



# ***‘CM’ and Corporation of the Synod of the Diocese of Brisbane [2014] AICmr 86 (2 September 2014)***

## **Determination and reasons for determination of Privacy Commissioner, Timothy Pilgrim**

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<b>Complainant:</b>	<b>‘CM’</b>
<b>Respondent:</b>	<b>Corporation of the Synod of the Diocese of Brisbane</b>
<b>Determination date:</b>	<b>2 September 2014</b>
<b>Application number:</b>	<b>C13099</b>
<b>Catchwords:</b>	<b>Privacy — Privacy Act — National Privacy Principles — (CTH) <i>Privacy Act 1982</i> s 52 — NPP 2 — Use and disclosure — NPP 4 — NPP 4.1 — NPP 4.2 — Data security — Compensation — Non-economic loss — Aggravated damages not awarded — Pecuniary damages not awarded</b>

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## Summary

1. The Corporation of the Synod of the Diocese of Brisbane (the Diocese) interfered with the complainant's privacy by misusing his personal information, in breach of National Privacy Principle (NPP) 4.1 of the *Privacy Act 1988* (Cth) (the Privacy Act).<sup>1</sup>
2. To redress this matter, the Diocese shall pay the complainant \$7500 for non-economic loss caused by the interference with the complainant's privacy.

## Background

3. The complainant attended St Paul's School in Brisbane. The complainant states that during his time at St Paul's he was sexually abused by a teacher at the school.
4. A number of years after he completed his schooling at St Paul's, in June 2000, the complainant wrote an anonymous letter to a Brisbane newspaper about the abuse. Shortly after the publication of the anonymous letter, the complainant advised St Paul's School that he was the author of the letter.
5. On or about 9 March 2007, the complainant contacted the Diocese about the abuse and sought settlement of his complaint and compensation.<sup>2</sup>
6. On 1 August 2007, Flower and Hart Lawyers, as legal representatives for the Diocese, wrote to the Diocese in relation to the complainant's legal action. This correspondence was also copied to St Paul's School. The Diocese says that the purpose of this correspondence was to allow the Diocese to respond to the complainant's allegations of sexual abuse and to consider a draft response to the complainant. The correspondence included documents which contained details of the complainant's allegations of sexual abuse.

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<sup>1</sup> The Privacy Act was amended on 12 March 2014 and replaced the National Privacy Principles (NPPs) with the Australian Privacy Principles (APPs). However, the complaint has been determined in accordance with the Privacy Act and the NPP's as they were the law in effect at the time the acts and practices occurred.

<sup>2</sup> In submissions to the Office of the Australian Information Commission (OAIC), the complainant advised that his claim against the Diocese was settled in November 2009.

7. On 6 September 2007, the St Paul's School Council met to discuss a number of issues. An 'Information Pack', containing documents which detailed the complainant's allegations of the sexual abuse, was provided to members of the School Council in preparation for this meeting.
8. On 22 August 2009, the complainant wrote to the Diocese about what he considered to be a breach of his privacy by the St Paul's School Council. In particular, the complainant alleged that the School Council distributed documents regarding his legal action to members of the School Council. The complainant said that he was concerned that the documents may have been distributed to members of the School Council by handing them to the children of School Council members who attend St Paul's School. The complainant further claimed that:

[n]o attempt was made to remove my name from any of the documents; an anonymous document was linked to my name; one of the Diocese' documents made inappropriate reference to particularly personal detail of the sexual assaults perpetrated upon me; one of the Council members discussed intimate details of my case publicly over dinner where non-members were party to the conversation...and one of the people provided with personal copies of my documents and allowed to sit in on the meeting was not even a member of the School Council.
9. On 31 August 2009, the Diocese responded to the complainant, stating that, given the nature of the issues raised by the complainant, it was of the view that independent assessment by the Privacy Commissioner was the preferable approach.

### **Privacy complaint and remedy sought**

10. On 2 September 2009, the complainant lodged a complaint with the Privacy Commissioner against the Diocese under s 36 of the Privacy Act.
11. The complainant alleged that the Diocese interfered with his privacy by:
  - improperly using and disclosing his personal information by copying and distributing the Information Pack to members of the School Council (NPP 2)
  - not taking reasonable steps to protect his personal information from misuse and loss, modification or disclosure by including his name in the documentation provided to School Council and non-School Council members when his identity was unnecessary to the decision making process (NPP 4.1)
  - misusing his personal information by providing a non-School Council member with a copy of the Information Pack and discussing the matter at the School Council meeting in the presence of that non-School Council member (NPP 4.1)
  - misusing his personal information by discussing his claim with non-School Council members at a social dinner prior to the meeting (NPP 4.1)

- failing to take reasonable steps to protect his personal information from misuse by possibly providing the Information Pack to School Council members via their children and not having appropriate measures in place for the storage and security of the Information Packs once in the possession of the School Council members (NPP 4.1)
  - failing to take reasonable steps to destroy the copies of the Information Pack after the School Council meeting (NPP 4.2)
12. The complainant seeks a declaration by me that he is entitled to:
- a formal finding of fault against the Diocese
  - compensation of \$20,000 and an order that the complainant donate this money to a registered charity of the complainant's choosing
  - a written apology to a third party and
  - any other such measures as the Privacy Commissioner considers appropriate.
13. The Diocese disagrees that it has breached NPPs 2 (use and disclosure), 4.1 (protecting personal information) and 4.2 (destruction of personal information).

## Relevant legislation

14. This matter relates to events that occurred prior to reforms to the Privacy Act that commenced on 12 March 2014 and so has been dealt with under the Privacy Act as it was at the time the acts and practices are alleged to have occurred. The Privacy Act at that time contained, in Schedule 3, a set of National Privacy Principles (NPPs). The NPP's outline the standards for 'organisations' handling personal information at the time of these allegations.
15. Section 6C of the Privacy Act defined 'organisation' as meaning:
- (a) an individual; or
  - (b) a body corporate; or
  - (c) a partnership; or
  - (d) any other unincorporated association; or
  - (e) a trust
- that is not a small business operator, a registered political party, an agency, a State or Territory authority or a prescribed instrumentality of a State or Territory.
16. 'Personal information' was defined in s 6(1) of the Privacy Act as:
- 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.

17. Section 52 of the Privacy Act provided that, after investigating a complaint, I may make a determination:
- dismissing the complaint (s 52(1(a)); or
  - finding the complaint substantiated and declaring:
    - that the respondent has engaged in conduct constituting an interference with the privacy of an individual and should not repeat or continue such conduct (s 52(1)(b)(A)); and/or
    - the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant (s 52(1)(b)(ii)); and/or
    - the complainant is entitled to compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint (s 52(1)(b)(iii)); and/or
    - it would be inappropriate for any further action to be taken in the matter (s 52(1)(b)(iv)).

## **Investigation process**

18. The investigation of this complaint involved the following:
- On 17 March 2010, an investigation was opened into the complainant's allegations under s 40(1) of the Privacy Act.
  - The Office of the Australian Information Commissioner (OAIC) considered written submissions and information provided by both the complainant and the Diocese
  - On 20 March 2012, the OAIC provided the complainant and the Diocese with its preliminary view on the complaint which found that the Diocese had not breach NPP 2 or NPP 4.2, but had breached NPP 4.1.
  - In response to the OAIC's preliminary view, both the complainant and the Diocese provided further submissions.
  - Attempts were made to resolve the matter through conciliation
  - The parties were unable to reach a mutually agreeable outcome through conciliation and I decided to determine the matter under s 52 of the Privacy Act.

## **Diocesan structure**

19. The Corporation of the Synod of the Diocese of Brisbane is a legal entity, incorporated under the *Anglican Church of Australia Act 1895* (QLD). Under the Diocesan Constitution, the Synod is the governing body for the management of the affairs of the Diocese of Brisbane.
20. Under regulations, known as Canons, the Diocese may delegate any of the powers conferred on it under the Diocesan Constitution to certain committees,

including School Councils. The Schools Regulation Canon (1990) provides that the general control and management of schools is vested in the Diocese.

21. St Paul's School forms part of the Diocesan legal entity, but has a separate constitution, the St Paul's School Constitution. The St Paul's School Constitution sets out a number of powers which have been delegated to it under the Schools Regulation Canon, including powers of the School Council and the responsibility of the headmaster (who is also the Chief Executive Officer of the school).
22. Clause 4.9(a) of the St Paul's School Constitution provides that the St Paul's School Council is a committee within the meaning of the *Schools Regulation Canon*. Clause 4.9(a) further provides that '[t]he Council is charged with the control, management and direction of the School and the maintenance and protection of the property of the School'.
23. This means that, in accordance with the *Schools Regulation Canon*, the Diocese remains ultimately responsible for the general control and management of all schools, but that the St Paul's School Council, as a committee under the *Schools Regulation Canon*, has been delegated certain powers and duties, as set out in the St Paul's School Constitution, including the power to control and manage the affairs of the School and to watch over its concerns and welfare.

## National Privacy Principle (NPP) 2

24. NPP 2.1 provided that:

An organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection unless:

(a) both of the following apply:

- (i) the secondary purpose is related to the primary purpose of collection and, if the personal information is sensitive information, directly related to the primary purpose of collection;
- (ii) the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose;...

25. The Guidelines to the National Privacy Principles state that '[t]o be related, the secondary purpose must be something that arises in the context of the primary purpose. If personal information is sensitive information the use or disclosure must be directly related to the primary purpose of collection. This means that there must be a stronger connection between the use or disclosure and the primary purpose for collection'.<sup>3</sup>
26. The complainant says that the Diocese breached NPP 2 by distributing the Information Pack, containing documents related to the complainant's allegations including the anonymous letter, to members of the School Council and others. The complainant says that by distributing this information, the

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<sup>3</sup> *Guidelines to the National Privacy Principles*, page 35.

Diocese used and disclosed his personal information for a purpose other than the primary purpose of collection.

27. The complainant further submits that neither the School nor the School Council had a legitimate purpose in reviewing his claim as this was a matter for consideration by the Diocese.
28. The complainant argued that the School and School Council's position as part of the Diocesan legal entity did not mean that it was required to consider his claim for the purposes of its governance as the School was not investigating his claim.
29. In any event, the complainant says that in considering his claim there was no need for his identity to be disclosed to the School Council and that the Diocese should have de-identified his personal information in the documents.
30. For these reasons, the complainant says that in disclosing the information to the School Council, the Diocese disclosed his personal information for a secondary purpose outside the exceptions provided for in NPP 2.
31. In submissions to the OAIC, the Diocese submitted that, given the legal structure of the Diocese, whereby the St Paul's School forms part of the Diocesan entity and the School Council exercises delegated powers on behalf of the Diocese, there was an obligation and duty on the School Council to consider the complainant's allegations. The Diocese also submitted that the Headmaster of St Paul's School was required, under its Constitution, to report all matters to the School Council, including legal matters such as the complainant's claim.
32. The Diocese said that the primary purpose of the collection of the information was to enable it to consider and respond to the complainant's legal claim. The Diocese submitted that the use and disclosure of the information to the School Council was also for that primary purpose – to enable the School Council, in the exercise of its delegated powers, to consider and assist the Diocese in responding to the complainant's claim.
33. The Diocese further submitted that it was appropriate for the Diocese to seek the input of the School Council in relation to the complainant's matter because part of the School Council's role was to provide input into legal claims affecting the School and to assist the Diocese in resolving them.
34. Finally, the Diocese submitted that the School Council may have been asked to contribute towards any financial compensation that may have been offered to the complainant and therefore it was appropriate to consult the School Council regarding the matter.

## **Findings**

35. The Information Pack was provided to the Diocese to enable it to consider and respond to the complainant's allegations of sexual abuse at St Paul's School. I accept that, in order to consider and respond to those allegations, the Diocese found it necessary to liaise with St Paul's School. Further, based on the

Diocese's submissions regarding its legal structure, I also accept that the School Council was the appropriate body for the Diocese to consult with when considering how to respond to the complainant's claims.

36. I am satisfied that the relevant documents in the Information Pack were provided to the Diocese (and copied to the School) for the primary purpose of considering and responding to the complainant's allegations and legal claim.
37. In light of the legal structure of the Diocese and the role of the School and School Council in that structure, I am satisfied that the information exchange between the Diocese, the School and the School Council was a 'use' within a single legal entity.
38. I am also satisfied that, in order to consider and respond to that claim and in accordance with Diocesan delegations, use and disclosure of that information with the School Council was also for the primary purpose of collection.
39. The Diocese has met its obligations under NPP2.

### **National Privacy Principle (NPP) 4.1**

40. NPP 4.1 provided:

An organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure.

41. The Guidelines to the National Privacy Principles state that '[i]n general terms an organisation discloses personal information when it releases information to others outside the organisation'.<sup>4</sup> The Guidelines further explain that:

What are reasonable steps to secure personal information will depend on the organisation's particular circumstances. Some relevant factors could include:

- the sensitivity of the personal information the organisation holds;
- the harm that is likely to result to people if there is a breach of security
- how the organisation stores, processes and transmits the personal information (for example, paper based or electronic records);
- the size of the organisation (the larger the organisation, the greater the level of security likely to be needed).<sup>5</sup>

42. The complainant says that the Diocese has breached NPP 4.1 in four ways:
  - not taking reasonable steps to protect his personal information from misuse and loss, unauthorised access, modification or disclosure by including his name in the documentation provided to School Council members and a non-School Council member when his identity was unnecessary to the decision making process (NPP 4.1 – Claim 1)

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<sup>4</sup> *Guidelines*, page 23.

<sup>5</sup> *Guidelines*, page 44.

- misusing his personal information by providing the Information Pack to a non-School Council member and discussing the matter at the School Council meeting in the presence of that non-School Council member (NPP 4.1 - Claim 2)
  - misusing his personal information by discussing it with non-School Council members at a social dinner prior to the meeting (NPP 4.1 - Claim 3)
  - failing to take reasonable steps to protect his personal information from misuse by possibly providing the Information Pack to School Council members via their children (NPP 4.1 - Claim 4)
43. I will address each of these claims below.

### **Claim 1**

44. The complainant says that the Diocese breached NPP 4.1 by not taking reasonable steps to protect his personal information from misuse and loss, and from unauthorised access, modification or disclosure by including his personal information, including his name together with details of his allegations of sexual abuse in the information it provided to attendees at the School Council meeting including school staff who were not School Council members.
45. The complainant noted that the information pack provided to the School Council members included a copy of an anonymous letter sent to and published in a newspaper which contained details of his allegations of sexual abuse. The information pack also contained draft correspondence from the Diocese lawyers to the complainant, including his email address which appeared to identify his place of employment, and a draft deed of release that identified the complainant and the proposed terms of settlement.
46. The correspondence from the lawyers identified the complainant as the author of the anonymous letter as the complainant had written to the school in June 2000, a few days after the publication of the letter in a newspaper, identifying himself as the author of the letter, although it appears he took no further action on the matter until the claim he made to the Diocese in 2007.
47. The complainant claims that the School Council's role was to consider the recommendation made by the solicitors rather than to confirm the veracity of facts in the claim. The complainant noted that the Diocese solicitors had confirmed the veracity of his claims in this correspondence and so had recommended to the Diocese that the matter be settled. He noted that the age of the events meant that the current School Council members would be unlikely to have had direct knowledge of the events affecting him as he had left the school over a decade before making the claim to the Diocese.
48. The complainant states that given the above it was not necessary for the detailed information including his name to be provided to the meeting attendees as they could consider the claim and the settlement proposal based on the information provided by the Diocese solicitors without the need to know the identity of the claimant. The highly sensitive nature of the information about the complainant's allegations meant that the potential loss,

misuse or disclosure of that information would have had a profound impact on the complainant. Given this it was incumbent on the Diocese to consider whether providing that personal information that would identify the complainant was necessary to the decision making process.

49. The Diocese states that the provision of the information including the complainant's identity was necessary to the 'investigation' of the complainant's claims including confirming his attendance at the school at the same time as the teacher who sexually abused him, the time and duration of his attendance and whether he had appointments with the relevant teacher.
50. I note from the documents provided by the Diocese that the decision the School Council was to make was whether to accept the draft letter from the Diocese lawyers to the complainant and the proposals for settlement outlined in a draft letter to the complainant.
51. I note also that there is no reference to the consideration of the complainant's claim in minutes of that School Council meeting provided with the Diocese response. The Diocese says this discussion was omitted from the minutes to protect the complainant's privacy. While this may be the case, it also means there is no record of the decision making process. The only documentation I can rely on is that the draft letter from the Diocese lawyers was sent to the complainant, with a change to the quantum of compensation being offered, so the School Council did accept the Diocese lawyers' advice to make an offer to the complainant to settle the matter.
52. The Diocese states that the complainant had not taken steps to avoid identification given he had written to the school in June 2000 identifying himself as the author of the letter, he had identified himself in approaching the Diocese in 2007 to settle the matter, and he later initiated legal proceedings against the Diocese which requires an applicant to identify themselves. Those proceedings were finalised in 2009.

### ***Findings***

53. I have considered the above information. I note the Diocese has acknowledged the particularly distressing and stressful nature of the events the complainant was dealing with. The Diocese claims it took great care to ensure the complainant's information was protected and only disclosed and used by those within the Diocese, the school and the School Council that were essential to the decision making process.
54. I note that there were a number of people the information was sent to as part of the School Council process – School Council members and one attendee at the School Council meeting who received the information pack in error. I deal with this particular issue further below.
55. Given this, the potential for misuse, loss, unauthorised access or disclosure of the information was increased because of the number of people involved in the process. I note also the complainant's point that the School Council was considering the draft correspondence to the complainant and the proposal for

settlement rather than investigating the veracity of his claims. This appears to have been confirmed by the Diocese lawyers in making their recommendation that the matter be settled. Consequently, it does not appear from the information before me that his identity was necessary to the decision making process.

56. Further, given the time lapse between the complainant's attendance at the school and therefore the relevance of his identity to the actual decision to be made by the School Council, the sensitivity of the information and the vulnerability of the complainant if the information were misused or disclosed, I consider that the Diocese could have taken additional reasonable steps to protect his personal information by redacting his name from the information circulated in the information packs. It does not appear that the complainant's name was necessary to the decision making process and so it was not necessary to include that information in the documentation sent to School Council meeting attendees.
57. While I note the Diocese view that everyone involved in the process understood their obligations of confidentiality, I consider that it was reasonably foreseeable the profound impact it would have on the complainant if the information were misused, lost or disclosed and it was appropriate to ensure reasonable steps were taken to protect that information as it was not necessary to the decision making process. I note that even if the information was necessary, the complainant's identity could have been provided to the School Council members at the meeting to reduce the risk of disclosure of that information.
58. I am therefore of the view that the Diocese's data security practices were not reasonable in this instance, and I do not consider that the Diocese has met its obligations under NPP 4.1 in respect of claim 1.

## **Claim 2**

59. The complainant says that the Diocese breached NPP 4.1 by misusing his personal information through its provision to a staff member of St Paul's School who was not a member of the School Council on two separate occasions — through firstly providing the Information Pack to the staff member prior to the meeting and secondly discussing the complainant's matter at the School Council meeting in the presence of the staff member.
60. In submissions to the OAIC, the complainant submitted that this misuse was unnecessary, unreasonable, unauthorised and unjustified.
61. In response to the Diocese's submission (below) that, while the staff member did receive a copy of the Information Pack, she did not read it, the complainant submitted that given the staff member received the documents approximately one week prior to the School Council meeting, it is probable that she did in fact read them. However, the applicant further submitted that it was not relevant if the staff member had not in fact read the Information Pack because the Diocese was in breach of NPP 4.1 simply by causing the documents to be

provided to the staff member when she was not a member of the School Council.

62. In submissions to the OAIC, the Diocese accepted that a copy of the Information Pack had inadvertently been provided to the staff member who was attending the School Council meeting to report on another matter. However, the Diocese submitted that this did not breach NPP 4.1 as the School had appropriate data security procedures in place for the distribution of the Information Packs, the disclosure to the staff member was an isolated incident due to human error and the Information Pack was returned without the staff member reading the documents.
63. In relation to its data security procedures, the Diocese advised that the Information Packs were provided to members of the School Council a week ahead of the School Council meeting in order to allow them sufficient time to consider the material before the School Council meeting.
64. The Diocese said that the Information Packs were placed in a sealed double envelope and were addressed to each School Council member individually and marked 'private and confidential'. The Information Packs were delivered directly to each School Council member by Courier using addresses nominated by those School Council members. The Diocese submitted that there was no information to suggest that School Council members ever left their Information Packs unsecured.
65. In submissions to the OAIC, the Diocese provided a copy of its '*Distribution of Confidential Documents to Council and Sub Committee members*' policy, which the Diocese says was not in place at the time of the incident but reflects the standard and usual practice adopted by the School Council at the time it considered the claimant's matter. The policy advises that School Council members are to '...undertake an induction; highlighting packs are to be treated with the strictest confidence [and] secured at all times...'
66. In submissions to the OAIC, the Diocese has also agreed to amend this policy to specifically state that School Council members are 'advised to keep Council packs under lock and key when not on their person or in use'.
67. The Diocese also submitted that as soon as it became aware that the Information Pack had been provided to the staff member, the Headmaster of St Paul's School contacted the staff member and requested that she return the Information Pack, which the Diocese states she did. While it is unclear specifically when this occurred the Diocese advised that the Information Pack was returned prior to the School Council meeting and that the staff member advised the School that she had not read the Information Pack.
68. The Diocese further advised that in relation to the School Council meeting, the staff member did attend the meeting to give a presentation, but left the meeting prior to the School Council's discussion of the complainant's matter.

## **Findings**

69. In determining whether the Diocese breached NPP 4.1 in respect of claim 2, I need to assess whether the Diocese took reasonable steps to protect the claimant's information from unauthorised use by a staff member who was not a committee member. I am required to consider all the relevant circumstances of the matter.
70. Whether or not the non-committee staff member did in fact open and read the Information Pack containing the claimant's information is not a relevant matter. However the fact that the information was distributed to a staff member who was not a committee member and should not have been supports the view that there was a misuse and is one factor to take into account when considering whether or not the Diocese took reasonable steps at the time of these events.
71. Evidence of a misuse does not in itself mean that the Diocese did not take reasonable steps. In cases where an organisation can demonstrate it has implemented reasonable steps for the protection of personal information from misuse and loss and from unauthorised access, modification or disclosure, I may find that, despite an isolated human error, the organisation has met its obligations under NPP 4. It falls on the organisation, in this case, the Diocese, to show that reasonable steps have been taken.
72. An assessment of reasonable steps is difficult given the limited evidence before me about Diocesan practices at that time and the extent to which they were observed.
73. The only evidence about such practices at the time of the misuse is the Diocese claim that it handled the complainant's information in accordance with its current written policy. The Diocese has now developed and implemented an information handling policy to ensure information being distributed to Council and Sub Committee members is secure. I note that at the time of the School Council meeting this policy was not in effect and therefore could not be referenced or enforced.
74. It is clear there was a failure on the part of the Diocese to adequately check who the Information Packs were being provided to, which resulted in the consequent delivery of the complainant's personal information to an unauthorised staff member. In view of this misuse of the complainant's personal information, and in the absence of any cogent evidence about the steps taken by the Diocese at the time preceding the School Council meeting, I cannot be satisfied that the Diocese has discharged the onus of establishing reasonable steps were undertaken. I therefore find that the Diocese breached NPP 4.1 in relation to this aspect of claim 2.
75. In respect of the claim that the matter was discussed at the School Council meeting in the presence of the staff member who was not a committee member, I note that there is no information to show that the complainant's matter was discussed in the presence of the staff member. I am therefore unable to make a finding as to whether or not the Diocese breached NPP 4.1

(or NPP 2.1 given that if this part of claim 2 was proven it could also have constituted an unauthorised use) in respect of this part of claim 2.

### **Claim 3**

76. The complainant says that the Diocese breached NPP 4.1 by misusing his personal information by discussing it with non-School Council members at a social dinner prior to the meeting. In submissions to the OAIC, the Diocese said that there was no information to support the complainant's claim that his matter had been discussed in the presence of the staff member at a social function prior to the meeting.

#### ***Findings***

77. There is no information to show that the complainant's matter was in fact discussed at a social event prior to the School Council meeting in the presence of the staff member.
78. I am therefore unable to make a finding as to whether the Diocese breached NPP 4.1 (or NPP 2.1 given that if this part of claim 3 was proven it could have also constituted an unauthorised disclosure) in this respect.

### **Claim 4**

79. In submissions to the OAIC, the complainant stated that allegations had been put to him that the Information Packs had been provided to School Council members via their children who attended St Paul's School. The complainant himself did acknowledge that there was no direct information to support this allegation and requested that the OAIC investigate the claims.

#### ***Findings***

80. In light of the Diocese's submissions about the process for delivering the Information Packs to the School Council members, and in the absence of any direct information from the applicant on this point, I am unable to make a finding that the Diocese has interfered with the complainant's privacy in respect of this part of his complaint.

### **National Privacy Principle (NPP) 4.2**

81. NPP 4.2 provided that:

An organisation must take reasonable steps to destroy or permanently de-identify personal information if it is no longer needed for any purpose for which the information may be used or disclosed under National Privacy Principle 2.

82. The complainant says that the Diocese breached NPP 4.2 by failing to destroy the documents after their distribution to the School Council members and the non-School Council member. The complainant says that, in not destroying the documents, the Diocese has failed to take reasonable steps to destroy his

personal information once it was no longer needed by the Diocese for the purpose of considering his claim in accordance with NPP 2.

83. In submissions to the OAIC, the complainant alleged that not all members of the School Council returned their Information Packs. The complainant further submitted that this meant that not all copies of the Information Packs have been destroyed and that his personal information may be in the public domain.
84. The complainant disputes the Diocese's submission (below) that all the Information Packs were collected and destroyed.
85. In submissions to the OAIC, the Diocese said that the Information Packs were collected and safely destroyed by being shredded following the School Council meeting.
86. The Diocese advised that St Paul's School retained the original Information Pack and one copy for record-keeping purposes and that these documents are stored in secure facilities and with only a very small number of people having access to them.
87. The Diocese further submitted that the School also retained an electronic version of the documents using 'industry secure standard software' and with controlled access.

## Findings

88. While I understand the complainant's concern that some of his personal information may not have been destroyed following the School Council meeting, I am not satisfied that there is any information to suggest that members of the School Council retained the Information Packs. Based on the information available to me I cannot find that the Diocese has breached NPP 4.2.

## Finding on damages

89. I have the discretion under s 52(1)(b)(iii) of the Privacy Act to award compensation for 'any loss or damage suffered by reason of' the interference with privacy. Section 52(1A) states that loss or damage can include 'injury to the complainant's feelings or humiliation suffered by the complainant'.
90. I am guided by the following principles on awarding compensation, summarised by the Administrative Appeals Tribunal (AAT) (Full Tribunal) in *Rummery and Federal Privacy Commissioner*:<sup>6</sup>
  - a. where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course
  - b. awards should be restrained but not minimal

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<sup>6</sup> [2004] AATA 1221 [32] (*Rummery*).

- c. in measuring compensation the principles of damages applied in tort law will assist, although the ultimate guide is the words of the statute
- d. in an appropriate case, aggravated damages may be awarded
- e. compensation should be assessed having regard to the complainant's reaction and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances.

91. The Tribunal in *Rummery* went on to express its own view, that it would:

... not go so far as deciding that we must award compensation once a loss is established. However, we are of the view that once loss is proved, there would need to be good reason shown to the Tribunal as to why compensation for that loss should not be awarded.<sup>7</sup>

### **Non-economic loss**

92. In his privacy complaint, the complainant advised that he was seeking financial compensation of \$10,000 for the pain, suffering and humiliation that he felt following the disclosure of his personal information. The complainant also sought an order that he be required to donate any compensation awarded to him to a registered charity.
93. In submissions to the OAIC, the complainant later amended this amount to \$20,000 and again sought an order requiring him to donate the money to a registered charity.
94. It is my view that the provision of the Information Pack to a non-member of the School Council has caused the complainant significant distress and that an award of damages is appropriate. I note also the complainant's claim and my finding that the Diocese has not demonstrated it was necessary for the complainant's identity to be included in the information packs given the risks associated with the distribution of that material and given it was not necessary for that information to be distributed to the School Council meeting attendees prior to the meeting. It does not appear from the material before me that the complainant's identity was necessary to the School Council's decision making process or even if it were that it was necessary to include that information in the material distributed to the meeting attendees prior to the meeting.
95. NPP 4 requires that organisations give consideration to the risks associated with using personal information and take reasonable steps to ensure the use of that information is necessary for the purpose for which it was collected. It also requires organisations to consider the impact on the individuals when assessing the risks of loss, misuse, unauthorised access or disclosure of that personal information.
96. In deciding the appropriate damages for non-economic loss, I have considered previous Privacy Commissioner determinations, discrimination cases that have

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<sup>7</sup> [2004] AATA 1221 [34].

considered compensation for non-economic loss, as outlined in *Federal Discrimination Law Online*,<sup>8</sup> and the Conciliation Register of the Australian Human Rights Commission.<sup>9</sup>

97. In *'BO' and AeroCare* [2014] AICmr 32, I awarded \$8500 for non-economic loss caused by the interference with the complainant's privacy. In that case, I found that AeroCare had breached the complainant's privacy both in its collection and disclosure of his sensitive medical information, and in circumstances where the complainant's disability made him particularly vulnerable. In *'D' and Wentworthville Leagues Club* [2011] AICmr 9, I awarded \$7500 for non-economic loss caused by the interference with the complainant's privacy. That case concerned an unauthorised disclosure of the complainant's former gambling habits which caused the complainant to suffer humiliation as well as serious anxiety, panic attacks and physical symptoms.
98. As noted at [90], I have also been guided by the AAT's decision in *Rummery*. In that case, the AAT was guided by the complainant's information as to the injury to his feelings and humiliation and made a declaration awarding \$8000 to Mr Rummery. The amount was awarded for loss and damage in circumstances where personal information concerning Mr Rummery's background and former employment was disclosed by an officer of Mr Rummery's former employer to the ACT Ombudsman, during an investigation into a public interest disclosure Mr Rummery made to the ACT Ombudsman.
99. In the present matter, I consider the sensitivity of the particular information in question and its handling by the Diocese to be a relevant factor. I consider that the manner in which the Diocese handled the complainant's personal information caused non-economic loss to the complainant, including pain and suffering and feelings of humiliation. Taking all the circumstances into account, I have decided that compensation in the amount of \$7500 for non-economic loss would be appropriate.
100. I have noted the complainant's request that I order him to donate the compensation to a registered charity. I appreciate the complainant's sentiment in making this request but this is beyond the scope of outcomes I am able to order.
101. The complainant has also asked that I order the Diocese to apologise to a school staff member who he says provided him with support in raising these issues with the Diocese and who he feels was penalised for providing that support. As that person is not a party to these proceedings that order is beyond the scope of outcomes I am able to order.

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<sup>8</sup> Australian Human Rights Commission, *Federal Discrimination Law* (2011) [www.hreoc.gov.au/legal/FDL/index.html](http://www.hreoc.gov.au/legal/FDL/index.html), ch 7 at 20 March 2014.

<sup>9</sup> Australian Human Rights Commission, *Conciliation Register*, <http://www.humanrights.gov.au/complaints/conciliation-register>

## Aggravated damages

102. The power to award damages in s 52 of the Privacy Act includes the power to award aggravated damages in addition to general damages.<sup>10</sup> I am guided by the following principles:

- a. aggravated damages may be awarded where the respondent behaved 'high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination'<sup>11</sup>
- b. the 'manner in which a defendant conducts his or her case may exacerbate the hurt and injury suffered by the plaintiff so as to warrant the award of additional compensation in the form of aggravated damages.'<sup>12</sup>

103. I do not consider the Diocese's conduct in this matter to be high-handed, malicious, insulting or oppressive and do not think the threshold for aggravated damages has been met.

## Determination

104. I declare in accordance with s 52(1)(b)(i)(B) of the Privacy Act that the respondent breached NPP 4.1 by misusing the personal information of the complainant.

105. I declare in accordance with s 52(1)(b)(iii) that the complainant is entitled to \$7500 for the non-economic loss suffered as a result of the respondent's interference with their privacy.

Timothy Pilgrim  
Privacy Commissioner

2 September 2014

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<sup>10</sup> *Rummery* [2004] AATA 1221 [32].

<sup>11</sup> *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72 [75].

<sup>12</sup> *Elliott v Nanda & Commonwealth* [2001] FCA 418 [180].

## **Review rights**

If a party to a privacy determination is unsatisfied with the privacy determination, they may apply under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* to have the determination reviewed by the Federal Court of Australia or the Federal Circuit Court. The Court will not review the merits of the determination, but may refer the matter back to the OAIC for further consideration if it finds the Information Commissioner's decision was wrong in law or the Information Commissioner's powers were not exercised properly. An application to the Court must be lodged within 28 days of the date of the determination. An application fee may be payable when lodging an application to the Court. Further information is available on the Court's website (<http://www.federalcourt.gov.au/>) or by contacting your nearest District Registry.

### *Determinations involving Australian Government agencies – compensation*

If a party to a privacy determination about a complaint involving an Australian or ACT government agency disagrees with the amount of compensation set by the Information Commissioner, they may apply under s 61 of the *Privacy Act 1988* to the Administrative Appeals Tribunal (AAT) to review the declaration about compensation. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm the Information Commissioner's declaration about compensation.

An application to the AAT must be made within 28 days of the day on which the applicant is given the Privacy determination (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$861, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website ([www.aat.gov.au](http://www.aat.gov.au)) or by telephoning 1300 366 700.

## **Enforcement of determination**

Under s 55 of the *Privacy Act 1988*, a respondent to a privacy determination is obliged to comply with any declarations made by the Information Commissioner in that determination.

Section 55A of the *Privacy Act 1988* provides that either the complainant or Information Commissioner may commence proceedings in the Federal Court or the Federal Circuit Court for an order to enforce the determination.