



'LB' and Comcare (Privacy) [2017] AICmr 28 (24 March 2017)

Decision and reasons for decision of
Privacy Commissioner, Timothy Pilgrim

complainant:	'LB'
Respondent:	Comcare
Decision date:	24 March 2017
Application number:	CP14/03263
Catchwords:	Privacy — Privacy Act — Information Privacy Principles — (CTH) Privacy Act 1988 s 52 — IPP 4 — Data security failure — IPP 11 — Unauthorised disclosure of personal information — Compensation awarded — Non-economic loss — Economic loss not awarded — Aggravated damages not awarded — Section 52(3) expenses awarded

Contents

Determination	2
The Complaint	2
The Law	4
The First Issue – IPP 11	5
The Second Issue – IPP 4	5
Findings	6
Damages.....	7
Declarations	11

Determination

1. I find that the respondent, Comcare, interfered with the complainant's privacy in breach of Part III of the *Privacy Act 1988* (Cth) (**Privacy Act**) by:
 - a. disclosing the complainant's personal information, including sensitive health information on a publicly available website contrary to Information Privacy Principle (**IPP**) 11; and
 - b. failing to take such security safeguards as it is reasonable in the circumstances to take, against loss, against unauthorised access, use, modification or disclosure, and against other misuse contrary to IPP 4.
2. Within 60 days from the date of this determination, Comcare shall:
 - a. pay the complainant the amount of \$20,000 for non-economic loss caused by the interference with the complainant's privacy; and
 - b. pay the complainant the amount of \$3,000 to reimburse her 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 Commissioner (**OAIC**).
4. In my determination, the complainant is referred to by the pseudonym 'LB' or 'the complainant' to protect her privacy as an individual. At the time of the alleged breach of her privacy, the complainant was employed by the Department of Defence (**Defence**).
5. Comcare, the respondent, is established under the *Safety Rehabilitation and Compensation Act 1988* (Cth) (**SCR Act**). Under the SRC Act, Comcare has a range of functions relating to rehabilitation and compensation for Australian Government employees, including employees of Defence. 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 that Act.
6. On 12 October 2009 solicitors engaged by the complainant requested Comcare investigate whether or not the complainant's employment with Defence had caused or contributed to her cancer. It was alleged that a number of the complainant's colleagues at Defence had become seriously ill or died from cancer-related illnesses.
7. On 5 May 2010 Comcare commenced an investigation into the complainant's allegations under section 41 of the former *Occupational Health and Safety Act 1991* (Cth).
8. Following its investigation, Comcare produced an investigation report, which contained the personal information of the complainant, including health information (the **Comcare Report**).
9. In July 2011, the complainant requested a copy of the Comcare Report under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). A redacted version of the Comcare Report was provided to the complainant, and the redacted Comcare Report made publicly available on Comcare's website through its freedom of information (**FOI**) disclosure log.



10. All government agencies that are subject to the FOI Act are required under section 11C of that Act to publish an FOI disclosure log on their website. The FOI disclosure log lists information that has been released in response to an access request under the FOI Act and the information released must either be made available on the website or through some other means. The information released that must be published is subject to certain exceptions including; personal information about any person, if it would be unreasonable to publish the information.
11. The redacted Comcare Report, which contained the complainant's personal information, including health information, did not properly de-identify and was published on Comcare's website.
12. On 9 August 2012, a senior officer in Defence sent an email to approximately 1270 staff, which included a link to the redacted Comcare Report on Comcare's website. On reading the email, the complainant became aware that the redacted Comcare Report had been published on Comcare's website, and contained her personal information, including sensitive health information. The redacted Comcare Report contained:
 - a. the complainant's name, postal address and date of birth;
 - b. the complainant's Personnel Management Key Solution (PMKeyS) number, a unique employee number allocated to Defence personnel, which provides access to phone number and personal email address information; and
 - c. the complainant's sensitive health information.
13. On 10 August 2012, the complainant wrote to the senior officer's Chief of Staff complaining that her personal information was included in the redacted Comcare Report, which had been sent via an email link to Defence staff, and demanded that the email be withdrawn.
14. On or about 13 August 2012 Comcare removed the redacted Comcare Report from its website, and issued a written apology to the complainant.
15. Around that time, the complainant became aware that the redacted Comcare Report had been publicly available on Comcare's website for about 12 months.
16. On 25 July 2014, the complainant made a complaint to the OAIC about Comcare making the redacted Comcare Report publicly available on its website from May 2011 to 18 August 2012.
17. The complainant complains that Comcare unlawfully interfered with her privacy, contrary to the Information Privacy Principles (**IPPs**) by:
 - a. improperly disclosing her personal information, including sensitive health information (IPP 11) (**Issue 1**); and
 - b. failing to take security safeguards as are reasonable in the circumstances against loss, unauthorised access or disclosure of her personal information including sensitive health information (IPP 4) (**Issue 2**).
18. The complainant seeks a declaration that Comcare interfered with her privacy. She seeks an apology and compensation from Comcare.



19. On 19 August 2014, the OAIC commenced its investigation into the complainant's complaint under section 40(1) of the Privacy Act.
20. The matter was not resolved through conciliation and I have decided to determine the matter under section 52 of the Privacy Act.
21. In making my determination, I have considered the following documents, provided to the OAIC by the parties during the course of the investigation:
 - a. the redacted Comcare Report;
 - b. Defence's internal email correspondence dated 10 August 2012;
 - c. email from Comcare to the complainant dated 13 August 2012;
 - d. complaint to the OAIC dated 25 July 2014;
 - e. medical and case assessment reports provided by the complainant dated 22 August 2012; 5 September 2012; 28 September 2012; 13 October 2012; 25 October 2012 and 8 November 2012;
 - f. Comcare's submissions dated 2 September 2014; 13 November 2014; 5 May 2016 and 10 August 2016;
 - g. the complainant's submissions dated 8 September 2014; 14 October 2014; 12 October 2015 and 12 July 2016;
 - h. the complainant's receipts and invoices for legal costs (provided to the OAIC on 5 October 2015).

The Law

22. 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 (s 52(1)(b)(i)(A));
 - 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)(ii));
 - iii. the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered by reason of the act or practice the subject of the complainant (s 52(1)(b)(iii));
 - iv. it would be inappropriate for any further action to be taken in the matter (s 52(1)(b)(vi)).
23. As the alleged breaches occurred before 12 March 2014, and Comcare is an agency, the former Information Privacy Principles (IPPs) apply. The IPPs were contained in section 14 of the Privacy Act and outlined standards for the handling of personal information held by certain Australian Government agencies.
24. Comcare is an agency for the purposes of the Privacy Act. Subject to certain exceptions, which do not arise in this case, section 16 of the Privacy Act prohibited an agency from breaching the IPPs.



The First Issue – IPP 11

25. The complainant alleges that Comcare failed to comply with IPP 11 by improperly disclosing her personal information, including sensitive health information.
26. IPP 11 stated that a record-keeper who has possession or control of a record that contains personal information shall not disclose the information to a person, body or agency (other than the individual concerned) unless an exception applies.
27. For the purposes of the Privacy Act an agency was regarded as a 'record-keeper' in relation to a record that contains personal information if it has possession or control of the record.
28. 'Personal information' was defined at section 6 to be "information or an 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".
29. I am satisfied that the redacted Comcare Report constituted personal information, and that Comcare was a record-keeper who had possession or control of the redacted Comcare report.
30. There are a number of exceptions to the prohibition of disclosure of personal information. Comcare has not sought to rely on an exception to the disclosure, and I am satisfied that none arise in this case.
31. In light of the above, I find that Comcare improperly disclosed the complainant's personal information including sensitive health information in breach of IPP 11, and has interfered with the complainant's privacy in that regard.

The Second Issue – IPP 4

32. The complainant alleges that, contrary to IPP 4, Comcare failed to take security safeguards as were reasonable in the circumstances to ensure the redacted Comcare Report (**the record**) containing her personal information was protected against loss, unauthorised access, use, modification or disclosure, and against other misuse.
33. There are a number of matters that may be taken into account when assessing the reasonableness of steps or safeguards taken by entities to ensure information is kept secure. These include, for instance:
 - a. the nature and quantity of personal information held
 - b. the risk to the individuals concerned if the personal information is not secured
 - c. the data handling practices of the entity holding the information
 - d. the ease with which a security measure can be implemented.
34. The redacted Comcare Report included the complainant's sensitive health information, which deserves a higher level of protection than non-sensitive information. It seems in this case that the person responsible for publishing the documents online inadvertently overlooked the personal information. I consider that it would have been reasonable for Comcare to ensure the removal or de-identification of all of the complainant's health information from the report prior to making it publicly available on its



website. This could have been achieved by second and third tier reviews to ensure inadvertent mistakes such as this one were not made.

35. Comcare acknowledges the redacted Comcare Report should have been more scrupulously redacted to ensure all personal information was removed or de-identified prior to publication. It accepts that it did not have adequate safeguards in place at that time.¹
36. Comcare maintains that since that time, it has made a number of changes to its FOI and privacy policies and procedures, including the setting up of specialist privacy and FOI teams, and an extensive review of its FOI processes, with an emphasis on processes relating to the FOI disclosure log. Comcare now publishes on its disclosure log a summary of documents released under an FOI request rather than publishing the documents in their entirety.
37. While I accept that Comcare has, since the time of the incident, introduced more stringent security safeguards to ensure personal information is not disclosed on its FOI disclosure log, this does not change my view that at the relevant time, the redacted Comcare Report was not protected by such security measures as it was reasonable in the circumstances to take.
38. Accordingly, I find that Comcare breached IPP 4.

Findings – Compensation and expenses reasonably occurred

39. I have found that Comcare has interfered with the complainant's privacy, including by improperly disclosing her personal information, including health information; and by failing to protect that information by such security safeguards as it was reasonable in the circumstances to take.
40. The complainant seeks a declaration that she is entitled to an apology and compensation.
41. Section 52(1)(b)(ii) provides that I can declare that the respondent must perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant.
42. Comcare apologised to the complainant in its letter of 13 August 2012. It informed the complainant that it had introduced new policies and procedures that significantly reduced the risk of a similar breach of the Privacy Act recurring.
43. I am satisfied that in the circumstances, it is unnecessary for me to make a declaration requiring Comcare to issue a further apology. The 13 August apology was offered at the earliest practical opportunity, soon after the breach was identified. It included an acceptance of responsibility for the disclosure and acknowledged the complainant's distress. It provided an explanation for the disclosure, and outlined actions taken to remove the redacted Comcare report and prevent such an incident from recurring.

¹ Comcare submission to the Oaic, 5 May 2016, 2.



Damages

44. Having found that Comcare has breached IPP 4 and IPP 11, 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'.
45. I am guided by the principles on awarding compensation summarised by the Administrative Appeals Tribunal in *Rummery and Federal Privacy Commissioner*.² 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

46. In *EQ and Office of the Australian Information Commissioner*,³ the AAT discusses 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".
47. The complainant has requested compensation for economic loss, including:
- a. \$5,000 for travelling costs, medication and expenses related to her medical treatment since August 2012 (the time of the incident); as well as
 - b. \$250,000 for future economic loss, based on the referral by her commanding officer for a psychiatric or psychological examination, which the complainant claims may lead to the 'cutting short' of her career.
48. At the time of the privacy breach, the complainant was employed by Defence as a Major, Staff Officer 2, Knowledge Systems. She has acknowledged that prior to the privacy breach, treatment costs for her medical issues and absences from her employment for treatment were covered by the conditions of her employment.⁴ As I understand it, the complainant is claiming lost income of around \$5,000 for medication, other medical treatment expenses and associated travelling costs since the time of the privacy breach. The complainant has provided me with a number of medical reports, which confirm that she underwent psychological and psychiatric assessments following the privacy breach, but she has not otherwise addressed the issue of economic loss in detail. I have no information, which indicates the

² [2004] AATA 1221 [32].

³ [2016] AATA 785 (6 October 2016).

⁴ Letter from the complainant's solicitors to the OAIC, 4 September 2014, page 2.



claimed loss of \$5,000 is the result of Comcare's privacy breach. There is therefore no basis for awarding compensation for the contended economic loss.

49. The complainant also contends that Comcare's breach will in all likelihood result in the termination of her career. She claims that the privacy breach has resulted in two 'administrative referrals' (the referral made by her employer for her to undertake psychological and psychiatric assessment), which may enable her supervisor to issue a 'show cause' as to why she should not be dismissed immediately from her employment. She claims that if Comcare had not breached its privacy obligations, she would not be "fighting for her job". Nonetheless, the complainant has not provided any evidence that the breach has impaired her future earning capacity. In *EQ and Office of the Australian Information Commissioner*, the AAT noted that "in terms of future loss, the onus remains on the Applicant 'to provide what if anything, he was now not capable of earning' (see *McCracken v Melbourne Storm Rugby Club Limited and Ors* [2007] NSWCA 353)".⁵ In the circumstances, I find that there is no basis for awarding compensation for future economic loss.

Non-economic loss

50. In this case, the complainant is seeking an award of damages for non-economic loss in the amount of \$150,000. The complainant has claimed that on discovery of the unauthorised disclosure of her personal information, she experienced "severe shock".⁶ She claims that the impact was exacerbated by constant humiliation and embarrassment in the workplace where colleagues and others discussed her case.⁷ The complainant claims her symptoms, which included severe depression and anxiety attacks, continued for months following the unauthorised disclosure.⁸
51. The complainant has provided a number of documents in support of her claim for non-economic loss, including reports from her treating psychiatrist and psychologist, which confirm the account of her distress.⁹ The reports indicate that the unauthorised release of the complainant's personal information contributed to her pre-existing distress. One report from her psychologist indicated that the complainant had experienced "acute distress" in response to the unauthorised disclosure.¹⁰
52. The complainant also claims she suffered other effects, such as severe choking, weight gain and a further cancer diagnosis, because of the unauthorised release of her personal information. In my view, the complainant has not provided sufficient information to substantiate a causal link between these effects and Comcare's privacy breach.
53. In light of the material contained in reports from her treating doctors, and the complainant's own accounts of her distress as a result of the breach, I am satisfied that it is appropriate to award damages for non-economic loss in respect of the impact of Comcare's breach. I take into account that the complainant has suffered significant distress as a result of the unauthorised disclosure of her personal

⁵ Deputy President Melick in *EQ and Office of the Australian Information Commissioner* [2016] AATA 785 at [44].

⁶ Letter from the complainant's solicitors to the OAIC, 4 September 2014, page 1.

⁷ Letter from the complainant's solicitors to the OAIC, 4 September 2014, page 2.

⁸ Letter from the complainant's solicitors to the OAIC, 4 September 2014, page 1.

⁹ Department of Defence, *Report on a case referred for a psychiatric or psychological examination*, 22 August 2012; Defence Force Psychology Organisation, *Psychological report*, 5 September 2012; Department of Defence, *Specialist report*, 13 October 2012; Department of Defence, *Specialist report*, 8 November 2012; Defence Force Psychology Organisation, *Psychological report*, 11 December 2012.

¹⁰ Defence Force Psychology Organisation, *Psychological report*, 11 December 2012.



information, and that her information, including sensitive health information was disclosed on a publicly available website for over one year. The circumstances of this case are not unlike *'HW' and Freelancer International Pty Limited*¹¹ where I awarded \$15,000 (plus an additional \$5,000 for aggravated damages) for the publication of personal information on a publicly available website, which resulted in injury to the complainant's feelings and humiliation suffered by the complainant.

54. Having regard to the circumstances, including that the information disclosed on Comcare's website included sensitive health information, and was publicly available for a prolonged period, I have determined that \$20,000 is an appropriate amount of non-economic compensation for the damage the disclosure by Comcare caused the complainant.

Expenses reasonably incurred

55. The complainant also seeks reimbursement of her legal fees to the amount of \$24,605.99. In support of her claim for legal expenses, the complainant has provided a number of invoices from her lawyers.

56. Section 52(3) of the Privacy Act provides me with a discretion to declare that a complainant is entitled to a specified amount to reimburse the complaint for 'expenses reasonably incurred ... in connection with the making of the complaint and the investigation of the complaint'. It does not have the effect of automatically transferring a complainant's legal expenses to the respondent, and I will not exercise the 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.

57. In this case, at the time of Comcare's privacy breach, the complainant had already engaged lawyers in relation to separate legal proceedings. These lawyers subsequently assisted the complainant in lodging submissions on her behalf in relation to her privacy complaint against Comcare.

58. Comcare, in its submissions, denies liability for the complainant's legal costs, referring to the OAIC's website, which states:

You do not need to be represented by a lawyer to make a complaint about your privacy. However, if you decide to hire a lawyer, you must pay for the lawyer yourself.¹²

59. Notwithstanding this, in its letter to the complainant of 7 January 2014, Comcare "strongly recommend[ed]" that the complainant seek legal representation to "explore her options", presumably including options relating to the privacy breach.

60. I am therefore satisfied that it was appropriate for the complainant to engage a legal professional, and that it is consequently appropriate for her to be reimbursed for legal expenses reasonably incurred in connection with her privacy complaint against Comcare.

61. In making a declaration that Comcare pay to the complainant a specific amount, I am guided by the principles in relation to the determination of costs under statute and court rules in deciding what amount is appropriate to reimburse the complainant. Where a court or tribunal has discretion in relation to costs, it may award costs on a party/party basis (those costs that are "fair and reasonable")

¹¹ [2015] AICmr 86 (18 December 2015).

¹² <https://oaic.gov.au/individuals/how-do-i-make-a-privacy-complaint>.



or an indemnity basis (all costs other than those that appear to have been unreasonably incurred or unreasonable in amount).¹³ 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.

62. In this case, I am not satisfied that it would be appropriate to reimburse the complainant for the whole of the legal expenses incurred. Having considered the invoices provided by the complainant, it is evident that not all expenses incurred were in connection with the complainant's making of her privacy complaint about Comcare and the investigation of the complaint. Moreover, the expenses incurred are disproportionate to the remedy I have decided to award.

63. For these reasons, I have decided that a portion of the complainant's legal expenses were reasonably incurred in connection with the complaint against Comcare, 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 Comcare should pay the complainant an amount of \$3,000 as reimbursement for an expense reasonably incurred in the making and investigation of the complainant's privacy complaint about Comcare.

Aggravated damages

64. The power to award damages in section 52 of the Privacy Act includes the power to award aggravated damages in addition to general damages.

65. I have previously made reference to two principles which provide useful guidance in determining whether such an award is warranted, including:

- a. where the respondent behaved 'high-handedly, maliciously, insultingly or oppressively in committing the act of discrimination' and
- 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.'¹⁴

66. I do not consider that in this matter the way in which Comcare has conducted its case falls within those categories, so as to justify an award of aggravated damages.

¹³ 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.

¹⁴ *D' v Wentworthville Leagues Club* [2001] AICmr 9 [50]; *S' v Veda Advantage Information Services and Solutions Limited* [2012] AICmr 33 [93]; *BO' v AeroCare Pty Ltd* [2014] AICmr 37 [57]; *HW' v Freelancer International Pty Limited* [2015] AICmr 86 [379].



Declarations

67. I declare that the complaint is substantiated under section 52(1)(b)(i)(B) of the Privacy Act, on the basis that:
- a. the respondent, Comcare, improperly disclosed the complainant's personal information, including sensitive health information on its publicly available website, in breach of IPP 11; and
 - b. Comcare failed to take security safeguards that were reasonable in the circumstances to take, to protect the complainant's personal information against loss, unauthorised access, use, modification or disclosure, and against other misuse, in breach of IPP 4.
68. I declare in accordance with s 52(1)(b)(iii) of the Privacy Act that Comcare must pay the complainant the amount of \$20,000 for non-economic loss caused by Comcare's interference with the complainant's privacy within 60 days of the date of this determination.
69. I declare in accordance with s 52(3) of the Privacy Act that the Comcare must pay the complainant the amount of \$3,000 as reimbursement for an expense reasonably incurred in connection with the complaint within 60 days of the date of this determination.

Timothy Pilgrim
Australian Privacy Commissioner

24 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.

