



'JO' and Comcare **[2016] AICmr 64 (21 September 2016)**

Determination and reasons for determination of Australian Privacy Commissioner, Timothy Pilgrim

Complainant:	'JO'
Respondent:	Comcare
Decision date:	21 September 2016
Application number:	CP16/00158
Catchwords:	Privacy — Australian Privacy Principles — <i>Privacy Act 1988</i> (Cth) s 52 — APP 6 — Use or disclosure of personal information — APP 11 — Security of personal information — Compensation awarded — Non-economic loss

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Findings

1. Comcare interfered with the complainant's privacy by:
 - disclosing information about workplace injuries at his current employer to his former employer and an insurance company, in breach of Australian Privacy Principle (**APP**) 6
 - failing to take reasonable steps under APP 11 of the Privacy Act to protect his personal information from unauthorised disclosure.
2. To compensate the complainant for the interference with his privacy, Comcare shall within six (6) weeks of the date of this determination:
 - pay the complainant \$3000 by way of compensation for the loss or damages suffered by the complainant by reason of the interference with his privacy.
3. To ensure that such conduct is not repeated or continued, Comcare shall within six (6) months of the date of this determination:
 - review its current quality assurance procedures and develop clear quality control measures regarding what personal information is disclosed in automated bulk data file transfers
 - provide a report to me advising the results of the review, and confirm that the quality control measures have been implemented.

Background

4. Comcare is established under the *Safety Rehabilitation and Compensation Act 1988* (Cth) (**SRC Act**). Under the SRC Act, Comcare has a range of functions relating to rehabilitation and compensation for Australian Government employees, including employees of the Department of Defence (**Defence**) and the Department of Human Services (**DHS**). Employees may make claims under the SRC Act for compensation for injuries suffered in the course of their employment, subject to various conditions set out in the SRC Act.
5. At the time of the incident the complainant was employed at Defence, and prior to 2010 was an employee of DHS.
6. In 2013 and 2014 the complainant lodged three workers' compensation claims with Comcare regarding injuries sustained at Defence in 2010 and 2013 (**the Defence claims**).

7. In early 2014 the complainant also lodged a workers' compensation claim with Comcare regarding an injury he sustained in 2009 while he was an employee at DHS (**the DHS claim**). Comcare accepted the DHS claim in April 2014, and subsequently closed the DHS claim in September 2014.
8. On 2 February 2016 the complainant received an email from Comcare advising that a new pilot program (**the pilot**) would change the way his current workers' compensation claim with DHS would be managed. The email advised that under the pilot:

the Department of Human Services (DHS), as your current employer or responsible rehabilitation authority, will have responsibility for determining your claim and entitlements. DHS will be assisted by Allianz, a third party claims management service provider.
9. On 2 February 2016 the complainant lodged a complaint with Comcare to question why he was included in the pilot, as he was not a current employee of DHS, and did not have an active workers' compensation claim with DHS or Allianz.
10. At the same time the complainant lodged a complaint against Comcare with the Office of the Australian Information Commissioner (**OAIC**) under s 36 of the *Privacy Act 1988* (Cth) (**Privacy Act**), alleging that Comcare had disclosed details of his workers' compensation claims with his current employer, Defence, to his previous employer, DHS.
11. On 22 March 2016 Comcare wrote to the complainant and apologised for the disclosure of the complainant's personal information in relation to his Defence claims to DHS and Allianz.

Privacy complaint and remedy sought

12. The complainant contends that Comcare interfered with his privacy by:
 - (a) improperly disclosing his personal information related to the Defence claims to DHS and Allianz (APP 6); and
 - (b) failing to take reasonable steps to protect his information from misuse, loss and unauthorised access (APP 11.1).
13. In support of his complaint about the steps taken by Comcare to protect his personal information, the complainant provided information to indicate that Comcare previously acknowledged interfering with his privacy in 2014, when it disclosed medical documents relating to the DHS claim to Defence in error.

14. On 5 May 2016 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 Comcare were considered.
15. The matter was not resolved through conciliation and I decided to determine the matter under s 52 of the Privacy Act.
16. In summary, s 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 the respondent has engaged in conduct constituting an interference with the privacy of an individual and should not repeat or continue such conduct (s 52(1)(b)(i)(A))
 - the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant (s 52(1)(b)(ii))
 - the complainant is entitled to compensation for any loss or damage suffered by reason of the act or practice the subject of the complaint (s 52(1)(b)(iii))
 - it would be inappropriate for any further action to be taken in the matter (s 52(1)(b)(iv)).
17. Although the complainant says he accepts Comcare's apology, he is seeking financial compensation 'for the embarrassment, hurt, humiliation and distress both these matters have caused.'¹

The Law

18. The 13 APPs contained in Schedule 1 of the Privacy Act regulate the handling of personal information by Australian Government agencies and some private sector organisations. Comcare is an agency for the purposes of the Privacy Act.
19. 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 APP in relation to personal information about the individual.
20. 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.

¹ Complainant's complaint to Comcare and the OAIC, 2 February 2016.

21. Health information falls within the definition of 'sensitive information' in s 6(1) of the Privacy Act, which is a list of kinds of information that are afforded a higher level of protection by the Privacy Act.
22. APP 6 outlines when an APP entity may use or disclose personal information. Specifically, an APP entity may use or disclose an individual's personal information when it is done for the same purpose for which the information was collected (the primary purpose). Use or disclosure for another purpose (a secondary purpose) is only permitted where the individual has consented to the use or disclosure of the information or where an exception under APP 6.2 applies to the use or disclosure.
23. APP 11.1 provides that:

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

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

Complaint about disclosure of personal information (APP 6)

24. The complainant alleges Comcare breached APP 6 by improperly disclosing his personal information to DHS and Allianz.
25. Comcare does not dispute that on 1 February 2016 it emailed an Excel spreadsheet (**the spreadsheet**) with the complainant's personal information to DHS and Allianz. Comcare has advised that for the purposes of the pilot, Allianz was acting as a contracted service provider (**CSP**) to Comcare.
26. Comcare confirmed that the spreadsheet disclosed the following information to DHS and Allianz about the complainant and the Defence claims:
 - Name
 - Postal address
 - Email address
 - Injury dates
 - Registered dates
 - Claims status: accepted/rejected

- Claims status: open/closed

27. Comcare submits:

The February 2016 incident was found to have been primarily due to a technical issue regarding the generation of a report and its subsequent disclosure to DHS and Allianz. The list was provided under the incorrect assumption that the report accurately captured the business rules of the pilot.²

28. DHS and Allianz were not involved in the management of the Defence claims. Comcare acknowledges that it disclosed the complainant's personal information in relation to the Defence claims to DHS and Allianz in error, but stated to the OAIC:

DHS were already in possession of the disclosed information as [the complainant] has a claim for an injury while employed by DHS.

29. The Australian Privacy Principles guidelines (**APP guidelines**) outline, amongst other things, how the OAIC will interpret the APPs. The APP guidelines advise that disclosure, in the context of the Privacy Act, can occur even where the personal information is already known to the recipient.³

30. However, Comcare has also acknowledged that neither DHS nor Allianz held information about the complainant's injury dates, claim dates or claims status in relation to the Defence claims.

Findings

31. I consider that Comcare's primary purpose for collecting the complainant's personal information in relation to the Defence claims was for Comcare to assess and manage the claims.
32. Comcare's stated purpose for the pilot was to trial a new process for managing DHS claims. Comcare has also advised that the complainant's DHS claim was closed at the relevant time of disclosure.
33. I am of the view that the disclosure of the complainant's personal information was not for the primary purpose of managing the Defence or DHS claims.
34. I am also satisfied that the complainant did not provide his consent under APP 6.1(a) to the disclosure of information relating to his Defence claims to DHS or Allianz, and that Comcare is unable to rely on an exception under

² Comcare letter to the OAIC, 23 May 2016.

³ *APP guidelines*, [B.64].

APP 6.2 to disclose this information for a secondary purpose to the purpose of collection.

35. I therefore find that Comcare improperly disclosed the complainant's personal information in breach of APP 6.1, and has interfered with the complainant's privacy in this regard.

Complaint about protection of personal information (APP 11)

36. The complainant alleges Comcare breached APP 11.1 by not taking reasonable steps to protect his personal information from unauthorised disclosure.

37. While I have found that Comcare breached APP 6 in disclosing the complainant's personal information in relation to his Defence claims to DHS and Allianz, this does not necessarily indicate a contravention of APP 11. Whether a contravention has occurred depends on if, at the time of the incident, Comcare had taken reasonable steps in the circumstances to protect the personal information it held.

38. 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.⁴

39. Comcare's functions include assessing and deciding the workers' compensation claims of employees working across a wide range of Australian Government agencies and statutory authorities. This function involves handling a substantial amount of individuals' health information related to the injuries declared in their claims. Health information is considered sensitive information for the purposes of the Privacy Act.⁵

⁴ *APP guidelines*, [11.7].

⁵ *Privacy Act 1988* (Cth), s 6(1).

40. Comcare has provided the following information about how the spreadsheet was generated:

The list of names for the DHS cohort of claims was produced against a set of business rules. These rules included the following:

- 1) Most recent claim opened (registered date) in the last 24 months where payroll authority is DHS.
 - 2) Previous claims also transfer over.⁶
41. In its initial correspondence with the complainant regarding his complaint, Comcare advised their privacy team's assessment found that Comcare had breached APP 11.⁷
42. In the course of this investigation, the OAIC advised Comcare that, on the available information, it agreed with this assessment and invited Comcare to provide any further information about relevant protections. Comcare did not contest the OAIC's preliminary view, or provide any further information about protections it has in place.

Findings

43. The personal information held by Comcare will often, as in this case, concern health information in relation to an individual's current employment. As such, there appears to be a foreseeable risk of adverse consequences to the individual concerned if their personal information is subject to unauthorised disclosure. This is relevant in considering the degree to which Comcare should secure the personal information it holds.
44. In my view, APP 11.1 relevantly requires Comcare to test the processes it uses to aggregate information which it intends to disclose in bulk to external third parties, such as DHS and Allianz, in order to minimise the risk of exposing the personal information it holds to unauthorised disclosure.
45. Particularly in circumstances where Comcare intends to disclose the personal and health information of a large number of individuals, implementing such measures is a necessary step in ensuring Comcare meets its obligations under APP 11 of the Privacy Act.
46. I therefore find that Comcare breached APP 11.1, and has interfered with the complainant's privacy in this regard.

⁶ Comcare letter to the OAIC, 23 May 2016.

⁷ Comcare letter to the complainant, 22 March 2016.

Findings on damages

47. I have found Comcare breached APP 6.1 and APP 11.1.
48. Having found the complaint substantiated, I have a discretion under s 52(1)(b)(iii) of the Privacy Act to award a specific amount 'by way of compensation' for 'any loss or damage suffered by reason of the interference with privacy'. Section 52(1AB) states that loss or damage can include injury to the complainant's feelings or humiliation suffered by the complainant.
49. I am guided by the principles on awarding compensation summarised by the Administrative Appeals Tribunal in *Rummery and Federal Privacy Commissioner*.⁸ I have discussed these principles in a number of previous determinations, including '*IR*' and *NRMA Insurance, Insurance Australia Limited*⁹ and '*HW*' and *Freelancer International Pty Limited*.¹⁰
50. I have also had regard to amounts awarded in other privacy determinations. I have previously summarised these in '*IY*' and *Business Services Brokers Pty Ltd t/a TeleChoice*¹¹ and '*IQ*' and *NRMA Insurance, Insurance Australia Limited*.¹²

Non-economic loss

51. The complainant submits that he has experienced anxiety and distress because of the disclosure of his personal information to DHS and Allianz. He states:
- I suffer from severe anxiety and depression, as accepted by Comcare, and this has been significantly distressing to say the least, even more so since it continues without any due care.¹³
52. The complainant has also submitted that the breach in 2016, taken together with the incident in 2014, meant he had ongoing concerns about the handling of his personal and health information by Comcare.
53. The complainant has further provided a letter from his clinical psychologist of three years dated 3 May 2016, which states:

It is my view that both these incidents caused considerable distress, humiliation and concern to [the complainant]. It did nothing to assist in

⁸ *Rummery and Federal Privacy Commissioner* [2004] AATA 1221 [32].

⁹ '*IR*' and *NRMA Insurance, Insurance Australia Limited* [2016] AICmr 37 [97].

¹⁰ '*HW*' and *Freelancer International Pty Limited* [2015] AICmr 86 [351].

¹¹ '*IY*' and *Business Services Brokers Pty Ltd t/a TeleChoice* [2016] AICmr 44 [53]-[56].

¹² '*IQ*' and *NRMA Insurance, Insurance Australia Limited* [2016] AICmr 36 [65]-[69].

¹³ Complainant's complaint to Comcare and the Oaic, 2 February 2016.

his rehabilitation or recovery, and only served to reinforce his anxiety and fears.

54. Having considered and given weight to the statement made by the complainant and the complainant's clinical psychologist, I am satisfied that Comcare's act of disclosing the complainant's personal and health information to DHS and Allianz has caused the complainant some anxiety and distress, and for this reason an award of damages is appropriate.
55. However, I note that Comcare responded to the complainant's initial complaint within a reasonable period, and acknowledged the improper disclosure of the complainant's personal information. Comcare also offered an apology to the complainant prior to the commencement of the OAIC's investigation, which the complainant has advised the OAIC he accepted. This is to Comcare's credit.
56. I have also had regard to the type of information that has been disclosed by Comcare and the identity of the recipients. While I am of the view that the information involved included the complainant's health information, the disclosure was limited to DHS and Allianz. Both Australian Government agencies and CSPs to Australian Government agencies have obligations under the Privacy Act in relation to how they handle personal information, and I consider it unlikely that either organisation would misuse the information.
57. Finally, the disclosure of the complainant's health information was restricted to the information identified in para 26, including the date of the complainant's injuries on the Defence claims and the fact of his claims. No further information about the complainant's health was disclosed to DHS and Allianz, and Comcare has confirmed that both DHS and Allianz have destroyed the spreadsheet containing the complainant's personal and health information.¹⁴
58. After consideration of the above factors, I consider it appropriate to award the complainant \$3000 in compensation for non-economic loss.

Determination

59. I declare in accordance with s 52(1)(b)(i)(A) of the Privacy Act that:
 - the complaint made by the complainant is substantiated

¹⁴ Comcare letter to the OAIC, 1 July 2016.

- that Comcare has breached APP 6 by improperly disclosing personal information about the complainant to DHS and Allianz
- that Comcare has breached APP 11 by not taking reasonable steps to secure the complainant's personal information relating to his claims with Defence against unauthorised disclosure.

60. I declare in accordance with s 52(1)(b)(iii) of the Privacy Act that the complainant is entitled to \$3000 for the non-economic loss suffered as a result of Comcare's interference with his privacy.

61. I further declare in accordance with s 52(1)(b)(ia) of the Privacy Act that to ensure that such conduct is not repeated or continued, Comcare shall within six (6) months of the date of this determination:

- review its current quality assurance procedures and develop clear quality control measures regarding what personal information is disclosed in automated bulk data file transfers
- provide a report to me advising the results of the review, and confirm that the quality control measures have been implemented.

Timothy Pilgrim
 Australian Privacy Commissioner
 21 September 2016

Review rights

A party may apply under s 96 of the Privacy Act 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* (Cth) 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.