



'LA' and Department of Defence (Privacy) [2017] AICmr 25 (17 March 2017)

Decision and reasons for decision of
Privacy Commissioner, Timothy Pilgrim

Complainant:	'LA'
Respondent:	Department of Defence
Decision date:	17 March 2017
Application number:	CP15/01047
Catchwords:	Privacy — <i>Privacy Act 1988</i> Part III — Australian Privacy Principles — APP6 — Unauthorised disclosure of personal information — Compensation awarded — Non-economic loss — Aggravated damages not awarded — Section 52(3) expenses awarded

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Determination

1. I find that the Department of Defence interfered with the Complainant's privacy in breach of Part III of the *Privacy Act 1988* (Cth) (**Privacy Act**) by disclosing the Complainant's personal information contrary to Australian Privacy Principle (**APP**) 6.
2. Within 60 days from the date of this determination, the Respondent shall:
 - a. pay the Complainant the amount of \$12,000 for non-economic loss caused by the interference with the Complainant's privacy; and
 - b. pay the Complainant \$3,420 to reimburse him for expenses reasonably incurred in connection with the making of the complaint and the investigation of the complaint.

The Complaint

3. I have set out below, the events leading to the making of the complaint, based on the information provided by the parties to the Office of the Australian Information Commission (**OAIC**).
4. In my determination, the pseudonym '**LA**' or '**the Complainant**' refers to the complainant, to protect his privacy as an individual.
5. The Complainant was previously employed by the Royal Australian Air Force, and is now retired.
6. On 8 September 2014, the Complainant's son sent an email to Defence Archives, Department of Defence (**Defence**) seeking details of the Complainant's hospital admissions for a period from the 1970s to early 1980s.
7. On 23 September 2014, Defence responded to the Complainant's son, enclosing a request form, and indicating that Defence could provide any documents pertaining to him, if they were contained on the Complainant's Military Medical File. The Complainant's son completed and returned the request form.
8. On 15 December 2014, Defence sent the Complainant's son a compact disc containing the Complainant's entire medical record, including specialist medical reports and assessments.
9. On 21 February 2015, after becoming aware of the release of his medical records, the Complainant sent an email to Defence Archives, notifying them of the unauthorised release of his personal information and requesting an explanation as to why this had happened.
10. On 15 April 2015, the Complainant received a telephone call from Defence apologising to him for the release of information and assuring him that internal processes had been reviewed and changed.
11. On 24 April 2015, Defence wrote to the Complainant apologising for the incorrect release of information.
12. On 26 June 2015, the Complainant made a complaint to the OAIC. The Complainant complains that Defence unlawfully interfered with his privacy, contrary to APP 6, by disclosing his personal information to his son.



13. The Complainant seeks a declaration under section 52(1)(b)(iii) of the Privacy Act that he is entitled to compensation for non-economic loss and economic loss as a result of the interference with his privacy.
14. As the matter was not resolved through conciliation, I have decided to determine the matter under section 52 of the Privacy Act.
15. In making my determination, I have considered the parties' respective submissions and correspondence, a medical report from the Complainant's treating psychiatrist dated 23 March 2016 and an Impact Statement prepared by the Complainant and dated 9 June 2016.

The Law

16. Section 52 of the Privacy Act provides that, after investigating a complaint, I may make a determination:
 - a. dismissing the complaint; 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 (section 52(1)(b)(i)(B));
 - ii. The respondent must take specified steps within a specified period to ensure that such conduct is not repeated or continued (section 52(1)(b)(ia));
 - iii. The respondent must perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant (section 52(1)(b)(iii)); or
 - iv. It would be inappropriate for any further action to be taken in the matter (section 52(1)(b)(vi)).
17. The Australian Privacy Principles (**APPs**), which are contained at Schedule 1 to the Privacy Act regulate the collection, use, disclosure and security of personal information held by government agencies and certain private sector organisations (**APP entities**). Section 15 of the Privacy Act prohibits an APP entity from doing an act, or engaging in a practice, that breaches an APP.
18. As Defence is an agency for the purposes of the Privacy Act, it is an APP entity and the APPs apply to it in respect to the acts and practices the subject of the privacy complaint by the Complainant.

The Complaint - APP 6 – Finding

19. The Complainant alleges that Defence failed to comply with APP 6, which relevantly provides that if an APP entity holds personal information about an individual that was collected for a particular purpose, the entity must not use or disclose the information for another purpose unless the individual has consented to the use or disclosure of the information. There are a number of other exceptions to APP 6, which do not arise in this matter.
20. 'Personal information' is defined at section 6 to be "information or an opinion about an identified individual, or an individual who is reasonably identifiable". It is clear that the Complainant's medical file constitutes personal information, and is held by Defence.



21. From the initial complaint to it by the Complainant and throughout the investigation, Defence has accepted that the disclosure of the Complainant's personal information was contrary to APP 6, and that no exception applies.
22. While Defence had in place policies and procedures to comply with its privacy obligations, as a result of human error, these were not followed in this case and the Complainant's personal information was disclosed without his consent.
23. In circumstances where Defence holds personal information in relation to the Complainant, has disclosed it without his consent, and is unable to rely upon any other exception in APP 6, I find that the Respondent has breached APP 6.

Findings – Compensation and expenses reasonably incurred

Damages

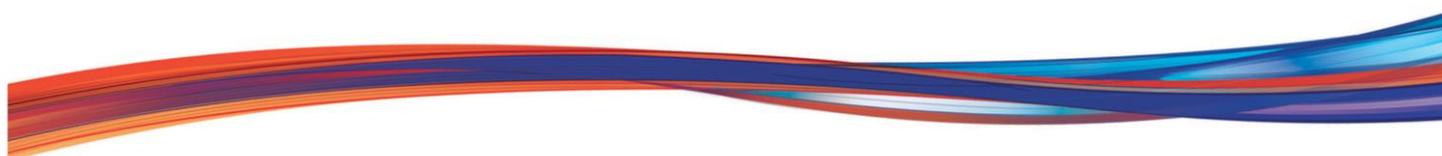
24. Having found that Defence has breached APP 6, I have the discretion under s 52(1)(b)(iii) of the Privacy Act to award compensation for 'any loss or damage suffered by reason of' the interference with privacy'. Section 52(1A) provides that loss or damage can include 'injury to the complainant's feelings or humiliation suffered by the complainant'.
25. As part of this consideration, I have had regard to the policies and procedures that Defence had in place in relation to privacy and how it has responded to the breach. I have also considered the nature of the personal information, and the effect its disclosure has had on the Complainant.
26. I am guided by the principles on awarding compensation summarised by the Administrative Appeals Tribunal in *Rummery and Federal Privacy Commissioner*¹. In that case, the Full Tribunal said:
 - 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 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.

Economic loss

27. In *EQ and Office of the Australian Information Commissioner*², the AAT states that damages for economic loss are awarded to restore an individual to 'the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation'.

¹ [2004] AATA 1221 [32].

² [2016] AATA 785 (6 October 2016).



28. The Complainant seeks that I make a declaration under s 52(1)(b)(iii) that he is entitled to the amount of \$8221.62 by way of compensation, being for:
- a. \$8001,62 in legal fees he has incurred in relation to the investigation of the Complaint by the OAIC; and
 - b. \$220, being the fees incurred in obtaining a letter from his treating psychiatrist in relation to the effect of the disclosure of his personal information on the Complainant's mental health.
29. As I have addressed below, I have determined, under section 52(3), that part of the Complainant's legal costs, and the fees in relation to his treating psychiatrist are to be reimbursed as reasonable expenses incurred to bring the complaint. It is therefore inappropriate for me to make a declaration for economic loss.

Non-economic loss

30. *EQ and Office of the Australian Information Commission* noted that the approach in *Rummery* was adopted from the Federal Court's approach taken to the assessment of damages under the *Sex Discrimination Act 1984* (Cth) in *Hall v A&A Sheiban Pty Ltd*³ where Wilcox J noted (at [42]) that:
- 'damages for such matters as injury to feelings, distress, humiliation and the effect of the complainant's relationships with other people are not susceptible to mathematical calculation.... To ignore such items of damages simply because of the impossibility of demonstrating the correctness of any particular figure would be to visit an injustice upon a complainant by failing to grant relief in a proven item of damage.'
31. In this case, the personal information is sensitive information, being health information (as defined at section 6 of the Privacy Act). The personal information that was disclosed included specialist reports and preliminary assessments in relation to the Complainant's gambling addiction, and notes about his recovery and prognosis. The Complainant says that the disclosure has caused increased stress on his relationships with his son and other children. He has suffered embarrassment and humiliation in having to recall and discuss these matters, which he was trying to forget, and of which his children were unaware.
32. The Complainant also says that the disclosure has added to his distress and anxiety, including regeneration of suicidal thoughts.
33. The Complainant's treating psychiatrist, in his letter of 23 March 2016, has expressed the view that the disclosure has exacerbated the Complainant's pre-existing depression and anxiety and has led to feelings of embarrassment and humiliation. I accept that disclosure has adversely affected the Complainant and that he has suffered damage as a result.
34. The Complainant seeks the amount of \$30,000 for non-economic loss. The Respondent submits that an amount of compensation in the range of \$4,500 and \$6,000 reflects the severity of the breach, previous decisions I have made, and its handling of the matter.
35. In determining an appropriate amount of compensation, I have had regard to the fact that:

³ *Re Susan Hall; Dianne Susan Oliver and Karyn Reid v A & A Sheiban Pty Ltd; Dr Atallah Sheiban and Human Rights and Equal Opportunity Commission* [1989] FCA 72.



- a. the personal information disclosed was of a sensitive nature, being health records;
- b. the personal information was disclosed to a third party who would not have any particular obligations to manage the personal information and there was a real risk it may have been misused or further disclosed; and
- c. that disclosure has caused harm to the Complainant.

36. I have also had regard to the fact that:

- a. Defence accepted that it had made an error at the earliest opportunity and apologised to the Complainant; and
- b. Defence had in place policies and protocols to comply with its privacy obligations, and following its breach of APP 6, it immediately reviewed and amended those policies and protocols to improve compliance.

37. Defence informed the Complainant in its letter of 16 April 2015 that the following measures have been put in place following his complaint to ensure such an error does not recur:

- a. improved identification procedures for ex-service members' dependants requesting documents;
- b. additional staff training and work instructions in relation to such requests;
- c. regular checking of adherence to work instruction by staff, and additional review during staff performance meetings;
- d. amendment to the standard operating procedure for redacting documents in order to provide further guidance to staff; and
- e. an additional staff check point has now been implemented prior to the release of records to allow a further 'set of eyes' to check for accuracy in the information being released.

38. I consider that these measures will minimise the recurrence of a similar breach of the Privacy Act and it is therefore unnecessary for me to make a declaration requiring Defence to review its procedures and to report to me on that review.

39. I have had regard to the amount of compensation I have awarded in previous determinations, but note that I am not bound by those determinations, but by the statute itself.

40. In *'BO' v Aerocare Pty Ltd*⁴ I awarded \$8,500 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. In *'DK' and Telstra Corporation Limited*⁵ I ordered Telstra to pay \$18,000 for non-economic loss caused by its publication of the complainant's personal information in the White Pages online and the hard copy. In that case, Telstra'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.

⁴ [2014] AICmr 37 (8 April 2014).

⁵ [2014] AICmr 118.



41. In circumstances not unlike this matter, I awarded \$10,000 for the unauthorised disclosure by a medical practitioner of a patient's medical information.⁶ The breach was limited to a single instance of disclosure to a small group of email recipients, and the complainant in that case did not suffer any long-term emotional or psychological harm.
42. Taking all the circumstances into account, I have decided that compensation for non-economic loss suffered by the Complainant in the amount of \$12,000 is appropriate. In this case, the Complainant's entire medical history including details of a prior gambling addiction was disclosed to his son, which has adversely affected the Complainant's psychological health and his current family relationships.

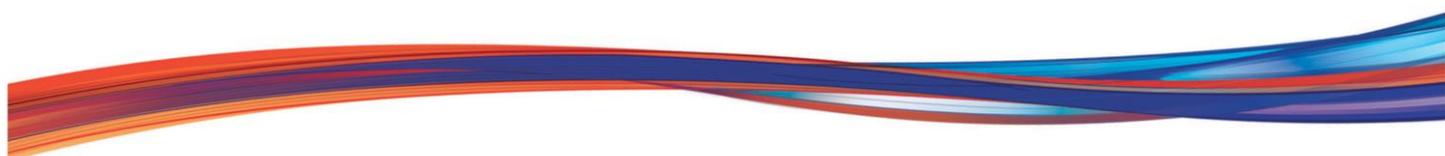
Reimbursement for expenses

43. I have the power under section 52(3) to make a declaration that the Complainant is entitled to a specified amount to reimburse him for expenses reasonably incurred in connection with the making of the complaint and its investigation.
44. The Complainant has sought reimbursement of \$8221.62 for:
- a. \$8001.62 in legal fees he has incurred in relation to the investigation of the Complaint by the OAIC; and
 - b. \$220, being the fees incurred in obtaining a letter from his treating psychiatrist in relation to the effect of the disclosure of his personal information on the Complainant's mental health.
45. As I addressed in my decision in *'KB' and Veda Advantage Information Services and Solutions Ltd* [2016]⁷ section 52(3) does not have the effect of automatically transferring a complainant's legal expenses to the respondent. Rather, section 52(3) provides me with a discretion to declare that a 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.'
46. I will not exercise that discretion on every occasion in which a complainant incurs legal or other expenses. Most privacy complaints can be resolved without the need for legal representation, and this position is confirmed in the OAIC's Guide to privacy regulatory action⁸ which states at paragraph [1.13]:
- The OAIC provides a free, informal and accessible complaint process. Parties do not require legal representation to participate in the complaint handling process or the determination process. Parties generally bear their own costs in the complaint handling process, including any legal expenses.
47. In this case, the Complainant engaged a solicitor towards the end of the investigation, who prepared submissions on his behalf in relation to compensation, and assisted him in obtaining a letter in support from his treating psychiatrist.

⁶ *'IV' and 'IW'* [2016] AICmr 41 (27 June 2016).

⁷ [2016] AICmr 81 (25 November 2016).

⁸ <https://www.oaic.gov.au/about-us/our-regulatory-approach/guide-to-privacy-regulatory-action/chapter-1-privacy-complaint-handling-process> accessed 31 January 2017.



48. I am satisfied that it was appropriate for the Complainant to engage a lawyer at that stage of the complaint process, and that the expenses incurred are not disproportionate to the harm he suffered or the remedy I have determined to award.
49. However, the discretion I have under s 52(3) does not mean I must make a declaration for all or any costs reasonable incurred by a Complainant. In order to assist me on what amount would be appropriate to reimburse the Complainant for costs incurred in making the complaint I have had regard to the general principles of the determination of costs.
50. The determination of costs is primarily regulated by statute and court rules. Where a court or tribunal has discretion in relation to costs, it may award costs on a party/party or indemnity basis. Indemnity costs are usually defined as all costs other than those which appear to have been unreasonably incurred or are unreasonable in amount. Conversely, party/party costs are defined as those costs that are "fair and reasonable". There are various considerations as to what is "fair and reasonable", and this will depend on the circumstances and nature of the matter. An assessment of what is "fair and reasonable" will have regard to:
- a. the level of skill, experience, specialisation and seniority of the lawyers concerned;
 - b. the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved a matter of public interest;
 - c. the labour and responsibility involved; and
 - d. the circumstances in acting on the matter.
51. There is no firm rule as to what costs would be allowed on assessment and it is generally accepted that party/party costs will be assessed in the range of 40 to 60 percent of solicitor-client costs, and indemnity costs will be between 60 and 80 percent of solicitor-client costs.
52. In this case, I have the power to make a declaration that the Respondent pay to the Complainant a specific amount. I do not have power to make a costs order. Nonetheless, I am guided by the above principles in relation to costs orders in deciding what amount is appropriate to reimburse the Complainant for expenses incurred in making the complaint and in the investigation of the complaint.
53. Having considered the invoices provided, I am not satisfied that it would be appropriate to reimburse the Complainant for the whole of the legal expenses incurred, where a number of those costs would not be recoverable on either an indemnity or party-party basis if a costs assessment applied.
54. I have decided that a portion of the Complainant's legal expenses were reasonably incurred in connection with the complaint, and have elected to exercise my discretion to declare that the Complainant should be reimbursed for a portion of those expenses. As such, I declare under s 52(3) that Defence should pay the Complainant an amount of \$3,200 as reimbursement.
55. In relation to the cost incurred in obtaining a psychiatric report, this was prepared in response to the Respondent's request for further information in respect of the Complainant's physical and mental condition. I have determined that it is an expense reasonably incurred in connection with the complaint. As such, I have determined that under section 52(3) of the Privacy Act, Defence should pay the Complainant an amount of \$220 as reimbursement.



Declarations

56. I declare that the complaint is substantiated under section 52(1)(b)(i)(A) of the Privacy Act, on the basis that the Respondent, the Department of Defence, improperly disclosed the Complainant's personal information.
57. I declare in accordance with s 52(1)(b)(ii) of the Privacy Act that the Respondent must pay the Complainant the amount of \$12,000 for non-economic loss caused by the Respondent's interference with the Complainant's privacy within 60 days of the date of this determination.
58. I declare in accordance with s 52(3) of the Privacy Act that the Respondent must pay the Complainant the amount of \$3,420 as reimbursement for expenses reasonably incurred in connection with the complaint within 60 days of the date of this determination.

Timothy Pilgrim
Privacy Commissioner

17 March 2017

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 calendar 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 calendar 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.

