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PROTECTION OF PRIVACY IN NEW ZEALAND: IS THERE A BETTER WAY?

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ABSTRACT

This paper reviews the present dispute resolution process used by the Office of the Privacy Commissioner. The paper focuses on access to personal information disputes as these make up approximately 30 per cent of all disputes handled by the Office of the Privacy Commissioner and are arguably the type of disputes most affected by any delays in the resolution process.

The development of privacy related legislation in New Zealand is charted with an emphasis on access to personal information and dispute resolution procedures in the legislation. This paper discusses the investigative dispute resolution process in the Privacy Act 1993 and how the investigative process is carried out in practice by the Office of the Privacy Commissioner. The value of the investigative process is assessed.

The paper then considers a two-stream approach for the resolution of access to information disputes using courts or tribunals as an alternative to the present process provided by the Office of the Privacy Commissioner.

The findings of this paper are that a two stream approach for access to information privacy disputes should be adopted with District Courts providing the second stream to the current system through the Office of the Privacy Commissioner.

The text of this paper (excluding contents page, footnotes and annexures) comprises 14,301 words.

I INTRODUCTION

The object of this paper is to consider whether the present dispute resolution scheme under the Privacy Act 1993 is the most effective way to resolve privacy disputes in New Zealand involving access to personal information. The paper will focus on issues concerning access to personal information disputes under the Privacy Act 1993 and consider how to address these issues.

The principal problem with the current dispute resolution scheme in the Privacy Act 1993 is the length of time it takes for the Office of the Privacy Commissioner to resolve disputes. In a 1999 survey of 13 consumer complaints bodies, the Consumers' Institute gave the Privacy Commissioner a "poor" rating for the speed in which disputes were resolved.[1] In the year to June 2003, the Office of the Privacy Commissioner resolved only 56 per cent of complaints in under six months of their receipt.[2] This paper will consider whether there are options that would allow faster resolution of privacy disputes, particularly for disputes involving access to personal information.[3] The options that will be considered in addition to the current investigative scheme are adversarial schemes utilising courts or tribunals.

The prompt resolution of access to information disputes is important because time may be of the essence in obtaining the information – the information may not be much use to the complainant unless it can be obtained promptly. Methods of resolving access to personal information disputes need a process that is fast and allows the parties to reach a result with the costs, both direct, such as court fees and indirect, such as legal fees and opportunity cost arising from delays, kept to a minimum. Access disputes are arguably more time sensitive than disclosure complaints[4] where the damage has already been done. In disclosure disputes the

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[1] Consumers' Institute "The Slow Trail to Justice" (September 1999) *Consumer* New Zealand 10.
[2] Privacy Commissioner *Report of the Privacy Commissioner for the Year Ended 30 June 2003* (A11, Wellington, November 2003) 21 [Report of the Privacy Commissioner for the Year Ended 30 June 2003].
[3] Access to personal information is used in terms of information privacy principle 6 of the Privacy Act 1993.
[4] Disclosure of personal information is used in terms of information privacy principle 5(a)(ii) of the Privacy Act 1993.

focus is on a reaching a settlement, whereas access complaints are situations where damage can be prevented, or at least mitigated, with prompt intervention and resolution. Access to information complaints was also the largest single category, over 30 per cent, of all complaints received by the Office of the Privacy Commissioner in 2002/2003.[5] Historically, disputes about access to information have been the most numerous type of complaint.[6] Therefore, providing alternative methods of resolving access disputes has the potential to significantly reduce the work load of the Office of the Privacy Commissioner and allow resources to be reprioritised. As well, obtaining access to personal information is recognised as a very important privacy right, Tim McBride has stated: [7]

> The right of data subjects to obtain access to personal information about them is regarded as one of the fundamental components of all the modern formulations of data privacy principles. It has been described as the "golden rule" of modern data protection law.

This paper focuses on access to information disputes as access disputes are better suited to a two-stream disputes process that also uses a short hearing or interlocutory application procedure than, say, disputes over disclosure of information. A short hearing can utilise the expertise of the judge to decide whether the document, or part thereof, in question should be disclosed or whether it attracts privilege or contains a trade secret and can therefore be withheld.[8]

An investigative process like that used by the Privacy Commissioner or, in the alternative, a full court hearing where witnesses can be examined, is better suited to a case where a document was incorrectly disclosed in order to quantify any damage to the complaint. In disclosure situations, it is a question of assessing

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[5] There were 361 access complaints made in 2002/2003 out of a total of 1202 complaints received. See "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 26.
[6] Privacy Commissioner *Review of the Privacy Act 1993: Discussion Papers – A compilation of 12 discussion papers released between July and September 1997* (Auckland, December 1997) DP3, 3. See also Elizabeth Longworth and Tim McBride *The Privacy Act: A Guide* (G P Publications, Wellington, 1994) 149.
[7] Tim McBride *Data Protection: an options paper* (Department of Justice, Wellington, 1987) 60 ["Data Protection: an options paper"].
[8] Privacy Act 1993, s 28.

the credibility of the parties, the harm caused and the quantum of damages rather than taking a document and deciding whether someone should have access to it.

This paper builds on my experiences as a privacy officer for a large company dealing with requests for personal information under the Privacy Act 1993 and working with the Office of the Privacy Commissioner to resolve complaints involving customers of my employer.

My findings are that a two-stream approach to privacy disputes involving access to personal information, where complainants can choose between the current investigative scheme provided by the Privacy Commissioner and an adversarial scheme in the court system will provide greater flexiblility for complainants. A two stream approach has the potential to reduce the delay complainants currently face. Both streams have the potential to provide cost effective dispute resolution when both direct and indirect costs are taken into account. A fair result can be obtained with regard to due process without tying the participants up in legalese.

II BACKGROUND

New Zealand society in the twenty first century faces many threats to the privacy of the individual. Changing and iterating computer technology means that the collection and processing of information continually becomes faster and easier.[9]

Trying to safeguard individual privacy is often a rear guard action. Those interested in protecting the privacy of the individual may not accept the introduction of processes such as data matching, however they have to move on to the next privacy threat. When new technology allowing processes such as data matching between government agencies is implemented, there is really no going back once a process is introduced as the process rapidly becomes entrenched.

Considering threats to privacy in a paper considering different types of dispute resolution for privacy disputes is important. This is because of the effect the choice of dispute resolution systems has on the allocation of resources in the

[9] For a useful background on the exponential growth of computer processing power see New Zealand Law Society *Business Online – the Legal Issues* (New Zealand Law Society, Wellington, 2002) 5.

Office of the Privacy Commissioner. Like other government entities, the Office of the Privacy Commissioner has a limited budget: in the year to June 2003 the total operating revenue was $2,185,000.[10] If a significant part of the budget and resources of the Office of the Privacy Commissioner is devoted to dispute resolution, there is less funding and resources available for other areas such as addressing threats to privacy.[11] Assuming the overall budget for the Office of the Privacy Commissioner remains constant, the design and options available to complainants in the privacy dispute resolution system could have a significant effect on focus as a whole of the Office of the Privacy Commissioner. Controlling the inflow of complaints by providing other options for the resolution of complaints is a valid way of dealing with the issue of delays in the Office of the Privacy Commissioner.

A Common Law

In common law there are traditional duties of confidentiality that arise in particular relationships. Common law duties of confidentiality are found in the relationship between an individual and their banker and priest respectively and in the course of employment.[12] A bank's duty of confidentiality to their customer is an implied term of their contract.[13] This implied term of confidentiality is overriden when there is a statutory duty to disclose information, such as to Inland Revenue.[14] These duties of confidentiality are limited to particular relationships and it is important to note that they do not confer rights of access to personal information.

However, as this section of my paper illustrates, the enactment of legislation covering personal information illustrates that Parliament recognised that there were many situations, whether or not covered by common law duties of confidentiality,

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[10] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 142.
[11] The Office of the Privacy Commissioner spent $2,052,000 supplying "outputs" to the Crown. There are six outputs, one of which is complaints resolution and compliance. The Office of the Privacy Commissioner's Annual Report does not provide individual budgets for each of the six outputs. See "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 145.
[12] Sally Fitzgerald and Victoria Heine *Confidential Information* (New Zealand Law Society, Wellington 2002) 30.
[13] *The Laws of New Zealand* (Butterworths Wellington 1999) Banking, 35, para 27.
[14] *The Laws of New Zealand*, above, n 13.

where people had a legitimate expectation that their personal information should be accessible. Key parts of the legislation were dispute resolution processes to deal with problems in accessing personal information. This discussion of legislation focuses on provisions allowing access to personal information and that deal with disputes around access to personal information.

B Wanganui Computer Centre Act 1976

The Wanganui Computer Centre Act 1976 was passed to allow the establishment of a government computer system run by the State Services Commission to hold information from the Police, Ministry of Justice and the Ministry of Transport.[15] The legislation allowed individuals to access the information held on the computer system unless the release of the information was likely to be detrimental to the administration of justice.[16]

A key part of the Wanganui Computer Centre Act 1976 was the appointment of a Wanganui Computer Centre Privacy Commissioner.[17] If an individual believed that the information recorded on the Wanganui computer about them was inaccurate or misleading they could complain to the Commissioner.[18] The Commissioner would then investigate the complaint.[19] If after investigating a complaint, the Commissioner believed the complaint was valid, the Commissioner had the power to direct the department concerned to amend the information.[20] If the information was not corrected to the Commissioner's satisfaction, the Commissioner was able to report the matter to the Prime Minister.[21]

In hindsight, the powers of the Wanganui Computer Centre Privacy Commissioner were a prelude to the Official Information Act 1982. The notion that citizens should have the ability to access and correct their personal information held by the state was a major advance on the then current Official Secrets Act 1951. As

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[15] See the long title to the Wanganui Computer Centre Act 1976.
[16] Wanganui Computer Centre Act 1976, s 14.
[17] Wanganui Computer Centre Act 1976, s 5.
[18] Wanganui Computer Centre Act 1976, s 15.
[19] Wanganui Computer Centre Act 1976, s 16.
[20] Wanganui Computer Centre Act 1976, s 17.
[21] Wanganui Computer Centre Act 1976, s 17.

far as the disputes process operated, investigations were conducted in private[22] and investigations were free for complainants.[23] The Commissioner was provided with flexibility as to how investigations were to be conducted[24] and the power to summon people.[25] The Privacy Act 1993 repealed the Wanganui Computer Centre Act 1976.

There are parallels between the powers and processes of the Wanganui Computer Centre Privacy Commissioner and the current Privacy Commissioner. The key parallels were the Wanganui Computer Centre Privacy Commissioner was an independent authority, had investigative powers and provided a free service. The key difference was that the Wanganui Computer Centre Privacy Commissioner had the power to compel departments to amend information.[26] The current Privacy Commissioner has only recommendatory powers.[27] Overall, the Wanganui Computer Centre Privacy Commissioner provided a signpost as to the powers for the current Privacy Commissioner.

C *Human Rights Commission Act 1977*

Prior to the Privacy Commissioner Act 1991 and then the Privacy Act 1993, the Human Rights Commission Act 1977 provided with Human Rights Commission with powers in relation to individual privacy. Part five of the Human Rights Commission Act 1977 set out the functions of the Human Rights Commission in relation to privacy. It did not have the power to investigate infringements of privacy.[28] Instead, the powers provided to the Human Rights Commission were essentially policy related with the power to report to the Prime Minister on privacy issues.[29] Part five of the Human Rights Commission Act 1977 was repealed when the Privacy Commissioner Act 1991 was introduced.[30] Overall,

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[22] Wanganui Computer Centre Act 1976, s 9(3).
[23] Wanganui Computer Centre Act 1976, s 14(5).
[24] Wanganui Computer Centre Act 1976, s 9(1).
[25] Wanganui Computer Centre Act 1976, s 16A(2).
[26] Wanganui Computer Centre Act 1976, s 17(1).
[27] Note that the exception in section 11(1) of the Privacy Act 1993 does provide a legal right in respect of information held by a public sector agency, however, this right is enforceable through the courts rather than by the Privacy Commissioner.
[28] Human Rights Commission Act 1977, s 67(3).
[29] Human Rights Commission Act 1977, s 67(1).
[30] See Longworth and McBride, above n 6, 38.

the Human Rights Act 1977 provided no significant advance for individuals seeking to access their personal information.

D Official Information Act 1982

The Official Information Act 1982 had a fundamental effect on a New Zealander's ability to access information held by government agencies.[31] The Official Information Act 1982 grew out of the New Zealand Committee on Official Information's report *Towards Open Government* published in 1981.[32] *Towards Open Government* signalled a shift away from the presumption in the Official Secrets Act 1951 "that information should not be disclosed without authorisation."[33] It set out a range of reasons to support access to information such as promoting participation in government processes and the accountability of civil servants and politicians.[34] Consequently, the report proposed moving to a presumption in regards to information held by government that "information should be made available unless there is good reason to withhold it."[35]

In discussing information about individuals, *Towards Open Government* sets out a number of concepts subsequently incorporated into the Privacy Act 1993:[36]

> Within the context of greater availability of information, frequent concern has been expressed that individual citizens should be able to ascertain the existance of, and have access to, information on their personal affairs that the government has collected and holds. This concern has been shown principally but by no means solely in relation to information held in computer databanks.

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[31] See Longworth and McBride, above n 6, 110 and McBride, above n 7, 62.
[32] New Zealand Committee on Official Information *Towards Open Government* (Government Printer, Wellington, 1981) ["Towards Open Government"]. See also "Data Protection: an options paper", above n 7, 34.
[33] Towards Open Government, above n 32, 13.
[34] Towards Open Government, above n 32, 14.
[35] Towards Open Government, above n 32, 21.
[36] Towards Open Government, above n 32, 16.

Towards Open Government also stated that as well as the ability to access personal information, the ability to correct personal information was also important:[37]

> There is a strong body of opinion, which we share, that, with only the necessary exception, individuals should be able to know and if necessary have corrected what personal information is held by departments or agencies. A precendent, which shows Parliament's acceptance of the principle, is to be found in the Wanganui Computer Centre Act 1976.

Prior to the enactment of the Privacy Act 1993, the Official Information Act 1982 provided individuals and bodies corporate with the right of access to[38] and correction of[39] their own personal information held by government entities with various exceptions for information deemed to be commercially sensitive[40] or security related.[41] This has now changed: the jurisdiction in relation to individuals accessing their personal information is now under the Privacy Act 1993. As the Law Commission states the current relationship between the Official Information Act 1982 and the Privacy Act 1993 is:[42]

> Since 1993, requests for personal information by *natural persons about themselves* have been considered under the Privacy Act 1993.[43] Part IV of the Official Information Act, and the equivalent provisions of the Local Government Official Information and Meetings Act, now apply only in respect of requests by *bodies corporate for personal information about themselves*, where those bodies are incorporated in New Zealand or have a place of business here.

The Official Information Act 1982 covers information held by central government organisations.[44] The Local Government Official Information and

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[37] Towards Open Government, above n 32, 16.
[38] Official Information Act 1982, s 24(1).
[39] Official Information Act 1982, s 26(1).
[40] Official Information Act 1982, s 9(1)(b).
[41] Official Information Act 1982, s 6(a).
[42] New Zealand Law Commission *Review of the Official Information Act 1982* (NZLC R40, Wellington, 1997) 100 (emphasis in the original).
[43] Principle 6 and Part IV of the Privacy Act 1993 (footnote in the original).
[44] The government organisations are listed in the Official Information Act 1982, 1st sch and the Ombudsmen Act 1975, 1st sch.

Meetings Act 1987 is the equivalent for councils and other territorial authorities. Schedule one of the Official Information Act 1982 lists the organisations that are subject to the Act. The Local Government Official Information and Meetings Act 1987 also allowed individuals to access[45] and correct[46] personal information and principle six of the Privacy Act 1993 in relation to personal information is expressly incorporated.[47] Both Acts define personal information as any official information held about an identifiable person.[48] Both Acts cover accessing information held by government organisations beyond just personal information.

Individuals[49] and incorporated groups have the right to take a complaint to the Ombudsman if a government organisation refuses an application for access to information. This right is required to be spelt out to the applicant if the application is refused.[50]

The Ombudsman has the power to investigate and review any decision made by a central or local government organisation about official information, including personal information.[51] The Ombudsman has the power to request information from the organisation related to the investigation[52] and may consult with the Privacy Commissioner during the investigation.[53] The Office of the Ombudsmen has developed a practice guideline to deal with the interface between the Privacy Act 1993 and the Official Information Act 1982.[54] Once the Ombudsman has reviewed the decision, the Ombudsman publishes a recommendation. It is rare that

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[45] Local Government Official Information and Meetings Act 1987, s 23.
[46] Local Government Official Information and Meetings Act 1987, s 25.
[47] Local Government Official Information and Meetings Act 1987, s 10(1A).
[48] Local Government Official Information and Meetings Act 1987, s 2; Official Information Act 1982, s 2.
[49] The individual does not need to a New Zealand citizen, you can just be in New Zealand: Official Information Act 1982, s 21.
[50] Local Government Official Information and Meetings Act 1987, s 18(b); Official Information Act 1982, s 19(b).
[51] Local Government Official Information and Meetings Act 1987, s 27; Official Information Act 1982, s 28.
[52] Local Government Official Information and Meetings Act 1987, s 29; Official Information Act 1982, s 29A.
[53] Local Government Official Information and Meetings Act 1987, s 29A; Official Information Act 1982, s 29B.
[54] Office of the Ombudsman *Practice Guidelines No.6* (Office of the Ombudsman, Wellington, 1994).

a recommendation of the Ombudsman made under the Official Information Act 1982 is not accepted; in the year to June 2003 all the recommendations were accepted.[55] A recent example of a recommendation of an Ombudsman not being accepted is a complaint involving the Southern Institute of Technology in Invercargill. A report was made to Parliament on the matter.[56] The report is comprehensive and contains copies of correspondence between the Office of the Ombudsman and the Southern Institute of Technology. The nature of the report and the fact that it is presented to Parliament means that the organisation concerned is placed under public scrutiny.

The recommendation of the Ombudsman is binding on the organisation concerned unless specific action is taken, in contrast to a recommendation of the Privacy Commissioner. The specific action required, if the request relates to central government, is the Governor General has to make an order in council to negate the request.[57] If the request relates to a local authority, the local authority must hold a meeting and pass a resolution opposing the recommendation.[58] This decision must then be publicly notified. [59] There is a right of appeal for a review of the order in council or the local authority meeting to the High Court with a further appeal to the Court of Appeal.[60] These statutory duties to comply with a recommendation of the Ombudsman were lost as far as personal information was concerned when the jurisdiction for access to personal information was transferred to the Privacy Commissioner in 1993.

The main criticisms that can be levelled at the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 are the exceptions in the legislation that can be used to stop the release of information and the potential for delays in resolving disputes. For the year ended 30 June 2003, the

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[55] Office of the Ombudsmen *Report of the Ombudsmen for the Year Ended 30 June 2003* (A3, Wellington, 2003) 30 ["Report of the Ombudsmen for the Year Ended 30 June 2003"].
[56] Office of the Ombudsman *Report of Ombudsman Mel Smith on a Complaint against the Southern Institute of Technology by six former students* (a3A(04), Wellington, 2004) ["Report of Ombudsman Mel Smith on a Complaint against the Southern Institute of Technology by six former students"].
[57] Official Information Act 1982, s 32.
[58] Local Government Official Information and Meetings Act 1987, s 32.
[59] Local Government Official Information and Meetings Act 1987, s 33.
[60] Local Government Official Information and Meetings Act 1987, ss 34 and 35; Official Information Act 1982, ss 32B and 32C.

average time taken by the Office of the Ombudsmen to resolve an official information complaint was 72 days.[61] In addition to this, the government organisation has up to 20 working days to respond to the initial information request.[62] This has the potential to add up to a considerable delay in getting the information.[63] It is important to note that the Official Information Act 1982 does allow for urgent requests.[64] This is to enable a request to be met faster than the standard 20 working days. There is no equivalent urgent request provision in the Privacy Act 1993. Any urgent request provisions need to have very clear criteria as to when they can be invoked and what constitutes an urgent response time from the agency. There is the risk that unless there are clear criteria for an urgent request, some people seeking information will class their request as urgent simply because the facility is available.

When compared to the Privacy Commissioner, the Ombudsman can also be described as an investigative model of dispute resolution.[65] There is the same sort of style of "off the papers" investigation procedure. Other similarities are that lodging a complaint with the Ombudsman is free and the process is private.[66] A useful discussion of the ombudsman model of dispute resolution was written by Howard Gadlin:[67]

> The classical ombudsman notion is located for the most part, but with some important deviations, within the tradition of adversarial dispute resolution. The classical ombudsman can compel cooperation with the investigation whereas a mediator, in most instances, depends on the voluntary cooperation of the parties with the mediation process. Also unlike a mediator, the classical ombudsman is an adjudicator. A citizen initiates a complaint about some sort of maladministration and an ombudsman investigates the complaint and renders a judgment about whether the complaint is

[61] "Report of the Ombudsmen for the Year Ended 30 June 2003", above n 55, 41.
[62] Official Information Act 1982, s 15.
[63] For a useful discussion see Office of the Privacy Commissioner *Official Information Act could help with problems* Private Word Issue 20, November 1998 and New Zealand Law Commission *Review of the Official Information Act 1982* (NZLC R40, Wellington, 1997) 59.
[64] Official Information Act 1982, s 12(3).
[65] Privacy Commissioner *Necessary and Desirable: Privacy Act 1993 Review: Report of the Privacy Commissioner on the First Periodic Review of the operation of the Privacy Act* (Office of the Privacy Commissioner, Auckland, 1998) 108 ["Necessary and Desirable: Privacy Act 1993 Review: Report of the Privacy Commissioner on the First Periodic Review of the operation of the Privacy Act"].
[66] Ombudsman Act 1975, s 18(2).
[67] Howard Gadlin "The Ombudsman: What's in a Name?" (2000) 16(1) NEJOEQ 37, 42.

> warranted or not. If the complaint is warranted, the classical ombudsman then makes a recommendation for appropriate remedies. However, the classical ombudsman contains within it some features of the ADR perspective as well. That is, although the classical ombudsman may render a judgment about right and wrong, the classical ombudsman lacks the authority to enforce that judgment.

Howard Gadlin's description fits both the Ombudsman and the Privacy Commissioner. An important difference between the two is that the Ombudsman has a much wider jurisdiction than than the Privacy Commissioner. The Ombudsman's powers are not just restricted to the Official Information Act 1982, the Ombudsman has powers to review a wide range of central and local government actions. As Philip Joseph states "...the New Zealand Ombudsmen discharge two primary roles: as citizens' protector in righting administrative wrongs and in promoting open government through access to official information."[68] The Ombudsman's decisions cannot be dismissed as easily as the Privacy Commissioner's recommendations. The Ombudsman's powers of publicity provide a real check on government agencies. The Chief Ombudsman has described the powers of Parliamentary Ombudsmen as:[69]

> Parliamentary Ombudsmen cannot make determinative or binding decisions after completing an investigation. They can only make recommendations. That sets the Ombudsman process apart from the normal adversarial process of the Courts who are empowered to make binding decisions. The recommendatory capacity of Ombudsmen has been extraordinarily effective. It is extremely rare for an Ombudsman's recommendation after a full investigation not to be acted upon.

A 1999 Consumers' Institute survey of consumer complaints bodies gave the Ombudsman an "excellent" overall rating, the Privacy Commissioner gained a "acceptable" overall rating.[70] The Ombudsman gained "excellent" ratings for transparency, independence, coverage and low cost. The Ombudsman received an "acceptable" rating for speed and ability to make binding decisions. The Privacy Commissioner received "excellent" ratings for transparency, independence, low

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[68] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, Wellington, 2001) 139.
[69] Joseph, above n 68, 140.
[70] Consumers' Institute, above n1. The Consumers' Institute assessed complaints services on six factors: speed, transparency, independence, how binding the decisions are, cost and coverage.

cost and coverage. However, the Privacy Commissioner received "poor" ratings for speed and the ability to make binding decisions.

1 Conclusion

Prior to the enactment of the Privacy Act 1993, both the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 provided comprehensive processes for individuals to access and correct personal information held by central and local government organisations. The ability to enlist the help of the Ombudsman meant that not only did individuals receive assistance but also that government officials had to be more open and could be more easily held accountable. Requirements for the organisation to raise the matter publicly if a recommendation of the Ombudsman would not be followed added transparency to the process. The potential to attract the glare of publicity is an important control on bureaucratic behaviour. The Southern Institute of Technology report is an example of this.[71]

The Official Information Act 1982 was a landmark change, in terms of the new presumption that personal information held by central and local government should generally be accessible to the individual concerned. The Official Information Act 1982 took the dispute resolution model provided in the Wanganui Computer Centre Act 1976 and extended it across most of the state sector. Another decade was to pass, however, before these concepts around accessibility of personal information were applied to the private sector.

E The Privacy Commissioner Act 1991

The Privacy Commissioner Act 1991 focused primarily on public sector information matching programmes. The Privacy Commissioner Act 1991 defined agencies but these were only a select group of government departments reflecting the narrow focus of the legislation. The Privacy Commissioner Act 1991 provided for the appointment of a Privacy Commissioner, however, there were no powers to

[71] "Report of Ombudsman Mel Smith on a Complaint against the Southern Institute of Technology by six former students", above n 56.

investigate complaints about infringements of privacy.[72] In this sense the Privacy Commissioner Act 1991 was similar in scope to the Human Rights Act 1977. For the purposes of this paper, the Privacy Commissioner Act 1991 did not represent a major advance for individuals seeking to access their personal information.

III THE PRIVACY ACT 1993

The Privacy Act 1993 covers both the government and the private sectors. It provides statutory standards covering personal information and a dispute resolution process to resolve privacy disputes. The coverage of the information privacy principles in the Privacy Act 1993 include the collection, retention, use, disclosure of and access to personal information. Personal information is widely defined both under the Privacy Act 1993 and in practice by the decisions of the Privacy Commissioner and the courts.[73] The intent of this paper is to ascertain whether the current statutory dispute resolution scheme is the most effective solution or whether other dispute resolution options should be available.

The current legislation is flexible and technologically neutral, that is, the Privacy Principles in section 6 are not directed at a particular system or process.[74] The claimed advantage of technological neutrality is that the legislation does not need to be continually amended to keep pace with new technological advancements. For example, when the Privacy Act 1993 was introduced, few people could have foreseen the growth of the internet and with it new challenges for privacy, however, the Privacy Principles are flexible and adaptable enough to encompass the internet.

A Scheme of the Privacy Act 1993

The Privacy Act 1993 represented a significant advance in that it covered personal information held by both public and private sector agencies. In this sense the Privacy Act was broader than the equivalent Australian legislation which only

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[72] Privacy Commissioner Act 1991, s 5(3).
[73] See *C v ASB Bank* (1997) 4 HRNZ 306 (CRT) Bathgate SC.
[74] "Necessary and Desirable: Privacy Act 1993 Review: Report of the Privacy Commissioner on the First Periodic Review of the operation of the Privacy Act", above n 65, 17.

covered the public sector.[75] The Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 already covered personal information held by local and central government and provided a process to access and correct personal information. If the Privacy Act 1993 had covered only the public sector most of it would be just duplicating the Official Information Act 1982 and Local Government Official Information and Meetings Act 1987.

B The Privacy Commissioner's Current Powers

The decisions of the Privacy Commissioner are not binding on the parties in a privacy dispute. As the Office of the Privacy Commissioner website states:[76]

> The Commissioner can investigate on receipt of a complaint or on her own initiative and form an opinion about whether there had been an interference with the privacy of an individual. She does not give a decision. Nor does her opinion bind anyone. Only the Human Rights Review Tribunal can give a decision which could be accurately described as a ruling.

The Privacy Commissioner can refer the matter to the Director of Human Rights Proceedings if the Privacy Commissioner's recommendation is not followed.[77] Parties can take privacy related complaints to the Human Rights Review Tribunal.[78] Decisions of the Human Rights Review Tribunal can be appealed to the High Court; a recent example of this is *Jans v Winter*.[79]

While the appeal process contained in the Privacy Act 1993 does provide complainants and respondents with a two-tier appeal system and the potential for a day in court, nevertheless, the Privacy Commissioner must first investigate the

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[75] Privacy Act 1988 (Cth).
[76] Office of the Privacy Commissioner <http://www.privacy.org.nz/news3.html> (last accessed 21 August 2004).
[77] Privacy Act 1993, s 77.
[78] Privacy Act 1993, s 82.
[79] *Jans v Winter* (6 April 2004) HC HAM CIV-2003-419-000854 Paterson J.

complaint.[80] If one or both parties in the dispute are intransigent or antagonistic, this process can take well over a year to work through.[81]

The Privacy Commissioner has a range of functions and powers available in section 13 of the Privacy Act 1993. A key consideration has to be how to best use these powers for the benefit to the greatest number of New Zealanders. The powers in section 13 include the ability to examine proposed legislation, provide education on privacy matters, review public registers, conduct inquiries on privacy related matters and provide advice to agencies on privacy related matters. A recent example of the Privacy Commissioner providing advice to an agency is the State Services Commission proposal for E Government. The State Services Commission are reported as having a budget to pay for the review of the E Government plans by the Privacy Commissioner.[82]

C Definitions

The Privacy Act 1993 is an example of statutory alternative dispute resolution, that is, the statute provides a scheme the object of which is to try and resolve disputes without recourse to the court system.[83] Section 11(2) of the Privacy Act 1993 provides that "the information privacy principles do not confer on any person any legal right that is enforcable in a court of law." There is an exception to this rule in section 11(1) that access to personal information held by a public sector agency is a legal right and one enforcable in court.[84] The Office of the Privacy Commissioner employs an investigative model of dispute resolution.[85]

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[80] Privacy Act 1993, s 82.

[81] Forty four per cent of complaints to the Office of the Privacy Commissioner take longer than six months to resolve. See "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 21.

[82] Tom Pullar-Strecker "SSC gets funding for ID project" Dominion Post, Wellington, 31 May 2004, 11.

[83] For other examples of statutory dispute resolution see Peter Spiller, *Dispute Resolution in New Zealand* (Oxford University Press, Auckland, 1999) 171.

[84] See "Necessary and Desirable: Privacy Act 1993 Review: Report of the Privacy Commissioner on the First Periodic Review of the operation of the Privacy Act", above n 65, 107.

[85] See New Zealand Law Commission *Delivering Justice for All: a Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004) 291 ["Delivering Justice for All: a Vision for New Zealand Courts and Tribunals"].

An investigative model of dispute resolution differs from other forms of alternative dispute resolution such as mediation and arbitration in a number of ways.[86] Mediation and arbitration principally involve the disputing parties meeting together in a manner that is faciliated to varying degrees in order to work through their differences.[87] An investigative model of dispute resolution, such as that practised by the Office of the Privacy Commissioner, does not require the parties to meet each other. Indeed, the parties do not even have to meet the investigator. My experience of the process adopted by the Office of the Privacy Commissioner is that investigations are generally done "off the papers".[88] For the purposes of this paper, an "off the papers" approach to investigation is a model where the investigator does not meet the parties to the dispute or bring the parties together in a physical sense. The Privacy Commissioner's staff work through the material provided by the parties, asking questions to clarify points or to elicit further information.[89] Conducting most investigations in an "off the papers" manner presumably has the benefit of being efficient in terms of staff time. In contrast, a process that required the Privacy Commissioner or their staff to meet with the parties to every complaint would be resource intensive, expensive in terms of travel and time consuming.

The downside of an "off the papers" approach to conducting investigations is that investigations can become drawn out over a long period of time. The effect of this is that the complainant does not get prompt access to their personal information and tensions can rise as the parties become more frustrated with the delays. Once the initial contact is made by the complainant, either by telephone or in writing, further questions are likely to arise.[90] Engaging in rounds of correspondence with the inevitable pauses in the investigation as the parties reply to the questions raised

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[86] Another statutory example of a body that uses an investigative model of dispute resolution is the Employment Relations Authority. See Employment Relations Act 2000 s 157(1).

[87] See Spiller, above n 833, 57 and 93.

[88] Other methods are occasionally used, the Privacy Commissioner arranged for two mediations in the 2002/2003 year. See "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 22.

[89] A useful example of the Office of the Privacy Commissioner asking further questions is contained in Gaeline Phipps "Privacy Act: two complaints dissected" (5 November 2003) *Doctor* New Zealand 19.

[90] For the statistics of the number of enquiries received by the Office of the Privacy Commissioner from 1998 to 2003 see "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 35.

all takes time.[91] The Office of the Privacy Commissioner has a performance standard that correspondence will be answered within 20 working days.[92] Even if this performance standard is somewhat exceeded, delays still occur. The Privacy Commissioner does have the power to compel the disputing parties to attend a conference, however, this does not appear to be used often.[93] The issue then becomes how quickly the complainant or agency responds to requests for clarification. Agencies have 20 working days to respond to requests from the Privacy Commissioner.[94] The "off the papers" model of dealing with complaints can be contrasted with a dispute resolution model such as mediation where the parties and the mediator meet together and work through the issues in "real time". In a mediation, with the parties sitting across the table from each other there is a strong likelihood that if an issue is raised the other party can promptly respond. My experience with the Office of the Privacy Commissioner has been that complainants will respond to issues through the investigating officer who in turn will respond to the agency in writing. Even with the best intentions, there is naturally some degree of delay in this chain of correspondence as an investigating officer does not have the luxury of working on one complaint at a time and so, presumably, must juggle their work. In 1997, every investigation officer had an average of 120 complaints each.[95]

The Privacy Commissioner cannot order or enforce settlements between parties to a privacy complaint. Enforcement powers under the Privacy Act 1993 are held only by the Human Rights Review Tribunal.[96] Once a complaint has been investigated by the Office of the Privacy Commissioner, one or both of the parties to a complaint can apply to have the Human Rights Review Tribunal hear the complaint. The Privacy Commissioner has the descretionary power to refer a

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[91] There is a statutory requirement in s 92 of the Privacy Act 1993 that an agency provides the Privacy Commissioner with any information or document requested within 20 working days.
[92] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 138.
[93] Statistics were sought from the Privacy Commissioner, a response was not received by 10 October 2004: Marie Shroff, Privacy Commissioner, from the author (17 August 2004) facsimile letter.
[94] Privacy Act 1993, s 92(2).
[95] "Necessary and Desirable: Privacy Act 1993 Review: Report of the Privacy Commissioner on the First Periodic Review of the operation of the Privacy Act", above n 65, 419.
[96] An example of a case where the Privacy Commissioner could not resolve a complaint and referred the matter to the Proceedings Commissioner is *Proceedings Commissioner v Health Waikato* (2000) 6 HRNZ 274, 280 (HC) Smellie J.

complaint to the Director of Human Rights Proceedings if the Privacy Commissioner believes that the complaint has substance.

D The Investigation Process – An Agency Perspective

When the Office of the Privacy Commissioner receives a complaint about an agency, it contacts the agency and advises the agency of the complaint. My experience is that where the Office of the Privacy Commissioner is aware of the name of the agency's privacy officer, it will contact that person directly. The agency is asked by the Office of the Privacy Commissioner to outline their perspective in realtion to the complaint. From the agency's perspective, this can involve considerable effort on the part of the Privacy Officer. In a large organisation, the privacy officer may not be aware of the background to the complaint before hearing from the Office of the Privacy Commissioner. The effect of this is the privacy officer has to determine who in the agency dealt with the complainant, contact the people concerned and collect the documentation involved. This information should allow the privacy officer to make an initial judgment on the veracity of the complaint. If the complaint is that documents have not been released, the privacy officer will need to review the documents to determine whether the documents should be released to the complainant. If the documents or parts of the documents are to be withheld, the privacy officer has to determine the grounds under the Privacy Act 1993 that allows the agency to legally withhold the information. The privacy officer has to exercise great care to ensure that in releasing information to a complainant, information about other individuals is not inadvertantly released. This can be difficult where a document refers to two individuals and only one individual is seeking the information. The privacy officer also has to ensure that trade secrets belonging to the agency are not released whilst meeting the requirements of the Privacy Act 1993.[97] Section 115 of the Privacy Act 1993 provides protection to those who make information available in good faith following a request under information privacy principle 6.[98] This is a valuable protection for agencies.

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[97] Privacy Act 1993, s 28.

[98] See *Ilich v Accident Rehabilitation and Compensation Corporation* [2000] 1 NZLR 380, 383 (HC) Tompkins J.

In summary, my experience is that agencies get frustrated by the delays in the current disputes process. Complaints can stretch out over a long period of time and neither party is bound by the outcome of the investigation. Where a complaint takes a long time to resolve, there is the risk that staff may leave the agency in the intervening period making it more difficult to resolve the complaint. A dispute process where the complaint is quickly dealt with and the result is binding on the parties means would be more efficient.

E Assessing the Value of an Investigative Process

The current investigative model has a number of benefits for resolving privacy disputes. A "one stop shop" where the Office of the Privacy Commissioner specialises in privacy matters and has a near monopoly on dealing with disputes under the Privacy Act 1993 should make it easier to develop a consistent approach to privacy disputes. Stability through a consistent approach to resolving disputes has developed during the decade long tenure of Bruce Slane as Privacy Commissioner.[99]

An investigative model provides the ability to take an in-depth and considered approach to dispute resolution because the Privacy Commissioner has a 20 working day period to respond, so there are no tight time constraints. There is not a timetable for hearings to be scheduled into, as opposed to, say, Disputes Tribunals where there are a number of hearings scheduled each day.[100] In depth reviews of disputes has the most benefit with complaints involving the disclosure of personal information or the collection of personal information arising under Information Privacy Principles 11 and 3 respectively. The ability to canvass in detail the issues in a disclosure complaint has the benefit of being able to assess the harm caused to the complainant. This investigation can also build up a detailed picture of why an agency was collecting personal information and what the personal information was to be used for. This is important as the scheme of the Privacy Act 1993 requires

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[99] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 8.
[100] Peter Spiller *The Disputes Tribunals of New Zealand* (Brookers, Wellington, 1997) 67 ["The Disputes Tribunals of New Zealand"].

that not only does one of the Information Privacy Principles have to be breached but that there is an interference with privacy in terms of section 66 for complaints other than those arising from access to and correction of personal information requests. Section 66(2) provides that there is an interference with privacy if an agency refuses to make information available.[101] The Privacy Commissioner has stated:[102]

> I am confident that section 66(2) was intended to ensure that substantiated access complaints could be considered an "interference with privacy" without any harm or detriment of the type referred to in section 66(1)(b) so long as the various criteria in section 66(2)(a) and (b) are present. However, if there was some harm or detriment, a breach of principle 6 could alternatively be brought under section 66(1).
>
> It is extremely important to ensure that there are enforcable remedies for the access entitlements in principle 6 without any proof of harm or detriment. Quite frequently, such harm or detriment will be absent.

For the purposes of this paper, the distinction in section 66 is important. Essentially, section 66 catagorises disputes arising from the information privacy principles into two groups, arguably, one group where an investigation is required to determine if there has been an interference with privacy. The second group has an inference that if an agency refuses to grant a request there is an interference with privacy. Therefore, the scheme of section 66 means that access requests are easier to deal with in a short hearing process because there is not the requirement for a detailed investigation as to whether the agency's conduct amounts to an interference. The scheme of section 66 also provides a basis to distinguish between access personal information complaints and other types of complaint.

In terms of an access to personal information complaint under information privacy principle 6, an interference with privacy is more likely to be exacerbated if there are significant delays in the dispute resolution process. The snowballing effect of delays in access disputes is a key reason to provide additional avenues to resolve access disputes quickly.

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[101] Privacy Act 1993, s 66(2)(a)(i).

The next point to be considered is whether there is an inherent value in an investigative process for the parties. The "off the papers" model of investigative dispute resolution as practised by the Office of the Privacy Commissioner means that generally there are no face-to-face meetings between the parties. This approach may take the heat out of the situation. The downside is that the parties do not get to look each other in the eye and there is the potential for ongoing tension to grow with successive rounds of correspondence and the inevitable time delays that this brings.

While an in-depth investigation may benefit the parties to a complaint, the question that has to be asked is: what benefit does the wider community get from the in depth review of one complaint? If the decision was novel or likely to affect a number of people, say a complaint about a government department such as Work and Income, where the agency concerned can change their processes as a result of an investigation by the Privacy Commissioner, then there is some wider benefit. An investigation by the Privacy Commissioner can have an educational function if there is a systemic problem at an agency. An alternative point of view is that an agency may change their processes just with some bad publicity arising from an error. A recent example of this was the error made by Work and Income in disclosing personal information of beneficiaries in a curriculum vitae writing scheme.[103]

A less adversarial approach to dispute resolution like an investigative model has advantages where there is an ongoing relationship between the parties. In a situation like an employment relationship, where reinstatement may be an option, it is important to try and preserve the relationship as far as possible and to design the dispute resolution process accordingly.[104] The questions that this raises in the context of privacy disputes are; do the parties care about the relationship and, if so,

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[102] "Necessary and Desirable: Privacy Act 1993 Review: Report of the Privacy Commissioner on the First Periodic Review of the operation of the Privacy Act", above n 65, 270.
[103] Leanne Bell "Beneficiaries Upset by Privacy Breaches" (26 May 2004) *Dominion Post* Wellington A4.
[104] See Employment Relations Act 2000, s 143.

is an investigative model going to preserve the relationship? The importance of preserving the relationship will depend on the context. If the relationship is a commercial one, say with a doctor or a chemist, then if other providers are available, the complainant can use them. My experience of complaints brought under the Privacy Act 1993, in a commercial environment where the complainant has a choice of providers for a particular service, is that often the relationship between the parties had already soured to a point where the choice of dispute resolution mechanism was not likely to matter or would not improve or rebuild the relationship. The Privacy Commissioner gave an indication of this in *Necessary and Desirable* "Many people aggrieved at some action, or lack of action, about a matter concerning them, obtain a real satisfaction from being able to access relevant information."[105] In dealing with an aggrieved complainant, it is a case of expediting the disputes process so the parties can go on their separate ways.

Where a privacy complaint involves a statutory monopoly where there is no choice but to deal with that organisation, such as ACC, that body is likely to already have internal systems to manage the process and to ensure people are dealt with fairly.[106] In any case, issues concerning the maintenance of relationships between government agencies and citizens after disputes have arisen are not confined to privacy related disputes.

An investigative process to resolve disputes provides an in depth investigation of the dispute. Where appropriate, the in depth review of a complaint can have positive outcomes for the agency in terms of improved processes. An investigative process suited to an "off the papers" mode of operating. It would depend on the particular circumstances of a complaint whether the investigative process would maintain the relationship between the parties. The current delays in resolving disputes in the Office of the Privacy Commissioner are likely to negate any benefit that the investigative process can bring to preserving the relationship between the parties.

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[105] "Necessary and Desirable: Privacy Act 1993 Review: Report of the Privacy Commissioner on the First Periodic Review of the operation of the Privacy Act", above n 65, 75.

[106] For example the Injury Prevention, Rehabilitation and Compensation (Code of ACC Claimants' Rights) Notice 2002.

F The Human Rights Review Tribunal

Recommendations of the Privacy Commissioner are not binding on the parties to a dispute so either party can take the matter to the Human Rights Review Tribunal (HRRT).[107] Less than five per cent of cases considered by the Privacy Commissioner are taken to the HRRT.[108] The HRRT was formerly known as the Complaints Review Tribunal and is established under the Human Rights Act 1993. The name changed on 1 January 2002 under the Human Rights Amendment Act 2001. The HRRT also hears complaints under the Human Rights Act 1993 and the Health and Disability Commissioner Act 1994. The HRRT is the second stage for human rights complaints. Complaints under the Human Rights Act 1993 have to first be considered by the Human Rights Commission.[109] This makes the process a mirror of the process for complaints under the Privacy Act 1993.

1 The HRRT Process

The HRRT has a range of judicial powers, there is a power to summons,[110] ignoring a summons from the HRRT is an offence.[111] The HRRT's powers under the Privacy Act 1993 are set out in section 85 of the Privacy Act 1993. The HRRT is also more flexible than the courts in how proceedings are conducted.[112] The basis of decision making in the HRRT is set out in section 105 of the Human Rights Act 1993. This section states:

> 105 Substantial Merits
>
> 1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities

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[107] Privacy Act 1993, s 77.
[108] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 21.
[109] Human Rights Commission *Fact Sheet 2: Process for Dealing with Disputes*. Copies of this are available on line at the Human Rights Commission website <http://www.hrc.co.nz/index.php?p=13855> (last accessed 21 August 2004).
[110] Human Rights Act 1993, s 109.
[111] Human Rights Act 1993, s 113.
[112] Human Rights Act 1993, s 104.

2) In exercising its powers and functions, the Tribunal must act

a) in accordance with the principles of natural justice; and
in a manner that is fair and reasonable; and
according to equity and good conscience.

This flexible approach to decision making in the HRRT is carried across to evidential requirements. The HRRT is not bound by strict rules of evidence.[113] In this respect the HRRT has similar rules of evidence to Disputes Tribunals.[114]

If the Privacy Commissioner cannot settle a dispute and believes that the complainant's case has merit, the Privacy Commissioner can refer the dispute to the Director of Human Rights Proceedings.[115] In the 2002/2003 year five referrals were made by the Privacy Commissioner.[116] The Privacy Commissioner stated:[117]

> My decision on whether to exercise my discretion to refer a matter will take account of a number of factors, both general and specific. Where I choose not to refer to the Director [of Human Rights Proceedings] a complaint following investigation, this should not be interpreted as indicating that the complaint is unmeritorious. If, for instance, I consider that a complainant has refused to accept a reasonable offer of settlement I might leave it for the complainant to bring a case to determine the appropriate remedy.

If the Privacy Commissioner does not refer a complaint to the Director of Human Rights Proceedings, the complainant has the right to take their complaint to the HRRT. The complainant's right to take their complaint to the HRRT is available irrespective of whether the Privacy Commissioner believes the complaint has substance.[118]

If one party is so minded as to ignore the decision of the Privacy Commissioner, the party seeking to enforce the decision, invariably the

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[113] Human Rights Act 1993, s 106.
[114] Disputes Tribunals Act 1988, s 40.
[115] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 29.
[116] Human Rights Commission *Report of the Human Rights Commission and The Office of Human Rights Proceedings for the Year Ended 30 June 2003* (E6, Wellington, 2003) 19.
[117] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 29.
[118] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 29.

complainant, has to go to the effort of taking the complaint to the HRRT. This incurs costs to both the parties to the complaint and costs to the taxpayer in running an HRRT hearing. The Director of Human Rights Proceedings can take matters to the HRRT on behalf of the complainant without cost to the complainant if the complaint is assessed as having merit. Although if the Director of Human Rights Proceedings takes the complaint to the HRRT any costs are borne by the Office of the Privacy Commissioner.[119] In this respect the Director of Human Rights Proceedings provides a worthwhile independent check of the merits of a particular complaint before more taxpayers money is spent taking the matter to the HRRT.

2 Difficulties in the HRRT

In recent years there was a problem with only a few cases getting accepted by the HRRT. In 2001 and 2002, the *National Business Review* reported that many privacy complaints taken to the Complaints Review Tribunal, as the HRRT was then known, were struck out on the basis that the complaint had no chance of succeeding, this approach was widely criticised.[120] These complaints were struck out without a hearing. The effect being that the complainants concerned were denied entry to a dispute resolution system that provided an enforceable remedy. Of the 21 privacy related complaints taken to the Complaints Review Tribunal between January 2000 and June 2001, 15 were struck out.[121] In nearly all the cases struck out, the complainants did not have counsel to represent them.[122]

The Office of the Privacy Commissioner's publication *Complaints Review Tribunal Privacy Cases 1998 – 2001*,[123] records that of the 48 cases taken by complainants to the Complaints Review Tribunal during the period covered, 25 cases had either part or all or their cases struck out without a hearing. Of the cases

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[119] Privacy Act 1993, s 86(4).
[120] Jock Anderson "Triple dipper's "moonlighting" bill revealed" National Business Review, 7 September 2001, 3 and Jock Anderson "Slane slams Bathgate's troubled tribunal" National Business Review, 18 January 2002, 2.
[121] Jock Anderson "Triple dipper's "moonlighting" bill revealed" National Business Review, 7 September 2001, 3.
[122] Jock Anderson "Slane slams Bathgate's troubled tribunal" National Business Review, 18 January 2002, 2.
[123] Office of the Privacy Commissioner *Complaints Review Tribunal Privacy Cases 1998 – 2001* (Office of the Privacy Commissioner, 2001).

heard by the Complaints Review Tribunal, only five complainants were legally represented compared to 17 of the respondents. The representation figures show an imbalance. However, when consideration is given to the fact that 73 per cent of the respondents were large Government departments,[124] it is not surprising that respondents generally have legal representation. Had the complainants' concerned had legal representation, they may have been advised that their cases were unlikely to succeed and so not have gone to the HRRT.

The HRRT has now amended its approach to privacy related complaints. As the *Report of the Privacy Commissioner for the Year Ended 30 June 2003* notes:[125]

> While the numbers of proceedings being initiated by the aggrieved individual in the [Human Rights Review] Tribunal remains constant (averaging around 24 per year in the last three years) the issues raised are now dealt with through full hearings (in contrast to the Tribunal's previous practice. In some cases this is in addition to detailed work at the pre-hearing stage.

As the Privacy Act 1993 currently stands, it is important for the HRRT to allow cases to be heard given that the Privacy Commissioner's powers are limited to making a recommendation. If a complainant is not given a hearing, the complainant is reliant on the goodwill or the good citizenship of the agency to provide access to personal information. The downside of the HRRT hearing every complaint is that complaints which have little basis or merit are heard. This incurs costs for both the agency in attending and the taxpayer in running an HRRT hearing. Both parties to a complaint need a reasonably affordable path to an enforceable result.

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[124] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 28.
[125] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 29.

G *Promotion of the Privacy Act 1993*

Part of an effective disputes resolution scheme is ensuring people are aware of the scheme, how it operates and the range of possible outcomes. The Office of the Privacy Commissioner currently promotes privacy issues in a number of ways. *Private Word*, a regular newsletter is distributed with archive copies available on the Office of the Privacy Commissioner's website.[126] Notes of selected cases and fact sheets are also issued.

A gap in the promotional information provided by the Privacy Commissioner is the lack of a small leaflet for distribution to organisations such as Community Law Centres, Citizens Advice Bureaux and public libraries. I visited the Wellington Citizens Advice Bureau and the Wellington Community Law Centre and was unable to obtain from either organisation a leaflet setting out the functions of the Office of the Privacy Commissioner.[127] Both organisations held copies of various *fact sheets* issued by the Privacy Commissioner for use by their staff. However, the fact sheets are reasonably detailed, this may make them too difficult to read and therefore inaccessible to some people. Furthermore, the copies of the fact sheets were for the use of the staff of the organisations rather than for distribution to the public. The effect of not having a leaflet on display are twofold, a casual visitor might gain the impression that a remedy for their problem is not available and simply leave or, secondly, have to seek an appointment with a staff member which might be inconvenient.

Given the wide coverage of the Privacy Act 1993, it may not just be individuals seeking information about how the Privacy Act 1993 operates. Agencies may find a succinct guide useful for training or reference purposes.

It was interesting to note that both the Wellington Citizens' Advice Bureau and the Wellington Community Law Centre both held copies of leaflets issued by

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[126] Private Word was published four times in the 2002/2003 year. See "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 140.

[127] Visits by author 7 September 2004. See also "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 140.

the Electricity Complaints Commission on its dispute process and leaflets on filing cases in Disputes Tribunals.

While the Office of the Privacy Commissioner has a detailed website, the risk of relying on a website to distribute information means that those who do not have internet access cannot obtain the information. A small leaflet providing a précis of the Privacy Commissioner's functions, a diagram of the disputes process and contact details would be very useful. Advocacy groups could have the leaflet available to answer enquiries and responsible agencies could even send copies of the leaflet out to individuals that present with privacy queries. All in all, a readily available, easily understood leaflet would be of real benefit to all concerned.

IV ACCESSING PERSONAL INFORMATION: THE CURRENT SITUATION

The current situation in New Zealand for obtaining access to personal information can be divided into two main categories, the Privacy Act 1993 and the court system.[128] I have already discussed the Privacy Act 1993, so this section is focussed on the court system.

A The Court System

The second category for obtaining personal information is by using the court system.[129] The following discussion is written on the basis that the plaintiff has a cause of action to file a case. The High Court in *Johansen v American Underwriters (NZ) Limited*[130] held that the discovery process and the Privacy Act 1993 can coexist.[131] In a civil case, the parties need to have the information that

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[128] There are other methods for accessing information such as those already discussed in the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987. For the sake of brevity, this paper does not review other individual statutes that provide access to information in particular areas.

[129] For a general discussion on litigation as a means of dispute resolution see Peter Spiller (ed) *Dispute Resolution in New Zealand* (Oxford University Press, Auckland, 1999) 131.

[130] *Johansen v American Underwriters (NZ) Limited* [1997] 3 NZLR 765 (HC) Master Kennedy-Grant.

[131] See Paul Roth (ed), *Privacy Law and Practice* (loose leaf, LexisNexus New Zealand Limited, Wellington, 2003) para 1006.32AA (last updated 25 May 2000).

pertains to their case in order to make their arguments as strong as possible. In the New Zealand court system, once a case has been filed in either the District Court or the High Court, the discovery process takes place. The discovery process is governed by the rules of the applicable court.

The discovery process is intended to allow the parties to a case to obtain all the documents that may be relevant to their case from the other parties.[132] The documents can include documents containing personal information. Each party assembles the relevant documents that they hold, lists the documents, and then allows the other parties to review their documents – a process known as inspection.[133] Documents are widely defined and include electronic material.[134] Each party must swear an affidavit stating that all the relevant documents they hold are listed.[135]

For documents to be excluded from the inspection process they have to attract legal privilege. There are established classes of documents that can be classed as privileged. These include correspondence from a person to their lawyer and without prejudice communication.[136] The point to note here is that legal privilege provides for only narrow exceptions to providing documents to the other party in contrast to the range of exceptions contained in the Official Information Act 1982[137] and the Privacy Act 1993.[138]

If one of the parties in a case is not happy with the extent of the documents discovered by the other party, the court rules allow the party to apply for court orders for further and better discovery[139] or for a judge to make a ruling on whether a particular document attracts privilege.[140]

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[132] See *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 (QB).
[133] See Andrew Beck *Principles of Civil Procedure* (Brookers, Wellington, 2001) 216.
[134] *Derby & Co Ltd v Weldon (No 9)* [1991] 1 WLR 652 (Chancery Division).
[135] High Court Rule 303(1); District Court Rules 325(1).
[136] See Beck, above n 133, 223.
[137] Conclusive reasons for withholding official information are set out in Official Information Act 1982, s 6.
[138] Privacy Act 1993, Part 4.
[139] The power is set out in High Court Rule 297 and District Court Rule 319.
[140] High Court Rule 311(1) and District Court Rule 333(1).

Once the discovery and inspection process is complete, the parties form the agreed bundle; these are the documents that will be referred to in the hearing.[141] An agreed bundle should support your case and include any documents that are referred to in evidence by either the lawyer or witnesses.

The fundamental differences between the discovery process in the court system and the Official Information Act 1982 is that discovery is applicable to both government and private sector information. The discovery process differs from the Privacy Act 1993 in that discovery is not just limited to obtaining personal information. Discovery is therefore a stronger tool for obtaining information, both personal and otherwise, than the Privacy Act 1993 or the Official Information Act 1982.

The fundamental problem with the discovery process is cost. Court fees in the District Court and High Court are substantial.[142] In addition, most people seeking to take a case to court will want to hire a lawyer to represent them. Unless the person is eligible for legal aid or is wealthy, the cost of taking a case to court is likely to deter most people. The effect of this is, while the discovery process in itself is an effective tool for accessing personal information, in reality because of cost the discovery option is unlikely to be used and cheaper options are required.

V A STREAMED APPROACH TO PRIVACY COMPLAINTS

The next part of this paper will take the dispute processes from the Privacy Act 1993 and the court system outlined above and consider whether they can be mixed together to build a better dispute resolution scheme for dealing with personal information.

[141] See Beck, above n 133, 232.
[142] See District Courts Fees Regulations 2001 and High Courts Fees Regulations 2001.

The option to be explored is a streamed scheme for access to information complaints. One stream would be the existing Privacy Commissioner investigative model scheme. The second stream would use a court or tribunal, either the Human Rights Review Tribunal, Disputes Tribunals or District Courts. The proposal is for complainants to have the option to use a court or tribunal where they are seeking access to or the release of a document – the complainant could obtain an order for the document to be released.

A Advantages of Hearings

The main reason for providing a court or tribunal based scheme, as an alternative option for complainants is speed. If Disputes Tribunals were used as the forum for hearing privacy disputes, 80 per cent of complainants could have their case heard in approximately 90 days.[143] The Wellington District Court hears civil interlocutory applications on the first Friday of every month.[144] These options are potentially much faster than the hearing time through the Office of the Privacy Commissioner. The Office of the Privacy Commissioner reports that in the 2002/2003 year, 15 per cent of complaints were closed within three months of receipt and another 41 per cent were closed within six months of receipt.[145] There is the potential for further delays if one of the parties to the dispute does not accept the Privacy Commissioner's recommendation following the investigation. As already set out, the Privacy Commissioner does not have the power to order a party to act; this power is reserved for the HRRT.

Providing an adversarial option for resolving privacy disputes recognises that one or both parties to a privacy dispute may not want to work constructively together to resolve the issue. There may be an inequality of bargaining strength that means one party is prepared to ignore the other party's rights. The agency involved may not be a good corporate citizen or be unconcerned about any negative

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[143] See Department for Courts *Annual Report for the year ending 30 June 2003* (E 60, Wellington, 2003) 50.
[144] Advice from Wellington District Court Registry to author 21 September 2004.
[145] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 21.

publicity that could arise from the complaint. There is also often not a commercial imperative on one party to resolve, or resolve promptly, an access to personal information issue. Arguably, where a complainant is using the Privacy Act 1993 as a tool for an information fishing exercise, perhaps to see if it is worthwhile filing a claim against the agency concerned, there is potentially quite the opposite incentive.[146] The current two-step system using the Privacy Commissioner and then the HRRT can be seen as recognising there are situations where the parties to a dispute will need an adversarial system with a result that can be enforced to settle a dispute. The problem with the current system is that while the HRRT can provide finality, there are considerable delays in getting to that point.

While the Office of the Privacy Commissioner is placing greater emphasis on mediation to resolving disputes promptly rather than going through a drawn out investigation.[147] The type of mediation practised is not conventional mediation where the parties meet, more a paper based mediation,[148] this is potentially fraught with difficulty because those involved may not be able to clearly communicate in writing or over the telephone. Further, mediation is heavily reliant on both parties having the will to cooperate. In any case, where the parties have the will to resolve a dispute they will need the minimum of assistance: many privacy disputes may well be resolved without the involvement of the Office of the Privacy Commissioner because the parties involved have the will to solve the problem. However, a dispute resolution system should not be designed on the basis that those who use it will want to work constructively together, the system needs to have some power.

B Which courts or tribunals would hear privacy matters?

The first question to be decided if privacy matters are to be dealt with in a court or tribunal is: which court or tribunal should hear them? The logical courts to consider for this purpose are the Human Rights Review Tribunal, Disputes Tribunals and District Courts.

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[146] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 23.
[147] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 21.
[148] See Spiller, above n 833, 57.

C Human Rights Review Tribunal

An option worth considering for the resolution of privacy complaints is to amend the structure of the Human Rights Review Tribunal (HRRT) to allow complainants to bring an action directly in the HRRT without having to first go through the Office of the Privacy Commissioner. This would require amending section 82 of the Privacy Act 1993.

The HRRT has a schedule of hearings that is demand driven. The HRRT travels to hear complaints and hearings are held near to where the complainant lives. Currently there is a four-month wait for an HRRT hearing.[149]

The HRRT sits in District Court facilities, though unlike District Courts does not have a permanent presence at each location. The issue with this is if the HRRT was to be used to hold hearings for access to information requests the process might be slower than if District Courts were used. The advantage of the District Court is that a complainant can visit the District Court and obtain an interlocutory application as opposed to waiting for the HRRT to come to town. There is little point in having a two-stream approach for access complaints using the Privacy Commissioner and direct recourse to the HRRT if someone in Oamaru has to wait months for the HRRT to come to town. This negates the convenience of the supposedly faster option. Consideration also should be given to the cost of moving the HRRT around New Zealand. It must be expensive for the taxpayer for the HRRT to travel to Gore, for example, just to hear one complaint. It is better from a cost perspective to use the existing District Court system.

As noted, the HRRT hears complaints arising under three statutes, the Human Rights Act 1993, the Privacy Act 1993 and the Health and Disability Commissioner Act 1994. All three statutes require the complainant to first go through a statutory body like the Privacy Commissioner. Careful consideration would need to be given to the amount of extra administration expenses that would be incurred in allowing the HRRT to hear access complaints directly. An exception for privacy access

[149] Chris Smith, Ministry of Justice, to the author (16 August 2004) letter.

complaints may cause problems for the other types of disputes the HRRT hears, there may be delays due to the HRRT being swamped by privacy complaints.

There are several positive aspects if direct entry to the HRRT for access to personal information complaints is allowed. The HRRT is experienced in privacy related issues as it handles privacy matters at present. The HRRT is free for users, this helps avoid deterring would be users because of cost.[150] The disadvantages of using the HRRT are that there are already delays of four months in obtaining a hearing. Unless further funding was provided to the HRRT, these delays may grow if more work was to come from privacy matters. Also, the HRRT does not have a permanent presence around New Zealand, meaning that would be users would have to wait until the HRRT came to town.

The effect of these issues is that the HRRT in its present form is not flexible enough to provide prompt resolution for access to personal information disputes. This out weighs the benefit of the HRRT's specialist knowledge. Disputes Tribunals or District Courts may provide more flexibility; these options will now be assessed.

D Disputes Tribunals

Disputes Tribunals were originally established as Small Claims Tribunals in the 1970's to hear and resolve disputes of low monetary value that would otherwise be uneconomic to pursue in the main court system.[151] Disputes Tribunals use District Court facilities, so they have a wide geographic presence, so many New Zealanders would have a Disputes Tribunal nearby. This wide presence is in contrast to the HRRT that has to travel for each hearing. Disputes Tribunals also hear complaints quickly; this has the benefit of reducing costs in terms of time and lost opportunities. Based on Department of Courts statistics and assuming the

[150] See Office of the Privacy Commissioner "Submission on review of Civil Court Fees: Stage Two - Human Rights Review Tribunal" (17 June 2003) 1 ["Submission on review of Civil Court Fees: Stage Two - Human Rights Review Tribunal"].
[151] "The Disputes Tribunals of New Zealand", above n 100, 5.

performance of Disputes Tribunals and the HRRT remain constant, if Disputes Tribunals were to hear privacy complaints over 80 per cent of claims would be heard in three months before the HRRT could start hearing complaints because of the HRRT's four month waiting period.[152]

Allowing Disputes Tribunals to hear privacy disputes would be a significant expansion of their jurisdiction. The jurisdiction of Disputes Tribunals is set by the Disputes Tribunals Act 1988 and is limited to contract and quasi contract, tort and statutory causes[153] of action such as under the Fencing Act 1978. As Peter Spiller states "[t]hese restrictions reflect the intention that the [Disputes] Tribunal's jurisdiction be limited to essentially factual matters not requiring complex and technical legal knowledge."[154]

An issue to address if Dispute Tribunals were to start hearing privacy matters is: do the existing referees have the requisite expertise?[155] Privacy related matters would be a departure from the current jurisdiction that is generally contract and tort based. While there is a growing tort of privacy in New Zealand, Disputes Tribunals can consider only a restricted range of torts,[156] this means that currently Disputes Tribunals cannot currently consider cases brought under the tort of privacy. The effect of these factors is that currently Disputes Tribunal referees are unlikely to have practical experience in dealing with privacy related issues or current expertise in privacy matters.[157] This is in marked contrast to the HRRT's good level of experience in privacy issues.

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[152] See Department for Courts, above n 143, 50.

[153] Most of the statutory causes of action are listed in the first schedule of the Disputes Tribunals Act 1988.

[154] "The Disputes Tribunals of New Zealand", above n 100, 35.

[155] See New Zealand Law Commission *Seeking Solutions: Options for change to the New Zealand Court System* (NZLC PP52, Wellington, 2002) 144 ["Seeking Solutions: Options for change to the New Zealand Court System"].

[156] The Disputes Tribunals Act 1988 s 10(1)(c) restricts the jurisdiction of Disputes Tribunals to torts involving property. See *Metrowater Ltd v Disputes Tribunal* [1999] 13 PRNZ 532, 535 (HC) Williams J.

[157] The Law Commission found that out of 56 referees sitting in 2002 a quarter were legally qualified: "Delivering Justice for All: a Vision for New Zealand Courts and Tribunals", above n 85, 159.

An option is to provide specific training on privacy matters for referees. In recent years, the Ministry of Justice has placed a greater emphasis on the training of referees. The Disputes Tribunals Amendment Act 1998 allowed for the appointment of a Principal Disputes Referee, the objective of this appointment was to improve training for and provide more support to referees.[158] In addition, The Open Polytechnic of New Zealand runs a training programme that newly appointed referees attend.[159] Referees are appointed for a three-year term without an automatic right of renewal,[160] having some knowledge of privacy issues could be part of the basis of the selection of new appointees. If there were a steady turnover of referees, over a period of time Disputes Tribunals would have the ability to hear privacy matters because of the arrival of privacy literate referees. Another option may be to have referees that specialise in privacy matters to hear privacy related cases. However, referees generally operate in a particular geographic area.[161] This means that it would be difficult to have "floating" referees who are privacy specialists that travelled to hear privacy cases.

There are monetary limits on Dispute Tribunal's jurisdiction that limits any claim for damages.[162] However, even the basic limit of $7,500 would cover most damages awards in access disputes, based on damage awards in cases such as *Proceedings Commissioner v Health Waikato* where a total of $8,000 was awarded.[163] Assuming *Proceedings Commissioner v Health Waikato* represents the high end of access disputes, then monetary jurisdiction is not a barrier to most access disputes being heard by Disputes Tribunals. Nevertheless, the monetary jurisdiction of Disputes Tribunals is significantly less than the HRRT that can award up to $200,000.[164]

Currently, Disputes Tribunals take a relaxed approach to evidential requirements. The Disputes Tribunals Act 1988 allows any relevant advice or

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[158] This became Disputes Tribunals Act 1988, s 6A.
[159] "The Disputes Tribunals of New Zealand", above n 100, 20.
[160] "The Disputes Tribunals of New Zealand", above n 100, 23.
[161] "The Disputes Tribunals of New Zealand", above n 100, 15.
[162] Disputes Tribunals Act 1988 s 10 sets the monetary limit of claims at $7,500. Section 12 allows the jurisdiction of a Disputes Tribunal to be extended to $12,000 if both parties agree.
[163] *Proceedings Commissioner v Health Waikato* (2000) 6 HRNZ 274, 291 (HC) Smellie J.
[164] Human Rights Act 1993, s 92Q.

information to be taken into account irrespective of whether the advice or information would be admissible in a court of law.[165] This procedural flexibility is also found in the HRRT. The benefit of the Disputes Tribunals approach is that hearings are not overly legalistic and that parties do not need knowledge of legal processes when they appear before a Disputes Tribunal. The negative effect of this is that referees are not necessarily familiar with the normal rules of evidence. If access to information matters were to be considered by Disputes Tribunals, referees may well deal with some complex decisions whether to allow access to documents covered by legal professional privilege and documents containing information belonging to other individuals or trade secrets. Caution would be required to ensure mistakes are avoided or that incorrect decisions were not made. While the HRRT takes a similar approach to procedural matters, the HRRT has experience in privacy issues and its decisions can be appealed. This raises the issue of whether greater appeal rights from the decisions of Disputes Tribunals would be warranted. Currently, the right to appeal against a decision of a Disputes Tribunal is very limited.[166] Appeals are only allowed where the hearing was conducted unfairly, not on matters of fact or law.[167] As the Law Commission has stated:[168]

> Decisions can only be questioned where the referee has conducted the hearing itself unfairly and the appellant has been prejudiced. The merits of the decision are out of bounds. The referee may have got the facts wrong, or the law wrong, but nothing can be done about that.

The Law Commission's report *Delivering Justice for All: a Vision for New Zealand Courts and Tribunals* recommends the maintenance of the limited right of appeal in Disputes Tribunals.[169] However, the Law Commission does not consider appeal rights for Disputes Tribunals in detail and states if there were wider appeal rights that "[p]arties with more time or resources to wear down the other side could abuse the appeal process."[170] The Law Commission report also claims that surveys have shown that users are happy with the current Disputes Tribunals system but

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[165] Disputes Tribunals Act 1988, s 40.
[166] Disputes Tribunal Act 1988 s 50(1); see also "The Disputes Tribunals of New Zealand", above n 100, 125.
[167] *NZI Insurance v. District Court at Auckland* [1993] 3 NZLR 453, 458 (HC) Thorpe J.
[168] "Seeking Solutions: Options for change to the New Zealand Court System", above n 155, 144.
[169] "Delivering Justice for All: a Vision for New Zealand Courts and Tribunals", above n 85, 160.
[170] "Delivering Justice for All: a Vision for New Zealand Courts and Tribunals", above n 85, 160.

does not quote the surveys or detail the survey findings.[171] Maintaining the limited right of appeal would have the benefit of minimising appeals being used as a delaying tactic to stall the release of information. However, if a two-stream approach for access disputes were to use Disputes Tribunals for one stream, the appeal provisions of the Disputes Tribunals Act 1988 would have to be revised. It would be unfair for parties using the Disputes Tribunals stream to have appeal rights that were far more limited than those using the Office of the Privacy Commissioner. Having different appeal rights for different types of disputes heard by Disputes Tribunals would create procedural problems. It would be rational for complainants to state claims as having a privacy aspect so as to take advantage of the wider appeal provisions.

Disputes Tribunals have a nation-wide presence and a monetary jurisdiction that would cover most access to personal information claims. The flexible procedure of Disputes Tribunals is positive and analogous to the HRRT. The harsh restrictions on appeal rights would create inequalities with complainants using the Office of the Privacy Commissioner. Addressing the lack of knowledge on privacy law in Disputes Tribunals would have to be a priority. In summary, expecting Disputes Tribunals to hear privacy claims is really taking a court set up to deal with small claims of a general legal nature and trying to adapt it to a relatively specialised role.

E District Courts

A process to deal with access and release disputes could be built into the existing interlocutory application process in the District Court system.[172] Essentially, District Court privacy hearings would operate along the lines of an interlocutory application,[173] though perhaps in a less formal manner such as in the judge's chambers.[174] If matters were heard in chambers, then the privacy of the

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[171] "Delivering Justice for All: a Vision for New Zealand Courts and Tribunals", above n 85, 160.
[172] For a succinct background on District Courts see "Seeking Solutions: Options for change to the New Zealand Court System", above n 155, 156.
[173] High Court Rule 3; District Court Rule 3.
[174] For a discussion on interlocutory applications see Beck, above n 1333, 162. For an outline on hearings in Chambers see "Seeking Solutions: Options for change to the New Zealand Court System", above n 155, 154.

parties would be protected and consistency maintained with complaints heard by the Office of the Privacy Commissioner. If forms were designed in a user-friendly manner, the need for legal representation would be reduced. The applicant would have to apply for a hearing through the court registry and serve notice on the other party. Alternatively, the Registrar could serve the notice on the other party, as is currently the case with Disputes Tribunals. This process envisages both parties being present for the hearing.

Ex parte applications in privacy matters would not be fair on the parties. It is difficult to see how an ex parte application could work in a privacy matter, as both parties would generally need to be present – the individual and the agency. Conceivably, the main use for an ex parte application would be to stop the release of information in a common law or contractual situation. This is not really required as injunctions already provide a tool for preventing release of information.

It is reasonable to expect that as District Court Judges are experienced lawyers, they would be conversant with rules of evidence and be able to apply the Privacy Act 1993. This knowledge advantage makes District Courts a more attractive option to hear access to personal information complaints than Disputes Tribunals.

Should the Law Commission proposal for a Community Court as set out in the *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* report be adopted, the hearing of privacy applications would fit within the proposed monetary jurisdictional limit of $50,000.[175] The Law Commission's proposals that Community Court fees and processes reflect low value civil claims adds to the attraction of the dispute resolution model utilising the District Court if the Law Commission's recommendations were to be adopted. [176]

[175] "Delivering Justice for All: a Vision for New Zealand Courts and Tribunals", above n 85, 118.
[176] "Delivering Justice for All: a Vision for New Zealand Courts and Tribunals", above n 85, 118.

F Operation of District Court Privacy Hearings

In the hearing, the respondent would be obliged to provide the documents in question to the judge for review. In the interests of speed and efficiency, the judge should be provided with a copy of the documents before the hearing. If the information sought did not exist, the respondent would be obliged to provide a statutory declaration that there was no such document.

Both parties would have the opportunity at the hearing to make representations to justify their point of view. As information privacy principle six of the Privacy Act 1993 contains an entitlement of access to personal information, the respondent would have the greater effort to oppose access.

Sensible precautions would need to be taken at the hearing. For example, in a dispute over disclosing a document that was withheld because part of the document contained personal information belonging to another person, the party requesting the information would not be allowed to view the document until the judge had ruled on the document. A useful check would be to allow District Courts to refer an application for access to the Office of the Privacy Commissioner if the judge believed the application was better suited to an investigative style of dispute resolution. This power might be exercised in a situation where there was a large number of documents to consider and it would take some time to work through them.

To make the District Court option easier for people seeking to file privacy claims, District Court forms for privacy matters would need to be designed in a way so as to be readily usable by lay people. The existing forms for Disputes Tribunal hearings where it is a matter of the parties "filling in the gaps" would be a useful starting point to design user-friendly forms. It would be of benefit to all users of District Courts if court forms were made easier to use – designing new forms for access to personal information disputes could be the starting point for this.

G The Cost of District Court Hearings

The fees for interlocutory applications in District Courts are currently set at $185.[177] This is considerably more than Disputes Tribunal filing fee[178] or the free service provided by the Office of the Privacy Commissioner. The trade-off against the cost of the District Court fee for the party seeking information is the potential to save time by using the District Court process. It may be cost effective for a party using a lawyer to pay the interlocutory application fee rather than persist through the Office of the Privacy Commissioner. A party using a lawyer runs the risk that the Privacy Commissioner's recommendation will not be accepted by the other party and then having to seek an HRRT hearing, all of which will incur time and legal fees.

The Privacy Commissioner made a submission to the Working Party on Civil Courts Fees.[179] The Working Party on Civil Court Fees was reviewing court fees.[180] In the submission, the Privacy Commissioner opposed the proposed imposition of a $400 filing fee for the HRRT. A $400 fee was seen as being a barrier to accessing the HRRT for litigants in person. The Privacy Commissioner made the rather generalised observation that a $400 filing fee would tip "[t]he balance of power between a complainant and a respondent will decisively move in favour of respondents." The Privacy Commissioner proposed that a filing fee in line with the top of the Disputes Tribunal filing fee range of $100 would be more appropriate. This figure is not too far removed from the District Court interlocutory application fee of $185 in the model this paper is proposing.

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[177] Ministry of Justice <www.justice.govt.nz> (last accessed 28 July 2004).
[178] These fees start at $30. See Ministry of Justice <www.justice.govt.nz> (last accessed 28 July 2004).
[179] "Submission on review of Civil Court Fees: Stage Two - Human Rights Review Tribunal", above n 150.
[180] See Department for Courts <http://www.courts.govt.nz/pubs/reports/2004/civil-court/introduction.html> (last accessed 8 October 2004).

H Legal Aid

Allowing Privacy Act 1993 claims in District Courts would mean that applicants have the potential to be covered by the legal aid scheme. Legal aid is available for civil claims and can be obtained promptly. The Legal Services Agency administers the legal aid scheme. In the 2002 to 2003 year, the Legal Services Agency processed 82.7 per cent of applications for legal aid in civil cases within 15 days.[181] If access to information claims under the Privacy Act 1993 were an accepted part of the jurisdiction of District Courts, then not only would a complainant be able to apply for legal aid to cover the costs of the hearing but also for their lawyers' time beforehand. Someone seeking access to personal information though the District Court may be able to include the cost of the application into the costs of a wider case.

VI CONCLUSION: WHO SHOULD DECIDE?

Having Disputes Tribunals hearing privacy applications would be a major expansion of their current jurisdiction. The Disputes Tribunals Act 1988 would need to be amended in areas such as evidence and appeals. It would be unfair for both complainants and agencies if Disputes Tribunals were used for access applications if applications made through Disputes Tribunals did not have appeal rights whereas those made through the Office of the Privacy Commissioner could be appealed. Training would need to be provided to referees on the Privacy Act 1993.

Having the HRRT hearing applications for access to personal information in the first instance would be a significant amendment to the current structure. The HRRT is currently the appellant tribunal for decisions of the Privacy Commissioner, the Human Rights Commission and the Health and Disability Services Commissioner. Currently, there is a consistent approach for complaints across all three bodies. As discussed, while the HRRT utilises District Court facilities, the HRRT does not have a permanent presence at every District Court and

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[181] Legal Services Agency *Annual Report 2002 - 2003* (E7, Wellington, 2003) 48.

the HRRT administration is centralised in Wellington. This reduces the attractiveness of the HRRT as a practical proposition to promptly hear applications; a person could not walk in off the street and fill in an HRRT application. It would be prohibitive from a cost perspective for the HRRT to travel around New Zealand at short notice to hear every application for accessing personal information.

The most attractive option is to use District Courts. District Courts already have judges who are skilled in dealing with evidence and who have considerable legal experience. District Courts have an existing procedure in the shape of interlocutory applications that would not require significant modification to deal with access to personal information disputes. However, if the option was to work, then workflows and District Court funding would need review to ensure the potential efficiencies are realised.

A Legislative Changes to the Privacy Act 1993

To allow a two stream system for access to personal information disputes, some amendments to the Privacy Act 1993 would be required.[182] Currently, there is a general rule in section 11(2) of the Privacy Act 1993 that the information privacy principles do not confer legal rights that are enforceable in courts of law.[183] There is an exception to this rule contained in section 11(1).[184] There is a legal right that is enforceable in a court of law for accessing personal information held by a state sector agency. The Privacy Act 1993 does not contain any specific provisions to prevent double jeopardy from a complaint using both a court and the Office of the Privacy Commissioner process to access information held by a state sector agency. Presumably, the Privacy Commissioner could discontinue an investigation using the discretionary powers contained in section 71 if a

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[182] The 1997 review of the Privacy Act 1997 raised the issue as to whether the courts should have greater jurisdiction in access complaints. Of the seven submissions that commented on this point, six opposed the idea. However, detailed analysis of the submissions is difficult because responses were generally just "no". The Wellington City Council supported a fast track option. See Privacy Commissioner *Review of the Privacy Act 1993: Public Submissions Volume Two: DP6 – DP12* (Privacy Commissioner, 1998).

[183] See *R v Harris* [2000] 2 NZLR 524, 527 (CA) Keith J for the Court. Parties can formulate claims so as to bring actions in other jurisdictions. See Paul Roth, Privacy Law and Practice LexisNexus New Zealand Limited, Wellington, 2003, para 1011.5 service No 25 May 2000.

[184] For a background to the rationale for this exception see "Necessary and Desirable: Privacy Act 1993 Review: Report of the Privacy Commissioner on the First Periodic Review of the operation of the Privacy Act", above n 65, 107.

complainant had tried unsuccessfully to access their personal information through the court system and then complained to the Office of the Privacy Commissioner.

To allow a two-stream process for accessing personal information held by any agency, section 11(1) would need to be amended so that information privacy principle six would confer a right of access to personal information enforceable in a court against any agency. It would be a simple drafting process to remove "public sector" from section 11(1) so that there was a consistent approach for accessing all personal information irrespective of whether the information was held in the public or private sector. A further refinement to section 11(1) would be the ability for a District Court Judge to refer the complaint to the Office of the Privacy Commissioner if the Judge believed the complaint was one that was more suitable to being investigated by the Privacy Commissioner. This subsection could read:

> (3) where an application is made to a District Court in reliance on subsection (1) the District Court may order that the matter be referred to the Commissioner for the Commissioner to undertake an investigation under Part 8 if it sees fit.

By integrating the two methods of dispute resolution using a new subsection 11(3) a degree of judicial control can be maintained over the dispute resolution process rather than an unfettered choice for the complainant. I would expect subsection 11(3) to be utilised by a District Court in situations where it became apparent at the hearing the matter involved other Information Privacy Principles. Alternatively, a District Court judge may refer the matter to the Privacy Commissioner if it became apparent at the hearing that there was a substantial amount of information to work through and the hearing would not allow enough time to do so.

To prevent double jeopardy situations arising, section 71(1) could be amended with the addition of a new subsection stating: "the complainant has already pursued an action in the District Court under section 11(1) for subject-matter of the complaint." Clarifying section 71 means that parties to a complaint will have certainty as to whether a complaint can be relitigated. The amendment also addresses the potential in the Privacy Act 1993 as it currently stands for a

complainant to use both the complaints process through the Office of the Privacy Commissioner and then take a further action against a public sector agency under section 11(1).

VII CONCLUSION

The Privacy Commissioner should be the Rock of Gibraltar standing fast against incursions on the privacy of the individual, be they from government or the private sector. Ideally, the Privacy Commissioner's focus should be on privacy issues that affect all or a significant part of the community rather than be directed at smaller disputes involving an individual or a small group of individuals. This concept is the starting point for this paper.

By providing another option for complainants seeking resolution in access to personal information related privacy complaints through District Courts, there is the potential to ease the overall complaints workload in the Office of the Privacy Commissioner. This has several benefits. A reduced workload may mean that other complaints can be dealt with faster. Currently, additional funding is provided to the Office of the Privacy Commissioner over two years so that longstanding complaints can be resolved.[185] There is no guarantee that this additional funding will continue. By giving complainants the option to use the court system some taxpayers' money may be saved as the user bears more of the costs in the court system, rather than more funding provided to the Office of the Privacy Commissioner.

If the number of complaints handled by the Office of the Privacy Commissioner reduced with a two-stream option for access to personal information complaints, then the Privacy Commissioner could reallocate resources to legislative and policy issues. Legislative and policy issues have the potential to affect a wide number of New Zealanders and are arguably more important from a public interest perspective than resolving complaints that may only affect one person.

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[185] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 21.

A two-stream approach for access to information disputes would provide greater flexibility for people to access their personal information. Provided there is the option to choose between the free services offered by the Privacy Commissioner and paying to use the District Court service, a two-stream approach does not impose a cost barrier to obtaining personal information. Costs must be viewed as more than just direct costs such as court fees. Indirect costs arising from delays in the complaints service need to be considered.

As only access to personal information complaints are covered by the proposed two-stream system then there is the minimal chance for inconsistencies between District Courts and the Privacy Commissioner or the Human Rights Review Tribunal. The right of access to personal information in the Privacy Act 1993 is not changed under this proposal. Access situations are fact based; deciding whether a document falls into one of the narrow exceptions to availability is done on a case by case basis. It would be highly unlikely that two complainants would be seeking access to exactly the same document from the same agency and then receive different results from the two complaints processes that are proposed. If one party was unhappy with the decision of the District Court, they could appeal to the High Court as is the case at present with the Human Rights Review Tribunal.

The Privacy Commissioner's annual report should provide more detailed financial reporting. The *Report of the Privacy Commissioner for the year ended 30 June 2003* does not even provide the cost for each of the output classes provided to the Crown.[186] The reporting of the average cost to resolve complaints would allow different options for dealing with privacy complaints to be compared and for informed decision making to take place. The average cost of resolving complaints is reported by the Ombudsman. In the year to June 2003, each completed Official Information Act 1982 complaint was estimated to have cost $1,195.[187] If the Ombudsman can provide this level of reporting, so should the Privacy Commissioner.

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[186] "Report of the Privacy Commissioner for the Year Ended 30 June 2003", above n 2, 145.
[187] Report of the Ombudsmen for the Year Ended 30 June 2003, above n 55,) 54.

The proposed amendments to the Privacy Act clarify the legislation and provide a flexible system for complainants while still allowing judicial control so that the flexibility is not untrammelled. I would recommend that the Privacy Act 1993 be amended accordingly.

Access to personal information complaints have proven to be the consistently largest single category of complaints. This paper recognises this fact and has proposed a system that gives complainants a chance to have their complaints resolved while still maintaining the current rights that the Privacy Act 1993 confers.

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