Australian Government
Office of the Australian Information Commissioner

'CP' and Department of Defence [2014] AICmr 88 (2 September 2014)

Determination and reasons for determination of Privacy Commissioner, Timothy Pilgrim

Complainant:	**'CP'**
Respondent:	**Department of Defence**
Decision date:	**2 September 2014**
Application number:	**CP13/00857**
Catchwords:	**Privacy — Privacy Act —Information Privacy Principles — (CTH) *Privacy Act 1988* s.52 — IPP 11 — IPP 11.1(a) — Disclosure — Compensation — Non-economic loss — Aggravated damages not awarded**

Contents

Summary

1. The Department of Defence (Defence) interfered with the complainant's privacy by disclosing personal information that was not authorised by IPP 11.1(a) of the Privacy Act.

2. To redress this matter Defence shall:

   - within four weeks of the date of this determination, apologise in writing to the complainant
   - amend its information handling procedures, specifically the handling of sensitive personal information when managing illness or injury of Defence employees, and submit to this office for review
   - undertake staff training in accordance with the revised information handling procedures
   - no later than six months from the date of this determination confirm that amendments to information handling procedures and staff training has been completed
   - within four weeks of the date of this determination, pay the complainant $5,000 for non-economic loss caused by the interference with the complainant's privacy.

Background

3. The complainant was employed by the Department of Defence. The complainant was 'injured/noticed he was ill' on 10 January 2013. The complainant subsequently lodged a compensation claim with Comcare, a Commonwealth statutory authority which is responsible for administering the federal workers' compensation scheme under the *Safety, Rehabilitation and Compensation Act 1988* and the *Work Health and Safety Act 2011*. On 12 March 2013 and 27 March 2013, as part of his claim for compensation, the complainant signed his agreement to an exchange of his personal information, including the disclosing or releasing of records containing his personal information, between relevant parties (including any health professional, hospital or health institution, employer, case manager or rehabilitation provider) in the course of managing his Comcare claim.

4. On 15 March 2013 an Early Intervention Advisor from Defence's People Solutions Division contacted the complainant by letter requesting that the complainant undertake a medical assessment with an independent medical practitioner to determine his fitness for duty (FFD) as a Defence employee. The 15 March 2013 letter included notice that the report prepared by the independent medical practitioner in relation to the complainant's FFD (**the report**) may be disclosed to the complainant's treating doctor and/or medical specialists.

5. The independent medical practitioner reportedly recommended that the complainant not be provided with a copy of the report directly, but provided to him through his treating doctor.

6. By email on 11 April 2013 the Early Intervention Advisor requested that the complainant notify Defence by 12 April 2013 if he did not give consent for his rehabilitation case officer or Defence to contact his treating medical practitioners about his rehabilitation.

7. By return email on that same day, 11 April 2013, the complainant expressly refused permission for his case officer or any Defence personnel or representative to contact his medical practitioners.

8. In a letter to the complainant dated 3 May 2013, Defence advised that a copy of the report had been disclosed to the complainant's treating general practitioner.

Privacy complaint and remedy sought

9. On 2 July 2013, the complainant lodged a complaint with the Office of the Australian Information Commissioner (**OAIC**) against Defence, under s 36 of the Privacy Act.

10. The complainant alleged that:

    - Defence interfered with his privacy by disclosing his sensitive personal information to a third party, his general practitioner, without his consent.

11. The complainant seeks a declaration by me that he is entitled to:

    - an apology from Defence
    - a declaration that Defence amend its information handling procedures in compliance with the Privacy Act
    - compensation for non-economic loss.

12. Defence has accepted that it breached IPP 11 (which limits the disclosure of personal information). It also acknowledges that the complainant has been diagnosed with a psychological disorder and the information proffered by his treating psychologist indicates that Defence's interference with the complainant's privacy has contributed to the disorder and the complainant's subsequent emotional suffering. Notwithstanding this, Defence considers that financial compensation is not warranted as the medical information provided to support a claim for non-economic loss relies on the complainant's version of events.

The law

13. The Information Privacy Principles (IPPs) contained in section 14 of the Privacy Act outline standards for handling personal information that legally bind agencies.[1] Under s 16 of the Privacy Act, an agency is prohibited from breaching the IPPs.

14. Personal information is defined in s 6(1) of the Privacy Act as:

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

15. Principle 11 (IPP 11) prohibits the disclosure of personal information, though the prohibition is qualified. The qualification relevant to this case is found in the first part of 11.1(a), which states that:

> 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….. that information of that kind is usually passed to that person, body or agency; …

16. Defence is an agency for the purposes of the Privacy Act. As an agency it is regarded as a 'record-keeper' in relation to a record if it has possession or control of a record that contains personal information.

17. Section 52 of the Privacy Act provides 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)).

[1] From 12 March 2014, the Australian Privacy Principles replace the National Privacy Principles (NPPs) and the Information Privacy Principles (IPPs) (except for ACT Government agencies, who continue to be covered by the IPPs). These new APPs apply to both Australian Government agencies and organisations covered by the Privacy Act.

Investigation process

18. The OAIC's investigation of this complaint involved the following:

    - the OAIC opened an investigation into the complaint on 12 December 2013 pursuant to s 40(1) of the Privacy Act
    - the written submissions provided by both the complainant and Defence were considered
    - on 8 April 2014 the OAIC provided Defence and the complainant with its preliminary view on the complaint which found that Defence had breached IPP 11 and could not rely on the exception at IPP 11.1(a)
    - in response to the OAIC's preliminary view on the complaint both Defence and the complainant provided further submissions
    - the parties were unable to achieve a mutually agreeable outcome through conciliation and I decided to determine the matter under s 52 of the Privacy Act.

Information Privacy Principle (IPP) 11.1(a)

19. The complainant says that Defence breached IPP 11 by disclosing the report containing his personal information to his treating GP after he had expressly refused to grant consent for Defence to release the report to that person.

20. In its initial submission to the OAIC, Defence admitted that the report was disclosed to the complainant's treating doctor. It advised that the report was disclosed in accordance with the advice of the independent medical practitioner, the author of the report, and fell under the exception in IPP 11.1(a). Defence argued that its 15 March 2013 letter to the complainant advising that the report may be made available to his treating doctors and medical specialists permitted it to disclose the report.

21. I have considered whether the complainant was 'reasonably likely to have been aware' that information such as that contained within the independent medical practitioner's report is usually passed to a person such as the complainant's treating GP. If the complainant was 'reasonably likely to have been aware', the information contained in the report would be subject to the IPP 11.1(a) and its disclosure would not be prohibited by Principle 11.

'Reasonably likely to have been aware'

22. The Privacy Act does not define the meaning of the expression 'reasonably likely to have been aware'. The term therefore should be given its ordinary meaning. The expression 'reasonably likely' in the context of IPP 11.1(a) was considered by Deputy President Forgie in *Skase and Minister for Immigration and Multicultural and Indigenous Affairs*[2]:

> When used as an adverb, the ordinary meaning of "likely" is "probably". When used in conjunction with the word "reasonably" a judgment is required as to

[2] [2005] AATA 200 [64].

> whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that Mrs Skase would probably have been aware that the information on her file would be passed to HWT [Herald & Weekly Times Pty Ltd]...

23. The OAIC's advisory *Plain English Guidelines to Information Privacy Principles 8-11*[3] (**Plain English Guidelines**) set out factors that may be taken into account in deciding when the person the information is about 'is reasonably likely to have been aware' of a particular disclosure. These factors include, relevantly here, the person's previous dealings with the agency.

24. In an email communication to the complainant dated 11 April 2013, Defence's Early Intervention Adviser stated that he assumed the complainant's signed consent on his ComCare claim form authorised the disclosure of the complainant's personal information to his treating doctors. However the 11 April 2013 email also provided the complainant with the opportunity to opt out:

> …although you have signed the ComCare form, if you are still adamant that you do not wish to give your permission for [Defence] to contact your NTD or your treating medical practitioners you must do so in writing to me.

25. In this respect the Plain English Guidelines[4] make it clear that consent to a use or disclosure can be revoked at any time:

> a person can consent to a use or disclosure and then later withdraw their consent.

26. I note that the complainant that same day provided a response to Defence indicating that he did not consent to the disclosure of his personal information to his treating doctors.

27. In a subsequent submission to this office, Defence accepted that the consent it initially relied on was superseded by the complainant's 11 April 2013 advice that he did not consent to the proposed disclosure.

Findings

28. I am of the view that by writing to the complainant on 11 April 2013 to ask whether or not he consented to release of the report to his treating doctors, Defence created an expectation that it would not disclose his personal information to those persons if the complainant requested Defence not to do so. The complainant's subsequent express refusal to consent to the disclosure of his personal information to his treating doctors in my opinion strengthened this expectation.

[3] *Plain English Guidelines*, p 33. These guidelines have been superseded by the APP Guidelines which apply from 12 March 2014.

[4] *Plain English Guidelines*, p 26.

29. While Defence has argued that it was reasonable for the complainant to expect that his information would be passed onto his treating doctor on the advice of the independent medical practitioner, there is no information before me to suggest that the individual was aware of the recommendation by the independent doctor.

30. I therefore do not consider that it is reasonably likely that the complainant would have been aware that his personal information contained in the report would be passed onto his treating GP.

31. I am of the view that disclosure of the complainant's personal information in this instance was not permissible under IPP 11.1(a) and that Defence has interfered with the complainant's privacy.

Finding on damages

32. Under s 52(1)(b)(iii) of the Privacy Act I may find the complaint substantiated and make a determination that includes a declaration that the complainant is entitled to a payment of compensation for 'any loss or damage suffered by reason of' the interference with privacy. Under section 52(1A) loss or damage can include 'injury to the complainant's feelings or humiliation suffered by the complainant'.

33. In making a declaration for an award of compensation, I have had regard to the principles relevant to the assessment of damages canvassed by the Administrative Appeals Tribunal (**AAT**) in *Rummery and Federal Privacy Commissioner.*[5] In setting out the factors relevant to compensation awards under the Privacy Act, the AAT considered the Federal Court's approach to the assessment of damages under the *Sex Discrimination Act 1984* (Cth) in *Hall v A & A Sheiban Pty Ltd*:[6]

    (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

    (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) compensation should be assessed having regard to the complainant's reaction (including injury to feelings, distress and humiliation) and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances

    (e) in an appropriate case, aggravated damages may be awarded.

[5] *Rummery and Federal Privacy Commissioner and Anor* [2004] AATA 1221 [32].
[6] *Rummery and Federal Privacy Commissioner and Anor* [2004] AATA 1221 [32].

Non-economic loss

34. The complainant has provided his own evidence in the form of a statutory declaration in support of his claim for non-economic loss, along with a report from his treating psychologist.

35. He claims that Defence's interference of his privacy has exacerbated his anxiety and depression, as well as increased his loss of confidence, panic and fear particularly in the context of returning to work.

36. The complainant cites effects such as lack of sleep, poor concentration, and an inability to regard his future positively. He states that the breach of his privacy has lengthened his rehabilitation period and increased family tensions.

37. Further, the report authored by his treating psychologist and dated 19 May 2014 (**psychologist's report**) refers to the complainant's 'emotional suffering' (including feelings of humiliation, vulnerability and a loss of confidence) being the direct result of the bullying, harassment, prejudicial treatment and violation of his privacy the complainant had experienced at his workplace.

38. The psychologist's report goes on to state that the complainant is suffering from an adjustment disorder with mixed anxiety and depressed mood with 'extremely severe levels' of depression, anxiety and stress. The report indicates that the intensity of the disorder has decreased with psychological treatment and medication but 'will take a long time to resolve'.

39. The psychologist's report also notes at paragraph 8 that:

> It is very difficult if not impossible to assess with any degree of accuracy what percentage of this disorder and suffering occurred as a result of the breach of privacy but it would be a significant contribution. Attaining a reasonable level of justice would assist him to reduce the remainder of his symptoms to a reasonable, but not zero level. The rest are likely to remain with him, and to cause him continuing suffering for a long time and probably for the rest of his life.'

40. Defence accepts that the complainant's statutory declaration dated 13 May 2014 is a record of the complainant's view of the hurt and suffering he feels he has experienced. Defence further acknowledges that the complainant was diagnosed with a psychological disorder and the interference with the complainant's privacy contributed to the disorder and the subsequent emotional suffering.

41. Notwithstanding this, Defence argues that the psychologist's report is based on information provided by the complainant, and Defence did not have the opportunity to also provide information to the psychologist.

42. While I note Defence's argument, the report however comprises the assessment and opinion of the complainant's treating psychologist in their professional capacity. It sets out the history given to the psychologist by the complainant, which is not uncommon in medical assessment and reporting. It is clear from the psychologist's report that the complainant's treating psychologist undertook sufficient evaluation to diagnose the complainant as having an adjustment disorder with mixed anxiety and depressed mood.

43. In *Phillis v Mandic*[7], Raphael FM notes that the question of damages requires an assessment of the medical evidence that has been produced:

> It is often the case that the Courts are assisted in this determination by medical evidence in the form of psychological or psychiatric assessments. Given that it is the effect of the accepted acts of harassment and not the act itself that is relevant, it is appropriate that due regard is had to the expertise of the medical profession.

44. I accept the complainant's claim that the disclosure of his personal information to his treating GP exacerbated his anxiety and depression, particularly in light of the supporting information provided by his treating psychologist.

45. From the information provided by both the complainant and his treating psychologist, it is evident that a proportion of the emotional suffering experienced by the complainant was not caused by Defence's disclosure of his personal information to his treating GP. A number of workplace incidents impacted on the complainant and contributed to his mood disorder and heightened anxiety and stress.

46. As the complainant's treating psychologist notes in their report, it is a difficult task to determine to what extent the exacerbation of the complainant's mood disorder and emotional suffering was caused by Defence's unauthorised disclosure. Nonetheless I am of the view that the disclosure impacted on the complainant's disorder and suffering even if there were other contributory causes.

47. In turning to what would constitute appropriate damages for non-economic loss in the complainant's case, I have taken into account the considerations identified in *Rummery*[8], discussed above, as well as former Privacy Commissioner determinations and discrimination cases that have considered compensation for non-economic loss[9]. I have also assessed the medical information (that is, the psychologist's report) that has been produced.

48. In *Phillis v Mandis*[10], Raphael FM discussed the difficulty in measuring damages for non-economic loss:

> [21] The proper method of assessing damages in cases such as these is to look not at the conduct …. but to the effect of that conduct …..
>
> [22]… if an action on the part of a respondent which might be considered by some to justify only a small reaction on the part of the applicant engenders a medically justified larger sequelae then the damages are to be measured on the basis of that sequelae and not of the basis of the action.

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[7] *Phillis v Mandic* [2005] FMCA 330, [24].

[8] *Rummery and Federal Privacy Commissioner and Anor* [2004] AATA 1221.

[9] Australian Human Rights Commission, *Federal Discrimination Law* (2011) www.humanrights.gov.au/our-work/legal/federal-discrimination-law-2011, ch 7 at 19 August 2014; Australian Human Rights Commission, *Conciliation Register*, www.humanrights.gov.au/complaints/conciliation-register

[10] *Phillis v Mandic* [2005] FMCA 330 (29 March 2005), [21]-[22].

49. I am of the view that my assessment of damages must take into account the impact of Defence's breach declared by the complainant and contained in the report of his treating psychologist.

50. The psychological report indicates that the complainant's levels of anxiety, depression and stress were 'extremely severe' and the privacy breach was a 'significant contribution' to the complainant's mood disorder and feelings of humiliation, vulnerability and loss of confidence. I note that Defence accepts the privacy breach has exacerbated the complainant's disorder and caused him emotional suffering. I also note that according to the psychologist's report the complainant's condition has been improving though it will take a long time to resolve.

51. In '*D' v Wentworthville Leagues Club*[11] 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 gaming habits which caused the complainant to suffer humiliation as well as serious anxiety and panic attacks. In *'BO' v Aerocare Pty Ltd*[12] I awarded $8500 for non-economic loss after finding that AeroCare interfered with the complainant's privacy by collecting and disclosing the complainant's sensitive personal information in an airport departure lounge in circumstances where the complainant, as a person with a disability, made him particularly vulnerable.

52. These cases are not unlike the present one. I am satisfied that Defence's improper disclosure had a significant impact on the complainant's disorder and emotional suffering. However unlike the two cases cited above, it would appear disclosure in this case was limited to providing the report containing the complainant's information to his treating doctor. As a health professional the complainant's medical practitioner has obligations to safeguard the privacy and confidentiality of patient medical information. I have no information before me to suggest that the complainant's personal information was disclosed more broadly.

53. In all the circumstances, I believe that an appropriate award for non-economic loss suffered by the applicant is $5,000.

Aggravated damages

54. As discussed above section 52(1)(iii) of the Privacy Act provides me with the power to award an amount 'by way of compensation' for any loss or damages suffered as a result of the breach of the complainant's privacy. Damages 'by way of compensation' include general damages and aggravated damages.[13]

55. Although the complainant has not specifically sought an award of aggravated damages, in light of s 52(1)(iii), I will consider it.

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[11] *'D' v Wentworthville Leagues Club* [2011] AlCmr 9 (9 December 2011).
[12] *'BO' v AeroCare Pty Ltd* [2014] AICmr 37 (8 April 2014).
[13] *Rummery and Federal Privacy Commissioner and Anor* [2004] AATA 1221; *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72.

56. In *'BO' v AeroCare Pty Ltd*[14] I set out two principles which are a useful guide in determining whether or not an award for aggravated damages is warranted. Aggravated damages may be awarded where:

- the respondent behaved 'high-handedly, maliciously, insultingly or oppressively[15]
- the manner in which a defendant conducts his or her case exacerbates the hurt and injury suffered by the plaintiff[16].

57. Defence has conceded the breach of IPP 11 of the Privacy Act. It also acknowledges that the privacy breach has contributed to the complainant's psychological disorder and subsequent emotional suffering. It has participated in conciliation efforts. Such actions are not reflective of conduct that is high-handed, malicious, insulting or oppressive. I therefore do not consider that it is appropriate to award the complainant aggravated damages in this case.

Determination

58. I declare in accordance with s 52(1)(b)(i)(B) of the Privacy Act that the complainant's complaint is substantiated. I declare that Defence has breached IPP 11 in disclosing personal information about the complainant to his treating doctor despite the complainant expressly refusing to give consent.

59. I declare, in accordance with s 52(1)(b)(ii) of the Privacy Act that Defence must issue a written apology to the complainant within four weeks of this determination. I also declare under s 52(1)(b)(ii) that Defence must amend its information handling procedures particularly in relation to the handling of sensitive personal information when managing injury or illness of Defence employees. Defence must also train its staff in accordance with amended procedures. Defence must confirm to me no later than six months from the date of this determination that amendments to its information handling procedures, as well as staff training, has been completed.

60. I declare in accordance with s 52(1)(b)(iii) that the complainant is entitled to $5,000 for the non-economic loss suffered as a result of Defence's interference with his privacy to be paid within four weeks of the date of this determination.

Timothy Pilgrim
Australian Privacy Commissioner
2 September 2014

[14] *'BO' v AeroCare Pty Ltd* [2014] AICmr 37 (8 April 2014) [57].
[15] *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72 [75].
[16] *Elliot v Nanda & Commonwealth* [2001] FCA 418 (11 April 2001) [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) 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.