

Complaint Determination No. 1 of 2003

Made under the *Privacy Act 1988* (Cth) section 52.

Between,

“Complainant”

Complainant

and,

ACT Government Solicitor

Respondent

History

This determination relates to a complaint lodged by “complainant” in March 2002 under section 36 of the *Privacy Act 1988* (Cth) against the ACT Government Solicitor, the respondent, regarding an alleged unauthorised disclosure of his personal information.

1. Evidence

The complainant lodged a complaint with Domestic Animal Services, Department of Urban Services ACT (DAS), against the owner of a dog (the “third party dog owner”) in August 1997. On 16 September 1998 the respondent received a brief to represent DAS in proceedings against the third party dog owner under section 3 of the *Animal Nuisance Control Act 1975* (ACT) (the “animal nuisance proceedings”). The complainant had advised DAS that he did not wish his identity to be revealed to the third party dog owner and he also advised the respondent that he did not wish his identity to be revealed to the third party dog owner on 23 September 1998. He wished to remain anonymous until the day of the hearing when he would be required to appear as a witness. On 25 September 1998 the animal nuisance proceedings were commenced by the respondent on behalf of DAS against the third party dog owner.

On 26 November 1998 the Registrar of Dogs at DAS typed a file note (the “DAS file note”) of a conversation she had with the third party dog owner. On the bottom of that file note in handwriting, the Registrar noted, “[third party dog owner] spoke to [X – respondent lawyer] on 26/11/98 - [X] released the complainant’s name – nothing further is expected”. This note was dated 2 December 1998 and its veracity was verified by the author in a letter addressed to the complainant on 23 May 2002 written by the Director, City Operations, Department of Urban Services. The letter also advised that either the third party dog owner or X [respondent lawyer] would have provided the Registrar of Dogs with the information she wrote in the hand written note dated 2 December 1998, but she could not recall which it was.

The DAS file note also contained a statement which read that the third party dog owner “intends to apply to the courts to have [DAS] release the name of the complainant”.

On that same day, 26 November 1998, the respondent spoke with the third party dog owner and an Officer of the Department of Urban Services over the telephone. The file note (the “respondent file note”) made by X [respondent lawyer] of the conversation it had with the Officer of the Department of Urban Services stated that “I confirm identity of complainant (not by name)...”.

On 23 March 1999 proceedings initiated by the respondent on behalf of DAS against the third party dog owner were discontinued due to lack of evidence. Accordingly, the complainant did not need to appear as a witness.

On 9 March 2001 the third party dog owner commenced legal proceedings (the “restraining order proceedings”) against the complainant (whose identity he had obtained as a result of the disclosure by X which is the subject of the determination) in order to obtain a restraining order against the complainant. The proceedings were dismissed by the Magistrates Court of the ACT without a hearing on 21 August 2001.

During my Office’s investigation of this complaint, the third party dog owner provided the respondent with affidavit evidence to suggest that he had deduced the identity of the complainant on his own and that X [respondent lawyer] had not disclosed the identity of the complainant to him. The process outlined in the affidavits by which he had made that deduction were found to be incorrect through evidence obtained from the complainant and the subsequent admission of the third party dog owner that the information was in fact incorrect.

2. Law

Personal information is defined in section 6(1) of the *Privacy Act 1988* (Cth) (the “Act”) as follows:

information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

Information Privacy Principle 11 (IPP 11) found in section 14 of the Act states:

1. A record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless:

(a) the individual concerned is reasonably likely to have been aware, or made aware under Principle 2, that information of that kind is usually passed to that person, body or agency;

(b) the individual concerned has consented to the disclosure;

(c) the record-keeper believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or of another person;

(d) the disclosure is required or authorised by or under law; or

(e) the disclosure is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue.

2. Where personal information is disclosed for the purposes of enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the purpose of the protection of the public revenue, the record-keeper shall include in the record containing that information a note of the disclosure.

3. A person, body or agency to whom personal information is disclosed under clause 1 of this Principle shall not use or disclose the information for a purpose other than the purpose for which the information was given to the person, body or agency.

3. Findings

I find the respondent in breach of IPP 11 since it disclosed the identity of the complainant to the third party dog owner in circumstances where it was unauthorised to do so.

The respondent denied that it disclosed the identity of the complainant to the third party dog owner. The respondent argued that the third party dog owner had enough information available to him to identify the complainant. However, in light of all the evidence it appears more probable than not that the respondent disclosed the identity of the complainant to the third party dog owner.

The file note made by X [respondent lawyer] states that "I confirm identity of complainant (not by name)...". Personal information, (the disclosure of which is prohibited by IPP 11) is information through which the identity of the individual can be reasonably ascertained or apparent. The respondent argued that the third party dog owner had deduced enough information himself to identify the complainant. However, I find that the affidavit material provided by the third party dog owner was factually incorrect in terms of how he allegedly deduced the identity of the complainant. It can be inferred from the typed DAS file note dated 26 November 1998 that the third party dog owner was unaware of the complainant's identity at the time as the DAS file note referred to the fact that: "[the third party dog owner] intends to apply to the courts to have [DAS] release the name of the complainant". I am, therefore satisfied that the respondent disclosed the identity of the complainant to the third party dog owner in breach of IPP 11.

4. Economic and non-Economic Loss

The complainant seeks compensation of \$6,873.65 in respect of legal costs incurred and a further \$1,336.85 in associated travel expenses and loss of income which are attributable to the restraining order proceedings. The restraining order proceedings were eventually dismissed by the Magistrates Court of the ACT without a hearing. In order for the third party dog owner to have commenced the restraining order proceedings, he needed to know the identity of the complainant. I have determined that the respondent unlawfully disclosed the identity of the complainant to the third party dog owner. The third party dog owner could have lawfully obtained the identity of the complainant by subpoenaing the information from DAS whilst the animal nuisance proceedings commenced by the respondent on its behalf were underway,

ie: between 25 September 1998 and 23 March 1999. The third party dog owner did not obtain the identity of the complainant through subpoena.

I have determined that the disclosure of the complainant's identity by the respondent took place on 26 November 1998. The animal nuisance proceedings were still underway after that date until 23 March 1999. If a breach of the Act causes detriment to the complainant and that detriment would otherwise not have eventuated, but for the breach, then that detriment should be fully compensated by the respondent. The detriment suffered by the complainant was the legal costs, associated travel expenses and loss of income resulting from the restraining order proceedings. If the identity of the complainant could have been obtained lawfully by the third party dog owner through subpoena or in some other manner, then compensation needs to be apportioned to reflect the breach itself and a percentage of the legal costs, associated travel expenses and loss of income resulting from the action instituted against the complainant by the third party dog owner.

The third party dog owner had the intention of applying to the courts to have the name of the complainant released, as is evidenced by the DAS file note dated 26 November 1998. I consider it appropriate in the circumstances to compensate the complainant for the breach itself and 20 per cent of the legal costs, associated travel expenses and loss of income incurred by him in the restraining order proceedings instituted by the third party dog owner. This 20 per cent apportionment recognises that it is likely that had the breach not occurred and his identity obtained lawfully by subpoena as foreshadowed, the complainant would still have had to pay legal and associated costs for the action that would most likely have been launched against him by the third party dog owner. In this regard, I also note the lengthy period of time between the unlawful disclosure by the respondent and the restraining order proceedings and the on-going dispute.

5. Determination

I declare, in accordance with section 52(1)(b)(iii) of the Act, that the complainant is entitled to \$1,000 as compensation for the loss of his privacy as a result of the unlawful disclosure which has given rise to these proceedings. I also declare, in accordance with section 52(1)(b)(iii) of the Act, that the complainant is entitled to \$1,643, which represents 20 per cent of the legal costs, associated travel expenses and loss of income incurred by the complainant in the restraining order proceedings instituted by the third party dog owner. The total amount payable by the respondent to the complainant is thus \$2,643.

Malcolm Crompton
Federal Privacy Commissioner

Dated 2 April 2003