OUT OF THE BLUE? IS LITIGATION UNDER THE PRIVACY ACT 1993 ADDRESSED ONLY AT PRIVACY GRIEVANCES?

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I. Introduction

The New Zealand Law Commission has recently completed its report on the future of the Privacy Act 1993 ("the Act").[1] Although significant changes are recommended – notable amongst which are recommendations to shift the Privacy Commissioner's role away from conciliation towards that of enforcement agency – the existing dispute resolution mechanisms that exist under the Act are not proposed to be amended in any significant manner.[2]

This recommendation is hardly surprising. The existing dispute resolution procedure contained in the Act (which largely avoids the need for complainants to undertake expensive court proceedings but instead provides access to a dedicated specialist tribunal) is an aspect that has worked well thus far. The advantages and shortcomings of this approach have been thoroughly canvassed in an earlier article which examined the nature of litigation under the Privacy Act, the nature of the litigants, the nature of their complaints and the remedies awarded.[3] In this article, we do not propose to replicate the earlier research. Instead, we examine litigation conducted under the Act from a somewhat different standpoint, viz. the potential motives of plaintiffs and the context in which the litigation occurred. In particular, we were concerned with two possibilities.

The first is that the relatively inexpensive avenues provided by the Act have allowed individuals to pursue disputes against others in circumstances where the cause of the dispute had little to do with privacy. This may, for example, have emboldened vexatious litigants and those – such as inmates in prisons and the like – who have had the opportunity and the time to contemplate bringing such claims.

The second possibility, however, is that litigation under the Act has, for the most part, served to advance the goals of information privacy law. The human rights foundations underpinning this branch of the law have been

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1 Law Commission (NZ) *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4, NZLC R 123*, June 2011.

2 Ibid at chapter 6.

3 See G Gunasekara and E Dillon "Data Protection Litigation in New Zealand: Processes and Outcomes" (2008) 39 Victoria University Law Review 457.

hinted at by privacy scholars who have observed the potential for abuses that exist in modern bureaucratic societies, such as those vividly portrayed by Kafka.[4] It has been noted that:[5]

> In *The Trial*, the problem is … a suffocating powerlessness and vulnerability created by the court system's use of personal data and its exclusion of the protagonist from having any knowledge or participation in the process. The harms consist of those created by bureaucracies – indifference, errors, abuses, frustration, and lack of transparency and accountability.

The study we have undertaken has thrown up many examples of bureaucratic failures along these very lines. Although there have been a few vexatious litigants along the way, a significant proportion of cases were linked to the exercise of rights by individuals under other legislation or to their obtaining of benefits. The management or mismanagement of personal information by agencies was often the target of such claims.

Finally, litigation under the Act was often the last recourse for the marginalised and for those on the periphery of society (those who had exhausted all other options) and indeed, served to shine a light on many dark corners of society in New Zealand, be they prisons, the nature of psychiatric treatments or the actions of individuals and organisations in positions of power whose decisions are otherwise unable to be scrutinised. The conclusions we reach help in answering hitherto difficult questions regarding the interests served by information privacy law, the value of privacy and where it sits in the wider legal landscape.

II. Scope and Methodology of Research

In their earlier study, Gunasekara and Dillon assessed the degree to which New Zealand's information privacy law:[6]

> … provides real remedies in concrete instances affecting real people. In New Zealand such a tool exists in the reported case law of the tribunal that hears privacy complaints …. now the Human Rights Review Tribunal.

The authors examined the decisions of the Human Rights Review Tribunal ("the HRRT") and the Complaints Review Tribunal ("the CRT") which existed before it, from 1993 to 2006. These decisions are publically accessible.[7] In addition, they address the relatively few cases where appeals were taken to the courts from the decisions of the Tribunals. They also made observations as to the areas of the Act that were most litigated, the identity of defendants and the remedies awarded.

The focus of this article is somewhat different. Whilst we examine the decisions of the CRT, the HRRT (and appeals from them) adopting a similar methodology to that of Gunasekara and Dillon, we were interested to discover whether privacy claims arose on their own as opposed to being incidental to the exercise of other claims and rights. In addition, we were

4 D Solove "I've Got Nothing to Hide' and Other Misunderstandings of Privacy" (2007) 44 San Diego Law Review 745 and 766.

5 Ibid.

6 Gunasekara, above n 3, at 459.

7 <http://www.nzlii.org/nz/cases/NZHRRT/>

interested to find out the extent to which the Act was being used in a service role to enable individuals to access benefits or to bring other claims. The extent to which the Act was employed to re-litigate other disputes that had little to do with privacy was also a subject of enquiry. The time frame of our study is 2000 to 2010.

In order to answer these questions, we examined all of the CRT, HRRT rulings (and appeals from them to the courts) in this period.[8] Seventy four cases formed the basis of the enquiry. These were rulings of the Tribunal that went to matters of substance. Excluded from consideration were preliminary or interlocutory rulings, strike-out applications, as well as decisions concerning costs. Tribunal cases that were appealed[9] to the High Court or to the Court of Appeal[10] were only counted once – that being the final ruling.

These cases were examined in some detail. Statistics were compiled from them which, amongst other things, catalogued which information privacy principles ("IPPs") were alleged to have been breached, the success of these claims and the nature of the defendants. More importantly, however, the *facts* of the cases were carefully scrutinised and an assessment made as to the context in which the litigation occurred. Cases where the dispute constituted only a breach of the Act were noted as such, whereas cases in which the facts disclosed the existence of other disputes between the parties or the exercise by them of rights unrelated to privacy were categorised separately.

Two examples (both of which are included in our survey) will suffice to demonstrate how we categorised the cases. In *Hamilton v The Deanery 2000 Limited*[11] a British advertising model sought confidential treatment for an alcohol addiction at an exclusive private New Zealand rehabilitation clinic. Although relations between her and the clinic were initially cordial (discussions had even taken place for her to play a role in marketing the clinic) they subsequently deteriorated and the clinic went public concerning her treatment by stating that she had "failed" its rehabilitation programme. This was compounded by the clinic making allegations to immigration authorities that she was an active drug user as a consequence of which she suffered the embarrassment of being questioned and searched at the airport. The information was also obtained by the British tabloid media which proceeded to publicise the story in the United Kingdom. This case has been classified by us as primarily concerned with privacy. While other disputes (such as a defamation suit against the tabloid media) also occurred, these were to a large extent as a consequence of the primary breach of privacy rather than their cause.

In *Yeo v McDowell and McDowell*[12], on the other hand, the defendants were a couple who were creditors of the plaintiff. Following the plaintiff's bankruptcy and the inability of the defendants to recoup their debt the

8 Included is one High Court appeal from a CRT decision prior to 2000.
9 Human Rights Act 1993, s 123.
10 Human Rights Act 1993, s 124: appeals are only permitted by leave and can be on a point of law or matter of general importance.
11 *Hamilton v The Deanery 2000 Limited* [2003] NZHRRT 28.
12 *Yeo v McDowell and McDowell* [2006] NZHRRT 11.

defendants chose, in essence, the self-help remedy of publicising the plaintiff's circumstances in the immediate community. The principal complaint of the plaintiff related to the defendants' placement on a noticeboard in their premises of both a dishonoured cheque as well as a letter from the Insolvency Service containing details of the plaintiff's circumstances known only to creditors. This case, in our view, does not mainly concern privacy and only arose due to the existence of another dispute between the parties.

In this context the distinctions we highlight have arisen and been given consideration in cases brought before the HRRT. For example, in *K E H and P H v Chief Executive of Work and Income*[13], the Tribunal opined that the dispute was related to long-standing family disputes involving other parties and that the defendant department had only become involved peripherally in them. It stated:[14]

> We do not accept that litigation based on breaches of the Privacy Act is the appropriate forum with which to air grievances of a domestic or family nature unless it is the breach itself which causes the grievance.

A case in which the privacy breach did come out of the blue and did in fact lead to a domestic rift was *Feather v Accident Compensation Corporation*.[15] Here, the defendant corporation disclosed details of the plaintiff's income (in the context of assessing his entitlement to compensation) to a third party who subsequently conveyed the information to the plaintiff's wife. It transpired that she had been unaware of the true extent of her husband's earnings and had for many years been given a meagre allowance by him. The breach caused considerable friction in their 50 year marriage leading to its break up. The plaintiff was awarded damages.

The limitations of the methodology we have adopted must be acknowledged at the outset. By necessity, we were limited to the Tribunals' statement of relevant facts in the rulings. Clearly, these varied widely although fortuitously many of the rulings saw fit to describe the wider context of the parties' dealings and relationships (often unnecessary in light of the narrow legal issues being litigated). It is therefore conceivable that even in the cases we classified as being purely concerned with privacy infringements, other underlying disputes existed between the parties that were not described in the rulings. That said, our classifications are based on empirical data consisting, in this case, of the written rulings of the Tribunals.

13 *K E H and P H v Chief Executive of Work and Income* [2000] NZCRT 40.
14 Ibid at 9.
15 *Feather v Accident Compensation Corporation* [2003] NZHRRT 29.

III. The Nature of Defendants and the Nature of Litigation

A. The Nature of Defendants

In assessing the context in which Privacy Act litigation occurred, an obvious clue not to be ignored are the identities of the defendants. These revealed that the public sector has continued to feature prominently as a target for litigants.[16] In our study 68 per cent of the cases concerned the public sector as opposed to 34 per cent involving the private sector.[17] The New Zealand Police headed the list with 17 cases brought against it, whilst the Accident Compensation Corporation ("ACC") had 10 cases brought against it.[18]

The fact that these organisations accounted for such a large proportion of cases is significant given that litigants are likely to have a pre-existing involuntary relationship with them, either through being the subject of law enforcement or the making of a claim for compensation for injury. Although it is no longer possible to sue for personal injury in New Zealand[19] it would still appear that a significant level of disputes exist as to the availability and amount of compensation when an accident occurs. Our research revealed that much of this has focused on the decision making processes followed by the ACC and this has included information provided to and from the medical professionals who are relied upon by the ACC. The very essence of information privacy rights, such as those conferred by the Act, has obvious application in this sphere. These include the rights of individuals to access their personal health records, ensure its accuracy prior to use and monitor who it is disclosed to. Other defendants included the Department of Corrections, Department of Work and Income, private health providers and private legal services, each of whom had four cases brought against them. Once again litigants in these areas are likely to be those who are amongst the most vulnerable members of society. Apart from the cases against various providers of legal services (which may or may not relate to a pre-existing dispute) these defendants exercise significant power over individuals and it would appear that the Act has a role in redressing this imbalance.

16 Gunasekara, above n 3, at 471.

17 The percentages sum to slightly more than 100 as in a few cases there were defendants from both sectors.

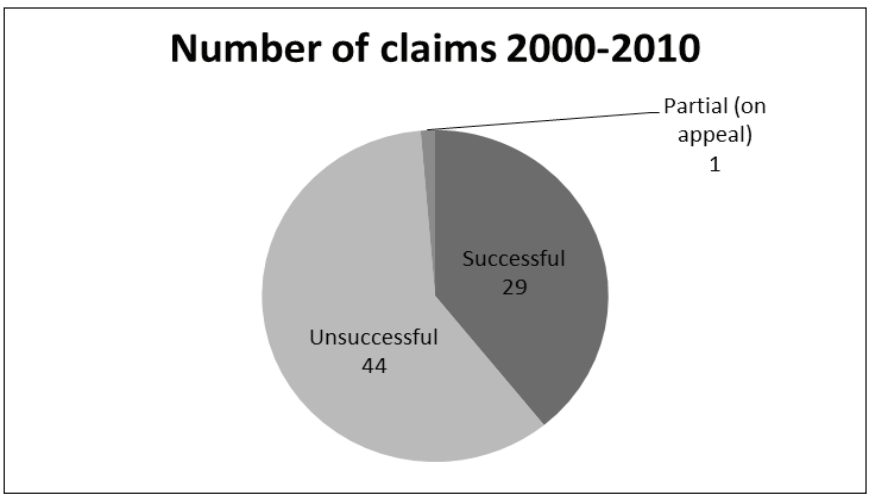
18 Two cases involving the Dispute Resolution Services Limited, a company, were classified as public sector defendants as the service was closely aligned to activities undertaken by the Accident Compensation Corporation.

19 Accident Compensation Act 2001, s 317.

B. The Nature of Litigation

The 12 IPPs[20] span the entire information life cycle encompassing obligations regarding the collection, use, storage, disclosure and disposal of personal information. They also give individuals the right to access their personal information and to correct it if necessary.[21] Graph 1 below depicts the breakdown as to the success or otherwise of the total number of claims that were analysed in this study.

Graph 1 (Total number of cases = 74)

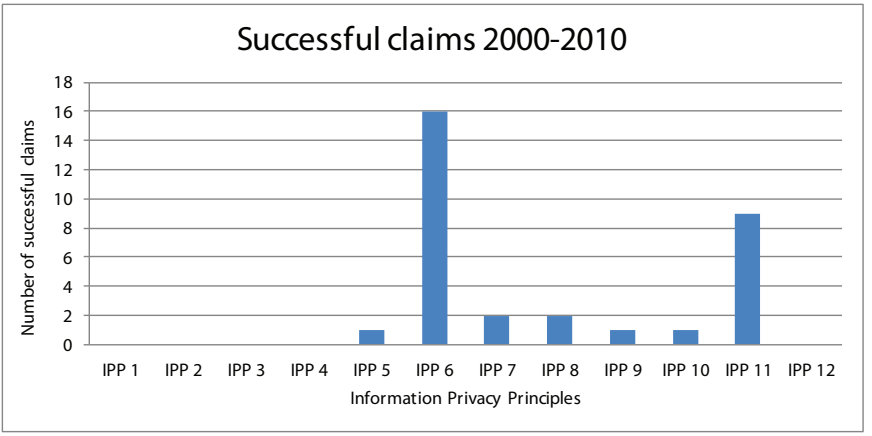


Source: CRT & HRRT Cases and Appeals

Interestingly, however, successful litigation has predominantly occurred in respect of relatively few of the IPPs. Of the 74 cases that were included in our study, 29 of these plaintiffs were successful in their claims. Graph 2 below depicts the breakdown in the IPPs where complainants succeeded in obtaining a remedy.[22]

20 Privacy Act 1993, s 6.
21 Privacy Act 1993, IPPs 6 and 7.
22 Remedies include a declaration, an injunction, damages or an order that the defendant perform any acts: see Privacy Act 1993, s 85.

Graph 2 (29 of 74 total cases)[23]



Source: CRT & HRRT Cases and Appeals

It will be evident that by far the most cases involved the failure by defendants to give access to individuals of personal information relating to them. The importance of access rights is discussed further below but it is worth noting that these cases significantly outnumbered those involving the inappropriate disclosure of personal information. While the pattern in this respect has continued to reflect those observed in the earlier study[24] what is more revealing is that complainants were more likely to be successful in bringing claims that information was wrongfully withheld than by bringing claims concerning breach of the other IPPs.

For instance it is noteworthy that 52 per cent of the claims alleging breach of IPP 6 were successful whereas only 32 per cent of the claims alleging breach of IPP 11 succeeded. Given that we found the overall success rate of litigation under the Act to be 39 per cent this demonstrates that, evidently, agencies have not been forthcoming in complying with their obligations under the Act to give people access to their own personal information when they have a right to it. This is particularly unfortunate as commentators regard access rights to personal information as underpinning all the other information privacy rights.[25] We would also observe that our research relates to actual litigation as opposed to complaints per se (most of which are addressed at

23 Some successful claims involved a breach of more than one IPP. The principles are 1. Purpose of collection of personal information; 2. Source of personal information; 3. Collection of information from subject; 4. Manner of collection of personal information; 5. Storage and security of personal information; 6. Access to personal information; 7. Correction of personal information; 8. Accuracy, etc, of personal information to be checked before use; 9. Agency not to keep personal information for longer than necessary; 10. Limits on use of personal information; 11. Limits on disclosure of personal information; 12. Unique identifiers.

24 Gunasekara, above n 3, at 473.

25 "…the right of individuals to access and challenge personal data is generally regarded as perhaps the most important privacy protection safeguard" *Appendix to the OECD Guidelines: Explanatory Memorandum* (Paris 1980) at [58]; see also P Roth Privacy Law and Practice (2011), at [PVA 6.9 (d)].

the Privacy Commissioner's level)[26] and that it is likely that many unfulfilled requests for access to personal information do not result in any complaint whatsoever.

It is also significant that successful claims have been founded on the obligations regarding the processing and dissemination of personal information as opposed to the obligations concerning the collection of personal information. This may simply reflect the evidentiary difficulties involved, not to mention the difficulty of discerning that a breach has occurred (for instance, where personal information is collected indirectly or where an individual is not informed that the information is being collected[27]). It may also reflect the current weakness in the Act as regards systemic breaches or minor breaches which do not occasion complaint at the individual level but pose a threat to privacy when aggregated. However, the predominance of complaints at the processing stage does accord with the broad thesis of this article that privacy disputes are more likely to arise where there is a pre-existing relationship between the parties.

Although litigation was brought under all but one of the IPPs[28] the plaintiffs were unsuccessful in cases involving the collection principles.[29] In *Director of Human Rights Proceedings v Wilson*,[30] for example, the lawfulness of collection of personal information and its collection from someone other than the information subject were alleged to have breached IPPs 1 and 2. A property developer had used the electoral roll in combination with his BayCorp[31] account to fish for information on a council worker he had had dealings with on a professional matter. The Tribunal held that a breach had occurred but that there had been no harm and that therefore there had been no interference with privacy.[32]

In the timeframe of our study five cases concerned the breach of IPP 3. This imposes significant collection obligations on agencies[33] that collect personal information, such as the duty to inform individuals that their information is being collected, the identity of the collector, the purposes for which it is to be used and the identities of persons to whom it is to be disclosed. Discussion of the seminal consideration of this obligation by the Court of Appeal in *Harder v Proceedings Commissioner*[34] is beyond the scope

26 The annual reports of the Privacy Commissioner reveal, however, that most of the complaints received also concern claims to access personal information: available at <www.privacy.org.nz>

27 This would amount to a breach of IPPs 2 and 3 respectively.

28 IPP 12 which regulates the use of unique identifiers and is unusual as complaints concerning its breach may only be taken to the Privacy Commissioner.

29 Privacy Act 1993, IPPs 1 – 4 inclusive.

30 *Director of Human Rights Proceedings v Wilson* [2010] NZHRRT 20.

31 One of New Zealand's major providers of credit information (now renamed Veda Advantage).

32 Privacy Act 1993, s 66(1)(b).

33 Agencies are broadly defined to include public and private sector organisations and can include individuals (as was the case in *Director of Human Rights Proceedings v Wilson*, above n 30) except where the information is collected or held solely or principally for the purposes of, or in connection with the individual's personal, family, or household affairs (Privacy Act 1993, s 56).

34 *Harder v Proceedings Commissioner* [2000] 3 NZLR 80.

of this article[35] although the case may have had a bearing on the lack of success by plaintiffs in this area. However, it may be that the current wording of IPP 3 is not ideal in that it does not require consent for the collection of personal information but merely notification contemporaneous with the collection. Furthermore, as it currently stands, IPP 3 applies to all types of personal information[36]; there being, for instance, no separate requirements for the collection of "sensitive information".[37]

These gaps were possibly brought to light in one of the cases we examined. In *A B v Accident Compensation Corporation*[38] the plaintiff had been the victim of appalling medical misadventure in psychiatric institutions in the late 1970s. These included being given medications without authority, incorrect diagnosis and treatment, subjection to unorthodox treatments such as "deep sleep therapy", electric shock treatment without consent,[39] and abscesses induced by intramuscular injections of a drug the use of which was unusual at the time. In short, it appears she was used as a proverbial "guinea pig". Unsurprisingly, the plaintiff developed Post-Traumatic Stress Disorder ("PTSD") as well as a phobia of psychiatrists in general.

The plaintiff's claim was only accepted in part by the ACC and protracted litigation ensued. In the course of investigating her further claims[40] the ACC requested that a further assessment by a psychiatrist take place. Although communications with the plaintiff were through her solicitor, unfortunately, due to an administrative error of judgement[41] the psychiatrist in question phoned the plaintiff in order to request that she make an appointment with her for the assessment. Not only did this compromise the plaintiff's rehabilitation but it led to a recurrence of her PTSD, nightmares and loss of weight.[42] Indeed a psychiatric assessment for the privacy litigation noted that:[43]

> It would be difficult to set up a situation that would be more devastating for [the plaintiff], given her particular set of circumstances, if one were actually deliberately trying to do so…

35 For instance, the narrow judicial interpretation that complying with the obligations is not required when it should be obvious from the circumstances who is collecting the information and for what purpose.

36 Codes of Practice issued by the Privacy Commissioner impose slightly different obligations, for example in respect to health information and credit information, but broadly the obligations are aligned with those in the IPPs.

37 Compare this with other jurisdictions; see Privacy Act 1988 (Cth) Schedule 3, National Privacy Principle 10.

38 *A B v Accident Compensation Corporation* [2002] NZHRRT 17.

39 The Tribunal decision euphemistically states "There were records of treatments being administered without any accompanying record of the administration of drugs of an anaesthetic kind".

40 For instance, there were allegations that the plaintiff had been raped while in psychiatric care.

41 The Corporation failed to appreciate that law firms do not operate in the period between Christmas and the New Year, whereas medical professionals often do.

42 The Tribunal's report of the evidence records that "When [the plaintiff's husband] was woken from sleep after being on night shift, he says that he found his wife in a state of terror, shaking and sweating and that it took him some time to piece together what had happened because she was not able to give him a coherent account".

43 *A B v Accident Compensation Corporation*, above n 38 at [17].

Despite the seemingly outrageous intrusion on the plaintiff's privacy that occurred in this instance she was ultimately unsuccessful in the litigation brought under the Privacy Act.[44] The manner in which the plaintiff was approached may have been insensitive and the defendants ought to have the onus of taking precautions under the familiar "egg-shell" principle, but the current wording of IPP 3 meant that it had not been breached. In fact, no collection of personal information took place as the plaintiff refused to talk with the psychiatrist and, furthermore, decided not to proceed with her further claims to the ACC for medical misadventure.

We think that this case and the lack of successful litigation in general involving IPP 3 point to two things. First, there is undoubtedly a greater need for the Privacy Commissioner to be able to ascertain whether systemic failures are occurring when personal information is being collected. As noted, this aspect has already been taken up by the Law Commission which has recommended that the Commissioner be given the power to issue compliance notices.[45] Secondly, there is a lacuna in New Zealand's Act in respect of "sensitive information" unlike the case in Australia.[46] Whether separate provision for this category of information would have averted the mischief in the case is beyond the scope of the current discussion but we think that it at least merits scrutiny in future.

C. The Nature of Exemptions

The IPPs are subject to a number of exceptions. Identically worded exceptions run through many if not most of the IPPs. These include where the use or disclosure of the personal information is either one of the purposes, or directly related to the purposes, in connection with which the information was obtained, that the disclosure is made to or authorised by the individual concerned, that non-compliance is necessary to avoid prejudice to the maintenance or enforcement of the law, or for the conduct of proceedings before any Court or Tribunal, that disclosure is necessary to prevent or lessen a serious and imminent threat to public health or public safety or the life or health of any individual or that the source of the information is a publicly available publication.

In addition to examining the litigation relating to access to personal information, which we do below, we also examined the litigation relating to improper disclosure of personal information (IPP 11) which was the second most litigated principle. The exceptions invoked[47] by defendants in order to justify the disclosure of personal information under this principle are revealing as they shed light on the context in which the disclosure occurred.

44 It is likely, however, that the plaintiff would be able to make a claim to the Health and Disability Commissioner.

45 Law Commission, above n 1, at [6.87].

46 Privacy Act 1988 (Cth) Schedule 3, National Privacy Principle 10.

47 In many cases defendants invoked more than one exception hence the percentages in our study sum to more than one hundred.

Even though the single most invoked exception for disclosure was that "the disclosure is authorised by the individual concerned"[48] (19 per cent) this was not significantly ahead of other grounds. These included that the disclosure was one of the purposes or a directly related purpose in connection with which the information was obtained[49] or that non-compliance was for the conduct of proceedings before any court or tribunal[50] (16 per cent each).

Other exceptions commonly invoked included that non-compliance is necessary to avoid prejudice to the maintenance of the law by any public sector agency[51], to prevent serious and imminent threats to public health, safety or lives[52] and that the release of official information was made in good faith under freedom of information law.[53]

Once again it will be observed that these exemptions (especially the "authorisation by individuals" exception) evidence a pre-existing relationship between the complainants and the defendants which accords with the broad thrust of our research. Furthermore, it can be noted that several of the exceptions, such as the maintenance of the law or the conduct of proceedings, hint at the existence of disputes between the parties that are extrinsic to privacy.

IV. The Importance of Obtaining Access to Personal Information

As observed above, the right to obtain access to one's personal information underpins most of the other rights conferred under the Act. In this respect the Act continues the policy towards openness in respect to personal information begun under New Zealand's freedom of information laws.[54]

Our examination of the CRT and HRRT cases has highlighted the importance of this right. As we have noted, complainants were more likely than not to succeed in claims involving improperly withheld personal information, than in claims involving breach of other privacy rights.

In some cases the refusal to grant individuals access has bordered on the outrageous, amounting to flagrant disregard of an individual's rights. In *Winter v Jans*[55] the High Court upheld a ruling by the HRRT that an individual had been wrongfully denied access to personal information, importantly ruling that it is not necessary to establish harm in such cases, unlike where a breach of the other privacy principles occurs.[56]

48 Privacy Act 1993, s 6, IPP 11(d).
49 Privacy Act 1993, s 6, IPP 11(a).
50 Privacy Act 1993, s 6, IPP 11(e)(iv).
51 Privacy Act 1993, s 6, IPP 11(e)(i).
52 Privacy Act 1993, s 6, IPP 11(f)(i) and (ii).
53 Official Information Act 1982, s 48.
54 Official Information Act 1982 and Local Government Official Information and Meetings Act 1987.
55 HC Hamilton CIV-2003-419-854, Paterson J. For a discussion as to the basis on which damages are awarded and the limitations that currently exist see Katrine Evans "Show Me the Money: Remedies Under the Privacy Act" (2005) 36 Victoria University of Wellington Law Review at 475 and 479.
56 Privacy Act 1993, s 66(2) and compare s 66(1)(b).

The case related to a dispute concerning a mortgagee sale of a couple's house. The complainants asked for information under the Act concerning the sale from the real estate agency. The latter's managing director responded, without taking any legal advice, that the Privacy Act applied only to official information and not to private files. After a complaint had been made to the Privacy Commissioner, but prior to the subsequent hearing in the HRRT, the defendant lost the file, when he was moving offices.

In addition to costs the Tribunal awarded the couple $15,000 in damages for loss of a non-monetary benefit, namely the benefit of knowing what the file might have revealed, and a further $5,000 for the resultant humiliation, loss of dignity and injury to their feelings. However this was slightly reduced on appeal to the High Court.

While cases such as this may be the exception, many cases involving access touched on a basic human need: the need to find out the reason why a decision about them was reached, benefit denied them, treatment given or statement made. Often the request was in order to find out who had made statements about the requestor and the content of such statements – many of these involved statements made by family members and intimate acquaintances. We deal separately below with the grounds available and those used to deny access to personal information but it suffices to say that the cases reveal an almost insatiable demand by individuals to know what others have said in relation to them.

The human element in these cases is important as in 13 of the 29 cases[57] relating to access (45 per cent) it is not possible to describe complainants as either vexatious or unreasonable. In these cases we found that the complainants were not merely attempting to re-litigate in a privacy forum a case they may have lost in another arena. Instead, they were seeking closure of a different kind through knowing the facts which led to the outcome of the earlier matter. An example of just such a case was *Waugh v New Zealand Association of Counsellors Incorporated*[58] where, essentially, the plaintiff had no other forum in which to test his claims. A counsellor had elicited allegations of sexual misconduct by the plaintiff from his daughter but these had never been substantiated and the Police had closed their file concerning the plaintiff. The plaintiff had also been unsuccessful in a claim alleging professional misconduct by the counsellor. The Tribunal held, however, that his request for personal information (that related to him in the course of the investigation of the counsellor) had been improperly denied.

Apart from the human dimension, 16 of the 29 cases relating to access (55 per cent) involve a forensic element (in a broad sense) viz. the request is made for the purpose of obtaining information in order to pursue other remedies or to obtain benefits of some kind. For instance in *D A S v Department of Child Youth and Family Services*[59] the plaintiff was a teacher of special needs

57 There were 31 cases in all but two of these related to the same matter and were brought by an individual who brought a large number of claims in the Tribunal - we have accordingly counted the case only once whilst the issue of vexatious litigants is discussed separately below.

58 *Waugh v New Zealand Association of Counsellors Incorporated* [2005] NZHRRT 24.

59 *D A S v Department of Child Youth and Family Services* [2000] NZCRT 24.

students. In 1993 there were allegations from the defendant of sexual abuse of one of the pupils of the plaintiff's class. During the course of the next few years he attempted to obtain all of the personal information held about him and the allegations from the defendant. The provision of information was delayed and some of it was not given. The plaintiff said these delays and refusals of information resulted in a great deal of humiliation and injury to his feelings. The efforts to obtain the information became the central focus of the plaintiff's life. He was, however, successful in obtaining damages in addition to costs in the Tribunal. Although the information had by that stage been given the Tribunal held in effect that justice delayed was justice denied.

It is therefore not surprising that we found that the vast majority of the cases involving access to information (27 out of 29 cases) involved circumstances where another dispute between the parties existed. In this respect the Act is an extrapolation of a trend that has occurred under New Zealand's freedom of information laws.[60] One of the major uses of this earlier regime (which amongst other things gave citizens access to their personal information held by the government) was to provide a cheap alternative to the discovery process to obtain information in the course of defending against criminal prosecutions. This may not have been entirely unanticipated as Sir Alan Danks, the architect of that regime, prophetically observed: "…there lingered a ghost at the feast: unforeseen consequences threatened".[61]

Unlike the forensic uses under the freedom of information laws, however, the privacy applications have not been limited to a narrow litigation context. We have seen that a majority of the cases (55 per cent) related to the need to obtain information necessary to litigate other claims, seek employment or to claim entitlements.[62] Despite the other 45 per cent being related to other needs, such as simply learning the basis on which a decision had been made about an individual, the majority sought knowledge of what was on their files for future reference in order to better access benefits and employment opportunities. We would characterise these as empowering rather than as being forensic in a strict sense.

Finally, we observe that the importance given to access requests has been recognised by the Law Commission's recommendation that access determinations should be made by the Commissioner rather than, as occurs presently, by the Tribunal.[63] The Commissioner's determinations would still be able to be appealed to the Tribunal but if not challenged would become binding and enforceable.[64] It remains to be seen if this recommendation is accepted and if so whether it will lead to a significant decrease in the

60 Official Information Act 1982 and Local Government Official Information and Meetings Act 1987.

61 See Foreword to I Eagles, M Taggart and G Liddell *Freedom of Information in New Zealand* (1992) at *xxiii*.

62 It was not possible, from the facts stated in the cases, to further differentiate these goals.

63 Law Commission above n 1, at [6.47].

64 Ibid at [6.48] and [6.49].

Tribunal's workload or if, on the other hand, defendants will continue to obstruct access requests by challenging the Commissioner's rulings in the Tribunal.

V. Reasons for Withholding Information

The entitlement conferred by IPP 6 contains two elements: firstly, an individual's right to find out whether an agency holds personal information about them[65] and secondly the right to have access to it.[66] It has been noted that the first obligation exists even where good reasons exist to deny the individuals access to their information.[67]

The Act contains provisions under which a significant number of grounds may be invoked for denying individuals access to personal information.[68] Many of these are the same as the exemptions that already existed under the freedom of information regime.[69] In this article we do not traverse the jurisprudential bases for invoking the exemptions such as rulings that there must be an evidentiary basis for invoking claims that disclosure "would be likely … to endanger safety of individuals".[70] Instead, we catalogued the types of exemptions most commonly invoked in order to see if they support our broad thesis. Table 1 below depicts the breakdown of the reasons invoked for withholding information from claimants.

65 Privacy Act 1993, s 6, IPP 6(1)(a).

66 Privacy Act 1993, s 6, IPP 6(1)(b).

67 See P Roth *Privacy Law and Practice* above n 25 at [9.4.6]: The only exception to this is where compliance would prejudice the interests protected by the exemptions to disclosure (Privacy Act 1993, s 32 – the neither confirm nor deny provision).

68 Privacy Act 1993, ss 27, 28 and 29.

69 Official Information Act 1982 and Local Government Official Information and Meetings Act 1987.

70 There must be a real and substantial risk of violence or a risk that could well eventuate as opposed to one that was merely possible: see W Brookbanks "Privacy and Mental Health" in S Penk and R Tobin (eds.) *Privacy Law in New Zealand* (2010) at 188; see also *Commissioner of Police v Ombudsman* [1988] 1 NZLR at 385 and 391 (CA) per Cooke P.

Table 1 (31 of 74 cases)[71]

IPP 6 Exception cited	No.	%
None	11	35%
Unwarranted disclosure of the affairs of another individual	8	26%
Prejudice the maintenance of the law	7	23%
Legal professional privilege	4	13%
Likely to endanger the safety of any individual	4	13%
Evaluative material	3	10%
Information not readily retrievable	3	10%
Information does not exist or cannot be found	3	10%
Request Frivolous or Vexatious	2	6%
Reasons other than allowed under the Privacy Act	2	6%
Prejudice the entrusting of information to the Government of New Zealand	1	3%
Likely to prejudice the physical or mental health of the individual	1	3%

Source: CRT & HRRT Cases and Appeals

Apart from the privacy exemption (unwarranted disclosure of the affairs of another individual) [72] it will immediately be evident that nearly half of the exemptions invoked (49 per cent) logically must relate to the existence of a dispute unrelated to privacy. Prejudice to the maintenance of the law[73] clearly implies an existing or prospective proceeding affecting the individual concerned. Similarly, legal professional privilege[74] implies either prospective litigation or legal consultation prior to the privacy complaint. Finally, the safety of an individual[75] is unlikely to be in issue unless the requester of information was engaged in some kind of disagreement with the agency or the individual concerned.[76]

These findings confirm our suspicion that most requests for access to personal information do not occur in a vacuum. The invoking of the types of exemption we have discovered help to reinforce our thesis.

In relation to the other grounds for denying access to personal information, surprisingly few cases litigated in the Tribunal concerned the withholding of information on the grounds that it, or the person supplying it, was "evaluative material" given on the basis of confidentiality.[77] Only three cases fell into this category, although significant cases exist outside of the time frame of our

71 In many cases defendants invoked more than one ground for withholding information hence the percentages in this table sum to more than one hundred.
72 Privacy Act 1993, s 29(1)(a).
73 Privacy Act 1993, s 27(1)(c).
74 Privacy Act 1993, s 29(1)(f).
75 Privacy Act 1993, s 27(1)(d).
76 A case that was something of an exception in this regard is that of *Te Koeti v Otago District Health Board* [2009] NZHRRT 24 which is discussed further below.
77 Privacy Act 1993, s 29(1)(b).

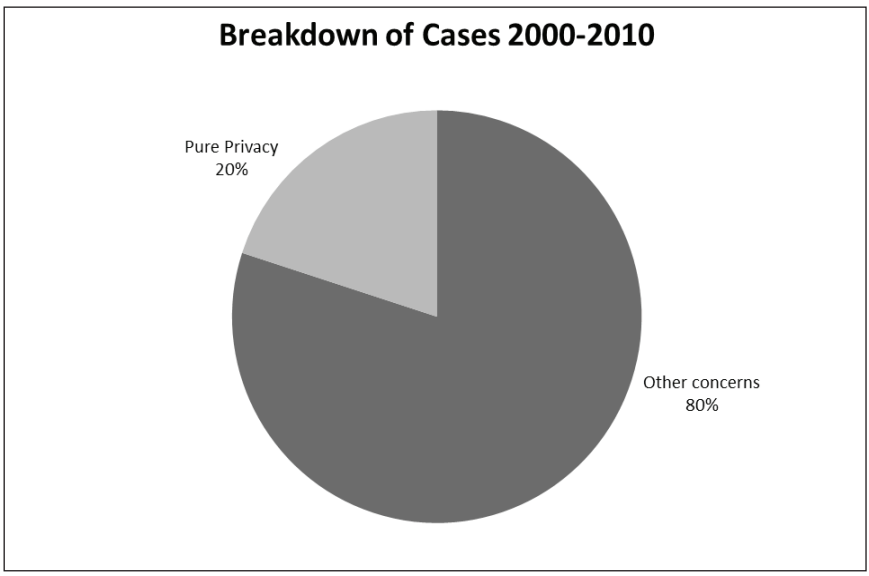
enquiry.[78] It may be that most of these complaints were dealt with at the level of Privacy Commissioner.[79] Two of the cases in our time frame related to employment disputes or concerns and one related to obtaining information necessary to challenge fees charged by a lawyer.

VI. The Litigation Context: Privacy or Other Grievances

The main focus of our research was to discover the wider context in which litigation under the Act occurred. Did the litigation relate only or mainly to breaches of the Act or, rather, to other disputes between the parties involved? As we stated at the outset this was not a straightforward task and the principal limitation we faced was the accuracy and completeness of the primary data (the decisions of the Tribunals we examined).

That said, the results of our search are startling to say the least. From the facts identified in the primary data we were able to conclude that the vast majority of litigation under the Act did not occur in isolation but related in some way to other disputes between the parties. The results of this are displayed in Graph 3.

Graph 3 (Total number of cases = 74)



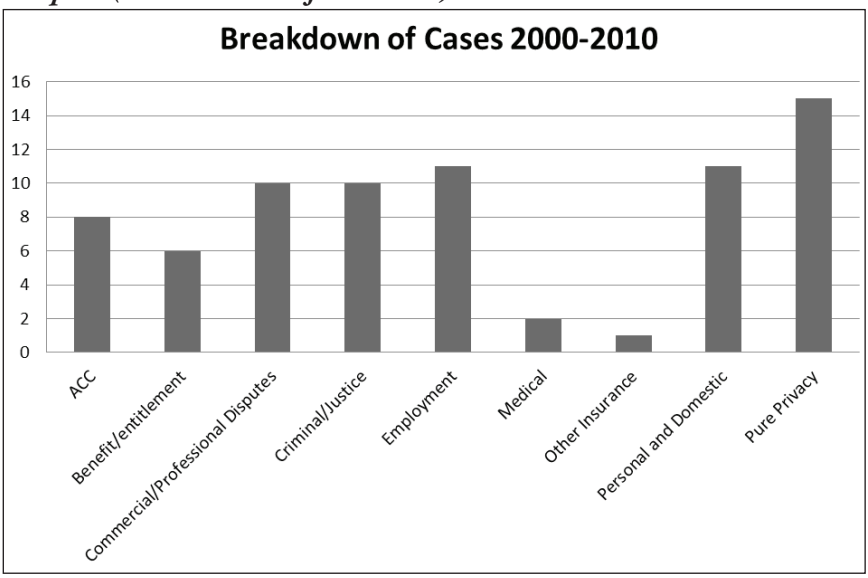
Source: CRT & HRRT Cases

We should hasten to add that, despite the limitations we have identified, these findings are, if at all, likely to be conservative. The reason for this is that, as we have already stated, some of the decisions of the Tribunals may have failed to state the existence of a dispute between the parties unrelated to privacy.

78 See for instance *Westwood v University of Auckland* (1998) 4 HRNZ 107.
79 See for instance Case Note 90682 [2006] NZPrivCmr 10.

Further analysis of the concerns underlying the privacy litigation was undertaken from the facts available in the cases before the CRT and HRRT. The results are depicted in Graph 4 below.

Graph 4 (Total number of cases = 74)



Source: CRT & HRRT Cases

The breakdown demonstrates that a wide range of concerns led to the privacy claims being brought. It can be seen that the two single largest categories occurred in the context of employment disputes and personal and domestic matters. Although, as seen earlier, the majority of defendants in privacy claims were public sector agencies our examination of the facts disclosed that the underlying issues that led to the claims often had different foundations such as, for example, family disputes or employment grievances. In addition, some cases involving public sector defendants as well as private sector ones were concerned with purely privacy matters.

The conclusion that most litigation under the Act did not occur in isolation does not, of course, shed light on the merits of the claims, in particular on whether a complainant was seeking to continue by other means a dispute with another party where inadequate recourse had been obtained in the other forum. What it does show, however, is that the rights conferred by the Act tend to be useful in exercising other legal rights and benefits. As we have seen the right to obtain access to personal information has empowered individuals by allowing them to know the basis on which decisions about them were made or to obtain information needed to bring claims in other contexts.

It is therefore difficult to characterise this trend as being an abuse of process or in some way providing a forum for vexatious litigants. However such a possibility cannot be completely ignored and this aspect is explored below.

VII. Deterring Vexatious Litigants and Costs Awards

In the course of our analysis of the CRT and HRRT decisions we did encounter evidence of potentially vexatious claims whether due to complainants bringing multiple claims or through reference to several other complaints unrelated to privacy. However these cases were few in number. In only two cases did we find actual reference to formal proceedings being taken to declare a litigant to be vexatious.

In *Reid v New Zealand Fire Commission and another*[80] the Attorney-General initiated proceedings in 1998 for the purpose of having the plaintiff declared to be a vexatious litigant under the provisions of what was then section 88A of the Judicature Act 1908. No such order was ever made, however, and the proceedings were discontinued in 2002. The plaintiff, believing that the Fire Service had referred the vexatious litigant issue to the Attorney-General, requested information from them and from Crown Law regarding that referral. It should be noted that the plaintiff had previously been involved in 18 sets of proceedings relating to dismissal from his employment with the Fire Service, and had also brought 8 sets of proceedings relating to the custody of his son. The requests for information were denied however and the Tribunal accepted that the information held by the Fire Service and Crown Law could be withheld for professional legal privilege.[81]

As had been noted in the earlier survey of Tribunal decisions[82] one complainant was responsible for instigating a large number of claims, including one against the Privacy Commissioner. Most of these claims were struck out and therefore not included in our sample. Ultimately, proceedings to declare the individual concerned a vexatious litigant were successful.[83]

Four cases involving this complainant were, however, included in our study. They are instructive in that the plaintiff was successful in only two of them, although in both these instances the Tribunal exercised its discretion to award a declaratory remedy only.[84] The complainant's dispute had originally been against the ACC but it progressively encompassed a range of other participants. In *O'Neill v Dispute Resolution Services Ltd*[85] the defendant had blocked the complainant's emails on the grounds that they were abusive and vexatious. A letter advising him of this unfortunately went astray. The complainant then sought access to all his personal information from the defendant – an "empty your pockets request".[86] This request was ignored in light of the policy towards the complainant adopted by the defendant. The Tribunal found in the event that an interference with privacy had occurred but granted only declaratory relief.[87]

80 *Reid v New Zealand Fire Commission and another* [2008] NZHRRT 8.
81 *Privacy Act 1993,* s 29(1)(f).
82 Gunasekara, above n 3, at 470.
83 *Attorney-General v O'Neill* [2008] NZAR 93.
84 *O'Neill v Accident Compensation Corporation* [2006] NZHRRT 25 and *O'Neill v Dispute Resolution Services Ltd* [2006] NZHRRT 15.
85 *O'Neill v Dispute Resolution Services Ltd* [2006] NZHRRT 15.
86 Ibid at [11].
87 Ibid at [37].

The case illustrates that care is needed even when dealing with requests for information that may appear frivolous or vexatious.[88] In only one other case was an information request denied on the grounds that it was frivolous or vexatious. In *Proceedings Commissioner v Commissioner of Police*[89] the plaintiff also succeeded in obtaining remedies, of modest damages and a declaration. In this case the Tribunal held that the mere fact that a request was burdensome to the agency or one of several requests did not thereby render it vexatious.

Another case that raised interesting issues cannot be characterised as vexatious in nature. In *Plumtree v Attorney-General*[90] the complainant had alleged that he had been mistreated during his service in the military. He had taken these complaints to the United Nations, the Ombudsmen and the Privacy Commissioner. The nub of the privacy complaints was to have access to his army records and to have them corrected.[91] The Tribunal found that the plaintiff's requests were dealt with in a manner that was humiliating for him. It was however difficult to disentangle the result of the denial of access, from hurt about the way in which the Army had treated him in general. Modest damages were awarded to compensate the plaintiff for humiliation, stress and injury to his feelings arising out of the way in which his requests for information were dealt with by the army. In addition, an order was made that aspects of his personal record[92] be corrected. This case illustrates that it is often difficult to separate other bureaucratic lapses and abuses of power from the exercise of powers relating to the handling of personal information.

Although several of the cases we found only involved a single claim and although it may have been possible to describe the claim as vexatious, the Tribunal was usually able to dismiss the claim under one of the other grounds for withholding information permitted by the Act. For example, in *Te Koeti v Otago District Health Board*[93], an abusive patient requested information concerning his admission and course of treatment including the names of the nurses who treated him. The refusal to grant access to the information was held to be justified on the grounds that it was "likely to endanger the safety of any individual".[94]

In this context it is interesting to note that, as opposed to recourse to the courts, recourse to the HRRT currently does not incur filing fees. This may appear odd, for example, when compared with other tribunals such as the Disputes Tribunal.[95] On the other hand, it could be argued that the important public policy aspect catered for by providing access to human

88 This is one of the reasons under which access requests may be denied, see Privacy Act 1993, s 29(1)(j).

89 *Proceedings Commissioner v Commissioner of Police* [2000] NZCRT 18.

90 *Plumtree v Attorney-General* [2002] NZHRRT 10.

91 In particular, the failure to provide access to historical vaccination records and a letter written while the plaintiff was in Vietnam requesting reduction of his engagement.

92 His vaccination records, dates and so forth.

93 *Te Koeti v Otago District Health Board* [2009] NZHRRT 24.

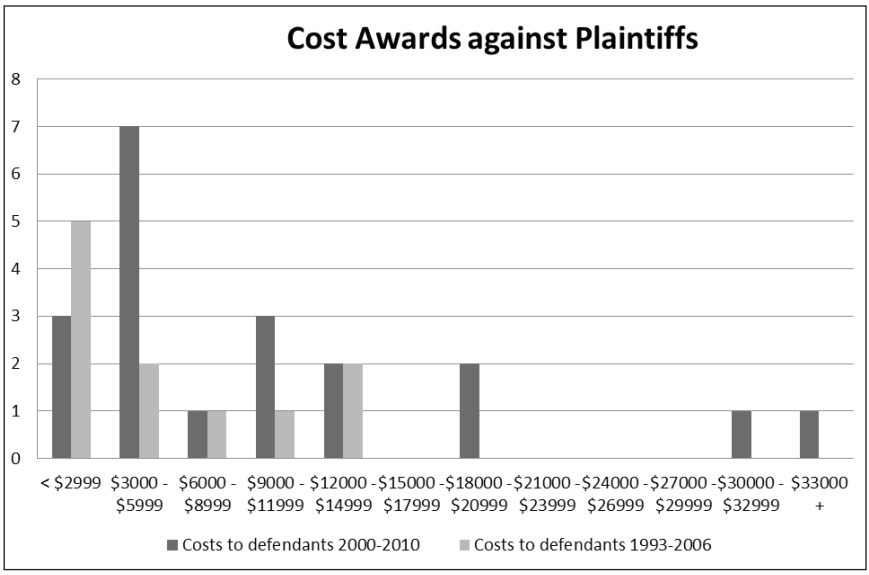
94 Privacy Act 1993, s 27(1)(d).

95 The current filing fee is $100.

rights concerns, such as those brought to the CRT and HRRT, militates against any fee whatever as this may deter disempowered and victimised members of society from airing genuine concerns.[96]

Given the current lack of any filing fee the only significant deterrent that currently exists is the ability of the Tribunal to award costs against an unsuccessful plaintiff. In this respect there have been noticeably more costs awards with higher average values in our time frame as compared with the earlier study.[97] Whereas in that study costs were awarded against plaintiffs in 21 per cent of unsuccessful claims[98], we found that in our time frame these amounted to 45 per cent. The range and frequency of the costs awards are depicted in Graph 5 below.

Graph 5 (2000-2010 data: 20 of 44 unsuccessful cases. 1993-2006 data: 10 of 47 unsuccessful cases)



Source: 2000-2010 data from CRT & HRRT cases, 1993-2006 data from earlier research[99]

As can be seen the upper range of awards has increased and the total number of awards in the more recent period has been greater than in the earlier one. Furthermore the median award in our time frame was around a thousand dollars more than the earlier one.[100] Some awards have been significant. *Cameron v Police*[101] was a case involving a person described by the Tribunal as "abrasive" where the dispute had little to do with privacy.

96 See submission of the Privacy Commissioner on the review of Civil Court Fees: Stage 2 – Human Rights Review Tribunal available at <http://privacy.org.nz/submisson-on-review-of-civil-court-fees-stage-2-human-rights-review-tribunal/>.

97 Gunasekara, above n 3, at 477.

98 Ibid.

99 Ibid.

100 The median was $4,560 as opposed to $3,500 in the earlier study.

101 *Cameron v Police* [2010] NZHRRT 11.

Not only were the complainant's various claims of breaches of the Act not upheld[102] but costs were awarded against him of $20,000. In at least two other cases significant costs were awarded in circumstances where the plaintiffs were found not to have suffered any significant harm.[103]

Although it may be that higher costs awards will be a sufficient deterrent to vexatious litigants, the difficulty with this approach is that most litigants may be unaware of the Tribunal's approach towards unsuccessful litigants, particularly given the fact that during the period we studied most litigants chose to represent themselves (62 per cent).[104] Consideration should perhaps be given to advising plaintiffs in some way of this risk, perhaps in the documentation accompanying the form required to commence proceedings. Such a response would be preferable to the alternative of imposing a modest filing fee.

VIII. Conclusion

In this article we have explored the alternative dispute resolution procedures, particularly in the specialist forum provided, contained in the Privacy Act. Implicit in our study is the question whether the existing forum has provided a valuable tool for resolving genuine disputes concerning interferences with privacy, as opposed to being a convenient forum for inexpensively venting disputes that at their root had little to do with privacy. This involved an examination in some detail of the substantive decisions in this jurisdiction in the period from 2000 to 2010. The primary goal of our research was to establish whether the claims brought under the Privacy Act arose on their own as opposed to being incidental to the exercise of other claims and of other rights by the parties.

The results of our survey were unambiguous. The facts disclosed that the vast majority of cases brought to the dedicated privacy forum did not occur in isolation but were tied either to pre-existing disputes between the parties or to the need by them to access other rights and remedies. This conclusion was also supported by our empirical findings as to the nature of the defendants, the nature of the claims and the nature of the exemptions invoked by the defendants. In addition, the prevalence of claims concerning access to personal information and the reasons for withholding such information reinforced this conclusion.

By contrast, we also found that few of the claims brought by complainants could be described as truly vexatious or pursued only for the reason that the privacy jurisdiction provided an alternate forum for continuing a dispute that was extrinsic to the alleged breach of privacy. Such complaints were in general not only unsuccessful but resulted in significant awards of costs against the unsuccessful plaintiffs.

102 Even where a technical breach of an information privacy principle occurs there is no interference with privacy unless harm of some kind has been suffered: Privacy Act 1993, s 66(1)(b).

103 *Haydock v Sheppard* [2006] NZHRRT 31 and *Herron v Speirs Group Ltd* [2006] NZHRRT 12.

104 Compare Gunasekara, above n 3, at 478.

The conclusions that might be drawn from this are twofold. First, it is evident that the bulk of litigation under the Privacy Act has been related to the exercise of other rights by the parties. This is unsurprising given also the fact that the majority of claims have continued to involve the public sector or government bureaucracies. The wheels of bureaucracy, whether in the private or public sector, are largely lubricated by information, especially information concerning individuals. The manner in which this information is processed, retained or withheld impacts directly on the individuals concerned. As we have seen the abuse of bureaucratic power has been described by scholars such as Daniel Solove as being a principal justification for modern information privacy laws.[105]

Many of the cases we examined encompassed precisely these concerns. Some cases were forensic in nature as the Privacy Act was sought in aid of obtaining personal information needed to pursue other litigation. Many, however, sought to use the Act to obtain personal information in order to clarify their circumstances or status or to obtain benefits of some kind. A significant number of cases revealed bureaucratic failures, sometimes those of a shocking nature. Litigants often constituted those who are vulnerable and disempowered (such as patients and inmates in institutions). Several of these had a genuine grievance but had been unable to secure redress in an alternate forum. Often the privacy jurisdiction afforded these individuals their day in court and we found that they tended to be more often successful than not in their privacy claims. Even where claimants were unsuccessful, the airing of their predicament afforded an opportunity for public scrutiny of bureaucratic lapses which may not otherwise exist.

Secondly and finally, our research may serve to establish the relative status and value of privacy as opposed to other rights. Privacy scholars generally see privacy as a right having to be balanced against competing values and interests.[106] In this article we have observed information privacy as being essentially a right servicing other rights including human rights. Rather than this pointing to information privacy being a subservient or secondary remedy, however, it instead signifies that the other rights and remedies are dependent in large measure on compliance with the privacy rights. This, if anything, indicates the higher status of information privacy as a fundamental human right.

105 Solove, above n 4.

106 Colin Bennett, *The governance of privacy: policy instruments in global perspective* (2003) 228: see also S Penk "Thinking About Privacy" in S Penk and R Tobin (eds.) *Privacy Law in New Zealand* (Brookers Ltd, Wellington, 2010) at 19-24.