IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 55**

	Reference No. HRRT 004/2015
UNDER	**THE PRIVACY ACT 1993**
BETWEEN	**LAWRENCE WAYNE DEEMING**
	PLAINTIFF
AND	**WHANGAREI DISTRICT COUNCIL**
	DEFENDANT

AT WHANGAREI

BEFORE:
Mr RPG Haines QC, Chairperson
Mr RK Musuku, Member
Mr BK Neeson JP, Member

REPRESENTATION:
Mr LW Deeming in person supported by Dr CS Anderson as *McKenzie* friend
Mr PJ Magee and Ms KE Candy for defendant

DATE OF HEARING: **30 November 2015 and 1 December 2015**

DATE OF DECISION: **22 December 2015**

DECISION OF TRIBUNAL[1]

Introduction

[1] On 8 August 2009 there was an incident at the Mid Western Rugby Squash Club Inc (Mid Western Rugby Club) which, in Mr Deeming's view, raised issues about the adherence of the club to the provisions of the then Sale of Liquor Act 1989 administered by the Whangarei District Council (WDC). Mr Deeming says he sought an investigation by WDC into the incident and in so doing relied on a policy by which WDC protected the identity of complainants. His case is that the complaint was disclosed to Councillor Shelley Deeming (the wife of a cousin of Mr Deeming) who was the Ward Councillor for

[1] [This decision is to be cited as: *Deeming v Whangarei District Council* [2015] NZHRRT 55]

that part of the District. She, in turn, disclosed the complaint to the President of the Mid Western Rugby Club (Mr Paul McDowell). As a result Mr Deeming was harassed at his home and other places and received a life-time ban from the club. Media reports led to hurt and humiliation not only to Mr Deeming but also to his family. Mr Deeming says WDC breached information privacy Principle 11 (personal information not to be disclosed except in certain limited circumstances).

[2] The WDC admits Councillor Shelley Deeming sent the complaint to the President of the Mid Western Rugby Club but in its defence relies on exceptions (a) and (d) to Principle 11.

[3] Because WDC concedes personal information about Mr Deeming was disclosed it is not intended to recite the evidence at length. The primary issues in this case are whether WDC has established one or both of the exceptions allowed by Principle 11(a) and (d) and if not, the nature of the remedy to be awarded Mr Deeming given the long delay since the events.

THE EVIDENCE

WDC policy on protecting the identity of a complainant

[4] Since at least January 2001 WDC has had a policy by which it protects the identity of those who make complaints to the Council. That policy relevantly provides:

> **POLICY ON PROTECTING COMPLAINANT'S IDENTITY**
>
> It is the policy of the Whangarei District Council to protect the identity of people who make complaints to council. This is to ensure people's privacy, protect complainants from harassment, and to ensure that people are not intimidated before or after lodging a complaint.

[5] Mr Deeming was aware of this policy because for some years prior to the events in question he was a member of a group which monitored the performance of WDC in relation to (inter alia) openness and transparency. Over an extended period he attended virtually all Council meetings open to the public and reported on the performance of WDC in general through Letters to the Editor and a website.

The incident at the Mid Western Rugby Club

[6] On 8 August 2009 an aftermatch function was held at the Mid Western Rugby Club. According to a report published by *The Northern Advocate* on 16 September 2009 (quoting the President of the club, Mr Paul McDowell) seven people were subsequently banned from the clubrooms for fighting at the function. One incident (characterised as a family dispute which had been brewing over a few years) involved regulars at the club. A second incident involved locals from Maungakaramea who had no association with the club. Mr McDowell was reported as saying that as the club's rooms were licensed premises it was not possible to predict "this sort of behaviour" but the club's policy of zero tolerance to fighting was designed to prevent any trouble.

[7] Less than a week after the incident the then Mayor of Whangarei, Mr Stan Semenoff on Thursday 13 August 2009 published an article in a local newspaper under the title "Liquor law changes are welcome". In this article Mr Semenoff welcomed news of an announcement the Law Commission had recommended changes to liquor licensing to tackle what Mr Semenoff described as "our binge drinking culture". At one point in his article Mr Semenoff described the problem in the following terms:

> Plenty of us are concerned about what our streets have turned into. Our young people are sloshing their way into town with a skinful of home-consumed alcohol, and the result is appalling.
>
> Police are locking up 20,000 people a year whose advanced drunkenness means they are a danger to themselves.
>
> Waiting to prey on them is another group, also drinking at home and consuming more while loitering in the carparks and shadows. Their victims often literally don't know what hit them.

[8] Mr Semenoff then referred to a recent complaint (received by him) in these terms:

> People are very concerned about this. Just last week I received a letter from a Whangarei woman demanding to know what I was doing about people being encouraged to drink excessively and about violence in Vine Street and its carpark.
>
> Whangarei District Council is reviewing its licensing policy, but we can do little to alter licenses which have been in operation for a number of years.

[9] After referring to the responsibility of central government to protect young people by reducing the availability and affordability of alcohol and by committing sufficient Police resources to make streets sociable and safe environments, Mr Semenoff concluded his article in the following terms:

> Our politicians need to be constantly reminded of that responsibility, not just by me but by all of us.

Mr Deeming's letter dated 14 August 2009

[10] By letter dated Friday 14 August 2009 (sent by email) addressed to Mr Semenoff, Mr Deeming agreed with the sentiments expressed by Mr Semenoff but noted Mr Semenoff had made no comment regarding what Mr Deeming described as "the alcohol fuelled brawl which lasted around three hours at the Mid Western Rugby Club last Saturday evening". Mr Deeming acknowledged he had not been present on that occasion but asserted the club had had for most of its existence, anecdotally at least, a binge drinking attitude to alcohol. Mr Deeming offered Mr Semenoff an opportunity to find out what had happened at the club before the information became public:

> So I will offer you an opportunity to find out what happened at Maungakaramea last Saturday night and say something about it before someone else in the community (eg me) does. It would not be a good look if the mayor was aware of this outrage and failed to support his rhetoric with appropriate action.

[11] At the same time as sending his letter to Mr Semenoff, Mr Deeming wrote to the Chief Executive of the Northland Rugby Union requesting a full investigation into the 8 August incidents at the Mid Western Rugby Club. In a reply dated Monday 17 August 2009 The Northland Rugby Union responded to the effect that enquiry with the club revealed there had indeed been several incidents as alleged and that the Union found the behaviour unacceptable. Its disappointment had been conveyed to the club. The issue of liquor licensing was one the club would have to deal with in its re-application.

[12] At 7:10am on Tuesday 18 August 2009 Mr Semenoff's executive assistant (Mr Ford Watson) sent to Councillor Shelley Deeming a copy of the 14 August 2009 email from Mr Deeming to Mr Semenoff. At 12:47pm on the same day Councillor Shelley Deeming forwarded Mr Deeming's email to Mr McDowell with a message which read "For your information and opportunity to respond".

[13] Prior to (and subsequent to) forwarding Mr Deeming's letter to Mr McDowell Councillor Shelley Deeming and Mr Ford Watson exchanged several emails, the

contents of which are relied on by Mr Deeming. The timing of the emails and the passages relied on by Mr Deeming are as follows:

[13.1] 18 August 2009 7:10am – Mr Watson to Councillor Shelley Deeming:

> Hello, Shelley.
>
> The latest from your perpetually peeved, puerile, petulant pal.
>
> Ford

[13.2] 18 August 2009 12:32pm – Councillor Shelley Deeming to Mr Watson:

> This is outrageous bullshit …
>
> I will let the locals know that they have a viper among them and need to have a response ready.

[13.3] 18 August 2009 12:42pm – Mr Watson to Councillor Shelley Deeming:

> But, yes, let his community know that he seeks to besmirch them.

[13.4] 18 August 2009 2:14pm – Councillor Shelley Deeming to Mr Watson:

> … [name redacted] said he hoped the rugby president didn't know where lives but it seems he does. …
>
> Four hundred Mid-Western rugby supporters will not be happy – tee hee.

[13.5] 18 August 2009 3:37pm – Mr Watson to Councillor Shelley Deeming:

> Excellent! And typical of him not to bother with the facts when rushing to smear you and Stan.

[13.6] 24 August 2009 7:42pm – Mr Watson to Councillor Shelley Deeming:

> Hello, Shelley?
>
> Any lynchings out your way over the weekend?

[13.7] 24 August 2009 8:28pm – Councillor Shelley Deeming to Mr Watson:

> Last I heard the club president thought he might have a visit from the constabulary after having given a summary of his background when they met on the open road this morning.
>
> I had suggested that no-one should visit at his property in case it gave him the opportunity to further misconstrue facts. They managed that but meeting him on the road was apparently too good to miss.

[13.8] 25 August 2009 7:25pm – Mr Watson to Councillor Shelley Deeming:

> It would be a shame should Mr McDowell get himself in trouble after being provoked by this sour fool. I think the defence of provocation would be perfectly justified in this case …
>
> I am not at all surprised that Maungakaramea is filthy on Mr Deeming. His warped ego blinds him to his puerility and stupidity.

Mr McDowell's visit to Mr Deeming's home

[14] On Wednesday 19 August 2009 Mr McDowell arrived at Mr Deeming's home to discuss the letter sent by Mr Deeming to Mr Semenoff on 14 August 2009. On the account given by Mr Deeming and his wife, Mr McDowell acted in an aggressive

manner, brandishing a sheet of paper being a copy of Mr Deeming's letter to Mr Semenoff, and demanding to know what it was all about and where Mr Deeming had obtained his information. Mr Deeming said Mr McDowell's behaviour was such that he (Mr Deeming) became fearful for his safety and that of his family. He thought it likely the whole club would soon be aware of the complaint and for that reason attempted to be as conciliatory as possible. It was in these circumstances Mr Deeming that evening sent to Mr Semenoff an email reporting his satisfaction that Mr Semenoff had been able to effect a meeting between himself (Mr Deeming) and Mr McDowell. Mr Deeming reported that Mr McDowell had said the club was as concerned as Mr Deeming about the incidents and the effect they could have on the community while Mr Deeming had conceded that he should have approached the club in the first instance.

[15] Mr McDowell's visit to Mr Deeming was on the morning of 19 August 2009 and the email just referred to was sent to Mr Semenoff at 5pm that day. Between these two events Mr Deeming and Mr WD Slater attended a meeting of the Northland Regional Council. They travelled to the meeting together. Mr Slater gave evidence that during the trip he sensed something was amiss with Mr Deeming. He was tense, shaky and made several calls on his cellphone which unusual for Mr Deeming. Asked what was wrong Mr Deeming recounted to Mr Slater the visit by Mr McDowell earlier in the day and explained why the incident had been both upsetting and threatening. Mr Slater said that Mr Deeming remained visibly uncomfortable throughout the rest of the day.

[16] Mr Deeming said that on his return home he wrote the conciliatory letter to both the Mayor and the club because he felt under extreme duress and wished to make the issue go away. However, by the following day (Thursday 20 August 2009) his equilibrium had returned sufficiently for him to write to Mr Semenoff recording his deep concern about the inappropriate behaviour of Mr McDowell during his visit to Mr Deeming's home. Mr Deeming also complained about the unauthorised release of his email to Mr McDowell, a release which he described as a gross breach of trust which had put Mr Deeming's safety at risk. Mr Deeming asked that WDC disclose the identity of the person who had revealed Mr Deeming's identity as the sender of the letter to the Mayor.

[17] Mr Deeming described to the Tribunal that on at least three occasions when he and his wife were walking in the local village they had been harassed by Mr McDowell. On one occasion they had been confronted by him outside the Maungakaramea Hall and when they returned home Mr Deeming's daughter (who teaches at the local school) called Mrs Deeming to say that a witness had suggested that Mr Deeming and his wife take out a protection order. Mr Deeming continually felt in danger.

[18] On Thursday 27 August 2009 an article was published in *Truth Weekender* reporting the incident at the Mid Western Rugby Club on Saturday 8 August 2009. The article commenced by stating that a "rugby-mad mum" faced a possible assault charge after punching the club coach in the face because he did not play her son in the season-ender grand final. The article went on to report that the incident had only came to light because Mr Deeming had made a complaint to WDC and that Mr Deeming was now described by locals as "the most hated man in town". Comments attributed to Mr McDowell were reported at some length:

> Deeming – the secretary of the Maungakaramea fire service – now claims he's become the target of threats from locals.
>
> That's been confirmed by several sources as well as Mid Western chairman Paul McDowell, who this week described Deeming as a "pompous git and whinger".

> McDowell wouldn't be drawn on whether the club planned to lay assault charges or ban [the rugby-mad mum] but said he was more upset with Deeming for trying to use the incident and a subsequent one at the after-match to further his designs on the Whangarei mayoralty. 'He's just a bloody idiot'.
>
> Another *Truth* source said Deeming was now the most unpopular man in Maungakaramea.

Shortly after publication the article was widely distributed at a community event in Maungakaramea.

The account given by Mr McDowell

[19] Mr McDowell gave evidence that prior to receiving the email from Councillor Shelley Deeming he had been telephoned by the Northland Rugby Union and told Mr Deeming had made a complaint to the Union. That complaint had then been emailed to Mr McDowell. Mr McDowell could not now remember which of the two emails he received first. Nor could he remember taking a copy of one or other of the emails with him when he went to see Mr Deeming on 19 August 2009.

[20] Mr McDowell's account of the 19 August 2009 meeting was that he told Mr Deeming that he (Mr Deeming) should have come directly to the club about his concerns and that the information Mr Deeming had regarding the events on 8 August 2009 was incorrect. Mr McDowell had also expressed his disappointment that Mr Deeming had complained to both WDC and Northland Rugby Union on no more evidence than "incorrect gossip". Mr McDowell said he had not been intimidating during the visit.

[21] Questioned about this account Mr McDowell conceded Councillor Shelley Deeming was a good friend of his and that he had never previously met Mr Deeming himself. In fact had not been aware he lived only a short distance from his (Mr McDowell's) farm. He said the discussion with Mr Deeming on the morning of 19 August 2009 had been an amicable one.

[22] Mr McDowell was asked whether he had been accurately reported in *Truth Weekender* as saying Mr Deeming was a "pompous git and whinger". He conceded it was possible he had made these remarks. He further conceded he had been accurately reported saying Mr Deeming was trying to use the incident to further his designs on the mayoralty and also accepted he had described Mr Deeming as "just a bloody idiot". Asked about subsequent correspondence sent by Mr Deeming to the club Mr McDowell said it had all been immediately placed in the rubbish and he did not think it had even been tabled. A decision had been made to ban Mr Deeming (not a member) from the club for life because he was "a nuisance and causing us annoyance". The club was spending too much time answering his correspondence.

[23] The banning letter (dated 10 November 2009) was in the following terms:

> The committee feels that you Mr Deeming has caused irreparable damage and unnecessary reprocutions (sic) towards our community focused rugby club, along with now the club losing their Boar's Head which has been an icon for many decades. So therefore on that basis, the committee agreed that we now feel that your presence would be no longer welcome back on our premises now or the foreseeable future.

Emotional harm

[24] To establish liability under s 66(1) Mr Deeming must establish not only a breach of Principle 11 but also that the breach has resulted in significant humiliation, significant loss of dignity or significant injury to his feelings.

[25] Mr Deeming's evidence was that prior to the disclosure of his letter to the Mayor he believed he had a good reputation within his local community. He had been instrumental in helping to form, and acted as Secretary of, the Mid-Western Community Association and with one other person had initiated and edited a local monthly newspaper, the *Tangihua Times*. He had also been involved as Secretary-Treasurer of the Maungakaramea Cricket Club, Treasurer of the Maungakaramea Recreation Society, acting chair of the Maungakaramea Sports Club for a short time and at the time of the disclosure was Secretary-Treasurer of the Maungakaramea Voluntary Rural Fire Force.

[26] As reflected in both the *Truth Weekender* article and in the email exchanges between Councillor Shelley Deeming and Mr Watson, disclosure of Mr Deeming's identity as the informer to the small community in which he lived led to him being regarded as "the most hated man in town", "a pompous git and whinger" and "just a bloody idiot". The references by Councillor Shelley Deeming and Mr Watson to "a viper among them", "seeking to besmirch them", and that 400 Mid Western rugby supporters would not be happy reflected an acknowledgement that living in a small community a perceived attack on a sporting and social institution of some significance to that community, its members and its liquor licence was not welcomed.

[27] Mr Deeming also relied on the fears for his safety triggered not just by Mr McDowell's visit and subsequent brushes with him (one of which is referred to by Councillor Shelley Deeming) but the fear that supporters of the club would similarly display the anger manifested by Mr McDowell. Mr Deeming held real fears for his family, his property and himself. He also made reference to the fact that his wife and daughter live in the same community and he found it humiliating that the hurt inflicted on him was inflicted also on his close family members.

[28] Since the disclosure he has found it extremely stressful and difficult to involve himself in any sort of community activity and no longer does so. He resigned his position with the Fire Force and now restricts himself to auditing books for the Uniting Church, the Maungakaramea Voluntary Rural Fire Force and the Maungakaramea Indoor Bowling Club. He rarely attends any community events and then only for the formal part and when accompanied by others. He said that it is hard to accept that people may still be looking sideways at one or sniggering behind one's back.

[29] Mr Deeming also believes that he has suffered increased stress necessitating on occasion the prescription of medication and he has also undergone an operation for the insertion of a stent owing to high blood pressure and heart disease. His wife collapsed in August 2009 at a 21st birthday party, partly due to stress.

The complaint to the Privacy Commissioner

[30] On 11 September 2009 Mr Deeming lodged a complaint with the Privacy Commissioner. That complaint was investigated as a complaint that Principle 11 had been breached. The investigation was closed on 10 May 2010 with the issue by the Commissioner of a Certificate of Investigation.

Subsequent events – the delay issue

[31] On 30 June 2010 Mr Deeming lodged with the Ombudsman a complaint relating to the conduct of the investigation by the Privacy Commissioner. That investigation did not conclude until February 2012. In the meantime in October 2010 Mr Deeming also lodged with the Mayor a complaint of unlawful disclosure based on the WDC Code of

Conduct. Other complaints were lodged, including a complaint with the Ombudsman (November 2012) relating to the refusal by WDC to provide certain information under the Official Information Act 1982, a complaint (in August 2013) with WDC regarding allegedly false information given in response to an OIA request, a complaint (September 2013) with the Ombudsman requesting WDC carry out a proper Code of Conduct process and the relodging of the Code of Conduct complaint with the incoming Mayor Mai.

[32] The present proceedings were not filed with the Tribunal until 20 January 2015.

[33] Mr Deeming explained he did not file proceedings with the Tribunal immediately after the Privacy Commissioner decision as he believed the investigation by the Commissioner had contained serious errors of fact and that the Commissioner had failed to properly mediate a solution. He sought to have those complaints resolved by the Ombudsman in the hope that a proper mediation process would then be carried out. The investigation took almost two years and failed to achieve its purpose. He also believed the responsibility was the Council's and that the separate codes of conduct for councillors and staff were the appropriate mechanisms through which the actions of the various actors could be considered. It was only when the Ombudsman decided on 14 November 2014 that no investigation would be carried out that Mr Deeming realised he had exhausted all non-litigation options. He says his actions over the past five years have been in good faith.

The evidence – discussion and findings

[34] The only substantial conflict of evidence relates to Mr McDowell's visit to Mr Deeming's home on 19 August 2009. In this regard the evidence given by Mr Deeming was supported by the evidence given by his wife (present on the occasion) and by Mr Slater who, on the same day as the visit, noticed Mr Deeming was uncomfortable, tense and shaky. On being questioned Mr Deeming disclosed the visit by Mr McDowell and told Mr Slater that he (Mr Deeming) had found the visit threatening. The evidence of all three witnesses was consistent and given in frank, direct terms.

[35] In contrast Mr McDowell was evasive and not forthcoming. Although he claimed had never met Mr Deeming prior to 19 August 2009 and although he further claimed the meeting had been amicable, he was reported a short time later by *Truth Weekender* as referring to Mr Deeming in disparaging terms which suggested Mr McDowell knew much more about Mr Deeming than he admitted to. It was clear to the Tribunal Mr McDowell does not like Mr Deeming and that in giving his evidence Mr McDowell was more intent on exculpating his own actions than giving a frank account of the events in question. It is not without significance Mr McDowell conceded he was a good friend of Councillor Shelley Deeming.

[36] In these circumstances we prefer the evidence given by Mr Deeming, his wife and Mr Slater. It follows we accept Mr Deeming's evidence that he felt threatened and that the so-called "retraction" letter he sent to Mr Semenoff on the day of Mr McDowell's visit was written at a time Mr Deeming felt under extreme stress with the result that little weight can be given to it.

[37] It follows we accept the account given by Mr Deeming and his witnesses.

THE LEGAL ISSUES

[38] WDC accepts:

> **[38.1]** It is an "agency" as defined in s 2(1) of the Act.
>
> **[38.2]** Mr Deeming's letter dated 14 August 2009 to Mr Semenoff contained "personal information" about Mr Deeming in terms of s 2(1) of the Act.
>
> **[38.3]** The effect of s 87 of the Act is that WDC has the burden of establishing the disclosure fell within either Principle 11(a) or (d) or both.

[39] We turn now to Principle 11.

The disclosure limitation principle – Principle 11

[40] Principle 11 stipulates that personal information should not be disclosed for purposes other than those for which the information was obtained:

> Principle 11
> *Limits on disclosure of personal information*
>
> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
> (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained; or
> (b) that the source of the information is a publicly available publication; or
> (c) that the disclosure is to the individual concerned; or
> (d) that the disclosure is authorised by the individual concerned; or
> (e) that non-compliance is necessary—
> (i) to avoid prejudice to the maintenance of the law by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences; or
> (ii) for the enforcement of a law imposing a pecuniary penalty; or
> (iii) for the protection of the public revenue; or
> (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
> (f) that the disclosure of the information is necessary to prevent or lessen a serious threat (as defined in section 2(1)) to—
> (i) public health or public safety; or
> (ii) the life or health of the individual concerned or another individual; or
> (g) that the disclosure of the information is necessary to facilitate the sale or other disposition of a business as a going concern; or
> (h) that the information—
> (i) is to be used in a form in which the individual concerned is not identified; or
> (ii) is to be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or
> (i) that the disclosure of the information is in accordance with an authority granted under section 54.

[41] The application of Principle 11 was summarised in *Geary v Accident Compensation Corporation* [2013] NZHRRT 34 at [190] as follows:

> **[190]** Applying this provision to Principle 11, it was established in *L v L* HC Auckland AP95-SW01, 31 May 2002, Harrison J at [20] (and see the Tribunal decisions collected in *Harris v Department of Corrections* [2013] NZHRRT 15 (24 April 2013) at [43]) that the sequential steps to be followed are:

> **[190.1]** Has there been a disclosure of personal information. The plaintiff carries the burden of proving this threshold element on the balance of probabilities.
>
> **[190.2]** If the Tribunal is satisfied that personal information has been disclosed, the burden shifts to the defendant to establish to the same standard that that disclosure fell within one of the exceptions provided by Principle 11.
>
> **[190.3]** Third, if the Tribunal is satisfied that the personal information was disclosed and that the defendant has not discharged his or her burden of proving one of the exceptions in Principle 11, the Tribunal must then determine whether the disclosure constituted an interference with the individual's privacy as defined in s 66 of the Privacy Act. That is, has the plaintiff established one of the forms of actual or potential harm contemplated by [s 66(1)]. The burden of proof reverts to the plaintiff at this stage.
>
> **[190.4]** Fourth, if the Tribunal is satisfied to this stage, then its final task is to determine whether, in its discretion, it should grant any of the statutory remedies identified in s 85 of the Act.

[191] It is not a defence that the interference was unintentional or without negligence on the part of the defendant. See s 85(4) and *L v L* at [13] and [99].

Conclusion on first sequential step

[42] As it is common ground personal information about Mr Deeming was disclosed by WDC to Councillor Deeming and in turn, to the Mid Western Rugby Club it follows the first of the sequential steps mandated in *L v L* has been established to the probability standard. That is there has been a disclosure of personal information.

[43] The question is whether WDC has established to the same standard the disclosure fell within the exception provided by Principle 11(a) or by Principle 11(d) or both.

Principle 11(a) and (d) – the requirements of the second sequential step

[44] Principle 11(a) has two limbs. The first requires an inquiry into whether disclosure of the information was one of the purposes in connection with which the information was obtained. The second requires inquiry into whether disclosure of the information was directly related to the purposes in connection with which the information was obtained:

> Principle 11
> *Limits on disclosure of personal information*
>
> An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,—
>
> (a) that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained.

It is not necessary for an agency to satisfy both limbs. One alone is sufficient.

[45] For WDC it was submitted the letter from Mr Deeming to Mr Semenoff was written with the clear intent of prompting the Mayor into finding out what had taken place at Maungakaramea on the evening of Saturday 8 August 2009 and if he (the Mayor) did not do something, Mr Deeming was prepared to take action. It is further submitted the letter provides a clear insight into Mr Deeming's intent and how he expected the letter to be used. That is, it is clear disclosure of the information (that there had been a complaint by Mr Deeming) was one of the purposes with which the information was obtained.

[46] In the alternative it was submitted disclosure of the information was directly related to the purposes in connection with which the information was obtained. There was an uninterrupted and immediate relationship to the original purpose that is, Mr Deeming wanted some form of investigation. It was therefore entirely appropriate for the Mayor to have delegated that task to the local representative, being Councillor Shelley Deeming. As a matter of natural justice, if a complaint is received it is entirely appropriate the entity complained about is provided with a copy.

[47] In our view both submissions in relation to Principle 11(a) proceed on a misreading of both the letter dated 14 August 2009 and on the circumstances. Certainly it is clear Mr Deeming was drawing attention to what he described as an "alcohol fuelled brawl" at the club where, he alleged, there was a binge drinking attitude to alcohol and Mr Semenoff was invited to investigate the events which occurred on the evening of Saturday 8 August 2009. But the investigation of these complaints did not require disclosure of Mr Deeming's identity as the person who had asked that the inquiry be set in motion. The personal information protected by Principle 11 was Mr Deeming's identity as the complainant, not the allegations he made in relation to the Mid Western Rugby Club. What the Mayor, his executive assistant (Mr Watson) and Councillor Shelley Deeming failed to appreciate was that while there was no restriction on the disclosure of the information provided by Mr Deeming there was a prohibition on the disclosure of Mr Deeming's identity as the complainant. Indeed, the WDC Policy on Protecting Complainant's Identity was to the same effect and also explained the reason for the prohibition namely, to ensure the complainant's privacy and to protect from harassment and intimidation. As the email correspondence between Councillor Shelley Deeming and Mr Watson makes abundantly clear, they knew from the outset that disclosure of the identity of Mr Deeming as the person making the complaint would result in highly unpleasant consequences, consequences they could not only foresee but welcomed. There is good evidence that as the reported comments of Mr McDowell in the *Truth Weekender* underline, it was not so much the incidents of 8 August 2009 which caused community concern, but the fact that one of the members of the community (Mr Deeming) had caused the incidents to come to light. Principle 11(a) accordingly has no application.

Principle 11(d)

[48] WDC argues in the alternative Principle 11(d) applies. That is, Mr Deeming either explicitly or implicitly authorised the disclosure.

[49] Here again we are of the view WDC has failed to draw a distinction between the information provided by Mr Deeming and his identification as the source of that information. The former was disclosable, the latter not.

[50] WDC relied on the fact that on the same day as writing to Mr Semenoff, Mr Deeming sent a similar letter to the Northland Rugby Union and did not explicitly or implicitly seek to inhibit the Union from disclosing the complaint or the fact that he (Mr Deeming) was the author of the complaint. To this it must be observed that only WDC had a policy of protecting a complainant's identity and it was WDC which at the time was the licensing authority under the then Sale of Liquor Act. There is logic to confidentiality being expected for one letter but not the other. Above all, however, there is no evidence that at the time Councillor Shelley Deeming disclosed the letter to Mr McDowell, she was aware of the existence of the letter to the Northland Rugby Union and of its terms. She could not have had any belief Mr Deeming had by writing to the Northland Rugby Union

explicitly or implicitly authorised disclosure of his identity by either WDC or by any of its Councillors.

[51] In these circumstances we do not accept WDC has established disclosure of Mr Deeming's letter to the Mayor was authorised by Mr Deeming. Indeed, the email correspondence between Councillor Shelley Deeming and Mr Watson rather suggests they both knew Mr Deeming was unaware his identity as complainant would be disclosed.

[52] However, we do accept that the letter to the Northland Rugby Union is relevant to the assessment of damages should Mr Deeming establish that in terms of s 66 of the Act there has been an interference with his privacy.

Belief on reasonable grounds

[53] It is now necessary to address the matters of "belief" and "reasonable grounds" in relation to both Principle 11(a) and (d). The application of both provisions depends on it being shown that at the time of the disclosure, the agency believed, on reasonable grounds the circumstances in one or more of the statutory exceptions applied to the facts.

[54] For the reasons explained in *Geary v Accident Compensation Corporation* at [201] to [203], the subjective component (the belief) as well as the objective component (the reasonable grounds) in Principle 11 must exist at the date of disclosure. There must be an actual belief based on a proper consideration of the relevant circumstances. An explanation devised in hindsight will not suffice:

> **[201]** Returning to Principle 11, it is to be noted that to escape the statutory prohibition on disclosure of personal information, an agency must establish that at the time of disclosure, it possessed the requisite belief on reasonable grounds:
>
> > An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds,….
>
> **[202]** There is a subjective component (the belief) and an objective component (the reasonable grounds). It must be established that both elements existed as at the date of disclosure.
>
> **[203]** The need for reasonable grounds for belief requires the agency to address its mind to the relevant paragraph of Principle 11 on which it intends to rely. See by analogy *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 at [63]:
>
> > We consider that the need for reasonable grounds for belief in the necessity of disclosure requires the agency concerned to first inspect and assess the material being disclosed. The exception is not engaged where there is a failure to check the contents of the disclosure material before transmission.
>
> There must be an **actual** belief based on a proper consideration of the relevant circumstances. An explanation devised in hindsight will not suffice.

[55] None of the 2009 decision-makers in WDC were called to give evidence. We refer here to Mr Semenoff, Councillor Shelley Deeming and Mr Watson. It follows there is no evidence the requisite subjective component (the belief) existed as at the date of disclosure to Mr McDowell.

[56] As to the need for reasonable grounds we have already noted the complete absence of evidence that any of the decision-makers were, as at the date of the disclosure to Mr McDowell (18 August 2009) aware that on 14 August 2009 Mr Deeming had written to the Chief Executive of the Northland Rugby Union. Furthermore, there is

no evidence that any of the decision-makers believed, on reasonable grounds that either Principle 11(a) or (d) applied to authorise the disclosure of the information. If anything, the decision-making process, such as it was, was characterised by a gleeful anticipation of the harm which would be inflicted on Mr Deeming once his identity as informant was disclosed.

Conclusion on second sequential step

[57] In summary, WDC has not proved to the civil standard disclosure of the statement fell within one of the exceptions provided by Principle 11.

The third sequential step – whether interference with privacy established

[58] The term "interference with privacy" is defined in s 66. Only subs (1) is relevant on the facts:

> **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.

[59] This provision requires Mr Deeming to establish:

> **[59.1]** That in relation to Mr Deeming an action of WDC breached an information privacy principle; **and**
>
> **[59.2]** In the opinion of the Tribunal the action:
>
> > **[59.2.1]** Has caused or may cause Mr Deeming loss, detriment, damage or injury; or
> >
> > **[59.2.2]** Has adversely affected, or may adversely affect, his rights, benefits, privileges, obligations, or interests; or
> >
> > **[59.2.3]** Has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to his feelings.

[60] As to the first requirement, we find Principle 11 was breached in the manner established by the evidence.

[61] As to the second requirement, Mr Deeming relies only on s 66(1)(b)(iii) namely, he claims he has suffered significant humiliation, significant loss of dignity or significant injury to his feelings.

[62] As to the meaning of humiliation, loss of dignity and injury to feelings we do not intend repeating what was said in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 (2 March 2015) at [152], [153], [170.6] and [170.7].

[63] As we accept Mr Deeming's evidence we find the consequences detailed in his evidence do amount to significant humiliation, significant loss of dignity and significant injury to feelings. In short disclosure of his identity has led to his identification as "the most hated man in town".

Causation

[64] Breach of an information privacy principle does not on its own satisfy the statutory definition of "interference with the privacy of an individual" in s 66(1) of the Privacy Act. Before the Tribunal can grant a remedy a harm threshold must be crossed and a causal connection established between the harm and the defendant's "action" as defined in s 2(1). That is, it must be shown the breach of the information privacy principle:

> **[64.1]** has caused, or may cause, loss, detriment, damage, or injury to that individual; or
>
> **[64.2]** has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
>
> **[64.3]** has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

In the present case only the third of these situations has application.

[65] As stated in *Taylor v Orcon Ltd* [2015] NZHRRT 15 at [61] 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.

[66] The facts in the present case are uncomplicated and straightforward. The disclosure by Councillor Shelley Deeming to Mr McDowell of Mr Deeming's identity as the person who was seeking an investigation into the events of 8 August 2009 led directly to Mr McDowell's visit to Mr Deeming's home, the life ban and the reported comments of Mr McDowell to *Truth Weekender* which in turn was distributed widely in the Maungakaramea community. In our view the causation standard, understood as a contributing or material cause, has been comfortably established by Mr Deeming to the probability standard in relation to s 66(1)(b)(iii). The fact that Mr Deeming's letter to the Northland Rugby Union also contributed to the significant humiliation, significant loss of dignity or significant injury to feelings is not material in the context of liability.

Conclusion on third sequential step

[67] For all these reasons we conclude in terms of s 66(1) of the Privacy Act there has been an action by WDC which was an interference with the privacy of Mr Deeming.

REMEDY

[68] Where 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 one or more of the remedies allowed by s 85 of the Act:

> **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.
> (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.
> (3) Where the Director of Human Rights Proceedings is the plaintiff, any costs awarded against him or her shall be paid by the Privacy Commissioner, and the Privacy Commissioner shall not be entitled to be indemnified by the aggrieved individual (if any).
> (4) It shall not be a defence to proceedings under section 82 or section 83 that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.

[69] Section 88(1) relevantly provides that damages may be awarded in relation to three specific heads of damage:

> **88 Damages**
>
> (1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:
> (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:
> (b) 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:
> (c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

Section 85(4) – the conduct of the defendant

[70] Section 85(4) provides that while it is no defence that the interference was unintentional or without negligence, the Tribunal must nevertheless take the conduct of the defendant into account in deciding what, if any, remedy to grant.

[71] On the evidence we have heard neither the Mayor's executive assistant (Mr Watson) nor Councillor Shelley Deeming appear to have comprehended their actions were governed not only by Principle 11 but also by WDC's own policy on protecting the identity of a complainant. As mentioned, their email exchanges seemed to have anticipated with some relish that release of the information to Mr McDowell would lead to community hostility towards Mr Deeming, a hostility they obviously shared in somewhat undisguised terms. We see no mitigating circumstances.

Delay by Mr Deeming

[72] It is well established delay by a plaintiff is relevant to the question of remedies. In *Te Wini v Askelund* [2015] NZHRRT 21 (15 June 2015) it was held at [47] to [49] that the claim in that case for damages for humiliation, loss of dignity and injury to feelings had not been established because of (inter alia) the inordinate delays which had characterised the case including a three year five month delay in bringing the proceedings and the failure over 13 months to comply with directions given by the Chairperson.

[73] In the present case the delay between closure of the investigation by the Privacy Commissioner on 10 May 2010 and the filing of these proceedings on 20 January 2015 is 4 years 8 months. Mr Deeming has established that in this period he was pursuing related complaints to the Ombudsman and to WDC itself. But while the delay has been explained we do not believe it has been excused. The Tribunal has always been the only appropriate forum for the hearing and resolution of this claim. The longer Mr Deeming put off filing the proceedings the greater the risk of fading memories and the confusion of issues caused by his repeated attempts to obtain a form of redress through the Ombudsman and through the Code of Conduct complaints to WDC. It has also become more difficult to assess the degree to which Mr Deeming experienced humiliation, loss of dignity or injury to feelings as a result of the August 2009 unauthorised disclosure as opposed to the subsequent conduct of the parties. Furthermore the Tribunal is now placed in a situation in which it must quantify the degree of emotional harm experienced 6 years 4 months in the past.

[74] It is against this background we turn to address the question of remedies.

Declaration

[75] 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].

[76] The long delay in this case has caused us to pause when considering the grant of a declaration. In the end we are persuaded it is appropriate this form of remedy be granted. The actions of Mr Watson and Councillor Shelley Deeming do neither themselves nor WDC any credit. There is no evidence that any regard was paid to the obligations imposed by the Privacy Act let alone the Council's own policy on protecting the identity of complainants. Personal animosity to Mr Deeming appears to have prevented better judgment being exercised. The consequences to Mr Deeming were both serious and foreseeable. In these circumstances a declaration that WDC interfered with Mr Deeming's privacy is appropriate and such declaration is accordingly made.

Training order

[77] We have already drawn attention to the fact there seemed little awareness on the part of those involved of the information privacy principles, let alone the reflection of Principle 11 in WDC's own policy which protects the identity of people who make complaints to council. When we raised with Mr Magee the possibility of a training order being made he responded that should Mr Deeming establish his case, WDC would accept a training order would be an appropriate remedy for the Tribunal to grant.

[78] We accordingly order that WDC, in conjunction with the Privacy Commissioner and at its own expense, provide training to its Councillors and management staff in relation to their and WDC's obligations under the Privacy Act.

Damages for emotional harm

[79] In his amended statement of claim dated 7 May 2015 Mr Deeming seeks damages of $40,000 for humiliation, loss of dignity and injury to feelings together with "aggravated damages" of $10,000.

[80] The claim for aggravated damages must be dismissed as the Tribunal has no jurisdiction to award such damages. We address then the claim for damages for what might loosely be called emotional harm.

[81] While it is accepted that in 2009 Mr Deeming experienced significant humiliation, significant loss of dignity and significant injury to feelings, quantification of damages is a less than straightforward exercise not just because the assessment falls to be made some six years after the event; there is also the fact Mr Deeming wrote simultaneously to the Northland Rugby Union in similar terms to his letter to the Mayor but did not ask in that letter for confidentiality. The evidence establishes the letter to the Union reached Mr McDowell at or about the same time as the email from Councillor Shelley Deeming. The two letters (the one to the Mayor, the other to the Northland Rugby Union) operated in parallel, the one causing as much damage as the other. While this does not affect causation in the context of liability, it does present challenges in the context of the assessment of damages because there must be a causal connection between the action which is an interference with the privacy of an individual and the damages awarded.

[82] We are satisfied all three forms of emotional harm were experienced by Mr Deeming and that such harm, in part, can be separately traced to the disclosure of his identity as the author of the letter to the Mayor. This is the point of distinction with *Te Wini v Askelund*. In that case the delay factor was compounded by the fact that little or no emotional harm had been established.

[83] However, the award of damages must be an appropriate response to adequately compensate the aggrieved individual for such emotional harm. See *Hammond* at [170.8]. Bearing in mind the complications caused by the delay factor and also taking into account the parallel disclosure to the Northland Rugby Union, we are of the view that an award of $2,000 is adequate to compensate Mr Deeming for his humiliation, loss of dignity and injury to feelings which flowed from the 2009 disclosure of his identity as the complainant in the complaint to the Mayor.

FORMAL ORDERS

[84] For the foregoing reasons the decision of the Tribunal is that it is satisfied on the balance of probabilities that an action of the Whangarei District Council was an interference with the privacy of Mr Deeming and:

> **[84.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that the Whangarei District Council interfered with the privacy of Mr Deeming by disclosing personal information about him when the Whangarei District Council did not believe on reasonable grounds that any of the exceptions listed in Principle 11 of the information privacy principles had application.

[84.2] Damages of $2,000 are awarded against the Whangarei District Council under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for humiliation, loss of dignity and injury to feelings.

[84.3] An order is made under s 85(1)(d) and (e) of the Privacy Act 1993 that the Whangarei District Council, in conjunction with the Privacy Commissioner and at its own expense, provide training to its Councillors and management staff in relation to their and the Whangarei District Council's obligations under the Privacy Act 1993 in order to ensure they are aware of those obligations.

COSTS

[85] As a lay litigant Mr Deeming is not entitled to costs, although he may recover disbursements. Essentially, he can recover the expense of photocopying documents for the purpose of these proceedings together with such witness expenses as may have been incurred.

[86] Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

[86.1] Mr Deeming is to file and serve particulars of any disbursements claimed within 14 days after the date of this decision. The submissions for WDC are to be filed and served within a further 14 days with a right of reply by Mr Deeming within 7 days after that.

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

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

.....	.....	.....
Mr RPG Haines QC	**Mr RK Musuku**	**Mr BK Neeson JP**
Chairperson	**Member**	**Member**