IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA195/2019
[2020] NZCA 551

BETWEEN	KIM DOTCOM Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	14 and 15 July 2020
Court:	French, Brown and Clifford JJ
Counsel:	R M Mansfield and S L Cogan for Appellant V E Casey QC and A P Lawson for Respondent B J R Keith and J M Hayward for Privacy Commissioner as Intervener
Judgment:	10 November 2020 at 11.00 am

JUDGMENT OF THE COURT

A We answer the questions of law submitted for determination by this Court:

(1) Can a request for personal information under the Privacy Act 1993 be transferred by the recipient to another agency where the request seeks urgency and the basis for the urgency request is not a matter that the recipient is able to sensibly assess but the agency to which the request is transferred is the only agency able to properly evaluate the claimed basis for the urgency request?

No. A transfer of an information privacy request under s 39(b)(ii) of the Privacy Act is permissible only if the person dealing with the request believes the information to which the request relates to be

more closely connected with the functions or activities of the transferee agency. The fact that a requestor seeks urgent treatment of an information request, whether or not in the same document as the request, does not comprise part of the information to which the information request relates.

(2) Is a request for urgency under s 37 of the Privacy Act 1993 a relevant factor for an agency in determining whether to refuse a request for personal information under s 29(1)(j) of that Act?

Yes, it may be a relevant factor. Although the mere fact of a request for urgency would not of itself generally be a proper basis for a finding of vexatiousness, we cannot exclude the possibility of there being circumstances where an inference of vexatiousness could be drawn from a request for urgency. Examples of such circumstances might include a grossly excessive number of requests for urgency or reasons given for urgency that are not credible. All will depend on the context in which the request for urgency is made.

B The appeal is allowed to the extent reflected in the answers to the approved questions.

C The proceeding is remitted to the Human Rights Review Tribunal for reconsideration of the issue of damages in respect of the interference with the appellant's privacy by the wrongful transfer of the appellant's information privacy requests.

D The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

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REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] This judgment addresses questions (a) concerning the procedure for transfer between agencies of information privacy requests under the Privacy Act 1993 (the Act) and (b) the significance of a request for urgency as a factor in the determination of whether an information request should be refused as vexatious.

[2] In July 2015 Mr Dotcom sent information privacy requests to some 52 agencies comprising 24 departments and Crown agencies and all Ministers of the Crown. Mr Dotcom asked that the requests for all personal information held by the recipients, colloquially known as "everything" requests, be treated as urgent for the reason that the information was required for "pending legal action". It was common ground that

the litigation referred to included an extradition eligibility hearing in the District Court then due to commence on 21 September 2015.

[3] Following an apparently unsolicited communication from Crown Law, nearly all the requests were transferred by the recipient agencies to the Attorney-General in reliance on s 39(b)(ii) of the Act, namely that the information to which the request related was believed by the person dealing with the request to be "more closely connected with the functions or activities" of the Attorney-General.

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

[5] Mr Dotcom's complaint to the Privacy Commissioner that the transfer of his requests and their subsequent declinature constituted an interference with his privacy[1] for which there was no basis was rejected in June 2016. However in Mr Dotcom's proceeding before the Human Rights Review Tribunal, the Tribunal concluded:[2]

(a) The Attorney-General was not the lawful transferee of the requests because the information to which the request related was not more closely connected with the functions or activities of the Attorney-General than with those of the transferring agencies.

(b) The decline of the urgency request did not justify declining the information privacy requests themselves on the grounds of vexatiousness.

[6] On appeal, the High Court concluded:[3]

> [239] The appeal is allowed. We find that there was a proper and lawful purpose for the transfer of the requests and that, because of the insistence that

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1 Privacy Act 1993, s 66(2).
2 *Dotcom v Crown Law Office* [2018] NZHRRT 7 [Tribunal decision].
3 *Attorney-General v Dotcom* [2018] NZHC 2564 [High Court judgment].

all 52 requests were required to be responded to urgently, on the ground that the information sought was relevant to the eligibility proceedings, they were vexatious.

[7] Pursuant to leave two questions of law are submitted to this Court for determination:[4]

> **Question 1:** Can a request for personal information under the Privacy Act 1993 be transferred by the recipient to another agency where[5] the request seeks urgency and the basis for the urgency request is not a matter that the recipient is able to sensibly assess but the agency to which the request is transferred is the only agency able to properly evaluate the claimed basis for the urgency?
>
> **Question 2:** Is a request for urgency under s 37 of the Privacy Act 1993 a relevant factor for an agency in determining whether to refuse a request for personal information under s 29(1)(j) of that Act?

The statutory framework

[8] The Act has the objective of promoting and protecting individual privacy[6] and in particular establishing certain principles with respect to access by individuals to information relating to them held by public and private sector agencies.[7] Part 2 of the Act details the 12 information privacy principles. Of particular relevance in the present case is principle 6.

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4 Pursuant to s 124 of the Human Rights Act 1993 which is imported into the Privacy Act by s 89. In respect of question 1 pursuant to leave of the High Court in *Dotcom v Attorney-General* [2019] NZHC 740. In respect of question 2 pursuant to leave of this Court in *Dotcom v Attorney-General* [2019] NZCA 509 [Leave judgment].

5 The word "because" instead of "where" would better reflect the reasoning of the High Court that a transfer to Crown Law was justifiable because the request for urgency was on account of the pending extradition hearing: see [85] below.

6 In general accordance with the Recommendation of the Council of the Organisation for Economic Co-operation and Development Concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data.

7 See the long title of the Privacy Act.

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.

[9] Procedural provisions relating to access to personal information are specified in pt 5. An agency to which an information privacy request is made shall as soon as reasonably practical and in any case not later than 20 working days after the day in which the request is received by that agency:[8]

(a) decide whether the request is to be granted; and

(b) give or post to the individual who made the request notice of the decision on the request.

[10] Where an information privacy request made by an individual is refused the agency shall give to the individual the reason for its refusal.[9] Part 4 of the Act prescribes what are good reasons for refusing access to personal information. Section 27 addresses reasons relating to security, defence and international relations, s 28 relates to the protection of trade secrets and s 29 details several other reasons for the refusal of requests. Relevant to this case is s 29(1)(j):

(1) An agency may refuse to disclose any information requested pursuant to principle 6 if—

…

8 Section 40(1).
9 Section 44.

(j) the request is frivolous or vexations, or the information requested is trivial.

[11] Section 38 directs that individuals making information privacy requests are to be provided with reasonable assistance:

38 Assistance

It is the duty of every agency to give reasonable assistance to an individual, who—

(a) wishes to make an information privacy request; or

(b) in making such a request, has not made the request in accordance with the requirements of this Act; or

(c) has not made his or her request to the appropriate agency,—

to make a request in a manner that is in accordance with the requirements of this Act or to direct his or her request to the appropriate agency.

[12] Section 39 makes provision for the transfer of requests between agencies:

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.

[13] Urgency may be sought in relation to information privacy requests:

> **37 Urgency**
>
> If an individual making an information privacy request asks that his or her request be treated as urgent, that individual shall give his or her reasons why the request should be treated as urgent.

[14] Conduct which constitutes an interference with the privacy of an individual is addressed in s 66 in pt 8, dealing with complaints. Section 66(2) states:

> (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.

Given the inclusive definition, it appeared to be common ground that a decision to transfer a request under s 39 would fall within s 66(2)(a).

Factual background

[15] On 18 January 2012 extradition proceedings were commenced by the United States of America against Mr Dotcom and three other persons. Following their

arrest on 20 January 2012, extensive and complex litigation ensued which it is unnecessary to document. The eligibility hearing date was set for 15 February 2015, but was adjourned until 2 June 2015 after Mr Dotcom's lawyers withdrew. The hearing was again adjourned by the High Court on 1 May 2015. On 6 May 2015 a new date of 21 September 2015 was confirmed.

Mr Dotcom's information privacy requests

[16] Mr Dotcom had previously made a substantial number of requests of government agencies under both the Official Information Act 1982 and the Privacy Act seeking information they held in relation to him. Responses were provided by several government agencies.

[17] On various days in July 2015 Mr Edgeler, acting on behalf of Mr Dotcom, sent information privacy requests to all Ministers and most government departments and agencies, all in the following format:

> 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.

The transfers of the requests

[18] Initially the recipients acted in various ways. Some such as the Reserve Bank responded to the request. Some, such as the Ministry of Defence, acknowledged the request and indicated that a response was being prepared. Some recipients initiated inquiries about relevant documentation.

[19] However on a date unknown, but which we infer to be in late July or early August, Crown Law sent a communication to most of the agencies following which those agencies then transferred the information requests to the Attorney-General. Privilege was claimed for the communications from Crown Law to the agencies, hence their precise content is unknown.

[20] However several of the recipients wrote to Mr Edgeler advising him in identical terms of the transfer to the Attorney-General. An example is the letter from the Ministry of Justice of 4 August 2015 which read:

> Thank you for your email of 20 July 2015 requesting, under the Privacy Act 1993, on behalf of your client Mr Kim Dotcom:
>
> > "all personal information that you hold about Kim Dotcom including under his previous names Kim Schmitz, and Kim Vestor."
>
> You have asked that the response include:
>
> > "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."
>
> 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.

[21] This letter, like several others from other agencies, contained an erroneous reference to s 39(a)(ii). The correct provision is s 39(b)(ii). Mr Mansfield inferred, and we agree, that the repetition of that error suggests that the Crown Law communication had provided a template response which contained that error. Furthermore as the High Court correctly observed,[10] the template response mis-stated the focus of s 39(b)(ii) for it is not the request, but the information to which the request relates, which needs to be believed to be more closely connected with the functions or activities of the other agency.

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[10] High Court judgment, above n 3, at [98].

The Solicitor-General's letters to Mr Dotcom's legal advisers

[22] On 5 August 2015 the Solicitor-General sent a letter to Mr Edgeler which addressed the various information requests in a global way. This letter is significant in a number of respects. Hence we highlight the different aspects.

[23] First the letter addressed the co-ordination of responses on behalf of the Attorney-General:

> 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 2012 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.

[24] The letter then addressed the fact that urgency had been sought.

> 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.

[25] The letter then advised that the information requests were declined together with the reason:

> 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.

[26] The letter concluded in this way:

> 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.

[27] In response Anderson Creagh Lai sent a letter to the Solicitor-General dated 17 August 2015 recording that the purported transfer of the requests either to Crown Law or to the Attorney-General was not accepted as permitted or lawful and requesting that the Solicitor-General "review the same".

[28] The Solicitor-General responded in a letter of 31 August 2015 which materially stated:

> 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.
>
> (Footnote omitted.)

The Solicitor-General's request for advice from the Privacy Commissioner

[29] The Privacy Commissioner has had reason to be engaged with this dispute on three distinct occasions. The first was as a consequence of a letter dated 31 August 2015 from the Solicitor-General requesting advice from the Privacy Commissioner pursuant to s 13(1)(l) of the Act on the Solicitor-General's response to date and intended response to Mr Dotcom's information requests. The letter explained the basis for declining the request under s 29(1)(j):

> 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.

[30] With reference to the rationale for the transfer of the requests the letter stated:

> 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. To use Mr Cogan's example, if Mr Dotcom genuinely wants to request information about his drivers' licence, there would be no basis to transfer that request to Crown Law. Nor would there be any reason linked to the litigation to treat that request as urgent.

[31] The Privacy Commissioner provided a draft response dated 10 September 2015 which he discussed with the Solicitor-General at a meeting on 21 September 2015. The Solicitor-General then provided comments on the draft advice in a letter of 1 October 2015. The Privacy Commissioner provided a final response dated 9 October 2015 addressing both refusal grounds and procedural issues, in particular transfer and urgency.

[32] In that letter the Privacy Commissioner explained that he did not consider it appropriate to go quite so far as the Solicitor-General might have wished with advice on the merits of the process set out in the Solicitor-General's letter. He flagged two aspects of the Solicitor-General's narration which suggested further inquiry, the first concerning the transfer decisions:

> First, it would be my expectation that prior to taking any decision to transfer a request to another agency under section 39(a)(ii), the person dealing with the request would review the personal information it holds, or a sample of it, in order to inform their belief as to the appropriateness or necessity of the transfer.

[33] The Privacy Commissioner also offered a provisional view on the merits of the urgency request:

> My provisional view, based on the information provided, is that the reasons given for urgency are not sufficient to place an onus on the responding agencies to deal with the requests urgently. The fact of the current litigation between the parties does not in my preliminary view provide a sufficiently specific reason to support the request for urgency, without more particulars being provided by the requester.

However, apart from what he described as general and preliminary comments, he caveated his response in this manner:

> I am not able to go further by way of advice or conclusions as to the approach taken to date without engaging in a process of investigation of the information held by the different agencies, and the ways in which they have made their decisions. However I am happy to provide some general observations and share my understanding of the operation of the Act in relation to transfers, requests for urgency, and the approach this office has taken in the past in relation to specific withholding grounds.

Mr Dotcom's complaint to the Privacy Commissioner

[34] The Solicitor-General's letter of 5 August 2015 to Mr Edgeler had concluded by noting that Mr Dotcom had the right under s 67 of the Act to make a complaint to the Privacy Commissioner in relation to the refusal of his requests. Mr Dotcom did so. This prompted the Privacy Commissioner's second phase of participation in the dispute. On 28 October 2015 Anderson Creagh Lai sent a letter to the Privacy Commissioner making a complaint in relation to (a) the transfer of Mr Dotcom's request from the individual recipient agencies to Crown Law and (b) the Crown Law response refusing the requests in their entirety. An exchange of correspondence followed.

[35] The Office of the Privacy Commissioner's letter dated 28 April 2016 expressing the preliminary view that there had been no interference with Mr Dotcom's privacy explained that the Commissioner was not limited by the position advanced by the parties or the form in which decisions had been made. The conclusion was based on the new ground that a transfer of the requests under s 39 was not necessary because Crown Law was entitled, as the government's legal adviser, to act on behalf of the agencies, including in respect of Privacy Act requests. As the Tribunal later observed,[11] this letter implicitly rejected the Crown's contention that the requests had been transferred to the Attorney-General under s 39(b)(ii).

[36] In a letter dated 15 June 2016 the Office of the Privacy Commissioner recorded its final view that Mr Dotcom's complaint of a significant and sustained interference with his privacy did not have substance. With reference to the issues of transfer and urgency the letter stated:

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[11] Tribunal decision, above n 2, at [55].

The transfer of the requests

9. You advise you consider the respondents have unlawfully delegated their decision making obligations in breach of the Privacy Act. With respect, we do not consider they have.

10. In the alternative, you consider that the addressee agencies did not properly or lawfully transfer the requests to Crown Law. As I explained in my earlier letter, the inquisitorial approach the Privacy Act provides for our investigations enables us to consider matters not raised by either party. On close examination we have determined that Crown Law acted lawfully as legal adviser to the addressee agencies.

…

The request for urgency

17. There is no obligation under the Privacy Act for an agency to accept a request for urgency, only to consider it. It appears to us that they did.

[37] Concerning the substantive decision to decline the information requests the letter further said:

12. In this case we have not concluded that all personal information held by the Crown about your client is trivial, but we have concluded that because of the breadth of the requests they included trivial material.

13. The totality of Mr Dotcom's requests met the legal test for section 29(1)(j) of the Privacy Act, as set out in my letter of 28 April 2016. While the test focuses on whether a particular request for information is frivolous or vexatious, the overall volume and extent of Mr Dotcom's requests indicate that the individual requests were designed to frustrate or vex the respondents.

14. In your 26 May letter you note that in order for a request to be vexatious, it must have been intended to be so by the requester. The test, as outlined in my 28 April letter, is objective and so Mr Dotcom's intent does not change my assessment of this matter. Further, the fact that the respondents not represented by Crown Law responded to Mr Dotcom's request is not relevant to this determination.

[38] The letter concluded with advice that, while the Privacy Commissioner could not take the issue further, Mr Dotcom was free to take a case to the Tribunal. Certificates of Investigation which would be required for that process were enclosed.

Mr Dotcom's claim to the Tribunal

[39] Mr Dotcom filed a claim in the Tribunal alleging interference with his privacy by the alleged unlawful transfer of the requests in breach of s 39, the unlawful refusal to deal with the requests urgently and the wrongful refusal of the requests in breach of s 40. He sought a declaration that the various unlawful acts amounted to an interference with his privacy, an order that any interference be remedied by the provision of access to his personal information in accordance with the requests as a matter of urgency, and damages in the amount of $200,000 for the loss of the benefit of the requested information in the extradition proceedings and for humiliation, loss of dignity and injury to his feelings.

[40] The Crown filed a reply in which it asserted that:

(a) the requests included requests for information that was not personal information within the scope of the privacy principles in the Act;

(b) the requests were vexatious and frivolous and the information sought was largely trivial; and

(c) the information requested was not held in such a way that it was readily retrievable.

[41] On the transfer issue the Crown maintained the contention that the transferring agencies could properly believe the information to which the requests related was more closely connected to the functions or activities of the Attorney-General. However, although not pleaded in its reply, the Crown also advanced an alternative defence adopting the Privacy Commissioner's 2016 view[12] that Crown Law had acted lawfully as legal adviser to the addressee agencies.[13]

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12 At [35]–[36] above.
13 Tribunal decision, above n 2, at [107]–[111].

The Tribunal's decision

[42] The basic narrative of events was not in dispute in the Tribunal. Mr Dotcom was cross-examined at length primarily with reference to the Crown's contention that his requests for access to information were vexatious or, as claimed in the Solicitor-General's letter to the Privacy Commissioner of 31 August 2015,[14] that the requests were not genuine Privacy Act requests but rather a litigation tactic and a fishing expedition with the ulterior motive to disrupt the extradition hearing.[15]

[43] Mr Dotcom denied those allegations. His evidence was accepted by the Tribunal which stated:

> [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.

[44] Following a detailed consideration of the history and interpretation of s 39 the Tribunal concluded that 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".[16] Finding a useful analogy in the interpretation of the Official Information Act which requires a transferee to have had some engagement with or dealing with the information, the Tribunal reasoned that:[17]

(a) Section 39(b)(ii) does not permit a "transfer" to a legal adviser for the purpose of taking legal advice.

(b) The agencies to which the requests were sent were required to decide if there were any withholding grounds under ss 27 to 29

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14 At [29] above.
15 Tribunal decision, above n 2, at [7].
16 At [96.5].
17 At [96.6]–[96.8].

which justified the refusal of the access request made by Mr Dotcom.

(c) 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 that 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.

(d) 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.

[45] On the transfer issue the Tribunal concluded:

> [104] For the reasons given our overall conclusion on the law is that [the Act], 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 [the Act], 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 [the Act], s 66(2)(b) there was no proper basis for the refusal.

[46] Turning to the issue of urgency the Tribunal noted that the decline of a request for urgency does not of itself give rise to a remedy because such decline is not included in the s 66 definition of interference with privacy. Consequently the Tribunal considered that no remedy could be granted under s 85 for declining urgency.[18] The Tribunal went on to consider the relevance of an urgency request for the decision to decline an information request stating:

> [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.

[47] The Tribunal therefore concluded that there was no proper basis for regarding the request for urgency as an indication the requests were not genuine and made with the intention of disrupting the extradition hearing. Noting that the Crown had ample remedies under the Privacy Act and under court processes, the Tribunal observed that terminating the requests by stigmatising them as vexatious was not objectively justifiable.[19]

[48] The Tribunal decided that all the remedies sought by Mr Dotcom should be granted. After reciting detailed reasons for the remedies granted, it made the following 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

[18] At [190].
[19] At [195].

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.

The High Court judgment

[49] Early in its judgment the High Court explained the primary reason why it reached a different view from the Tribunal on the transfer and urgency issues:[20]

> One of the principal reasons for that is that we have regarded a request which seeks urgency and provides a particular justification for the urgency, as being one request rather than two separate and disconnected requests. We have come to the conclusion that a request which incorporates a requirement for an urgent response and provides a justification for that requirement, justifies the agency receiving the request considering the request as a whole. We consider that, in the present case, this is relevant to both the issues of "transfer" and "vexatiousness".

[50] Adopting that approach the Court reasoned that part of the information that was the subject of the information privacy request (because of the explicit justification for the claim of urgency) was information about the eligibility proceedings,[21] stating:

> [106] In the context of this request and, specifically, in relation to the linking of the request for urgency with the need to have the information for the purposes of the extradition hearing, we find that there is a plausible basis upon which the transferring agencies could have concluded that the information that

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[20] High Court judgment, above n 3, at [6].

[21] At [105].

> was the subject of the request was more closely connected with the functions or activities of the other agencies. In this case, the functions or activities were the conduct by Crown Law of the litigation in respect of which the claim for urgency was made.

[51] The Court considered it was clear that the only component of the request made by Mr Dotcom of the agencies that justified the transfer to the Attorney-General was the request for urgency,[22] stating:

> [113] We have come to the conclusion that because an integral component of the information request was that of urgency, it was open to the receiving agencies to transfer the request for a coordinated response to come from the Attorney-General. The Act does not require that the Attorney-General holds the information nor that he had held it previously.
>
> …
>
> [115] There is nothing in the text, context or purpose of the [Act] that would preclude a receiving agency from transferring the request to the only other agency that is in any position to make a considered evaluation of the aspect of the request relating to urgency.

[52] The Court noted that the Privacy Commissioner had chosen to analyse the transfer as if it were simply a request for legal advice and assistance from Crown Law but observed that that was not how Crown Law had presented the case to the Commissioner.[23] The Court said:

> [119] … On the facts, the Privacy Commissioner's analysis is also unfounded. The recipient agencies transferred the request because they believed that the information that was a critical component of the request (namely the requirement to treat the request with urgency because of pending legal action) was most closely connected with the functions and activities of Crown Law.
>
> [120] They did not transfer the requests to get legal advice. If Crown Law's only involvement was to provide legal advice, the Attorney-General would not have been authorised to make the decision to decline the request on the ground of vexatiousness.

[53] The Tribunal had noted in its decision that the Crown case on vexatiousness was based on the narrow contention that in making the requests Mr Dotcom had an improper motive to disrupt the extradition hearing.[24] However the High Court

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22 At [123].
23 Contrary to the Tribunal's recitation of events that the Crown adopted this as an alternative defence: see [41] above.
24 Tribunal decision, above n 2, at [160].

recorded that the Crown case on appeal was not so narrowly focused.[25] Indeed the Crown relied on nine separate factors said to support a conclusion that the requests were vexatious in the sense of having the effect of vexing or frustrating.[26] On the basis of those nine factors the High Court accepted that there was a proper basis under s 29(1)(j) for the Attorney-General to have concluded that in the particular context of the requests they were vexatious.[27]

[54] Somewhat inconsistently the Court also drew attention to the fact that the Solicitor-General had made it clear that the only component of the request that made it vexatious was that of urgency.[28] The Court remarked that all Mr Dotcom had to do to avoid a failure to respond on the ground of vexatiousness was to resubmit the request without the urgency component but he made a deliberate choice not to do that.[29]

[55] Consequently the Court allowed the appeal, finding there was a proper and lawful purpose for the transfer of the requests and that, because of the insistence that all 52 requests were required to be responded to urgently on the ground that the information sought was relevant to the eligibility proceedings, the requests were vexatious.[30] The Court stated that had it been required to determine the issue of remedies it would have set aside the awards of damages on the basis that they were wholly erroneous and remitted the question of damages to the Tribunal for determination in accordance with the principles outlined in the High Court's judgment.

The interpretation of the Privacy Act

A fundamental difference in approach to interpretation

[56] As Ms Casey QC for the Attorney-General emphasised, this appeal is confined to two questions of law which concern the proper interpretation of particular provisions of the Act. However, before turning to address those approved questions, it is necessary to engage with fundamental differences in approach to the interpretation

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25 High Court judgment, above n 3, at [163].
26 At [160].
27 At [174].
28 At [186], referring to para 7 of the letter of 5 August 2015 at [25] above.
29 At [187].
30 At [239].

of the Act adopted by the respondent and the Privacy Commissioner, whose appearance on this appeal pursuant to s 86(5) of the Act was his third episode of involvement in the dispute.

[57] Emphasising the broadly phrased language of the "open-textured" approach of the Act and noting the Law Commission's recognition of both its virtues and associated downside,[31] Ms Casey drew attention to the Tribunal's approach to interpretation in *Taylor v Chief Executive, Department of Corrections*:[32]

> [A] key feature of the Privacy Act is that it is not rules-based. It is principles-based and open-textured, and regulates in a rather light-handed way. The open-textured nature of the Act means that judgment is required in its application since it does not set out detailed steps for agencies to follow or provide a checklist for compliance. The privacy principles must be applied and assessed in relation to each individual set of facts as they arise.

[58] It was Ms Casey's contention that those features inform the approach to the interpretation of the Act and in particular provide a strong indication against implying rigid rules or tightly prescribed thresholds or constraints on the exercise of the various judgements required from decision-makers in giving effect to the privacy principles.

[59] By contrast and highlighting the constitutional consequence of access to personal information provided by the Act, Mr Keith for the Privacy Commissioner submitted that the answers to the questions before the Court, in particular the correct interpretation of s 29, are not questions of particular fact or discretionary judgment. Rather they are questions of statutory interpretation of wide consequence. He submitted that the interpretation placed upon them by the respondent had the effect of denying substantive responses to a substantial number of the personal information requests made by Mr Dotcom.

Ms Casey's submission

[60] Ms Casey contended that the Act provides for a low level process for resolving disputes that is intended to be fast, practical and responsive, consistent with its

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31 Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at 11.

32 *Taylor v Chief Executive, Department of Corrections* [2018] NZHRRT 35 at [91]. The decision was upheld on appeal in *Taylor v Chief Executive of the Department of Corrections* [2020] NZHC 383, although the High Court did not discuss the Act being "open-textured" or "principles-based".

principles-based flexible character and the breadth of the regime's application. Save for the single exception of privacy principle 6, the rights and duties under the Act are not enforceable through the courts.

[61] She drew attention to the fact that, as a precursor to a Tribunal hearing, the statute makes provision for a complaint to the Privacy Commissioner. In investigating and attempting to resolve the complaint, the Commissioner is directed to act as a conciliator.[33] If following an investigation the complaint is found to have substance, the Commissioner is directed to use his or her best endeavours to secure a settlement between the parties concerned.[34] If that fails, then the Commissioner may refer the complaint to the Director of Human Rights who may, exercising his or her own discretion, bring proceedings before the Tribunal.[35]

[62] Ms Casey explained that the statutory regime is not framed around facilitating claims by individuals to the Tribunal. Rather, the ability to bring such a claim is a form of "back-stop", providing an independent review of a complaint. She then submitted:

> 34. The concept of "lawfulness" and "unlawfulness" emphasised in Mr Dotcom's submissions is not apt: in the context of a request under Privacy Principle 6 the Act does not render any action unlawful, but rather allows for an assessment (and conciliatory resolution) of whether a complaint that an agency has failed to comply with that Principle has substance.
>
> 35. This framework is consistent with the flexibility of the regime, and the recognition that agencies are expected to make judgement calls with little information under tight timeframes, and should not be exposed to overly prescriptive retrospective reviews of those judgements. As the Tribunal recorded in *Taylor v Chief Executive, Dept of Corrections*, having noted the timeframes required by the Act, and that "of necessity" there is no participation by the individual in the decisions made by the agency …
>
> 36. The interpretation of the Act must accordingly reflect that the regime is not directed to setting prescriptive rules and then imposing penalties for non-compliance. The aim of the access right in Privacy Principle 6 and the procedural provisions in Part 5 is to support the promotion and protection of individual privacy, and so an agency's judgements are reviewed on a 'conciliatory' basis, with the intention that errors can be corrected and the privacy issues resolved in a non-punitive way.

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33 Privacy Act, s 69(1)(b).
34 Section 77(1)(a).
35 Sections 77(2)–(3) and 82.

Mr Keith's submission

[63] In Mr Keith's analysis the provisions of the Act can be understood in terms of three distinct aspects. In respect of the first, the day-to-day operation of the information privacy principles, he agreed that much can be understood as "open-textured", involving the common sense application of the information privacy principles to facilitate access to information. The second significant aspect comprised the limits and other protections which the Act provides for agencies that hold personal information.

[64] It was in respect of the third aspect, namely prescribed rights and obligations under the Act, that he parted company with the Attorney-General's submission. Contending that this aspect of the Act prescribes legal standards, he drew attention to the following statutory features:

(a) The broad powers of remedy provided in the Act include not only damages, declarations and costs but also the power to make orders restraining a defendant from continuing or repeating an interference with privacy[36] and requiring a defendant to perform any specified acts with a view to remedying an interference.[37]

(b) The operation of grounds for refusal is not "open-textured" but a rigorous legal standard.

(c) While rights conferred by the information privacy principles are in general enforceable only through the mechanisms in the Act, s 11(1) provides that the principle 6 entitlement, so far as it relates to personal information held by a public sector agency, is a legal right enforceable in a court of law.

(d) The Act confers jurisdiction on this Court to determine questions of law.

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36 Section 85(1)(b).
37 Section 85(1)(d).

[65] Rejecting the proposition that the particular requests in this case and the response to them were exceptional, Mr Keith captured the essence of his submission in this way:

> 11. The short point is that, as with this Court's consideration of withholding grounds in *Commissioner of Police v Ombudsman*:
>
> 11.1 Through the right of access to personal information, the Privacy Act upholds basic human rights and, in respect of information held by public bodies, constitutional safeguards. Although, and as set out above, aspects of the Act are concerned with conciliation and practical resolution, it remains that that right of access is a legal right.
>
> 11.2 That said, however, the safeguards that apply under the Act can and should provide mechanisms by which excessive requests can be curtailed and, as necessary, declined. For the Act to be workable and fair, that cannot … depend upon an intense factual analysis of the context and the stated or perceived purpose of requests, either as a basis to refuse or as a basis to require fuller compliance.
>
> 11.3 Instead, they are questions of robust application of the statutory language, interpreted consistently with the purposes and context of the Privacy Act. What follows, as this Court and the court below recognised in granting leave on the questions as put and as discussed in detail below, is that the extent of and limits upon that right are not, and cannot be left to be, matters of pragmatic judgment by the recipient agency or matters of intense factual consideration. The Act, and ss 29, 37 and 39 in particular, are capable of clear and straightforward interpretation and application.

Analysis

[66] The two approved questions qualify as questions of law because they concern the proper construction of the Act.[38] The statutory meaning is to be ascertained from its text and in light of its purpose.[39] We will address the text and purpose of the particular provisions in the course of considering the two approved questions below.

[67] At this juncture we discuss the different approaches to the interpretation of the Act reflected in the submissions of the Attorney-General and the Privacy Commissioner. For that purpose we accept that pt 2 of the Act, which contains the

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38 *Commissioner of Inland Revenue v Walker* [1963] NZLR 339 (CA) at 353 per Gresson P.

39 Interpretation Act 1999, s 5(1); and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

12 information privacy principles, is open-textured in the manner described by Ms Casey and, subject to what is said below in relation to principle 6, we assume (but without making a specific finding) that it is amenable to interpretation in a manner calculated to achieve the objectives described by Ms Casey at [58] above.

[68] As the Supreme Court in *R v Alsford* recognised, the privacy principles do not, for the most part, create rights that are enforceable through the courts.[40] However different considerations apply in respect of principle 6. That is the consequence of s 11 which states:

> **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.

As Mr Keith submitted, where information is held by public bodies, s 11(1) gives distinct and legally binding status to the right of access under information privacy principle 6.

[69] While recognising the exception in s 11(1), Ms Casey nevertheless envisaged that the additional provisions specific to the principle 6 entitlement concerning procedure and grounds for refusal should be subject to the same caution about reading in strict or rigid requirements.[41] Despite its frequent use as an information disclosure tool, she submitted that the primary purpose of the Act is not about access to information but rather the promotion and protection of individual privacy.[42]

[70] Acknowledging that privacy principle 6 can stand alone, she nevertheless emphasised that it works as a "key accountability mechanism" that supports the other privacy principles by allowing an individual to see what information has been collected about them. She submitted that the fact that privacy principle 6 is not

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[40] *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [37].
[41] For example see para 36 of her submission at [62] above.
[42] As stated in the long title of the Act.

primarily directed at establishing a full "as of right" information disclosure regime was supported by the Tribunal's decision in *Taylor*.[43] She also drew attention to the appeal decision where the High Court approved the observation of the Court of Appeal of England and Wales that the right to access to personal data enables an individual to assess whether their privacy is being unlawfully infringed upon, rather than being an "automatic key to information" for any purpose.[44]

[71] However, and as Mr Keith responded, the Court of Appeal has since emphasised in *Dawson-Damer v Taylor Wessing LLP*[45] that *Durant* does not invite critical inquiry into purpose, observing that:

> [91] Confining the scope of subject access rights [to disclosure] by reference to purpose is an unprincipled restriction of the … right and will result in complex litigation in an attempt to determine the "true" purpose of any application. …

[72] Mr Keith observed that the operation of grounds for refusal is not "open-textured" but rather a rigorous legal standard, drawing attention to the observations of this Court in *Commissioner of Police v Ombudsman* in the context of the provisions for access to personal information provided in respect of public bodies in pt 4 of the Official Information Act:[46]

> Parliament has adopted the strong word "right" and has expressly conferred the rights upon individuals, features which were noticeably absent in *Pasmore* itself, and the obvious intention in my opinion was to create a legally enforceable right in the person concerned. We should not emasculate the Act by refusing to give effect to it.

[73] Consistent with the status of an enforceable legal right, pt 5 provides specific procedural provisions to facilitate responses to requests made pursuant to sub-cl 1(a) and (b) of principle 6.[47] As Mr Keith said, these express provisions and procedures are provided for the effective and accountable operation of the Act with the objective of ensuring that a recipient agency is focused on the request and upon the information sought in accordance with the rights that underpin the Act.

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43 *Taylor v Chief Executive, Department of Corrections*, above n 32, at [125].

44 *Taylor v Chief Executive of the Department of Corrections*, above n 32, at [53] n 38, citing *Durant v Financial Services Authority* [2003] EWCA Civ 1746 at [27].

45 *Dawson-Damer v Taylor Wessing LLP* [2017] EWCA Civ 74, [2017] 1 WLR 3255.

46 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 at 389.

47 It also applies to a request made pursuant to sub-cl (1) of principle 7: see s 33(c).

[74] On this issue of interpretative approach we agree with the view advanced by the Privacy Commissioner.[48] The legal right conferred by s 11(1) is not susceptible to the more liberal interpretative treatment applicable to privacy principles other than principle 6. The entitlement to refuse access prescribed in pt 4 and the procedural steps provided in pt 5 should be construed in accordance with orthodox principles of statutory interpretation. Their meaning should not vary to accommodate what may be seen as the flexible and pragmatic objective of the statutory "regime".

[75] Ms Casey emphasised that the definition of "agency" in s 2 applies to a far wider group than the term in the Official Information Act. She submitted that the interpretation of the Act must be consistent across its application to all agencies, from the corner dairy to a large bank or government department, making the point that the Act does not excuse compliance depending on the size or resources of an agency.

[76] We agree that the interpretation of s 39 and of the other process provisions in pt 5 should not discriminate between categories of agencies. We do not accept the proposition that, because there are potentially a broad range of agencies who must comply with the Act, some lowest common denominator approach to interpretation should apply to the pt 5 provisions.

[77] While we recognise that the legal right conferred by s 11(1) extends only in relation to public sector agencies, we note that it is principle 6 itself which states that its application is subject to pts 4 and 5. Although it is not strictly part of the ratio of this judgment, we can see no reason why the process provisions should receive a different interpretation where the agency in question is not a public sector agency.

The Attorney-General's additional argument

[78] In support of the Attorney-General's statutory interpretation proposition Ms Casey also referred to passages in judgments which recognise the narrow scope of appeals limited to questions of law. Attention was first drawn to the following passage from *Bryson v Three Foot Six Ltd*:[49]

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48 At [64]–[65] above.

49 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25].

> It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.

That extract omitted the initial sentence which reads:

> An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case.

The Supreme Court was there contrasting factual appeals from appeals on questions of law. The distinction has no application to the present matter.

[79] Following reference to *Bryson*, Ms Casey contended this Court's approach in *Equus Trust v Christchurch City Council* is "particularly apt" for the instant case, citing the following passage:[50]

> [7] Where an appeal is limited to a question of law which concerns the interpretation of legislation, it is not sufficient for an applicant simply to point to one interpretation being perhaps preferable to another. The Supreme Court made this abundantly clear in *Vodafone New Zealand Ltd v Telecom New Zealand* when endorsing the observation of Lord Mustill in *R v Monopolies and Mergers Commission ex parte South Yorkshire Transport Ltd*. Where a legislative instrument genuinely makes available a range of meanings, the Court is entitled to substitute its own opinion for that of the original decision maker "only if the decision is so aberrant that it cannot be classed as rational". These principles apply with particular force when the decision maker is a specialist tribunal. …
>
> (Footnotes omitted.)

[80] That paragraph concluded with the statement that those principles accordingly applied in the *Equus Trust* case. This Court was satisfied that the interpretation of the Canterbury Regional Policy Statement by the hearing panel "was plainly available to it and not irrational".[51]

[81] However this Court's observations in *Equus Trust* were plainly concerned with the rare category of case discussed in *Bryson* which falls within Lord Radcliffe's

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50 *Equus Trust v Christchurch City Council* [2017] NZCA 200.
51 At [8].

tripartite description in *Edwards (Inspector of Taxes) v Bairstow*, namely a state of affairs described:[52]

> … as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination.

It was with reference to that rare category of case that the Supreme Court in *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* issued the caution about the interpretation of words or phrases in statutes which involve an imprecise criterion.[53]

[82] We recognise that, viewed in isolation, the first sentence in the *Equus Trust* paragraph could be read as having application more generally to appeals on questions of law. However clearly that was not the intention. Properly understood the dictum is not authority for the argument which the Attorney-General advances in the present case in support of the proposition that the procedural processes in pt 5 of the Act should be construed in a more flexible manner than orthodox statutory interpretation mandates.

Conclusion

[83] We agree with the submission of the Privacy Commissioner that pts 4 and 5 of the Act should be construed in accordance with orthodox principles of statutory interpretation. We do not accept the Attorney-General's contention that some more fluid or liberal interpretative approach should be adopted in order to accommodate what is described as the flexible and pragmatic objective of the statutory regime.

Question 1

[84] The first question put before the Court reads as follows:

> Can a request for personal information under the Privacy Act 1993 be transferred by the recipient to another agency where the request seeks urgency

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52 *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL) at 36.

53 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [54]–[56].

and the basis for the urgency request is not a matter that the recipient is able to sensibly assess but the agency to which the request is transferred is the only agency able to properly evaluate the claimed basis for the urgency?

[85] The condition-laden formulation of the question derived from the ratio of the High Court judgment. The Court accepted that the Tribunal had been undoubtedly correct in holding that the decision to transfer and the declinature itself were made for reasons other than those related to the assessment of the information itself and what should be disclosed or withheld.[54] However the Court considered the issue to be whether, in the circumstances where the requests made of all 52 agencies specifically sought urgency on the basis that the documentation was needed urgently in connection with the extradition hearing, the "transfer to Crown Law" was justified on the basis it was the entity conducting that litigation and best placed to analyse and respond to that request.[55]

[86] The High Court reasoned:

(a) because of the "explicit justification for the claim of urgency", information about the eligibility proceedings was "part of the information that was the subject of the request";[56]

(b) the only component of the information request that justified the transfer by the agencies to the Attorney-General was the request for urgency;[57] and

(c) because the request for urgency was an integral component of the information requests, it was open to the agencies to transfer the request for a co-ordinated response to come from the Attorney-General.[58]

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54 High Court judgment, above n 3, at [96][97], quoting the Tribunal decision, above n 2, at [67].
55 At [97].
56 At [105].
57 At [123].
58 At [113]. See [51] above.

The Court concluded:

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

[87] Ms Casey elaborated upon that justification explaining that the requests were transferred as part of a "whole of Crown" approach in formulating the response.

> 59. … Crown Law (the Attorney-General) was identified as the appropriate transferee, because:
>
> 59.1 Crown Law was (and is) the central agency responsible for the extradition litigation to which the requests (and the claim for urgency) were expressly linked;
>
> 59.2 Mr Dotcom was involved in extensive litigation with the Crown, both in defending the extradition and in a range of related civil … proceedings. Discovery and disclosure had been a prominent feature of this litigation. Crown Law was familiar with the full details of this and had visibility across the entire scope of the potential issues that might arise with the responses to these requests.
>
> 59.3 Crown Law was in the best position to make centralised decisions in relation to the requested information on the request for urgency, and in co-ordinating and assessing the response to the requests, including the application of any grounds for declining the requests or withholding information should the requests be accepted.
>
> (Footnotes omitted.)

[88] Section 39 contemplates an inter-agency transfer in two scenarios:[59]

> Where—
>
> …
>
> (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,—

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59 At [12] above.

The focus of argument in this case is the second scenario.

[89] Section 39 is one of three provisions which necessitate consideration of whether an agency other than the recipient agency is a more suitable respondent to a request. The second is found in the ground of refusal in s 29:

> (2) An agency may refuse a request made pursuant to principle 6 if—
>
> …
>
> (c) the information requested is not held by the agency and the person dealing with the request has no grounds for believing that the information is either—
>
> (i) held by another agency; or
>
> (ii) connected more closely with the functions or activities of another agency.

In addition, s 38 imposes a duty to direct a request to "the appropriate agency".[60] Both ss 29(2)(c) and 39 have their antecedents in the Official Information Act[61] and the Local Government Official Information and Meetings Act 1987.[62]

[90] Ms Casey submitted that there is no policy reason to limit the scope of s 39(b)(ii) or impose strict rules on an agency as to when a transfer is or is not appropriate. From the requestors' perspective they are entitled to disclosure of their personal information unless one of the withholding grounds properly applies. Such entitlement does not vary with the identity of the agency making the decision. She submitted that in real terms it makes no difference to a requestor which agency provides the response:

> In other words, in terms of its purpose the Act is neutral as to who responds to the request.

[91] Ms Casey submitted that even on "a narrow reading" of s 39(b)(ii) it will be legitimate for an agency to transfer a request to another agency if the transferee is assessed to be in a better position to make decisions about "whether and how" to disclose the information held by the first agency. By way of example it was said the

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60 At [11] above.
61 Sections 18(g) and 14 respectively.
62 Sections 17(g) and 12 respectively.

transferee may be in a better position to undertake the assessment of whether there are proper grounds for withholding the information under ss 27–29 and the extent to which it would be appropriate to do so. It was further submitted:

> Similarly, that agency may be in a better position to estimate how long that assessment might take and accordingly whether an extension of time would be appropriate under s 41 (and equally, whether a request for urgent provision of the information can or ought to be met).

[92] However we agree with Mr Keith[63] that the High Court's reasoning presents several difficulties. First, section 39(b)(ii) provides for transfer in specific terms. It is the "information" sought that is to be "more closely connected" with the functions or activities of another agency, not the request as the High Court itself had earlier correctly observed.[64] Secondly the criterion for transfer is a belief, necessarily on some objective basis, on the part of the person dealing with the request as to such a connection between the information and the activities or functions of the other agency.

[93] Mr Keith emphasised the issue is whether s 39 "permits" a transfer. That involves the application of a statutory procedure and applicable criteria before a recipient may transfer responsibility for a request. A transfer not falling within those criteria is not lawful. Hence he took issue with the High Court's approach[65] in analysing whether there was anything to "preclude" a transfer for the purpose of undertaking a considered evaluation of a request for urgency. We agree with the tenor of his submission that the neutrality of the Act as asserted by the Attorney-General does not mandate ignoring the procedural requirements of s 39(b)(ii).

[94] Mr Keith made the further point that the premise of the High Court, that transfer is necessary in order to make an informed assessment of the claim to urgency, overlooked the scope for a recipient to seek advice. In particular he drew attention to the express provision for consultation between public bodies in s 40(4):

> Nothing in subsection (3) prevents the chief executive of a department or any officer or employee of a department from consulting a Minister or any other person in relation to the decision that the chief executive or officer or

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63 Mr Mansfield supported this argument. He also submitted that it was a requirement of s 39(b)(ii) that a proposed transferee must either hold or control the requested information. It is unnecessary for us to address that contention.

64 At [21] above.

65 High Court judgment, above n 3, at [115]. See [51] and [86] above.

> employee proposes to make on any information privacy request made or transferred to the department in accordance with this Act.

[95] Indeed it was acknowledged in the Attorney-General's submission that an agency which held requested information but considered another agency to be more closely connected, and thus in a better position to make the relevant decisions under the Act, could either transfer the request or decide to keep the request and consult with the other agency about what it wished to be done in response to the request.

[96] On this issue as well, we consider that the argument of the Privacy Commissioner is to be preferred. The fact that urgency is sought does not comprise a part of the information the subject of an information privacy request. It does not provide a proper basis for a transfer of the information request to another agency. We answer the question in the negative.

Question 2

[97] As earlier noted[66] the High Court concluded that the only component of Mr Dotcom's information requests that justified the transfer by the agencies to the Attorney-General was the fact urgency was sought. Hence the application for special leave to appeal posed the following question of law:

> Is a request for urgency accompanying a request for personal information under Information Privacy Principle 6 a proper basis for refusing the request as vexatious under s 29(1)(j) of the Privacy Act 1993?

[98] The leave judgment records that the question was reformulated in discussion with counsel at the leave hearing.[67] In doing so the question was broadened to address scenarios where the fact that urgency is sought is not the sole consideration in the determination whether to refuse the information request on the grounds it is vexatious. It now reads:

> Is a request for urgency under s 37 of the Privacy Act 1993 a relevant factor for an agency in determining whether to refuse a request for personal information under s 29(1)(j) of that Act?

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66 At [86(b)] above.

67 Leave judgment, above n 4, at [3].

[99] Mr Mansfield submitted that a request for urgency can never be relevant to whether a request is vexatious because, irrespective of how they are made, a request for information and a request for urgency are two separate requests under two distinct provisions of the Act. Although they may be made concurrently, they are unrelated and require two distinct decisions.

[100] Ms Casey suggested that Mr Dotcom's argument appeared to resolve to the single proposition that, had the Court adopted the two request analysis, it would have found there was no proper basis to consider the information request was vexatious. Ms Casey responded that the High Court's assessment, that the request for urgency was an integral component of the information requests, was a finding of fact not capable of challenge on appeal. However as we have held, the reasoning, that seeking urgency is a component of the information requested, is flawed.

[101] Ms Casey then submitted that the assessment of whether an information request is vexatious will always be intensely fact specific. She contended that under ordinary principles the assessment can and should take into account the full context and the whole course of conduct[68] and that it would be an extraordinary proposition to say that one important aspect of a request, namely the seeking of urgency, is by law excluded from the assessment whether the information request is vexatious.

[102] Noting that the threshold for vexatiousness in New Zealand is to require that "no reasonable person could properly treat it as bona fide (that is, having been made in good faith)",[69] Mr Keith submitted that it is difficult to see the ancillary provision for urgency itself reaching the necessarily high threshold for vexatiousness. He drew attention to the need for rigour being emphasised with considerable care in the English decision *Dransfield v Information Commissioner*:[70]

> [T]he emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore

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68 Citing *Siemer v Attorney-General* [2016] NZCA 43, [2016] NZAR 411 at [33], which in turn quoted *Brogden v Attorney-General* [2001] NZAR 809 (CA) at [22].

69 Citing Paul Roth and Graham Taylor *Access to Information* (2nd ed, LexisNexis, Wellington, 2017) at [3.10.16].

70 *Dransfield v Information Commissioner* [2015] EWCA Civ 454, [2015] 1 WLR 5316 at [68].

> means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision-maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available.

[103] Mr Keith accepted that on that approach it followed that "in a strict sense" a request for urgency might conceivably indicate vexatiousness. The important point in his submission for the operation of the Act is that, as with *Dransfield*, a broad and balanced consideration is required and "a sufficient degree of assurance" reached that the high threshold there described is met.

[104] While considering it to be relatively straight forward for a recipient to determine whether a request for urgency is well-founded, Mr Keith submitted that it is very difficult to infer improper purpose or bad faith in the information request by reference to the accompanying request for urgency.

[105] Unlike an information request which is not required to be supported by reasons, a requestor seeking urgency under s 37 must give reasons why the information request should be treated as urgent. Just as those reasons may fail to support urgency, they may also reveal information from which a vexatious purpose might properly be inferred. We are mindful of Mr Keith's caution that reasons advanced for urgency cannot be assumed to be the reason, or the only reason, for the information request itself. However for present purposes the issue is whether it is possible for the urgency request to disclose a vexatious purpose.

[106] In our view the reasons advanced for seeking urgency could inform the decision-maker on the issue of whether the information privacy request is vexatious. Hence in that manner a request for urgency could be a relevant factor for consideration in the decision to refuse the request. However the mere fact of a request for urgency would not alone be a proper basis for a refusal on the vexatious ground. While we agree with the tenor of the submissions for the Privacy Commissioner that it is difficult

to conceive how the mere fact of a request for urgency could be a relevant factor for consideration in a decision to refuse an information request itself on the grounds it is vexatious, it is not possible to say that it could never be so.

Consequential directions

[107] It follows from our answer to Question 1 that the transfers of Mr Dotcom's information privacy requests to the Attorney-General were invalid and, on the face of it, an interference with Mr Dotcom's privacy.

[108] It follows from our answer to Question 2 that a refusal to respond to Mr Dotcom's requests on the grounds that they were vexatious would not be supportable on the basis of the reasons given by the Solicitor-General in his letters of 5 and 31 August 2015. Ms Casey submitted that the High Court did not find that the request for urgency was the only relevant ground to support the assessment that the request was vexatious. However the issue whether the decision to decline the information requests in reliance on s 29(1)(j) for reasons different from those which were proffered at the time is not a matter before us on this confined appeal.

[109] Mr Mansfield submitted that the appropriate course was for the Tribunal's decision on the issue of interference with Mr Dotcom's privacy to be reinstated and the question of damages to be remitted to the High Court for determination. However the Tribunal's decision on the transfer issue was based on the different argument then advanced on behalf of the Crown that the transfer was for the obtaining of legal advice as well as the co-ordination of the Crown's response.

[110] We consider that the appropriate order is to allow the appeal from the High Court judgment to the extent reflected in our answers to the two approved questions. The issue of damages should be remitted to the Tribunal for reconsideration in the light of this judgment.

Result

[111] We answer the questions in this way:

Question 1: Can a request for personal information under the Privacy Act 1993 be transferred by the recipient to another agency where the request seeks urgency and the basis for the urgency request is not a matter that the recipient is able to sensibly assess but the agency to which the request is transferred is the only agency able to properly evaluate the claimed basis for urgency?

No. A transfer of an information privacy request under s 39(b)(ii) is permissible only if the person dealing with the request believes the information to which the request relates to be more closely connected with the functions or activities of the transferee agency. The fact that a requestor seeks urgent treatment of an information request, whether or not in the same document as the request, does not comprise part of the information to which the information request relates.

Question 2: Is a request for urgency under s 37 of the Privacy Act 1993 a relevant factor for an agency in determining whether to refuse a request for personal information under s 29(1)(j) of that Act?

Yes, it may be a relevant factor. Although the mere fact of a request for urgency would not of itself generally be a proper basis for a finding of vexatiousness, we cannot exclude the possibility of there being circumstances where an inference of vexatiousness could be drawn from a request for urgency. Examples of such circumstances might include a grossly excessive number of requests for urgency or reasons given for urgency that are not credible. All will depend on the context in which the request for urgency is made.

[112] The appeal is allowed to the extent reflected in the answers to the approved questions.

[113] The proceeding is remitted to the Human Rights Review Tribunal for reconsideration of the issue of damages in respect of the interference with the appellant's privacy by the wrongful transfer of the appellant's information privacy requests.

[114] The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.

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