



## ***'HW' and Freelancer International Pty Limited*** **[2015] AICmr 86 (18 December 2015)**

**Determination and reasons for determination of  
 Acting Australian Information Commissioner, Timothy Pilgrim**

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<b>Complainant:</b>	<b>'HW'</b>
<b>Respondent:</b>	<b>Freelancer International Pty Limited</b>
<b>Decision date:</b>	<b>18 December 2015</b>
<b>Application number:</b>	<b>CP13/00903</b>
<b>Catchwords:</b>	<b>Privacy — Privacy Act — National Privacy Principles — <i>Privacy Act 1988</i> (Cth) — s 52 — NPP 1.1 — Necessary collection — NPP 1.2 — Fair and lawful collection — NPP 1.3 — Notice of collection — Breach of NPP 1.3 — NPP 2.1 — Use and disclosure of customer’s personal information online — Breach of NPP 2.1— NPP 4.2 — Retaining of data — Compensation awarded — Non-economic loss — Aggravated damages awarded</b>

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## Summary

1. Freelancer International Pty Limited interfered with the complainant's privacy:
  - (a) by not taking reasonable steps to make the complainant aware of the purposes of collection of the complainant's IP address information in breach of National Privacy Principle (**NPP**) 1.3
  - (b) by disclosing personal information that was not authorised by NPP 2.1 of the *Privacy Act 1988* (Cth) (**Privacy Act**).
2. To redress this matter Freelancer shall:
  - (a) within 6 weeks of this determination issue an apology to the complainant, acknowledging its interference with the complainant's privacy
  - (b) undertake staff training in accordance with its information handling procedures
  - (c) no later than six months from the date of this determination confirm that staff training has been completed
  - (d) pay the complainant \$20,000 for non-economic loss caused by the interference with the complainant's privacy, including \$5,000 in aggravated damages for the additional hurt to the complainant caused by the manner in which the interference with his privacy was committed.

## Background

3. The respondent in this matter is Freelancer International Pty Limited, a company incorporated in Australia and a wholly owned subsidiary of the parent company Freelancer Limited, also incorporated in Australia whose shares are publicly traded on the Australian Securities Exchange. Freelancer Limited and its subsidiaries are collectively referred to as The Freelancer Group.<sup>1</sup>
4. The Freelancer Group, through the parent company and its subsidiaries controls and operates an online marketplace with global reach that operates

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<sup>1</sup> Freelancer Limited, *2013 Annual Report* (27 February 2014) <[https://cdn6.f-cdn.com/investor/documents/20140227\\_FLN-FY13\\_Annual\\_Report.pdf?v=670d9331bd15f046395c7d3302c5b4de&%3Bm=5](https://cdn6.f-cdn.com/investor/documents/20140227_FLN-FY13_Annual_Report.pdf?v=670d9331bd15f046395c7d3302c5b4de&%3Bm=5)>.

through a core website, Freelancer.com, and 40 regional websites.<sup>2</sup> An Australian-based third party provider provides a hosting platform for Freelancer's websites.<sup>3</sup>

5. The User Agreement for Freelancer.com describes the terms and conditions on which users are allowed to use the website and Freelancer services. The agreement provides that the User Agreement is a contract between the user and Freelancer International Pty Limited (hereafter referred to as **Freelancer**).
6. Freelancer is an Australian entity carrying on business throughout Australia and overseas. The Privacy Act applies to the Australian acts and practices of organisations and if certain criteria are met, it also applies to the overseas acts and practices of organisations.

7. By the respondent's own account Freelancer.com is:

'the world's largest freelancing, outsourcing and crowdsourcing marketplace by number of users and projects. [It] connect[s] over 15,348,679 employers and freelancers globally from over 247 countries, regions and territories. Through [its] marketplace, employers can hire freelancers to do work in areas such as software development, writing, data entry and design right through to engineering, the sciences, sales and marketing, accounting and legal services'.<sup>4</sup>

8. Wikipedia describes Freelancer.com in the following way:

Freelancer is a marketplace where employers and employees are able to find each other. The site allows employers to post work to get done. Anybody is then able to offer quotes to complete the project, upon which point the original employer is able to award the work.<sup>5</sup>

9. Buyers (or employers, that is, users who purchase services) and sellers (or freelancers, that is, users who offer and provide services) must register for a user account in order to buy or sell services. Freelancer collects the personal information of buyers and sellers when they register as users of the Freelancer.com site.

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<sup>2</sup> Freelancer Limited Prospectus, *Company Overview* (21 October 2013) 61 <[https://cdn6.f-cdn.com/investor/documents/Freelancer\\_Limited\\_Replacement\\_Prospectus\\_-\\_21\\_Oct\\_2013.pdf?v=bcaf633d584f37dac84e28087bbb0dac&m=5](https://cdn6.f-cdn.com/investor/documents/Freelancer_Limited_Replacement_Prospectus_-_21_Oct_2013.pdf?v=bcaf633d584f37dac84e28087bbb0dac&m=5)>.

<sup>3</sup> Freelancer Limited Prospectus, *Company Overview* (21 October 2013) 93 <[https://cdn6.f-cdn.com/investor/documents/Freelancer\\_Limited\\_Replacement\\_Prospectus\\_-\\_21\\_Oct\\_2013.pdf?v=bcaf633d584f37dac84e28087bbb0dac&m=5](https://cdn6.f-cdn.com/investor/documents/Freelancer_Limited_Replacement_Prospectus_-_21_Oct_2013.pdf?v=bcaf633d584f37dac84e28087bbb0dac&m=5)>.

<sup>4</sup> Freelancer, *About Us*, <<https://www.freelancer.com.au/about>>.

<sup>5</sup> Wikipedia The Free Encyclopaedia, *Freelancer.com* (24 September 2015) <<https://en.wikipedia.org/wiki/Freelancer.com>>.

10. The complainant, a freelancer living in Europe, registered with the Freelancer.com site in 2009 and was provided with an active user account. During the registration process, the complainant provided his name, street address and two email addresses as part of his user profile.
11. I accept that the following events took place between the time of the complainant's initial registration with Freelancer and the complainant's lodgement of his complaint with the Office of the Australian Information Commissioner (**OAIC**):

Date	Event
late 2010	<ul style="list-style-type: none"> <li data-bbox="639 696 1326 864">▪ The complainant voluntarily updates his Freelancer.com profile with additional personal information including his business logo and educational history</li> <li data-bbox="639 920 1326 1223">▪ In order to make a Freelancer.com profile more complete, the site encourages users to send 'invitations to friends' and to provide the email addresses of those friends. In response to this, the complainant provides a 'dummy' email address, which he uses for receipt of spam</li> <li data-bbox="639 1279 1326 1536">▪ The complainant sets up two additional 'dummy' user accounts on the Freelancer.com site. One (dummy account 'Y') is attached to the dummy email address he provided in response to Freelancer's request to send invitations to friends</li> </ul>
December 2010	<ul style="list-style-type: none"> <li data-bbox="639 1592 1326 1715">▪ The complainant receives a first payment in his operative Freelancer account for work performed and seeks to withdraw those funds</li> <li data-bbox="639 1771 1326 1939">▪ Freelancer suspends the complainant's account (and freezes account funds) for a period of two weeks for unexplained 'security purposes'</li> <li data-bbox="639 1995 1326 2027">▪ The account is then suspended for a further</li> </ul>

	<p>month (and funds withheld) as penalty for the complainant providing a potential customer with his email address, in breach of the Freelancer User Agreement</p>
<p>February 2011 (to the best of the complainant's knowledge)<sup>6</sup></p>	<ul style="list-style-type: none"> <li>▪ Complainant's operative user account is suspended (and funds frozen) for a third time because Freelancer advises it needs to verify the complainant's identity</li> <li>▪ On request the complainant provides Freelancer with his state-issued identity card, as well as copies of credit card statements and utility bills</li> <li>▪ Suspension of the user account is lifted, funds are released and the complainant continues to use the account</li> </ul>
<p>Sometime later (undefined) in 2011</p>	<ul style="list-style-type: none"> <li>▪ The complainant receives an email from Freelancer asking the complainant to explain the relationship between his operative user account and dummy account 'Y'</li> <li>▪ The complainant advises Freelancer that the owner of dummy account 'Y' is a Mr Z<sup>7</sup> who uses the same computer as the complainant</li> </ul>
<p>14 April 2011</p>	<ul style="list-style-type: none"> <li>▪ Dummy account 'Y' is suspended for identity verification and closed a few weeks thereafter</li> </ul>
<p>26 March 2012</p>	<ul style="list-style-type: none"> <li>▪ At a time when further funds have been deposited into the complainant's operative user account, the account is suspended again<sup>8</sup></li> </ul>

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<sup>6</sup> There is some discrepancy with this date. Freelancer has indicated to the OAIC that the request for identity verification was first sent on 19 April 2011 (see Freelancer letter to the OAIC, 17 December 2014). The dispute around this date does not affect my consideration of the events as they occurred around that time.

<sup>7</sup> 'Mr Z' constitutes dummy data provided with dummy account 'Y'.

<sup>8</sup> The complainant refers to another account suspension occurring sometime between April 2011 and March 2012 when Freelancer reportedly suspended the complainant's account while requesting him to verify his phone number. It is not clear whether the complainant complained to Freelancer about

	<p>for security reasons. The complainant is asked to provide:</p> <ul style="list-style-type: none"> <li>○ details in relation to his most recent client transactions</li> <li>○ a scanned colour copy of his photo ID (e.g. passport or driver's licence)</li> <li>○ a picture of the complainant holding the photo ID together with a piece of paper with a handwritten verification code on it</li> </ul> <ul style="list-style-type: none"> <li>▪ The complainant complies with the request, but posts a complaint about his experiences on Freelancer's Facebook profile <sup>9</sup></li> <li>▪ Freelancer CEO, Matt Barrie, responds requesting information about the complainant's specific problems, and advises that the matter has been sent on internally to be looked at</li> <li>▪ A few days later the complainant's account is reactivated and he is able to access his funds</li> <li>▪ The complainant offers his services to Freelancer to help improve its policies.<sup>10</sup> No further response from Freelancer CEO</li> </ul>
July 2012	<ul style="list-style-type: none"> <li>▪ The complainant sets up personal blog under a pseudonym</li> </ul>
2 August 2012	<ul style="list-style-type: none"> <li>▪ The complainant posts an article about Freelancer on his personal blog site<sup>11</sup></li> </ul>

this incident. Freelancer has not made any comment in relation to it and I have accordingly not considered it as part of the accepted chronology of events.

<sup>9</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, exhibit 9.

<sup>10</sup> Complaint form to the OAIC, 8 July 2013, attachment 2(f), page 7 of 8.

<sup>11</sup> Complaint form to the OAIC, 8 July 2013, attachment 2(a).

12 August 2012	<ul style="list-style-type: none"> <li>▪ The complainant's article is published on the Business2Community business blog site</li> <li>▪ The complainant's operative user account is suspended for security reasons</li> </ul>
13 August 2012	<ul style="list-style-type: none"> <li>▪ The complainant receives an email<sup>12</sup> from a Freelancer representative advising that Freelancer is aware of the complainant's blogs as well as the complainant's 'vandalism of [Freelancer's] Wikipedia page' and requests that the complainant remove his posts or Freelancer will take action against him and contact the relevant local authorities<sup>13</sup></li> </ul>
13 August 2012	<ul style="list-style-type: none"> <li>▪ The complainant responds to the Freelancer email requesting contact from the Freelancer CEO and receives no response</li> </ul>
13 August 2012	<ul style="list-style-type: none"> <li>▪ Freelancer attempts to post a comment on the complainant's blog site naming the complainant and his pseudonyms. The comment also advises readers that the complainant has posted a number of inaccurate articles about Freelancer, has had fake accounts which were closed as a result of fraudulent activity, and implies that the complainant is racist.<sup>14</sup></li> <li>▪ The comment is not posted on the complainant's blog but captured as spam.</li> </ul>
13-14 August 2012	<ul style="list-style-type: none"> <li>▪ Freelancer removes the complainant's edits on its Wikipedia page, publishing the</li> </ul>

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<sup>12</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, exhibit 10 and unreferenced exhibit.

<sup>13</sup> According to the complainant, it is around this time that Freelancer also informs the complainant's clients that the complainant's account has been suspended or closed. Freelancer claims it did not disclose the complainant's personal information to the complainant's clients. I have accordingly not considered this alleged event as part of the accepted chronology of events.

<sup>14</sup> Initial complaint submission to the OAIC, 8 July 2013, 6; complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 37 and exhibit 13.

	<p>complainant's full name on the <i>Wikipedia Freelancer.com: Revision History</i> page, as follows:</p> <p><i>'removing vandalism by [complainant's full name]'</i></p> <p><i>'more vandalism by [complainant's first name]'</i></p> <p><i>'defacement again by [complainant's full name]'</i></p> <p><i>'vandalism by [complainant's first name]'</i>.<sup>15</sup></p>
<p>13 August 2012</p>	<p>Freelancer publishes the following on the <i>Wikipedia Matt Barrie: Revision history</i> page:</p> <ul style="list-style-type: none"> <li>- <i>'defacement by vandal for "freelancer.com" article'</i></li> </ul> <p>The complainant claims that this is a clear reference to him</p>
<p>14 August 2012</p>	<p>Freelancer publishes the following on the <i>Wikipedia Talk: Freelancer.com: Revision history</i> page:</p> <p><i>'the poster has been vandalising the page which has now been protected.'</i><sup>16</sup></p> <p>The complainant claims that this is a clear reference to him</p>
<p>14 August 2012</p>	<p>Freelancer publishes the following on the <i>Wikipedia Talk: Matt Barrie</i> page:</p> <ul style="list-style-type: none"> <li>- <i>'this page is being defaced by the same person defacing Freelancer.com'</i><sup>17</sup></li> </ul> <p>The complainant claims that this is a clear reference to him</p>

<sup>15</sup> Initial complaint submission to the OAIC, 8 July 2013, 5; complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 40-42.

<sup>16</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 41.

<sup>17</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 41-42.

15 August 2012	<ul style="list-style-type: none"> <li>The complainant is notified that his user account is closed<sup>18</sup></li> </ul>
16 August 2012	<ul style="list-style-type: none"> <li>A client of the complainant emails complainant advising that he received notification from Freelancer.com that the complainant's account had been suspended<sup>19</sup></li> </ul>
5 October 2012	<ul style="list-style-type: none"> <li>The complainant posts another article about Freelancer on his personal blog<sup>20</sup></li> </ul>
15 October 2012	<ul style="list-style-type: none"> <li>The complainant posts comments about Freelancer on a third party blog site</li> <li>Freelancer responds by posting comment on third party blog site:  <i>Yes pseudonym aka full name pseudonym aka full name pseudonym aka first name and initial of real surname, we are well aware of your grievances and your racist comments on your [name of blog]. You are well aware of the reasons your particular account was closed.</i><sup>21</sup></li> </ul>
15 November 2012	<ul style="list-style-type: none"> <li>The complainant posts further comments about Freelancer on his personal blog site<sup>22</sup></li> </ul>
16 November 2012	<ul style="list-style-type: none"> <li>The complainant receives cease and desist demand by email from Freelancer's legal representatives in Poland<sup>23</sup></li> </ul>
21 November 2012	<ul style="list-style-type: none"> <li>The complainant receives cease and desist demand by letter<sup>24</sup></li> </ul>

<sup>18</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, exhibit 12.

<sup>19</sup> Initial complaint submission to the OAIC, 8 July 2013, 8; complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, exhibit 14.

<sup>20</sup> Initial complaint submission to the OAIC, 8 July 2013, attachment 2(b).

<sup>21</sup> Initial complaint submission to the OAIC, 8 July 2013, attachment 2(d), page 15-16 of 18.

<sup>22</sup> Initial complaint submission to the OAIC, 8 July 2013, attachment 2(f), 1-8.

<sup>23</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 50-53 and exhibit 17.

<sup>24</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 53 and exhibit 18.

23 November 2012 (or thereabouts)	<ul style="list-style-type: none"> <li>▪ The complainant receives phone contact from Freelancer legal representative regarding cease and desist<sup>25</sup></li> </ul>
2 December 2012	<ul style="list-style-type: none"> <li>▪ The complainant posts comment about Freelancer’s cease and desist demand on his personal blog site<sup>26</sup></li> </ul>
20 December 2012	<ul style="list-style-type: none"> <li>▪ Freelancer removes edits to its Wikipedia page, noting the following on the <i>Wikipedia Freelancer.com: Revision history</i> page:  <i>‘removing persistent vandal of this page – see the history’.</i>  The complainant claims he is identifiable by this reference<sup>27</sup></li> </ul>
21 December 2012	<ul style="list-style-type: none"> <li>▪ Further email correspondence from Freelancer’s legal representatives advising they will be in contact early 2013<sup>28</sup></li> </ul>
7 January 2013	<ul style="list-style-type: none"> <li>▪ Freelancer removes edits to its Wikipedia page, noting the following on its <i>Talk:Freelancer.com: Revision history</i> page:  <i>‘removing defamatory comments by vandal’.</i>  The complainant claims he is identifiable by this reference<sup>29</sup></li> </ul>
14 January 2013	<ul style="list-style-type: none"> <li>▪ A comment is posted on BlackHatWorld SEO forum under username ‘mattbarrie’ and makes reference to <i>‘an individual with a vendetta against us that had their account closed</i></li> </ul>

<sup>25</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 53.

<sup>26</sup> Initial complaint submission to the OAIC, 8 July 2013, attachment 2f, page 1 of 3.

<sup>27</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 56.

<sup>28</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 56-57.

<sup>29</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 57.

	<p><i>because they were trying to buy fake paypal accounts on the site under fake names.</i><sup>30</sup></p> <p>The complainant claims he is identifiable by this reference</p>
19 January 2013	<ul style="list-style-type: none"> <li>▪ Freelancer comments on its <i>Wikipedia Talk:Freelancer.com: Difference between revisions</i> page: <p><i>‘The bulk of the edits are coming from one individual who is using proxies to do the edits and heavily promoting vandalism of the page as a way to get back at the company on his blog (see post of Aug 2 on [name of blog site]). He is also the author of some of the links added or the primary poster (under a variety of pseudonyms including [full name/pseudonym/pseudonym].’</i><sup>31</sup></p> <p><i>and</i></p> <p><i>‘This page is continually vandalised by an individual in Poland’.</i></p> <p>The complainant claims that he is identifiable by these references<sup>32</sup></p> </li> </ul>
19 January 2013 onwards	<ul style="list-style-type: none"> <li>▪ Complainant continues to post comments on BlackHatWorld SEO forum about Freelancer until July 2013</li> </ul>
21 January 2013	<ul style="list-style-type: none"> <li>▪ An online comment which names the complainant (by poster name) is posted on BlackHatWorld SEO forum, in response to online remarks made by complainant: <p><i>[Poster name] you get the honorary title of Chief Wikipedia Editor for our page.</i><sup>33</sup></p> </li> </ul>

<sup>30</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 59.

<sup>31</sup> Initial complaint submission to the OAIC, 8 July 2013, attachment 2(d).

<sup>32</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 58.

9 July 2013	<ul style="list-style-type: none"> <li>▪ Complainant lodges complaint with the OAIC<sup>34</sup></li> </ul>
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## Privacy complaint and remedy sought

12. On 9 July 2013 the complainant lodged a complaint with the OAIC against Freelancer under s 36 of the Privacy Act.<sup>35</sup>
  
13. The complainant alleges that Freelancer interfered with his privacy by:
  - the unnecessary collection of his IP address information (NPP 1.1)
  - collecting his personal information unfairly and/or in an unreasonably intrusive way by freezing his user account until the complainant provided the requisite photographic identification (NPP 1.2)
  - not taking reasonable steps to ensure that the complainant was aware of the following: how to contact the organisation, the purposes for which the information was collected, the law that required the collection of the complainant's information and the main consequences (if any) for the individual if all or part of the information is not provided (NPP 1.3)
  - misusing his personal information by improperly collecting his IP addresses and identifying him through his use of a number of accounts in such a way that was unrelated to primary purpose of collection (NPP 2.1)
  - disclosing the complainant's personal information online to the 'world at large' (NPP 2.1)
  - disclosing his personal information to Freelancer legal representatives overseas (NPP 2.1 and NPP 9)
  - not taking reasonable steps to destroy his personal information after his Freelancer accounts had been closed (NPP 4.2)
  
14. The complainant further relates that he has received correspondence from another individual who apparently also claims that Freelancer has 'threatened'

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<sup>33</sup> Initial complaint submission to the OAIC, 8 July 2013, attachment 2g; complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 59.

<sup>34</sup> Initial complaint submission to the OAIC, 8 July 2013.

<sup>35</sup> Complainant's original privacy complaint to the OAIC, 8 July 2013. Further material subsequently provided on 25 July 2013.

to report him to the authorities for ‘something fraudulent’ which he says he did not commit. The complainant argues that this third party testimonial supports his claim that Freelancer misuses or mishandles the personal information it holds.<sup>36</sup>

15. The complainant seeks a declaration by me that Freelancer interfered with his privacy and that he is entitled to compensation for economic and non-economic loss in respect of that interference.

## The law

16. At the time of the alleged breaches, the NPPs were the standards for handling personal information which private sector organisations subject to the Privacy Act were obliged to uphold. The *Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Privacy Amendment Act)*, which substantively took effect on 12 March 2014, replaced the NPPs with the Australian Privacy Principles.
17. I have considered the complaint under the provisions of the Privacy Act including the NPPs in effect at the relevant time.
18. Section 13A of the Privacy Act held that an act or practice that breached an NPP in relation to personal information was for the purposes of the Act an interference with the privacy of the individual who the information was about. Section 16A required an organisation not do an act or engage in a practice that breaches the NPPs.
19. Personal information was defined in s 6 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.<sup>37</sup>

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<sup>36</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 63-64.

<sup>37</sup> ‘Personal information’ under the post-12 March 2014 regime is defined to mean:  
information or an opinion about an identified individual, or an individual who is reasonably identifiable:  
(a) whether the information or opinion is true or not; and  
(b) whether the information or opinion is recorded in a material form or not.

20. NPP 1 dealt with the collection of personal information. NPP 1.1 provided that:

An organisation must not collect personal information unless the information is necessary for one or more of its functions or activities.

21. NPP 1.2 stated that:

An organisation must collect personal information only by lawful and fair means and not in an unreasonably intrusive way.

22. NPP 1.3 provided:

At or before the time (or, if that is not practicable, as soon as practicable after) an organisation collects personal information about an individual from the individual, the organisation must take reasonable steps to ensure that the individual is aware of:

- (a) the identity of the organisation and how to contact it; and
- (b) the fact that he or she is able to gain access to the information; and
- (c) the purposes for which the information is collected; and
- (d) the organisations (or the types of organisations) to which the organisation usually discloses information of that kind; and
- (e) any law that requires the particular information to be collected; and
- (f) the main consequences (if any) for the individual if all or part of the information is not provided.

23. NPP 2 permitted organisations to use or disclose personal information for the purpose for which it was collected, but limited secondary uses and disclosures to specific circumstances.

24. Relevant to this matter are the circumstances described at NPP 2.1(a) and NPP 2.1(f), which stated 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;... or
- (f) the organisation has reason to suspect that unlawful activity has been, is being or may be engaged in, and uses or discloses the personal information as a necessary part of its investigation of the matter...

25. NPP 4.2 dealt with the issue of retaining data. It stated 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.

26. NPP 9 dealt with issue of transborder data flow. Under NPP 9 an organisation in Australia may transfer personal information about an individual to someone (other than the organisation or the individual) who is in a foreign country only if, relevantly here:

- a. the organisation reasonably believes that the recipient of the information is subject to a law ... which effectively upholds principles of fair handling of the information that are substantially similar to the National Privacy Principles; or
- b. the individual consents to the transfer...

27. Freelancer is an organisation for the purposes of the Privacy Act, and is accordingly bound by the NPPs.

28. Section 52 of the Privacy Act provides that, after investigating a complaint, I may make a determination:

- (a) dismissing the complaint;<sup>38</sup> or

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<sup>38</sup> *Privacy Act 1988*, s 52(1(a)).

- (b) finding the complaint substantiated and declare:
- (i) that the respondent has engaged in conduct constituting an interference with the privacy of an individual and should not repeat or continue such conduct;<sup>39</sup> and/or
  - (ii) the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;<sup>40</sup> and/or
  - (iii) the complainant is entitled to compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint;<sup>41</sup> and/or
  - (iv) it would be inappropriate for any further action to be taken in the matter.<sup>42</sup>

## Investigation process

29. The OAIC's investigation of this complaint is set out in the table below.

30. Much of the material disseminated as part of the attempted conciliation has not been made available to me. It is not relevant to my determination of this matter and I have consequently not considered this material in my decision.<sup>43</sup>

<b>Chronology of Investigation</b>	
8 January 2014	Letters are sent to the complainant and Freelancer notifying the parties of the Assistant Privacy Commissioner's intention to investigate the matter under s 40(1) of the Privacy Act
From 3 February 2014	Written responses provided by both the complainant and Freelancer are considered
From April 2014	Based on the information provided by the parties, the Assistant Commissioner moves to conciliation

<sup>39</sup> *Privacy Act 1988* (Cth), s 52(1)(b)(i)(B).

<sup>40</sup> *Privacy Act 1988* (Cth), s 52(1)(b)(ii).

<sup>41</sup> *Privacy Act 1988* (Cth), s 52(1)(b)(iii).

<sup>42</sup> *Privacy Act 1988* (Cth), s 52(1)(b)(iv).

<sup>43</sup> A majority of documents disseminated between 4 April 2014 and 15 October 2014 are not included in the material before me unless, it was provided thereafter as part of a submission during the determination process.

15 October 2014	The parties are unable to achieve a mutually agreeable outcome through conciliation and a decision is made to determine the matter under s 52 of the Privacy Act
From 15 October 2014	Parties are provided with an opportunity to provide further submissions in accordance with s 43(5) of the Privacy Act
From 17 December 2014	On requests for further information from the OAIC, Freelancer provides additional material <sup>44</sup>
17 February 2015	Further material is also received from the complainant <sup>45</sup>

## General Considerations

31. In determining this matter I must consider Freelancer's functions, activities and purposes of collecting, using and disclosing the complainant's personal information.
32. I must consider if Freelancer is collecting personal information for identity verification purposes fairly, and for what purposes the personal information that Freelancer collects may be used and disclosed. I must also consider whether Freelancer is retaining personal information for longer than it is permitted.

## Collection Issues

### Collection necessary for functions or activities

33. The complainant accepts that the collection of personal information for identity verification purposes is a legitimate part of Freelancer's business.<sup>46</sup> He alleges however that the collection of internet protocol (IP) address information is not necessary for the functions or activities of Freelancer. He argues that the collection of IP addresses is not required as Freelancer's

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<sup>44</sup> Freelancer letter to the OIAC, 17 December 2014; Freelancer letter to the OAIC, 3 February 2015; Freelancer letter to the OAIC, 8 May 2015.

<sup>45</sup> Complainant's submission emailed to the OAIC, *Additional Information Referring to Case of CP13/00903*, 7 April 2004, 8.

<sup>46</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 16.

primary operations do not extend to those of banks or electronic payment processors like PayPal. He also states that Freelancer's collection of his IP addresses was done without notice and/or without his consent.<sup>47</sup>

34. The meaning of the word 'necessary' in the context of NPP 1.1 has not been judicially considered. I note however the comments of the former Privacy Commissioner in *Tenants' Union of Queensland Inc, Tenants' Union of NSW Co-op Ltd v TICA Default Tenancy Control Pty Ltd* which give support to the notion that collection has to be relevant rather than crucial to the organisation's functions and activities.<sup>48</sup>

In my view [the meaning of the word necessary] does not require that the information be indispensable to an organisation, in that, without such information, it would be impossible to carry on its business...

Rather, determining whether or not the collection of personal information is 'necessary' *requires consideration of whether or not it is clearly appropriate and relevant to the functions or activities of the organisation*. In my view information that is only of marginal relevance to the functions or activities of the organisation is more likely to be considered unnecessary for the purposes of NPP 1.1....<sup>49</sup> (*italics my emphasis*).

35. Furthermore NPP 1 does not require organisations to seek the consent of an individual before collecting that individual's personal information.
36. Freelancer does not dispute that it logs IP addresses, and in reference to this particular case, collected IP address information subscribed to by the applicant which linked the applicant's primary user account to his dummy accounts.<sup>50</sup>
37. Freelancer states that its collection of IP address information (along with its identity verification processes) is essential in its attempt to combat fraud and satisfy the requirements of third party service providers such as providers of payment gateways,<sup>51</sup> who must comply with the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (AML/CTF Act) and its AML/CTF

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<sup>47</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 20-21.

<sup>48</sup> [2004] PrivCmrACD 4 (16 April 2004), [49].

<sup>49</sup> Office of the Federal Privacy Commissioner, Complaint Determination No. 4 of 2004 (April 2004) 10 <https://www.oaic.gov.au/images/documents/migrated/migrated/comdeter0404.pdf>.

<sup>50</sup> Correspondence from Freelancer to the OAIC, 17 December 2014.

<sup>51</sup> A payment gateway is essentially the software application that allows a merchant to accept online credit card payments from customers by processing the transaction on behalf of the merchant.

Rules<sup>52</sup> as well as Payment Card Industry Data Security Standard (PCI DSS)<sup>53</sup> compliance requirements.

38. The AML/CTF Act requires (and did so at the relevant times<sup>54</sup>) that in relation to identification procedures entities subject to AML/CTF legislation (**reporting entities**) like the providers of payment gateways must carry out a customer identification procedure to verify a customer's identity before providing a designated service to the customer.<sup>55</sup>
39. The AML/CTF Act also imposes (and did so at the relevant times) a number of obligations on those entities with respect to ongoing customer due diligence, including identifying, mitigating and managing risk.<sup>56</sup> It also provided (and still does) that a reporting entity may authorise another person to be its agent for the purposes of carrying out applicable identity verification procedures on the reporting entity's behalf.<sup>57</sup>
40. Freelancer's current *Know Your Customer and Identity Verification Policy* provides that 'several of our service providers, such as our payment gateway providers require us to perform certain checks on customer identity'.<sup>58</sup>
41. It is not clear whether at the relevant times Freelancer was acting as an agent for third party service providers, but it is unnecessary to determine this issue here. The legitimacy of Freelancer's collection of personal information for identity verification purposes does not depend on whether it was acting as an agent on behalf of a payment gateway provider, but rather on whether the collection was relevant to its functions and/or activities.

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<sup>52</sup> The customer identification procedures required of entities subject to AML/CTF legislation are set out in Part B of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (the AML/CTF Rules).

<sup>53</sup> The PCI DSS was founded by American Express, Discover Financial Services, JCB International, MasterCard Worldwide and Visa Inc 'in an attempt to create a secure framework for dealing with customer credit card information': Merchant Warrior, *Payment Gateways in Australia* <<http://www.paymentgatewayaustralia.com/>>.

<sup>54</sup> I must examine what legislation, policies, notices, etc., were in place at the time of the alleged improper collection, that is, February 2011 and March 2012.

<sup>55</sup> *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) Part 2, 'Identification Procedures', s 35A.

<[https://www.comlaw.gov.au/Details/C2012C00295/Html/Text#\\_Toc319660068](https://www.comlaw.gov.au/Details/C2012C00295/Html/Text#_Toc319660068)>.

<sup>56</sup> *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth), s 36(1).

<sup>57</sup> *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth), s 37.

<sup>58</sup> Freelancer.com, *Know Your Customer and Verification Policy* (2015)

<[https://www.freelancer.com.au/page.php?p=info/kyc\\_policy](https://www.freelancer.com.au/page.php?p=info/kyc_policy)>.

42. Freelancer has indicated that the collection of IP addresses is undertaken for the purpose of verifying applicants' identities, investigating suspicious activity, and preventing online fraud and money laundering.<sup>59</sup> I accept that the collection of personal information for identity verification purposes may form part of the risk management strategy of organisations particularly those at high risk of identity theft and fraud like Freelancer. I accept that the monitoring of IP addresses may assist Freelancer in its monitoring of suspicious and potentially fraudulent online activity.
43. The Privacy Act recognises that other public interests compete with privacy including the right of businesses to be able to achieve their objectives efficiently.<sup>60</sup>
44. I find that on balance, the collection of the complainant's IP address information (as well as other information identifying the complainant) is appropriate and relevant to the business operations of Freelancer. I do not believe that the information could be said to be only of marginal relevance. Freelancer holds large amounts of personal information about its customers, which could be a target for fraudulent activity including identity fraud. Preventing online fraud requires a risk-based approach and monitoring IP addresses is one way to observe account activity and identify, manage and prevent suspicious and potentially fraudulent transactions.<sup>61</sup>
45. I therefore find that the collection of the complainant's IP address information was necessary for the purposes of NPP 1.1, and Freelancer has not interfered with the complainant's privacy in this respect.

### **Method of Collection**

46. The complainant also questions Freelancer's collection procedures, including the forms of notice used, arguing breaches of NPP 1.2 and NPP 1.3.<sup>62</sup>

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<sup>59</sup> Freelancer letter to the OAIC, 3 February 2014, 1.

<sup>60</sup> *Privacy Amendment (Private Sector) Act 2000* (Cth), s 3.

<sup>61</sup> See for example, PayPal, *Digital goods guide to help combat fraud*

[https://www.paypalobjects.com/webstatic/en\\_AU/mktg/pdf/Exodus-DG-Fraud-Prevention-AU.pdf](https://www.paypalobjects.com/webstatic/en_AU/mktg/pdf/Exodus-DG-Fraud-Prevention-AU.pdf);

Neustar, *IP Geolocation: Fight Online Payment Fraud* (2015)

<https://www.neustar.biz/resources/whitepapers/ip-geolocation-online-payment-fraud-whitepaper>;

Campbell, Anita, *10 Tips for Preventing Online Credit Card Fraud* (12 September 2013)

<http://smallbiztrends.com/2013/09/tips-prevent-online-credit-card-fraud.html>]; Gaperin, Eran,

*Fighting online fraud – pitfalls and solutions* (31 July 2012)

<http://www.binpress.com/blog/2012/07/31/fighting-online-fraud-pitfalls-and-solutions/>.

<sup>62</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 16-25.

47. The requirement imposed by NPP 1.2 is that organisations must collect personal information only by lawful and fair means and not in an unreasonably intrusive way. The complainant alleges that Freelancer's collection of its users' personal information is unfair and unreasonably intrusive.<sup>63</sup> He also alleges that Freelancer's notice of collection never fully disclosed the type of information collected such as IP addresses or the collection procedures themselves.<sup>64</sup> I deal with the issue of notice at paragraphs [84] to [95].

### ***Personal Information for Identity Verification Purposes***

48. The complainant asserts that Freelancer coerced him into providing his personal information in the form of photographic identification by freezing funds that had been deposited into his Freelancer account for work done until his personal information had been handed over.
49. The complainant also alleges that in addition to the requests for personal information for identity verification purposes in February 2011 and March 2012, there was a further request for his personal information, which he considers unfair and intrusive.<sup>65</sup> According to the complainant at some time between February 2011 and March 2012, his primary user account was suspended again, at which time he was required to verify his phone number. The verification process reportedly required the complainant to send to Freelancer a code that had been sent to the complainant's phone.
50. I have no further information before me regarding this issue, and Freelancer has provided no comment on it. Nonetheless as the complainant has indicated that the same issues were raised in relation to this incident as were raised in relation to the first request for personal information for identity verification purposes, I will deal with it in the context of whether or not the collection by Freelancer of the complainant's personal information generally was fair.
51. Freelancer states that all users when they register a Freelancer account are required to agree to the terms and conditions contained in the User Agreement, which includes information about identity verification.<sup>66</sup> Freelancer advises that users and potential users also have online access to Freelancer's Privacy Policy which provides the requisite notification about the

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<sup>63</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 15-25.

<sup>64</sup> For example, complainant's email to the OAIC, 19 October 2014; complainant's submissions to the OAIC, (25 July 2014, 1 December 2014).

<sup>65</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 22.

<sup>66</sup> Freelancer letters to the OAIC, (2 December 2014, 17 December 2014, 8 May 2014).

type of personal information that may be collected and the purposes for the information collection.

52. Freelancer points out that its current online User Agreement outlines in detail the requisite identification procedures to all users and potential users. I note that clause 52 of the current User Agreement provides that, amongst other policies and rules, its Privacy Policy and its Know Your Customer and ID Verification Policy constitute part of the User Agreement.<sup>67</sup>
53. However I must examine what policies and notices were in place at the time of the alleged breaches. The complainant is alleging that the Privacy Policy in place at times of the alleged improper collection<sup>68</sup> indicated that the personal information of users could be provided on a voluntary basis. He claims there was no notice in either the User Agreement or the Privacy Policy which indicated:
- Freelancer contact details
  - that IP addresses were collected with user visits to the Freelancer.com website
  - the process involved in identity verification and what the consequences were if users did not comply, i.e., that user accounts would be suspended until the requisite personal information was provided
  - which laws permitted Freelancer to undertake the kinds of identity verification procedures undertaken by Freelancer.<sup>69</sup>
54. I have examined the Privacy Policy and User Agreement in place at the relevant times.<sup>70</sup>

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<sup>67</sup> Freelancer, *User Agreement* (20 April 2015) <<https://www.freelancer.com.au/about/terms>>.

<sup>68</sup> February 2011 and March 2012.

<sup>69</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 16-19.

<sup>70</sup> Freelancer, *Our Privacy Policy* (8 February 2011)

<<http://web.archive.org/web/20110208020106/http://www.freelancer.com/page.php?p=info/privacy>>; Freelancer, *Our Privacy Policy* (9 March 2012)

<<http://web.archive.org/web/20120309125448/http://www.freelancer.com/page.php?p=info/privacy>>; Freelancer, *User Agreement for Freelancer.com* (28 January 2011)

<<http://web.archive.org/web/20110128015058/http://www.freelancer.com/page.php?p=info/terms>>; Freelancer, *User Agreement for Freelancer.com* (21 March 2012)

<<http://web.archive.org/web/20120321104725/http://www.freelancer.com/page.php?p=info/terms>>.

55. The Privacy Policy was not significantly amended between the time of the first collection of personal information for identity verification purposes in February 2011 and the time of the second collection in March 2012.<sup>71</sup> It provided the following details:

Freelancer.com collects only the domain name, but not the email address of visitors to our website, aggregate information on what pages consumers access or visit, information volunteered by the consumer, such as survey information and/or site registrations. The information we collect is used to improve the content of our web site, used to notify consumers about updates to our web site, not shared with other organisations for commercial purposes.

When you participate on the Freelancer.com web site, we request certain information. Freelancer.com does not share any of your personally identifiable or transactional information with any person or entity. No other third party receives your personally identifiable information or other transactional data except for those with whom you have transactions.

....

Personally Identifiable Information – When visiting Freelancer.com’s or any client’s web site and signing up for or using Freelancer.com services through any Service Page, you may choose to supply Freelancer.com with information that identifies users personally...

From time to time, Freelancer.com may use customer information for new, innovative and unanticipated uses not previously disclosed or described in our privacy notice...<sup>72</sup>

56. The User Agreement in place in February 2011, around the time that the complainant was first required to handover photographic identification as well as credit card and utility bill information, relevantly stated the following in relation to the handling of personal information and the suspension of user accounts:

#### **Acceptance of User Agreement**

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<sup>71</sup> An email from Freelancer’s legal representative to the OAIC dated 28 May 2014 attaching the relevant Privacy Policy, noted that:

‘The attached policy applied for [the period from August 2009 to late 2012] except for a few cosmetic changes that were made during the period – [those] being some minor spacing changes and [a] change in the name of the website from GetAFreelancer.com to Freelancer.com in 2010.’

<sup>72</sup> Freelancer, *Our Privacy Policy* (8 February 2011)

<<http://web.archive.org/web/20110208020106/http://www.freelancer.com/page.php?p=info/privacy>>; Freelancer, *Our Privacy Policy* (9 March 2012)

<<http://web.archive.org/web/20120309125448/http://www.freelancer.com/page.php?p=info/privacy>>.

...The Site is offered to you conditional on your acceptance of the User Agreement. Please review the terms and conditions set out below before using the Site. Your continued use of the Site after such time will signify your acceptance of this User Agreement.

...Please note that we may close, suspend, or limit your access to your Freelancer.com account ("Account") or the Services provided by us on the Site ("Services"), and/or limit access to your funds if you carry out activities which are in contravention of this User Agreement and its associated policies incorporated by reference.

.....

## **7. ACCOUNTS**

### **7.1 Opening Account**

To become a User and access the Site and Services you must register for an "Account.. You agree to provide true, accurate and complete information as prompted by the registration form and all forms you access on the Site, and to update this information to maintain its truthfulness, accuracy and completeness.

### **7.2 Accounts**

Freelancer.com reserves the right to suspend a withdrawal if the source of the funds is suspected to be fraudulent...

### **10.6 General restrictions**

....

- Users will not engage in personal attacks, negative or other unfair criticism or other forms of discourteous and unprofessional online conduct or practices.
- Users will not create multiple user Accounts to avoid fees, suspension or bad ratings on the Site.

## **12. REGISTRATION AND PROCESSING OF YOUR PERSONAL DATA**

Your personal information will be processed by Freelancer.com in order to fulfil the agreement with You, perform delivery of products, etc. ..Your personal information may also be transferred between Freelancer.com and any associated entity within the Freelancer.com organisation... At such transfer, personal data may be transferred outside the EEC-area. By entering into this agreement, You hereby approve such processing of your personal information as set forth above, including the processing of your personal identification number, and hereby give consent as required by the Swedish Personal Data Protection Act...<sup>73</sup>

57. The User Agreement was modified several times between February 2011 and 26 March 2012, the time of the second collection of personal information for

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<sup>73</sup> Freelancer, *User Agreement for Freelancer.com* (28 January 2011)

<<http://web.archive.org/web/20110128015058/http://www.freelancer.com/page.php?p=info/terms>>.

identity verification purposes. There is however no relevant difference between the earlier and later versions of the Agreement reproduced during that time interval in relation to how Freelancer deals with personal information.<sup>74</sup>

58. The complainant was notified by email at the time of each request for personal information for identity verification purposes. Freelancer has advised that the form of the email sent to the complainant at the time of the initial request for information was a format similar to the following:

Your Freelancer.com account has been suspended for over {remind\_days}, but you can easily reactivate your account by doing the following:

Just scan and upload a valid form of identification such as a passport, driver's license or other government issued ID here.

Copy and paste this in your web browser. We'll receive and compare your document against our records and then either reactivate your Freelancer.com account or request more information, if necessary.<sup>75</sup>

It's important to start the reactivation process now so you can focus on what matters most – getting your work done and earning money on Freelancer.com!

We're ready to answer any question you have.

59. The email notice does not request credit card information or copies of utility bills, which the complainant indicates he was also required to provide.<sup>76</sup> The complainant has however agreed that a notice similar to that outlined above was sent to him around the time of February 2011.<sup>77</sup> I consequently accept that this was the form of the initial request for personal information for identity verification purposes.

60. Freelancer has also provided a further example of an email notice, which it indicates was likely sent to the complainant when further verification of his identity was required:

*Further Verification Required*

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<sup>74</sup> Freelancer, *User Agreement for Freelancer.com* (21 March 2012)  
<<http://web.archive.org/web/20120321104725/http://www.freelancer.com/page.php?p=info/terms>

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<sup>75</sup> Email from Freelancer to the OAIC, 22 December 2014, attachment 1 of 4.

<sup>76</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 15.

<sup>77</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, fn 20.

Your account at {email\_receiver.sitename} has been suspended and requires further action.

To re-activate your account, please send us the following documents:

- a scanned Government-issued photo ID, driver's license or passport (in English) which include your picture, signature, name, date of birth and address
- a photo of you holding the verification code displayed below in one hand and your ID clearly visible in your other hand.<sup>78</sup>

61. The complainant confirms the receipt of a notice taking a similar form.<sup>79</sup> I therefore accept that this, or something like this, took the form of the second request for personal information for identity verification purposes.
62. Freelancer suggests that it is likely the complainant's user account was suspended on these occasions and he received a request for further information, like those above, because of 'suspicious' activity picked up on his account by Freelancer's anti-fraud team.<sup>80</sup> Freelancer claims that its identity checks have proven invaluable to Freelancer in its attempts to 'fight fraud' both on Freelancer and its users.
63. Freelancer also makes the point that the complainant's account was automatically reactivated once the additional information was received from the complainant. It notes that the complainant did not raise with Freelancer support staff any issues with the collection of his information at the relevant times, nor did he seek alternative arrangements.<sup>81</sup>
64. The complainant claims that he felt humiliated and he had been forced to comply on both occasions in order to access the money in his user account.<sup>82</sup> He states that he cannot recall Freelancer making reference to any legislation which allowed it to request this information.<sup>83</sup> He states he was also not informed about what Freelancer would do with that information and said he was scared that providing further information about himself would heighten the risk of future identity theft.<sup>84</sup> The complainant alleges that the collection

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<sup>78</sup> Freelancer email to the OAIC, 22 December 2014, attachments 2 & 3 of 4.

<sup>79</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 23.

<sup>80</sup> Freelancer letter to the OAIC, 17 December 2014, 2.

<sup>81</sup> Freelancer letter to the OAIC, 17 December 2014, 2.

<sup>82</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2012, 18 and 23-24.

<sup>83</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2012, 17.

<sup>84</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2012, 16.

of this information was given in unfair and coercive circumstances and is therefore an improper collection for the purposes of the Privacy Act.

65. As noted NPP 1 does not require consent for the collection of personal information. The requirement imposed by NPP 1.2 is that organisations must collect personal information only by lawful and fair means and not in an unreasonably intrusive way.
66. The question is therefore whether it is in fact fair and lawful that Freelancer collected the complainant's additional personal information in this way for the purposes of NPP 1.2. The OAIC's advisory *Guidelines to the National Privacy Principles (NPP Guidelines)* provide that the 'fair' generally means 'without intimidation or deception'.<sup>85</sup>
67. Freelancer does not dispute that there may be adverse consequences for not providing the additional personal information for the purposes of identification verification (namely, suspension of user account and no access to any money held therein). It contends however that the complainant was provided with requisite notice of the collection of his personal information for identity verification purposes as constituted by the emails sent to the complainant on suspension of his account, and described in paragraphs [58] and [60] above (**the emails**).
68. Freelancer contends that additionally the complainant should have been reasonably aware through the broad provisions of Freelancer's User Agreement and Privacy Policy that this type of information could be collected, and user accounts suspended if fraudulent activity was suspected.<sup>86</sup>
69. I have outlined the relevant provisions of Freelancer's User Agreement at paragraph [56]. I note under the heading 'Acceptance of User Agreement' that a user is unable to use the Freelancer Site unless they agree to the terms and conditions outlined in the User Agreement, and that continued use of the Site signifies acceptance of the User Agreement.<sup>87</sup> The User Agreement also points

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<sup>85</sup> Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles* (September 2001), 27. These guidelines have been superseded by the Australian Privacy Principle Guidelines which apply from 14 March 2015.

<sup>86</sup> Freelancer letter to the OAIC, 17 December 2014, 4.

<sup>87</sup> Freelancer, *User Agreement for Freelancer.com* (28 January 2011)

<<http://web.archive.org/web/20110128015058/http://www.freelancer.com/page.php?p=info/terms>>.

out this includes an agreement to update user information to maintain the truthfulness, accuracy and completeness of that information.

70. I further note that Freelancer states in its User Agreement that it may close, suspend or limit access to a user's account and/or access to a user's funds if a user contravenes the terms and conditions of the Agreement. The User Agreement also states at clause 12 of the Agreement that Freelancer will process a user's personal information in order to fulfil the agreement with a user.
71. The Privacy Policy, which constitutes part of the User Agreement (and is incorporated by reference), indicates that when a consumer participates on the Freelancer.com website, Freelancer requests certain information.<sup>88</sup>
72. As the complainant rightly points out the Privacy Policy also states that when signing up for or using Freelancer.com services through any Service Page, users may choose to supply Freelancer.com with information that identifies users personally. This suggests that the proffering of at least some personal information is voluntary and not mandatory.<sup>89</sup> Notwithstanding this when various provisions within the User Agreement are considered collectively, I think it is sufficiently clear that in the event of suspected contravention of User Agreement terms and conditions further information may be requested from the user, and a user's access to their account and/or funds may be limited.
73. Freelancer notes that the email notifications sent to the complainant requesting further information were sent after one of Freelancer's anti-fraud teams flagged the complainant's account as suspicious.<sup>90</sup> The emails describe

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<sup>87</sup> Freelancer, *User Agreement for Freelancer.com* (21 March 2012)

<<http://web.archive.org/web/20120321104725/http://www.freelancer.com/page.php?p=info/terms>>.

<sup>88</sup> Freelancer, *Our Privacy Policy* (8 February 2011)

<<http://web.archive.org/web/20110208020106/http://www.freelancer.com/page.php?p=info/privacy>>; Freelancer, *Our Privacy Policy* (9 March 2012)

<<http://web.archive.org/web/20120309125448/http://www.freelancer.com/page.php?p=info/privacy>>.

<sup>89</sup> Freelancer, *Our Privacy Policy* (8 February 2011)

<<http://web.archive.org/web/20110208020106/http://www.freelancer.com/page.php?p=info/privacy>>; Freelancer, *Our Privacy Policy* (9 March 2012)

<<http://web.archive.org/web/20120309125448/http://www.freelancer.com/page.php?p=info/privacy>>.

<sup>90</sup> Freelancer letter to the OAIC, 17 December 2014, 2.

why further information is required and the consequences for the user if the information is not provided.

74. I accept that by continuing to use the Freelancer site the complainant accepted the terms and conditions outlined in Freelancer's User Agreement. I also accept that in accordance with those terms and conditions, Freelancer was entitled to request further information when potentially suspicious activity was identified on the complainant's account. In my view the complainant's acceptance of the terms and conditions in Freelancer's User Agreement, is sufficient to make lawful Freelancer's collection of the personal information in question.
75. In my view, the User Agreement and Privacy Policy did provide information to put users on notice that access to their account and/or funds could be limited in the event of suspected contravention of the Agreement's terms and conditions. Emails forwarded to the complainant on suspension of his user account explained why further personal information was required and what would happen if the information was or was not provided.
76. There were evidently negative consequences for not providing additional personal information for identity verification purposes. However notice of the collection of additional personal information which was provided to the complainant through Freelancer's User Agreement, Privacy Policy and notification emails was not such to make the collection of that information deceptive or intimidating. Therefore I do not consider the process of collection of this information 'unfair' or 'unreasonably intrusive' in terms of NPP 1.2, and Freelancer has not interfered with the complainant's privacy in this respect.

#### ***IP Addresses***

77. The complainant is also complaining that the collection of his IP address information was covertly undertaken (that is, Freelancer did not inform users that it collects IP addresses) and is consequently unfair, in breach of NPP 1.2.
78. The NPP Guidelines made it clear that organisations are generally required not to collect personal information covertly, although there are circumstances in

which covert collection would be fair (for example, the investigation of fraud or other unlawful activity).<sup>91</sup>

79. Freelancer's User Agreement indicates in general terms that Freelancer may collect information from users and that the personal information of users will be processed. The complainant was made overtly aware that some of his metadata<sup>92</sup> was being collected. Though Freelancer's Privacy Policy at the relevant times did not specify the collection of IP addresses, it did specify that its web-server automatically recognises users' domain names and this information is collected. Furthermore, when users log in to their accounts, previous log-in details are viewable, including date and time and IP address.<sup>93</sup>
80. Having regard to Freelancer's functions and activities, as well as the role IP address information may play in the risk management strategies employed by businesses,<sup>94</sup> I cannot conclude that the collection of such information by Freelancer in these circumstances is unlawful.
81. Moreover the NPPs although requiring organisations to take reasonable steps to make sure that individuals are made aware of the general purposes of collection of personal information, do not require organisations to outline the specific type of personal information to be collected.
82. While I believe Freelancer's Privacy Policy and User Agreement notices were lacking at the relevant times (and I provide further information on this at paragraphs [96] to [106]), in my view, they are not so inadequate as to render the collection of IP addresses unfair or unreasonably intrusive. I am therefore not satisfied that there is any breach of NPP 1.2 in respect of the collection of the complainant's IP address information.

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<sup>91</sup> Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles* (September 2001), 27.

<sup>92</sup> Metadata refers to 'telecommunications data' or 'communications data', and can include amongst other data, Internet Protocol addresses and Uniform Resources Locators (URLs) to the extent that they do not identify the content of a communication: see my discussion of metadata in [Ben Grubb and Telstra Corporation Limited \[2015\] \[35\] \(1 May 2015\)](#).

<sup>93</sup> Freelancer letter to the OAIC, 17 December 2014, 2; Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, exhibit 11.

<sup>94</sup> See also Australian Government, *Cyber Security Strategy* (2009), <<https://www.ag.gov.au/RightsAndProtections/CyberSecurity/Documents/AGCyberSecurityStrategy.DOC>>.

## Notice of Collection

83. The complainant claims that when Freelancer sought to collect personal information from him, it had not provided him with adequate notice of collection, with respect to both the personal information he was required to provide for identity verification purposes and his IP address information.
84. NPP 1.3 stated that at or before the time (or if that is not practicable, as soon as practicable after) an organisation collects an individual's personal information, it must take reasonable steps to ensure the individual is aware of a number of factors:
- (a) the identity of the organisation and how to contact it
  - (b) the fact that he or she is able to gain access to the information
  - (c) the purposes for which information is collected
  - (d) the organisations (or the types of organisations) to which the organisation usually discloses information of that kind
  - (e) any law that requires the particular information to be collected
  - (f) the main consequences (if any) for the individual if all or part of the information is not provided.
85. The question I therefore need to consider is whether Freelancer has taken reasonable steps to ensure that the complainant was aware of the matters set out above, in particular NPP 1.3(a), (c), (e) and (f).
86. Notably, NPP 1.3 does not specify how notice of the matters set out in NPP 1.3 must be given, and it is open for information to be provided in different forms or in different locations.<sup>95</sup>
87. In *Tenants' Union of Queensland Inc, Tenants' Union of NSW Co-op Ltd v TICA Default Tenancy Control Pty Ltd*, the then Privacy Commissioner held that:
- If an organisation provides the information required to meet its obligations on different forms or in different locations it would generally need to alert individuals to the fact the other information was available.<sup>96</sup>
88. In this case the User Agreement at the relevant times incorporated the Privacy Policy by reference. Under the heading 'Acceptance of User Agreement' it stipulated that:

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<sup>95</sup> [Tenants' Union of Queensland Inc, Tenants' Union of NSW Co-op Ltd v TICA Default Tenancy Control Pty Ltd \[2004\] PrivCmrACD 4 \(16 April 2004\)](#).

<sup>96</sup> [2004] PrivCmrACD 4 (16 April 2004), [49].

We may close, suspend, or limit your access to your Freelancer.com account (“Account”) or the Services provided by us on the Site (“Services”), and/or limit access to your funds if you carry out activities which are in contravention of this User Agreement and its associated policies incorporated by reference.<sup>97</sup>

89. Both the User Agreement and the Privacy Policy were, at the relevant times, easily accessible on the Freelancer website. Both the Agreement and the Privacy Policy provide a ‘Contact Us’ hyperlink to a contact email address. Although the contact email is to a general customer support line, this does provide individuals with a means to contact the organisation and it is in my view, sufficient for the purposes of NPP 1.3(a).
90. There is no requirement under NPP 1.3 that there be a law requiring particular personal information to be collected.<sup>98</sup> This is clear from the wording of NPP 1.3(e) which refers to ‘any law’, not ‘the law’ (emphasis added). The proviso is that if there is such a law then the individual whose information is being collected needs to be made aware of it. In this case, there was no such law, so the obligation to notify the complainant pursuant to NPP 1.3 (e) is not enlivened.
91. In particular, the complainant argues that Freelancer’s Privacy Policy and its User Agreement do not properly describe the nature of the personal information that Freelancer will collect; for example, they do not mention the collection of IP address information, or sufficiently describe the process of identity verification and/or the purposes for which personal information is being collected.
92. As noted NPP 1.3 does not require that an individual be notified about the specific type of information to be collected. Arguably though to ensure the necessary level of ‘awareness’ required by NPP 1.3, it is necessary that the relevant personal information be properly identifiable.<sup>99</sup>
93. It is true that the User Agreement and the Privacy Policy at the relevant times did not *specifically* identify the type of personal information that may be collected (i.e. the personal information required for identity verification purposes and the IP address information). However as already discussed in

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<sup>97</sup> ‘Associated policies’ includes the Privacy Policy.

<sup>98</sup> Though there might not be a specific legal requirement to collect the personal information, it must be necessary for the functions and/or activities of the organisation, and collected in a lawful and fair and not in an unreasonably intrusive manner: NPP 1.2.

<sup>99</sup> [Tenants’ Union of Queensland Inc, Tenants’ Union of NSW Co-op Ltd v TICA Default Tenancy Control Pty Ltd \[2004\] PrivCmrACD 4 \(16 April 2004\)](#), [76].

respect of Freelancer's collection of personal information for identity verification purposes the complainant was provided with specific notice *at the time* of each request.

94. The emails set out at paragraphs [58] and [60] detailed what type of information needed to be collected from the complainant and what the consequences were if the complainant did not provide some or all of that information.
95. The requirement at NPP 1.3 is for organisations *at or* before the time of collection to take reasonable steps to make the individual aware of the matters listed at NPP 1.3 (emphasis in italics added). The emails together with the more generalised information concerning the collection of personal information found in the User Agreement and Privacy Policy are in my view sufficient for me to find that Freelancer has taken reasonable steps to enable an individual to be aware of the collection of personal information for identity verification purposes.

### ***Collection of IP addresses***

96. As noted Freelancer's User Agreement and Privacy Policy at the relevant times did not specifically address the collection of IP addresses.
97. Freelancer implies that it is reasonable to assume that people would be aware that IP addresses are collected when users log onto the Freelancer website:
- You cannot communicate with anyone on the Internet without providing and storing an IP address.<sup>100</sup>
98. Moreover, Freelancer contends that website users are shown their IP address information whenever they log onto the Freelancer.com website.<sup>101</sup>
99. I note from an exhibit attached to one of the complainant's submissions<sup>102</sup> that when logging on, the following message pops up in a box on the screen:

Welcome [Account Name]  
Your last login was on [date]  
at [time] from [IP address].

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<sup>100</sup> Letter from Freelancer to the OAIC, 17 December 2014, 2.

<sup>101</sup> Letter from Freelancer to the OAIC, 17 December 2014, 2.

<sup>102</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, Exhibit 11.

100. Freelancer states that this is ‘to help users maintain their own account security’.<sup>103</sup> By this, I take it that Freelancer is contending this disclosure is sufficient to identify for individuals the IP addresses it collects as to enable an individual to be adequately made aware of, amongst other things, the purposes of collection including fraud protection.
101. I accept that by disclosing to users their IP addresses as they log on, these individuals may recognise that their IP address information is captured and stored during online communications. The question then becomes is this step, in conjunction with information provided in the User Agreement and Privacy Policy, sufficient to enable users to be made aware that the collection of IP addresses is for risk management purposes, including protection against fraud.
102. In reviewing Freelancer’s Privacy Policy and User Agreement at the relevant times, I note that there is no reference to IP addresses being collected for purposes of risk management, or cyber security or protection against fraud. There is notice that some metadata is collected for the purposes of improving the content of the Freelancer website, and notifying customers about updates to the Freelancer site.<sup>104</sup> There is also notice that a user’s account may be limited if fraudulent activity is suspected, and notice that a referral to the Affiliate Program<sup>105</sup> cannot be made to a user with the same IP address as the referrer.<sup>106</sup> There is however no information before me to suggest that users of the Freelancer website were made aware their IP address information was collected for reasons relating to risk management, cyber security and/or fraud prevention.

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<sup>103</sup> Letter from Freelancer to the OAIC, 17 December 2014, 2.

<sup>104</sup> Freelancer, *Our Privacy Policy* (8 February 2011)

<<http://web.archive.org/web/20110208020106/http://www.freelancer.com/page.php?p=info/privacy>>; Freelancer, *Our Privacy Policy* (9 March 2012)

<<http://web.archive.org/web/20120309125448/http://www.freelancer.com/page.php?p=info/privacy>>.

<sup>105</sup> Clause 5.1 of Freelancer’s User Agreement defines the Freelancer Affiliate Program as ‘a program that allows you to receive a payment from Freelancer (“Bonus”) into your Account for referring a new user (“Referred user”) to Freelancer.

<sup>106</sup> Freelancer, *User Agreement for Freelancer.com* (28 January 2011)

<<http://web.archive.org/web/20110128015058/http://www.freelancer.com/page.php?p=info/terms>>.

<sup>106</sup> Freelancer, *User Agreement for Freelancer.com* (21 March 2012)

<<http://web.archive.org/web/20120321104725/http://www.freelancer.com/page.php?p=info/terms>>.

103. Freelancer appears to contend that because it is (apparently) general knowledge that one of the purposes of collecting IP addresses and other metadata, is for risk management including fraud protection reasons, there was no need to take additional steps to so inform the users of its website.
104. An organisation's assumption about an individual's general knowledge may inform that organisation about what steps are reasonable to take to ensure an individual is aware of the matters listed at NPP 1.3. Making such an assumption is not however a reasonable step in itself. In any case it is unclear how Freelancer arrived at the assumption it did. The mention in Freelancer's Privacy Policy of only some metadata being collected for purposes specifically set out in the Policy (i.e. improving the content of the website and notifying customers about updates to the website) sets an expectation that collection is restricted to a certain subset of metadata to be used for limited (specified) purposes.
105. There is no information before me to suggest that the complainant may have already been generally aware that Freelancer used IP addresses for purposes of cyber security or fraud protection. Freelancer had an obligation to take reasonable steps to make users of its website aware that other metadata such as IP addresses may be collected for risk management purposes. It did not do so. I therefore find that Freelancer has breached NPP 1.3 in this regard.
106. In making this finding though, I acknowledge that since this complaint was lodged Freelancer has to its credit extensively revised its User Agreement and Privacy Policy. It presently provides to visitors and users of its website significantly more comprehensive information about what personal information it collects, holds, uses and discloses, why it does so, and how it handles the personal information of users in accordance with its legislative obligations under the Privacy Act.

### **Use and Disclosure Issues**

107. NPP 2.1 precluded an organisation such as Freelancer from using or disclosing personal information about an individual such as the complainant for a secondary purpose unless one of a number of sub-paragraphs relevantly applies to the information in question.
108. For present purposes, it is sufficient to have regard to sub-paragraph (a). Clause 2.1 provided as follows:

An organisation must not use or disclose personal information about an individual for a purpose (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 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....

## Use

109. The complainant alleges that Freelancer failed to meet the requirements of NPP 2.1 when it used his IP address data to monitor his Freelancer accounts and link his active user account with his dummy accounts, which had apparently been deleted some months earlier, to identify him.<sup>107</sup>
110. Following the publication on the complainant's personal blog of an article he wrote which was critical of Freelancer and the publication of this article on the Business2Community business blog site, the complainant received an email from a Freelancer representative on 13 August 2012, the content of which included the following:

Case ID X0000/000 Re: Complainant's Last Name/Active User Account Name/Dummy Account 1 Name/Dummy Account 2 Name

Hello [complainant's first name] ("complainant's pseudonyms") [complainant's last name],

We are well aware of your campaign against Freelancer from your posts under a fake name [complainant's pseudonym],

Vandalism of our Wikipedia page and so forth.

[web address for article of Business2Community business blog site]

[web address for complainant's personal blog site]

We ask that you immediately remove these posts or we will take action against you as well as contact the relevant authorities in [city].

.....

Please respond to this email by 5 pm CEST or we will commence action against you.

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<sup>107</sup> Complainant's original complaint to the OAIC, 8 July 2013; complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 20-21, 31-32.

Regards

Customer Service Manager.<sup>108</sup>

111. The complainant contends that this was proof that Freelancer had been 'running a database containing its users' IP addresses'.<sup>109</sup> The complainant claims that, aside from a first name pseudonym and an email address<sup>110</sup>, there was no other information linking the complainant's blog site with his active user account and dummy accounts.
112. The complainant submits that once Freelancer had identified him using his IP address information it blackmailed him, deleted his user account and threatened to take legal action against the complainant unless he remove his posts.<sup>111</sup>
113. In response, Freelancer claims the following:
- IP address information is collected for fraud detection purposes
  - no additional personal information was collected to track and establish the complainant's identity in relation to anonymous postings he made on the internet criticising Freelancer's practices
  - as part of its customer service practices it monitors publicly available information on social media sites for references to Freelancer (positive and negative)
  - on several occasions prior to his postings the complainant had corresponded with Freelancer signing off with various pseudonyms and his last name<sup>112</sup>
  - additionally, the complainant's contact address on his postings was the same email address linked to one of his Freelancer accounts.<sup>113</sup>

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<sup>108</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 30, Exhibit 10.

<sup>109</sup> Complainant's submission to the OAIC, *Comments on Respondent's Submission*, 1 December 2014, 1-2, 6-7; complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 31.

<sup>110</sup> I note Freelancer's Privacy Policy (at the relevant times) provided that it does not collect the email addresses of visitors to its website. In this case however, the complainant is not only a visitor to the website, but has also established user accounts.

<sup>111</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 38.

<sup>112</sup> I note that this likely includes a reference to the complainant's post on Freelancer's Facebook profile in March 2012 in which the complainant signs off on the message using his real full name and well as two first names aliases. Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, Exhibit 9.

114. The complainant dismisses the claim made by Freelancer that the respondent linked the accounts through a first name pseudonym and an email address. He claims that given its millions of users it is improbable that Freelancer was able to connect a first name pseudonym in a blog to his Freelancer accounts. He states that it is more probable that Freelancer used IP address information to link his names and accounts.<sup>114</sup>
115. The complainant claims that Freelancer's actions to 'track [him] down' using IP address information without his knowledge or consent, and then threaten him (by stating Freelancer will commence action against him) is illegal and in breach of NPP 2.1.<sup>115</sup>
116. I accept that once the complainant was identified by Freelancer and his accounts linked, the complainant's user account was deleted, and the complainant was notified by Freelancer that it was aware of his postings and it requested removal of those posts.
117. I have examined what policies and notices were in place at the time of the alleged breach of improper use.<sup>116</sup>
118. I note that in accordance with the terms of the User Agreement at the relevant time:

#### **10.6 General restrictions**

Users agree that:

....

- Users will not engage in personal attacks, negative or other unfair criticism or other forms of discourteous and unprofessional online conduct or practices.

....

- Users will not create multiple user Accounts for any reason or under any circumstance.<sup>117</sup>

119. I also note that in accordance with the User Agreement, Freelancer may close, suspend or limit access to a user's Freelancer.com account if the user carries

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<sup>113</sup> Freelancer letter to the OAIC, 3 February 2014, 2; Freelancer letter to the OAIC, 2 December 2014.

<sup>114</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 31.

<sup>115</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 28 and 32.

<sup>116</sup> 13 August 2012.

<sup>117</sup> Freelancer, General Restrictions, *User Agreement for Freelancer.com* (8 August 2012), cl 10.6 <<http://web.archive.org/web/20120808234054/http://www.freelancer.com/page.php?p=info/terms>>. Note this provision is an updated clause from earlier versions which provided that 'users will not create multiple user accounts to avoid fees, suspension or bad ratings on the Site.'

out activities which are in contravention of the User Agreement and its associated policies.<sup>118</sup>

120. Though Freelancer's notice to the complainant on 13 August 2012 appears less than courteous, I am not satisfied that the assertions made by the complainant of intimidation and blackmail are applicable in the circumstances of this matter. In any case, such assertions lie outside the operation of the Privacy Act and need not be considered here further.
121. Of more relevance here is the alleged improper use of IP address information. There are two significant points with regard to NPP 2.1. First, an individual's knowledge about how an organisation may use their personal information may factor into the consideration of whether or not they could reasonably expect their information to be used in that way. However an individual's knowledge or awareness is not required in order to use that individual's information. Nor is an individual's consent.
122. Second is the NPP 2.1 principle that limited use of personal information only comes into play where the information is used other than for the primary purpose of collection.
123. I am satisfied, as indicated above, that the collection of IP address information, is necessary for Freelancer's risk management activity of monitoring fraudulent or suspicious movement on users' accounts. Therefore, if Freelancer collects IP address information from users to monitor suspicious activity online, the use of that IP address information to identify and link users to user accounts would be arguably still within the primary purpose of collection.
124. For that reason there is no need for me to determine whether in fact Freelancer did use the IP address information it had collected to identify the complainant and link him to his Freelancer accounts, or whether the connection was apparent from the face of the complainant's publicly available postings.

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<sup>118</sup> Freelancer, Acceptance of User Agreement, *User Agreement for Freelancer.com* (8 August 2012) <<http://web.archive.org/web/20120808234054/http://www.freelancer.com/page.php?p=info/terms>>.

125. To the extent that the IP address information was used by Freelancer to identify the complainant and his user accounts, its use was for the primary purpose for which it was collected. Accordingly I am satisfied that there is no breach of NPP 2.1 in relation to Freelancer's use of the complainant's IP address information, and Freelancer has not interfered with the complainant's privacy in this respect.

## Disclosure

126. The complainant alleges that Freelancer improperly disclosed his personal information on a number of separate occasions. They can be summarised as follows:

- on 13 August 2012 Freelancer attempts to disclose on the complainant's blog site, his name and pseudonyms, advising readers that the complainant has posted inaccurate articles about Freelancer, has fraudulent accounts on the Freelancer site and suggests that the complainant is a racist<sup>119</sup>
- on 13-14 August 2012 Freelancer removes the complainant's edits on its Wikipedia page, publishing the complainant's full name on the *Wikipedia Freelancer.com: Revision History* page, e.g. 'removing vandalism by [complainant's full name]', 'more vandalism by [complainant's first name]', 'defacement again by [complainant's full name]', 'vandalism by [complainant's first name]'<sup>120</sup>
- on 13 August 2012, Freelancer refers to 'defacement by vandal for "freelancer.com" article' on the *Wikipedia Matt Barrie: Revision history* page. The complainant claims that he is identifiable by this reference
- on 14 August 2012 Freelancer publishes the following on the *Wikipedia Talk: Freelancer.com: Revision history* page: 'the poster has been vandalising the page which has now been protected'. The complainant claims that he is identifiable by this reference<sup>121</sup>
- on 14 August 2012, Freelancer refers to 'page being defaced by the same person defacing Freelancer.com' on the *Wikipedia Talk: Matt Barrie* page. The complainant claims he is identifiable by this reference<sup>122</sup>

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<sup>119</sup> Initial complaint submission to the OAIC, 8 July 2013, 6; complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 37 and exhibit 13.

<sup>120</sup> Initial complaint submission to the OAIC, 8 July 2013, 5; complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 40-42.

<sup>121</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 41.

<sup>122</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 41-42.

- around 16 August 2012, Freelancer notifies one of the complainant's clients that the complainant's account has been suspended
- on 15 October 2012, Freelancer responds to comments posted by the complainant on a third party blog site, naming the complainant and his pseudonyms, describing his comments as racist and disclosing that complainant's account was closed<sup>123</sup>
- on or around 16 November 2012, Freelancer improperly provides the complainant's personal information to its legal representatives in Poland
- on 19-20 December 2012, Freelancer removes edits to its Wikipedia page, disclosing on the *Wikipedia Freelancer.com: Revision history* page that it is 'removing vandalism', 'removing vandalism edit' and 'removing persistent vandal of this page – see the history'. The complainant claims that he is identifiable by these references<sup>124</sup>
- on 7 January 2013, Freelancer publishes on its *Wikipedia Talk: Freelancer.com: Revision history* page 'removing defamatory comments by vandal'. The complainant claims that he is identifiable by this reference<sup>125</sup>
- on 14 January 2013, Freelancer posts a comment about the complainant naming him on the BlackHatWorld SEO forum, in response to a comment made by the complainant. The complainant claims that he is identifiable by this reference<sup>126</sup>
- on 19 January 2013, Freelancer comments on its *Wikipedia Talk: Freelancer.com: Difference between revisions* page that the Freelancer Wikipedia page is being 'consistently vandalised by one individual...' and names the complainant's blog site and his names and various pseudonyms<sup>127</sup>
- on that same day, Freelancer comments on its *Wikipedia Talk: Freelancer.com: Difference between revisions* page that the page is continually being vandalised by an individual in Poland. The complainant claims he is identifiable by this reference<sup>128</sup>
- on 21 January 2013 Freelancer allegedly posts a comment on the BlackHatWorld SEO forum identifying the complainant by his poster name and stating that the complainant 'gets the honorary title of Chief

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<sup>123</sup> Initial complaint submission to the OAIC, 8 July 2013, attachment 2(d), page 15-16 of 18.

<sup>124</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 56.

<sup>125</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 57.

<sup>126</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 59.

<sup>127</sup> Initial complaint submission to the OAIC, 8 July 2013, attachment 2(d).

<sup>128</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 58.

*Wikipedia Editor for [Freelancer's] page'*.<sup>129</sup> The complainant claims that he is identifiable by this reference.

127. In relation to the alleged improper online disclosures, Freelancer submits that its conduct was permitted under NPP 2.1(a). It contends that the complainant should have reasonably expected his personal information to be disclosed in circumstances where the complainant elected to make adverse public comments about Freelancer.<sup>130</sup>

128. Freelancer contends that the Freelancer Privacy Policy as it existed at the relevant times, specifically states that:

from time to time, Freelancer.com may use customer information for new, innovative and unanticipated uses not previously disclosed or described in our privacy notice.<sup>131</sup>

129. It also claims that there are terms in the User Agreement which lead to a reasonable expectation of online disclosure. The following provisions may arguably provide support for an argument of reasonable expectation.

#### **10.6 General restrictions**

....

- Users will not engage in personal attacks, negative or other unfair criticism or other forms of discourteous and unprofessional online conduct or practices.

#### **12. REGISTRATION AND PROCESSING OF YOUR PERSONAL DATA**

Your personal information will be processed by Freelancer.com in order to fulfil the agreement with You, perform delivery of products, etc. ..<sup>132</sup>

130. I understand that Freelancer is claiming that the complainant should be aware of such terms and conditions and the disclosure is therefore a disclosure permitted under NPP 2.1(a) of the Privacy Act.<sup>133</sup>

131. I note that there was an update made to the User Agreement on 13 August 2012, which included a clause on identity authentication<sup>134</sup>, but no relevant

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<sup>129</sup> Initial complaint submission to the OAIC, 8 July 2013, attachment 2g; complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 59.

<sup>130</sup> Freelancer letter to the OAIC, 3 February 2014, 2; Freelancer email to the OAIC, 26 May 2014.

<sup>131</sup> TheFreelancer email to the OAIC, 26 May 2014, 2.

<sup>132</sup> Freelancer, *User Agreement for Freelancer.com* (8 August 2012)

<<http://web.archive.org/web/20120808234054/http://www.freelancer.com/page.php?p=info/terms>

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<sup>133</sup> Freelancer letter to the OAIC, 3 February 2014.

changes were made to the User Agreement or Privacy Policy which affect my consideration of Freelancer's alleged improper disclosures of personal information between 13 August 2012 (the date of the first alleged improper disclosure) and 21 January 2013 (the date of the final alleged improper disclosure).

132. Freelancer also contends that its disclosure of the complainant's personal information took place on websites which already included sufficient information to make the complainant reasonably identifiable to a third party.<sup>135</sup> It argues that the information it published online was 'limited to [complainant's name] and other publicly available information which was neither confidential nor sensitive'.<sup>136</sup>

133. It is Freelancer's view that:

In disclosing certain non-confidential and non-sensitive information about [the complainant], Freelancer's conduct did not go beyond the reasonable expectations [of the complainant].<sup>137</sup>

134. Freelancer refutes the allegation that on or around 16 August 2012 it disclosed the complainant's personal information to his clients.<sup>138</sup> I consider this contention at paragraphs [189] to [196].

135. In relation to the allegation that it improperly disclosed the complainant's personal information to its legal representatives in Poland, Freelancer argues that the disclosure was permissible in accordance with NPP 2.1(f). I consider this contention below at paragraphs [216] to [232].

136. I will deal with each of the alleged improper disclosures in turn.

### ***13 August 2012 alleged disclosure to complainant's blog site***

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<sup>134</sup> Freelancer, *User Agreement for Freelancer.com* (16 August 2012) cl 7.8  
<<http://web.archive.org/web/201208160208244/http://www.freelancer.com/page.php?p=info/terms>>.

<sup>135</sup> Freelancer letter to the OAIC, 3 February 2014, 2; Freelancer email to the OAIC, 18 June 2014.

<sup>136</sup> Freelancer email to the OAIC, 26 May 2014, 2.

<sup>137</sup> Freelancer email to the OAIC, 26 May 2014, 2.

<sup>138</sup> Freelancer letter to the OAIC, 17 December 2014, 3.

137. The complainant advises that on 12 [sic] August 2012, he woke to find the spam filter on his personal blog had intercepted the following comment by Freelancer:

Hello there,

...

We do not usually respond to individual issues published publicly, but in this case [complainant's name aka complainant's pseudonym] has taken it upon himself to post a number of inaccurate and erratic articles around the Internet, including the referenced links in this post....

[Complainant's name] had a number of fake accounts on our site, which were closed due to fake names and fraudulent activity. In addition, he appears to have a number of grievances which are racist in nature, which can be seen from the link he provided above on the [name of blog] website he has created [blog web address]...

138. According to the complainant, Freelancer's purported aim was to disseminate this information on his blog site to its reader audience for the purpose of 'outing' the complainant. I accept that this email was intended to be posted on the complainant's blog, and, but for the blog's spam filter, would have been publicly posted on the blog site. However I need to consider the situation as it occurred, not what may have been meant to occur.

139. The question is whether the captured online message can be characterised as a disclosure by Freelancer and one permitted by NPP 2.1 of the Privacy Act.

140. The term 'disclose' is not defined in the Privacy Act. Whether there is a disclosure of personal information for the purposes of NPP 2.1 will depend on whether the organisation makes that information accessible to others outside that organisation, and releases from its effective control the subsequent handling of the information.<sup>139</sup>

141. On the meaning of 'disclosure', the NPP Guidelines note that:

In general terms an organisation discloses personal information when it releases information to others outside the organisation. It does not include giving individuals information about themselves (this is 'access' ....).<sup>140</sup>

142. In this case, Freelancer posted personal information about the complainant that was only accessible to the complainant himself. The apparent *intended*

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<sup>139</sup> *Pratt Consolidated Holdings Pty Ltd and Commissioner of Taxation* [2011] AATA 907, [108] – [119].

<sup>140</sup> Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles* (September 2001), 23.

disclosure of the applicant's personal information to other readers of the applicant's blog site did not transpire (i.e. the information was not made accessible to others apart from the individual who the information was about).

143. Consequently I find that there was no disclosure of the complainant's personal information. Freelancer has not breached NPP 2.1 in this instance.

***13-14 August 2012 alleged improper disclosures on the Wikipedia Freelancer.com: Revision history page***

144. The complainant submitted that on 13 August 2012, subsequent to him receiving the email from Freelancer requesting that he remove his posts, Freelancer published his first name and surname on the *Wikipedia Freelancer.com: Revision history* page. The relevant section of the Wikipedia web page is replicated below:

*Freelancer:* Removing vandalism by [complainant's first and last name]

*Complainant:* That was funny. One kills a valuable edition and says he is removing the vandalism...

*Freelancer:* More vandalism by [complainant's first name]

*Complainant:* New privacy policy of Freelancer.com?

*Freelancer:* Defacement again by [complainant's first and last name]

*Complainant:* Freelancer.com staff publishing my personal data without my consent again.

*Freelancer:* Vandalism by [complainant's first name]

*Complainant:* Shall I add information about this invasion of privacy? Freelancer.com disclosed my personal data.

*Freelancer:* Then stop the childish screwing around with this page.

145. The complainant did not dispute that he had edited Freelancer's Wikipedia page on numerous occasions, claiming that frequently he was simply restoring third party editions deleted by Freelancer.<sup>141</sup> The complainant contends, and I accept, that it appeared to be Freelancer's practice to monitor the Wikipedia page of Freelancer.com and remove from that web page all negative criticism about the Freelancer.com website.

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<sup>141</sup> The complainant states that as at 13 August 2012, he had made approximately 10 edits to Freelancer's Wikipedia page: complainant's submission to the Oaic, *Complete Submission*, 1 December 2014, 39-40.

146. Freelancer does not dispute that it disclosed the complainant's personal information online on several occasions, including on its *Wikipedia Freelancer.com: Revision history* page. It claims that its online disclosures of the complainant's information are commensurate with the terms of the Freelancer User Agreement which is accepted by users on registration, and provides that Freelancer may use personal information for the delivery of Freelancer services.<sup>142</sup>
147. The complainant submits that there is no related connection between the purpose for which his personal information had been collected by Freelancer and the online disclosures. He submits that the disclosures did not fall within his reasonable expectations of information that Freelancer would usually disclose for the purposes of providing Freelancer services.<sup>143</sup>
148. Freelancer contends that the collection of users' personal information such as name is for the primary purpose of providing Freelancer services to its subscribers and users. It claims that responding to the complainant's public postings is for the related secondary purpose of defending Freelancer's business operations and/or reputation in accordance with the terms and conditions of the User Agreement.<sup>144</sup>
149. I accept that the primary purpose of Freelancer's collection of users' personal information is to enable Freelancer to deliver those services to which users have subscribed. I am also of the view that taking action to defend its business and reputation does not fall within the primary purpose of collection, and is for a secondary purpose.
150. In respect of working out what is a related secondary purpose, the NPP Guidelines provide that:
- to be related, the secondary purpose must be something that arises in the context of the primary purpose.<sup>145</sup>
151. Taking into account the various provisions within the Freelancer User Agreement which are aimed at maintaining the integrity of the Freelancer

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<sup>142</sup> Freelancer letter to the OAIC, 3 February 2014, 2.

<sup>143</sup> Complainant's submission to the OAIC, *Comments on Respondent's Testimonies to OAIC*, 1 December 2014, 7-8.

<sup>144</sup> Freelancer letter to the OAIC, 3 February 2014, 2.

<sup>145</sup> Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles* (September 2001), 35.

site<sup>146</sup>, I am of the view that taking action to defend its reputation against criticism arises in the context of the primary purpose (that is, Freelancer's delivery of services to subscribed users), and I accept is for the related secondary purpose of meeting claims against it.

152. However I am not persuaded that the complainant would reasonably expect incidental online disclosure of his personal information to general internet users (i.e. general forum and blog site visitors) in this process.

153. Freelancer claims that it is 'reasonable to conclude' that the complainant would reasonably expect Freelancer to respond publicly to the complainant's online comments about Freelancer.<sup>147</sup> Freelancer appears to base its conclusion of reasonable expectation on the terms of the Privacy Policy and User Agreement discussed at paragraphs [128] and [129], and the notion that the personal information it disclosed online was already publicly available.

154. The complainant on the other hand claims there is nothing in either the Privacy Policy or the User Agreement which raises an expectation that an individual's personal information will be publicly disclosed online. The complainant also contends that Wikipedia's own *Harassment Policy*, which has rules against posting another editor's personal information (and did so at the relevant times), raises an expectation that personal information will not be posted on Wikipedia.<sup>148</sup>

155. Additionally, the complainant contends that he used pseudonyms when setting up his online blog and participating in online forums. He argues that because of the measures he employed to disguise his real identity, he had a reasonable expectation of privacy.

156. In support of this, I am referred to the message he posted on Freelancer's Facebook page:

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<sup>146</sup> Freelancer, *User Agreement for Freelancer.com* (8 August 2012). See for example *User Content*, cl 9; *Prohibited use of Site content*, cl 10.5, *General restrictions*, cl 10.6  
<<http://web.archive.org/web/20120816020824/http://www.freelancer.com/page.php?p=info/terms>>.

<sup>147</sup> Freelancer letter to the OAIC, 3 February 2014, 2.

<sup>148</sup> Complainant's submission, *Complete Submission*, 1 December 2014, 41. Also Wikipedia The Free Encyclopedia, *Harassment, Posting of Personal Information* (9 August 2011)  
<<https://web.archive.org/web/20110809192124/http://en.wikipedia.org/wiki/Wikipedia:Harassment>>

sincerely

[full name and first name aliases]

[As I don't like publishing my personal info, I am here as [pseudonym] – just like to protect my privacy, in fact I don't like Facebook]

157. He also contends that for approximately two years prior to his public postings about Freelancer, Freelancer had been responding to similar public criticisms from other 'forum posters'.<sup>149</sup> The complainant points out that during this period Freelancer generally addressed a forum poster by their posted name. The complainant claims that this added to his expectation that Freelancer would address him using his poster name (which in the case of the complainant was a pseudonym) rather than his real name.

158. In this instance, I accept the complainant's argument. There is no information before me to suggest that the complainant should have reasonably expected his personal information to be publicly disclosed online. I explain the reasons for my conclusion as follows.

#### *Generally available publication*

159. Freelancer is of the view that as the complainant's information was neither confidential nor sensitive, Freelancer's subsequent publication of the complainant's personal information was not, or should not have been, beyond the reasonable expectations of the complainant (or any reasonable person).<sup>150</sup>

160. Freelancer also claims that on several occasions prior to his postings the complainant had corresponded with it, signing with his real name.<sup>151</sup> It argues therefore that the complainant's name and Freelancer's inclusion of it on the *Wikipedia Freelancer.com: Revision history* page is not capable of amounting to an interference with the complainant's privacy because his name was publicly available information and therefore subsequently disclosing it online should have been within the reasonable expectations of the complainant.

161. It is true to say that the complainant's name is neither confidential nor sensitive and as a result, in the circumstances described here, not subject to the higher standard of information handling that normally applies to sensitive

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<sup>149</sup> Complainant's submission, *Comments on Respondent's Testimonies to OAIC*, 1 December 2014, 4.

<sup>150</sup> Freelancer email to the OAIC, 26 May 2014, 2.

<sup>151</sup> Freelancer letter to the OAIC, 3 February 2014, 1.

information or information received in confidence. Nonetheless the complainant's name falls within the definition of 'personal information' under the Privacy Act and Freelancer remains obliged to deal with it accordingly.

162. It appears that Freelancer uses its Facebook page as a vehicle through which complaints to Freelancer may be made and addressed. Apart from its contentions that the complainant's online comments including his personal information constitute publicly available information, it has not provided any information to demonstrate why the complainant should reasonably expect that his personal information would be published online by Freelancer in other online forums for the purpose of contesting criticism against it.
163. There is no definition for 'publicly available' in the Privacy Act, though the OAIC has provided guidance to organisations about how the Privacy Act applies to personal information that is publicly available.<sup>152</sup>
164. Notably the Privacy Act applies to personal information that is publicly available, where the information is collected for inclusion in a record or a generally available publication<sup>153</sup>, or held in a record. Publicly available information falls within the definition of personal information in section 6 of the Privacy Act<sup>154</sup>, and so organisations which collect, use or disclose publicly available personal information must still consider the NPPs when handling this type of information.
165. In this regard Freelancer submits its conduct was permitted under NPP 2.1(a), claiming that 'any reasonable individual would expect Freelancer to use their personal information where they elect to publish inaccurate and defamatory commentary on widely access[ible] public websites'.<sup>155</sup> I am of the view that the complainant would not reasonably expect such disclosure of his personal information whether or not it had been made available by the complainant in other online forums or blog sites.

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<sup>152</sup> Office of the Privacy Commissioner, Information Sheet (Private Sector) - 17, *Privacy and Personal Information that is Publicly Available* (February 2003) < <http://www.oaic.gov.au/privacy/privacy-resources/privacy-fact-sheets/other/information-sheet-private-sector-17-2003-privacy-and-personal-information-that-is-publicly-available>>.

<sup>153</sup> A 'generally available publication' means 'a magazine, book, newspaper or other publication (however published) that is or will be generally available to members of the public, *Privacy Act 1988* (Cth), s 6.

<sup>154</sup> Office of the Privacy Commissioner, Information Sheet (Private Sector) - 17, *Privacy and Personal Information that is Publicly Available* (February 2003) < <http://www.oaic.gov.au/privacy/privacy-resources/privacy-fact-sheets/other/information-sheet-private-sector-17-2003-privacy-and-personal-information-that-is-publicly-available>>.

<sup>155</sup> Freelancer email to the OAIC, 26 May 2014, 1-2.

166. The complainant admits to using his full real name when he posted a complaint on Freelancer's Facebook page, though he notes that his own Facebook account was set up using a pseudonym. The complainant claims that as at the time of the August 2012 disclosures he had never disclosed his full real name on his personal blog site or when he posted material that was critical of Freelancer on other blog sites or forums.<sup>156</sup>
167. I have no information available to me that disputes this contention.<sup>157</sup> Even so, whether or not the complainant's identity had been made available by the complainant in other forums or online blog sites, I am of the view that the complainant would not, in any case, reasonably expect this type of disclosure of his personal information by Freelancer.

*Reasonable expectation based on terms of Privacy Policy and User Agreement*

168. I have examined the policies and notices were in place at the time of the alleged improper disclosures in August 2012.<sup>158</sup>
169. While the terms of Freelancer's User Agreement may declare that public negative criticism is in contravention of the Agreement,<sup>159</sup> there is no information before me to suggest that individuals who may contravene the terms or conditions of the User Agreement are aware or made aware that their personal information may consequently be publicly disclosed online.
170. I accept users are notified by Freelancer through its User Agreement that the carrying out of activities which contravene the Agreement and its associated policies may lead to the closure or suspension of a user account and/or termination of Freelancer services. However the online public disclosure of a

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<sup>156</sup> The complainant set up his profile on the Elance freelancer site using his real name, but this was subsequent to the August 2012 disclosures. Moreover there is no visible connection between this profile and the complainant's public criticisms of Freelancer using his pseudonyms.

<sup>157</sup> There is information available that indicates in late 2012 the complainant disclosed his real name on his blog site when criticising Freelancer and its alleged interferences with this privacy. Nonetheless this posting was subsequent to the August 2012 disclosures.

<sup>158</sup> Freelancer, *Our Privacy Policy* (4 August 2012)

<<http://web.archive.org/web/20120804144119/http://www.freelancer.com/page.php?p=info/privacy>>; Freelancer, *User Agreement for Freelancer.com* (8 August 2012)

<<http://web.archive.org/web/20120808234054/http://www.freelancer.com/page.php?p=info/terms>>; Freelancer, *User Agreement for Freelancer.com* (16 August 2012)

<<http://web.archive.org/web/20120816020824/http://www.freelancer.com/page.php?p=info/terms>>.

<sup>159</sup> Freelancer, *General Restrictions, User Agreement for Freelancer.com* (8 August 2012), cl 10.6

<<http://web.archive.org/web/20120808234054/http://www.freelancer.com/page.php?p=info/terms>>.

user's personal information, in my view, is entirely disparate from the penalties for contravention identified in Freelancer policies at the relevant times.

171. I also disagree with the view that the public online disclosure of an individual's personal information in response to criticism about Freelancer can be considered a 'new, innovative or unanticipated use' of customer information as provided for by Freelancer's Privacy Policy.

172. Rather, Freelancer's Privacy Policy at the relevant times, and under the heading 'Our Privacy Policy,' states that:

Freelancer has created this privacy statement in order to demonstrate our firm commitment to privacy.<sup>160</sup>

173. This, in my view, creates an expectation that personal information will be handled by Freelancer in a manner consistent with its obligations under the Privacy Act. The public online disclosure of an individual's personal information is inconsistent with such an expectation.

174. The complainant has also referred me to Wikipedia's *Harassment Policy* with respect to the posting of personal information. The Wikipedia harassment policy at the relevant time stated the following:

Posting another editor's personal information is harassment, unless that person voluntarily had posted his or her own information, or links to such information, on Wikipedia. Personal information includes legal name, date of birth, identification numbers, home or workplace address, job title and work organisation, telephone number, email address, or other contact information, *whether any such information is accurate or not*. Posting such information about another editor is an unjustifiable and uninvited invasion of privacy and may place that editor at risk of harm outside of their activities on Wikipedia. This applies to the personal information of both editors and non-editors.<sup>161</sup>

175. I am of the view that this statement creates an expectation amongst editors and non-editors of the site that personal information will not be posted. Freelancer's subsequent posting of the complainant's personal information

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<sup>160</sup> Freelancer, *Our Privacy Policy* (4 August 2012)

<<http://web.archive.org/web/20120804144119/http://www.freelancer.com/page.php?p=info/privacy>>.

<sup>161</sup> Wikipedia, *Harassment, Posting of Personal Information* (12 August 2012)

<<https://web.archive.org/web/20120812164912/http://en.wikipedia.org/wiki/Wikipedia:Harassment>>.

(his name, pseudonyms and blog site) on its *Wikipedia Freelancer.com: Revision history* page is inconsistent with such an expectation.

176. I therefore find that Freelancer failed to comply with NPP 2.1 when it disclosed the complainant's personal information on its *Wikipedia Freelancer.com: Revision history* page on 13-14 August 2012. Although the disclosure was for a secondary related purpose, it was in no way within the complainant's reasonable expectations. I do not consider any other exception in NPP 2 permitted disclosure of the complainant's personal information.

***13 August 2012 alleged improper disclosure on Wikipedia Matt Barrie: Revision history page***

177. The complainant claims that on 13 August 2012 Freelancer was clearly referring to him when it deleted information the complainant had posted on the Wikipedia Matt Barrie page and posted the following statement on the *Matt Barrie: Revision history page*:

defacement by vandal for "freelancer.com" article

***14 August 2012 alleged improper disclosures on the Wikipedia Talk Freelancer.com: Revision history page and the Wikipedia Talk: Matt Barrie page***<sup>162</sup>

178. The complainant claims that on 14 August 2012 Freelancer was clearly referring to him when Freelancer posted the following comment on the *Wikipedia Talk: Freelancer.com: Revision history page* and the *Wikipedia Talk: Matt Barrie* page respectively:

Wikipedia is not a place to vent customer support issues. The poster has been vandalising the page which has now been protected.

*and*

This page is being defaced by the same person defacing Freelancer.com.

179. I will consider all three allegations of improper disclosure collectively.

180. I note that Freelancer has limited its submissions to dealing with those allegations of improper disclosure where the complainant was identified by name. It provides no view or comment on the alleged disclosures by

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<sup>162</sup> Wikipedia describes a talk page as 'a page which editors can use to discuss improvements to an article or another Wikipedia page'. Wikipedia. *Help: Using talk pages* (6 September 2015) [https://en.wikipedia.org/wiki/Help:Using\\_talk\\_pages](https://en.wikipedia.org/wiki/Help:Using_talk_pages)Wikipedia.

reference on 13 or 14 August 2015, or any subsequent alleged disclosures by reference.

181. The issue to firstly consider here is whether the comments made by Freelancer on the relevant Wikipedia pages constitute disclosures of personal information. The complainant's identity is not, on the face of it, apparent by any of the following phrases: '*defacement by vandal*' or '*the poster has been vandalising*' or '*by the same person defacing Freelancer.com*'. I must therefore consider whether or not the identity of the applicant can reasonably be ascertained from those comments to fall within the meaning of personal information under the Privacy Act.
182. This issue was considered by the Deputy President Coghlan of the Administrative Appeals Tribunal in *La Trobe University (General)*.<sup>163</sup> DP Coghlan held that it was possible to have resort to the use of extraneous material when determining whether a person's identity could reasonably be ascertained from the opinion or information. I adopted this approach in *Grubb v Telstra*.<sup>164</sup>
183. In that matter I noted that when considering the issue of reasonableness about whether an individual's identity could be ascertained from the information, Coghlan DP had examined both:
- (a) the complexity of the inquiries that would need to be undertaken to ascertain the individual's identity from the information allowing for the use of any extraneous material, and
  - (b) the degree of certainty with which possible connections could be made between the individual's identity and the information.<sup>165</sup>
184. The process of ascertainment would in this case require the cross matching of the phrases, '*the poster has been vandalising*', '*defacement by vandal*' or '*by the same person defacing Freelancer.com*' between the relevant Wikipedia web pages, and cross matching this information with other information on relevant forums and blog sites, then making possible connections which would identify the complainant with certainty.
185. In my view even if the information could all be put together it is doubtful the complainant could be identified with any degree of certainty.

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<sup>163</sup> *WL v La Trobe University (General)*[2005] VCAT 2592.

<sup>164</sup> *Ben Grubb v Telstra Corporation Limited* [2015] AICmr 35.

<sup>165</sup> *Ben Grubb v Telstra Corporation Limited* [2015] AICmr 35, [42] (footnotes omitted).

186. The complainant himself notes that it is Freelancer's practice to delete from its Wikipedia page all revisions or edits which criticise or are unfavourable to Freelancer. The complainant describes how Freelancer representatives remove unfavourable comments and label them 'vandalism' or 'defamation'.<sup>166</sup> I note that the *Freelancer.com: Revision history* page at the relevant time makes references to 'vandalism', 'undoing vandalism' and 'vandalising the entry again' apart from those the complainant claims are ascribed to him.<sup>167</sup>
187. It is apparent that there are some revisions to the Freelancer.com Wikipedia page undertaken by persons other than the complainant, of which Freelancer is aware and has decided also need to be undone or removed and labelled as 'vandalism'. Amongst his submissions to the OAIC the complainant also makes reference to a number of blogs and other web sites which are critical of Freelancer and its operations. I am therefore not satisfied that Freelancer's comments on the Wikipedia Freelancer.com and Matt Barrie talk pages (i.e. 'the poster has been vandalising', 'defacement by vandal' or 'by the same person defacing Freelancer.com') can lead with certainty to the identification of the complainant. I am of the view that this is beyond what is reasonable.
188. Accordingly I find that Freelancer did not disclose the complainant's personal information when it posted the above comments online. Its conduct was therefore not in breach of NPP 2.1 and it did not interfere with the complainant's privacy in these instances.

***Freelancer's alleged disclosure to the complainant's clientele***

189. The complainant claims that on 16 August 2012 or thereabouts, Freelancer notified one of his clients that his account had been suspended, and in doing so, improperly disclosed his personal information to a third party. He also claims that Freelancer disclosed his personal information to other clients and states that '*this communication resulted in virtually all my customers ceasing contact with me*'.<sup>168</sup>
190. The complainant makes this claim based on the following sequence of events.

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<sup>166</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 39-40.

<sup>168</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 44.

191. He describes how subsequent to notification by Freelancer of the deletion of his user account on 15 August 2012, he sent the following notice to his customers:

Since I have engaged in consumer actions against Freelancer.com's bad practices (please refer to ....), they have deleted my account. For any assistance, please respond to this mail directly.<sup>169</sup>

192. The complainant notes that he subsequently received the following response from one of his clients:

I also received notification from Freelancer.com about your account suspension...<sup>170</sup>

193. The complainant contends that this is evidence that Freelancer had improperly disclosed his personal information including his name and his customer record to his clients.

194. In response, Freelancer advises that:

...no information is provided to other users if an employer or freelancer they are dealing with is suspended or deleted. They are not notified of the suspension or deletion – the suspended or deleted user just appears to not login from the other users' perspective. No personal information is provided to them.<sup>171</sup>

195. While it is evident that the complainant's client was somehow notified of the suspension of the complainant's account, it is not clear that this was brought about by a disclosure by Freelancer. It may be simply, as contended by Freelancer, that the online screen showed the complainant as 'no login', and the complainant's client inferred from this and the complainant's own notice to him, that the complainant's account had been suspended.

196. As I have no further information before me on this issue, I am unable to be satisfied that there has been any improper disclosure by Freelancer to the complainant's client or to his clientele more generally. I therefore find that there has been no contravention of NPP 2.1 by Freelancer in this instance and it has not interfered with the complainant's privacy in this regard.

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<sup>169</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 43.

<sup>170</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 43 and exhibit 14.

<sup>171</sup> Freelancer letter to the OAIC, 17 December 2014, 3.

***Alleged improper disclosure by Freelancer on a third party blog site, 15 October 2012***

197. The complainant claims that on 15 October 2012 he responded as follows to a statement made by a Freelancer representative on a third party blog site that had also been critical of Freelancer's processes:

You are a bunch of liars and use the security as excuse to withhold the funds!<sup>172</sup>

198. The complainant advises that he also provided a reference to his article on his personal blog site. He claims that Freelancer subsequently responded to his comments, naming the complainant and his pseudonyms, describing his comments as racist and disclosing that complainant's account was closed:

Yes [complainant's pseudonym] aka [pseudonym] aka [pseudonym] aka [real name – first name and surname initial]. We are well aware of your grievances and your racist comments on your [blog site name] blog. You are well aware of the reasons your particular account was closed.<sup>173</sup>

199. As previously noted Freelancer does not dispute it disclosed the complainant's personal information online in this instance, but contends that its conduct was permitted under NPP 2.1(a). It argues that its online disclosure of the complainant's personal information was for the related secondary purpose of managing the complainant's use of Freelancer services in accordance with the User Agreement to which he was a party, and managing his relationship with both Freelancer itself and other Freelancer users.<sup>174</sup> Freelancer also contends that:

any reasonably individual would expect Freelancer to use his or her personal information where they elect to publish inaccurate and defamatory commentary on widely access[ible] public websites.<sup>175</sup>

200. I am not persuaded by Freelancer's argument here. Firstly I note that it is not clear whether at the time of this disclosure subsequent to the closing of the complainant's user account, the complainant was even an existing Freelancer customer and still a party to the relevant terms of the Freelancer User Agreement.

201. Moreover as I noted at paragraph [151], I accept that disclosure of the complainant's personal information to combat criticism directed at Freelancer

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<sup>172</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 45-46.

<sup>173</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 46.

<sup>174</sup> Freelancer email to the OAIC, 26 May 2014, 1.

<sup>175</sup> Freelancer email to the OAIC, 26 May 2014, 2.

may be for a related secondary purpose in the context of Freelancer service delivery. The complainant might reasonably expect that information of this kind might be disclosed in certain instances (for example, advising third party legal representatives) to assist Freelancer in meeting the claims against it.

202. I am of the view however that the complainant would not reasonably expect Freelancer to disclose his personal information to general internet users as part of managing his use of Freelancer services or managing the relationship between the complainant and Freelancer, and its other users.
203. Freelancer contends that the complainant should have reasonably expected his information to be disclosed online because he elected to publish unfavourable comments about Freelancer on public websites.
204. However Freelancer has not provided any information to demonstrate why Freelancer customers who are party to the Freelancer User Agreement should reasonably expect the personal information they provide to Freelancer to be published on public websites in response to criticisms directed at Freelancer. There is no information provided in the relevant Privacy Policy<sup>176</sup> or User Agreement<sup>177</sup> which informs customers about this type of disclosure of their personal information or creates an expectation that personal information will be handled in this way. I have discussed this in detail at paragraphs [168] to [173].
205. Accordingly I find Freelancer cannot rely on NPP 2.1(a) to justify its disclosure of the complainant's personal information on a third party blog site and Freelancer has breached NPP 2.1 in this instance.

***Alleged improper disclosure by Freelancer to its legal representatives***

206. The complainant contends that on 16 November 2012 he received an email from Freelancer's legal representatives in Poland. He alleges that the email constituted a 'cease and desist order'.<sup>178</sup> The complainant advises that he subsequently received a hard copy of the 'cease and desist' notice by mail on or around 21 November 2012 and 1-2 days thereafter he was contacted by phone by Freelancer's lawyers apparently in an attempt to secure the

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<sup>176</sup> Freelancer, *Our Privacy Policy* (5 October 2012)

<<http://web.archive.org/web/20121005175239/http://www.freelancer.com/page.php?p=info/privacy>>.

<sup>177</sup> Freelancer, *User Agreement for Freelancer.com* (14 October 2012)

<<http://web.archive.org/web/20121014084732/http://www.freelancer.com/page.php?p=info/terms>>.

<sup>178</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 52.

complainant's agreement to cease publishing further articles about Freelancer.<sup>179</sup>

207. Aside from his claims of harassment and coercion by Freelancer lawyers, allegations which cannot be dealt with under the Privacy Act, the complainant alleges that his personal information was improperly disclosed to Freelancer's legal representatives.<sup>180</sup> He appears to be contending that:
- (a) his personal information was disclosed not for the related secondary purpose of contesting the complainant's claims against Freelancer, but rather disclosed for the unrelated improper purpose of harassment and blackmail in breach of NPP 2.1, and
  - (b) Freelancer improperly transferred his information overseas (in breach of NPP 9).

*Unrelated secondary purpose*

208. The complainant considers that the engagement of Polish legal representatives to advise on his potentially criminal activity was effectively a 'cover-up' of the real purpose of engagement, that was, to blackmail the complainant and coerce him to desist in publishing articles critical of Freelancer.<sup>181</sup>
209. As I have said complaints about harassment, coercion or blackmail lie outside the jurisdiction of the Privacy Act, and I am unable to consider these issues further.
210. Freelancer contends that it engaged legal advisors to seek advice on 'possible unlawful activity' by the complainant. It claims that this disclosure is permitted under the NPP 2.1(f) exception to the prohibition on disclosure because Freelancer had reason to believe that unlawful activity had been engaged in. It contends that it disclosed the complainant's personal information to its legal representatives as a necessary part of its investigation into the matter.<sup>182</sup>
211. I discuss the application of NPP 2.1(f) to the circumstances of this case at paragraphs [216] to [232] below.

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<sup>179</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 53-55.

<sup>180</sup> Complainant's submission to the OAIC, *Comments on December the 2<sup>nd</sup> 2014 Respondent's Submission*, 2 December 2014, 1-3; complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 50-55.

<sup>181</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 53.

<sup>182</sup> Freelancer letter to the OAIC, 3 February 2014, 2; Freelancer letter to the OAIC, 2 December 2014, 1.

212. I accept that Freelancer engaged legal advisors in Poland to perform services on its behalf as part of a risk management process. Whether for the purpose of advising on the possibility of criminal activity on the part of the complainant or for the purpose of preparing a defence to meet the claims made against it by the complainant, I accept that the disclosure of the complainant's information to Freelancer lawyers was made for the related secondary purpose of managing the risk associated with the complainant's activities concerning Freelancer.

213. It appears the disclosure of the complainant's personal information by Freelancer to its legal counsel was in the course of communications between a client and its lawyers. In such circumstances the lawyers in Poland may I think be properly regarded as the agents of Freelancer because the information in question (the complainant's personal information) is related to the very matter in which they were instructed.

214. I am also of the view that the complainant would reasonably expect disclosure of this kind. The complainant himself noted that it was appropriate for Freelancer to engage legal counsel. While attempting to explain how an entity 'feeling defamed by anonymous internet postings should behave' the complainant concedes:

As the entity is supplied with relevant information, it is permitted to commence legal actions...<sup>183</sup>

215. I therefore find that there is no breach of NPP 2.1 in this instance. Freelancer's disclosure of the complainant's personal information was made pursuant to seeking counsel and guidance from its legal representatives, and was a disclosure that the complainant would (and evidently did) reasonably expect Freelancer to make for that purpose. Though it did not do so in its submissions, Freelancer was entitled to rely on the NPP 2.1(a) exception to the general prohibition on disclosure under the Privacy Act in this instance.

*NPP 2.1(f)*

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<sup>183</sup> Complainant's submission to the OAIC, *Comments on December 2<sup>nd</sup> 2014 Respondent's Submission*, 2 December 2014, 2.

216. For completion, I will now turn to Freelancer's contention that its disclosure to its legal representatives in Poland was permissible under the NPP 2.1(f) exception.
217. NPP 2.1(f) permits an organisation to disclose personal information if it has reason to suspect that unlawful activity has been, is being or may be engaged in, and it uses or discloses the personal information, relevantly here, as a necessary part of its investigation of the matter.
218. The expression 'unlawful activity' is not defined in the Privacy Act. The Macquarie Dictionary defines 'unlawful' as:
- not lawful; contrary to law; illegal; not sanctioned by law.<sup>184</sup>
219. In a criminal context, 'unlawful activity' has been defined as:
- 'an act or omission constituting an offence against domestic or foreign law.'<sup>185</sup>
220. Accordingly activities that may constitute breaches of the Freelancer User Agreement, such as creating multiple user accounts or negatively criticising Freelancer publicly online are not, without more, necessarily unlawful.
221. Freelancer contends however that the complainant's activities may be fraud related, and indicates that such activities may fall under the auspices of 'unlawful activity'. Freelancer submits that 'the complainant had his account on [the Freelancer] website suspended and then closed because there was fraud related activity associated with the account'.<sup>186</sup> It contends that fraudulent activity included 'the attempted buying of deliberately fraudulent PayPal accounts'.<sup>187</sup>
222. By the complainant's own admission, he held dummy accounts in contravention of the Freelancer User Agreement, which at the relevant time provided that:

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<sup>184</sup> Macquarie Dictionary, *Macquarie Dictionary Online*, 6<sup>th</sup> edition (October 2013) <[https://www.macquariedictionary.com.au/features/word/search/?word=unlawful&search\\_word\\_type=Dictionary](https://www.macquariedictionary.com.au/features/word/search/?word=unlawful&search_word_type=Dictionary)>.

<sup>185</sup> *Proceeds of Crime Act 1987* (Cth), s 4.

<sup>186</sup> Freelancer letter to the OAIC, 2 December 2014, 2.

<sup>187</sup> Freelancer letter to the OAIC, 17 December 2014, 3.

Users will not create multiple user Accounts to avoid fees, suspension or bad ratings on the Site.<sup>188</sup>

223. The complainant admits to using one of his dummy accounts to attempt to bid for another PayPal account.

...I posted auction concerning my alleged will to buy PayPal account. I would like to note such auctions were common on Respondent's Portal which made me reasonably believe this auction constituted neither offense, nor crime.<sup>189</sup>

224. It is not clear whether the complainant's actions were illicit. I have no information before me which substantiates the allegations of fraudulent activity. Nonetheless I am of the view that the ostensible activities associated with the complainant's account had the *potential* to be unlawful. I am therefore of the view that in this instance Freelancer had sufficient reason to suspect unlawful activity.

225. For the disclosure to be permitted under NPP 2.1(f), it must also be a *necessary* part of an organisation's investigation into the unlawful activity.

226. I have discussed the meaning of the word 'necessary' in the context of NPP 1.1 at paragraph [34]. With no contrary express or implied meaning to its construction, there is no reason to adopt a different meaning of the word for the purposes of NPP 2.1(f). As noted at paragraph [34] being necessary for the doing of something (in this instance, investigating potentially unlawful activity) does not have to mean 'indispensable' or 'essential', but rather something that is reasonably required and ancillary to its achievement.<sup>190</sup>

227. The NPP Guidelines note that this NPP 2.1(f) exception to the general rule of non-disclosure:

acknowledges that one of an organisation's legitimate functions is to investigate and report on suspected unlawful activity. Ordinarily but not in all cases, the suspected unlawful activity would relate to the organisation's operations.<sup>191</sup>

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<sup>188</sup> Freelancer, General Restrictions, *User Agreement for Freelancer.com*, cl 10.6 (28 January 2011) <<http://web.archive.org/web/20110128015058/http://www.freelancer.com/page.php?p=info/terms>

I note that later versions of the Agreement amended this provision to avoid confusion with its interpretation: 'Users will not create multiple user Accounts for any reason, or under any circumstance'.

<sup>189</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 32.

<sup>190</sup> See also *Ng v Department of Education (General)* [2005] VCAT 1054, [77]-[79], referring to Allen J in *State Drug Crime Commission of NSW v Chapman* (1987) 12 NSWLR 447, [452], citing Pollock CB in *Attorney-General v Walker* (1849) 3 EX 342, 255-6.

<sup>191</sup> Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles* (September 2001), 41.

228. In this present matter Freelancer advises that:

...some of the activity is potentially criminal in Poland. We expect to continue to take counsel from our legal representatives in Poland in this matter.<sup>192</sup>

229. Freelancer contends that it disclosed the complainant's information to its legal representatives in Poland as a necessary part of its investigation of the complainant's user activities.

230. The enquiries Freelancer made of its legal representatives and any subsequent disclosures of information made to give effect to Freelancer's inquiries were undertaken in exercise of its legitimate function to investigate and report on suspected unlawful activity. I accept that suspicious user activity is a fundamental concern for Freelancer, and I am of the view that Freelancer was at liberty to seek assistance from lawyers local to the area to provide the requisite expert advice on potential criminality arising from the complainant's online activities.

231. The complainant does not in fact dispute this. In providing an explanation of how an entity feeling defamed should behave, he states:

If the alleged defamer is located overseas, the procedure should [may] be exercised by authorities in the country in question. Local legal representation may be necessary.<sup>193</sup>

232. I am therefore of the view that Freelancer's disclosure of the complainant's information to its Polish lawyers was a requisite part of its investigation into the complainant's activities, which Freelancer had reason to suspect were unlawful. I am consequently satisfied this disclosure was permitted under NPP 2.1(f).

#### *Transfer of personal information overseas*

233. The complainant also contends that Freelancer improperly transferred his personal information overseas. He submits that:

personal information cannot be casually spread all around the world just because the respondent ... is commencing or considering commenc[ing] legal actions against [someone].<sup>194</sup>

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<sup>192</sup> Freelancer letter to the OAIC, 2 December 2014, 1.

<sup>193</sup> Complainant's submission to the OAIC, *Comments on December 2<sup>nd</sup> 2014 Respondent's Submission*, 2 December 2014, 2.

234. Under the pre-March 2014 privacy regime an organisation was subject to the requirements of National Privacy Principle 9 if it transferred personal information to a person in a foreign country.<sup>195</sup> NPP 9 limited the circumstances in which an organisation can transfer personal information it holds outside Australia, though it did not prevent transfers of personal information outside Australia by an organisation to another part of the same organisation, or to the individual concerned.<sup>196</sup> This privacy principle was based on the constraints on international transfers of personal information set out in the European Union Data Protection Directive 95/46EC (**the EU Directive**).<sup>197</sup>

235. The limited circumstances in which personal information may be transferred to a recipient in a foreign country are listed in NPP 9(a) to (f). Of relevance to this matter are the circumstances listed at NPP 9(a) and (b) which permit the transfer of personal information about an individual to someone (other than the organisation or the individual) who is in a foreign country if:

- (a) the organisation reasonably believes that the recipient of the information is subject to a law ... which effectively upholds principles of fair handling of the information that are substantially similar to the National Privacy Principles; or
- (b) the individual consents to the transfer; ...

#### *Transfer of personal information*

236. It is unclear whether or not disclosure to Freelancer's legal representatives has involved a 'transfer of information to someone who is in a foreign country'.

237. The word 'transfer' is not defined in the Privacy Act. The *Macquarie Dictionary* suggests the term is distinguishable from the word 'disclosure' (found in NPP 2) with 'transfer' meaning 'to convey or remove from one place or person to another'.<sup>198</sup> The word 'disclose' on the other hand is defined as

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<sup>194</sup> Complainant's submission to the OAIC, *Comments on December 2<sup>nd</sup> 2014 Respondent's Submission*, 2 December 2014, 3.

<sup>195</sup> *Privacy Act 1988 (Cth)*, Schedule 3, cl 2.1, n 3.

<sup>196</sup> Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles* (September 2001), 58.

<sup>197</sup> Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles* (September 2001), 58.

<sup>198</sup> *Macquarie Dictionary, Macquarie Dictionary Online*, 6<sup>th</sup> ed (October 2013) <[https://www.macquariedictionary.com.au/features/word/search/?word=transfer&search\\_word\\_type=Dictionary](https://www.macquariedictionary.com.au/features/word/search/?word=transfer&search_word_type=Dictionary)>.

‘the act of disclosing; exposure; revelation, while ‘disclosing’ means ‘to cause to appear; allow to be seen; make known; reveal’.<sup>199</sup>

238. By contrast, the Explanatory Memorandum to the *Privacy Amendment (Private Sector) Bill 2000* uses the two terms interchangeably providing that:

This [NPP 9] principle prevents an organisation from disclosing personal information to a recipient located in a foreign country that is not subject to a comparable information privacy scheme (except with the individual’s consent).<sup>200</sup>

239. The issue of whether ‘transfer’ means something more than disclosure in the context of the Privacy Act has not been judicially considered as far as I am aware. However it is not something I need to deliberate further for the purposes of this determination.

240. Although not argued in submissions, NPP 9(a) may have permitted the transfer of the complainant’s personal information from Freelancer to its legal representatives in Poland.

241. It is arguable that in the event there was a transborder data flow, Freelancer reasonably believed that its legal representatives in Poland were subject to privacy laws which upheld principles for the fair handling of personal information substantially similar to the National Privacy Principles.

242. Though the term ‘substantially similar’ is not defined in the Privacy Act, the *Guidelines to the National Privacy Principles* suggest that a foreign country’s information scheme needs to be comparable to the NPPs in the Privacy Act. In similar wording to the Explanatory Memorandum to the *Privacy Amendment (Private Sector) Bill 2000*, the Guidelines provide that:

In its simplest terms, NPP 9 prevents an organisation from disclosing personal information to someone in a foreign country that is not subject to a comparable information scheme, except...<sup>201</sup>

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<sup>199</sup> Macquarie Dictionary, *Macquarie Dictionary Online*, 6<sup>th</sup> ed (October 2013) <[https://www.macquariedictionary.com.au/features/word/search/?word=disclosure&search\\_word\\_type=Dictionary](https://www.macquariedictionary.com.au/features/word/search/?word=disclosure&search_word_type=Dictionary)>.

<sup>200</sup> Explanatory Memorandum, *Privacy Amendment (Private Sector) Bill 2000*.

<sup>201</sup> Office of the Federal Privacy Commissioner, *Guidelines to the National Privacy Principles* (September 2001), 58.

243. The notion of ‘substantially similar’ meaning ‘comparable to’ is consistent with the *Macquarie Dictionary* definition which defines ‘similar’ as “having likeness or resemblance, especially in a general way”; and ‘substantially’ as relevantly here “of ample or considerable amount, quantity, size”, or “relating to the substance, matter, or material of a thing”.<sup>202</sup>

#### *Reasonable belief*

244. The terms ‘reasonably believes’ and ‘reasonable belief’ are likewise not defined in the Privacy Act. Nonetheless I have previously adopted the meaning of a belief that is of ‘sound judgment’ or ‘agreeable to reason’.<sup>203</sup>

245. Though Freelancer has not provided information in respect of any deliberations which may have occurred prior to its engagement of Polish legal representatives (and from which a reasonable belief may be established), the following particulars are noteworthy.

246. Poland implemented the EU Directive into its *Protection of Personal Data Act* of 29 August 1997 (**PDPA**) by the Amendment of Certain Laws in Connection with Membership of the Republic of Poland in the European Union of 2007.<sup>204</sup>

247. As a Member State, Poland’s personal data<sup>205</sup> laws must accordingly be consistent with the principles contained within the EU Directive. As well as setting limits on the transfer of personal data to third countries, the EU Directive set limits on the processing of personal data<sup>206</sup>, including its collection, use and storage, as well as setting down principles with respect to

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<sup>202</sup> Macquarie Dictionary, *Macquarie Dictionary Online*, 6<sup>th</sup> ed. (October 2013) <<https://www.macquariedictionary.com.au>>.

<sup>203</sup> ‘EZ’ and ‘EY’ [2015] AICmr 23, [31].

<sup>204</sup> (Journal of laws of 2007, No 176, item 1238): DLA Piper, *DLA Piper’s Data Protection Laws of the World* (March 2012) <<http://www.edrm.net/resources/data-privacy-protection/data-protection-laws/poland>>.

<sup>205</sup> For the purpose of the EU Directive, ‘personal data’ means any information relating to an identified or identifiable natural person; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more facts specific to his physical, physiological, mental, economic, cultural or social identity: [Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data](#). (OJ L 281, 23.11.1995, p.31), article 2(a).

<sup>206</sup> For the purpose of the EU Directive, ‘processing of personal data’ means any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction: [Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data](#), (OJ L 281, 23.11.1995, p.31), article 2(b).

notice of collection of data, data quality, data security and an individual's right to access their personal data. These principles are notably consistent with the NPPs in the Privacy Act.

248. Freelancer is in its own words is 'a freelancing, outsourcing and crowdsourcing marketplace connecting over 15,348,679 employers and freelancers globally from over 247 countries, regions and territories'.<sup>207</sup> Taking into account Freelancer's international presence and its handling of personal information of individuals world-wide, I think it is reasonable to suppose that the particulars outlined at paragraphs [246] and [247] were within the general knowledge of Freelancer at the relevant time.

249. Moreover, the online privacy notice provided by the legal firm representing Freelancer stated (at the relevant time) that it:

will process personal data entered in forms or gathered through [its] website in a manner .... compliant with the requirements of Polish law, specifically the Personal Data Protection Act dated 29 August 1997 ...and the Act on Performance of Electronic Services dated 18 July 2002...

250. Arguably the reference to the law firm's compliance with the PDPA is sufficient for Freelancer to form the reasonable belief that its lawyers in Poland are subject to privacy laws which uphold principles for the handling of personal information comparable to the National Privacy Principles.

251. In the event that NPP 9 does apply to the circumstances of this matter, I am satisfied that at the relevant time it was open to Freelancer to form a reasonable belief that its overseas legal representatives were subject to privacy laws that were substantially similar to the NPPs in the Privacy Act. Accordingly I am of the view that if in fact Freelancer's disclosure of the complainant's personal information to its Polish lawyers constituted a transfer of personal information to a recipient located in a foreign country, paragraph NPP 9(a) permitted the transfer, and the disclosure does not constitute an interference with the complainant's privacy.

252. I am also of the view that NPP 9(b) may have permitted the transfer. It is arguable I think that the complainant impliedly consented to it.

253. Users of the Freelancer site cannot register and use the Freelancer site without agreeing to their personal information being handled in the manner

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<sup>207</sup> Freelancer, *About Us*, <<https://www.freelancer.com.au/about>>.

described in clause 12 of Freelancer’s User Agreement, which at the relevant time provided:

Your personal information may also be transferred between Freelancer.com and any associated entity within the Freelancer.com organisation. At such transfer, personal data may be transferred outside the EEC-area. By entering into this agreement, You hereby approve such processing of your personal information as set forth above...<sup>208</sup>

254. Arguably the complainant’s consent to a transfer of his personal information out of the EEC-area and from Freelancer to any of its associated entities (not defined) may be implied from the complainant’s actions in registering and using the Freelancer site.

255. However for reasons already outlined, I do not need to draw any firm conclusion on this issue.

***20 December 2012 and 7 January 2013 alleged improper disclosures on the Wikipedia Freelancer.com: Revision history and Talk: Freelancer.com: Revision history pages***

256. The complainant claims that on 20 December 2012 Freelancer again disclosed his personal information when it posted the following comment on the *Wikipedia Freelancer.com: Revision history* page:

Removing persistent vandal of this page – see the history. The comments are untrue and defamatory.<sup>209</sup>

257. The complainant also alleges that on 7 January 2013 the following comment posted on the *Wikipedia Talk: Freelancer.com: Revision history* page was a reference to him and an improper disclosure under the Privacy Act:

Removing defamatory comments by vandal.<sup>210</sup>

258. It is the complainant’s contention that he can be identified when these comments are matched against other postings on the Wikipedia Freelancer.com web pages.

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<sup>208</sup> Freelancer, *User Agreement for Freelancer.com* (8 November 2012) <<http://web.archive.org/web/20121108121216/http://www.freelancer.com/page.php?p=info/terms>

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<sup>209</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 56.

<sup>210</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 57.

259. I believe it is difficult to make such a finding. As I discussed at paragraphs [181]-[188] I must consider whether or not the identity of the complainant can reasonably be ascertained from the information to determine whether Freelancer has interfered with the complainant's privacy in these types of instances.
260. The process of ascertainment of the complainant's identity from the comment, '*persistent vandal of this page-see the history*' on the *Freelancer.com: Revision history* page would require the matching of this information with information on other relevant Wikipedia pages and then the making of any possible connections which would identify the complainant with certainty. A similar process would need to be carried out in regard to the comment '*removing defamatory comments by vandal*' posted by Freelancer on 7 January 2013.
261. The complainant claims that:
- Not only [had] the recent editions not been made by me.... [but] the '*persistent vandal*' and '*see the history*' parts [of Freelancer's posting on the revision history page] indicate [Freelancer] had been referring to me as I was the only person the identity of whom had been outed.<sup>211</sup>
- ....
- Since [Freelancer] had been labelling me as 'vandal' before there are no doubts the respondent referred to me personally.<sup>212</sup>
262. Notwithstanding the complainant's contention here, I have previously found that there have been some revisions to the Wikipedia Freelancer.com web pages undertaken by persons other than the complainant, of which Freelancer is aware and has decided in relation to those revisions to undo, remove or label as 'vandalism'.
263. The 20 December 2012 and 7 January 2013 comments by Freelancer on its Wikipedia revision history page (i.e. '*removing persistent vandal of this page – see the history*') and on its talk page ('*removing defamatory comments by vandal*') do not specifically name the individual and could be attributed to other editors or contributors beside the complainant. In my view the complainant could not be identified with any degree of certainty and therefore his identity not reasonably be ascertained from this information.

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<sup>211</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 56.

<sup>212</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 57.

264. Accordingly I find that Freelancer did not disclose the complainant's personal information when it posted the above comments online. Its conduct was therefore not in breach of NPP 2.1 and it did not interfere with the complainant's privacy in these instances.

**14 January 2013 and 21 January 2013 alleged improper disclosures on the BlackHatWorld SEO forum**

265. The complainant alleges that on 14 January 2013, a Freelancer representative using the poster name 'mattbarrie' made a 'defamatory reference' about him on the Black Hat World SEO forum.<sup>213</sup>

266. In response to a forum user's question about complaints made by a disgruntled Freelancer user (not the complainant), the following comment was made on 14 January 2013 under the poster name 'mattbarrie':

He runs [blog site X]. We think he keeps it up there because it gets traffic to his website and is being encouraged by an individual with a vendetta against us that had their account closed because they were trying to buy paypal accounts on the site under fake names.<sup>214</sup>

267. The complainant claims that this 14 January 2013 post reveals his personal information and is a breach of NPP 2.1 of the Privacy Act.

268. On 19 January 2013 the complainant in response posted the following remarks on the Black Hat World SEO forum:

Haven't had any answer before, so let me ask you "mattbarrie" (he is not that polite; not a long time ago referred to people criticizing his company as "crazies" and "peanut gallery") again:

- (a) Why is your company outing customer[s] data on purpose? (including: name, surname, nicknames and country)
- (b) Why has your company been using user history to blackmail your customer[s]?
- (c) Why is your company engaging in slander? (the paypal part, the conspiracy part, the traffic part...)

...

The list of such questions is quite long...<sup>215</sup>

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<sup>213</sup> The Black Hat World's home page describes its site as 'the home of internet marketing': Black Hat World, Home <http://www.blackhatworld.com/>.

<sup>214</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 58-60, referencing relevant web page.

<sup>215</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 59.

269. On 21 January 2013, the following response was posted under the poster name 'mattbarrie':

[Complainant's poster name] you get the honorary title of Chief Wikipedia Editor for our page.

270. The complainant claims that this is another example of Freelancer's interference with his privacy. Although not explicitly stated the complainant contends that his poster name together with the reference to the Wikipedia revisions provide the public with an ability to refer to additional information sufficient for him to be identified.

271. Freelancer has not responded to these allegations in its submissions, and it remains unclear who posted these comments.

272. Notwithstanding this, I find on review of the thread in which the above posts appear there is support to suggest that the author is someone with working knowledge of Freelancer and the ongoing issues between that organisation and the complainant. There is in my view a strong likelihood that the 'poster' was acting in their capacity as a Freelancer representative.

273. That said, I nonetheless find that the complainant's identity cannot reasonably be ascertained from the content of the information contained in the posts.

274. The 14 January 2013 post (*'an individual with a vendetta against us that had their account closed because they were trying to buy paypal accounts on the site under fake names'*) does not specifically name the complainant and could be attributed to other individuals beside the complainant for reasons previously outlined. I am not aware of any information posted on any site prior to or at the time of the alleged improper disclosure (other than that provided directly by Freelancer to the complainant's own email account), which may potentially link the identity of the complainant to the buying of paypal accounts. In my view therefore the complainant's identity could not reasonably be ascertained from this information.

275. I am also of the view that the 21 January 2013 'mattbarrie' post (*'[Complainant's poster name] you get the honorary title of Chief Wikipedia Editor for our page'*) likewise does not provide for the identity of the complainant to reasonably be ascertained.

276. Firstly the use of the complainant's pseudonym in 'mattbarrie's' response is not in issue. Although the complainant is identified by one of his pseudonyms,

this is the poster name used by the complainant in this forum. The complainant would therefore reasonably expect the poster 'mattbarrie' to respond using the complainant's poster name. The complainant confirms such an expectation in his submissions to the OAIC:

At the time I made my posting the [Freelancer-] had about 2 years of experience addressing publicly available voice of disapproval against it. Whenever [Freelancer] addressed a person (e.g. forum poster), it used [the] poster's taken name.

In such circumstances I have been reasonably expecting that [Freelancer] will address me as [poster name].<sup>216</sup>

277. Moreover the identity of the complainant is not ascertainable to anyone accessing the Black Hat World SEO Forum without the use of additional information linking the complainant's true identity to the complainant's poster first name pseudonym.

278. It is difficult to see how a member of the public could have, at the time of the alleged improper disclosures, ascertained with the degree of certainty required to reach the threshold of 'to reasonably be ascertained', the identity of the complainant from the information on the Black Hat World SEO forum together with the information on relevant Wikipedia web pages and other blog sites and forums.

279. It is apparent that there are other contributors and editors (or 'vandals') of the Wikipedia Freelancer.com site, who may possibly meet the definition of 'chief Wikipedia editor'. As pointed out by the complainant:

At the time I made my posting [Freelancer] had about 2 years of experience addressing publicly available voice of disapproval against it.<sup>217</sup>

280. At best the disclosure may enable people to speculate that individuals complaining about Freelancer in other forums and or on blog sites may have been involved in the editing of the Freelancer.com Wikipedia page.

281. I also refer to the complainant's own submission which argues that because of the alleged 'millions of clients all around the world', it is 'virtually impossible

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<sup>216</sup> Complainant's submission to the OAIC, *Comments on Respondent's Testimonies to OAIC*, 1 December 2014, 4.

<sup>217</sup> Complainant's submission to the OAIC, *Comments on Respondent's Testimonies to OAIC*, 1 December 2014, 4.

to make a guess and be able to successfully establish an identity of a blogger by his first name'.<sup>218</sup>

282. I am of the view that it was not possible at the time of the alleged improper disclosure to *definitively* link the disclosed information to the identification of the complainant. I am accordingly not satisfied that Freelancer's disclosure of the information in issue on the Black Hat World SEO forum enables the complainant's identity to reasonably be ascertained. In these circumstances, I therefore find that Freelancer has not breached NPP 2.1 in this instance.

***19 January 2013 alleged improper disclosures on Wikipedia's Talk: Freelancer.com: Difference between revisions page***

283. The complainant claims that on 19 January 2013 Freelancer interfered with his privacy again by naming his blog site on the *Wikipedia Talk: Freelancer.com: Difference between revisions* pages:

The page is being consistently vandalised by one known individual using proxies who is promoting the vandalism of such on his website [http name of blog site].<sup>219</sup>

284. He contends that later that same day there was a further publication of his personal information, with Freelancer contributing to its Wikipedia talk page naming the complainant and his pseudonyms:

The bulk of the edits are coming from one individual who is using proxies to do the edits and heavily promoting vandalism of the page as a way to get back at the company on his blog (see post of Aug 2 on [name of website]). He is also the author of some of the links added or the primary poster (under a variety of pseudonyms including real name/first name pseudonym/first name pseudonym).<sup>220</sup>

285. The complainant argues that a further interference with his privacy occurred on the same day 19 October 2013 on Freelancer's Wikipedia talk page:

This page is continually vandalised by an individual in Poland.<sup>221</sup>

286. I will deal with each of these allegations in turn.

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<sup>218</sup> Complainant's submission to the OAIC, *Comments on Respondent's Submission*, 1 December 2014, 7.

<sup>219</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 58.

<sup>220</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 58.

<sup>221</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 58.

*19 January 2013 - first disclosure*

287. The complainant claims that by naming his blog site on Freelancer's Wikipedia talk page, Freelancer has improperly disclosed his personal information and interfered with his privacy.

288. At issue is whether the information which names the complainant's blog site and discusses the complainant's alleged vandalism of Freelancer's Wikipedia page is a disclosure of the complainant's personal information for the purposes of the Privacy Act. In naming the blog site Freelancer did not identify the applicant. Nor was the identity of the complainant otherwise apparent or ascertainable from existing information contained on the Freelancer Wikipedia talk page. However it is the contention of the complainant that his identity could reasonably be ascertained through the cross-matching of this information with information held on other sites.

289. The complainant's blog site was set up with the use of a pseudonym. The complainant's evidence is that he went to some effort to avoid being identified because he had concerns about his privacy.<sup>222</sup>

290. Nonetheless the complainant's identity is accessible by undertaking a Google search. An internet search using the blog site's name and search terms '*freelancer*' and '*wikipedia*', brings up an article on the complainant's blog site predating the alleged improper disclosure of 19 January 2013. The 13 November 2012 blog article includes a screenshot of the Freelancer Wikipedia revision history page highlighting the complainant's name.

291. It is evident that the information contained in the screenshot discloses the complainant's identity, and links the complainant's identity to his blog site. The complainant's identity is able to reasonably be ascertained from his blog site, which accordingly constitutes the complainant's personal information for the purposes of the Privacy Act.

292. As this came through a simple Google search, it could in a sense also be described as publicly available information, which still falls within the meaning of 'personal information' and under the auspices of the Privacy Act. I have discussed an organisation's obligations in relation to 'publicly available' information at paragraphs [163] to [164].

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<sup>222</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 58.

293. Freelancer has in its submissions to the OAIC reiterated that as part of its customer service practices it monitors publicly available information on social media sites for references to Freelancer (both negative and positive).<sup>223</sup> I accept that information about the complainant was being accessed by Freelancer for this purpose, most particularly information on his blog site and on other sites where the complainant posted adversarial comments about Freelancer and its operations.
294. Freelancer contends that in posting articles about Freelancer on his blog the complainant should reasonably expect Freelancer to use or disclose the information it garners from his and other sites for the related secondary purpose of responding publicly to the complainant's public criticisms of Freelancer.
295. For reasons outlined, I take the view that the complainant would not have reasonably expected his information to be published online for such a purpose. I conclude that the disclosure was not authorised by NPP 2.1(a) and note that no other NPP 2.1 exceptions are applicable in this circumstance. I find that Freelancer has therefore interfered with the complainant's privacy in this instance.

*19 January 2013 - second disclosure*

296. Freelancer accepts that it made an online disclosure about the complainant on 19 January 2013, where it names him, his pseudonyms and blog site, but contends that its conduct was permitted under NPP 2.1(a). Freelancer argues that because the complainant:

publicly provide[d] links in a variety of places across the internet signing himself using pseudonyms and/or his first and/or last real name

he would have reasonably expected Freelancer's use of his personal information for the related secondary purpose of responding to the complainant's negative public commentary about Freelancer.<sup>224</sup>

297. Freelancer also contends that:

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<sup>223</sup> Freelancer letter to the OAIC, 3 February 2014, 1.

<sup>224</sup> Freelancer letter to the OAIC, 2 December 2014, 1.

disclosure of the complainant's personal information took place on websites which already included sufficient personal information to make the complainant reasonably identifiable to a third party visitor, in the case of Wikipedia, in a location only likely to be accessed by a small number of people who would generally hold a particular interest in the nature and accuracy of the amendments made.<sup>225</sup>

298. I shall firstly deal briefly with this latter contention. The number of persons to whom a disclosure is made, on its own, bears no relevance to whether or not there has been a breach of NPP 2.1 and an interference with an individual's privacy. How broadly an individual's personal information is disclosed may however influence the amount of damages awarded.<sup>226</sup> I discuss my findings on damages at paragraphs [319] to [372] below.
299. Moreover while the complainant's use of his own personal information online may have some impact on his expectations about how Freelancer handles his information, it does not exempt Freelancer from the application of the Privacy Act.<sup>227</sup>
300. As I noted at paragraphs [150] to [152] I accept that disclosure of the complainant's personal information to combat criticism directed at Freelancer may be for a related secondary purpose in the context of Freelancer service delivery. The complainant could reasonably expect that his personal information might be disclosed in certain instances for the purpose of Freelancer responding to the claims against it made by the complainant.
301. I am of the view however that the complainant would not reasonably expect Freelancer to disclose his personal information online to the general public for that related secondary purpose.
302. I have reviewed Freelancer's Privacy Policy and User Agreement at the relevant times, noting that there are no significant amendments to the provisions dealing with the disclosure of personal information since the time of Freelancer's improper disclosure in August 2012.<sup>228</sup> Freelancer has not provided any information to demonstrate why Freelancer customers should

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<sup>225</sup> Freelancer letter to the OAIC, 2 December 2014, 2.

<sup>226</sup> *CP and Department of Defence* [2014] AICmr 88, [52].

<sup>227</sup> See paragraphs [164]-[168].

<sup>228</sup> Freelancer, *User Agreement for Freelancer.com* (16 January 2013)

<<http://web.archive.org/web/20130116061706/http://www.freelancer.com/page.php?p=info/terms>

> Freelancer, *Our Privacy Policy* (16 January 2013)

<<http://web.archive.org/web/20130116033709/http://www.freelancer.com/page.php?p=info/privacy>>..

reasonably expect the personal information they provide to Freelancer or the personal information which Freelancer collects from publicly available sites will be published by Freelancer on public websites in response to criticisms directed at Freelancer. I have discussed this in detail at paragraphs [168] to [176].

303. Accordingly I find Freelancer cannot rely on NPP 2.1(a) to justify its disclosure of the complainant's personal information on Freelancer's Wikipedia talk page and Freelancer has breached NPP 2.1 in relation to the second alleged disclosure of the complainant's personal information on 19 January 2013.

*19 January 2013 -third disclosure*

304. I am however not satisfied that the complainant's contention of an interference with his privacy in respect of an alleged third disclosure by Freelancer on its Wikipedia talk page (*'this page is continually vandalised by an individual in Poland'*) on 19 January 2013 is made out. I am of the view that this statement does not constitute the complainant's personal information within the meaning of section 6 of the Privacy Act because it is not 'information or an opinion ... about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.'
305. The information contained in the statement on the *Wikipedia Talk: Freelancer.com: Difference between revisions* page does not name the complainant. Further information would be required to link this information to the complainant's identity. To constitute the personal information of the complainant, that additional information must inevitably lead to the identity of the complainant.<sup>229</sup>
306. It is apparent that there are numerous contributors, editors and/or 'vandals' of the Freelancer.com Wikipedia site, some who may possibly live in Poland.
307. There is no information before me to suggest that the complainant's place of residence was unique to him thereby making his identity able to reasonably be ascertained.
308. In this instance I am satisfied that it is not possible to definitively link any publicly available information about the complainant to the comment about

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<sup>229</sup> *WL v La Trobe University* [2005] VCAT 2592 (followed by the Appeal Panel in *WL v Randwick City Council* [2007] NSWADTAP 58. See also *QN & Ors v Commissioner of Fire Brigades* [2011] NSWADT 125, [27].

an individual living in Poland. At best disclosure may enable a person to speculate that one of a number of individuals complaining about Freelancer and named in forums and/or on blog sites live in Poland.

309. I therefore find the complainant's complaint in this instance is not a complaint about his personal information for the purposes of the Privacy Act and Freelancer has not breached NPP 2.1.

### **Retaining of data**

310. The complainant contends that Freelancer continued to store information concerning his user accounts well after those accounts were deleted.<sup>230</sup> He argues that at the times his accounts closed, information collected by Freelancer in relation to the closed accounts was no longer needed for any purpose and should have been destroyed. The complainant claims that the continued retention of that information was done so that Freelancer could subsequently use the account records for the purposes of extortion.<sup>231</sup>

311. Freelancer admits to holding the complainant's personal information in the same way it does other users' information. It advises that it holds users' personal information in order to assist in the detection of fraud by users, and to assist legal authorities investigating fraud or other illegal behaviour on the Freelancer site.<sup>232</sup>

312. At issue is whether Freelancer's holding of the complainant's personal information for an undefined period of time is consistent with its obligations in relation to NPP 4.2 to take reasonable steps to delete or permanently de-identify personal information if it is no longer needed for any purpose for which it may be used and disclosed under NPP 2.

313. I accept Freelancer's contentions here. Information concerning the complainant's accounts, his user account as well as his dummy accounts, continues to have utility as a risk assessment tool, and for the related secondary purpose of defending claims made against Freelancer. The information is therefore still needed for the primary purpose for which it was collected and for other permitted purposes under NPP 2.1.

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<sup>230</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 32.

<sup>231</sup> Complainant's submission to the OAIC, *Comments on December 2<sup>nd</sup> 2014 Respondent's Submission*, 2 December 2014, 6.

<sup>232</sup> Freelancer letter to the OAIC, 3 February 2014, 2.

314. Accordingly I find that in the circumstances of the complainant's matter Freelancer is not at this time obliged to destroy or de-identify the complainant's account information and is not in breach of NPP 4.2. Notwithstanding this, there will be a point in time when the complainant's information is no longer of use, and Freelancer will be obliged to destroy or de-identify it.
315. Freelancer should ensure that it does not entertain a practice of holding onto old customer information that is not being used or disclosed for any purpose under NPP 2. It should ensure it has systems or procedures in place to identify information the organisation no longer needs and a process for how the destruction or de-identification of the information will occur.
316. As to the complainant's contentions about motives of extortion by Freelancer, as previously noted such a claim falls outside the purview of the Privacy Act, and I have no jurisdiction to consider this issue further.

### **Third party complaint**

317. The complainant contends that on 18 March 2013, and then again on 2 June 2013, a third party individual sent him an email requesting advice about Freelancer which had allegedly threatened to report this individual to the authorities for something he apparently did not commit. This individual was also reportedly concerned about the security of his personal information as Freelancer had been in possession of scanned copies of his passport.<sup>233</sup> The complainant argues that the circumstances in which the third party individual finds himself is comparable to his own situation and supports the complainant's allegation that Freelancer is misusing the personal information it holds.
318. However the alleged conduct by Freelancer in this case does not concern the complainant's personal information, and I am not aware of the complainant acting as a representative or an agent of this individual.
319. Therefore the complainant cannot complain about this alleged conduct, and I am not in a position to consider this particular matter further. I accordingly dismiss this part of the complainant's complaint.

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<sup>233</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 63-64.

## Findings

320. The complaint is substantiated insofar as it alleges a breach by Freelancer of NPP 1.3. I find that Freelancer did not take reasonable steps to ensure that the complainant was aware of the purposes of collection of his IP address information.
321. I also find that Freelancer breached NPP 2.1 when is improperly disclosed the complainant's personal information:
- (a) on 13 August 2012 on *Wikipedia Freelancer.com: Revision history* page
  - (b) on 15 October 2012 on a third party's blogging site, and
  - (c) on 19 January 2013 on the *Wikipedia Talk: Freelancer.com: Difference between revisions* page.
322. The complaint in respect of all other matters is not substantiated and pursuant to s 52(1)(a) of the Privacy Act, I make a determination dismissing the complaint in respect of those matters.

## Finding on damages

323. 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'.
324. The complainant asserts that he has suffered financial loss and damage to his psychological well-being because of Freelancer's conduct. He seeks the following:
- (a) \$20,000 as financial compensation for the break down in business relations he alleges he has suffered because of the breaches

(b) \$50,000 as compensation and damages for the psychological damage he alleges he has suffered because of the conduct of Freelancer.<sup>234</sup>

325. The complainant argues that because of the apparent ‘malice and perseverance exercised’ by Freelancer in its abuse of his privacy and the ‘widespread character of that abuse’, aggravated and punitive damages should be awarded against Freelancer.<sup>235</sup>

326. He says that he does not feel an apology by Freelancer would be appropriate in these circumstances, as the respondent does not seem interested ‘in proper and honest reconciliation’. He contends that aggravated and punitive damages ‘are [therefore] the only meaningful remedies’.<sup>236</sup>

### ***The complainant’s case***

327. The complainant asserts that he was ‘severely shocked’ when he realised that Freelancer was collecting his IP address information.<sup>237</sup> He also claims that he was:

- ‘shocked’ when he discovered that Freelancer had published his personal information on its Wikipedia revision history page<sup>238</sup>
- ‘angry’, ‘confused’, ‘exhausted’ and ‘overwhelmed’ when he discovered that Freelancer had published his information on a third party blog site<sup>239</sup>
- ‘utterly confused’ and ‘severely disturbed’ by Freelancer’s behaviour.<sup>240</sup>

328. He stated that when he realised that Freelancer’s ‘employees [were] showing no restraint in sharing and publishing [his] personal data’, he started to ‘feel anxious about [his] personal well-being’ and ‘thoughts about [Freelancer’s] possible subsequent illegal actions started haunting [him]’.<sup>241</sup>

329. He says that ‘as a result of [Freelancer’s] malicious actions in contacting [his] customers to defame him, they ceased to communicate with [him]’.<sup>242</sup> The

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<sup>234</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 66-68.

<sup>235</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 58, 66-68.

<sup>236</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 68.

<sup>237</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 30.

<sup>238</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 40-41.

<sup>239</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 46-47.

<sup>240</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 18.

<sup>241</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 47.

<sup>242</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 67.

complainant contends that he has consequently lost the benefits of those business relations. He provides no further details with respect to his assertion of lost income or lost opportunity to generate income.

330. He asserts that Freelancer's 'prolonged period of privacy abuse associated with uncertainty (didn't know what [was] happening with [his] personal data and where it [could] be published next day) has resulted in a gradual impairment of [his] psychological well-being'.<sup>243</sup>

331. The complainant states that he has developed the following health issues and decline in his wellbeing as a result of Freelancer's conduct:

- sleep disturbances from anxiety
- abandonment of social life, social norms and contact with other people, including family
- mood swings
- memory problems.<sup>244</sup>

332. The complainant has provided his own evidence in the form of a statement dated 22 June 2014. His statement provides:

...For almost two years I have been suffering due to emotional distress caused by the privacy abuse as its character [has] resulted in feeling[s] of serious insecurity. The intensity and length of that suffering has been purposefully increased by Freelancer Ltd (malicious and recurring character of the abuse....). The suffering has resulted [in] harm to my personal and professional life.

...the fact my private data has been compromised by Freelancer Ltd. has negative[ly] impacted on my income [and] my everyday wellbeing and actions are of impaired quality.<sup>245</sup>

333. Aside from his own submission, the complainant relies on a statement from his mother, who is also a registered nurse. The statement dated 22 June 2014 states:

....I am aware of [his] dispute with Freelancer Ltd., including the abused privacy of him. I can confirm that during the recent two years my son's emotional wellbeing has been hit badly. He became nervous, disorganised and isolated from the family. Apart from that he became obsessed with the case against Freelancer Ltd. Very often he's been informing me [that he] feels threatened as Freelancer Ltd. had absolutely no respect for his privacy. Assessing the rationality (whether there are reasons to feel genuinely threatened) of his allegations is out of my powers as I do not know the details of his situation. However, I can

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<sup>243</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 60.

<sup>244</sup> OAIC email to Freelancer, 4 December 2014, 2.

<sup>245</sup> Complainant's statement to the OAIC, 22 June 2014.

confirm that my son behaves in a manner people under such emotional duress do and it is clearly related to Freelancer Ltd's misconduct.

As far as I am concerned, my son has developed some symptoms specific for depression and neurosis due to fact Freelancer Ltd. had no respect for his privacy.<sup>246</sup>

334. The complainant says that Freelancer should pay aggravated and punitive damages because of Freelancer's 'privacy abuses' were 'systematic and took place [over a] prolonged period of time'. He says that:

The Respondent seemed to take some wicked pleasure [in] abusing me and prolonging the state of my anxiety.<sup>247</sup>

### ***Freelancer's case***

335. Freelancer has stated that it has no specific information about the health issues allegedly suffered by the complainant as a result of Freelancer's alleged interference with his privacy. It considers that any emotional distress the complainant may now be suffering has stemmed from the termination of the complainant's Freelancer account rather than any perceived interference with the complainant's privacy.<sup>248</sup>

### **Conclusions**

336. The complainant has asserted that he has suffered both financial loss and injury to his emotional well-being because of Freelancer's conduct. As noted, the Privacy Act provides for 'any loss or damage suffered by the complainant' including 'injury to feelings' or 'humiliation'<sup>249</sup>, being variously described by the complainant in his submissions as 'shock', 'state of severe anxiety', 'severe stress', 'confusion', 'anger', 'impairment of psychological wellbeing' and 'deterioration of emotional state'.

337. The expression 'injury to feelings' is not defined in the Privacy Act, nor is the term 'humiliation'. The *Macquarie Dictionary* defines the relevant terms:

*'feelings'* as "(psychology) a state of mind, as happiness, sadness, anxiety, calm, etc., as opposed to thought or perception"

*'humiliate'* as "to lower the pride or self-respect of; cause a painful loss of dignity to; mortify"

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<sup>246</sup> Statement to the OAIC made by complainant's mother, 22 June 2014.

<sup>247</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 66.

<sup>248</sup> Freelancer letter to the OAIC, 17 December 2015, 3.

<sup>249</sup> *Privacy Act 1988* (Cth), s 52(1A).

*'humiliation'* as "the state or feeling of being humiliated; mortification"  
*'injury'* as "harm of any kind done or sustained".<sup>250</sup>

338. Australian authorities have recognised that the use of the expression 'injury to feelings' includes a situation where the individual suffers some impairment to or damage to their mental wellbeing. The Tribunal in *Coleman v Bentley* for example considered that an applicant whose 'psychological wellbeing' and enjoyment of life had been adversely impacted by the sexual harassment of the respondent had suffered 'hurt, humiliation and injury to feelings'.<sup>251</sup>
339. In the present matter, the complainant alleges psychological or emotional distress, which in my view, falls within the scope of the expression, 'injury to the complainant's feelings' provided at s 52(1A) of the Privacy Act.
340. Based on his own evidence and the evidence given by his mother I accept that the complainant has suffered some type of emotional distress.
341. The next step is to determine whether the complainant has suffered injury to his feelings because of Freelancer's conduct and if so whether an award of damages is warranted. I must also determine whether the complainant suffered financial loss because of Freelancer's conduct and if so whether an award of damages is warranted for that loss.

### ***Economic Loss***

342. The complainant has asserted that there is a direct link between Freelancer's privacy breaches, the subsequent decline of his online customer base and the 'deterioration in [his] professional life'.<sup>252</sup> Though he contends that Freelancer contacted his clients 'to defame him', as noted at paragraph [196], I am unable to be satisfied that there has been any improper disclosure by Freelancer in that respect.
343. I am also unable to be satisfied that any causal link can be established between Freelancer's behaviours which I found contravened the Privacy Act and the complainant's claim of a decline in his online clientele. While I accept that there may be some indirect association between these issues (linked to the deterioration in his emotional wellbeing), I cannot conclusively determine

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<sup>250</sup> Macquarie Dictionary, *Macquarie Dictionary Online*, 6<sup>th</sup> ed (October 2013)  
<<https://www.macquariedictionary.com.au>>.

<sup>251</sup> [2002] NSWADT 87, [39].

<sup>252</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 15.

that any decline in the complainant's online customer base is as a result of Freelancer's improper online disclosures of the complainant's personal information.

344. In any event, I have no evidence on which I could assess any loss of income that the complainant might have incurred as a result of any decline in his online customer base. I have no information about his income prior or subsequent to Freelancer's breaches or the percentage of his income associated with work he secured through the Freelancer site.

345. In the circumstances there is no basis for awarding compensation for the alleged economic loss.

### ***Non-economic loss***

346. I am however satisfied that a causal link can be established between the revelation to the complainant that Freelancer had been collecting his IP address information and disclosing his personal information online, and the deterioration in the complainant's psychological wellbeing. The complainant's own evidence and that of his mother supports this conclusion.

346. From the information provided by both the complainant and his mother, it is evident that Freelancer's conduct, which occurred over a five month period, significantly impacted on the complainant and contributed to a deterioration of his emotional health.

347. Whether the complainant's emotional distress was caused predominantly by Freelancer's improper conduct is difficult to assess. The complainant contends that Freelancer has caused significant distress:

... [as there was] no event not caused by the respondent that could have caused the deterioration [that] took place (e.g. drug abuse or, say, military service), I can reasonably assume [the] respondent's actions were [the] reason behind that deterioration.<sup>253</sup>

348. It may be that there were other stressors in the complainant's life that impacted on the state of the complainant's health and wellbeing. Some of the complainant's humiliation and distress appears to have been the result of Freelancer's information collection procedures that I have found did not contravene the Privacy Act.

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<sup>253</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 16.

349. Nonetheless I have considered and given weight to the statements of both the complainant and his mother. I am of the view that Freelancer's improper conduct (that is, the lack of notice about the collection of IP addresses and the numerous of unauthorised online disclosures of the complainant's personal information) contributed to the decline in the complainant's emotional wellbeing even if there may have been other contributory causes. The voluminous online communiqués that the complainant dispatched about his situation with Freelancer during and subsequent to its improper conduct clearly illustrate his escalating levels of distress, hurt and frustration.

350. It remains to be determined having regard to all the circumstances of the case what would constitute an appropriate amount of compensation. In determining the amount of the award I have for reasons of convenience and rationality treated the privacy breaches as a whole continuum, rather than subjecting each contravention to a specific damages assessment. Though the complainant made a number of claims which I have found are substantiated, they constitute parts of a single complaint lodged with the OAIC and do not require different considerations to be applied to each.

351. 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*:<sup>254</sup>

- (i) where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course
- (ii) awards should be restrained but not minimal
- (iii) in measuring compensation the principles of damages applied in tort law will assist although the ultimate guide is the words of the statute

and in particular

- (iv) compensation should be assessed having regard to the complainant's reaction and not the perceived reaction of the majority of the community or of a reasonable person in similar circumstances.<sup>255</sup>

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<sup>254</sup> *Rummery and Federal Privacy Commissioner and Anor* [2004] AATA 1221, [32]. 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* [1989] FCA 72.

352. My assessment of damages in this case must therefore take into account the impact of Freelancer's breaches declared by the complainant and contained in his statement and submissions.

353. In light of the complainant's lengthy submissions setting out the harm he feels he has suffered, I accept that the complainant's reaction to Freelancer's conduct is a heightened one, and as I detail below, was intensified with each ensuing privacy breach.

354. He describes his reaction following receipt of the 13 August 2012 Freelancer email, which requested that he shut down his posts or have action taken against him, and which he contends 'proves' that Freelancer gathered users' IP addresses:<sup>256</sup>

At the moment I [read] this mail for the first time I experienced a state [of] severe anxiety: my forehead became sweaty immediately, my hands started shaking, ... my intestines [started] literally turning and [my] neck (the throat) felt hugged-like.<sup>257</sup>

355. It is evident that the complainant has an intense sense of being singled out and as he puts it, being 'stalked and tracked down' by the respondent.<sup>258</sup> He submits:

After I launched my blog, the respondent tracked me down and commenced most malicious and systematic personal abuse against me. During that abuse the respondent used my customer record to put me in a false light and blackmail me. Moreover it has been publishing my personal data (such as name and surname) on various websites. All that took months and was happening in spite of my recurring protests.<sup>259</sup>

356. The statement made by the complainant's mother indicates that he has become 'nervous, disorganised, isolated from the family', and 'obsessed with the case against Freelancer'. According to the mother's statement, it is her professional opinion that her son has developed symptoms specific to depression and neurosis and Freelancer's misconduct is the cause.

357. There is no doubt that the improper online disclosures by Freelancer contained negative and hurtful opinions about the complainant and although

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<sup>255</sup> [2004] AATA 1221, [46].

<sup>256</sup> See paragraphs [110]-[111].

<sup>257</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 34.

<sup>258</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 28.

<sup>259</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 5.

Freelancer claims these publications did not receive wide currency, they were published online for general public viewing. In my opinion any person would to some degree have been distressed to see such adverse comments about them published online in this way.

358. To assist me in reaching a conclusion as to an appropriate sum for damages I have looked at the amounts for non-economic loss awarded in comparable privacy cases in both federal and state jurisdictions, as well as settlement amounts agreed upon in conciliated complaints of similar ilk. I note that they are generally in a range up to \$25,000 with a majority in the mid to lower end of that range.<sup>260</sup>

359. In *Rummery* the Tribunal awarded \$8000 for non-economic loss caused by the interference with Mr Rummery's privacy. It concluded:

53. In assessing the appropriate amount of compensation we have considered Mr Rummery's evidence as to his feelings when he learned of the details of the disclosures made by Mr Keady [head of department]. This was clearly a serious breach in Mr Rummery's eyes.

54. It is our opinion also that this was a serious breach. We have had regard to this in assessing the significance of Mr Rummery's evidence as to the injury to his feelings and humiliation. It assists us in assessing the depth of his feelings. It is quite inappropriate for a senior officer of a law department to seek to answer a complaint made under specific provision in Commonwealth legislation by a private telephone conversation not disclosed by the officer to the complainant, the substance of which answer is to concentrate on the character and conduct of the complainant apart from the subject matter of the complaint and not to concentrate on addressing the complaint and its content. This is playing the man and not the ball. It is as unfair in public administration as it is in sport.<sup>261</sup>

360. In *D' v Wentworthville Leagues Club*<sup>262</sup> I awarded \$7500 for non-economic loss caused by the unauthorised disclosure of the complainant's former gaming habits to their ex-partner. The complainant had felt humiliated, and suffered from anxiety and panic attacks after they became aware of the disclosure. In *'BO' v Aerocare Pty Ltd*<sup>263</sup> I awarded \$8500 after finding that AeroCare collected and disclosed the complainant's sensitive personal information in an airport departure lounge causing non-economic loss to the complainant, including injury to the complainant's feelings, humiliation and distress.

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<sup>260</sup> Australian Human Rights Commission, *Federal Discrimination Law* (2011) [www.humanrights.gov.au/our-work/legal/federal-discrimination-law-2011](http://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](http://www.humanrights.gov.au/complaints/conciliation-register).

<sup>261</sup> *Rummery and Federal Privacy Commissioner and Anor* [2004] AATA 1221, [XX].

<sup>262</sup> *D' v Wentworthville Leagues Club* [2011] AICmr 9 (9 December 2011).

<sup>263</sup> *'BO' v AeroCare Pty Ltd* [2014] AICmr 37 (8 April 2014).

361. With regard to the effects on the complainant caused by the respondent's improper conduct, these cases are not unlike the present one. I am satisfied that Freelancer's interference with the complainant's privacy had a significant impact on his emotional wellbeing.
362. However unlike the last-mentioned cases in which the disclosure was limited to one person (an ex-partner) in the case of *Wentworthville Leagues Club* or in *'BO' v Aerocare Pty Ltd* to a small group of persons who were within earshot in the airport lounge, Freelancer's disclosure of the complainant's personal information took place on publicly available websites. Freelancer contends that:
- 'in the case of Wikipedia, [such] a location [is] only likely to be accessed by a small number of people who would generally hold a particular interest in the nature and accuracy of the amendments made.'<sup>264</sup>
363. I disagree with that contention. Each instance of disclosure took place on websites that may be easily accessed by any member of the public. In my view the complainant's information has been disclosed to a potentially very wide audience online, and this must be factored into my calculation of what is an appropriate sum.
364. In *'DK' and Telstra Corporation Limited*<sup>265</sup> I ordered Telstra to pay \$18,000 for non-economic loss caused by its publication of the complainant's personal information in both the White Pages online and the hard copy directory. In that case the respondent's breach had serious consequences for the complainant who was forced to move interstate because of a well-founded fear for his safety and that of his partner.
365. In a settled privacy complaint as reported in the *Eighth Annual Report* of the Federal Privacy Commissioner, an agency agreed to pay a complainant \$10,000 compensation for her embarrassment and humiliation over two notices sent to all agency staff, which contained her personal, sensitive information. The initial notice reported that air conditioning towers were to be cleaned as a result of the complainant's legionnaire's disease. The subsequent notice advised incorrectly that the complainant did not have legionnaire's disease.<sup>266</sup>

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<sup>264</sup> Freelancer letter to the OAIC, 2 December 2014, 2.

<sup>265</sup> [2014] AICmr 118.

<sup>266</sup> Federal Privacy Commissioner, *Eighth Annual Report on the Operation of the Privacy Act for the period 1 July 1995 to 30 June 1996*, October 1996, 90.

366. In another reported matter which settled for \$10,000 the complainants were severely humiliated when inaccurate information about their credit history and credit capacity was published in a major newspaper.<sup>267</sup>

367. In previous determinations when deciding on an appropriate award of compensation I have also placed weight on the sensitivity of the personal information that has been disclosed.<sup>268</sup>

368. In the matter before me now, I have taken into account that Freelancer's conduct included an instance of disclosure of information that was of a more sensitive nature than other kinds of personal information.

369. Section 6 of the Privacy Act relevantly defines 'sensitive information' to include 'information or an opinion about an individual's:

(v) philosophical beliefs –  
that is also personal information.'

365. 'Philosophical beliefs' is not defined in the Privacy Act, but the words are defined in the *Macquarie Dictionary* as:

*'philosophical'* meaning "tending to regulate one's life, actions, judgements, etc"

*'beliefs'* meaning "conviction of the truth or reality of a thing, based upon grounds insufficient to afford positive knowledge".<sup>269</sup>

366. In its improper disclosure on 15 October 2012 on a publicly accessible website, Freelancer maintained that the complainant had 'racist comments' on his blog, naming the blog and the complainant.

367. Freelancer's inference that the complainant is a racist or has racist tendencies by disclosing that his blog contains 'racist comments' may arguably constitute information about the complainant's philosophical beliefs on the basis that an individual's attitude to race may act as a guiding principle for their behaviour.

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<sup>267</sup> Federal Privacy Commissioner, *Eighth Annual Report on the Operation of the Privacy Act for the period 1 July 1995 to 30 June 1996*, October 1996, 90.

<sup>268</sup> For example, 'EZ' and 'EY' [2015] AICmr 23.

<sup>269</sup> *Macquarie Dictionary, Macquarie Dictionary Online*, 6<sup>th</sup> ed (October 2013) <<https://www.macquariedictionary.com.au>>.

368. In my view in order to best serve the purpose of the Privacy Act, the term ‘sensitive information’ should be broadly construed.<sup>270</sup> The Tribunal in *Gao v Victoria Legal Aid* observed that:

Sensitive information in Schedule 1 is defined to include information such as race, political or religious belief, philosophical belief, sexual preference or practice, as well as “criminal record”. What these kinds of information have in common how they tend to define what a person is, and how their disclosure might distress the individual, and damage his or her relationships or community reputation or standing. These kinds of information are more private, more “sensitive” than other kinds of personal information..<sup>271</sup>

366. Labelling someone racially prejudiced is undoubtedly information that defines a person in some way. It is also information that might distress an individual, and damage their community standing.

367. I am therefore not prepared to say that Freelancer’s conduct did not involve the disclosure of any sensitive information. I am of the view that in any case information inferring the complainant was a racist was at the very least information of a sensitive nature. Therefore in determining an appropriate award for non-economic loss, I have taken into account that information publicly disclosed by Freelancer included some information that was ‘more sensitive’ than other kinds.

369. Moreover unlike previous cases where the improper disclosure by the respondent was limited to one or two instances, the respondent’s conduct in this matter has occurred over a prolonged period and involved several instances of improper conduct. The complainant describes feeling ‘uncertain, not knowing what is happening with his personal information, and where it can be published the next day’.<sup>272</sup> I have also given weight to this factor in my consideration of an award for damages.

370. In my view an appropriate award for damages suffered by the complainant taking account of the circumstances of this case, and having regard to the various considerations outlined in *Rummery* is \$15,000. I have taken into account the impact of the privacy breaches on the complainant, the

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<sup>270</sup> *Acts Interpretation Act 1901* (Cth), s 15AA. See, for example, *Gao v Victoria Legal Aid (Health and Privacy)* [2012] VCAT 523, which considered the breadth of ‘sensitive information’ in the context of the *Information Privacy Act 2000* (Vic), which contained in its schedule a definition of ‘sensitive information’ similar to that found in the *Privacy Act 1988* (Cth). The *Information Privacy Act 2000* (Vic) has now been replaced by the *Privacy and Data Protection Act 2014* (Vic).

<sup>271</sup> *Gao v Victoria Legal Aid (Health and Privacy)* [2012] VCAT 523, [46].

<sup>272</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 60.

multiplicity of the breaches, the fact that the breaches of improper disclosure were made to the general public over a protracted period and that information of a sensitive nature in at least one instance was also disclosed.

371. The complainant in the present case has not suffered the physical disruption to his life that the complainant in the *'DK' and Telstra* matter did, however as with the above mentioned conciliated privacy matters, the extent of the disclosures was wide and difficult to contain, causing the complainant significant hurt and distress.

### **Aggravated damages**

372. The complainant also seeks an award for aggravated, as well as punitive damages. As discussed above s 52(1)(iii) of the Privacy Act provides me with the power to award an amount 'by way of compensation' for any loss or damage suffered as a result of the breach of the complainant's privacy.

373. Reference to 'by way of compensation' in s 52(1)(iii) includes general and aggravated damages, but would appear to exclude punitive or exemplary damage, which are more penal than compensatory in character.<sup>273</sup>

374. The difference between aggravated damages and punitive damages was identified in *Clarke v Nationwide News Pty Ltd*.<sup>274</sup> Barker J observed:

Aggravated damages are given to compensate a person where the harm suffered was aggravated by the manner in which the act was done. In this, they are different from exemplary damages, which are intended to punish a wrongdoer and deliver a measure of moral retribution or deterrence.<sup>275</sup>

375. As I take the view that I do not have the power to award punitive damages under s 52(1)(iii), the complainant's request for punitive damages is dismissed.

376. The complainant has submitted that this is an appropriate case for aggravated damages because:

- this is not a case of a single privacy infringement, but rather there were multiple privacy breaches

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<sup>273</sup> *Rummery and Federal Privacy Commissioner and Anor* [2004] AATA 1221; *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72.

<sup>274</sup> [2012] FCA 307.

<sup>275</sup> *Clarke v Nationwide News Pty Ltd* [2012] FCA 307, [347].

- the ‘online’ attacks against him were malicious, personal and abusive
- the privacy ‘abuses’ were widespread and took place during a prolonged period of time
- the respondent appeared to take pleasure in prolonging his stress and anxiety
- each and every privacy breach impacted on his emotional wellbeing.<sup>276</sup>

377. Australian authorities appear to support the notion of an award for aggravated damages in privacy cases in appropriate circumstances. In *NZ v Director General, Department of Housing*<sup>277</sup> President O’Connor observed that:

*Rummery* is a good illustration of a case where the conduct of the agency in defence of the claim was so egregious that such an award might well have been made. But the award ultimately made was global... I should add that I do not see any difficulty in awarding aggravated or exemplary damages if the case justifies it.<sup>278</sup>

378. In *Hall v Sheiban*<sup>279</sup> the Tribunal considered the circumstances in which aggravated damages are available in the Australian law of torts:

It is fundamental that an award of a larger amount of damages by way of aggravated damages serves to compensate the victim for damage occasioned by the defendant’s conduct where an element of aggravation is involved in that conduct, and not to punish the defendant.<sup>280</sup>

379. In *‘BO’ v AeroCare Pty Ltd*<sup>281</sup> I highlighted 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:

- (i) the respondent behaved ‘high-handedly, maliciously, insultingly or oppressively’<sup>282</sup>
- (ii) the manner in which a defendant conducts his or her case exacerbates the hurt and injury suffered by the plaintiff<sup>283</sup>.

380. The *Macquarie Dictionary* defines ‘maliciously’ as “showing malice” and ‘malice’ as a “desire to inflict injury or suffering on another”. It defines ‘insultingly’ as “treat[ing] insolently or with contemptuous rudeness; affront”.

<sup>276</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 65-68.

<sup>277</sup> [2006] NSWADT173.

<sup>278</sup> [2006] NSWADT 173, [52].

<sup>279</sup> *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72.

<sup>280</sup> *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72 (citations omitted).

<sup>281</sup> *‘BO’ v AeroCare Pty Ltd* [2014] AICmr 37, [57].

<sup>282</sup> *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72, [75].

<sup>283</sup> *Elliot v Nanda & Commonwealth* [2001] FCA 418, [180].

It defines ‘*oppressive*’ as “burdensome, unjustly harsh or tyrannical”; and ‘*high-handed*’ as “overbearing”, with ‘*overbearing*’ defined as “domineering; dictatorial; haughtily or rudely arrogant”.<sup>284</sup>

381. I have already concluded that Freelancer’s conduct contravened the Privacy Act and that the complainant suffered injury to his feelings. I included in my consideration of ‘injury to feelings’ the extent of the breaches, their multiplicity and the length of time over which they occurred. This has been compensated for in the complainant’s claim for general damages. Notwithstanding this, in my view this is a case in which compensation in the nature of aggravated damages is appropriate. The manner in which Freelancer carried out its improper conduct (rather than the conduct itself) enlivens an entitlement to such damages.<sup>285</sup>
382. Freelancer’s conduct in improperly disclosing the complainant’s personal information was in my view aggravated by its apparent disregard for the complainant’s privacy and its own privacy obligations. Freelancer continued to publish the complainant’s information online despite being made aware by the complainant that such action breached privacy legislation and was contrary to Freelancer’s own privacy policy.
383. From the complainant’s own evidence, it is clear that the manner in which Freelancer conducted itself highlighted Freelancer’s apparent contempt of, or at best, indifference to, the complainant’s complaints about its interference with his privacy. I am of the view that this conduct could be described as malicious, oppressive and/or high-handed, falling within the scope of the *Macquarie Dictionary* definitions of those terms.
384. Though it is difficult to tease out the distinct effect upon the complainant of the manner in which Freelancer undertook its improper conduct, on his own evidence, I find that the way in which Freelancer disclosed his personal information exacerbated the complainant’s frustration, anger, humiliation and emotional distress. In response to Freelancer’s improper disclosure on 13 August 2012, the complainant observes :

I have been simply exhausted and shocked about the Respondent using offensive language on top of personal data outing.<sup>286</sup>

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<sup>284</sup> Macquarie Dictionary, *Macquarie Dictionary Online*, 6<sup>th</sup> ed (October 2013) <<https://www.macquariedictionary.com.au/>>.

<sup>285</sup> See *Gordon v State of Queensland & Ors* [2013] QCAT 564.

<sup>286</sup> Complainant’s submission to the OAIC, *Complete Submission*, 1 December 2014, 41.

385. The complainant describes his feelings following the respondent's 15 October 2012 disclosure as follows:

I felt simply exhausted and totally overwhelmed with [the] Respondent's audacious behaviour ...this behaviour of the Respondent put me into [an] even deeper state of anger and utter confusion. I did not understand what is happening and why does the Respondent feel so free about publishing my personal information. This made me suffer more as I realized a number of [the] Respondent's employees show absolutely no restraint in sharing and publishing my personal data.<sup>287</sup>

386. I have looked at compensation awards ordered in discrimination cases which have provided general guidance as to the amounts offered for aggravated damages. Awards in these cases appear to range from \$500 - \$7,500<sup>288</sup>, with a majority towards the maximum end of that range.<sup>289</sup>

387. In the case of *Elliot v Nanda*<sup>290</sup> the Federal Court found the respondent liable to pay the applicant \$5,000 in aggravated damages to compensate her for the additional stress and mental anguish resulting from the considerable delay to the resolution of the complaint caused by the respondent's conduct. In *Hughes v Car Buyers Pty Ltd*<sup>291</sup>, the applicant was also awarded \$5,000 in aggravated damages for the additional mental distress, frustration, humiliation and anger she felt as a result of her complaint effectively being treated with contempt by the respondent during the proceedings.

388. In the latter mentioned cases it was the circumstances in which the respondents conducted themselves in subsequent proceedings that gave rise to an element of aggravation. Despite the complainant's contention to the contrary, this is not the case here.<sup>292</sup>

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<sup>287</sup> Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 47.

<sup>288</sup> Notably in *Font v Paspaley Pearls Pty Ltd* (2002) FMCA 142 the amount of \$7,500 awarded covered 'exemplary damages'. Raphael FM remarked at [166]:

I do not think that the fact that the conduct which is complained of was described as entitling the applicant to aggravated damages, when in fact a proper description would have included exemplary damages, should prevent the applicant from recovering. .. All that I propose to do is to give the award which I intend to make its proper nomenclature and that is "exemplary damages".

<sup>289</sup> Australian Human Rights Commission, *Federal Discrimination Law Online* (October 2011)

<<https://www.humanrights.gov.au/our-work/legal/federal-discrimination-law-2011>>..

<sup>290</sup> [2001] 111 FCR 240.

<sup>291</sup> [2004] FMCA 526.

<sup>292</sup> The complainant claims that Freelancer has deliberately prolonged the proceedings: Complainant's submission to the OAIC, *Complete Submission*, 1 December 2014, 66.

389. This present matter is not one in which the respondent has ignored the complaint made to the OAIC or has refused to conciliate and negotiate with the complainant. The respondent did make at least two offers of settlement to the complainant. Nonetheless I am of the view that the effect on the complainant of the respondent's high-handedness during the period of its improper conduct and its apparent indifference to the effect of its conduct towards the complainant warrants an award in a similar amount as that awarded in those cases.
390. On the evidence and having regard to comparable awards in discrimination cases I therefore find that the circumstances of the present case warrants an additional award of aggravated damages in the amount of \$5,000 reflecting the repeated disregard Freelancer appeared to demonstrate for the complainant's privacy rights and its own privacy obligations, and the consequent intensification and perpetuation of the emotional distress caused to the complainant.

## **Determination**

391. I declare in accordance with s 52(1)(b)(i)(B) of the Privacy Act that the complainant's complaint is substantiated in part. I declare that Freelancer has breached NPP 1.3 by providing the complainant with no or insufficient notice about its collection of his IP address information. I further declare that Freelancer has breached NPP 2.1 by improperly disclosing personal information about the complainant on publicly accessible websites.
392. The complainant has not sought a declaration by me that Freelancer issue an apology for the distress caused to him by its actions in this matter. Nonetheless Freelancer has in my view demonstrated a reckless indifference to the privacy rights of the complainant. In my view, an apology is warranted and appropriate.
393. I therefore declare, in accordance with s 52(1)(b)(ii) of the Privacy Act that Freelancer must issue a written apology to the complainant within six weeks of this determination, acknowledging its interference with the complainant's privacy .
394. I acknowledge that since the time of the privacy breaches Freelancer has undertaken a comprehensive review of the information handling policies made available on its website. In light of that review, I do not consider that any declaration is warranted in relation to its information handling policies.

395. Nonetheless I am of the view that Freelancer must train its staff in accordance with its updated policies and procedures. I therefore declare under s 52(1)(b)(ii) that Freelancer must have its staff undertake training in its updated information handling policies, and must confirm to me no later than six months from the date of this determination that this training has been completed.

396. I declare in accordance with s 52(1)(b)(iii) that the complainant is entitled to \$20,000 for the non-economic loss suffered as a result of Freelancer's interference with his privacy, comprised of:

- (a) \$15,000 in general damages
- (b) \$5,000 in aggravated damages.

Timothy Pilgrim  
Acting Australian Information Commissioner  
18 December 2015

#### **Review rights**

A party may apply under s 96 of the *Privacy Act 1988* to have a decision under s 52(1) or (1A) to make a determination reviewed by the Administrative Appeals Tribunal (AAT). The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm a privacy determination. An application to the AAT must be made within 28 days after the day on which the person 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. Further information is available on the AAT's website ([www.aat.gov.au](http://www.aat.gov.au)) or by telephoning 1300 366 700.

A party may also apply under [s 5](#) of the *Administrative Decisions (Judicial Review) Act 1977* to have the determination reviewed by the Federal Circuit Court or the Federal Court of Australia. The Court 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.