



‘IX’ and Business Service Brokers Pty Ltd t/a TeleChoice [2016] AICmr 42 (30 June 2016)

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

Complainant:	‘IX’
Respondent:	Business Service Brokers Pty Ltd t/a TeleChoice
Decision date:	30 June 2016
Application number:	CP15/00996
Catchwords:	Privacy — Privacy Act — Australian Privacy Principles — <i>Privacy Act 1988</i> (Cth) s 52 — APP 11 — Security of personal information — Compensation awarded — Non-economic loss — Aggravated damages not awarded

Contents

Findings	2
Background	2
Privacy Complaint and remedy sought	3
The Law	5
Alleged Breach of APP 11.1	6
Findings on alleged breach of APP 11.1	9
Alleged Breach of APP 11.2	11
Findings on alleged breach of APP 11.2	12
Finding on damages	13
Non-economic loss	14
Aggravated damages	16
Determination	17



Findings

1. The respondent Business Service Brokers Pty Ltd t/a TeleChoice (**TeleChoice**) interfered with the complainant's privacy by:
 - not taking reasonable steps to protect her personal information from misuse, interference and loss; and from unauthorised access, modification or disclosure in breach of Australian Privacy Principle (**APP**) 11.1 under the *Privacy Act 1988* (Cth) (**Privacy Act**)
 - not taking reasonable steps to destroy or de-identify the complainant's personal information which it no longer needed in breach of APP 11.2.

2. To redress the matter TeleChoice shall with 30 days of this determination:
 - (a) issue an apology to the complainant acknowledging its interference with the complainant's privacy.
 - (b) pay the complainant \$3,500 for non-economic loss caused by the interference with the complainant's privacy.

Background

3. At some time before 13 April 2011 the complainant signed up for a mobile phone and phone plan with a telecommunications company.¹ The mobile phone was bought through a TeleChoice dealer store. TeleChoice, as a retail distributor for the telecommunications company, was required to market, distribute and sell products on its behalf.

4. As part of buying the phone and signing up for the plan the complainant was required to provide identification information, which included the complainant's driver's licence and credit card details.

¹ Complainant's privacy complaint form, June 17 2015. Complainant states she obtained access to her credit file held by Veda Advantage which showed Optus Financial Services performed a credit check on her on 13 April 2011 in support of this application.



5. On the 23 April 2015 Channel 9 aired a story on its 'A Current Affair' (**ACA**) program about the alleged abandonment of TeleChoice customer information which had been discovered in open shipping containers, apparently accessible to members of the public, in bushland in Hastings, Victoria (**the privacy incident**).
6. The broadcast shows at various times footage of an open shipping container with a large mound of paper files spilling out from the container's entrance onto the ground. During the filming there are two shots of a manila folder on which the complainant's name is visible to the viewing public.
7. The complainant advises that she was alerted to the incident and the disclosure of her name on television by her brother-in-law who had been watching the program.²
8. Following the airing of the ACA program the complainant's customer file was returned to the shipping container.³
9. On 24 April 2015 TeleChoice provided the Office of the Australian Information Commissioner (**OAIC**) with a voluntary data breach notification (**DBN**) about the incident and on 20 October 2015 offered an enforceable undertaking under s 33E of the Privacy Act to address the incident and prevent similar incidents occurring in the future.⁴ I accepted the enforceable undertaking on 22 October 2015.

Privacy Complaint and remedy sought

10. On 18 June 2015, the complainant lodged a complaint against TeleChoice with the OAIC under s 36 of the Privacy Act.⁵
11. The complainant contends that TeleChoice interfered with her privacy by:
 - (a) not taking reasonable steps to protect her information from misuse, loss and unauthorised access (APP 11.1), and

² Complainant's privacy complaint form, 17 June 2015.

³ Letter from complainant to TeleChoice, 13 May 2015, 2.

⁴ Office of the Australian Information Commissioner, *TeleChoice: enforceable undertaking* (22 October 2015) <<https://www.oaic.gov.au/privacy-law/enforceable-undertakings/TeleChoice-enforceable-undertaking>>.

⁵ Letter from complainant's legal representative to TeleChoice, 13 May 2015.

⁶ Complainant's privacy complaint form, 17 June 2015.



- (b) not taking reasonable steps to destroy or de-identify her information (APP 11.2⁷).
12. The complainant seeks a declaration by me that TeleChoice interfered with her privacy and that TeleChoice do the following:
- (a) provide the complainant with an explanation about how her personal information came to be abandoned in an unsecured shipping container
 - (b) provide to the complainant details of the investigation being undertaken by TeleChoice in relation to the incident
 - (c) return to the complainant her personal information or provide her with evidence of its destruction
 - (d) compensate the complainant for the time taken 'trying to ascertain the current status of [her] personal information', the stress the incident caused, in addition to legal costs.⁸
13. On 8 July 2015 the OAIC opened an investigation into the complainant's allegations under s 40(1) of the Privacy Act. Submissions made by both the complainant and TeleChoice were considered.
14. The matter was not resolved through conciliation and I decided to determine the matter under s 52 of the Privacy Act.
15. Section 52(1) provides that, after investigating the complaint, I may make a determination:
- (a) dismissing the complaint (s 52(1(a))); or
 - (b) finding the complaint substantiated and declaring that:
 - (i) the respondent has engaged in conduct constituting an interference with privacy of an individual and should not repeat or continue such conduct (s 52(1)(b)(i)(B))

⁷ Privacy complaint form, 18 June 2015; letter from complainant to TeleChoice, 13 May 2105, 2.

⁸ Privacy complaint form, 18 June 2015; letter from complainant to TeleChoice, 13 May 2105.



- (ii) the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant (s 52(1)(b)(iii))
- (iii) the complainant is entitled to compensation of any loss or damage suffered by reason of the act or practice the subject of the complaint (s52(1)(b)(iii))
- (iv) it would be inappropriate for any further action to be taken in the matter (s 52(1)(b)(iv)).

The law

16. The 13 Australian Privacy Principles (**APPs**) contained in schedule 1 of the Privacy Act regulate the handling of personal information by Australian government agencies and some private sector organisations.
17. Under s 13(1) of the Privacy Act, an act or practice of an APP entity is an interference with the privacy of an individual if:
 - the act or practice breaches an Australian Privacy Principle in relation to personal information about the individual.
18. Personal information is defined in s 6(1) of the Privacy Act as:
 - 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.
19. Under s 6(1) of the Privacy Act an 'APP entity' is defined to be an agency or organisation. An organisation is defined in s 6C to mean:
 - (a) an individual; or
 - (b) a body corporate; or
 - (c) a partnership; or
 - (d) any other unincorporated association; or



(e) a trust

that is not a small business operator, a registered political party, an agency, a State or Territory authority or a prescribed instrumentality of a State or Territory.

20. TeleChoice falls within the definition of an 'organisation' under s 6C, being a body corporate which is not a small business operator, a registered political party, a State or Territory authority or a prescribed instrumentality of a State or Territory, and is accordingly bound by the APPs.

21. APP 11 provides that:

11.1 If an APP entity holds personal information, the entity must take such steps as are reasonable in the circumstances to protection information:

- (a) from misuse, interference and loss; and
- (b) from unauthorised access, modification or disclosure.

11.2 If:

- (a) an APP entity holds personal information about an individual; and
- (b) the entity no longer needs the information for any purpose for which the information may be used or disclosed by the entity under this Schedule; and
- (c) the information is not contained in a Commonwealth record; and
- (d) the entity is not required by or under an Australian law, or a court/tribunal order, to retain the information;

the entity must take such steps as are reasonable in the circumstances to destroy the information or to ensure that the information is de-identified.

Alleged Breach of APP 11.1

22. The complainant alleges TeleChoice breached APP 11 by not taking reasonable steps to protect her personal information because it stored her information on publicly accessible land without any apparent security measures to prevent unauthorised access to the documents.



23. She contends that her personal information was 'clearly abandoned, without being de-identified', and that 'this constitutes a clear breach of Australian Privacy Principle 11'.⁹
24. The complainant also notes that the 'abandonment' of her personal information is in breach of TeleChoice's own Privacy Policy which at the relevant time stated the following:

Keeping your personal information secure

All registration and order information provided to TeleChoice is stored on secured servers...

TeleChoice does not store credit card details...

However, once we have received your information, we will use strict procedures and security features to try and prevent unauthorised access.

25. TeleChoice has acknowledged that the privacy incident constitutes a breach of 11.1.¹⁰
26. The Australian Privacy Principles guidelines (**APP guidelines**) issued by the Information Commissioner outline, amongst other things, how the OAIC will interpret the APPs. They provide an analysis of the meaning of the terms used in APP 11.1. The terms most relevant to this matter include 'interference', 'loss', 'unauthorised access' and 'unauthorised disclosure':

Interference

11.14 'Interference' with personal information occurs where there is an attack on personal information that an APP entity holds that interferes with the personal information but does not necessarily modify its content, [but] ...leads to exposure of personal information.

...

Loss

11.15 'Loss' of personal information ...includes when an APP entity:

- physically loses personal information..., for example, by leaving it in a public place...

⁹ Complainant's letter to TeleChoice, 13 May 2015, 1.

¹⁰Office of the Australian Information Commissioner, *TeleChoice: Enforceable undertaking* (22 October 2015) <<https://www.oaic.gov.au/privacy-law/enforceable-undertakings/TeleChoice-enforceable-undertaking>>.



11.16 Loss may also occur as a result of theft following unauthorised access or modification of personal information...

Unauthorised access

11.18 'Unauthorised access' of personal information occurs when personal information that an APP entity holds is accessed by someone who is not permitted to do so. This includes ... unauthorised access by an external third party...

Unauthorised disclosure

11.20 'Unauthorised disclosure' occurs when an APP entity:

- makes personal information accessible or visible to others outside the entity, and
- releases that information from its effective control in a way that is not permitted by the Privacy Act.¹¹

27. The ACA was not authorised to access personal information held by TeleChoice.
28. In assessing whether TeleChoice took reasonable steps to comply with APP 11.1, I have considered information from TeleChoice about the security safeguards in place prior to the privacy incident, and what steps would have been reasonable in the circumstances to protect the personal information held.
29. The APP guidelines state that:

The 'reasonable steps' that an APP entity should take to ensure the security of personal information will depend upon circumstances that include:

- the nature of the APP entity
- the amount and sensitivity of the personal information held
- the possible adverse consequences for an individual in the case of a breach
- the practical implications of implementing the security measure, including time and cost involved
- whether a security measure is in itself privacy invasive.¹²

30. I have also considered the OAIC's *Guide to securing personal information*¹³ which provides guidance on the reasonable steps entities are required to take under the

¹¹ APP guidelines, [11.11]-[11.21].

¹² APP guidelines, [11.7].

¹³ Office of the Australian Information Commissioner, *Guide to securing personal information* (January 2015) <<https://www.oaic.gov.au/agencies-and-organisations/guides/guide-to-securing-personal-information>>.



Privacy Act to protect the personal information they hold from misuse, interference, loss, and from unauthorised access, modification or disclosure.

Storage of documents

31. TeleChoice advises that there were three shipping containers belonging to TeleChoice which were located on private land (**the Hastings location**) pending destruction by a document destruction contractor.¹⁴
32. It confirmed that the containers were secured and locked ‘with multiple locks’ and ‘checked monthly by maintenance staff’.¹⁵
33. TeleChoice advises that the shipping containers contained a number of items, including marketing material, suppliers’ invoices, copies of telecommunication services contracts entered into by customers, and copies of identification documents in respect of the telecommunication service contracts entered into by customers.¹⁶
34. In light of the advice provided by the complainant and TeleChoice, as well as the ACA program which showed footage of a manila folder displaying the complainant’s name, I am satisfied that documents that were stored in the containers included the complainant’s personal information. I am also satisfied that in this instance TeleChoice failed to secure the complainant’s personal information against the unauthorised access and disclosure, and potential loss and interference.
35. TeleChoice states that on or about 23 April 2015 trespassers broke into the locked shipping containers at the Hastings location.¹⁷ Although the containers were reportedly locked at the time of the break-in, TeleChoice has admitted that the land on which the shipping containers were located was unfenced, and despite being private land, was accessible by members of the public.¹⁸

Findings on alleged breach of APP 11.1

¹⁴ TeleChoice letter to OAIC’s Assistant Commissioner, 29 July 2015, 1.

¹⁵ TeleChoice letter to OAIC’s Assistant Commissioner, 29 July 2015, 1.

¹⁶ TeleChoice letter to OAIC’s Assistant Commissioner, 29 July 2015, 1.

¹⁷ TeleChoice letter to OAIC’s Assistant Commissioner, 29 July 2015, 1.

¹⁸ Office of the Australian Information Commissioner, *TeleChoice: Enforceable undertaking* (22 October 2015) <<https://www.oaic.gov.au/privacy-law/enforceable-undertakings/TeleChoice-enforceable-undertaking>>.



36. In coming to a view about whether the steps taken to protect the complainant's personal information were reasonable in the circumstances, I note that TeleChoice holds the personal information of a large number of individuals and that the type of information required to establish mobile phone accounts includes identification information. I am of the view that such information should be afforded a high level of protection, especially given the possible adverse consequences for customers if there was unauthorised access to that information, and potential loss and interference of that information.
37. As noted in the OAIC's *Guide to securing personal information* physical security is an important part of ensuring that personal information is not inappropriately accessed.¹⁹ In order to comply with APP 11.1 APP entities need to consider, amongst other things, what steps are reasonable steps to ensure the physical security of personal information. Such steps may include:
- (a) monitoring the movement of physical files
 - (b) the implementation of physical access controls such as issuing a limited numbers of keys or passes to areas in which the information is stored
 - (c) monitoring and guarding the location in which the information is stored, and
 - (d) using a secure means of storage, such as a secure or locked room in monitored, guarded or staffed premises.²⁰
38. Notwithstanding TeleChoice employing measures such as securing the shipping containers with 'double locks' and having staff periodically check in on the locked containers, I do not consider there to be any circumstances in which it could be considered reasonable for TeleChoice to store the complainant's personal information in shipping containers located in open unfenced bushland accessible to the public and which TeleChoice was not in a position to effectively monitor given its relatively isolated location. In my view TeleChoice had not taken adequate steps to protect the complainant's personal information against misuse, interference and loss, and from unauthorised access, modification or disclosure.
39. I find that TeleChoice breached APP 11.1 and has interfered with the complainant's privacy in this regard.

¹⁹ Office of the Australian Information Commissioner, *Guide to securing personal information*, Physical Security (January 2015) <<https://www.oaic.gov.au/agencies-and-organisations/guides/guide-to-securing-personal-information#part-b-steps-and-strategies-which-may-be-reasonable-to-take>>.

²⁰ Pound Road Medical Centre: Own motion investigation report [2014] AICmrCN 4.



Alleged Breach of APP 11.2

40. The complainant also alleges that TeleChoice breached APP 11.2 by not taking steps to destroy or de-identify her personal information that it no longer needed.
41. APP 11.2 requires APP entities if they hold personal information about an individual and no longer need the information for any purpose for which the information may be used or disclosed by the entity (and the information is not contained in a Commonwealth record or the entity is not required by law or court order to retain the information) to take such steps as are reasonable to destroy the information or to ensure that it is de-identified.
42. TeleChoice has acknowledged that the privacy incident constitutes a breach of APP 11.2.²¹
43. TeleChoice advises that the shipping containers had been stored at the Hastings location from January 2015 to 23 April 2015.²² Prior to that time, from June 2013 to 23 April 2015, the containers had been stored at a fenced property in Bentleigh East Victoria before being moved to the Hastings location.²³ The information stored in the shipping containers had consequently been awaiting destruction by a document destruction contractor for almost two years.²⁴
44. As noted at paragraph [34], I accept that the shipping containers held documents containing customer information including the personal information of the complainant. I also accept that because it was awaiting destruction by a document destruction contractor, TeleChoice had formed the view that the complainant's personal information was information that it no longer needed for any purpose for which the information could be properly used or disclosed by TeleChoice.

²¹ Office of the Australian Information Commissioner, *TeleChoice: Enforceable undertaking* (22 October 2015) <https://www.oaic.gov.au/privacy-law/enforceable-undertakings/TeleChoice-enforceable-undertaking..>

²², Office of the Australian Information Commissioner, *TeleChoice: Enforceable undertaking* (22 October 2015) <https://www.oaic.gov.au/privacy-law/enforceable-undertakings/TeleChoice-enforceable-undertaking.>

²³Office of the Australian Information Commissioner, *TeleChoice: Enforceable undertaking* (22 October 2015) <https://www.oaic.gov.au/privacy-law/enforceable-undertakings/TeleChoice-enforceable-undertaking.>

²⁴ Letter from TeleChoice, 6 June 2015.



45. TeleChoice has acknowledged that while the personal information was awaiting destruction, the destruction could have occurred anytime between when the documents were no longer required and the date on which they were destroyed, 23 April 2015.²⁵
46. TeleChoice advises that upon learning of the privacy incident it sent five TeleChoice representatives to attend the Hastings location and secure the material held in the shipping containers.²⁶ It advises that a document destruction contractor attended the location on the same date and destroyed all material in the containers other than a sample of documents which TeleChoice states it has kept to assist it in its investigation of the privacy incident.²⁷

Findings on alleged breach of APP 11.2

47. I have viewed a copy of an invoice for the shredding of documents and a certificate of destruction dated 23 April 2015 and accept this as verification that the documents containing personal information stored in the shipping containers at the Hastings location were destroyed on site on the said date.
48. Notwithstanding this, I am of the view that prior to the privacy incident TeleChoice had failed to take reasonable steps to destroy the complainant's personal information which it held and no longer needed.
49. I therefore find that TeleChoice breached APP 11.2 and interfered with the complainant's privacy in this regard.

²⁵ Certificate of destruction issued by ShredOnSite dated 23 April 2015. Note Office of the Australian Information Commissioner, *TeleChoice: Enforceable undertaking* (22 October 2015) <https://www.oaic.gov.au/privacy-law/enforceable-undertakings/TeleChoice-enforceable-undertaking> incorrectly notes date of destruction as 24 April 2015 due to a typographical error.

²⁶ TeleChoice letter to OAIC Assistant Commissioner, 29 July 2015, 2.

²⁷ TeleChoice letter to OAIC Assistant Commissioner, 29 July 2015, 2.



Enforceable Undertaking

50. It is important to note that since this complaint was first made to the OAIC, TeleChoice has entered into an enforceable undertaking, which commits TeleChoice to undertake a number of measures to address the security of the personal information it holds, including to:
- (a) conduct a review of the personal information it holds to ensure it is secure
 - (b) establish written policies and procedures about the storage and destruction of customer information including the conduct of regular audits of customer records²⁸
 - (c) develop and conduct regular privacy training for staff about TeleChoice's obligations under the Privacy Act, including, but not limited to, training on the securing of personal information
 - (d) offer to reimburse the cost of a 12-month credit monitoring service for affected customers.²⁹

Finding on damages

51. I have found that the respondent TeleChoice breached APP 11.1 and APP 11.2. I have the discretion under s 52(1)(b)(iii) of the Privacy Act to award compensation for 'any loss or damage suffered by reason of' the interference with privacy. Section 52(1A) provides that loss or damage can include 'injury to the complainant's feelings or humiliation suffered by the complainant'.
52. It has long been established that damages should be assessed on tort-based principles³⁰, while on the other hand, damages awards compensating for injured feelings should not be so low as to diminish respect for the public policy to which the legislation gives effect.³¹

²⁸ In May 2015 TeleChoice implemented a Customer Information Handling Policy (CIHP) which included processes for managing customers' personal information in accordance with the Privacy Act.

²⁹ Office of the Australian Information Commissioner, *TeleChoice: Enforceable undertaking* (22 October 2015) <https://www.oaic.gov.au/privacy-law/enforceable-undertakings/TeleChoice-enforceable-undertaking>.

³⁰ *Haines v Bendall* [1991] HCA 15.

³¹ *Hall & Ors v Sheiban Pty Ltd & Ors* [1989] FCA 72 per Wilcox J, adopting as a statement of principle what was said by May LJ, *Alexander v Home Office* [1988] 1 WLR 968, 975.



53. I am guided by the following principles on awarding compensation, summarised by the Administrative Appeals Tribunal (AAT) (Full Tribunal) in *Rummery and Federal Privacy Commissioner*:³²
- a) where a complaint is substantiated and loss or damage is suffered, the legislation contemplates some form of redress in the ordinary course
 - b) awards should be restrained but not minimal
 - c) in measuring compensation, the principles of damages applied in tort law will assist, although the ultimate guide is the words of the statute
 - d) in an appropriate case, aggravated damages may be awarded
 - e) compensation should be assessed having regard to the complainant's reaction and not to the perceived reaction of the majority of the community or of a reasonable person in similar circumstances.

Non-economic loss

54. The complainant has provided her own evidence in the form of an impact statement in support of her claim for compensation, along with a medical certificate from a doctor who treated her 2-4 days after the ACA program aired. The complainant claims that the breach has caused her significant and prolonged anxiety and stress:

I suffered with extreme shock from the situation so much so that I ended up in emergency suffering with a major anxiety reaction (drs [sic] certificate attached). I have ongoing worry and stress about the incident; this has not been help by the process being dragged out and the lack of timely response ...from TeleChoice. This has resulted in prolonged anxiety and stress over a period of time. I now find it hard to give my birthdate to anyone...any constantly worry if my details have been used to steal my identity. I am not sure how I will deal with this ongoing issue.³³

55. The doctor's certificate provided to the OAIC confirms that the complainant presented to the emergency department of a Sydney hospital on 26 April 2015, and subsequently to the attending doctor on 30 April 2015, for 'significant anxiety'.³⁴
56. I have considered and given weight to the statement made by the complainant and the certificate provided by the hospital doctor. I am satisfied that at least some of the

³² [\[2004\] AATA 1221](#) [32] (*Rummery*).

³³ Complainant's statement to the OAIC, 8 September 15.

³⁴ Medical certificate, 7 September 2015.



anxiety experienced by the complainant was the result of her becoming aware that her personal information had been abandoned in unguarded shipping containers that were accessible to the public. I am of the view that the manner in which TeleChoice handled the complainant's personal information has caused the complainant some distress and that an award of damages is consequently appropriate.

57. In turning to what would constitute an appropriate award of compensation I have taken into account the considerations identified in *Rummery*³⁵, discussed above, as well as previous [Privacy Act](#) determinations and discrimination cases that have considered compensation for non-economic loss, as outlined in *Federal Discrimination Law Online*,³⁶ and the Conciliation Register of the Australian Human Rights Commission.³⁷ In particular I point to the following decisions in which financial compensation has been awarded for comparable privacy breaches:
58. In *'S' and Veda Advantage Information Services and Solutions Limited*, I awarded \$2,000 for distress and anxiety caused to a complainant by reason of Veda's failure to take reasonable steps to ensure that the personal information contained in the complainant's credit file was accurate, up-to-date, complete and not misleading.³⁸
59. In *'EQ' and Great Barrier Reef Marine Authority*³⁹, I awarded \$5,000 for non-economic loss caused by the interference with the complainant's privacy where the respondent disclosed to the media personal information connected to its investigation of the complainant.
60. In *'D' and Wentworthville Leagues Club*⁴⁰, I awarded \$7500 for non-economic loss caused by the interference with the complainant's privacy. That case concerned an unauthorised disclosure of the complainant's former gambling habits which caused the complainant to suffer humiliation as well as serious anxiety, panic attacks and physical symptoms.
61. In *'DK' and Telstra Corporation Limited*⁴¹ I awarded \$15,000 to complainant who because of concerns for his personal safety and that of his partner had to move

³⁵ *Rummery and Federal Privacy Commissioner and Anor* [2004] AATA 1221

³⁶ Australian Human Rights Commission, *Federal Discrimination Law* (2011) www.hreoc.gov.au/legal/FDL/index.html, ch 7 at 20 March 2014.

³⁷ Australian Human Rights Commission, *Conciliation Register*, <http://www.humanrights.gov.au/complaints/conciliation-register>

³⁸ [2012] AICmr 33.

³⁹ [2015] AICmr 11.

⁴⁰ [2011] AICmr 9.

⁴¹ [2014] AICmr 118.



interstate when Telstra published his personal information in the White Pages directory and online.

62. In the matter before me, the complainant was made anxious by TeleChoice's failure to comply with its obligations under the Privacy Act, which led to her personal information being broadcast on *A Current Affair*. Aside from her name being broadcast, it is not clear what other personal information of the complainant's was subject to unauthorised access, misuse or interference. While I accept that TeleChoice's conduct has been distressing for the complainant, there is no evidence of substantial consequences for the complainant, physical, psychological, financial or otherwise that would warrant an award of damages at the higher end of the range.
63. Having regard to the above cases in terms of the anxiety and distress suffered by the complainant I conclude that an appropriate award of compensation is the sum of \$3,500.
64. The complainant has also requested compensation for the time taken in 'trying to ascertain the current status on her personal information', as well as legal costs. Section 52(3) of the Privacy Act gives me the power to include a declaration that the complainant is entitled to a specified amount to reimburse the complainant for expenses reasonably incurred in connection with the making of the complaint and the investigation of the complaint.
65. The complainant has not provided any financial information that details the costs, legal or otherwise, that may have been reasonably incurred in the making and investigation of her complaint. I am consequently of the view that there is no basis for awarding compensation under s 52(3).

Aggravated damages

66. The power to award damages in [s 52](#) of the [Privacy Act](#) does include the power to award aggravated damages in addition to general damages.⁴² I am guided by the following principles:
 - a. aggravated damages may be awarded where the respondent behaved 'high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination'⁴³

⁴² Rummery [2004] AATA 1221 [32].

⁴³ *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72 [75].



- b. the 'manner in which a defendant conducts his or her case may exacerbate the hurt and injury suffered by the plaintiff so as to warrant the award of additional compensation in the form of aggravated damages.'⁴⁴

67. The complainant claims that TeleChoice has prolonged these proceedings by a lack of timely responses dealing with her allegations against it. However, I do not think there is sufficient evidence for me to infer that TeleChoice's conduct has exacerbated the anxiety and distress suffered by the complainant so as to warrant the award of additional compensation in the form of aggravated damages.

Determination

68. I declare in accordance with s 52(1)(b)(i)(B) of the Privacy Act that the complainant's complaint is substantiated and that TeleChoice has breached APP 11 by:

- not taking steps that were reasonable in the circumstances to protect the complainant's information against potential misuse, interference or loss; and against unauthorised access and disclosure (APP 11.1)
- not taking reasonable to steps to destroy or de-identify the complainant's personal information which it no longer needed (APP 11.2).

72. TeleChoice has already taken a number of steps in response to the privacy incident. In accordance with TeleChoice's enforceable undertaking which I accepted on 22 October 2015, TeleChoice has:

- taken the steps outlined at paragraph [50] above
- destroyed the records as noted at paragraph [47].

73. TeleChoice has also given the complainant an explanation of the privacy incident and outlined the steps TeleChoice has taken in responding to the incident.⁴⁵

74. In addition to these measures, I declare in accordance with s 52(1)(b)(ii) of the Privacy Act that TeleChoice must apologise in writing to the complainant within 30 days of this determination.

⁴⁴ *Elliott v Nanda & Commonwealth* [2001] FCA 418 [180].

⁴⁵ TeleChoice letter to the complainant, 29 July 2015.



Australian Government

Office of the Australian Information Commissioner

75. I declare in accordance with s 52(1)(b)(iii) that the complainant is entitled to \$3,500 for non-economic loss suffered as a result of TeleChoice's interference with her privacy and that TeleChoice pay the compensation to the complainant within 30 days of this determination.

Timothy Pilgrim

Acting Australian Information Commissioner

30 June 2016

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) 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.