet taken civil proceedings against Mr Winter or the mortgagee (the ANZ Bank) was not seen as of significance. See [46]:

> [46] There are some similarities between *Health Waikato* and the present case. In that case, the complainant did come to know what the letters that had been withheld contained, but his uncertainty was that he will never know whether the result of his Employment Tribunal case may have been more advantageous to him if those letters had been available for cross-examination at the hearing. The Court was of the view that if the letters had been available, the modest damages awarded to the complainant by the Employment Tribunal would probably have been increased. In the present case, Mr and Mrs Jans do not know whether there may have been documents which would have assisted them in a claim against either the ANZ Bank or Bayleys. However, for the reasons given in para 38, we do not place the same weight on this factor as did the Tribunal. In our view, the two cases are in many respects comparable, and there are grounds for saying that the situation faced by Mr and Mrs Jans was worse than the situation in which the complainant in the *Health Waikato* case found himself in. However, in our view the term "considerably worse" was not justified.

[229] The High Court made the following additional points:

[229.1] There must be a causal connection between the breach of the information privacy principle and the damages. However, causation may in appropriate circumstances be assumed or inferred. See [33].

[229.2] Anxiety and stress are "injury to feelings". See [36].

[229.3] Where it is proposed to make separate awards of damages arising from the same factual situation the total damages should have regard to the totality of the situation and there should be consideration as to whether or not the total damages are appropriate in the light of the defendant's default. See [49].

[230] In *Grupen v Director of Human Rights Proceedings* [2012] NZHC 580 the plaintiff had been represented by Ms Grupen (a lawyer) in two civil proceedings. A dispute arose over Ms Grupen's fees. That dispute went to a cost revision in which it became necessary for Ms Grupen to establish each of her attendances for which a fee had been charged. This she did by reference to handwritten entries in her diary recording the time spent and the nature of the attendance. However, she did not want to allow inspection of the diary entries by the plaintiff or by his solicitor. Instead she prepared what she said was a transcript of the relevant information. The plaintiff's solicitor made formal request for access to the diary entries from which the transcript had been taken. Ms Grupen refused. The Tribunal accepted the plaintiff had thereby lost a benefit, namely the certainty that would have come from comparing the transcript with the actual diary entries. The complainant had been left believing he may not have had a fair hearing in the cost revision. Damages of $5,000 were awarded under PA, s 88(1)(b). That award and the reasoning process were upheld by the High Court on appeal.

[231] These decisions have been followed and applied by the Tribunal. Examples follow. In *Director of Human Rights Proceedings v Schubach* [2015] NZHRRT 4 a legal representative failed to make available to his former client a letter (from the mother of the client's child) which could potentially have been deployed by the client either in Family Court proceedings or in settlement negotiations with the mother. Damages of $5,000 were awarded for loss of this benefit.

[232] In *Watson v Capital and Coast District Health Board* [2015] NZHRRT 27 two documents had been sought for use in proceedings before the Employment Relations Authority. The loss of benefit was not having the ability to utilise the documents in those proceedings or to request correction of the information which had been compiled by the employer. See [124] and [127]. Damages of $5,000 were awarded for loss of benefit.

[233] In *Director of Human Rights Proceedings v Hamilton* [2012] NZHRRT 24 the loss of benefit was the loss of an opportunity to obtain advice and assistance from an accountant to provide effective representation in dealing with Inland Revenue. Damages of $5,000 were awarded. See also *Director of Human Rights Proceedings v Valli and Hughes* [2014] NZHRRT 58 at [42.2]. In that case the failure by the employers to provide wage and time records led to the loss by the employee of the benefit of having his tax liability ascertained simply and efficiently. He had also lost peace of mind in relation to

his obligation to Inland Revenue. Again, damages of $5,000 were awarded for loss of benefit.

[234] Central to the Crown argument is that Mr Dotcom is required to prove that the withheld information would shift the courts from their finding that the allegations made by him in the stay application were unfounded. It was also submitted that even if proved to be true, the allegations would have had no effect on the eligibility decision.

[235] The short answer to this submission is that the law does not require Mr Dotcom to establish anything of the sort, as has been made clear by the High Court in *Health Waikato*. It is also the principle which underlies *Winter v Jans* (where at [38] express reference is made to the fact that no proceedings had been instituted) and *Grupen*. In addition, it is difficult to envisage any principle of law which would justify the implicit Crown contention that without knowing what information has been withheld, a plaintiff must establish that that information would have made a difference to the findings made by a court or tribunal which also has not seen the information.

[236] As to the submission that Mr Dotcom did not respond to "invitations" to narrow his requests, we have already addressed this point and rejected the claim. Mr Dotcom did respond, only to be faced with a new allegation (of improper motive) on 31 August 2015. The events subsequent to this date are too remote to have relevance and in any event there is no basis for alleging that Mr Dotcom did anything other than to reasonably pursue his requests.

[237] On the question of quantum, it is necessary to bear in mind the serious view the High Court has taken of the refusal to provide personal information which has been requested in the context of litigation. See *Health Waikato* at [50] and [69] and the explicit recognition in that case of what was described as a bitterness which never completely dissipates. The benefit which has been lost is aptly captured in the comments of Megarry J in *John v Rees* [1970] Ch 345 at 402:

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

[238] Assessment of the appropriate level of damages to be awarded under PA, s 88(1)(b) for loss of any benefit must be based on an objective assessment of the nature of the benefit which the aggrieved individual might reasonably have been expected to have obtained but for the interference, the seriousness of the interference and the surrounding circumstances.

[239] In the present case the mandated assessment must include the following:

[239.1] Mr Dotcom believes (correctly) that a wide range of agencies of the government of New Zealand have been collecting, storing and using personal information about him.

[239.2] It has been acknowledged by the New Zealand government that at least one such agency has unlawfully collected personal information about Mr Dotcom. See the extraordinary public apology by the then Prime Minister of New Zealand, Hon John Key, to Mr Dotcom following the release of a report into the unlawful monitoring of Mr Dotcom by the Government Communications Security Bureau (GCSB): Adam Bennett "PM apologies to Dotcom over 'basic errors'" *The New Zealand Herald* (New Zealand, 27 September 2012). The subsequent report by Rebecca Kitteridge *Review of Compliance at the Government Communications Security Bureau* (March 2013) at 12 likewise acknowledged:

> … that GCSB had unlawfully intercepted the communications of Mr Kim Dotcom.

[239.3] 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. 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. These are benefits of a substantial nature. Their loss is serious. The more so given that in the extradition context the discovery process is but limited and the Supreme Court has explicitly acknowledged the Privacy Act (and the OIA) have a proper role to play in supplementing court-sanctioned disclosure regimes.

[239.4] The interference with Mr Dotcom's privacy has been uniform across a wide spectrum of 52 agencies of the New Zealand government.

[240] These factors make Mr Dotcom's case exceptional, if not unique and the level of awards made in the earlier High Court and Tribunal decisions referred to provide no useful guidance. Furthermore, the awards in *Health Waikato* and in *Winter v Jans* are somewhat dated and require upwards recalibration. 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 that same $5,000 be compounded at 3% it would presently be worth $8,264. If compound interest at 5% is applied the adjusted figure is $11,460. The overarching point, however, is that the facts of Mr Dotcom's case are unique and comparisons with earlier awards unhelpful.

[241] To avoid a possibly artificial apportionment of damages among all the defendants and in the interests of arriving at a figure which in its totality represents an appropriate award, we intend making an award against "the Crown" as represented by the Attorney-General.

[242] Doing the best we can, we are of the view an award of $30,000 properly recognises the nature of the benefits which Mr Dotcom might reasonably have expected to have obtained but for the interference with his privacy.

Damages for loss of dignity or injury to feelings

[243] Section 88(1)(c) confers jurisdiction on the Tribunal to award damages against a defendant for:

> humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

[244] As mentioned, Mr Dotcom does not rely on the "humiliation" ground.

[245] The Crown is mistaken in submitting Mr Dotcom adduced "no evidence at all" of loss of dignity or injury to feelings caused by the decision to decline his requests. 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. Mr Dotcom was at pains to explain why he has been pursuing disclosure by the Crown for a period of years, first to the Supreme Court and then to the High Court. The judgment of Simon France J made it clear he would have to use the Privacy Act provisions which allow for requests for access to information to be addressed directly to a particular agency. When he took that step his request was stigmatised as vexatious and "not genuine and … intended to disrupt the extradition hearing". We have found it was nothing of the sort.

[246] 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 had 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.
>
> …
>
> 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.

[247] Given we have accepted Mr Dotcom as a credible witness we are of the view he has clearly and unambiguously established loss of dignity and injury to feelings as defined in *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66 at [170] and we adopt all that is said there regarding the application of PA, s 88(1)(c). The passage is too long for repetition here.

[248] Furthermore the decision in *Winter v Jans* explicitly acknowledged at [32] to [36] that anxiety and stress are included in "injury to the feelings" and that the forms of harm listed in PA, s 88(1)(c) may in appropriate cases be assumed or inferred. The qualification advanced by the Crown (that those occasions should be rare) is not supported by the decision or by principle. It would place a premium on the plaintiff using the words of the section in the course of his or her evidence and on "talking up" the form of harm. It would result in otherwise cogent claims, such as the present, being wrongly discounted or dismissed.

[249] Then the Crown submitted it would not be legitimate to award damages against an agency "to compensate a person for injury to feelings arising from their own unproven conspiracy theories (even if genuinely held)". As we hope will be clear, we find that Mr Dotcom has established loss of dignity and injury to feelings and that such loss and injury are causally connected to the interference with his privacy. They are also causally connected to the grounds on which his request for personal information was refused. The unjustified allegation that his requests were vexatious, not genuine and intended to disrupt the extradition hearing contained a real sting. Unsurprisingly, loss of dignity and injury to feelings followed. In addition a litigant's desire to pursue the truth and to secure a fair hearing is not, without good reason, to be cynically dismissed. The compensation to be awarded to Mr Dotcom has nothing to do with the alleged "unproven conspiracy theories".

[250] As to quantum, it was recognised in *Hammond* at [170.5] that the nature of the harm for which damages can be awarded under PA, s 88(1)(c) means there is an inevitably subjective element to their assessment. Each case is fact specific and cases also turn on the personality of the aggrieved individual as underlined by the passage from *Vento v Chief Constable of West Yorkshire Police* which is cited in *Hammond* at [170.5]:

> [170.5] The very nature of the s 88(1)(c) heads of damages means there is a subjective element to their assessment. Not only are the circumstances of humiliation, loss of dignity and injury to feelings fact specific, they also turn on the personality of the aggrieved individual. These challenges were acknowledged in *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ1871 at [50] and [51]:
>
> > 50. It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. As Dickson J said in *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452 at 475-476, (cited by this Court in *Heil v Rankin* [2001] QB 272 at 292, paragraph 16) there is no medium of exchange or market for non-pecuniary losses and their monetary evaluation
> >
> > > "... is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

> 51. Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury.

[251] For loss of dignity and stress Mr Dotcom submitted an award of between $10,000 to $20,000 should be made against Crown Law and the Attorney-General while $5,000 to $10,000 should be awarded against each of the other defendant agencies. The higher award against Crown Law and the Attorney-General was said to be justified on the basis that they "orchestrated the non-disclosure and unlawful transfer of the requests".

[252] As to this the award of damages under PA, s 88(1)(c) is to compensate for humiliation, loss of dignity or injury to feelings, not to punish the defendant and in proceedings under the Privacy Act the Tribunal has no jurisdiction to award exemplary damages.

[253] In addition, if accepted, the submission that separate awards be made against each defendant could jeopardise the twin principles that:

> **[253.1]** An award of damages must be an appropriate response to adequately compensate the aggrieved individual for the humiliation, loss of dignity or injury to feelings caused by the particular defendant. In the unusual circumstances of the present case, the "defendant" was in substance the Crown (sued through the Attorney-General) and for that reason there should be only one award of damages against the Attorney-General as representing the Crown, not against each individual defendant named in the intituling. Section 105 of the Human Rights Act 1993 (incorporated into the Privacy Act by s 89 of the latter Act) reinforces the duty of the Tribunal to act according to the substantial merits of the case without regard to technicalities.
>
> **[253.2]** The damages awarded must have regard to what in *Winter v Jans* at [49] was described as the "totality of the situation". It is the appropriateness of the total damages which must be considered.

[254] In determining the appropriate award of damages we do not intend reciting again the particular circumstances of Mr Dotcom's case. Briefly, they include the unfounded stigmatisation of his requests as vexatious and the equally unfounded assertion that the requests were not genuine because they were intended to disrupt the extradition hearing. Mr Dotcom's very genuine pursuit of the truth and his fully justified desire for a fair hearing had taken him first to the Supreme Court and then to the High Court. In both fora he had been told, in effect, to use the Privacy Act by addressing information privacy requests to the relevant state agencies. When he did so, the requests were without justification characterised as not genuine, vexatious and intended to disrupt the extradition hearing. The resulting loss of dignity and injury to feelings was substantial and for these reasons the upper end of the middle band in *Hammond* applies. In our view the appropriate award against the Attorney-General (as representing the Crown) is $60,000. In arriving at this

sum we have taken care to ensure that none of the elements which go to make up the award of damages for loss of benefit have been taken into account for a second time.

FORMAL ORDERS

[255] For the foregoing reasons the decision of the Tribunal is that it is satisfied on the balance of probabilities that an action of the Crown (represented by the Attorney-General) was an interference with the privacy of Mr Dotcom and

[255.1] A declaration is made under s 85(1)(a) of the Privacy Act 1993 that there was an interference with the privacy of Mr Dotcom by:

[255.1.1] The transfer, without legal authority, to the Attorney-General of the information privacy requests made by Mr Dotcom in July 2015. The Attorney-General had no lawful authority, as purported transferee under the Privacy Act 1993, s 39(b)(ii), to refuse the requests on the grounds that they were vexatious and there was no proper basis for that refusal; in the alternative, if the transfers were lawful:

[255.1.2] Refusing the information privacy requests on the grounds that they were vexatious when there was no proper basis for that decision.

[255.2] An order is made under s 85(1)(d) and (e) of the Privacy Act 1993 that the agencies (including the Ministers of the Crown) to which the information privacy requests were sent by Mr Dotcom in the period 17 to 31 July 2015 must comply with those requests subject to the provisions of the Privacy Act 1993 and in particular (but not exclusively) Parts 4 and 5 of that Act. For the purposes of this order the date of receipt of the requests is to be taken to be the fifth working day which follows immediately after the day on which this decision is published to the parties.

[255.3] Damages of $30,000 are awarded against the Attorney-General under ss 85(1)(c) and 88(1)(b) of the Privacy Act 1993 for the loss of a benefit Mr Dotcom might reasonably have been expected to obtain but for the interference.

[255.4] Damages of $60,000 are awarded against the Attorney-General under ss 85(1)(c) and 88(1)(c) for loss of dignity and injury to feelings.

COSTS

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

[256.1] Mr Dotcom is to file his submissions within 16 days after the date of this decision. The submissions for the Crown are to be filed within the 14 days which follow. Mr Dotcom is to have a right of reply within 7 days after that.

[256.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

[256.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Ms GJ Goodwin**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**

Appendix One

Edited Chronology

Date	Event/Correspondence	Agreed Bundle of Documents Reference (Vol./Page)
17 October 2014	Simon France J dismisses Dotcom's applications in CIV-1297 for judicial review of the District Court decision to refuse disclosure orders [2014] NZHC 2550	ABD 8/2340
30 October 2014	First application for stay filed in District Court, alleging abuse of process through misconduct by authorities. Mr Dotcom and other respondents apply to District Court for adjournment of extradition hearing	ABD 9/2376; ABD 9/2381
7 November 2014	Mr Dotcom's lawyers and counsel, Simpson Grierson and Mr Davison QC advise they have terminated their engagement to act for Mr Dotcom.	ABD 9/2384
17 November 2014	District Court conference. Mr Davison QC seeks leave to withdraw, Mr Graeme Edgeler enters an appearance for Mr Dotcom, saying he was instructed the Thursday prior. Mr Davison QC files a memorandum advising the court of the reasons for the termination of his and SG's engagement which are "private and confidential" and not intended to secure an advantage for the application for adjournment or the stay application. Crown opposes adjournment. Eligibility hearing in February vacated and fixture set for June 2015	ABD 9/2389
17 December 2014 *From plaintiff's chronology*	*Anderson Creagh Lai Limited (ACL) and Ron Mansfield formally engaged as Mr Dotcom's solicitors and counsel respectively*	
19 December 2014	Memorandum from Ron Mansfield and Simon Cogan confirming their instructions for Mr Dotcom, advising "at this stage availability of funding for legal representation is the only issue that will be determinative of whether Mr Dotcom's counsel is ready to proceed with the	ABD 9/2521

	current fixture." Foreshadows an application to release funding to the High Court	
23 December 2014	Supreme Court upholds validity of the search warrants ([2014] NZSC 199)	
23 December 2014	Mr Dotcom application to vary the restraining order to release funds for living and legal expenses.	ABD 9/2536
2015		
18 February 2015	Mr Dotcom applies to the District Court to adjourn the June 2014 fixture for the eligibility hearing	ABD 9/2551
26 February 2015	High Court hearing in CIV-33 on release of funds from freezing order.	ABD 8/2556
12 March 2015	Orders in in CIV-33 variation to restraining orders releasing further $700,000 for immediate legal and living expenses [2015] NZHC 458.	ABD 8/2556
16 March 2015	District Court Minute declining application to adjourn and confirming fixture on 2 June 2015.	ABD 9/2568; ABD 9/2590
19 March 2015	Mr Dotcom files application for judicial review of the District Court's decision to refuse adjournment (CIV-2015-404-564)	ABD 9/2570
9 April 2015 *From plaintiff's chronology*	*Commissioner of Police applied to the High Court to register the United States forfeiture order*	
10 April 2015 *From plaintiff's chronology*	*Mr Dotcom filed a notice of opposition to registration of the United States forfeiture order*	
18 April 2015	High Court varies restraining order to allow access to the remaining $3.9 million bond funds to be accessed at a rate of $170,000 per month for his living expenses (reasons delivered 23 April 2015)	ABD 10/2745; ABD 10/2748; ABD 10/2841
20 April 2015 *From plaintiff's chronology*	*Mr Dotcom and Mr van der Kolk commenced High Court proceedings seeking interim orders restraining the Commissioner from pursuing the application for registration of the United States forfeiture order*	
1 May 2015	Katz J decision in CIV-564 [2015] NZHC 901. Adjourning eligibility hearing to date	ABD 10/2858

	no earlier than 1 September, because of new legal team, but dismissing other challenges. Notes Mr Dotcom's legal team could have commenced preparation for eligibility hearing from 13 March onwards.	
6 May 2015	District Court confirms fixture for eligibility hearing 21 September	ABD 10/2902
21 May 2015	Memorandum from Mr Dotcom and other respondents to District Court seeking a teleconference and informing the Court that a timetable could not be agreed, asserting a 'strategy' to deprive them of funds, and alleging a conflict of interest by Crown Law in acting in the extradition proceeding, such that Crown Law must withdraw from the extradition and all other proceedings involving Mr Dotcom. Also stating that any timetable for the eligibility hearing could not be set until the Court of Appeal had decided an appeal against Katz J's decision in CIV – 564 (not filed).	ABD 11/2925
27 May 2015	Memorandum for Mr Dotcom and other respondents for the upcoming District Court teleconference, including formal objection to counsel from the Crown Law Office appearing at the teleconference due to alleged conflicts of interest.	ABD 11/2972
3 June 2015 *From plaintiff's chronology*	*Ellis J issued a judgment restraining Deputy Solicitor-General and the Commissioner of Police frim taking further steps to register the United States forfeiture order*	
8 June 2015	Application in CIV-2168 (damages claim) that Crown Law cease to act for defendants	ABD 11/3065
8 June 2015	Crown submissions filed in eligibility hearing	ABD 11/3074; ABD 12/3208
10 June 2015	Mr Dotcom memorandum to District Court seeking adjournment of teleconference, referring to the Crown prejudicing their ability to prepare for the eligibility hearing through depriving them of funds, and arguing that a timetable for the eligibility hearing should not be made	ABD 12/3410

11 June 2015	District Court Minute setting timetable for remaining steps in preparing for eligibility hearing	ABD 12/3418
23 June 2015 *From plaintiff's chronology*	*The United States provides an assurance to counsel for Mr Dotcom that the United States government would not take action against NZ citizens who received forfeited funds*	
26 June 2015	Mr Dotcom and other respondents seek recall of the District Court timetable orders and suspension of the timetable, and ask the Court to hear and determine a new application for stay of the proceeding on the ground of abuse process, prior to hearing on eligibility	ABD 12/3458
3 July 2015	District Court Minute declining to take action on memorandum (and subsequent other documents filed by the respondents), indicating that formal applications are required	ABD 12/3473
13 July 2015	High Court adjourns application to disqualify Crown Law from representing the Crown in CIV-2168 at the plaintiff's request and adjourns application for security for costs at AG's request, until after eligibility hearing	ABD 12/3474
14 July 2015	Second ('funding') application to District Court to permanently stay extradition process and affidavit of Dotcom in support. Alleges abuse of process from (1) funding and (2) allegations of conflict of interest by Crown Law.	ABD 12/3476; ABD 12/3488
17-31 July 2015	Privacy Act requests sent to all Ministers and most government departments (July 2015 Requests)	ABD 12/3507-3511; ABD 13/3512-3554; ABD 13/3581; ABD 13/3583; ABD 13/3622; ABD 13/3623; ABD 13/3624-3628; ABD 13/3695-3725.
20 July 2015	Mr Dotcom files memorandum in support of funding stay application	ABD 13/3562
21 July 2015	District Court declines to set fixture for the stay applications ahead of the eligibility hearing and confirms the existing timetable orders	ABD 13/3579
30 July to 10 August 2015	Transfer responses in respect of the July 2015 Requests	ABD 13/3793 – ABD 15/4249

5 August 2015	Crown Law declines July 2015 Requests	ABD 15/4170
5 August 2015	Mr Dotcom files application for judicial review of District Court timetabling, and for stay of eligibility proceedings (CIV-1770). Application for proceeding to be heard urgently with similar application from co-respondents.	ABD 15/4179; ABD 15/4211
12 August 2015	Dotcom affidavit in support of JR and stay in CIV-1770	ABD 17/4886
13 August 2015	High Court declines urgent fixture for JR of decline to hear application for stay prior to eligibility	ABD 15/4254
17 August 2015	Mr Dotcom responds to Crown Law's decline of the Privacy Act requests.	ABD 15/4259
Plaintiff's chronology states:	*ACL wrote to Crown Law to seek urgency in respect of eight Original Requests only.* This is incorrect – see ADB 15/4259 at [14] and [21]	
17 – 19 August 2015	Mr Dotcom makes five targeted OIA requests with urgency to Minister and Ministry of Justice and a further two OIA requests to DPMC (August 2015 Requests)	ABD 15/4264; ABD 15/4275; ABD 15/4280
21 August 2015	Mr Dotcom files appeal against High Court decision in CIV-1770 refusing to grant an urgent fixture for the judicial review of the District Court time table orders and application for permanent stay	ABD 15/4387
21 August 2015	Mr Dotcom files an amended misconduct stay application for stay. Memorandum foreshadows need for security clearance for the Judge and counsel, a secure court and up to 16 witnesses	ABD 15/4376
28 August 2015	Minister of Justice transfers the August 2015 Request to the Ministry of Justice	ABD 16/4512
31 August 2015	Crown Law response to Mr Dotcom on July 2015 requests; Crown Law refers issue to Privacy Commissioner	ABD 16/4520; ABD 16/4522